Perspectives for European Consumer Law

Towards a Directive on Consumer Rights and Beyond

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Introduction

It is European consumer law in particular which holds a heavy influence over national contract laws. Since a modest start in 1985 about 10 (mainly) consumer contract law directives have been enacted and subsequently transposed in the Member States. None of these directives aims at a comprehensive regulation of consumer contracts. According to the limited legislative competence of the EU, i.e. the principle of conferred powers, and the EU's usual style of politics, these directives only regulate selected areas, in particular certain distribution techniques or contract types which are seen as politically relevant for the internal market. The only exception and, therefore, possibly a forerunner to the current development is the Unfair Terms Directive[1], which is applicable to all contracts irrespective of type or whether a certain distribution technique has been applied. The entire collection of these directives covers an impressive number of pages in the Official Journal, which in turn, contains several hundreds of articles. One might say that the consumer contract *acquis communautaire* is the size of a full blown Consumer Contract Code – but far from being one. The individual directives are badly inter-coordinated. There are gaps and contradictions. The legislative quality of the directives is far below the usual quality of national legislation. The directives are also characterised by an overload of information duties, whereas substantive remedies, in particular consumer rights in case of non-performance, play a minor role.

Until now, the current state of these directives did not pose severe problems to the Member States' contract laws, because most of them, in particular the broad ones such as the Unfair Terms and the Consumer Sales Directives, have a minimum clause. The Member States, therefore, could at least repair most of the shortcomings in the directives simply by making use of the minimum clause. Thereby, the Member States could preserve or restore the coherence of their domestic laws despite the sub-optimal state of the consumer acquis. However, the price of the possibility of and the need for making use of the minimum clauses was a lack of approximation of national laws. In particular, not only due to the minimum clauses but also to many gaps and contradictions in the directives, EC legislation did not lead to substantial approximation of the Member States' laws in the field of consumer contracts.

These problems are by no means new. In particular, it must be acknowledged that the European Commission has recognised the problem and taken

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[1] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

action. The initial step was the Communication on European Contract Law of 2001[2]. Since then, the launch of the Consumer Acquis Review and, particularly, the Action Plan 2003[3] which envisaged a Common Frame of Reference have illustrated that the Commission is striving for improvement. The Proposal for a Directive on Consumer Rights of October 2008[4] belongs in this context.

In February 2009, the EU Presidency of the Czech Republic and the Plenary of the Acquis Group at Prague gave rise to the occasion, assembling leading contract law scholars and officials from the Czech government responsible for the Directive on Consumer Rights. In addition, stakeholders from businesses, consumer organisations and the legal profession joined in to debate the Proposal and the perspectives for European consumer law. This volume is the result of this conference. The contributions were subsequently written and are influenced by both the discussion at Prague and the further development of the Proposal.

The volume consists of two main parts. In Part I, the contributions evaluate the core parts of the Proposal for a Directive on Consumer Rights. *Luc Grynbaum*, Professor at the University of Paris V, finds that full harmonisation in the area of pre-contractual information duties will, on the one hand, lead to a reduction of information duties in the Member States. On the other hand, the Proposal, in his view, only stipulates information duties and does not give clear guidance on the sanctions for the infringement of these duties. Therefore, there is no way that full harmonisation will be reached by the new directive.

Reiner Schulze, Professor at the University of Münster, has noted positive and negative aspects in the section on withdrawal. He generally welcomes the aim for a general set of rules on withdrawal. However, in his view, the Commission did not take the part on withdrawal far enough as it is only applicable to some consumer directives. It also contains several gaps and contradictions concerning consumer protection.

The contribution of *Jules Stuyck*, Professor at the University of Leuwen, on sales law compares the Proposal to the existing Consumer Sales Directive and the DCFR. His contribution contains a number of substantial suggestions for improvement. *Thomas Pfeiffer*, Professor at the University of Heidelberg, explores this analysis further by picking out individual areas from the chapter on consumer sales of the Proposal. *Luboš Tichý*, Professor at the

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2 European Commission communication to the Council and the European Parliament on European Contract Law, COM(2001) 398.

