

# **Legislative framework**

## **Annexe C of the doorstep selling report**

May 2004

This annexe contains details of the existing legislation and common law remedies that can, and have, been used to tackle doorstep selling issues.

## **Sale of Goods/Supply of Goods and Services**

- C.1 There are several pieces of legislation that cover the contractual relationships between consumers and traders who adopt doorstep selling tactics.
- C.2 Where there is a contract for the sale of goods by description, by virtue of sections 13 and 13 (1A) of the Sale of Goods Act 1979 (as amended by the Sale and Supply of Goods Act 1994), there is an implied condition in the contract that the goods will correspond with the description. According to section 14 (2) of the Sale of Goods Act 1979, where a trader sells goods in the course of a business, there is also an implied term that the goods supplied under the contract are of satisfactory quality. For these purposes, the quality of goods may include their fitness for all the purposes for which goods of the kind in question are commonly supplied, appearance and finish, freedom from minor defects, safety and durability. Further, section 14 (3) of the Sale of Goods Act 1979 provides that, where a trader sells goods in the course of a business, and the consumer makes known to the trader any particular purpose for which the goods are being bought, there is an implied term that the goods supplied under the contract are reasonably fit for that purpose, unless the consumer does not rely, or it is unreasonable for him to rely, on the skill or judgment of the trader. These provisions apply equally to conditional sale and credit-sale agreements.
- C.3 Sections 9 and 10 of the Supply of Goods (Implied Terms) Act 1973 imply analogous terms as to quality, fitness for purpose and correspondence with description into hire-purchase agreements.
- C.4 Where a trader enters into a contract with a consumer to do work and supply materials, as opposed to a contract of sale (this is commonplace in the area of home improvements, for example fitted kitchens), the Supply of Goods and Services Act 1982, as amended by the Sale and Supply of Goods Act 1994, provides that there are similar implied terms as to correspondence with description, quality

and fitness for purpose<sup>1</sup>. In contracts for the hire of goods, sections 8 and 9 the Supply of Goods and Services Act 1982 imply conditions that the goods supplied correspond with the description and are of satisfactory quality and fit for any particular purpose.

- C.5 Moreover, section 13 of the Supply of Goods and Services Act 1982 provides that, where the supplier of a service is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill. Section 11S of the Supply of Goods and Services Act 1982 (which was inserted by the Sale and Supply of Goods to Consumers Regulations 2002 to implement Directive 99/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) provides that where the installation of goods is part of the contract, for example where a bathroom is being fitted, and where the goods are installed by the trader, or under his responsibility, the goods will not conform to the contract if the installation is not carried out with reasonable care and skill.
- C.6 If, under a contract for the supply of a service by a supplier acting in the course of a business, the time for the service to be carried out is not fixed by the contract or otherwise agreed between the parties, there is an implied term that the supplier will carry out the service within a reasonable time<sup>2</sup>.
- C.7 Under sections 6 (2) of the Unfair Contract Terms Act 1977, as against a person dealing as a consumer, a trader's liability for breach of the obligations arising from sections 13 or 14 of the Sale of Goods Act 1979 (the implied terms as to conformity of goods with description, or as to their quality or fitness for a particular purpose) or sections 9 or 10 of the Supply of Goods (Implied Terms) Act 1973 (the corresponding things in relation to hire-purchase) cannot be excluded or restricted by reference to any contract term. The use of terms purporting to exclude such liability is a criminal offence under the Consumer Transactions (Restrictions

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<sup>1</sup> Sections 3 and 4 of the Supply of Goods and Services Act 1982.

<sup>2</sup> Section 14 of the Supply of Goods and Services Act 1982

on Statements) Order 1976. Further, as against a person dealing as a consumer, attempts by a trader in a contract for work and materials, or in a contract of hire, to exclude or limit its liability in respect of the goods' correspondence with description, or their quality or fitness for any particular purpose, deriving from the Supply of Goods and Services Act 1982, are not allowed<sup>3</sup>.

