



The present state of consumer contract law in the EU (and its relationship with CESL)

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Outline

- Two tracks: harmonisation directives and Optional Instrument (CESL)
- The consumer acquis: a mix of minimum and full harmonisation and some regulations
- Comparison of level of consumer protection
- Concluding remarks



Two tracks

- Harmonisation of certain aspects of consumer contract law, mandatory rules and default regime, *not limited to cross-border transactions*:
 - Horizontal: unfair terms (Directive 93/13); general pre-contractual information duty (CRD 2011/83)
 - By subject: conformity in consumer sales; consumer credit, time sharing, travel contracts; pre-contractual information duty and right of withdrawal for distant selling and off premises sales
- CESL: option for parties, *as a matter of principle only for cross-border transactions* (and not limited to B2C)
 - only sales contracts, contracts for the supply of digital content and related service contracts
 - But rather comprehensive set of rules

The consumer contract law acquis 1

- *Off premises contracts*: Directive 85/577; (minimum harmonisation); now CRD 2011/83 (full harmonisation)
- *Consumer Credit*: Directive 87/102, replaced by Directive 2008/48 (targeted full harmonisation)
- *Package Travel*: Directive 90/314 (minimum harmonisation), presently under review
- *Unfair Terms in Consumer Contracts*: Directive 93/13 (minimum harmonisation) (maintained by CRD)
- *Timesharing*: Directive 94/47 replaced by Directive 2008/122 (full harmonisation)
- *Distant Contracts*: Directive 97/7 (minimum harmonisation); now CRD 2011/83 (full harmonisation)

The consumer contract law acquis 2

- *Consumer sales: (conformity):* Directive 1999/44 (minimum harmonisation)
- *Distance marketing of consumer financial services:* Directive 2002/65 (minimum harmonisation for information; opt outs for right of withdrawal)
- *Transport* : several regulations (delays, denied boarding, default options)
- *Electronic communications:* Directive 2009/136 (Article 20: written contract and right to withdraw in case of modifications),
- *General pre-contractual information requirement:* Art. 5 CRD Directive 2011/83 (minimum harmonisation)

The consumer contract law acquis 3

- *Delivery and passing of risk* in consumer sales contracts: Art. 18 and 20 CRD 2011/83 (full harmonisation)
- *Some provisions* for sales and services contracts and contracts for the supply of water, gas, electricity, district heating and digital content: (i) fees for the use of means of payment; (ii) communication by telephone (iii) additional payments (Article 19, 21 and 22 CRD)

Relationship between CESL and consumer acquis: scope of CESL

- CESL as a second law regime within each Member State's national law (within the meaning of Rome I) or rather a 28th (or 29th) regime?
- Scope: only sales contracts, contracts for the supply of digital content and related service contracts (Article 5 Chapeau)
- Personal scope: B2C and B2B where one party is SME (Chapeau Article 7), but MS may extend to all B2B contracts (Article 13(b) Chapeau)
- Optional: parties have to agree on its use (Article 3 and 8)
- Only eligible for cross border contracts (Article 4), but MS may extend to domestic contracts (Article 13(a) Chapeau)

Relationship between CESL and consumer acquis 2

- No cherry picking in B2C: CESL has to be chosen in its entirety (Article 8(3) Chapeau)
- Numerous contract aspects fall outside CESL's scope (recital 27): legal personality, illegality and immorality, language, non discrimination, representation, plurality of debtors and creditors, change of parties, assignment, set-off and merger (and property law, IP, torts)
- Consumer acquis is not limited to sales (and related services)
- In particular pre-contractual information duty and right of withdrawal and the control of unfair contracts terms apply to services as well
- For cross border sales contracts the consumer acquis will still be applicable in the absence of an option for CESL

Some advantages of CESL

- More (Important) aspects of contract law, relating to sales, harmonised (examples: conclusion of contract, defects in consent, interpretation, seller's remedies, damages and interests, late payments, restitution, prescription.....)
- Standard information notice: better accessibility of the law for consumers
- Its optional character: freely chosen by the parties; in practice: by business, but consumer's consent has to be made expressly in a separate statement
- High level of consumer protection



Some areas compared

- Unfair contract terms
- Pre-contractual information duty
- Right of withdrawal (p.m.)
- Remedies



Example: unfair terms (Directive 93/13)

- The directive contains a general clause and an indicative list of unfair terms
- Minimum harmonisation: some MS do not limit the control to non negotiated terms and do not exclude core terms/ CESL: limitation to non negotiated terms and exclusion of core terms (Art. 80(2) CESL)
- No general duty of transparency (but in Article 82 CESL: yes)
- Purely indicative list, whereas CESL: 84 and 85: black and grey list: more certainty, but will the lists work, are the items well chosen? how will judges with different legal traditions look at it?
- ECJ has taken a very consumer friendly attitude (ex officio application)

Example: pre-contractual information duty for point of sales contracts

- New in the CRD
- List of information to be given under CRD and CESL is (quasi) identical
- CRD Article 5: exhaustive list and minimum harmonisation (general duty, under national law, to give all relevant information not excluded)/ CESL Article 20: an exhaustive list (might be less favourable to consumers than certain national regimes)
- CRD Article 5(3) opt-out for MS regarding day-to-day transactions/ CESL: no application to day-to-day requirements



Example: right of withdrawal

- Withdrawal period (14 days) and its commencement and effects are basically the same
- See further: Rupert Bellinghausen



Example: remedies of buyer

- Consumer acquis: no comprehensive system of remedies; only the specific remedies for non conformity in CSD (repair or replacement, and in subsidiary order: price reduction or replacement; and CRD Article 18 failure to deliver: termination of the contract, after (normally) expiry of period of cure (Article 18(2) and (3); + remedies according to national law (Article 18(4));
- CESL: the full range of remedies in Article 106 (right to withhold performance, damages..) and no right of cure in B2C



Pros and cons of the two regimes

Pros of CESL

- For sales: more comprehensive nature and hence less uncertainty about how purely national law will complement it
- optional character, i.e. freely chosen by the parties, where they (the business) see an advantage
- more commonality between B2B and B2C

Pros of CRD

- broader scope (also services) for some issue
- partly confirmed by or based on case law of the ECJ
- national flexibility
- Same rules for domestic situations

Some concluding remarks

1. Only certain areas of consumer contract law are harmonised
2. But indeed some important aspects, such as unfair terms, distant selling and conformity in consumer sales contracts
3. Specific rules exist only for certain services (financial services, travel, timeshare)
4. The mix of minimum and full harmonisation is confusing, but perhaps inevitable
5. The system of remedies in the consumer acquis is incomplete
6. There is a creeping infiltration of national contract law by regulations (transport, electronic communications..)
7. Fragmentation leads to uncertainty
8. There is a growing role for the ECJ
9. CESL (high level of consumer protection) might become a further step in the improvement of the consumer protection