A EUROPEAN APPROACH OF GENERAL TERMS AND CONDITIONS IN BUSINESS-TO-CONSUMER CONTRACTS CONCLUDED ONLINE

The difference between Business-to-business (B2B) contracts and business-to-consumer (B2C) contracts is pretty straightforward: the protection offered to the consumer is much stronger than the one offered to normal business players. European directives have been enacted in order to protect the consumer, who is not an experienced market player. For instance: Directive 99/44/EC of 25 May 1999 *on certain aspects of the sale of consumer goods and associated guarantees*, the Directive 05/29/EC of 11 May 2005 *concerning unfair business-to-consumer commercial practices in the internal market*, otherwise called the "*Unfair Commercial Practices Directive*". But when it comes to general terms that are incorporated in online sales, this protection is to be strengthened and adapted to the new ways of selling goods, especially through the Internet. Selling products through this means has become increasingly pervasive and almost everything now can be bought on the Internet. Hence, European Directives have been adopted, especially the Directive 97/7/EC of 20 May 1997 *on the protection of consumers in respect of distance contracts*, benchmark concerning online sales, and Directive 95/46/EC of 24 October 1995 *on the protection of individuals with regard to the processing of personal data and on the free movement of such data*. Indeed, selling products through the Internet is involving two important issues: on the one hand, this is about protecting the consumer as regard to the goods themselves: quality, delivery, guarantees etc. and on the other hand, it is also about protecting consumers' personal data: processing, archiving, etc. Thus Europe brought some answers to legal problems that stems from the use of Internet for selling products. But in addition to these European texts, some countries in Europe, such as France, have their own and specific statutes/case law that deal with these particular issues. And it will be the subject of this paper: which are the specificities of some European countries when talking about B2C contracts?

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BELGIUM

The use of online general terms of sale in Belgium is mainly regulated by (i) the Act of 14 July 1991 on trade practices, the information and the protection of the consumer[1], (ii) the Act of 11 March 2003 on electronic commerce[2] and (iii) the Act of 8 December 1992 on the protection of privacy with respect to the processing of personal data[3].

As a general observation, the Belgian consumer protection law is undergoing major changes, not only since the adoption of directive 2005/29 on unfair commercial practices, but also as a result of a landmark ruling of the European Court of Justice of 23 April 2009[4]. Lastly, it remains to be seen whether and to what extent the future directive on the rights of consumers[5] will affect the rules on consumer protection in contractual matters.

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1. *Briefly, what points should we be aware of regarding online B2C General Terms of Sale in Belgium?*

Firstly, there is a number of mandatory information which the supplier is obliged to communicate to the consumers, in order to adequately and properly identify the supplier, by providing his name, address of establishment, email address and phone number, registration number at the companies register, VAT number, and possible other information such as applicable codes of conduct or professional rules. Secondly, in the framework of distance selling, suppliers must provide the consumer with appropriate information relating to the products or services offered for sale: such information covers, *inter alia*, the main characteristics of the products or services, the price thereof, the existence of taxes or delivery costs on top of the price, the means of payment and of delivery, the existence or the absence of a right of withdrawal (see *infra*), etc. Thirdly, suppliers must inform the consumers properly about the technical steps needed to place an order, the languages that are available for the conclusion of the contract, the technical means allowing to identify and correct details put in the order, and the modalities through which the contract will be archived (or not).

Generally speaking, this information must be easily, directly and permanently available. In this respect, it is sufficient to provide a web page accessible via a link available on all pages of the website.

Like in any transaction under Belgian law, general terms of sale are not binding unless it is proven that they have been notified to the consumer and the latter has accepted them. Proof of

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[1] Implementing, *inter alia*, directive 97/7/CE on distance selling and directive 93/13 on unfair contract terms.
[2] Implementing directive 2000/31 on certain legal aspects of information society services.
[3] Implementing directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
[4] ECJ, 23 April 2009, C-261/07 and C-299/07, *VTB-VAB*.
[5] See the proposal for a directive of the European parliament and of the council on consumer rights, of 8 October 2008, COM/2008/0614 final – COD 2008/0196.

the acceptance may derive from the execution of the contract, but it is sometimes harder to establish that the consumer has read the terms before placing the order. For that reason, it is advisable to display the terms of sale in a separate window or pop-up which consumers must read and approve before proceeding further. Another reason for doing so is that the Act of 11 March 2003 on electronic commerce provides that the information must be communicated to the consumer before the placing of an order.

In addition, suppliers must acknowledge receipt of the order, and send to consumers a summary of the order, together with a confirmation of the abovementioned information, in writing or by other technical means, such as an electronic message, provided that the latter is sent in such a format that the consumer may access, record and reproduce the information.

Consumers always have at least seven working days after the delivery of the products, or seven working days after the conclusion of a contract for the provision of services, to withdraw their acceptance, without costs and by simply notifying the supplier. In addition, suppliers may not oblige the consumers to pay before the expiry of the withdrawal period. In the event suppliers fail to provide the consumers with all the mandatory information cited above, the withdrawal period is extended up to three months ! Note that this right of withdrawal is however not applicable in some circumstances like e.g. downloading music, video or software, online photo printing, subscriptions to newspapers or magazines, etc.

According to the Act of 1 September 2004 on the protection of consumers with respect to the sale of goods, the legal warranty period is of two years. This special regime is applicable to internet sales, on top of common regimes deriving from the classical Civil Code rules on sale contracts, like e.g. hidden defects of conformity warranty.

It is also worth mentioning that with the view to protect the consumer, the rules on unfair contract terms provide for a so-called “black list” of clauses that are always forbidden and that are deemed to be void in any instance, as long as Belgian law is applicable.

2. What is the influence of data protection law on B2C online terms of sale?

Generally speaking, companies selling goods online have the obligation to comply with a number of duties with respect to the personal data they collect and process. This covers not only names and addresses, but all other personal information like bank account details or shopping preferences for instance. We summarize here only the main obligations. First, the data must be processed for limited and identified purposes. Second, companies must obtain the consent of consumers in respect of the use of their data, and provide them with detailed information regarding the way these data are processed. This has led companies to adopt privacy policies separate from their general terms of sale (for transparency reasons). Third, companies must file a declaration with the Belgian Privacy Commission. This declaration must be filed prior to any processing, thus prior to the launch of the business as a matter of principle.

In addition, specific rules apply to direct marketing. Companies must obtain the consumer’s “*free, specific and informed consent*” prior to any sending of electronic messages for advertising purposes. Suppliers of emails must always provide a means of opting out of receiving future electronic messages. This is not applicable to the use of so-called impersonal email addresses (e.g. info@company.com), nor to the sending of messages to existing customers in relation with products similar to those already supplied to the same customer. In practice, it remains unclear whether this “opt-in” rule prohibits companies to make use of so-called “tell a friend” systems,

e.g. for viral marketing purposes. Some guidance on that question from a court of appeals is expected for the end of 2009.

Lastly, the Act of 8 December 1992 gives consumers the right to oppose the use of their data for direct marketing purposes. When a consumer asks to be withdrawn from a direct marketing file, companies have no choice but to comply with that request.

3. Can you tell us a little bit more about electronic signatures, invoices, payments and archiving?

Electronic signatures are governed by article 1322 of the Civil Code and by the Act of 9 July 2001 creating a legal framework for electronic signatures and certification services. In short, this text provides that electronic signatures are assimilated to written signatures upon certain conditions, namely the intervention of a trusted third party that will certify the identification and the security of the signature. The subject matter of this Act is mainly to regulate the activities of the providers of certification services.

Electronic invoices are permitted under articles 51, 53, 53*octies*, 60 and 61 of the VAT Code and the VAT Royal Decree nr. 1, provided that the authenticity of the origin and the integrity of the content thereof is guaranteed, and subject to an acceptance by the customer. The means to ensure the authenticity of the origin and the integrity of the content are either the use of an EDI standard, or of an electronic signature meeting some specific requirements set forth in the Act of 9 July 2001 on electronic signatures.

Electronic payments are the subject matter of the Act of 17 July 2002 on electronic funds transfer. The said act was adopted in anticipation of the directive 2007/64 on electronic payment services. It protects the consumer against the unauthorized use of electronic means of payment, and is *inter alia* applicable to payments made via a credit or debit card through an e-commerce website. The underlying idea is that the issuer of an electronic payment instrument (i.e. a bank of a credit card company) will bear the financial consequences of the unauthorized use of an instrument that has been lost or stolen, provided that the consumer has reported the loss or the theft. This regime might be slightly modified after the implementation of the directive 2007/64, which is due on 1 November 2009.

