Chapter 5

The Legal Environment

CHAPTER OBJECTIVES

This chapter will explain:

- the key legal challenges and opportunities facing business organizations, in respect of their relationships with customers, suppliers, employees and intermediaries
- sources of law – common law and statute law
- the basic principles of law – contract and tort
- legal processes
- quasi-law based on voluntary codes of conduct
- legal protection of intellectual property

5.1 Introduction

It was noted in the first chapter that all societies need some form of rules that govern the relationship between individuals, organizations and government bodies. In the absence of rules, chaos is likely to ensue, in which the strongest people will survive at the expense of the weakest. Businesses do not like to operate in environments in which there are no accepted rules of behaviour, because there is no guarantee that their investments will be protected from unauthorized seizure. This may partly explain why some countries of central Africa, which have been regarded as lawless areas without proper government, have failed to attract significant inward investment by businesses.

However, a system of rules does not necessarily imply a formal legal system. Many less developed economies manage with moral codes of governance that exert pressure on individuals and organizations to conform to an agreed code of conduct. In such countries, the shame inflicted on the family of a trader who defrauds a customer may be sufficient to ensure that traders abide by a moral code of governance.

In complex, pluralistic societies, moral governance alone may be insufficient to ensure compliance from business organizations. The tendency therefore has been for legal frameworks to expand as economies develop. One observer has pointed out that the Ten Commandments – a biblical code for governing society – ran to about 300 words. The American Bill of Rights of 1791 ran to about 700 words. Today, as an example of the detailed legislation that affects our conduct, the Eggs (Marketing Standards) Regulations 1995 run to several pages. The law essentially represents a codification of the rules and governance values of a society, expressed in a way that allows aggrieved parties to use an essentially bureaucratic system to gain what the society regards as justice. The legal environment of Western developed economies is very much influenced by the political environment, which in turn is influenced by the social environment. In this sense, the law does not exist in a vacuum. Developments in the business environment have led to changes in the law affecting businesses, and the law in turn has affected the activities of business organizations.

In previous chapters we have considered the relationship between elements of an organization's micro- and macroenvironments at a fairly abstract level. In reality, these relationships are governed by a legal framework that presents opportunities and constraints for the manner in which these relationships can be developed.

We can identify a number of important areas in which the legal environment impinges on the activities of business organizations.

- The nature of the relationship between the organization and its customers, suppliers and intermediaries is influenced by the prevailing law. Over time, there has been a tendency for the law to give additional rights to buyers of goods and additional duties to the seller, especially in the case of transactions between businesses and private individuals. Whereas the nineteenth-century entrepreneur in Britain would have had almost complete freedom to dictate the terms of the relationship with its customers, developments in statute law now require, for example, the supplier to ensure that the goods are of satisfactory quality and that no misleading description of them is made. Furthermore, the expectations of an organization's customers have changed over time. Whereas previous generations may have resigned themselves to suffering injustice in their dealings with a business, today the

expectation is increasingly for perfection every time. Greater awareness of the law on the part of consumers has produced an increasingly litigious society.

- In addition to the direct relationship that a company has with its customers, the law also influences the relationship that it has with other members of the general public. The law may, for example, prevent a firm having business relationships with certain sectors of the market, as where children are prohibited by law from buying cigarettes or drinking in public houses. Also, the messages that a company sends out in its advertising are likely to be picked up by members of the general public, and the law has intervened to protect the public interest where these messages could cause offence (adverts that are racially prejudicial, for example).
- Employment relationships are covered by increasingly complex legislation, which recognizes that employees have a proprietary interest in their job. Legislation seeks to make up for inequalities in the power between employers and employee.
- The legal environment influences the relationship between business enterprises themselves, not only in terms of contracts for transactions between them, but also in the way they relate to each other in a competitive environment. The law has increasingly prevented companies from joining together in anti-competitive practices, whether covertly or overtly.
- Companies need to develop new products, yet the rewards of undertaking new product development are influenced by the law. The laws of copyright and patent protect a firm's investment in fruitful research.
- The legal environment influences the production possibilities of an enterprise and hence the products that can be offered to consumers. These can have a direct effect – as in the case of regulations stipulating car safety design requirements – or a more indirect effect – as where legislation to reduce pollution increases the manufacturing costs of a product, or prevents its manufacture completely.

The legal environment is very closely related to the political environment. In the UK, law derives from two sources: common law and statute law.

1 The **common law** develops on the basis of judgments in the courts – a case may set a precedent for all subsequent cases to follow. The judiciary is independent of government and the general direction of precedents tends gradually to reflect changing attitudes in society.

2 **Statute law**, on the other hand, is passed by Parliament and can reflect the prevailing political ideology of the government.

We can draw a distinction between *civil* law and *criminal* law. Civil law provides a means by which one party can bring an action for a loss it has suffered as the direct result of actions by another party. A party who is injured by a defective vehicle, or has suffered loss because a promised order for goods has not been delivered can use the civil law to claim some kind of recompense against the other party. By contrast, criminal law is invoked when a party causes harm to society more generally. In this case, it is the government that brings a claim against a wrongdoer and punishment generally takes the form of a fine or a prison sentence. Most of the subjects covered in this chapter are concerned with the civil law – that is, relationships between an organization and other individuals and organizations in their business environment.

However, business organizations are increasingly being prosecuted for breaches of criminal law. Cases discussed in this chapter include breaches of food safety law, breaches of health and safety law, and providing misleading price information.

The law is a very complex area of the business environment. Most businesses would call upon expert members of the legal profession to interpret and act upon some of the more complex elements of the law. The purpose of this chapter is not to give definitive answers on aspects of the law as it affects business organizations – this would be impossible and dangerous in such a short space. Instead, the aim is to raise awareness of legal issues in order to recognize in general terms the opportunities and restrictions that the law poses, and the areas in which business organizations may need to seek the specialized advice of a legal professional.

This chapter will begin by looking at some general principles of law: the law of contract, the law relating to negligence and the processes of the legal system in England. Although the detail will describe the legal system of England, many of the principles apply in other judicial systems. The chapter will then consider the following specific areas of applications of the law, which are of particular relevance to businesses:

- dealings between organizations and their customers for the supply of goods and services
- contracts of employment
- protection of **intellectual property rights**
- legislation relating to production processes
- legislation to prevent anti-competitive practices.

5.2 The law of contract

A **contract** is an agreement between two parties where one party agrees to do something (e.g. supply goods, provide a service, offer employment) in return for which the other party provides some form of payment (in money or some other form of value). A typical organization would have contracts with a wide range of other parties, including customers, suppliers, employees and intermediaries.

There can be no direct legal relationship between a company and any of these groups unless it can be proved that a contract exists. An advertisement on its own only very rarely creates a legal relationship. The elements of a contract comprise: offer, acceptance, intention to create legal relations, consideration and capacity. We will consider these in turn.

5.2.1 Offer

This a declaration by which the offeror indicates that they intend to be legally bound on the terms stated in the offer if it is accepted by the offeree. An offer must be distinguished from an invitation to treat, which can be defined as an invitation to make offers. Normally, advertisements are regarded as invitations to treat, rather than an offer. Similarly, priced goods on display in shops are invitations to treat. Therefore, if a leather jacket is priced at £20 (through error) in the shop widow, it is not possible to demand the garment at that price. As the display is an invitation to treat, it is the consumer who is making the offer, which the shopkeeper may accept or reject as he wishes.

5.2.2 Acceptance

This may be made only by the person(s) to whom the offer was made, and it must be absolute and unqualified (i.e. it must not add any new terms or conditions, for to do so would have the effect of revoking the original offer). Acceptance must be communicated to the offeror unless it can be implied by conduct. An offer may be revoked at any time prior to acceptance. However, if postal acceptance is an acceptable means of communication between the parties, then acceptance is effective as soon as it is posted, provided it is correctly addressed and stamped.

5.2.3 Intention to create legal relations

Generally, in all commercial agreements it is accepted that both parties intend to make a legally binding contract and therefore it is unnecessary to include terms to this effect. In some circumstances, however, there may be no intention on the part of one or both parties to create legal relations, as occurs where a donor casually gives money to a charity organization. In the absence of such intention, a contract cannot exist.

5.2.4 Consideration

This is essential in all contracts unless they are made 'under seal'. Consideration has been defined as some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other (i.e. some benefit accruing to one party or a detriment suffered by the other). In commercial contracts generally, the consideration takes the form of a cash payment. However, in contracts of barter, which are common in some countries, goods are often exchanged for goods.

5.2.5 Capacity

Generally, any person or organization may enter into an agreement, which may be enforced against them. They are deemed to have the 'capacity' to do so. Exceptions include minors, drunks and mental patients; for this reason, companies usually exclude people under 18 from offers of goods to be supplied on credit. Limited companies must have the capacity to make a contract identified in their Objects clause within their Articles and Memorandum of Association (see Chapter 6).

5.2.6 Terms and representations

Finally, a distinction can be made between the terms of a contract and representations, which were made prior to forming the contract. Generally, it is assumed that statements that are made at the formation of a contract are terms of that contract, but many statements made during the course of negotiations are mere representations. If the statement is a term, the injured party may sue for breach of contract and will normally obtain damages that are deemed to put him or her in the position they would have been in if the statement had been true. If the statement is a mere representation, it may be possible to avoid the contract by obtaining an order – known as

Thinking around the subject:
Is a business relationship a contract?

One of the trends in the business environment that we discussed in Chapter 1 is towards closer relationships between companies in a supply chain. So, instead of buying 'job lots' of components and raw materials from the cheapest buyer whenever they are needed, a buyer and seller will come to an arrangement for their supply over the longer term. The parties may not be able to specify the precise products or volumes that they will need to buy, but just by understanding each other's processes and likely future requirements, the supply chain can be made more efficient and effective.

Many of these business relationships are based on 'gentlemen's agreements' with little formal specification in writing. So is this a contract? Can either party unilaterally end a gentleman's agreement?

The question was tested in 2002 in the case of Baird Textile Holdings Ltd vs Marks & Spencer plc (M&S). Baird had been making lingerie, women's coats and men's clothes for M&S for over 30 years, and had largely built its business round the retail chain's requirements. However, the parties had resisted formalizing the arrangement in order to maintain maximum flexibility in their relationship. But increased competition in the high street led M&S to look for cheaper sources of manufacturing overseas, and Baird was told that with immediate effect its goods were no longer required by M&S.

