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*Committee on Legal Affairs*

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# **WORKING DOCUMENT**

on consumer rights

Committee on Legal Affairs

Rapporteur: Diana Wallis

## Background

Since the Commission presented its proposal for a framework directive on consumer (contractual) rights on 8 October 2008, things have significantly developed. The new Parliament has been elected and continues the work on the consumer rights proposal within the Committee on the Internal Market and Consumer protection (IMCO) and the Committee on Legal Affairs. Both committees are closely working together as associated committees under Rule 50 of the Rules of Procedures.

In December 2009 the Treaty of Lisbon came into force. In February 2010 the new Commission took office. The responsibility for the proposal on consumer rights, originally under DG SANCO, has been moved to DG JLS, under Commissioner Reding, being now responsible for contract law issues including the Common Frame of Reference (CFR) and the proposal for a consumer rights directive (CRD). Furthermore, since arriving in DG JLS, Commissioner Reding has indicated greater flexibility on behalf of the Commission with regards to the final structure, scope and content of the Directive.

Further to its first working document and discussions in the committee and in the working group on contract law, the Committee on Legal Affairs ordered two studies, one on the relationship between the DCFR and the CRD<sup>1</sup> and one on the potential impact of the CRD on national contract law<sup>2</sup>. These were presented at the committee meeting of November 2009.

With this new working document the rapporteur for opinion intends to discuss several issues related to these new developments and to these two studies and to propose possible options for the future work of the committee on the CRD.

### The main characteristics of the Commission proposal

The Commission proposal for a directive on consumer rights, based on Article 95 of the EC Treaty (now Article 114 TFEU) is a result of the review of the consumer acquis, which was launched in 2004 with the objective of simplifying and completing the existing regulatory framework. The proposal merges four central directives on consumer contract law<sup>3</sup> into a single horizontal directive (in contrast to the sector-specific approach hitherto taken in EC consumer contract law)<sup>4</sup>. Furthermore, the proposal moves away from the minimum harmonisation approach followed in the four Directives under review and follows a full harmonisation approach (i.e. Member States cannot maintain or adopt provisions diverging from those laid down in the Directive, whether more or less stringent - see Art. 4 of the proposal).

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<sup>1</sup> De Booy, Mak, Hesselink, "A comparison between the provisions of the draft Common Frame of Reference and the European Commission's proposal for a Consumer rights directive- How the CFR can improve the Consumer rights directive", PE 419.608.

<sup>2</sup> Schulte - Nölke, "The potential impact of the Consumer rights directive on Member States contract law", PE 419.606.

<sup>3</sup> Directive 85/577/EEC on contracts negotiated away from business premises, Directive 93/13/EEC on unfair terms in consumer contracts, Directive 97/7/EC on distance contracts and Directive 1999/44/EC on consumer sales and guarantees.

<sup>4</sup> Furthermore, updated and revised sectoral legislation has already been adopted on Timeshare (2008/122/EC) and Consumer Credit (2008/48/EC).

## **Full harmonisation and the potential impact of the proposed directive on Member States' contract law**

The Commission argues that legal fragmentation causes significant compliance costs for business in cross-border transactions and results in a low level of consumer confidence in cross-border shopping and that therefore a single set of rules would foster cross-border transactions.

The intention to increase cross-border transactions by eliminating legal fragmentation has to be highly welcomed. However, it is not at all clear that full harmonisation as presented would really contribute to achieving this goal, or even lead to a single set of rules. Consumer contract law forms part of contract law in general, and the rules proposed cannot function in isolation of national systems of contract law. The subject matter of the proposal touches upon the core of contract law. The proposal is not a comprehensive harmonisation of contract law, yet it inevitably has unintended repercussions on national law (the so-called "spill-over effects"). The full harmonisation of consumer contract law as proposed would lead in many cases to paradoxical effects, where the fully harmonised provisions of consumer contract law would contrast with other, not fully harmonised provisions of b2c and b2b contract law at Member State level<sup>1</sup>.

As a result, the goal of a "single set of rules" is highly unlikely to be achievable, and endless litigation around delineation issues is predictable<sup>2</sup>. Minimum harmonisation at a high level of consumer protection coupled with full harmonisation of specific, technical rules such as e.g. formal requirements, periods for withdrawal, calculation of those periods, would certainly be preferable. Members of the Committee on the Internal Market and Consumer Protection have similarly indicated targeted full harmonisation as a preferred option. As IMCO's steady work through the proposal has shown, however, there are no areas where full harmonisation would be entirely unproblematic.

### **The proposal and the DCFR**

The proposal does not contain any single reference to the DCFR. This is quite astonishing, as the main purpose of the Common Frame of Reference was that it could serve as a toolbox for the Commission when revising the *acquis communautaire* in the area of contract law<sup>3</sup>. Furthermore, there are considerable differences between the rules in the proposal and those in the DCFR. It is very regrettable that the proposal gives no justification why the proposed solutions in the DCFR, which perhaps would fit better within the national civil law systems, were not taken into account.