Electronic archiving, together with services of electronic registered mail, time-stamping and temporary blocking of sums, are to some extent regulated by the Act of 15 May 2007 creating a legal framework for some certification services. However, this piece of legislation is not fully entered into force and is not expected to enter into force soon.

ENGLAND

The number of companies selling goods online is continuing to increase rapidly, not only because of its popularity with consumers but also because of the ease with which online shops can be established and the savings that can be made through lower running costs and overheads compared to 'real' shops. However, it was evident that when the internet emerged as a viable alternative to the high street, there were also high levels of consumer mistrust arising from the relative anonymity of the online supplier as compared to face to face transactions. Consequently, UK legislation has not only replicated the protections afforded to consumers in face to face transactions but also supplanted them with additional protective measures which are specific to the internet. It is important that suppliers are aware of the range of rights that consumers enjoy and the requirements for suppliers, not only to stay within the law, but also to ensure that the sales process is complaints free and the supplier's reputation is protected. There are various relevant pieces of UK legislation, many derived from EU law, which operate in order to govern the online sales of goods to consumers, each one tackling a specific issue but collectively geared towards ensuring consumer protection in a virtual world.

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1. What are the required sales terms for online business to consumer transactions in the UK?

Sales terms which govern online transactions with consumers must include information which adequately identifies the supplier, including their name, country of registration, registered office address, email address and VAT number. The usual off-line contractual obligations are augmented by a duty to provide a clear description of how to enter into the contract (which should be reiterated at the "shopping basket" stage), how to correct any errors made in the purchasing process and how to access and save the sales terms. Once the contract has been concluded, the supplier must ensure that an electronic confirmation is sent to the consumer acknowledging the order and, provided there is adequate stock, a subsequent dispatch confirmation.

As with face to face transactions, online sale terms must be properly incorporated into the contract between the supplier and consumer in order to ensure that the consumer is bound by them and must therefore be clearly brought to the attention of the consumer before the conclusion of the sale. Often the most practical method of doing this is by inserting a hyperlink to a separate page containing the terms and conditions which the consumer can either read or simply tick a box indicating that they accept to be bound by them. However, a more prudent approach may be to display the sale terms inside a separate scroll-down window on the website which customers are forced to review before placing an order.

When drafting the sales terms, various issues must be considered, including the nature of the goods, the jurisdiction to which they will be delivered and whether they need to comply with any relevant consumer protection legislation where the consumer is based.

2. What are the objectives of the supplier regarding cancellation, cooling off periods and delivery?

The Distance Selling Regulations set a deadline of 30 days beginning the day after the consumer places their order for the supplier to fulfil their obligations. If the supplier cannot perform his obligations due to the goods not being available, then the supplier must at this stage inform the consumer that he cannot perform the contract and reimburse them. This leaves intact

the rights and remedies the consumer has under the contract as a result of non-performance. Breach of these rules is a criminal offence which, enforceable by the Office of Fair Trading, against the supplier company (and possibly its directors).

The consumer also enjoys an automatic right to a "cooling off period" in respect of the purchase, whereby they may cancel the order without reason within seven working days of the date of receipt of the goods, as well as receiving a full refund. This right must also be brought to the attention of the consumer otherwise the cooling off period can be extended. Suppliers may charge consumers the delivery costs of returning goods when exercising the rights granted by the 'cooling off period'. However, if the goods are returned because of a defect, the supplier must bear all such delivery costs. Certain products are exempted from the "cooling off" protection, including personalised, bespoke or perishable goods, computer software and any audio/video recordings which have been unsealed by the consumer.

The price of the goods must be clearly quoted on the website, making clear whether VAT is included. It is also advisable to include a provision in the sale terms which sets out that the prices shown on the website are subject to verification at the time the order is received and that the correct price is that which is shown on the dispatch confirmation. This is to ensure that the supplier is not bound to sell the customer goods at incorrectly displayed prices due to an IT or administrative error.

3. What are the main principles in relation to consumer data under English law?

Online transactions with consumers will naturally involve the collection by the supplier of personal information including the consumer's name, home and email addresses and bank account details. A supplier holding such personal information will be deemed to be a "data controller" for the purpose of the Data Protection Act 1998 and, as such, has an obligation to use such information only in accordance with the Act.

The supplier is obliged to obtain the consent of the consumer in respect of the use of their personal data. However, by submitting their details, and placing an order, the consumer's consent will usually be implied. Nevertheless, it would be prudent for the supplier to include some wording along the lines of "by placing your order/submitting your details, you agree to the conditions of our privacy policy.". An up to date privacy policy must also be readily available and should detail exactly how the personal data will be stored and used.

In the event that suppliers wish to carry out direct marketing to customers in the future, there are certain requirements with which the supplier must comply. If the supplier contacts previous customers about goods or services which are similar to those which it has already supplied to that customer, then it does not need the customer to actively consent (or "opt-in") to receiving such marketing, provided that the supplier always gives the customer a means of opting out of receiving future correspondence. For any unsolicited email marketing, suppliers must always obtain specific consent, and should include an "opt-in" tick box when it collects the personal details.

In conclusion…

This guidance represents a brief overview of recommendations for any businesses that sell goods to consumers via the internet, although it is by no means a definitive guide. The overriding themes of the UK consumer legislation that governs online sale contracts, is transparency, fairness and choice for consumers. The statutory provisions relating to the identity of the supplier, the rights of cancellation and returns, as well as the penalties available for non-compliance, are more generous than when dealing face to face in order to ensure that online consumers are placed in a strong and protected position against the risk of being exploited by an unseen online trader.

FRANCE

The use of online General Terms of Sale was harmonised by EU directive 97/7/EC dated 20 May 1997 on the protection of consumers as regards distance contracts. However, a certain number of differences remain between countries of the European Union.

From the point of view of French law, great care needs to be exercised in drawing up such Terms as the French legal landscape has changed somewhat in recent months. Particular care should be taken over clauses on delivery times and how the rights to withdraw from a contract or return goods are to be exercised. But although the legal obligations on personal information and data storage have not been modified, we still need to take great care regarding these problems as the EU directive does not impose such obligations.

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1. Briefly, what points should we be aware of regarding online B2C General Terms of Sale in France?

2008 saw root and branch changes to consumer law, particularly in the e-commerce sector. The so-called Chatel Act, which was adopted on 3 January 2008 and came into force on 1st July 2008, made a certain number of changes to French consumer law. Among these changes is the obligation laid on professional distance sellers to give an undertaking on delivery timelines; prior to the introduction of this Act, this provision only applied to purchases worth € 500 or more. Drawing up online General Terms of Sale means that professionals now need to be cautious more than ever before. If no delivery times are given, the law assumes that the seller undertakes to deliver as soon as the contract is concluded. This provision raises a certain number of problems since sellers use service providers to make deliveries for them and therefore have no control over delivery timelines. Delivery times therefore need to be generous enough to allow professionals to make provisions to protect them against the hazards that may affect service providers, and against the possibility of consumers cancelling their orders and being entitled to a refund if delivery is more than 7 days late. But a delivery clause that has been defined too broadly may cause professionals to lose a large number of customers, not to mention the possibility of such clauses being cancelled as unfair, given that French courts consider delivery times an essential component of any contract[6].

2. Can you tell us a little more about the other changes brought in by the Chatel Act?

Apart from changes on delivery timelines, the major modifications I would point out are the new dispositions on the right of withdrawal and the right to return goods purchased online. The Chatel Act imposes a certain number of additional conditions that were not present in the 1997 European directive. For instance, vendors must now give a telephone number on which customers can contact them effectively (L.121-18 of the French Consumer Code), so that consumers have an opportunity to exercise their rights concretely. Article L.121-19 of the Consumer Code also stipulates that such numbers may not be Premium-rate numbers; consumers may, however, be billed the time they spend waiting for their call to be answered. The Chatel Act also modifies Article L.121-20-1 of the Consumer Code which defines the basis on which consumers exercising their right of withdrawal may be refunded. Professionals now must refund “all sums paid”, including the initial cost of shipping. Consumers are, however, liable for the cost of returning goods (L.121-20). The Chatel Act tries to halt unfair methods used by some online sellers who made the rights to withdraw and return goods subject to so many conditions that it

[6] Paris *Tribunal de Grande Instance* (High Court), 4 Feb. 2003.

became impossible for some consumers to use their rights effectively[7].