Baird argued that although there was no written contract governing their relationship, there was an implied term that either party would give reasonable notice of any change to the relationship. The supplier claimed for damages of £53.6 million, which included a £33 million charge to cover redundancy payments, and further amounts in respect of asset write-downs, including IT equipment it used to help fulfil its M&S clothing orders. The claim was intended to put Baird back into the position it would have been in had M&S given it three years' notice, rather than suddenly terminating its agreement. But did the agreement between the two constitute a contract?

The Court of Appeal held that the long-term arrangements between Baird and M&S did not constitute a contract. It stated that there was a clear mutual intent not to enter into a legal agreement and this view was supported by the absence of any precise terms. Both parties clearly wished to preserve flexibility in their dealings with each other. A contract existed only in respect of individual orders when they were placed, but there was no contract governing the continuity of orders.

rescission – which puts the parties back in the position they were in prior to the formation of the contract. Even though the essential elements of a contract are present, the contract may still fail to be given full effect.

5.3 Non-contractual liability

Consider now the situation where a consumer discovers that goods are defective in some way but is unable to sue the retailer from which they were supplied because the consumer is not a party to the contract (which may occur where the goods were bought as a gift by a friend). The product may also injure a completely unconnected third party. The only possible course of action here has been to sue the manufacturer. This situation was illustrated in 1932 in the case

of Donaghue vs Stevenson, where a man bought a bottle of ginger beer manufactured by the defendant. The man gave the bottle to his female companion, who became ill from drinking the contents, as the bottle (which was opaque) contained the decomposing remains of a snail. The consumer sued the manufacturer and won. The House of Lords held that on the facts outlined there was remedy in the **tort** of negligence.

To prove **negligence**, there are three elements that must be shown:

1 that the defendant was under a duty of care to the plaintiff
2 that there had been a breach of that duty
3 that there is damage to the plaintiff as a result of the breach, which is not too remote a consequence.

In the case, Lord Atkin defined a **duty of care** by stating that:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

The law of negligence is founded almost entirely on decided cases, and the approach adopted by the courts is one that affords flexibility in response to the changing patterns of practical problems. Unfortunately, it is unavoidable that with flexibility comes an element of uncertainty. Whether or not liability will arise in a particular set of circumstances appears to be heavily governed by public policy, and it is not clear exactly when a duty of care will arise. At present, the principles, or alternatively the questions to be asked in attempting to determine whether a duty exists, are:

- is there foreseeability of harm and, if so . . .
- is there proximity – a close and direct relationship – and, if so . . .
- is it fair and reasonable for there to be a duty in these circumstances?

Having established in certain circumstances that a duty of care exists, defendants will be in breach of that duty if they have not acted reasonably. The question is 'What standard of care does the law require?' The standard of care required is that of an ordinary prudent man in the circumstances pertaining to the case. For example, in one case it was held that an employee owed a higher standard of care to a one-eyed motor mechanic and was therefore obliged to provide protective goggles – not because the likelihood of damage was greater, but because the consequences of an eye injury were more serious (Paris vs Stepney BC, 1951). Similarly, a higher standard of care would be expected from a drug manufacturer than from a greetings cards manufacturer because the consequences of defective products would be far more serious in the former case.

Where a person is regarded as a professional (i.e. where people set themselves up as possessing a particular skill, such as a plumber, solicitor, surgeon) then they must display the type of skill required in carrying out that particular profession or trade.

With a liability based on fault, the defendant can be liable only for damages caused by him or her. The test adopted is whether the damage is of a type or kind that ought reasonably to have been foreseen even though the extent need not have been envisaged. The main duty is that of the manufacturer, but cases have shown that almost any party that is responsible for the supply of goods may be held liable. The onus of proving negligence is on the plaintiff. Of importance in this area is s. 2(1) of the Unfair Contract Terms Act 1977, which states: 'a person cannot by reference to any contract term or notice exclude or restrict his liability for death or personal injury resulting from negligence'. Also s. 2(2): 'in the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the contract term or notice satisfies the test of reasonableness'. Thus, all clauses that purport to exclude liability in respect of negligence resulting in death or personal injuries are void, and other clauses (e.g. 'goods accepted at owner's risk') must satisfy the test of reasonableness.

5.4 Legal processes

It is not only changes in the law itself that should be of concern to businesses but also the ease of access to legal processes. If legal processes are excessively expensive or time-consuming, the law may come to be seen as irrelevant if parties have no realistic means of enforcing the law. In general, developed economies have seen access to the law widened, so that it is not exclusively at the service of rich individuals or companies. As well as individuals and companies having the right to protect their own legal interests, a number of government agencies facilitate enforcement of the law.

In England, a number of courts of law operate with distinct functional and hierarchical roles.

- The Magistrates' Court deals primarily with criminal matters, where it handles approximately 97 per cent of the workload. It is responsible for handling prosecutions of companies for breaches of legislation under the Trade Descriptions and the Consumer Protection Acts. More serious criminal matters are 'committed' up to the Crown Court for trial.
- The Crown Court handles the more serious cases that have been committed to it for trial on 'indictment'. In addition, it also hears defendants' appeals as to sentence or conviction from the Magistrates' Court.
- The High Court is responsible for hearing appeals by way of 'case stated' from the Magistrates' Court or occasionally the Crown Court. The lower court, whose decision is being challenged, prepares papers (the case) and seeks the opinion of the High Court.
- The Court of Appeal deals primarily with appeals from trials on indictment in the Crown Court. It may review either sentence or conviction.
- County Courts are for almost all purposes the courts of first instance in civil matters (contract and tort). Generally, where the amount claimed is less than £25,000, this court will have jurisdiction in the first instance, but between £25,000 and £50,000, the case may be heard here, or be directed to the High Court, depending on its complexity.
- When larger amounts are being litigated, the High Court will have jurisdiction in the first instance. There is a commercial court within the structure that is designed to be a quicker

and generally more suitable court for commercial matters; bankruptcy appeals from the County Court are heard here.

- Cases worth less than £5000 are referred by the County Court to its 'Small Claims' division, where the case will be heard informally under arbitration, and costs normally limited to the value of the issue of the summons.
- The Court of Appeals' Civil Division hears civil appeals from the County Court and the High Court.
- The House of Lords is the ultimate appeal court for both criminal and domestic matters.
- However, where there is a European Issue, the European Court of Justice will give a ruling on the point at issue, after which the case is referred back to the UK court.

In addition to the court structure (see Figure 5.1), there are numerous quasi-judicial tribunals that exist to reconcile disagreeing parties. Examples include Rent Tribunals (for agreeing property rents), Valuation Tribunals (for agreeing property values) and Employment Tribunals (for bringing claims covered by employment legislation).

Despite the existence of legal rights, the cost to an individual or a firm of enforcing its rights can be prohibitive, especially where there is no certainty that a party taking action will be able to recover its legal costs. For a typical inter-company dispute over a debt of £50,000, the party suing the debtor can easily incur legal expenses of several thousand pounds, not counting the cost of its employees' time. Where a case goes to the Court of Appeal, a company could be involved in inestimable costs. The legal process can also be very slow. In the case of an inter-company debt claim, a case may take up to ten years between the first issue of a writ and compensation finally being received.

Numerous attempts have been made to make the legal system more widely accessible, such as the small claims section of the County Court, which handles claims of up to £5000 in a less formal and costly manner than a normal County Court claim. There have also been attempts to reduce the risks to individuals by allowing, in certain circumstances, solicitors to charge their

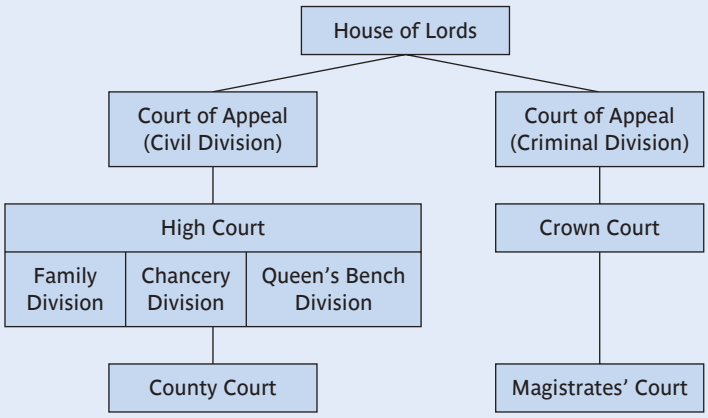

Figure 5.1 The structure of courts in England

clients depending upon results obtained in court (often referred to as a 'no win, no fee' system). There is a strong feeling that the costs of running the courts system could be cut by reducing many bureaucratic and restrictive practices within the legal profession.

Despite moves to make legal remedies more widely available, access to the law remains unequal. Among commercial organizations, a small under-resourced firm may be unable to put the money upfront to pursue a case against a larger company that could defend itself with an army of retained lawyers. Similarly, private consumers are unequal in their access to the law. It has often been suggested that easy access to the law is afforded to the very rich (who can afford it) and the very poor (who may be eligible to receive legal aid). An apparent paradox of attempts to make the law more accessible is that these attempts may themselves overwhelm courts with cases with which they are unable to cope. As an example, the Small Claims Court is reported to have been overwhelmed in 2007 by thousands of bank customers suing their banks for a refund of 'unreasonable' charges levied by the banks. The flood of litigants was assisted by the availability online of template letters promoted by consumer group sites and the ability of aggrieved customers to submit small claims online (www.moneyclaim.gov.uk).

Central and local government is increasingly being given power to act as a consumer champion and to bring cases before the courts which are in the interest of consumers in general. Bodies that pursue actions in this way include the following.

- Trading Standards Departments, which are operated by local authorities, have powers to investigate complaints about false or misleading descriptions of prices, inaccurate weights and measures, consumer credit and the safety of consumer legislation. Consumers' knowledge of their rights has often stretched the resources of Trading Standards Departments so that, at best, they can take action against bad practice only selectively.
- The Environmental Health Departments of local authorities deal with health matters such as unfit food and dirty shops and restaurants. A consumer who suspects that they have suffered food poisoning as a result of eating unfit food at a restaurant may lodge a complaint with the local Environmental Health Department, which may collate similar complaints and use this evidence to prosecute the offending restaurant or take steps to have it closed down.
- Utility regulators have powers to bring action against companies that are in breach of their licence conditions.