- C.8 If there is a breach of the implied conditions as to correspondence with description, satisfactory quality or fitness for purpose<sup>4</sup>, a consumer may be able to reject the goods and recover any money paid under the contract. Alternatively, the consumer will be able to recover damages to compensate him for the loss he has suffered through the breach of contract.
- C.9 In addition, if a trader enters into a contract with a consumer for the sale of goods or for the transfer of goods (e.g. where a fitted kitchen is being installed), and the goods do not conform to the contract at the time of delivery, the consumer has the right (in certain circumstances) to require the trader to repair or replace the goods, or to require the trader to reduce the purchase price of the goods by an appropriate amount or to rescind the contract with regard to the goods in question<sup>5</sup>.
- C.10 For these purposes, goods do not conform to a contract of sale or of transfer if, among other things, there is a breach of a term implied by sections 14 or 15 of the Sale of Goods Act 1979 or by sections 3 and 4 of the Supply of Goods and Services Act 1982<sup>6</sup>

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<sup>3</sup> Section 7 (2) of the unfair Contract Terms Act 1977

<sup>4</sup> Under the Sale of Goods Act 1979 and the Supply of Goods (Implied Terms) Act 1973, the obligations are designated as 'conditions' only as regards England and Wales and Northern Ireland. In Scotland, the effect of a breach is governed by s.12A of the 1973 Act and s.15B of the 1979 Act.

<sup>5</sup> Section 48A of the Sale of Goods Act 1979 and section 11M of the Supply of Goods and Services Act 1982 inserted by the Sale and Supply of Goods to Consumers Regulations 2002 to implement Directive 99/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees.

<sup>6</sup> Section 48F of the Sale of Goods Act 1979 and section 11S of the Supply of Goods and Services Act 1982.

## Unfair Terms in Consumer Contracts Regulations 1999

C.11 These regulations implement Council Directive 93/13/EEC on unfair terms in consumer contracts and apply to contracts concluded between a consumer and a seller or supplier (who is defined as a person who is acting for purposes relating to his trade, business or profession). A term will be construed as unfair if it has not been individually negotiated and, contrary to the requirement of good faith<sup>7</sup>, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer<sup>8</sup>. Schedule 2 to the regulations comprises a non-exhaustive list of terms which may be regarded as unfair. This rubric includes inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier, permitting the seller or supplier to retain sums paid by the consumer where the consumer decides not to perform the contract without providing for the consumer to receive compensation of an equivalent amount where the seller cancels the contract, requiring a consumer who commits a breach of contract to pay a disproportionately high sum in compensation, limiting the seller or supplier's duty to respect promises made by his agents and allowing the seller or supplier to increase the price of goods or services without giving the consumer the corresponding right to cancel the contract if the varied price is too high. However, the definition of the main subject matter of the contract, and the adequacy of the price or remuneration as against the goods or services supplied in exchange under the contract, are not vulnerable to an assessment of fairness, in so far as they are set out in plain and intelligible language<sup>9</sup>. An unfair term in a contract concluded with a consumer by a seller or supplier is not

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<sup>7</sup> In *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 All ER 97, HL Lord Bingham indicated that 'The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position'.

<sup>8</sup> Regulation 5 (1) of the Unfair Terms in Consumer Contracts Regulations 1999

<sup>9</sup> Regulation 6 (2) of the Unfair Terms in Consumer Contracts Regulations 1999

binding on the consumer, and the OFT and other qualifying bodies have the power to apply for an injunction against any person appearing to be using, or recommending the use of, an unfair term. Further, a seller or supplier has a duty to ensure that the terms of the contract are expressed in plain, intelligible language.

## **Misrepresentation, collateral warranty and non est factum**

C.12 The law relating to misrepresentation may also be relevant in this context. A claim based on misrepresentation may arise where a sales representative makes to a consumer a false representation of fact which induces the consumer to enter into a contract. The consumer's remedies for misrepresentation may include the right to rescind the contract and/or damages<sup>10</sup>. A promise made by a sales representative may also in some circumstances be construed as a collateral warranty (i.e. a separate contract alongside the main contract), a breach of which will give rise to an action for damages. The doctrine of *Non est Factum* may also have some application. According to this rule, if a vulnerable consumer has been misled into signing a document, the character or effect of which is fundamentally different from what the consumer believed it to be, the consumer may be able to successfully claim that the document is void<sup>11</sup>. Further, if a consumer enters into a contract as a result of duress, he may, in certain limited circumstances, be able to set aside the transaction, if the coercion is of sufficient gravity. For example, a threat of violence by a trader directed to a consumer may constitute duress<sup>12</sup>.