3. Apart from the provisions of the Chatel Act, what can you tell us about the precautions we need to take when drawing up online General Terms of Sale?

European directive No. 95/46/EC dated 24 October 1995 harmonised European legislation on the protection of personal data. France has incorporated this directive into its national law and that is why one of the essential recommendations of the CNIL[8] on the processing of personal data lies in the protection of civil rights, including the right to access and correct information and object to how it is used. The French Data Protection Law dated 6 January 1978, as modified in 2004 following incorporation into national law of the 1995 directive, states that "*every natural person is entitled to object to his or her personal data being processed*" (Article 38), without being charged for this right. This Law also stipulates that individuals are entitled to object to their personal data being used, for example, "*for the purposes of canvassing, particularly for commercial purposes*". Where personal data is computer processed, the law also stipulates that the individuals concerned are entitled to access and correct the personal data held on them (Article 40). Now how can online buyers access and correct personal data as well as object to how it is used if online sellers do not inform them of their rights? Careful professionals will make sure that their online General Terms of Sale include a provision of information clause for potential online buyers regarding personal data about them. Online sellers may wish to include a statement to the effect that online buyers implicitly agree to their data being processed. If necessary, a statement that the personal data collected has been processed may be filed at a later date.

4. Can you tell us something about electronic archiving, which is a special feature of French law?

Online General Terms of Sale constitute nothing less than an electronic contract drawn up between a professional and, say, a consumer. Although under French law archiving electronic contracts is a legal obligation in B2C dealings if the contract is worth € 120 or more (Article L.134-2 of the Consumer Code), companies are strongly advised to archive all their electronic contracts. Keeping contracts in this way ensures that professionals can lay their hands on the proof they need in the event of a dispute regarding, for example, the delivery times in force when the dispute arose, terms of payment, warranty, after-sales, etc.

Since the introduction of the French Act dated 13 March 2000, electronic documents have the same evidential value as paper documents (Article 1316-1 of the French Civil Code). Electronic archiving would therefore seem the obvious way of keeping online General Terms of Sale. However, Article 1316-1 of the Civil Code makes the evidential value of electronic documents subject to conditions: electronic documents thus only have the same evidential value as paper documents provided the person who wrote them can be identified and provided they are drawn up and kept under conditions that ensure their integrity. The condition on identifying the author has nothing to do with archiving. Complying with this type of condition is predicated on using an electronic signature that may or may not be secure, as well as establishing conventions on proof with the consumer. In contrast, electronic archiving is directly affected by the condition on guaranteeing the integrity of archived electronic documents. For this reason archiving must be sufficiently secure (access control, regular backups, traceability of modifications made to documents, etc.) and regular audits of the archiving system are advisable. For example, according to experts on cryptography, the risk of 128-bit keys being crackable within the next five or ten years should not be underestimated even though the current risk is limited. This implies regularly auditing electronic documents to check their integrity and possibly using other means such as so-called 'active archiving' to guarantee integrity.

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[7] Bordeaux *Tribunal de Grande Instance* (High Court) ,11 March 2008.
[8] French data protection authority (Commission Nationale de l'informatique et des libertés)

GERMANY

The use of general terms and conditions of business (hereinafter "General Terms") under German Law is subject to considerable restrictions with respect to implementation and content. Such restrictions, although initially intended to protect the customer, also apply equally to business to business contracts through established case law of the German Supreme Court.

Users of General Terms should be aware of detailed provisions of German law that list specific deviations from statutory rules which will be invalid if contained in General Terms. In addition, with respect to online transactions, the party intending to implement its General Terms has to comply with strict requirements regarding explicit reference to such terms and providing the other party an acceptable opportunity to take notice of their content.

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1. What rules apply in Germany to General Terms in online transactions?

General Terms in online transactions are, just as General Terms used offline, subject to the general provisions governing the use and admissibility of General Terms contained in Sec. 305 et seq. of the German Civil Code (BGB).

Additionally, Sec. 312b through 312f apply in e-commerce transactions, implementing the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000, on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), as well as the Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997, on the protection of consumers with respect to distance contracts. These provisions almost exclusively apply to B2C-contracts, with the exception of Sec. 312d, which sets forth certain mandatory information requirements applicable to all online transactions without regard to the parties involved. However, these rules are not specific rules for the use and admissibility of General Terms, but additional rules which protect the internet user regardless of whether he has submitted to specific General Terms of the online provider governing his individual online order.

2. When will a set of rules, if posted online, be considered as "General Terms" under German law?

Sec. 305 subs. 1 BGB provides that General Terms are pre-drafted provisions imposed by one party (the "user") on the other (the "receiving party") at the conclusion of a contract, and are not individually negotiated. As an additional criterion, they must be intended to be used in several contracts, which the German Supreme Court (BGH) considers to be met in the event of three consecutive agreements. It does not matter whether the General Terms are incorporated in the underlying contract, which may otherwise have been individually negotiated, or whether they are contained in separate documents.

3. Is it possible for the user of General Terms to exclude or limit the applicability of the German rules governing General Terms in online transactions not involving a consumer?

Even though the underlying idea of the rules applicable to General Terms is to protect the consumer and not businesses (cf. Sec. 310 subs. 1 BGB), they are more or less equally applied

to B2B-contracts by the German Courts. Such application has become established case law.

4. How are General Terms validly included in e-commerce transactions?

The critical issue regarding online transactions is how General Terms become part of the agreement which is concluded online. According to Sec. 305 subs. 2 BGB, General Terms only become part of the contract if the user, when entering into the contract: (1) explicitly refers to these terms, or, under specific circumstances, provides for a clearly visible notice at the place where the contract is entered into: and (2) gives the receiving party, in an acceptable manner, the opportunity to take notice of their content. Finally, the receiving party must consent to the application of the General Terms.

In offline B2C-contracts, these conditions are only met if the consumer actually receives the General Terms as such. The mere possibility that he could have accessed the General Terms will generally not be sufficient. This is different with regards to B2B-contracts where the possibility that the receiving party may obtain the General Terms upon request is sufficient to have them validly incorporated into the underlying contract. However, in circumstances where a B2B-contract falls within the scope of the CISG (Convention on Contracts for the International Sale of Goods), it is necessary that the user actually sends the General Terms to the receiving party or makes them available to that party in any other way.

As a general rule in online transactions, the requirements for incorporation of the General Terms are fulfilled if: (1) the notification that General Terms shall apply is unmistakably placed on the website to the effect that it becomes apparent at a glance; and (2) the General Terms can be easily accessed by use of a clearly visible hyperlink on the provider’s order platform. However, the client must generally have the possibility to print the General Terms, unless they can be thoroughly examined at first sight in regard of their length and design.

5. When are General Terms to be considered invalid and to what effect? Are there specific invalidity triggers with regard to e-commerce transactions?

Regardless of whether General Terms are imposed upon the receiving party in e-commerce or offline transactions, they are as a general rule invalid if they provide for a material deviation from the statutory provision and/or if they contain incomprehensible or misleading language (Sec. 307 BGB). In addition to this general review standard, Sec. 308 and 309 BGB list examples of reasons for invalidity of General Terms. Sec. 308 BGB somewhat specifies the general invalidity rule contained in Sec. 307 BGB, and provides for a non-exclusive set of examples which are, however, subject to interpretation by the courts.

Sec. 309 BGB in contrast, lists specific and definite grounds for invalidity that are not subject to interpretation by the courts. The list includes provisions which:

- enable the user to effect price increases on short notice;
- restrict the right of the other party to refuse performance or prohibit set-offs;
- exempt the user from giving warning notices or entitle him to demand liquidated damages or certain contractual penalties;
- exclude or limit his liability in certain breach of contract situations;

- extend the duration of continuing obligations beyond a certain limit;
- allow the user to assign his rights and duties to a third party without any prior specification;
- extend the statutory liability of an agent;
- alter the burden of proof standard to the disadvantage of the receiving party; and
- provide for stricter form requirements than stipulated by law.