5.5 Legislation affecting the supply of goods and services

Prior to 1968, there was very little statutory intervention in the contractual relationship between business organizations and their customers, with a few exceptions such as those that came within the scope of the Food and Drugs Act 1955. Since the 1960s there has been an increasing amount of legislation designed to protect the interests of private consumers, who legislators have seen as unequal parties to a contract. In recent years EU directives have been incorporated into UK legislation to provide additional duties for suppliers of goods and services. It should be noted that much of the legislation applies only to business-to-consumer contracts and not business-to-business contracts. In the latter case, legislation has often presumed that parties have equal bargaining power and therefore do not need additional legislative protection.

Thinking around the subject:
Who benefits from a 'compensation culture'?

Are we becoming a litigious society, dominated by a 'compensation culture'? Newspapers are continually reporting claims made by individuals that at first may seem quite trivial and not warranting legal intervention. Recent reported claims, which some would argue typify a compensation culture, include a teacher who won £55,000 after slipping on a chip, and the parents of a Girl Guide who sued after she was burnt by fat spitting from a sausage. Aggrieved parties may have been spurred on by the rise of 'personal injury advisers' who offer to take on a claim at no risk to the claimant. They have sometimes been referred to as 'ambulance chasers' for the way they pursue injured parties, making them aware of the possibility of claiming for a loss or injury, which they may otherwise have written off in their minds as just bad luck. If their claim is rejected by the court, the claimant will pay nothing. If it succeeds, they pay the company handling the claim a percentage of the damages awarded. Such companies have been accused of unrealistically raising clients' expectations of damages, and looking for confrontation where alternative methods of reconciliation may be more effective. The business practices of some companies have been criticized, and one company, the Accident Group, went out of business in 2004 after accumulating large debts and failing to deliver promised benefits to many of its customers.

Is the compensation culture necessarily a bad thing for society? Defending cases costs companies time and money, which will inevitably be passed on in the form of higher prices charged to consumers. Claims against companies sometimes even lead to goods or services no longer being made available to consumers because of an open-ended risk of being sued if there is a problem with the product.

But shouldn't consumers expect businesses to deliver their promises in a responsible manner? Is a compensation culture essentially about redressing the balance between relatively weak consumers and more powerful organizations? If those organizations did their job properly, would there be no case for even talking about a compensation culture? If the cost of obtaining justice made it difficult for aggrieved customers to bring a claim against a company, would the company simply carry on acting irresponsibly because it realized it was beyond reproach? In the case of very dubious claims, such as a customer who sued a restaurant because their cup of coffee was 'too hot', could the company attract sympathy from the majority of its customers, who might regard such a claim as frivolous?

In this section, we consider the following important pieces of statute law that have an impact on the relationship between an organization and its customers:

- the Trade Descriptions Act 1968
- the Sale of Goods Act 1979
- the Misrepresentation Act 1967
- the Consumer Protection Act 1987
- the Consumer Credit Act 1974.

In addition, this section reviews a number of quasi-legal codes of conduct operated by industry bodies.

5.5.1 Trade Descriptions Act 1968

The Trade Descriptions Act 1968 makes it an offence for a person to make a false or misleading trade description and creates three principal offences, as described below.

A false trade description to goods

Under s. 1, this states that 'a person who, in the course of business, applies false trade descriptions to goods or suppliers or offers to supply goods to which a false description has been applied is guilty of an offence'. Section 2 defines a false trade description as including 'any indication of any physical characteristics such as quantity, size, method of manufacture, composition and fitness for purpose'. A description is regarded as false when it is false or, by s. 3(2), misleading to a material degree. In some cases consumers are misled by advertisements that are economical with the truth. A car was advertised as having one previous 'owner'. Strictly this was true, but it had been owned by a leasing company, which had leased it to five different users. The divisional court held this was misleading and caught by s. 3(2) of the Trade Descriptions Act (R. vs South Western Justices ex parte London Borough of Wandsworth, *The Times*, 20 January 1983).

A false statement of price

Section 11 makes a false statement as to the price an offence. If a trader claims that its prices are reduced, it is guilty of an offence unless it can show that the goods have been on sale at the higher price during the preceding six months for a consecutive period of 28 days (more specific requirements concerning pricing are contained in the Price Marking Order 2004).

A false trade description of services

Section 14 states that it is an offence to make false or misleading statements about services. An example of this is illustrated in the case of a store that advertised 'folding doors and folding door gear – carriage free'. This statement was intended to convey to the consumer that only the folding door gear would be sent carriage-free on purchase of the folding doors. It was held that the advert was misleading and that it was irrelevant that it was not intended to be misleading (MFI Warehouses Ltd vs Nattrass, 1973, 1 All ER 762).

Traders can use a number of defences under the Act, set out in s. 24(i):

(a) that the commission of the offence was due to a mistake or to reliance on information supplied to the company or to the act or default of another person, an accident or some other cause beyond its control, and

(b) that the company took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by itself or any person under its control.

For the defence to succeed, it is necessary to show that both sub-sections apply. In a case concerning a leading supermarket, washing powder was advertised as being 5p less than the price marked in the store. The defendants said that it was the fault of the store manager who had failed to go through the system laid down for checking shelves. The court held that the defence applied; the store manager was 'another person' (s. 24(i)(a)) and the store had taken reasonable precautions to prevent commission of the offence (Tesco Supermarkets Ltd vs Nattrass, 1971, 2 All ER 127).

5.5.2 Sale of Goods Act 1979

What rights has the consumer if he or she discovers that the goods purchased are faulty or different from those ordered? The Sale of Goods Act (SOGA) contains terms specifically to protect the consumer. The term 'consumer' is defined by s. 20(6) of the Consumer Protection Act 1987, and essentially covers situations where a purchase is made for private consumption, rather than for use in the course of a business.

Section 13 of the Sale of Goods Act 1979 states that, 'Where there is a contract for the sale of goods by description there is an implied condition that the goods will correspond with the description.' Goods must be as described on the package. If a customer purchases a blue long-sleeved shirt and on opening the box discovers that it is a red short-sleeved shirt, then he is entitled to a return of the price for breach of an implied condition of the contract.

Section 14(2), as amended by the Sale and Supply of Goods Act 1994, states that where a seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality. For the purposes of this Act goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, fitness for all the purposes for which goods of the kind in question are commonly supplied, appearance and finish, safety, durability, freedom from minor defects, the price (if relevant) and all other relevant circumstances.

However, section 14(2C) states that the standard of satisfactory quality need not apply in respect of faults that are specifically drawn to the buyer's attention before the contract is made, which should be reasonably apparent to a buyer before purchase.

The implied term of unsatisfactory quality applies to sale goods and second-hand goods, but clearly the consumer would not have such high expectations of second-hand goods. For example, a clutch fault in a new car would make it unsatisfactory, but not so if the car were second-hand. In a second-hand car – again, depending on all the circumstances – a fault would have to be major to render the car unsatisfactory. Thus, the question to be asked is, 'Are the goods satisfactory in the light of the contract description and all the circumstances of the case?'

It is often asked for how long the goods should remain satisfactory. It is perhaps implicit that the goods remain satisfactory for a length of time reasonable in the circumstances of the case and the nature of the goods. If a good becomes defective within a very short time, this is evidence that there was possibly a latent defect at the time of the sale.

Under s. 14(3), there is an implied condition that goods are fit for a particular purpose where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which the goods are being bought. Thus, if a seller, on request, confirms suitability for a particular purpose and the product proves unsuitable, there would be a breach of s. 14(3); if the product is also unsuitable for its normal purposes, then s. 14(2) would be breached too. If the seller disclaims any knowledge of the product's suitability for the particular purpose and the consumer takes a chance and purchases it, then if it proves unsuitable for its particular purpose there is no breach of s. 14(3). The only circumstance in which a breach may occur is, again, if it were unsuitable for its normal purposes under s. 14(2).

In business contracts, implied terms in ss. 13–15 of the Sale of Goods Act 1979 can be excluded. Such exclusion clauses, purporting, for example, to exclude a term for reasonable

fitness for goods (s. 14), are valid subject to the test of reasonableness provided that the term is incorporated into the contract. However, for consumer contracts, such clauses that purport to limit or exclude liability are void under s. 6(2) of the Unfair Contract Terms Act 1977.

The Supply of Goods and Services Act 1982 (SGSA) offers almost identical protection where goods and services are provided. Section 3 corresponds to s. 13 of SOGA and s. 4 corresponds to s. 14 of SOGA. Section 13 of SGSA provides that, where the supplier of a service under a contract 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. Reasonable care and skill may be defined as 'the ordinary skill of an ordinary competent man exercising that particular act'. Much will depend on the circumstances of the case and the nature of the trade or profession.

5.5.3 Misrepresentation Act 1967

The Misrepresentation Act 1967 provides remedies for victims of **misrepresentation**. For the purpose of the Act, an actionable misrepresentation may be defined as 'a false statement of existing or past fact made by one party to the other before or at the time of making the contract, which is intended to, and does, induce the other party to enter into the contract'.

Since the 1967 Act, it has been necessary to maintain a clear distinction between fraudulent misrepresentation, negligent misrepresentation and wholly innocent misrepresentation (Section 2(1)). Rescission of a contract is a remedy for all three types of misrepresentation. In addition to rescission for fraudulent misrepresentation, damages may be awarded under the tort of fraud, and in respect of negligent misrepresentation damages may be awarded under s. 2(1) of the 1967 Act. Under s. 2(2) damages may also be awarded at the discretion of the court, but, if so, these are in lieu of rescission.

The Property Misdescriptions Act 1991 built on the Misrepresentation Act and created a strict liability criminal offence of making, in the course of an estate agency or property development business, a false or misleading statement about a prescribed matter (s. 1(1)) to be specified in an order by the Secretary of State (s. 1(5)). The most common complaints from estate agents' (mis)descriptions include incorrect room sizes, misleading photographs and deceptive descriptions of local amenities. In one case, the agents blocked out in the photograph an ugly gasworks that overshadowed a house they were trying to sell.

5.5.4 The Consumer Protection Act 1987

The Consumer Protection Act 1987 came into force in March 1988 as a result of the government's obligation to implement an EU directive, and provides a remedy in damages for anyone who suffers personal injury or damage to property as a result of a defective product. The effect is to impose a strict (i.e. whereby it is unnecessary to prove negligence) tortious liability on producers of defective goods. The Act supplements the existing law; thus, a consumer may well have a remedy in contract, in the tort of negligence or under the Act if he or she has suffered loss caused by a defective product.