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<sup>10</sup> E.g. in tort or under section 2 (1) of the Misrepresentation Act 1967

<sup>11</sup> See for example *Saunders v Anglia Building Society* [1971] AC 1004

<sup>12</sup> See for example *Barton v Armstrong* [1976] AC 104

## Consumer Credit Act 1974

### Cancellation rights

C.13 Under section 67 of the Consumer Credit Act 1974, a consumer has the right to cancel a credit or hiring agreement, together with any linked transaction into which he may have entered (e.g. a transaction financed by the credit agreement), if the negotiations before the agreement was entered into included oral representations made by the finance company or the trader in the presence of the consumer (e.g. if a doorstep sales representative persuades a consumer to enter into a credit agreement during a visit to the consumer's home). There are certain exceptions to this, one of which is that this right does not apply where the consumer signs the agreement at premises at which the finance company or the trader carries on any business. If an agreement is cancellable, it must comply with the Consumer Credit (Agreements) Regulations 1983 by informing the consumer of his right to cancel the agreement. Further, section 64 (1) of the Consumer Credit Act 1974 provides that every copy of the agreement given to the consumer must contain notice of the consumer's right to cancel the agreement in the form prescribed by the Consumer Credit (Cancellation Notices and Copies of Documents) Regulations 1983. If the agreement that the consumer is presented with for his signature is an unexecuted agreement (i.e. it sets out the terms of the prospective agreement and there will be no concluded agreement until it is signed by the finance company), a copy of it must be given to the consumer when he signs it<sup>13</sup> and a further copy of the executed agreement must be sent to him within seven days following the making of the agreement<sup>14</sup>. If, on the other hand, the agreement presented to the consumer for his signature during the sales representative's visit to his home becomes an executed agreement when he signs it (i.e. the finance company has already signed the agreement), a copy of the agreement must be given to the consumer at that time<sup>15</sup>, and a separate notice of the

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<sup>13</sup> Section 62 (1) of the Consumer Credit Act 1974

<sup>14</sup> Section 63 (2) of the Consumer Credit Act 1974

<sup>15</sup> Section 63 (1) of the Consumer Credit Act 1974

consumer's cancellation rights must also be sent by post to the consumer within seven days following the making of the agreement<sup>16</sup>. The period within which the consumer may cancel the agreement (i.e. the cooling off period) begins when the consumer signs the unexecuted agreement and expires five days after the consumer receives the second copy of the agreement or the separate notice of his cancellation rights<sup>17</sup>

## Licensing

C.14 Under the Consumer Credit Act 1974 (which, together with regulations made under it, implements Council Directive 87/102/EEC as amended) a license is required to carry on a consumer credit or a consumer higher business<sup>18</sup> or an ancillary credit business<sup>19</sup>, which includes credit brokerage<sup>20</sup>. The OFT is responsible for issuing, varying, renewing, suspending and revoking such licences. The OFT will grant a licence to a person if it is satisfied that he is a fit person to engage in the activities covered by the licence and the name under which he applies to be licensed is not misleading or otherwise undesirable<sup>21</sup>. In determining whether an applicant for a licence is a fit person, the OFT will have regard to any circumstances appearing to it to be relevant. In particular, the OFT will take into account, among other things, evidence tending to show that the applicant has engaged in business practices appearing to it to be deceitful or oppressive, or otherwise unfair or improper (whether or not those practices are lawful)<sup>22</sup>, such as the deliberate use of salesmen using high-pressure tactics

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<sup>16</sup> section 64 (1) (b) of the Consumer Credit Act 1974

<sup>17</sup> section 68 of the Consumer Credit Act 1974

<sup>18</sup> section 21 (1) of the Consumer Credit Act 1974

<sup>19</sup> section 147 (1) of the Consumer Credit Act 1974

<sup>20</sup> section 145 (1) (a) of the Consumer Credit Act 1974

<sup>21</sup> section 25 (1) of the Consumer Credit Act 1974

<sup>22</sup> section 25 (2) (d) of the Consumer Credit Act 1974

to sell credit, or persistently entering into extortionate credit deals with consumers<sup>23</sup>. A person needs specific authorisation for the canvassing off trade premises of debtor-creditor-supplier agreements or regulated consumer hire agreements<sup>24</sup>. It is an offence to canvass debtor-creditor agreements off trade premises<sup>25</sup>, and it is also an offence to canvass off trade premises the services of a person carrying on a business of credit brokerage, debt adjusting or debt counselling<sup>26</sup>.