European Commission communication to the Council and the European Parliament 'A more coherent European contract law – An action plan', COM(2003) 68.

4 Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614 final.

Charles University of Prague, scrutinises the chapter on unfair terms. He detects many shortcomings and criticises the Czech version of the Proposal, which contains astonishing mistakes. Moreover, he underlines the need for rules on restitution in the directive. *Thomáš Pelikán*, advocate at Prague, focuses on the key problem in the enforcement of long term consumer contracts, in particular, on one-sided change of contract terms by the provider. Based on both European and Czech experience, he proposes a solution within the framework of the Proposal.

Part II of this volume widens the perspective on political, practical and theoretical aspects. *Lenka Froňková*, the official responsible at the Czech Ministry on Trade and Industry, outlines the position of the Presidency and the further political roadmap for the directive. *Thomáš Břicháček*, the official responsible at the Czech Ministry of Justice, explains his Ministry's point of view.

Jiří Grygar, judge at a District Court, gives insight into the judicial implementation of consumer law according to his experience. He has drafted a sceptical picture saying that consumer law is not widely respected in day to day court practice. He expresses hope for improvement when the new Czech Civil Code, which strengthens protection, will be enacted. In addition, the fundamental rights charter of the EU might have an impact because of the right on good administration.

Martin Řezek, representative of the Czech consumer organisation, underlines, in particular, the advantages of the Proposal. He sees in different regulation in the national states an obstacle for cross-boarder transactions. Moreover, he expects improvement for legal certainty by uniform regulation and clear definitions and therefore hopes for quick transposition.

Jan Hurdík, Professor at the University of Brno, contributes theoretical reflections on the position of consumer law and its integration into the private law system. In particular, he points out that social change, different values and the change of economical models lead to fundamental changes in the private law systems. Consumer law can be seen as a propagator of this development. *Hurdík*, in particular, thinks that the forthcoming Directive on Consumer Rights will intensify these changes.

In an Annex to this volume a Position Paper of the Acquis Group on the Proposal is included. This paper makes the works of the Acquis Group fruitful for further discussion and contains many suggestions for improvement, in particular, the technical quality of the Proposal.

The editors are grateful for all contributions and support to the conference and the volume itself. We would like to express our gratitude to the Czech Ministry of Trade and the Czech Ministry of Justice, the Czech European Consumer Center, the Czech Trade Commission, the Charles University and the Acquis Group who materially and ideally supported the conference. The editors also would like to express their gratitude to the publisher, Patrick Sellier, who made a quick and elaborate publication possible, as well

as to Miloš Kocí, Martin Werneburg and Martina Winter who carried the burden of formatting and linguistic editing. Finally, the editors willingly fulfil the obligation of indicating that the conference has also been supported by the European Commission research funds under the Network of Excellence on European Private Law in the 6th Framework Programme.

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Hans Schulte-Nölke and
Luboš Tichý

Part I:
The Proposal for a Directive on Consumer Rights

Pre-contractual information duties: the foreseeable failure of full harmonisation

Luc Grynbaum

Pre-contractual information to consumers is a major topic for the European internal market. The aim of protection is said to be important in the memorandum explaining the Proposal for a Directive on Consumer Rights. It is not the sole purpose of pre-contractual information duties. The idea is also based upon an economic analysis of the law.

Pre-contractual information duties avoid transaction costs which means the saving of money and time spent to find a "good contract". When the same pre-contractual information duties are mandatory in all markets, the consumers avoid transaction costs. The Proposal also exposes that such duties will enhance consumer confidence in the internal market, especially in cross-border e-commerce, that is, on the side of the consumers.

On the other hand, all European businesses will have to comply with the same pre-contractual information duties. The same compliances mean the same costs for all, which is a good thing from a market point of view. This is why this Proposal provides pre-contractual information duties for any sales or service contracts[1] and specific rules for distance contracts and off-premises contracts.[2]

Because of the broad scope of application of the Proposal,[3] these new rules would affect the business to consumer relationship in EC countries. In this way the aim of improving the internal market could be achieved.