The producer will be liable if the consumer can establish that the product is defective and that it caused a loss. There is a defect if the safety of the goods does not conform to general expectations with reference to the risk of damage to property or risk of death or personal injury.

The general expectations will differ depending on the particular circumstances, but points to be taken into account include the product's instructions, warnings and the time elapsed since supply, the latter point to determine the possibility of the defect being due to wear and tear.

The onus is on the plaintiff to prove that loss was caused by the defect. A claim may be made by anyone, whether death, personal injury or damage to property has occurred. However, where damage to property is concerned, the damage is confined to property ordinarily intended for private use or consumption and acquired by the person mainly for his or her own use or consumption, thus excluding commercial goods and property. Damage caused to private property must exceed £275 for claims to be considered. It is not possible to exclude liability under the Consumer Protection Act.

The Act is intended to place liability on the producer of defective goods. In some cases the company may not manufacture the goods, but may still be liable, as outlined below.

- Anyone carrying out 'industrial or other process' to goods that have been manufactured by someone else will be treated as the producer where 'essential characteristics' are attributable to that process. Essential characteristics are nowhere defined in the Act, but processes that modify the goods may well be within its scope.
- If a company puts its own brand name on goods that have been manufactured on its behalf, thus holding itself out to be the producer, that company will be liable for any defects in the goods.
- Any importer who imports goods from outside EU countries will likewise be liable for defects in the imported goods. This is an extremely beneficial move for the consumer.

The Act is also instrumental in providing a remedy against suppliers who are unable to identify the importee or the previous supplier to them. If the supplier fails or cannot identify the manufacturer's importee or previous supplier, then the supplier is liable.

5.5.5 Consumer Credit Act 1974

This is a consumer protection measure to protect the public from, among other things, extortionate credit agreements and high-pressure selling off trade premises. The Act became fully operational in 1985, and much of the protection afforded to hire purchase transactions is extended to those obtaining goods and services through consumer credit transactions. It is important to note that contract law governs the formation of agreements coming within the scope of the Consumer Credit Act. Section 8(2) defines a consumer credit agreement as personal credit providing the debtor with credit not exceeding £25,000. Section 9 defines credit as a cash loan and any form of financial accommodation.

There are two types of credit. The first is a running account credit (s. 10(a)), whereby the debtor is enabled to receive from time to time, from the creditor or a third party, cash, goods and services to an amount or value such that, taking into account payments made by or to the credit of the debtor, the credit limit (if any) is not at any time exceeded. Thus, running account credit is revolving credit, where the debtor can keep taking credit when he or she wants it subject to a credit limit. An example of this is a credit card facility, e.g. Visa or MasterCard. The second type is fixed-sum credit, defined in s. 10(b) as any other facility under a personal credit agreement whereby the debtor is enabled to receive credit. An example here would be a bank loan.

The Act covers hire purchase agreements (s. 189), which are agreements under which goods are hired in return for periodical payments by the person to whom they are hired and where the property in the goods will pass to that person if the terms of the agreement are complied with – for example, the exercise of an option to purchase by that person. In addition to hire purchase agreements, also within the scope of the Act are conditional sale agreements for the sale of goods or land, in respect of which the price is payable by instalments and the property (i.e. ownership) remains with the seller until any conditions set out in the contract are fulfilled, and credit sale agreements, where the property (ownership) passes to the buyer when the sale is effected.

Debtor–creditor supplier agreements relate to the situation where there is a business connection between creditor and supplier (i.e. a pre-existing arrangement) or where the creditor and the supplier are the same person.

Section 55 and ss. 60–65 deal with formalities of the contract between debtor and creditor, their aim being that the debtor be made fully aware of the nature and the cost of the transaction and his or her rights and liabilities under it. The Act requires that certain information must be disclosed to the debtor before the contract is made. This includes total charge for credit, and the annual rate of the total charge for credit that the debtor will have to pay expressed in an approved format. All regulated agreements must comply with the formality procedures and must contain, among other things, the debtor's right to cancel and to pay off the debt early.

If a consumer credit agreement is drawn up off business premises, then it is a cancellable agreement designed to counteract high-pressure doorstep selling. If an agreement is cancellable, the debtor is entitled to a cooling-off period (i.e. to the close of the fifth day following the date the second copy of the agreement is received). If the debtor then cancels in writing, the agreement and any linked transaction is cancelled. Any sums paid are recoverable, and the debtor has a lien on any goods in his or her possession until repayment is made.

5.5.6 Codes of practice

Codes of practice do not in themselves have the force of law. They can, however, be of great importance to businesses. In the first place, they can help to raise the standards of an industry by imposing a discipline on signatories to a code not to indulge in dubious marketing practices, which – although legal – act against the long-term interests of the industry and its customers. Second, voluntary codes of practice can offer a cheaper and quicker means of resolving grievances between the two parties compared with more formal legal channels. For example, the holiday industry has its own arbitration facilities, which avoid the cost of taking many cases through to the courts. Third, business organizations are often happy to accept restrictions imposed by codes of practice as these are seen as preferable to restrictions being imposed by laws. The tobacco industry in the UK for a long time avoided statutory controls on cigarette advertising because of the existence of its voluntary code, which imposed restrictions on tobacco advertising.

The Director General of the Office of Fair Trading is instrumental in encouraging trade associations to adopt codes of practice. An example of a voluntary code is provided by the Vehicle Builders and Repair Association, which, among other items, requires members to: give clear estimates of prices; inform customers as soon as possible if additional costs are likely to be incurred; complete work in a timely manner. In the event of a dispute between a customer and a member of the Association, a conciliation service is available that reduces the need to resort to

legal remedies. However, in April 2005, the National Consumer Council accused the motor industry of failing to adequately regulate itself, by providing 'shoddy services and rip-off charges'. The Council pledged to submit a 'super complaint' to the Office of Fair Trading (OFT), which would force the OFT to investigate its allegations, unless the industry took prompt remedial action. This raised the possibility of a licensing system for car repairers, something the industry had resisted so far and realized would be more onerous than a voluntary code of conduct.

Useful leaflets published by the OFT giving information regarding codes of practice can be obtained from local Consumer Advice Bureaux.

5.5.7 Controls on advertising

There are a number of laws that influence the content of advertisements in Britain. For example, the Trade Descriptions Act makes false statements in an advertisement an offence, while the Consumer Credit Act lays down quite precise rules about the way in which credit can be advertised. However, the content of advertisements is also influenced by voluntary codes. In the UK, the codes for advertising are the responsibility of the advertising industry through two Committees of Advertising Practice: CAP (Broadcast) and CAP (Non-broadcast). CAP (Broadcast) is responsible for the TV and radio advertising codes, and CAP (Non-broadcast) is responsible for non-broadcast advertisements, sales promotions and direct marketing. Both are administered by the Advertising Standards Authority (ASA). The Office of Communications (Ofcom) is the statutory regulator for broadcast advertising in the UK and has delegated its powers to the ASA, which deals with all complaints about such advertising.

The ASA codes are subscribed to by most organizations involved in advertising, including the Advertising Association, the Institute of Practitioners in Advertising, and the associations representing publishers of newspapers and magazines, the outdoor advertising industry and direct marketing.

The Code of Advertising Practice (Non-broadcast) requires that all advertisements appearing in members' publications should be legal, honest, decent and truthful. Two recent (2008) adjudications illustrate how the ASA interprets this. In one case, a national press advert for the retailer Lidl featured a Landmann Lava Rock Gas Barbecue and the message '£10 cheaper compared to B&Q'. It was held that the comparison was misleading, because the precise model sold by B&Q was not accurately specified, therefore the fact of '£10 cheaper' could not be established. In another case from 2008, an advert in the *Daily Mail* for Ryanair under the headline 'Hottest back to school fares . . . one way fares £10' featured a picture of a teenage girl or woman standing in a classroom and wearing a version of a school uniform consisting of a short tartan skirt, a cropped short sleeved shirt and tie, and long white socks. The ASA considered the model's clothing, together with the setting of the ad in a classroom strongly suggested she was a schoolgirl and considered that her appearance and pose, in conjunction with the heading 'Hottest', appeared to link teenage girls with sexually provocative behaviour. It considered the advert was likely to cause serious or widespread offence, and was in breach of the Code's sections governing social responsibility and decency.

Although the main role of the ASA is advisory, it does have a number of sanctions available against individual advertisers that break the code, ultimately leading to the ASA requesting its media members to refuse to publish the advertisements of an offending company. More often,

the ASA relies on publicizing its rulings to shame advertisers into responding (although some critics would say that press coverage of companies breaching the code simply provides free awareness-grabbing publicity for the company).

The advertising codes are continually evolving to meet the changing attitudes and expectations of the public. Thus, restrictions on alcohol advertising have been tightened up – for example, by insisting that young actors are not portrayed in advertisements and by not showing them on television when children are likely to be watching. On the other hand, advertising restrictions for some products have been relaxed in response to changing public attitudes. Television adverts for condoms have moved from being completely banned to being allowed, but only in very abstract form, to the present situation where the product itself can be mentioned using actors in life-like situations.

Numerous other forms of voluntary control exist. As mentioned previously, many trade associations have codes that impose restrictions on how they can advertise. Solicitors, for example, were previously not allowed to advertise at all, but now can do so within limits defined by the Law Society.

The Control of Misleading Advertisements Regulations 1988 (as amended) provides the legislative back-up to the self-regulatory system in respect of advertisements that mislead. The Regulations require the Office of Fair Trading (OFT) to investigate complaints, and empower the OFT to seek, if necessary, an injunction from the courts against publication of an advertisement. More usually it would initially seek assurances from an advertiser to modify or not repeat an offending advertisement. Before investigating, the OFT can require that other means of dealing with a complaint, such as the ASA system mentioned above, have been fully explored. Action by the OFT therefore usually results only from a referral from the Advertising Standards Authority where the self-regulatory system has not had the required impact.

In general, the system of voluntary regulation of advertising has worked well in the UK. For advertisers, voluntary codes can allow more flexibility and opportunities to have an input to the code. For the public, a code can be updated in a less bureaucratic manner than may be necessary with new legislation or statutory regulations. However, the question remains as to how much responsibility for the social and cultural content of advertising should be given to industry-led voluntary bodies rather than being decided by government. Do voluntary codes unduly reflect the narrow financial interests of advertisers rather than the broader interests of the public at large? Doubtless, advertisers realize that if they do not develop a code that is socially acceptable, the task will be taken away from them and carried out by government in a process where they will have less influence.