### **Consumer protection (Cancellation of contracts concluded away from business premises) Regulations 1987 (the doorstep selling regulations)**

C.15 The doorstep selling regulations, which extend to the whole of the UK, implement Council Directive 85/577/EEC and are designed to protect consumers in respect of contracts made at the doorstep or otherwise concluded away from the trader's business premises. They apply to a contract for the supply by a trader of goods or services to a consumer which is made during an unsolicited visit by a trader to the consumer's home or to the home of another person, or to the consumer's place of work. They also apply to a visit by a trader at the request of the consumer where the goods or services to which the contract relates are other than those concerning which the consumer requested the visit of the trader. In these circumstances, the doorstep selling regulations apply only if, at the

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<sup>23</sup> In the White Paper entitled 'Fair, Clear and Competitive The Consumer Credit Market in the 21<sup>st</sup> Century' published in December 2003, the DTI has set out proposals for the reform of the regulation of the consumer credit industry. The proposals include amendments to the licensing regime, such as the strengthening of the fitness test, and the provision of clear pre-contractual information to consumers, including information about the right to cancel. On 11 September 2002, the European Commission published a proposal for a new Directive on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers (COM (2002) 443). Article 5 of the proposed Directive would impose a ban on the negotiation of a credit or a surety agreement outside business premises.

<sup>24</sup> section 23 (3) of the Consumer Credit Act 1974

<sup>25</sup> section 49 (1) of the Consumer Credit Act 1974

<sup>26</sup> section 154 of the Consumer Credit Act 1974

time when the visit was requested, the consumer did not know, or could not reasonably have known, that the supply of those other goods or services formed part of the trader's business activities<sup>27</sup>. Further, by virtue of regulation 3 (1) (d), the doorstep selling regulations cover contracts made during an excursion organised by the trader away from premises on which he is carrying on any business, whether on a permanent or temporary basis. The European Court of Justice has decided that a contract concluded in a situation in which a trader has invited a consumer to go in person to a specified place at a certain distance from the place where the consumer lives and which is different from the premises where the trader usually carries on his business and is not clearly identified as premises for sales to the public, in order to present to him the products and services he is offering, must be considered to have been concluded during an excursion organised by the trader away from his business premises<sup>28</sup>. In this context, an unsolicited visit means a visit by a trader, whether or not he is the trader who supplies the goods or services, which does not take place at the express request of the consumer<sup>29</sup>. It includes a visit by a trader which takes place after he telephones the consumer and indicates that he is willing to visit the consumer, unless the telephone call was expressly requested by the consumer. It also includes a second visit by a trader at the invitation of a consumer which takes place after an initial unsolicited visit by the trader during the course of which he indicates, either expressly or by implication, that he is willing to make a second visit to the consumer<sup>30</sup>. Certain contracts, are outside the scope of the doorstep selling regulations.

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<sup>27</sup> regulation 3 (1) of the doorstep selling regulations

<sup>28</sup> *Travel-Vac S L v Sanchis* C-423/97 [1999] All ER (EC) 656, ECJ

<sup>29</sup> It appears that the delivery of a leaflet, inviting the recipient to telephone or return a coupon requesting a visit, does not amount to a visit for the purposes of precipitating a cooling off period; *Havair Ltd v Vile* [2000] 5 CL 114, Basildon County Court.

<sup>30</sup> regulation 3 (3) of the doorstep selling regulations, substituted by The Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) (Amendment) Regulations 1998

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**Section 3.2 of the Doorstep Selling Regulations provides the following:**

'2) For the purposes of this regulation an excepted contract means

- a) any contract which involves the sale of:
  - a. land or other disposition of land, or for a lease or land mortgage;
  - b. finance the purchase of land;
  - c. for a bridging loan in connection with the purchase of land;
  - d. or for the construction or extension of a building or other erection on land:

Provided that these Regulations shall apply to a contract for the supply of goods and their incorporation in any land or a contract for the repair or improvement of a building or other erection on land, where the contract is not financed by a loan secured by a land mortgage;