Even though Sec. 308 and 309 BGB are technically not applicable in B2B-contracts due to the exemption rule in Sec. 310 subs. 1 BGB, German courts in B2B cases nonetheless refer to various invalidity reasons contained therein by application of the general rule in Sec. 307 BGB for instance, as far as a user tries to limit his liability for breach of contract, including the limitation of the other party's remedies for defective products:

i) A clause by which the user intends to limit its liability will, with a very few exceptions, be subject to the following restrictions set forth in Sec. 309 No. 7 BGB: First, any exclusion or limitation of liability for damage from injury to life, body or health due to negligent breach of duty by the user or intentional or negligent breach of duty by a legal representative or a person used to perform an obligation of the user will be ineffective according to Sec. 309 No. 7a) BGB. Second, any exclusion or limitation of liability for other damage arising from a grossly negligent breach of duty by the user or from an intentional or grossly negligent breach of duty by a legal representative of the user or a person used to perform an obligation of the user will be invalid pursuant to Sec. 309 No. 7b) BGB.

This rule is generally applied to B2B-contracts as well. However, according to case law, it is permissive for the user in respect of certain types of B2B-agreements to limit his liability to damages typically occurring under such agreements.

ii) A list of limitations with respect to restricting the other party's available remedies for defective products is contained in Sec. 309 No. 8b) aa) through ff) BGB. In particular, a provision in General Terms will be invalid if in contracts relating to the supply of newly manufactured goods and relating to deliverables: (i) the claims against the user are limited in whole or with regard to individual parts to a right to cure, to the extent that the right is not expressly reserved for the other party to the contract to reduce the purchase price, if the cure should fail or, except where building work is the object of liability for defects, at its option to withdraw from the contract (Sec. 309 No. 8 b) bb) BGB); (ii) the duty of the user to bear the expenses necessary for the purpose of cure, in particular to bear transport, workmen's travel, work and materials costs, is excluded or limited (Sec. 309 No. 8 b) cc) BGB); and (iii) the statute of limitations for claims against the user due to defects of movable goods and deliverables is reduced to less than one year from the beginning of the statutory limitation period (Sec. 309 No. 8 b) ff) BGB). All of the aforementioned restrictions apply to B2B-contracts as well.

Provided that a General Term is to be considered wholly or partially invalid according to the aforementioned provisions, unlike the general rule pursuant to Sec. 139 BGB stipulating that an entire legal transaction is void if only parts of it are void, Sec. 306 BGB provides that the remainder of the contract remains in effect. Courts will not modify or reduce the invalid clause to an acceptable standard. The invalidity extends to all parts of the clause unless they are clearly separate and independent (cf. Sec. 306 subs. 1 and 2 BGB).

6. Do General Terms have to contain specific data protection provisions in online transactions?

General Terms in online transactions do generally contain detailed data protection clauses with extensive information regarding the purpose and scope of use of the receiving party's personal data by the provider as required by Sec. 33 subs. 1 of the Federal Data Protection Act and Sec. 13 subs. 1 of the German Telemedia Act. However, online providers tend to provide separately accessible data protection notifications for clarification purposes.

IRELAND

Directive 97/7/EC on the protection of consumers in respect of distance contracts (the Directive) sought to harmonise the law relating to the conclusion of online contracts. The Directive has been implemented in Ireland with very little elaboration; few provisions go beyond those set out in the Directive. The European Communications Protection of Consumers in Respect of Contracts by means of Distance Communication) Regulations 2001, SI 2001/207 (the 2001 Regulations) transposed the Directive into Irish law.

Directive 2000/31/EC is also relevant (the E-Commerce Directive) and was transposed into Irish law by the European Communities (Directive 2001/31/EC) Regulations, 2003, SI 68/2003. This Directive relates to 'information society services'. The Recitals to the Directive demonstrate that this should include most online activities, including the online selling of goods. Regulation 7 contains a requirement for businesses online to provide important information to users of their websites. Regulation 13 contains further information requirements.

Questionnaire submitted to Caoimhe Daly, associate at BCM Hanby Wallace. E-mail: cdaly@bcmhw.com Tel: +353 1 4186774 Web: www.bcmhw.com Address: 88 Harcourt Street, Dublin 2.

1. What points should we be aware of regarding online B2C General Terms of Sale in Ireland?

When selling goods and services to consumers online the following requirements must be adhered to:

a) Prior Information

Certain details must be supplied by the supplier to the consumer in advance of contract formation. Further, the information must be provided "in a clear and comprehensible manner". There is no indication in the 2001 Regulations or in the Directive regarding what constitutes a clear and comprehensible manner. Regulation 4 specifically refers to the "manner" of provision of information as opposed to simply the language used. This suggests a requirement for some degree of physical accessibility of the information. In particular, it requires a clear and well-marked link to the legal information. Information concerning the identity of the supplier should be presented under a heading such as "About Us" or "Contact Us", as a hyperlink on the home page and subsequent pages. The provision of the information "must be appropriate to the means of distance communication used". In practice, where goods or services are being sold online, this information must be made available on the supplier's website, before or in the course of the ordering process. The commercial purpose of both the contract and the information provided must be made clear to the consumer. The details required are as follows:

- The identity of the supplier (and, if payment in advance is required, the address);
- The main characteristics of the goods or services;
- The price of the goods or services, including all taxes;
- Delivery costs, where appropriate;
- The arrangements for payment, delivery or performance;

- The existence of a right of withdrawal (where the Directive gives one);
- The cost of using the means of distance communication (if not the basic rate);
- The period for which the offer or price remains valid; and
- (Where appropriate) the minimum duration of the contract in the case of contracts for the supply of products or services to be performed permanently or recurrently.

The use of a "click-wrap" system, where purchasers are required to click a box to confirm that they have read the terms and conditions under which they contract, helps to alert consumers to their existence.

b) *Written confirmation*

Regulation 5(1) provides that a contract is not enforceable by the supplier unless the consumer receives written confirmation or confirmation in another durable medium available and accessible to him. This must be provided before the contract is made or "in good time after it". The confirmation must be provided during the performance of the contract or at the latest at the time of delivery of the goods where the goods concerned are not for delivery to third parties. "Durable medium" is not defined. Some argue this means any permanent medium, which would include any medium that can be stored or printed out. Due to the lack of clarity on the issue it is recommended that suppliers include a print option. The 2001 Regulations explicitly provide for confirmation by e-mail. The first six items of "prior information" required (above) must be included in the confirmation, in addition to:

- the conditions and procedures for exercising the right of withdrawal (the 2001 Regulations are not very specific or detailed);
- the supplier's (geographical) address to which the consumer may address any complaints;
- information regarding any after-sales services and guarantees; and
- any conditions for cancelling the contract, where the contract is for an indefinite period or for a duration exceeding one year.

If the distance contract is for once-off services, and if these services are invoiced by means of distance communication, the requirement to provide written confirmation does not apply. In such a case the supplier must ensure that the consumer has been furnished with the supplier's geographical address to which the consumer can address any complaints.

c) *Right of Withdrawal*

The consumer has a right to withdraw from certain distance contracts without penalty and without giving any reason during specific time frames set out in the 2001 Regulations. This right of withdrawal is commonly referred to as the "cooling-off period". The consumer must be reimbursed as soon as possible after the right to cancel has been exercised, subject to a maximum period of 30 days from the date of exercise. If the price was covered (wholly or partly) by credit a provision of the 2001 Regulations deals with the cancellation of credit.

Consumers may not be charged for exercising their right of withdrawal; only for the direct cost of returning the goods. In the case of goods, the consumer has 7 days from the day the goods are

received, or (if later) when the confirmation was received, to withdraw from the contract. In the case of services, the consumer has 7 days from when the contract was made, or (if later) when the confirmation is received, to a maximum of 3 months from the date of contract, in which to cancel. If no confirmation is sent in respect of the supply of goods or services, the withdrawal period is extended by 3 months. In distance contracts for services, subject to a contrary agreement between the parties, the right to cancel ceases to exist as soon as the supplier begins to perform with the consumer's consent. This right of cancellation in distance contracts does not apply to all goods and services. For example, it does not apply to:

- goods where the price is tied to financial market fluctuations not under the supplier's control;
- personalised goods or made to the consumer's specifications;
- goods which are inherently impossible to return or likely to deteriorate or expire rapidly;
- unsealed recordings or software;
- newspapers, magazines and periodicals, and
- gaming or lottery services.