But there is a problem with the remedies for breach of contract. Sanctions or penalties remain with Member States, which is a source of fragmentation of the law. Then the Proposal, through the pre-contractual information duties, embraces an economic analysis point of view (I), but the text fails the purpose of harmonisation because of the lack of remedies for breach of these requirements (II).

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1 Article 5 of the Proposal.

2 Article 9 of the Proposal.

3 Article 3 of the Proposal.

I. Simplifying but reducing pre-contractual information duties: an economic analysis method of making law

The Proposal contains several provisions about pre-contractual information. Article 5 forecasts for the "trader" the duty to provide the consumer with information such as the characteristics of the product, the address and identity of the trader, the price, tax and additional charges included, the arrangements for payment and delivery, the existence of a right of withdrawal, where applicable and the conditions of after-sales services. This kind of information is usually provided in directives such as distance sale[4] or e-commerce.[5]

In addition to those general provisions, Article 7 deals with specific ones, required when an intermediary intervenes in the contract; he has a duty to disclose to the consumer that he is acting in the name of another consumer. This provision concerns the case of e-commerce intermediaries. In addition to these requirements, specific duties are provided by Article 9 for distance and off-premises contracts. It emphasises the information about withdrawal: the address to which the consumer can send his complaints, the existence of codes of conduct or amicable dispute settlement.

The major concern about these provisions, particularly Article 5, concerning general information, is that it could apply, in accordance with Article 3, to any sale or service contract between a business and a consumer. Moreover, because Article 4 makes these rules mandatory, considered as full harmonisation, it would be impossible for the Member States to maintain or to introduce more or less stringent provisions.

This means the reducing of many information duties in favour of consumers provided by Member States Law or specific regulations. For instance, at the present time, when off-premises contracts are proposed some specific mandatory information is added for some services such as credit cards or banking services. In this case, the general information must be completed by specific information, financial service by financial service. However, on reading Articles 3(2),[6] 9[7] and 20[8] of the proposal for a directive on consumer rights it is not clear whether this combination of general and specific rules would be maintained. On the contrary, it seems that it would not be possible to add specific information for some specific services to the general ones provided by the proposal of the directive.

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4 Article 4 of the Distance Selling Directive 97/7/EC.

5 Article 5 of the E-Commerce Directive 20000/31/EC.

6 Provision about the scope of the directive; "this directive shall apply to financial services as regards certain off-premises contracts provided for by Articles 8 to 20 ..., read in conjunction with Article 4 on full harmonisation".

7 Specific information for distance and off-premises contract.

8 Provisions of the Proposal excluded for some off-premises and distance contracts.

If the proposal is adopted with the full harmonisation rule, it would be difficult to provide specific rules to enhance consumer protection without disturbing the system of minimum and maximum standards of information created by this horizontal instrument. Moreover, it would be impossible to maintain or increase the consumer protection of Member States which could be the purpose of this proposal in an economic analysis point of view at the very least.

In order to improve understanding of this Community project of a horizontal instrument merging four directives, we should compare it to existing work, proposing a uniform European contract law.

Among these projects we can distinguish between two categories. Some have adopted a classical point of view by which the question of offer is the only one of interest. On the other hand, in some works, an effort has been made to summarise the existing pre-contractual information duties.

In the first category we may mention the Principles of European Contract Law, led by Ole Lando, in which Article 2:201 provides the definition of a sufficiently definite offer but does not state anything about pre-contractual information. It is the same in the Unidroit Principles of international commercial contracts (2004) in which an offer is defined by the Article 2.1.2 but with no concern for disclosure prior to contract.