The study on the comparison between the provisions of the DCFR and the CRD proposal examines these differences and makes proposals on how the provisions of the DCFR could be used for amending the proposal for a consumer rights directive. As the study points out, most

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<sup>1</sup> Schulte-Nölke, op. cit.

<sup>2</sup> Peter Rott; Evelyn Terryn, Proposal for a Directive on Consumer Rights: No Single Set of Rules, In: European Review of Private Law, 2009, Vol. 17, No. 3, p. 456-488.

<sup>3</sup> Briefing note for the Committee on Legal Affairs of February 2009 - PE 410.674: The Consumer Rights Directive and the CFR: Two worlds apart? , available under:  
<http://www.europarl.europa.eu/activities/committees/studies.do?language=EN>.

of the rules in the DCFR provide a higher level of consumer protection than the rules in the consumer rights proposal. Furthermore, the DCFR is based on a comparison of the legal systems of the Member States and also on the analysis of the consumer *acquis*. It therefore provides a European system of private law rules. Using the DCFR as an inspiration for amendments could thus improve coherence with national contract law as well as with other European legislation in the field of consumer law<sup>1</sup>.

If, as is being discussed, the DCFR will be used as model for an optional European code of contracts, coherence between the provisions of the CRD and the DCFR is of utmost importance. However, amending the proposal in line with the provisions of the DCFR does not solve the problem of spill-over effects on national contract law if full harmonisation is followed.

### **Level of consumer protection**

As a consequence of the full harmonisation approach, the proposal as it stands would result in a lowering of the level of consumer protection in some Member States. It would lead to the paradoxical situation where consumers would be less protected than businesses when acting in the areas of contract law covered by the proposal. It is questionable that this would be in line with high level of protection guaranteed by Art 114 TFEU.

This result can only be avoided by abandoning full harmonisation as a rule. Member States should have as much as possible room to decide how to integrate consumer protection legislation in the field of contract law into their legal systems, respecting the different legal culture in the Member States and the different approach to contract law issues. The rule should therefore be minimum harmonisation, which does not exclude, that as an exception of the rule, some areas of more technical nature could be put under full harmonisation. It should also be noted that consumer organisations have been similarly reticent to support full harmonisation, quite possibly unwilling to risk losing the ground gained in the agreement on Rome I.

Nevertheless, the proposal would need to be amended to a great extent. The studies carried out for the committee conclude that, overall, the DCFR provides a higher level of consumer protection than the CRD proposal. The DCFR should therefore be used as a starting point and as a guide for amendment where appropriate.

### **An optional instrument as an alternative to full harmonisation**

The areas where the EU legislator will be able to intervene to achieve “targeted full harmonisation” will be very limited. It must be asked whether this will in turn limit the impact of the proposal and whether an optional instrument, with provisions that parties could freely choose<sup>2</sup>, would be a better solution which would avoid spill-over effects on national law. A political choice has to be made whether we want fully harmonised national law or an optional instrument.

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<sup>1</sup> De Booy, Mak, Hesselink, Study see reference in footnote 1.

<sup>2</sup> “blue button” approach advocated by Schulte Nölke.

It should also be considered whether a strictly targeted full harmonisation combined with an optional instrument on contract law would better meet the aims set out in the proposal, especially given Commissioner Reding's recent suggestion that the Directive focuses on online contracts.

The precondition for such a combined approach is that the rules are consistent with each other as far as possible. As any optional instrument would build on the DCFR, it is highly important to use the DCFR for inspiration when amending the consumer rights proposal.

### **Conclusions:**

It follows that discussion in committee should focus on the following questions:

1. In order to avoid, as far as possible, "spill over" effects with negative impact on national systems of contract law, full harmonisation should be abandoned as a general rule and should be limited to some areas of more technical nature. On the basis of a detailed analysis article by article of the rules proposed by the CRD proposal, the areas where exceptionally full harmonisation might work should be examined. However, amendments would be necessary to a great extent on almost all provisions. The DCFR could be used as a source of inspiration for amending the proposal.
2. An in depth discussion should consider the question of the relationship between the CRD and the DCFR and any optional instrument. Is the "blue button" idea of an optional 28<sup>th</sup> regime a better alternative to the CRD on the basis of which cross-border transactions of business could be facilitated with better results, in particular for on-line contracts? What should be covered by a possible optional instrument? 3. Should a possible optional instrument in the field of contract law be accompanied by a consumer rights directive based on minimum harmonisation, possibly including some points where full harmonisation might be exceptionally used?
4. The Legal Affairs Committee should also be aware of the work on the Principles of Insurance Contract law, and the consumer protection provisions it offers. Indeed, given the context of the financial crisis it might do more to achieve the EU2020 goals.
5. If it is decided to continue work on the CRD on the basis of strictly targeted full harmonisation, it has to be ensured that its amendment is informed by the DCFR and there is clear consensus about where we are heading (i.e. an eventual Consumer Regulation or Code). In addition, it might be necessary to assess further the impact on national contract law. This approach could be combined with longer term work on an optional instrument on contract law, compatible with and informed by the DCFR and PECL, and work on a possible optional instrument for consumer and financial services/insurance contracts, which could be a boost for EU 2020.