The 2001 Regulations do not specify that the cancellation must be in writing nor that the consumer actually return the goods so it is important that the supplier's contractual terms cover these issues.

d) *Execution*

The supplier must execute the order within 30 days from the date on which it was originally placed. If the goods or services are not available the consumer must be informed as soon as possible and must be able to obtain a refund within the 30 day period. The 2001 Regulations provide that the supplier may supply alternative goods of equivalent quality and price, as long as certain additional requirements are met:

- that the consumer was informed of this possibility prior to the contract or in the contract itself;
- that this information was clear and comprehensible, and
- that if in these circumstances the consumer exercises their right of cancellation, the supplier bears the cost of return.

The right of refund does not apply to outdoor leisure events, which by their nature cannot be rescheduled, where agreed between the parties prior to making the distance contract.

e) *Inertia Selling*

Demands for payment of unsolicited services are prohibited. Attempts to conclude a distance contract made by way of an automated calling system or unsolicited fax will not be enforceable against a consumer, unless the consumer's prior consent to such means being used has been obtained. A contract made by distance communication other than by an automated calling system or fax is enforceable provided no clear objection has been made by the consumer (i.e. the consumer must opt-out).

2. Can you tell us a little more about the transposition of the Directive in Ireland?

Ireland adopted a minimalist approach to the transposition of the Directive. The effects of

adopting such an approach are especially apparent in the context of payment protection. Article 8 of the Directive includes no legal requirement regarding the technological security of payment methods employed. The payment protection accorded under Article 8 of Directive 97/7 fails to address a number of issues:

i) There is no requirement that Member States should require suppliers to offer a secure means of payment.

ii) The Directive requires Member States to ensure that appropriate means exist to allow a consumer to request cancellation of a payment where fraudulent use has been made of his or her payment card and in the event of fraudulent use to be re-credited with the sum paid. However Article 8 does not deal with when and how the request for cancellation should be granted.

iii) While the consumer is entitled to a return of any sums paid as a result of fraudulent use, the Directive fails to deal with standards of proof in relation to the establishment of fraud and who should bear the loss for the fraudulent usage.

iv) No reference is made in Article 8 to the protection of payment in the event of supplier insolvency where the consumer has pre-paid for goods or services.

Ireland transposed Article 8 without addressing any of the above omissions. Regulation 10 of the 2001 Regulations merely states that a consumer may request cancellation of any payment made under a distance contract, or as appropriate, the re-credit or return of such a payment, where fraudulent use has been made of his "payment card". It continues that such a request must be complied with immediately, and any person who fails to comply with this request is guilty of an offence. It is not clear whether the request for cancellation is to be directed to the supplier or to the issuer of the card. The regulation does not expressly indicate who must re-credit or return a payment (as opposed to cancelling the payment) but it would seem that it is addressed to the supplier. There is no provision regarding what constitutes fraudulent use of the card or regarding what level of proof of fraud a supplier may require. Given that a supplier who fails to return the payment "immediately" is guilty of an offence, this provision puts suppliers in a rather difficult position. Finally, it seems to place responsibility for return or re-crediting of a payment entirely in the hands of the supplier. This may cause difficulties if the supplier is not in a position to return the payment i.e. through fraud or insolvency. Under the 2001 Regulations the consumer is left with no meaningful payment protection. However, in practice most credit card providers now offer charge-back systems allowing quick and efficient refunds without any costs for the consumer. As it currently stands, as a result of international rules regarding credit card payments, it is the suppliers who suffer charge-backs in the absence of any physical signature evidencing the transaction.

3. Are there any particular Data Protection issues we should be aware of?

The European Communities (Electronic Communications Networks and Services) (Data Protection and Privacy) Regulations 2003 (the Electronic Communications Regulations) transpose Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector. Regulation 13 restricts the ability to use publicly available electronic communications services to send unsolicited communications or to make unsolicited calls for the purpose of direct marketing. The following table summarises the rules that apply:

	SMS Text/Email Marketing	Fax Marketing	Phone Marketing
Individual (customer)	Opt-out (provided the communication relates to similar products or service: Reg.13(7) below)	Opt-out	Opt-out
Individual (non-customer)	Opt-in	Opt-in	If objection recorded on the National Directory Database (NDD) or if they have informed the supplier of their objection – Opt-in. Otherwise, Opt-out
Businesses	Opt-out	If objection recorded on NDD consent is required. Otherwise, Opt-out.	If objection recorded on NDD – Opt-in. Otherwise, Opt-out.

Regulation 13(7) provides that where the subscriber's electronic contact details are obtained from a customer in the context of the sale of a product or service, e-mail and SMS text messaging can be used for direct marketing purposes if an easy to use, free of charge opportunity is given to object to these marketing messages and provided that the SMS text or e-mail concerns his/her own similar products or services. The Irish Data Protection Commissioner has advised that subscribers' details can only be used for such purposes within 12 months of the date on which they were obtained.

General Irish data protection law provisions, as contained in the Data Protection Act 1988 and 2003, also apply where personal information is being collected, held and/or processed by a supplier. An up-to-date privacy policy should be readily available and should specify the manner in which the data will be stored and used.

The European Communities (Electronic Communications Networks and Services) (Data Protection and Privacy) (Amendment) Regulations 2008 came into force in December 2008, and increase the fines that may be imposed on direct marketers who send unsolicited commercial communications in breach of the Electronic Communications Regulations. The new Regulations also create an indictable offence for any such breach. It is worth noting that the Data Protection Commissioner in Ireland is extremely vigilant in prosecuting breaches of the direct marketing rules set out in the Electronic Communications Regulations.

ITALY

The legal framework of the subject matter of this paper is mainly represented by Legislative Decree 206/2005 (the "Italian Consumers Code"), implementing, inter alia, Directive 97/7/EC on the protection of consumers in respect of distance contracts and Directive 2005/29/EC on unfair commercial practices; Legislative Decree 70/2003 (the "Italian E-commerce Law"), implementing Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market; and Legislative Decree 196/2003 (the "Italian Privacy Code"), implementing Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

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1. Briefly, what points should we be aware of regarding online B2C General Terms of Sale in Italy?

Italian law provides a number of requirements to be taken into account when promoting and concluding B2C online contracts, including the following:

a) Prior information (minimum contents of the offer by the seller)

According to the Italian Consumers Code, the consumer shall be provided with clear and comprehensible information prior to the placement of the purchase order. Prior information shall include, *inter alia*, (a) the identity of the seller and, in the case of contracts requiring payment in advance, its address; (b) the main characteristics of the goods or services; (c) the price of the goods or services including all taxes; (d) delivery costs; (e) the arrangements for payment, delivery or performance as well as any other modalities of execution of the contract; (f) the existence of a right of withdrawal (see also under relevant point below) or the exclusion of the same as provided in specific circumstances; (g) modalities and terms for the return or collection of the goods in case of exercise of the right of withdrawal.

The information referred to above shall be provided in a clear and comprehensible manner, with due regard, in particular, to the principles of good faith in commercial transactions, and the principles governing the protection of those consumers who pertains to vulnerable categories such as minors. Where prior information is misleading and/or contrary to the general principle of good faith, an "unfair commercial practice" may be contested and sanctioned with fines, by the Italian Antitrust Authority.

In addition, the Italian E-commerce Law provides for further information to be rendered by the seller prior to the placement of the purchase order, including (i) the different technical steps to follow for the conclusion of the contract; (ii) the modalities through which the concluded contract will be stored by the seller and the modalities through which it will be accessible; (iii) the technical means for identifying and correcting input errors prior to the placing of the order; (iv) the relevant codes of conduct to which the seller subscribed, if any, and information on how those codes can be consulted electronically; (v) the languages offered for the conclusion of the contract in addition to Italian language; (vi) the indication of the available means of alternative dispute resolutions, if any.

Contract terms and general conditions must be made available in a way that allows consumer to store and reproduce them.

b) *Language*

All the information addressed to consumers regarding goods that are offered for sale shall be provided in Italian language and the characters used for the information rendered in Italian language shall not be different to those used in other languages.