5.6 Statutory legislation on employment

Employment law is essentially based on the principles of law previously discussed. The relationship between an employer and its employees is governed by the law of contract, while the employer owes a duty of care to its employees and can be sued for negligence where this duty of care is broken. Employers are vicariously liable for the actions of their employees, so if an employee is negligent and harms a member of the public during the course of their employment, the injured party has a claim against the employer as well as the employee who was the immediate cause of the injury.

The common law principles of contract and negligence have for a long time been supplemented with statutory intervention. Society has recognized that a contract of employment is quite different from a contract to buy consumer goods, because the personal investment of the employee in their job can be very considerable. Losing a job without good cause can have a much more profound effect than suffering loss as a result of losing money on the purchase of goods. Governments have recognized that individuals should have a proprietary interest in their jobs and have therefore passed legislation to protect employees against the actions of unscrupulous employers who abuse their dominant power over employees. Legislation has also recognized that employment practices can have a much wider effect on society through organizations' recruitment policies.

In this section we consider some of the areas in which statutory intervention has affected the environment in which organizations recruit, reward and dismiss employees. The information here cannot hope to go into any depth on particular legislative requirements, as legislation is complex, detailed and continually changing. There is also considerable difference between countries in terms of legislation that affects employment. The following brief summary can only aim to identify the main issues of concern covered by legislation, in England specifically. This chapter should also be read in conjunction with Chapter 9, on the internal environment. In that chapter we look in general terms at issues such as the need for flexibility in the workforce. This chapter identifies particular legal opportunities and constraints, which help to define an organization's internal environment.

5.6.1 When does an employment contract occur?

It is not always obvious whether a contract of employment exists between an organization and individuals providing services for it. Many individuals working for organizations in fact provide their services as self-employed subcontractors, rather than as employees. The distinction between the two is important, because a self-employed contractor does not benefit from the legislation, which only protects employees. There can be many advantages in classifying an individual as self-employed rather than as an employee. For the self-employed, tax advantages result from being able to claim as legitimate business expense items that in many circumstances are denied to the employee. The method of assessing National Insurance and income tax liability in arrears can favour a self-employed subcontractor. For the employer, designation as self-employed could relieve the employer of some duties that are imposed in respect of employees but not subcontractors, such as entitlement to sick pay, notice periods and maternity leave.

There was a great move towards self-employment during the 1990s, encouraged by the trend towards outsourcing of many non-core functions by businesses (see Chapter 7). Not surprisingly, the UK Government has sought to recoup potentially lost tax revenue and to protect unwitting self-employed individuals, by examining closely the terms on which an individual is engaged. The courts have decided the matter on the basis of, among other things, the degree of control that the organization buying a person's services has over the person providing them, the level of integration between the individual and the organization, and who bears the business risk. If the organization is able to specify the manner in which a task is to be carried out, then an employment relationship generally exists. If, however, the required end result is specified but

the manner in which it is achieved is left up to the individual, then a contract for services will exist – in other words, self-employment. There is still ambiguity in the distinction between employment and self-employment, which has, for example, resulted in numerous appeals by individuals against classification decisions made by the Inland Revenue.

5.6.2 Flexibility of contract

Organizations are increasingly seeking a more flexible workforce to help them respond more rapidly to changes in their external environment. In Chapter 9 we see some of the benefits to an organization of developing flexible employment practices.

Short-term employment contracts are becoming increasingly significant in a number of European countries, partly due to the existence of labour market regulations that make it difficult for employers to recruit and dismiss permanent staff. Within Europe, there has been a tendency for national legislation to reflect EU directives by imposing additional burdens on employers of full-time, permanent employees. This can affect the ease with which staff can be laid off or dismissed should demand fall – for example, in Germany, the Dismissals Protection Law (Kundigungsschutzgesetz) has given considerable protection to salaried staff who have been in their job for more than six months, allowing dismissal only for a 'socially justified' reason.

The move towards short-term contracts is a Europe-wide phenomenon. In 2005, about 34 per cent of the Spanish workforce was employed with contracts of limited duration compared to less than 16 per cent 20 years previously, while in France the proportion of employees with contracts of limited duration climbed from 6.7 per cent in 1985 to about 13 per cent by 2005 (Eurostat 2006–07). The spread of short-term contracts is most apparent among young workers employed in insecure and highly mobile areas of the labour market, such as the retail, distribution, communication and information technology sectors.

The percentage of persons working part-time increased persistently in the last decade. In the spring of 2005, 7 per cent of employed men in the EU-25 worked on a part-time basis, a share that rose considerably higher for women (33 per cent). Those countries with employment rates of 67 per cent or more also generally had higher proportions of part-time work, especially among women. In 2005, the Netherlands had the highest percentage of part-time employment, with 23 per cent of employed males and 75 per cent of females employed on a part-time basis (the latter figure rose from 71 per cent in 2001) (Eurostat 2006–07).

The European Union and most member state governments have been keen to ensure that workers on short-term contracts enjoy similar legal rights as those in full-time, permanent employment. In the UK, the Employment Relations Act 1999 requires the trade and industry secretary to make regulations to ensure that part-time workers are treated no less favourably than full-time workers. These regulations include provisions to implement the EU-level social partners' agreement and subsequent Council Directive on part-time work (97/81/EC).

Despite imposing additional burdens, many European governments have encouraged the greater use of short-term contracts as a way of improving the flexibility of their national economies – for example, through changes in welfare benefits that do not penalize short-term working.

5.6.3 Terms of the contract of employment

Under the Employment Rights Act 1996 it is required that an employer must issue its employees within 13 weeks of the date they start work the written terms and conditions of their employment in detail. The details can, however, be placed on a staff noticeboard at a point where every member of the workforce concerned can read them. In the statement there should be references to the following:

1. the job title
2. which individuals or groups the document is addressed to
3. the starting date of the employment
4. the scale of wages and the calculations used to work this out
5. the periods in which wages are paid
6. hours of work and the terms and conditions
7. holidays and holiday pay
8. sickness and sickness pay
9. pensions and pension schemes
10. how much notice the employee must give upon leaving and how much notice the company has to give the employee when terminating employment
11. rules for discipline procedures
12. to whom any grievances are to be made, and procedures.

The terms of contract cannot be altered until both parties have discussed and agreed the new conditions.

5.6.4 Minimum acceptable contract terms

Legislators have recognized that employee and employer often possess unequal bargaining power in the process of forming a contract of employment. Legislation therefore protects the interests of the weaker party – generally the employee – against the use of their power by unscrupulous employers. The following are examples of statutory intervention that protect employees' rights. Some would argue that intervention of this type has the effect of increasing the costs of businesses, thereby reducing their competitive advantage. However, as can be seen in Chapter 9, a lot of statutory intervention is merely spreading current best practice to all employees.

Health and safety legislation

There is a wide range of regulations governing employers' duty to provide a safe working environment. Most health and safety legislation is based on the Health and Safety at Work Act 1974, which provides a general duty to provide a safe working environment. The Act makes provision for specific regulations to be issued by government ministers and these detailed regulations can have significant impacts on businesses. The following are some recent examples of regulations:

Figure 5.2 Visitors to Bavaria's beer festivals come away with memories of the beer and barmaids. The event is made memorable by the distinctive dress worn by barmaids, which combines tradition with visual appeal (especially to men, who make up a large part of the festivals' market). The barmaids' dress, known as a 'dirndl', comprises a figure-hugging dress and apron with a tight, low-cut top. The sight of a barmaid dressed in a dirndl and carrying several glasses of beer helps to transform a drink into an experience. Customers love the dress, brewers love it, and apparently the barmaids do too. But this apparently happy service environment was threatened in 2006 by the EU's Optical Radiation Directive, by which employers of staff who work outdoors, such as those in Bavaria's beer gardens, must ensure that staff are protected against the risk of sunburn. The serious point underlying the EU legislation is that in the UK alone about 70,000 new cases of skin cancer are diagnosed each year. Faced with this directive, how should the provider of an outdoor service encounter react? If they leave scantily dressed employees exposed to the sun, they could face fines, and possible legal action by employees who subsequently develop skin cancer. But, contrary to many newspaper reports, the EU directive does not specifically require Bavarian barmaids (or outdoor workers elsewhere) to cover up their low-cut dresses. Management must undertake a risk assessment and consider what is appropriate to a specific service encounter. Perhaps the unique character of the Munich Oktoberfest could be preserved with the help of sun cream and by reducing each barmaid's hours of exposure to the sun.

- the Control of Major Accident Hazards Regulations 1999
- the Control of Substances Hazardous to Health Regulations 1999
- the Lifts Regulations 1997
- the Railway Safety (Miscellaneous Provisions) Regulations 1997.

The Health & Safety Executive oversees enforcement of these regulations.

Thinking around the subject:
Take risks and go to jail?

One of the defining characteristics of a limited liability company (discussed in Chapter 6), is the separation of the company from its owners. So, in general, if the company breaks the law, whether civil law or criminal, the directors of the company can protect themselves behind a 'veil of incorporation'. Furthermore, many of the punishments available under the criminal law would at first sight seem to be inappropriate to business organizations. How, for example, can an organization be sent to prison for a serious breach of the criminal law? The question has arisen following a number of high-profile cases where a business has caused harm to the general public, but the directors of the company responsible for the wrongdoing have escaped relatively lightly. The *Herald of Free Enterprise* tragedy in 1987, and the Ladbroke Grove train accident of 1999 raised issues about senior management's culpability in these two serious transport accidents. In the first case, questions were raised about unreasonable pressures that management had put on staff loading vehicles on to ferries, one of which subsequently capsized. In the second case, questions were raised about the suitability of staff training programmes, which management, and ultimately the board of directors, was responsible for. Relatives of victims who died in both of these incidents claimed that they were not accidents at all, but the culmination of negligent actions by senior management. In both cases, initial blame was focused on relatively low-paid junior staff who made a mistake. But was senior management responsible for expecting too much of its junior staff? In both cases, attempts were made to bring charges of manslaughter against the directors of the companies involved, but due to the complexity of the cases, and the diffuse lines of responsibility within their organizations, there was insufficient evidence to successfully bring a case. According to the Centre for Corporate Accountability, only 11 directors were successfully prosecuted for manslaughter in the 30 years to 2005. Most of these have been small company directors; for example, in January 2005, the managing director of a building contractor was sentenced to 16 months in jail after a roofing worker died falling through a poorly protected roof light. Campaigners for a law on corporate manslaughter have argued that it is much more difficult to pin down responsibility in a large organization, but this is no reason for not trying to make senior staff personally accountable for their actions. Would directors of a company be so keen to pursue potentially dangerous efficiency-gaining strategies if they thought there was a risk that they might personally end up in prison? Or would a corporate manslaughter law stifle initiatives by directors, fearful that, if anything went wrong, there could be very serious consequences for them personally?