- b) any contract for the supply of food, drink or other goods intended for current consumption by use in the household and supplied by regular roundsmen;
- c) any contract for the supply of goods or services which satisfies all the following conditions, namely –
  - (i) terms of the contract are contained in a trader's catalogue which is readily available to the consumer to read in the absence of the trader or his representative before the conclusion of the contract;
  - (ii) the parties to the contract intend that there shall be maintained continuity of contact between the trader or his representative and the consumer in relation to the transaction in question or any subsequent transaction; and

- (iii) both the catalogue and the contract contain or are accompanied by a prominent notice indicating that the consumer has a right to return to the trader or his representative goods supplied to him within the period of not less than 7 days from the day on which the goods are received by the consumer and otherwise to cancel the contract within that period without the consumer incurring any liability, other than any liability which may arise from the failure of the consumer to take reasonable care of the goods while they are in his possession;
  - d) contracts of insurance;
  - e) any agreement the making or performance of which by either party constitutes a relevant regulated activity;
  - f) any contract not falling within sub-paragraph(g) below under which the total payments to be made by the consumer do not exceed £35; and
  - g) any contract under which credit within the meaning of the Consumer Credit Act 1974 is provided not exceeding £35 other than a hire-purchase or conditional sale agreement.'
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C.16 If the doorstep selling regulations apply to a contract, the consumer may cancel the contract if, within 7 days following the making of the contract, the consumer serves a notice in writing on the trader which indicates his intention to cancel the contract<sup>31</sup>. If the consumer does so, the contract is treated as if it had never been entered into by him<sup>32</sup>. There is no requirement to show that the consumer was influenced or manipulated by the trader<sup>33</sup>.

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<sup>31</sup> regulation 4 (5) of the doorstep selling regulations

<sup>32</sup> By virtue of regulation 5, on the cancellation of a contract under the doorstep selling regulations, any money paid by or on behalf of the consumer under or in contemplation of the contract must be refunded. The consumer has a lien over any goods, possession of which he acquired under the cancelled contract, for this sum. The consumer has a corresponding duty under regulation 7 to restore to the trader goods that came into his possession under the contract before he exercised his right to cancel, subject to any lien that he enjoys. However,

C.17 A contract falling within the ambit of the doorstep selling regulations is not enforceable against the consumer unless the trader has delivered to the consumer a notice in writing, in the prescribed form, indicating the right of the consumer to cancel the contract within 7 days<sup>34</sup> and containing certain other information, such as the name and address of a person to whom notice of cancellation may be given. This notice must, usually, be given to the consumer at the time of the making of the contract<sup>35</sup>. A failure to deliver such a notice to the consumer is also a criminal offence<sup>36</sup>. A term contained in the contract is void if, and to the extent that, it is inconsistent with a provision for the protection of the consumer set out in the doorstep selling regulations<sup>37</sup>.

## Enterprise Act 2002

C.18 Part 8 of the Enterprise Act 2002 confers on enforcer's strengthened powers to obtain court orders against businesses that do not comply with their legal obligations towards consumers. By virtue of section 213 of the Enterprise Act 2002, the OFT and every local weights and measures authority in Great Britain, are general enforcers. A general enforcer may make an application for an enforcement order in respect of any infringement by a trader. There are two categories of infringements, domestic infringements and community infringements. The provisions relating to Community infringements implement the E.C. Directive on injunctions for the protection of consumers' interests<sup>38</sup>. A domestic infringement is defined as an act or omission which is done or

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regulation 7 (2) provides, among other things, that the consumer is not under a duty to return goods which, before the cancellation, had become incorporated in land. In these circumstances, the consumer has an obligation to pay for the goods in accordance with the cancelled contract.

<sup>33</sup> *Travel-Vac S L v Sanchis* C-423/97 [1999] All ER (EC) 656, ECJ.

<sup>34</sup> regulation 4 (1) of the doorstep selling regulations

<sup>35</sup> this provision of the doorstep selling regulations does not apply to a cancellable agreement within the meaning of the Consumer Credit Act 1974; regulation 4 (2).

<sup>36</sup> regulation 4A of the doorstep selling regulations, inserted by The Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) (Amendment) Regulations 1998

<sup>37</sup> regulation 10 (1) of the doorstep selling regulations

<sup>38</sup> Directive 98/27/EC

made by a person in the course of a business, which falls within subsection (2) and harms the collective interests of consumers in the United Kingdom<sup>39</sup>. The Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2003<sup>40</sup> specifies the enactments and rules of law in respect of which acts or omissions may constitute domestic infringements. These include the Consumer Credit Act 1974, the Sale of Goods Act 1979 and the Unfair Contract Terms Act 1977.