When using Italian language, words/expressions in languages other than Italian are permitted if entered in the Italian language common use only (e.g. website, e-mail).

c) *Confirmation*

Pursuant to the Italian Consumers Code, the consumer shall receive written confirmation or, upon his request, confirmation in another durable medium available and accessible to him, of the information referred to above, prior or at the time of the conclusion of the contract. In any event, within such term the following must be provided (in writing or on another durable medium available and accessible to the consumer): (a) information on the conditions and procedures for exercising the right of withdrawal; (b) the geographical address of the place of business of the seller to which the consumer may address any complaints; (c) information on applicable after-sales services and guarantees; (d) the conditions for terminating the contract, where it is of unspecified duration or of a duration exceeding one year.

In addition, except as otherwise provided, the seller shall perform its delivery obligation within thirty days running from the day after the transmission of the order by the consumer.

d) *Right of withdrawal*

Pursuant to the Italian Consumer Code, for any distance contract the consumer shall have a period of ten working days in which to withdraw from the contract without penalty and without giving any reason. The only charge that may be applied to the consumer because of the exercise of his right of withdrawal is the direct cost for returning the goods, where expressly provided for in the contract.

2. Can you tell us a little more about the other provisions of Italian law which specifically apply to B2C General Terms of Sale in Italy?

Italian Consumers Code provides for certain warranties in favour of the consumer in case of sale of consumer goods, regardless if they are sold online.

In particular:

a) *Compliance with the contract*

The seller shall deliver goods to the consumer which comply with the contract of sale. Consumer goods are presumed to be compliant with the contract, for example, if they: (i) are fit for the purposes for which goods of the same type are normally used; (ii) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model; (iii) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods

made about them by the seller, the producer or his representative, particularly in advertising or on labelling; (iv) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted even if only implicitly.

b) *Rights of the consumer*

The seller shall be liable to the consumer for any lack of compliance of the goods existing at the time the goods were delivered. In the case of a lack of compliance, the consumer shall be entitled to have the goods brought into compliance free of charge by repair or replacement, or to have an appropriate reduction made in the price or the contract cancelled with regard to those goods. Any contractual terms or agreements concluded with the seller before the lack of compliance is brought to the seller's attention, which directly or indirectly waive or restrict such rights, shall be null and void.

3. Apart from the provisions of the Italian E-commerce Law and the Italian Consumers Code, what can you tell us about the precautions we need to take when drawing up online General Terms of Sale?

According to the Italian Privacy Code, processing of personal data shall comply, *inter alia*, with the following requirements:

a) *Prior Informative Note*

Each individual shall be previously informed of the terms of the processing of his/her data. In particular, the data controller shall inform the data subject on the "right to access" granted to him by the law, which includes, *inter alia*, the right to:

- request and obtain (a) confirmation as to whether or not personal data concerning him/her exist, (b) communication of such data, to the extent they are currently retained, (c) erasure, anonymization or blocking of data that have been processed unlawfully;

- object, on legitimate grounds, to the processing of his/her personal data.

b) *Consent*

As a general rule, the data controller shall obtain the express consent by the data subject in order to process his personal data. However, the Italian Privacy Code provides certain cases in which the express consent by the data subject in respect of the processing of his non-sensitive data is not required (eg. *inter alia*, in case the processing is carried out in order to perform contractual obligations or in order to comply with specific requests made by the data subject prior to entering into a contract, or if it concerns data taken from public registers, lists, documents or records that are publicly available).

In addition, personal data undergoing processing shall be kept in a form which permits the identification of the data subject only for the period necessary for the purposes for which the data were collected or subsequently processed.

In light of the above, the seller shall:

(i) provide the consumers with a prior privacy policy online;

(ii) obtain, where required, the express consent by the consumer to the processing;

(iii) comply with the data retention periods.

4. Can you tell us something about electronic archiving under Italian law?

Although not generally mandatory, electronic archiving of B2C contracts is advisable since electronic documents can be used as evidence in court proceedings.

In order to secure integrity of the documents, electronic archives shall comply with adequate security measures (e.g. access control, regular backups, traceability of amendments/changes made to documents, etc.) so as to minimise the risk of destruction or loss of the documentation archived and of unauthorized access by third parties.

Minimum retention periods are provided by legislation governing specific fields, such as financial and environmental sectors.

THE NETHERLANDS

The legal framework of the subject of this memo is mainly based on Legislative Decree 617/2000 (the "Dutch Consumers Code") and Legislative Decree 397/2008, implementing, inter alia, Directive 97/7/EC on the protection of consumers in respect of distance contracts and Directive 2005/29/EC on unfair commercial practices; Legislative Decree 110/2003 ("Dutch Consumers Code"), implementing, inter alia, Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees; Legislative Decree 210/2004 (the "Dutch E-commerce Law"), implementing Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market; and Legislative Decree 302/2000 (the "Dutch Privacy Code"), implementing Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

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1. Briefly, what points should we be aware of regarding online B2C General Terms of Sale in the Netherlands?

Distance contracts

Dutch Law protects consumers against risks that may occur entering into a distance contract, a contract whereby there is no personal contact between the buyer and the seller. The Dutch Consumers Code protects consumers purchasing goods and services by way of a distance contract. The following requirements should be taken into account when promoting and concluding B2C distance contracts

a) *The right to prior information*

The seller has an obligation to provide information. The consumer shall be provided with clear and comprehensible information prior to the placement of the purchase order. The seller is in any case obliged, prior to the purchase, to provide the buyer with certain relevant information as reflected by Dutch law. In addition, the Dutch E-commerce Law provides for an obligation of the seller to render further information prior to the placement of the purchase order. Contract terms must be made available in a way that allows consumer to save, store and reproduce them.

b) *Written confirmation*

The seller has to send a written confirmation in advance, not later than the date of delivery, that the contract is effected. The consumer shall receive written confirmation or, upon his request, confirmation in another durable medium available and accessible to him, of the information referred to above ('the right to prior information') prior to or at the time of delivery. In any event, within such term the Seller must be provide for certain information as described in the Dutch law.

c) *Right of withdrawal*

During a period of seven working days after the reception of the good(s), the consumer shall have the right to withdraw from the contract without penalty and without giving reasons. If the requirements as mentioned above (under 'Written confirmation') are not all satisfied, this period

will be three months. The only charge that may be applied to the consumer because of the exercise of his right of withdrawal is for the direct costs of returning the goods, if this is expressly provided for in the contract. The right of withdrawal does not apply to all kind of goods. For example, the right of withdrawal does not apply to time-sensitive products like newspapers and magazines, and goods that are clearly personal in nature.

d) *Fulfilment*

The seller has to deliver the goods or services in 30 days after the order. The seller is de jure in default in the event of non-compliance within 30 days after the order was placed.

When the order can not be delivered, the seller has to inform the consumer as soon as possible, and refund possible payments.

2. Can you tell us a little more about the other provisions of Dutch law which specifically apply to B2C General Terms of Sale in the Netherlands?

Dutch law provides for certain warranties in favour of the consumer in case of sale of consumer goods, regardless if they are sold online, and irrespective to distance contracts. These (general) provisions are implemented under Dutch law by Legislative Decree 110/2003. The provisions under Dutch law only apply to goods, and not to services.

a) *Conformity with consumer contract*

The goods delivered must comply with the contract. The consumer may expect that the goods have the actual characteristics required for normal use, as well as all the characteristics which are necessary for a special use which has been mentioned in the contract. If the consumer has received a sample or a model, the delivered goods have to comply with the description given by the seller and possess the qualities of the sample or model that was presented to the consumer.

b) *Rights of the consumer in case of non-conformity with the consumer contract*

If the delivered goods do not comply with the contract, the consumer can require (i) delivery of what/which is lacking; (ii) repair of the goods delivered (providing that the seller can reasonably perform such a repair); (iii) replacement of the goods delivered; (iii) an appropriate reduction made in the price; (iv) termination of the consumer contract.

3. Apart from the provisions of the Dutch E-commerce Law and the Dutch Consumers Code, what can you tell us about the precautions we need to take when drawing up online General Terms of Sale?

A clause in a set of general terms and conditions can be annulled if the wording and the content of such clause are unreasonable for the other party, and if the other party did not have a reasonable opportunity to take note of the general terms and conditions. The seller has to offer the consumer this reasonable opportunity. In all events, the seller has given the other party this opportunity, when he has handed over the general terms of sale before, or during, the conclusion of the contract. Other possibilities are described under article 6:234 of the Dutch Civil Code.