On the other hand, Acquis Principles,[9] based upon the analysis of the existing contract law contained in the Community directives, provides a wide range of rules from Article 2:201 to Article 2:206, in order to frame the pre-contractual information duties. These provisions deal with the general duty to inform the other party about the goods or services[10] and the information due to consumers by businesses,[11] particularly toward those which are disadvantaged because of the medium of transaction (distance).[12] Specific provisions concern real time communication[13] and transactions concluded through the internet.[14] Finally, a general duty of information is provided by Article 2:206 of the Acquis Principles. We can find the same kind of infor-

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9 Research Group on the Existing EC Private Law (Acquis Group), *Principles of the Existing EC Contract Law (Acquis Principles) Contract I – Pre-contractual Obligations, Conclusion of Contract, Unfair Terms*, 2007, Munich: Sellier.

10 Article 2:201 ACQP.

11 Article 2:202 ACQP; which are very close to the one provided by Article 5 of the Proposal.

12 Article 2:203 ACQP.

13 Such as telephone, Article 2:204 ACQP.

14 Information about the technical steps to conclude a contract by electronic means, Article 2:205 ACQP.

mation duties in the Draft Common Frame of Reference[15] in Articles II.–3:101 to 3:108.

As we can see, a real inquiry on existing Community contract law reveals a rich range of pre-contractual information, more precise than Articles 5, 7 and 9 of the Proposal. This provides only a minimum of standard information which would reduce the protection granted to consumers in many Member States. Moreover, the promise of full harmonisation would fail because of the remaining disparities in the remedies offered for breach of information duties.

II. The lack of remedies for breach: soft law is not harmonisation

Article 6(1) of the Proposal provides a sanction for breach of pre-contractual information duties for a very small matter: when the business has not informed the consumer of an additional charge, the consumer is not required to pay for it. On the question of information on the right of withdrawal, Article 13 provides that if the business does not comply with this particular requirement, the withdrawal period shall expire three months after the business has fully performed its other contractual obligations. Except for these very precise breaches, there is no remedy based on a Community law approach. Article 6(2) gives Member States the task of finding effective remedies for any breach of general pre-contractual information duties in their national laws. In addition, Article 42, as stated many times in directives, provides that the penalties adopted by Member States in order to enforce the rules of the Community law must be "effective, proportionate and dissuasive".

Of course, although it is usual that directives refer to national laws to find out the remedies or the sanctions for breach[16] it is also a retreat regarding existing Community law or "*acquis*". For instance, according to Article 6 of the Distance Selling Directive and Article 6 of the Financial Services Distance Selling Directive 2002/65/EC, when any kind of pre-contractual information requirements have not been fulfilled, the withdrawal period is postponed. This example shows that it is possible in a directive, i.e. in a "horizontal instrument", to provide remedies and sanctions for breach of information requirements.

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[15] C. von Bar et al (eds.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) Outline Edition*, 2009, Munich: Sellier.

[16] C. Aubert de Vincelles, J. Rochfeld (eds.), *L'acquis communautaire, Les sanctions de l'inexécution du contrat*, n° 152 and followings.

That is why in Article 2:207 ACQP and Article II.–3:109 DCFR, sanctions are provided for breach of pre-contractual information requirements. First of all, when a right of withdrawal exists, the period of withdrawal is postponed until the information has been delivered. Secondly, when a contract has been concluded and the business has not complied with its preclusion duties, remedies for non-performance, such as damages or termination, apply to these pre-contractual information duties. Finally, if no contract has been concluded, reliance damages may be granted to the consumer.

It was then possible in the Proposal to provide remedies for breach of pre-contractual information requirements. The Community legislator, has chosen the usual way to transfer to Member States the task of finding out remedies, which is an example of the "soft law" technique. However, in that case it is an error regarding the aim of full harmonisation. The purposes of full harmonisation are to achieve the same consumer protection in Member States in order to protect them, to avoid transaction costs and to submit all the European Community businesses to the same information costs. But, if the remedies for breach are different in each Member State, there will be no effective harmonisation. Therefore, the phenomenon of fragmentation remains partially unsolved by the Proposal.