Minimum wage legislation

The national minimum wage came into force in the UK in 1999, implementing an earlier EU directive. In October 2007, this rate was set at £5.52 per hour for workers aged 22 and over, £4.60 for 18 to 21 year olds, and £3.40 for 15 to 17 year olds. There is provision for annual revision. Most adult workers in the UK must be paid at least the national minimum wage. This includes part-time workers, temporary or short-term workers, home workers, agency workers and casual labourers. An employee cannot be forced by an employer to accept a wage that is below the minimum wage, and can claim compensation if they are sacked or victimized because they sought to enforce their right to the national minimum wage.

Working hours

The EU's Working Time Directive of 1993 was implemented in the UK by the Working Time Regulations of 2000. According to these regulations, workers cannot be forced to work for more than 48 hours a week on average. However, there are various exclusions to this time and workers can cancel any opt-out agreement whenever they want, although they must give their employer at least seven days' notice, or longer (up to three months) if this has been agreed.

5.6.5 Discrimination at work

Companies sometimes find themselves being required to recruit their second choice of staff in order to comply with legislation against racial and sexual discrimination. For example, one UK airline found through its research that the majority of its customers preferred its cabin crew to be female and subsequently recruited predominantly female staff for this role. The airline was fined for unlawful **discrimination** against men, even though it had been innovative in appointing women to the traditionally male job of pilot. Legislation seeks to protect disadvantaged groups that may be discriminated against simply out of employers' ignorance.

The Sex Discrimination Act 1975 (SDA) prohibits discrimination against women, and men, on the grounds of sex or of being married. The SDA makes the distinction between the concepts of direct and indirect discrimination. Direct sex discrimination occurs when an employee is treated less favourably because of her, or his, sex. Indirect discrimination occurs when a requirement or condition – which may seem 'neutral' in terms of how it impacts upon men and women – in fact has an adverse effect on women, or men, in general (for example, specifying a dress code that is more onerous on women than men). The Equal Pay Act 1970 requires that a woman is entitled to the same pay (and other contractual conditions) as a man working for the same employer, provided they are doing similar work or work of equal value.

The legislation dealing with race discrimination derives from the Race Relations Act 1976 (RRA). By this Act, a person is guilty of race discrimination if 'on racial grounds he treats [a] person less favourably than he treats or would treat other persons'. Like the SDA, the RRA makes it illegal to discriminate directly or indirectly against a person on racial grounds. Research and official statistics demonstrate that people from ethnic minorities continue to experience severe discrimination in the field of employment. A report by the Joseph Rowntree Foundation found particularly high levels of unemployment among Africans, Pakistanis and Bangladeshis (Berthoud 2005).

5.6.6 Termination of contract

The proprietary interest of employees in their jobs is recognized by legislation that restricts the ability of an employer to terminate an employee's contract of employment.

Termination may come about because an individual's position is no longer required and the individual is declared redundant. The Employment Rights Act 1996 defines the circumstances in which redundancy takes effect and a sliding scale of payments which an employee is entitled to if they are made redundant by their employer.

In circumstances other than redundancy, employers may not terminate a contract in a way that constitutes unfair **dismissal**. Under the Employment Relations Act 1999, employees are not entitled to claim unfair dismissal until they have accumulated one year's service. Dismissal may be considered fair where an employee has not acted in good faith and/or has failed to observe previous warnings about poor conduct. Employment tribunals judge whether a dismissal is fair or not, and judgment frequently centres on procedural issues. A finding of unfair dismissal may lead to an order for compensation and a request for reinstatement.

5.6.7 Rights to workers' representation

The political environment and the dominant political ideology have had a very close bearing on legislation regulating the activities of trades unions. Traditionally, Labour governments have sought to advance the cause of organized labour, while Conservative governments have taken a more individualist approach to relationships between employers and employees. The incoming Conservative government of 1979 dismantled much of the legislation that had been passed by the previous Labour government to give greater rights for trades unions and greater duties for employers. The incoming Labour government of 1997 has gone some way to restoring trades union rights. This government inherited the Trade Union Reform and Employment Rights Act 1993 and the Trade Union and Labour Relations (Consolidation) Act 1992. The essence of this legislation was to make trades unions more accountable to their members and to reduce the risks to employers of loss resulting from politically inspired disputes. The following are key features that were covered by the legislation:

- individuals affected by industrial action are able to seek an injunction to prevent unlawful industrial action taking place
- seven days' notice must be given by trades unions of ballots and of industrial action
- individuals have a right to challenge collective agreements
- employers may refuse to recognize a trades union in specified circumstances
- all industrial action ballots must be postal and subject to independent scrutiny.

The Employment Relations Act 1999 amended a number of provisions of the previous legislation. For trades unions, the key element of the Act is a statutory procedure through which independent unions are able to seek recognition for collective bargaining from employers with more than 20 employees. The Act amended previous legislation to enable employees dismissed for taking part in lawfully organized official industrial action to take cases of unfair dismissal to an employment tribunal where the dismissal occurs within eight weeks of the start of the action.

The Transnational Information and Consultation of Employees Regulations 1999 came into force in the UK in 2000, implementing the EU Directive on European Works Councils. The Directive covers undertakings that have more than 1000 employees in member states and more than 150 employees in each of two member states, and sets out procedures for giving employees a statutory right to be consulted about a range of activities affecting the organization. From 2005, the legislation has given employees a legal right to know about, and be consulted on, an organization's plans that affect them. This can cover anything from the economic health of the business to decisions likely to cause redundancies or changes in how work is organized. This requirement applies initially only to larger organizations – those with 50 or more employees. However, from 2007, the threshold was lowered to 100 employees and, in 2008, lowered again to 50 or more employees.

5.7 The Human Rights Act

The Human Rights Act came into force in the UK in 2000 and has presented a number of new legal challenges for business organizations. The Act incorporates the European Convention on Human Rights into domestic law. The Convention is a 50-year-old code of basic rights drawn up in the aftermath of the Second World War, and covers such rights as that to a family life, to privacy and a fair trial. Prior to 2000, although UK courts could take note of the rights identified by the Convention, they could not be directly enforced, so aggrieved parties often had to take cases to the European Court of Human Rights for a remedy – a lengthy and costly process.

The Act incorporates only part of the European Convention and does not incorporate any of the procedural rights of the Convention. However, it does include all the following substantive rights:

- to life
- to freedom from torture or inhuman or degrading punishment
- to freedom from slavery, servitude, enforced or compulsory labour
- to liberty and security of the person
- to a fair trial
- to respect for private and family life
- to freedom of thought, conscience and religion
- to freedom of expression
- to freedom of assembly and association
- to marry and found a family
- to education in conformity with parents' religious and philosophical convictions
- to freedom from unfair discrimination in the enjoyment of these rights.

Many of the wider rights enshrined in the Human Rights Act are already protected by the UK's domestic legislation (e.g. the Sex Discrimination Act 1975). From 2000, courts in the UK have been able to issue injunctions to prevent violations of rights, award damages and quash unlawful decisions. Individuals are now able to use the Act to defend themselves in criminal proceedings.

The Act does not make Convention rights directly enforceable in proceedings against a private litigant, nor against a 'quasi-public' body, unless that body is acting in a public capacity. However, private individuals and companies have to take the Convention into account because the courts will be obliged to interpret the law so as to conform to it wherever possible.

In the early days of the Act a number of examples illustrated its possible impact on business organizations, including challenges about the legitimacy of local authority planning procedures and privacy of personal information. Despite early fears that the Human Rights Act would add significantly to business organizations' costs, it would appear that more recent cases have taken a balanced view on what is reasonable and in the public interest.

5.8 Protection of a company's intangible property rights

The value of a business enterprise can be measured not only by the value of its physical assets, such as land and buildings: increasingly, the value of a business reflects its investment in new product development and strong brand images. To protect a company from imitators benefiting from this investment, but bearing none of its cost, a number of legal protections are available. The most commonly used methods are patents and trademarks, which are described below. Intellectual property can also be protected through copyright (for example, the unauthorized copying and sale of DVD films is a breach of copyright).

5.8.1 Patents

We saw in Chapter 4 that a **patent** is a right given to an inventor that allows him or her exclusively to reap the benefits from the invention over a specified period. To obtain a patent, application must be made to the Patent Office in accordance with the procedure set out in the Patents Act 1977. To qualify for a patent, the invention must have certain characteristics laid down: it must be covered by the Act, it must be novel and it must include an inventive step. Some inventions would not qualify for a patent – for example, anything that has at any time before filing for the patent been made available to the public anywhere in the world by written or oral description, by use, or in any other way (s. 2(2)).

The effect of the Patents Act 1977 has been to bring UK patent law more into line with that of the EU in accordance with the provisions of the European Patent Convention. As a result of the implementation of the Convention, there are almost uniform criteria in the establishment of a patent in Austria, Belgium, Switzerland, Germany, France, the United Kingdom, Italy, Liechtenstein, Luxembourg, the Netherlands and Sweden. A European Patent Office has been set up in Munich, which provides a cheaper method to obtain a patent in three or more countries, but it should be noted that, if the patent fails as a result of an application to the European Patent Office, the rejection applies to all member states unless there is contrary domestic legislation that covers this part.

5.8.2 Trademarks

The Trade Marks Act 1994, which replaced the 1938 Act, implemented the Trade Marks Harmonization Directive No. 89/104/EEC, which provides protection for trademarks (they are

also protected under the common law of passing off). A **trademark** is defined as any sign capable of being represented graphically that is capable of distinguishing goods or services of one undertaking from those of other undertakings (s. 1(1)).

Any trademark satisfying these criteria is registerable unless prohibited by s. 3; for example, an application may be refused if a trademark is devoid of any distinctive character, or is contrary to accepted principles of morality, or is of such a nature as to deceive the public.

If a trademark is infringed in any way, a successful plaintiff will be entitled to an injunction and to damages.

5.8.3 Law and the internet

The development of the internet does not change the basic principles of law, but the law has on occasions become ambiguous in the light of technological developments.