'Black' and 'grey' list

Unreasonably onerous stipulations can be challenged before the court and may be annulled. The Dutch Civil Code contains a 'black list' and a 'grey list'. The black list sets out contractual

stipulations which are strictly forbidden. When a clause of this black list is included into the general conditions applicable to the contract concerned, it can be nullified. The ‘grey list’ sets out contractual stipulations which are presumed to be onerous. The clauses on this grey list are not considered to be unreasonably onerous *per se*, but will lead to a presumption of being unreasonably onerous in favour of the consumer. This presumption can be rebutted by the user of the general conditions. A stipulation which is neither on the black nor on the grey list may still be an onerous one, if it is unreasonably onerous to the other party, taking into consideration the nature and the further content of the contract, the manner in which the terms and conditions were established, the mutually apparent interests of the parties and the other specific circumstances of the case.

The ‘black list’ includes:

- A stipulation which totally and unconditionally excludes the other party’s right to enforce performance;

- A stipulation which limits or excludes the other party’s right to set the contract aside;

- A stipulation which limits or excludes the right which, pursuant to the law, the other party has to suspend performance or which gives the user a more extensive power of suspension than that to which he is entitled pursuant to the law[9]

The ‘grey list’ includes:

- A stipulation which, taking into account the circumstances of the case, gives the user an unusually long or an insufficiently precise period to react to an offer or another declaration of the other party;

- A stipulation which materially limits the scope of the obligations of the user with respect to what the other party could reasonably expect in the absence of such stipulations, taking into account rules of law which pertain to the contract.

(Please be aware of the fact that this is a no exhaustive enumeration).

In light of the above, the seller gives the other party a reasonable opportunity to take note of the general terms and conditions and must be aware of the fact that unreasonably onerous stipulations are voidable.

4. Can you tell us something about electronic archiving under Dutch law?

According to the Dutch Privacy Code, processing and archiving of personal data must comply with the following requirements:

Each individual shall be informed in advance of the terms of the processing of his/her data. The individual, hereinafter called the “data subject”, must receive information about the intended purposes of the processing of the data. The data subject must receive the information about the identity of the controller of the data and of his representative. Furthermore, the data subject has the right to access his/her data. This right of access provides the data subject the right to obtain

[9] Please be aware of the fact that this is a non exhaustive enumeration

from the controller (without constraint at reasonable intervals):

- Confirmation as to whether or not data relating to him are being processed.

- If data relating to him are being processed, the confirmation contains information about the purposes of the processing, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed.

- If necessary, knowledge of the logic involved in any automatic processing of data concerning him.

- If appropriate, the data subject can request the rectification, erasure or blocking of data.

- Notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with the above, unless this proves impossible or involves a disproportionate effort.

PORTUGAL

In Portugal the transposition of the EC Directive regarding the distance agreements (in which online sales are included) has not been very creative. In fact only in a few aspects has the Portuguese legislator set forth provisions that go beyond what is foreseen in the EC Directive. Among these cases we may find the time limit to use the right to withdrawal and the consequences of not complying with reimbursement duties. Another EC Directive that should be taken into consideration is the Directive on electronic commerce aiming to ensure the freedom of establishment in Member States.

Questionnaire submitted to Joana Santos, member of the Portuguese Bar Association, Joao Caiado Guerreiro & Associados. E-mail: jsantos@fcguerreiro.com Tel: +351 213 717 000 Web: www.fcguerreiro.com Address: Rua Castilho, 39, 15º 1250-068 Lisbon.

1. How have European Directives on e-commerce, namely on general terms and conditions applicable to online sales, been transposed into the Portuguese legal system?

The two main directives applicable to online sales, Directive 97/7/EC (on the protection of consumers in respect of distance contracts) and Directive 2000/31/EC (Directive on electronic commerce) have been already transposed into the Portuguese legal system for some time. The first Directive (Directive 97/7/EC) was transposed in 2001 by Decree-Law no. 143/2001, of 26th April (which was amended this year by Decree-Law no. 82/2008, of 20th May), and the Directive on electronic commerce has been transposed by Decree-Law no. 95/2006, of 29th May (E-commerce law).

It is important to notice that Portugal does not have a Consumer Code (although a proposal of Consumer Code has been under discussion for a while) and therefore, the provisions protecting consumers are spread among several laws and decree-laws such as the ones I have just mentioned.

This is why the decree-law that rules online sales has in fact a more broad scope, including all types of distant contracts, contracts entered into at someone's home and automatic sales.

Regarding distance contracts, specifically the case of online sales, the more significant aspects are (i) the supply of written information regarding the supplier, the good/service, the price, the delivery costs, payment conditions and the right to withdrawal; (ii) the right to freely terminate the contract within 14 days, the double of what is foreseen in the EC Directive (and there are cases where it can be extended) – the so-called right to withdrawal; and (iii) the time limit of 30 days for the supplier to execute the order.

2. What are the consequences for the non-compliance with such rules?

Regarding the written information, if it is not sent, the right to withdrawal may be exercised during 3 months since the receipt of the goods or, for service contracts, since the date the contract was entered into or the rendering of services begun. In what concerns the right to freely terminate the agreement, the supplier is obliged to reimburse the consumer for all expenses, which must be done within 30 days. If not, he must reimburse the consumer in twice the amount he has paid within 15 working days after such 30 days have lapsed without prejudice of the consumer being entitled to be indemnified. Finally, regarding the delivery deadline, if the supplier cannot perform

the agreement in such deadline on the grounds that the goods or services ordered are unavailable, he has 30 days to notify and reimburse the consumer of all amounts paid. Otherwise, at the end of this period, the supplier will have 15 working days to reimburse the consumer in twice of the amount he has paid.

The right to be reimbursed twice the amount paid was an amendment to the existing law that entered into force at the end of June 2008 – which derive from the verified fact that most suppliers/sellers never complied with the 30 day period to reimburse the consumer – and therefore the legislator has considered that such suppliers required and extra incentive to comply with the law.

Additionally, fines can also be applied. In some cases they can go up to €2,000 for individuals and €25,000 for legal entities.

It is very important to bear in mind that it is up to the supplier to provide the necessary evidence in what concerns the existence of the prior information, of the written confirmation, of the compliance of deadlines and the consent of the consumer.

3. What about the specific rules set forth in the transposition of the Directive on E-commerce?

In what concerns rules regarding electronic contracts it should be noted that they are applicable to the information society service providers established in Portugal regarding the activity exercised, including information society services provided in another EU Member State.

Regarding online intermediary service providers, I would just like to point that they are not under the general obligation to monitor the information that they transmit or store, nor to investigate possible offences practised within their scope. This provision limits the liability of such intermediaries regarding the contents which they make available or storage. What is more, in "mere conduit" cases if the intermediary service provider is only pursuing an activity that consists in the transmission of information in a communication network, or the provision of access to a communication network, not having initiated the transmission, nor modified the contents of the messages transmitted, nor selected either the information or the receivers, he shall not be liable in any way for the information transmitted. However, they still have the obligation, among others, of informing the authorities promptly when becoming aware of illegal activities undertaken via services rendered.

Pursuant to the E-commerce Law, contracts can be freely concluded by electronic means, and their effectiveness or validity is not prejudiced on account of the use of that means. However, it is not allowed for general contract conditions to impose electronic means for the conclusion of contracts with consumers. It should be furthermore noted that declarations issued by electronic means meet the legal requirement of "written form" when they are contained in a support that presents the same guaranties as regards reliability, understandability and storage.

In what concerns the placement of orders exclusively by electronic means (excluding the situations of agreements entered into by simple exchange of e-mails), certain prior information must be provided such as whether or not the concluded contract will be filed by the service provider and whether it will be accessible for the recipient and the terms and general conditions of the contract to be concluded. Also, upon receipt of such an order the service provider shall promptly acknowledge its receipt by electronic means, except when otherwise agreed with the party who is not a consumer, unless there is an immediate online provision of the product or service.

It is important to notice that contract terms and general conditions, as well as the acknowledgement of receipt, must be made available to the recipient in a way that allows him/her to store and reproduce them.

A controversial matter is whether the online offer of products or services is a contract offer or a simple invitation to treat. For Portugal, the E-commerce Law establishes that such online offer is deemed as a contract offer where it includes all the necessary particulars for the contract to be concluded through the mere acceptance of the recipient; otherwise, it represents an invitation to treat. If it is a mere invitation to treat, the placement of the order would be the contract offer and the acknowledgement of receipt could be considered as the acceptance of the offer. However, the E-commerce Law sets forth that the mere acknowledgement of receipt of the order has no legal significance for the determination of the moment of conclusion of the contract.