C.19 A community infringement is expressed to be an act or omission which harms the collective interests of consumers and which contravenes a listed Directive as given effect by the laws, regulations, or administrative provisions of an EEA state or contravenes such laws, regulations or administrative provisions which provide additional permitted protections<sup>41</sup>. The Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2003<sup>42</sup> specifies the law in the United Kingdom which gives effect to the EC directives, and provides additional permitted protections, and this includes the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987 and the Unfair Terms in Consumer Contracts Regulations 1999.

## **Theft Act 1968**

C.20 Under section 15 of the Theft Act 1968, a person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other person of it, is guilty of an offence. For these purposes, property includes money<sup>43</sup> and 'deception' means any deception, whether deliberate or reckless, by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person<sup>44</sup>. Under section 15A of the Theft Act 1968, a person is also guilty of an offence if by any deception

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<sup>39</sup> section 211 of the Enterprise Act 2002

<sup>40</sup> SI 2003/1593

<sup>41</sup> section 212 of the Enterprise Act 2002

<sup>42</sup> SI 2003/1374

<sup>43</sup> section 4 (1) of the Theft Act 1968

<sup>44</sup> section 15 (4) of the Theft Act 1968

he dishonestly obtains a money transfer for himself or another<sup>45</sup>. A money transfer occurs when a debit of an amount of money is made to one account (e.g. a bank account) and a credit of an amount of money is made to another account and the credit results from the debit or the debit results from the credit.

## **Trade Descriptions Act 1968**

C.21 Under section 14 of the Trade Descriptions Act 1968, it is an offence for any person in the course of any trade or business to make a statement which he knows to be false, or recklessly to make a statement<sup>46</sup> which is false, as to the provision or nature of any services, accommodation or facilities, or as to the time at which or the manner in which any services, accommodation or facilities are provided.

## **Business Names Act 1985**

C.22 Under section 4 of the Business Names Act 1985, any person who has a place of business in Great Britain and who carries on business in Great Britain must state in legible characters on all business

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<sup>45</sup> This was inserted by the Theft (Amendment) Act 1996 in response to the decision of the House of Lords in *R v Preddy and Slade; R v Dhillon* [1996] AC 815 that section 15 (1) of the Theft Act 1968 does not cover many cases of obtaining a thing in action by deception. The House of Lords said, obiter, that if a person by deception induces another to draw a cheque in his favour and give it to him, he cannot be convicted of obtaining property by deception. See also *R v Clark* [2001] Crim LR 572, CA.

<sup>46</sup> There has been some difficulty in distinguishing between false statements of fact, which fall within the purview of section 14, and unfulfilled promises as to the future provision of services, which are not covered. In *R v Sunair Holidays Ltd* [1973] 2 All ER 1233 it was said 'A promise or forecast may contain by implication a statement of present fact. The person who makes the promise may be implying that his present intention is to keep it or that he has at present the power to perform it. The person who makes the forecast may be implying that he now believes that his prediction will come true or that he has the means of bringing it to pass. Such implied statements of present intention, means or belief, when they are made, may well be within s 14 and therefore punishable if they were false and were made knowingly or recklessly. But if they are punishable, the offence is not the breaking of a promise or the failure to make a prediction come true. It is the making of a false statement of an existing fact, somebody's present state of mind or present means'.

letters, written orders for goods or services to be supplied to the business, invoices and receipts issued in the course of the business and written demands for payment of debts arising in the course of the business certain information. In the case of a partnership, the name of each partner must be stated (unless the partnership consists of more than 20 persons), in the case of an individual, his name must be set out, and in the case of a company, its corporate names must be given. Further, in relation to each person, an address in Great Britain must be stated at which service of any document relating in any way to the business will be effective. A failure to do so amounts to a criminal offence<sup>47</sup>.