Unlawful copying of material downloaded from the internet (images, documents and particularly music) has focused attention on issues of ownership of intellectual property. Section 17 of the Copyright, Designs and Patents Act 1988 provides that: 'Copying in relation to a literary, dramatic, musical or artistic work means reproducing the work in any material form. This includes storing the work in any medium by electronic means.' Copying, therefore, includes downloading files from the internet or copying text into or attaching it to an email. Given the ability to copy material virtually instantaneously to potentially huge numbers, the internet presents a serious risk of copyright infringement liability. Just what constitutes 'public domain' information, and can therefore lawfully be copied, has been raised in a number of cases.

In addition to copyright issues, the international nature of communications on the internet makes it essential not to overlook questions such as where is the contract concluded, when is it concluded, what law governs it and where will any subsequent dispute be decided? Unexpected additional obligations may arise as a result of statements made during contract negotiations – for example, in an email from a salesperson to a customer. Even where the final written contract expressly excludes such representations, courts may be prepared to find that a collateral contract came into existence through the exchange of email messages.

EU countries have begun to introduce into national legislation a 1999 EU directive on electronic signatures. The directive comprises two major advances: the legal recognition of electronic signatures, which provide reliable identification of the parties engaged in an online transaction; and encryption, which enables companies to electronically protect documents liable to be intercepted during transmission, by wire or over the air. These measures will help companies doing business over the internet to verify with accuracy the identity of their contracting partners and to improve online security standards for international business.

The internet has also intensified concerns about data privacy. The misuse of personal data has always been an issue with traditional paper-based systems of recording information, but the internet increases the possibility for large amounts of data to be accidentally or deliberately misused. Chapter 4 reviewed some of the principal concerns, and you will recall that, in the UK, the Data Protection Commissioner is responsible for overseeing the provisions of the Data Protection Act 1988, which itself was based on an EU directive. The Act requires companies to keep accurate records that are not unnecessarily excessive in detail, and shall not be kept for longer than is necessary for the purpose of collecting them. Appropriate technical and

organizational measures must be taken against unauthorized or unlawful processing of personal data, and against its accidental loss or destruction. Companies have been helped in their efforts to secure their data by the Computer Misuse Act 1990, which makes hacking and the introduction of viruses criminal offences.

Although the emphasis of the Data Protection Act has been on limiting the dissemination of data, the Act also provides individuals and companies with certain rights of access to data about them that are held by companies. There is also a more general provision under the Freedom of Information Act 2002, which allows individuals to request information.

Thinking around the subject:
Taking a punt online

The internet has brought new challenges to the legal environment. Usually, it is quite easy to determine the jurisdiction of a transaction – for example, a British tourist eating in a Spanish restaurant would be covered by the laws of Spain. For exports, the parties can agree between themselves which legal jurisdiction should apply to their transaction – for example, a British exporter and a Spanish buyer may between them agree that British law will govern their contract. But many internet dealings may involve numerous nationalities – for example, a British buyer on holiday in France may use an American-based travel agent to buy tickets from an airline based in Hong Kong, using an internet service provider based in Belgium. Regulatory authorities have been keen to control some types of internet activity that are considered to be against the public interest, but have repeatedly come across the problem of defining legal jurisdiction. For service-based transactions, governments do not have the power or ability to stop such services coming into their country, as they could in the case of goods that need to pass through some kind of customs check. Service-based companies have sometimes moved their operations to jurisdictions that are friendly towards their activities, then 'export' their services to countries where they would otherwise be illegal.

One type of activity that has exercised the minds of lawyers is gambling. In many countries, gambling has been associated with a range of social problems, therefore countries have strict controls on individuals' access to gambling services. Betting shops have been strictly regulated in the UK and many other countries, and it has been made illegal for young people to enter them. But the internet can avoid many of these controls by slipping under regulators' radar and going direct from an offshore service provider to the punter's own home. This has annoyed regulators in the United States, where gambling laws tend to be quite strict. The United States by itself cannot legislate to stop online gambling companies selling their services from other countries in the world. In a free market economy where freedom of speech is valued, the US Government is not predisposed to censoring the internet, in a way that the Chinese Government has done in respect of political websites. So how can a government use the law to defend the interests of its citizens, when the borderless world of the internet allows many services to reach consumers unchallenged by national borders?

For online gambling companies, such as Partypoker.com and 888.com, the United States is a very attractive market, with a high disposable income and latent demand that has been suppressed by strict anti-gambling legislation. The online gambling companies could not operate legally if they were based in the United States, so most are based in countries with more lax regimes, including the Cayman Islands and the

United Kingdom. Indeed, in 2007, the UK Government expressed an aim to become the world's leading centre for the online gaming industry.

The US Government, frustrated by the inability of its anti-gambling laws to control offshore internet operations has resorted to a number of more indirect approaches to control these companies. Making it illegal for US-based companies to operate online gambling sites simply handed the business opportunity to overseas companies that had no such restriction. But, in 2007, the government sought to implement its laws through American-based banks, making it illegal for them to carry out transactions with online gambling companies. American customers of Partypoker.com suddenly found that their bank wouldn't allow them to pay for gambling using their credit card (although, not to be outdone, the gambling companies have attempted to facilitate payment through third-party mechanisms such as PayPal). The US Government has also sought to extend its jurisdiction and prosecute the directors of offshore gambling companies. In 2006, the sector was shaken by the arrest of David Carruthers, a UK citizen and Chief Executive Officer of London Stock Exchange listed BetonSports, while in transit in Dallas from the UK to Costa Rica. He and ten other individuals and four corporations faced a 22-count indictment on various charges of racketeering, conspiracy and fraud.

Are the actions of the United States to control the internet intrusive, and beyond what should be its legal jurisdiction? Should there be a higher level of international law to govern an internet world that knows no political boundaries? Would it have any chance of succeeding? How would it reconcile the United States' aims for tighter legislation on gambling with the UK's aim of becoming the centre for the online gambling sector?

5.9 The law and production processes

As economies develop, there is a tendency for societies to raise their expectations about firms' behaviour, particularly where they are responsible for significant external costs (see Chapter 10). The result has been increasing levels of legislation that constrain the activities of firms in meeting buyers' needs. Some of the more important constraints that affect business decisions are described below.

- Pollution of the natural environment is an external cost that governments seek to limit through legislation such as the Environmental Protection Act 1995, the Environment Act 1990 and the Water Resources Act 1991. Examples of impacts on firms include requirements for additional noise insulation, and investment in equipment to purify discharges into watercourses and the atmosphere. These have often added to a firm's total production costs, thereby putting it at a competitive disadvantage, or made plans to increase production capacity uneconomic when faced with competition from companies in countries that have less demanding requirements for environmental protection.
- The rights of employees to enjoy safe working conditions have become increasingly enshrined in law as a country develops. In the United Kingdom, it was noted earlier in this

chapter that the Health & Safety at Work Act 1974 provides for large fines and, in extreme cases, imprisonment of company directors for failing to provide a safe working environment. Definitions of what constitutes an acceptable level of risk for employees to face change over time. As well as obvious serious physical injury, the courts in England now recognize the responsibility of firms to protect their employees against more subtle dangers such as repetitive strain injury. There has also been debate in cases brought before courts as to whether a firm should be responsible for mental illness caused by excessive stress in a job, and the courts have held that companies should be liable if the employee has suffered stress in the past of which the company was aware.

- In many cases it is not sufficient to rely on law to protect customers from the faulty outcomes of a firm's production. It is also necessary to legislate in respect of the quality of the *processes* of production. This is important where buyers are unable to fully evaluate a product without a guarantee that the method of producing it has been in accordance with acceptable criteria. An example of this is the Food Safety Act 1990, which imposes requirements on all firms that manufacture or handle food products to ensure that they cannot become contaminated (e.g. by being kept at too high a temperature during transport). Many small to medium-sized food manufacturers have closed down, claiming that they cannot justify the cost of upgrading premises. Laws governing production processes are also important in the case of intangible services, where customers may have little opportunity for evaluating the credentials of one service against another. For example, to protect the public against unethical behaviour by unscrupulous sales personnel, the Financial Services Act 1986 lays down procedures for regulating business practices within the sector.

The traditional view of legislation on production is that the mounting weight of legislation puts domestic firms at a cost disadvantage to those operating in relatively unregulated environments overseas. Critics of over-regulation point to Britain and the United States as two economies that have priced themselves out of many international markets.

Against this, it is argued that as the economy of a country develops, economic gains should be enjoyed by all stakeholders of business, including employees and the local communities in which a business operates. There are also many persuasive arguments why increasing regulation of production processes may not be incompatible with greater business prosperity.

- Attempts to deregulate conditions of employment may allow firms to be more flexible in their production methods and thereby reduce their costs. However, there is a suggestion that a casualized workforce becomes increasingly reluctant to make major purchases, thereby reducing the level of activity in the domestic economy. In the United Kingdom, moves during the 1990s to free employers of many of their responsibilities to employees resulted in a large number of casual workers who were reluctant or unable to buy houses, resulting in a knock-on effect on supplies of home-related goods and services.
- There is similarly much evidence that a healthy and safe working environment is likely to be associated with high levels of commitment by employees and a high standard of output quality. The law should represent no more than a codification of good practice by firms.
- Environmental protection and cost reduction may not be mutually incompatible, as Chapter 10 demonstrates.

5.10 Legislation to protect the competitiveness of markets

Finally, there are presumed benefits of having markets that are competitive and free of harmful monopolistic or collusive tendencies. Because of this, the law of most developed countries has been used to try to remove market imperfections where these are deemed to be against the public interest. We will discuss in Chapter 12 how the common law of England has developed the principle of restraint of trade, through which anti-competitive practices have been curbed.

As the economy has become more complex, common law has proved inadequate on its own to preserve the competitiveness of markets. Common law has therefore been supplemented by statutory legislation. One outcome of statutory intervention has been the creation of a regulatory infrastructure, which in the United Kingdom includes the Office of Fair Trading, the Competition Commission and regulatory bodies to control specific industries. However, much of the current regulatory framework in the UK is based on the requirements of Articles 85 and 86 of the Treaty of Rome.

In the UK, the Competition Act 1998 and the Enterprise Act 2002 reformed and strengthened competition law by prohibiting anti-competitive behaviour. The 1998 Act introduced two basic prohibitions: a prohibition of anti-competitive agreements, based closely on Article 85 of the EC Treaty; and a prohibition of abuse of a dominant position in a market, based closely on Article 86 of the EC Treaty. The Act prohibits agreements that have the aim or effect of preventing, restricting or distorting competition in the UK. Since anti-competitive behaviour between companies may occur without a clearly defined agreement, the prohibition covers not only agreements by associations of companies, but also covert practices.