4. Are there any particular issues regarding data protection?

The regimes of data processing and privacy protection are out of scope of the E-commerce Law and of Decree-Law 143/2001 (as amended by Decree-law 82/2008). Only the matter of unsolicited communications is regulated in the E-commerce Law as a transposition of article 13 of the EC Directive 2002/58/EC. Therefore, the general Portuguese provisions of personal data protection apply to e-commerce.

5. Are there any duties which consumers must comply with?

Probably the most relevant consumer duty regards the right of withdrawal. If the consumer has used his/hers withdrawal right, he/she must keep the goods in such a way to allow him/her to return them to the supplier or to the person referred to in the contract in proper use conditions during 30 days after its receipt.

SWITZERLAND

The legal framework of general terms of sale for the use in connection with B2C sales is mainly governed by the Code of Obligations, the Unfair Competition Act and the Data Protection Law. A variety of other statutes may be applicable depending on the situation at hand. The project of a Swiss E-Commerce Act was abandoned in 2005.

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1. Briefly, what points should we be aware of regarding online B2C general terms of sale in Switzerland?

a) *Incorporation*

It is not sufficient that a seller draws up general terms of sale. Unless accepted the seller's general terms are neither binding nor part of any agreement between the seller and his customers. Customers may accept general terms explicitly, tacitly or by conduct implying acceptance. In general, a prudent website programmer designs a website in a manner requiring customers to confirm the applicability of the general terms of sale explicitly before completing an order. Thus, the ordering process is automatically interrupted, should the customer refuse to accept the general terms, i.e. should he not click on the respective OK-button. Should the seller however decide that an OK-button discourages customers from purchasing through the Internet and should he therefore allow orders without prior acceptance of his general terms, he runs the risk that they will not apply when needed.

If a customer declares to accept the general terms after having read them he is generally bound to his declaration. In reality, a typical customer accepts general terms without taking notice of their content. Nevertheless, the seller's trust into a customer's declaration of acceptance is protected as long as the customer had reasonable access to the general terms. Hence, a reference to the general terms must be clearly visible on the website of the seller and customers visiting the website must have the opportunity to easily take note of the content of the general terms. As already mentioned, it is strongly recommended to have customers accept the general terms explicitly in order to avoid disputes. Furthermore, general terms should be easily understandable for customers and limited in length. Please keep in mind that four different national languages are spoken in Switzerland. In addition, it is recommended to implement a change management. The seller should be in a position to prove the date when the general terms were accepted and when the contract was entered into. Finally, it should be possible for customers to print the general terms or to make a copy of them. These kind of measures help avoid disputes concerning manipulations and belated amendments of general terms.

b) *Unexpected clauses*

Accepted general terms of sale are applicable in principle. The seller can rely on a declaration of acceptance the customer has given, even if the customer did not read the general terms before accepting them. The reliance of seller is protected, but only with regard to clauses a customer must usually expect in general terms of sale. It is assumed that clauses usually not contained in general terms of the same type of business and clauses usually mentioned in a different context within general terms are not covered by the customer's acceptance. The seller can prove the contrary. The rationale behind this rule is to protect the justified expectations of a particular

customer taking into account his business experience and the type of contract he entered into. To be on the safe side, general terms therefore have to be drafted for a totally inexperienced customer. Unusual clauses need to be accepted separately and their meaning must be explained to the customer. In addition, unusual structures of general terms shall be avoided.

c) *Unfair competition*

According to the Unfair Competition Act, it is abusive to use general terms in a misleading manner to the detriment of the customer should the general terms used deviate substantially from the statutory order or establish duties and rights contradicting the nature of the contract. Abusive general terms can be sanctioned. The statutory provision shall avoid deceit of an average market participant. A full review of the content of general terms has been refused by the courts several times.

d) *Mandatory law*

Illegal clauses and clauses violating bonos mores are null and void. The invalidity of such clauses does not affect the rest of the general terms which remain in force. Some examples of invalid and, hence, unenforceable clauses concern e.g. limitations of liability for gross negligence or intent, waivers of warranty in case of fraudulent concealment, unreasonable penalties etc. In ecommerce sellers should also pay attention to the fact that sales with payment in advance need to be signed by the parties and have to comply with additional legal requirements. Consumer credit contracts, including sales with subsequent payment in installments and consumer leasing contracts are governed by the Consumer Credit Act which asks among others for written contracts, i.e. written contracts signed by both parties.

e) *Interpretation of general terms*

Ambiguous clauses of general terms shall be interpreted to the disadvantage of the seller having drafted the clauses. In addition, clauses limiting the rights of the customer shall be interpreted narrowly. These two rules are of particular importance if terms are used which have a different meaning in different geographical regions. The problem is especially encountered if the general terms of sale are written in English or in German.

f) *No particular right of withdrawal*

Switzerland knows a particular right of withdrawal within seven days for certain sales at the doorstep or at the usual place of work. A project to introduce a similar rule for B2C contracts was abandoned in 2005. While some authors wish to extend the special rules for the door-to-door selling to online contracting, the majority of legal scholars share the view that these special provisions concerning door-to-door selling require a personal contact which is not given if an agreement is entered into online. The customer therefore has no special right of withdrawal just because the contract was entered into online. However, there is a general right to withdraw from an offer until the offer is accepted and a right of withdrawal for consumer credit agreements. As already mentioned such consumer credit agreements usually are not concluded online since a written agreement with the signatures of both parties is required. Special rules apply also to package holidays and insurance policies.

g) *No specific information requirements*

While the EU knows special information requirements for online agreements, Swiss law treats

online contracts the same as other contracts. Therefore, the fact that a contract is entered into online does not increase the level of pre-contractual or contractual information requirements. Please note that e.g. the Consumer Information Act asks for particular declaration requirements applicable also to B2C contracts.

2. Can you tell us how data protection influences the drawing up of general terms of sale?

First of all, it is important to realize that the Data Protection Act protects personal data of individuals and legal entities. This might cause difficulties because personal data of companies is not protected in most other countries.

With regard to non-sensitive personal data, the data subject must be aware of the collection of personal data and the purposes for which it is collected. Unless it is evident that personal data is collected and used for a certain purpose, the data subject needs to be informed about the data processing. Special information is required if sensitive personal data (including personality profiles) is processed. Special information obligations exist also for the use of cookies (even if no personal data is collected). The information can be given within general terms of sale or by reference to privacy policies easily accessible on the respective website. E-shops tend to collect personal data in excess of what is needed for a B2C sale. In addition, collecting more and more data about a customer can lead to a consumer profile which is treated as sensitive personal data. In sum, it is highly recommended to explicitly inform the customers about the collection and processing of personal data and to get their consent.

In general, personal data shall be processed only for purposes required by law, for the purpose indicated at the occasion of the data collection or for the purpose the data subject must have been aware of at that time. Therefore, data collected in connection with the sale of a product should not be sold to direct-mailing companies. In addition, a data controller should be especially careful to comply with the rules concerning any transfer of personal data to a third party or across the borders, even in case the transfer takes place within the same group of companies or data is provided to an outsourcing partner. The data controller should also know that he is obliged by law to give full information in writing about all personal data processed of a certain data subject free of charge upon first request of the data subject and that the data subject may ask for correction of false personal data.

It should also be noted that collecting personal data for the use of (spam) e-mails is illegal, if the customer was not informed about the possibility to refuse such e-mails.

3. What can you tell us about electronic archiving under Swiss law?

The Code of Obligations requires companies registered in a Swiss commercial register to properly keep and preserve their books, their accounting records and all business correspondence (including e-mails, electronic offers etc.) necessary to properly reflect the financial situation of the business and to determine the operating results of each business year. Except for the profit and loss statements and the balance sheets, which shall be preserved in written and signed form, these documents may, in principle, be preserved electronically if they can be made readable at any time. In general, business books, accounting records and business correspondence, preserved in compliance with the applicable provisions in electronic form, have the same probative force as those which are readable without auxiliary means. In addition, Swiss VAT legislation allows archiving documents electronically to a certain extent. Finally, it is in the own interest of a business active in the B2C marketing to collect evidence concerning any transaction, in particular with regard to the formation of a contract, its content and its performance.