## **Sale of Fuel**

C.23 By virtue of section 5 of the Gas Act 1986 and section 4 of the Electricity Act 1989, as amended by the Utilities Act 2000, a company that supplies gas or electricity requires a licence granted by the Gas and Electricity Markets Authority. This sector is regulated by the Office of Gas and Electricity Markets (Ofgem), which operates under the direction and governance of the Gas and Electricity Markets Authority. Licences include standard conditions with which licensees must comply. The Secretary of State, in exercise of the powers conferred on her by section 33(1) and (2) (in the case of electricity licences) and section 81(1) and (2) (in the case of gas licences) of the Utilities Act 2000 has determined standard conditions with which licensees must comply. In relation to the marketing of electricity to domestic customers, a licensee must take all reasonable steps to ensure that any unsolicited contact made on behalf of the licensee with any domestic customer takes place at a reasonable time<sup>48</sup>. Further, where a domestic supply contract has been entered into by a domestic customer in the course of a visit to the customer's premises by a representative of the licensee, the licensee must, not less than 24 hours or more than 14 days after the date of the contract, use reasonable endeavours to contact the customer seeking his confirmation that he understands that he has entered into a contract for the supply of

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<sup>47</sup> Section 4 (6) of the Business Names Act 1985

<sup>48</sup> Condition 48 (2) (c) (iii) Electricity Supply Licence: Standard Conditions

electricity, he is content to have entered into the contract and he is content with the way in which the marketing activities of the licensee were conducted. If the customer is not content and wishes to terminate the contract, the licensee must take all reasonable steps to ensure that the contract is terminated. Similar standard conditions apply to gas suppliers' licences<sup>49</sup>. A failure to comply with a standard licence condition may lead to enforcement action by Ofgem, which includes the imposition of a financial penalty.

### **Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC**

C.24 On 18 June 2003 the European Commission published a Proposal for a Directive concerning unfair business-to-consumer commercial practices in the Internal Market (COM (2003) 0356). Article 5 of the draft Directive prohibits unfair commercial practices. According to Article 5 (2), a commercial practice will be regarded as unfair if it is contrary to the requirements of professional diligence and it materially distorts the economic behaviour of the average consumer whom it reaches or to whom it is addressed, or is likely to do so. An average consumer is defined as a consumer who is reasonably well informed and reasonably observant and circumspect. Commercial practices that are misleading or aggressive within the meaning of the Directive will be deemed to be unfair. By virtue of Article 8 of the draft Directive, a commercial practice will be treated as aggressive if, by harassment, coercion or undue influence, it significantly impairs the average consumer's freedom of choice or conduct and causes him to enter into a transaction where he would not otherwise have done so. The draft Directive contains a list of commercial practices which will in all circumstances be regarded as unfair, which includes creating the impression that the consumer cannot leave the premises until the contract is signed or payment is made and conducting prolonged and/or repeated personal visits to the consumer's home ignoring

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<sup>49</sup> Condition 48 Gas Suppliers Licence: Standard Conditions

the consumer's request to leave. In its present form, the Directive is a maximum harmonisation measure. The Directive is currently the subject of discussion between Government departments and at an EC level.

## **Privacy and Electronic Communications (EC Directive) Regulations 2003<sup>50</sup> ('the 2003 Regulations')**

C.25 The Telecommunications (Data Protection and Privacy) Regulations 1999 were revoked by the Privacy and Electronic Communications (EC Directive) Regulations 2003 as from 11 December 2003<sup>51</sup>. By virtue of regulation 21 of the 2003 Regulations, the use of a publicly available electronic communications service for the purposes of making unsolicited calls to a person for direct marketing purposes is prohibited where

- (i) the person has previously notified the caller that such calls should not be made to his telephone number; or
- (ii) the person's telephone number is listed on the register kept under regulation 26 of the 2003 Regulations.

C.26 Under regulation 26 of the 2003 Regulations, OFCOM<sup>52</sup> has a duty to maintain and keep up-to-date a register of the telephone numbers of individuals who have notified them that they do not wish to receive unsolicited calls for direct marketing purposes on that number. This central opt out register is known as the "Telephone Preference Service".

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<sup>50</sup> SI 2003/2426. In relation to unsolicited sales and marketing telephone calls, the effect of the 1999 Regulations and the 2003 Regulations (which replaced them) is broadly similar.

<sup>51</sup> Regulation 3 of the Privacy and Electronic Communications (EC Directive) Regulations 2003

<sup>52</sup> The Office of Communications, established by section 1 of the Office of Communications Act 2002

C.27 The effect of regulation 31 of the 2003 Regulations is that, if the Information Commissioner is satisfied that a person has contravened the requirements of the 2003 Regulations, the Information Commissioner may serve him with an enforcement notice obliging him to take the steps specified in the notice.