Further discussion of the application of legislation concerning anti-competitive practices, and the task of defining the public interest, may be found in Chapter 12.

Case study: Legislation strengthened in a bid to end 'nightmare' holidays

Tour operators have probably felt more keenly than most businesses the effects of new legislation to protect consumers. Because holidays are essentially intangible, it is very difficult for a prospective customer to check out claims made by tour operators' advertising until their holiday is under way, when it may be too late to do anything to prevent a ruined holiday. Traditional attitudes of 'let the buyer beware' can be of little use to holidaymakers who have little tangible evidence on which to base their decision when they book a holiday.

Consumers have traditionally had very little comeback against tour operators that fail to provide a holiday that is in line with the expectations held out in their brochure. Their brochures have frequently been accused of misleading customers – for example, by showing pictures of hotels that conveniently omit the adjacent airport runway or sewerage works. The freedom of tour operators to produce fanciful brochures was limited by the Consumer Protection Act 1987. Part III of the Act holds that any person, who, in the course of a business of his, gives (by any means whatsoever) to any consumers an indication that is misleading as to the price at which any goods, services, accommodation or facilities are available shall be guilty of an offence. These provisions of the Act forced tour operators to end such practices as promoting very low-priced holidays, which in reality were never available when ▶

customers enquired about them – only higher-priced holidays were offered. Supplements for additional items such as regional airport departures could no longer be hidden away in the small print.

When a customer buys a package holiday through a travel agent, she or he is entering into a contract with the tour operator, and the travel agent is essentially a mediator that brings together the customer and tour operator. The tour operator itself enters into a series of contracts with service providers, including hotels, airlines and bus companies, among others. Although these suppliers are contracted to provide services, the tour operator in practice has no effective day-to-day control of its suppliers' operations. It has therefore been quite usual for tour operators to include in their booking conditions an exclusion clause absolving themselves of any liability arising from the faults of their subcontractors. If a customer was injured by a faulty lift in a Spanish hotel, a tour operator would deny any responsibility for the injury and could only advise the holidaymaker to sue the Spanish hotel themselves. For some time, the courts in England recognized that it would be unreasonable to expect UK tour operators to be liable for actions that were effectively beyond their management control. Anyone who had felt unfairly treated by a tour operator had to take the offending company to court personally, often at great expense and inconvenience to themselves.

EU legislation has strengthened the position of consumers. EU Directive 90/314/EEC is designed to protect consumers who contract package travel in the EU, and was implemented in the UK through the Package Travel Regulations 1992. It covers the sale of a pre-arranged combination of transport, accommodation and other tourist services ancillary to transport or accommodation and accounting for a significant proportion of the package. Consumers are covered only where at least two of these elements are sold or offered for sale at an inclusive price, and the service covers a period of more than 24 hours or includes overnight accommodation.

The Directive contains rules concerning the liability of package organizers and retailers, which must accept responsibility for the performance of the services offered. There are some exceptions – for example, cases of 'force majeure' or similar circumstances, which could be neither foreseen nor overcome. However, even in these cases the organizer must use its best endeavours to help consumers.

The Directive also prescribes rules on the information that must be given to consumers. It contains specific requirements with regard to the content of brochures, where these are issued. For example, any brochure made available to consumers must indicate clearly and accurately the price, destination, itinerary and the means of transport used, type of accommodation, meal plan, passport and visa requirements, health formalities, timetable for payment and the deadline for informing consumers in the event of cancellation.

The Regulations have sought to redress the balance by providing greater protection for customers of tour operators and making all tour operators liable for the actions of their subcontractors. In cases that have been brought before courts in England, tour operators have been held liable for illness caused by food poisoning at a hotel, injury caused by uneven tiles at a swimming pool, and loss of enjoyment caused by noisy building work. To emphasize the effects of the directive, one British tour operator was ordered to compensate a holidaymaker in respect of claims that she had been harassed by a waiter at a hotel that had been contracted by the tour operator.

In the space of less than a decade, the UK tour operating industry has been transformed from relying on exclusion clauses and seeking to govern its dealings with customers through voluntary codes of conduct (especially the code of the Association of British Travel Agents (ABTA)). Many would argue that voluntary regulation had failed to protect consumers in accordance with their rising expectations. Legislation, while it was initially resisted by tour operators, has undoubtedly increased consumers' confidence in buying package holidays, and lessened the chances of them buying a holiday from a rogue company, and thereby harming the reputation of the industry as a whole.

The effects of this and other legislation have borne down heavily on tour operators. Having grown rapidly during the 1970s and 1980s, their pace of growth has slowed considerably. This may be partly explained by consumers' greater confidence and willingness to make up their own packages independently, encouraged by cut-price hotel and flight deals offered by companies who are not bound by the packaged travel regulations. The internet has allowed consumers to easily 'pick and mix' the different parts of the package holiday, so that they can buy the cheapest airline ticket from one source, and the cheapest hotel room from another source, for example. However, if anything goes wrong with such a self-created package, the consumer has fewer statutory rights to rely on. So if a flight is delayed or rescheduled, causing a hotel booking to be wasted, or tickets to a sporting event to be rendered useless, the customer cannot rely on one single company to put things right. In fact, if the airline was at fault and caused them to waste a hotel booking and sports tickets, they may have only a limited claim for compensation against the airline, and almost certainly no claim for consequential loss of the hotel booking or sports tickets (although EU Regulation 261/2004 does require airline passengers to be compensated for delays and compensation in specified circumstances).

Increased legislation can undoubtedly be expensive for companies to comply with. But the legislation itself can add value to a product. In the case of package holidays, consumers could avoid the burden of costs imposed on tour operators by booking independently, but they would also lose many of the benefits provided by legislation.

QUESTIONS

1 What factors could explain the increasing amount of legislation that now faces tour operators?

2 Summarize the main consequences of the EU Directive referred to above on the marketing of package holidays in the UK.

3 Is there still a role for voluntary codes of conduct in preference to legislation as a means of regulating the relationship between a tour operator and its customers?

Summary

This chapter has noted the increasing effects that legislation is having on businesses. The principal sources of law have been identified. Statute law is becoming increasingly important, with more influence being felt from the EU. Legal processes and the remedies available to a firm's customers have been discussed.

Voluntary codes of conduct are often seen as an alternative to law, and offer firms lower cost and greater flexibility.

The discussion of business ethics in **Chapter 10** relates closely to the legal environment. To many people, law is essentially a formalization of ethics, with statute law enacted by government (**Chapter 2**). The competition environment (**Chapter 11**) is increasingly influenced by legislation governing anti-competitive practices. We saw in **Chapter 4** that legal protection for innovative new technologies is vital if expenditure on research and development is to be sustained. In addition to the aspects of law discussed in this chapter, legislation affects the status of organizations (**Chapter 6**) – for example, in the protection that is given to limited liability companies.

Key Terms

Codes of practice (189)
Common law (176)
Contract (177)
Discrimination (197)
Dismissal (198)
Duty of care (180)
Intellectual property rights (177)
Misrepresentation (187)
Negligence (180)
Patents (200)
Statute law (176)
Tort (180)
Trademarks (201)

Chapter review questions

1 Discuss the main ways in which the legal environment impacts on the activities of the sales and marketing functions of business organizations.

2 Giving examples, evaluate the criticism that government legislation primarily impacts on those firms that can least afford to pay for it, mainly the small and the competitively vulnerable.

3 Using an appropriate example, evaluate the virtues and drawbacks of using voluntary codes of practice to regulate business activity.

Activities

1 Think back to a time when you had a problem with a good or service that didn't meet the agreed specification (e.g. a DVD you ordered didn't have as many tracks as advertised; the seats you ended up with at a rock concert were not as good as the ones you had ordered). Identify the methods of conflict resolution available to you, short of taking legal action. Did the supplier make it easy to resolve the problem? What more could it have done? Is there a voluntary code of conduct or arbitration service that you could have used? Is it easy to use? What factors would encourage or discourage you from taking legal action?

2 Philip, shopping at a large department store, sees a colourful spinning top, which he buys for his grandson Harry. While purchasing the toy, he sees a prominent notice in the store, which states: 'This store will not be held responsible for any defects in the toys sold.' The box containing the spinning top carries the description 'Ideal for children over 12 months, safe and non-toxic' (Harry is 15 months old). Within four weeks the spinning top has split into two parts, each with a jagged edge, and Harry has suffered an illness as a result of sucking the

paint. Philip has complained vociferously to the store, which merely pointed to the prominent notice disclaiming liability. Philip has now informed the store that he intends to take legal action against it.

Draft a report to the managing director setting out the legal liability of the store.

3 Zak runs his own painting and decorating business, and has been engaged to decorate Rebecca's lounge. While burning off layers of paint from the door with his blowtorch, Zak's attention is diverted by the barking of Camilla's Yorkshire terrier and, as he turns round, the flame catches a cushion on the sofa. Within seconds the room is filled with acrid smoke. Both the carpet and sofa are damaged beyond repair, and the dog, terrified, rushes into the road, where it is run over by a car. Consider Zak's legal liability.

Further Reading

The following texts provide a general overview of law as it affects commercial organizations.

Adams, A. (2006) *Law for Business Students*, 4th edn, London, Longman.

Keenan, D. and Riches, S. (2007) *Business Law*, 8th edn, London, Longman.

Woodroffe, G. and Lowe, R. (2007) *Consumer Law and Practice*, 7th edn, London, Sweet & Maxwell.

This chapter has discussed the basics of the law of contract and the following texts provide useful further reading.

Poole, J. (2006) *Textbook on Contract Law*, 8th edn, Oxford, Oxford University Press.

Elliott, C. and Quinn, F. (2007) *Contract Law*, 6th edn, London, Longman.

Trademarks and patent laws are discussed in the following text.

Hart, T., Fazzani, L. and Clark, S. (2006) *Intellectual Property Law*, 4th edn, Basingstoke, Palgrave Macmillan.

A valuable overview of employment law is provided in the following.

Lewis, D. and Sargeant, M. (2007) *Essentials of Employment Law*, 9th edn, London, Chartered Institute of Personnel and Development.

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Eurostat (2006–07) *Eurostat Yearbook 2006–07*, Luxembourg, Statistical Office of the European Communities.