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Editorial

The Proposal for a Directive on Consumer Rights: The Emperor's New Clothes?

On 16 December 2010, the Council of the European Union (EU) has decided to submit an amended proposal for a directive on consumer rights to the European Parliament. The Parliament is to give its response by March 2011. As compared with the original text of October 2008,[1] the text has been fundamentally reworked. What has remained is the proposed total harmonization. However, in order to accommodate the often severe criticism of total harmonization, two of the directives originally included – those on unfair contract terms[2] and consumer sales[3] – have been removed from the proposal. The proposal now only includes the directive on contracts negotiated away from business premises[4] and the directive on distance contracts.[5] Because with only these directives on board, 'consumer rights' would be too broad a description, the title of the proposal has been changed into 'Directive on consumer rights in distance and off premises contracts'. If this were all there is, the whole exercise would now not amount to much, but the fact that consumer transactions in general are also covered means that the proposal is slightly more important than the mere integration of two existing directives.

The biggest obstacle as seen in the many critical comments of the 2008 proposal has been the proposed total harmonization.[6] Until recently, minimum harmonization used to be by far the most popular method used in consumer protection. Minimum harmonization allowed Member States to provide consumers more protection than the directive prescribed – a freedom that they made ample use of.[7] Minimum harmonization was the rule, and total harmonization, the exception. A rare exception of the past was the 1985 product liability directive, which, however, was not considered a matter of consumer protection by the European Commission (EC).[8]

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1 COM 2008/614 def.

2 Directive of 21 April 1993, *OJ* 1993, L 95.

3 Directive of 7 July 1999, *OJ* 1999, L 171.

4 Directive of 31 December 1985, *OJ* 1985, L 372.

5 Directive of 4 June 1997, last amended *OJ* 2007, L 319.

6 For a discussion of the notions of total, maximum and full harmonisation see Kathleen Gutman, *The constitutionality of European contract law,* PhD thesis Leuven, Oxford: University Press, 2011 (forthcoming).

7 See the survey in Hans Schulte-Nölke, Christian Twigg-Flesner en Martin Ebers, *EC consumer law compendium/The consumer acquis and its transposition in the member states,* München: Sellier, 2008, 529 p.

8 Which is already apparent from the fact that the directive is missing in the list of directives referred to in the Injunctions directive of 19 May 1998, *OJ* 1998, L 166.

A more recent example is the Unfair Commercial Practices Directive.[9] This directive exemplifies the new EC policy to go for total rather than minimum harmonization. Total harmonization is considered to benefit small and medium enterprises, which under the present system will still have to find out whether perhaps Finnish, Latvian, and Portuguese legislation provides more protection than a directive does. Personally, I even think that consumers may profit from total harmonization,[10] but I must concede that this is a minority view: most authors are against total harmonization, as can be witnessed from recent publications in Belgium,[11] Germany,[12] and the Netherlands.[13] Not only is total harmonization considered to lower consumer protection. Technically, also, it will be difficult to arrive at total harmonization of the various national lists of contract terms considered unfair.

As indicated above, the EC has not remained deaf to the heavy criticism. Two options were available. One would have been to come back on the proposed total harmonization. This would have violated the Commission's avowed policy of introducing total harmonization. The EC has therefore opted for another option: that of withdrawing the proposal to integrate consumer sales and unfair contract terms in the directive. This does not mean that the amended proposal is bereft of any value. Indeed, although for the time being this is not of major importance, the directive will apply to consumer transactions in general.

What does the remainder of the proposal deal with? Chapter III lays down a number of rules for information, which are quite detailed, although any idea of solving the linguistic riddle has now been abandoned.[14] With the modern proponents of behavioural law and economics, one may express doubts as to the effectiveness of such rules.[15] Chapter IV provides for a two-week cooling-off period, which has met with surprisingly little opposition from business circles – and indeed conforms with some self-regulatory schemes. The number of provisions for consumer transactions

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[9] Directive of 11 May 2005, *OJ* 2005, L 149.

[10] See my (Dutch language) paper 'De toekomst van het consumentenrecht in het licht van het voorstel voor een richtlijn consumentenrechten en het ontwerp gemeenschappelijk referentiekader ', in: Johan Meeusen, Gert Straetmans , Anne-Marie Van den Bossche (eds.), *Het EG-consumentenacquis : nu en straks*, Antwerpen: Intersentia, 2009, p. 101-145.

[11] See some of the papers by Christine Biquet-Mathieu, Catherine Delforge, Jaques Laffineur, Jessica Loly, Ilse Samoy, Reinhard Steennot, Sophie Stijns, Matthias Storme, Jules Stuyck, Elke Swaenepoel, Evelyn Terryn, Aloïs Van Oevelen, Pierre Van Ommeslaghe and Patrick Wéry, *Droit de la consommation – Consumentenrecht (DCCR)* 2009.

[12] Beate Gsell, Carsten Herresthal (eds.), *Vollharmonisierung im Privatrecht/Die Konzeption der Richtlinie am Scheideweg?,* Tübingen: Mohr, 2009, 320 p.

[13] M.W. Hesselink, M.B.M. Loos (eds.), *Het voorstel voor een Europese richtlijn consumentenrechten,* The Hague : Boom, 2010, 263 p.

[14] Preamble 10 quater.

[15] Hanneke A. Luth*, Behavioural economics in consumer policy/The economic analysis of standard terms in consumer contracts revisited,* PhD thesis Rotterdam, Antwerpen: Intersentia, 2010, 322 p.

in general is for the time being limited to a mere two: the obligation of delivery of the goods and the transfer of risk. The detailed information requirements and cooling-off provisions only apply to the two directives mentioned above and not to consumer transactions in general.

Because consumer sales are out, consumer guarantees likewise no longer figure in the proposal. However, if the *Draft common frame of reference* were to be transformed into an optional contract code as envisaged in the Green paper,[16] it could well be that consumer guarantees will find a place in European legislation.

Bringing into circulation a proposal entails the danger that various policy departments or ministries – in Brussels: directorates-general – will seek to make exceptions for their specific area. This is also what happened with the consumer rights proposal. The amended proposal now excludes – wholly or partially – from the scope: a employment contracts;[17] foundation of companies;[18] health care;[19] notarial contracts;[20] succession and family contracts;[21] lotteries;[22] supply of water, gas, electricity, and heating;[23] and transport of persons.[24]

Initially, the Commission wanted to integrate eight directives. In October 2008, the proposed directive consumer rights retained four of the eight directives. By 2011, another two have succumbed because of the total harmonization, which the Commission wished to retain. The added value is that the consumer transaction in general is beginning to take shape. It may be expected that in case of future measures in consumer protection, integration in the present directive will be the first option.

What may the reader expect in this issue of ERPL? Michael Stürner from the *Europa-Universität Viadrina* in Frankfurt an der Oder first requires our attention for one of these evergreens, which divide common and civil laws: the right to specific performance. The *Draft common frame of reference* – as did the *Principles of European Contract Law* – has sought and found a compromise between the two systems. As in the civil law, specific performance is the main rule and not the exception, but from the common law, the remedy notion has been taken. This means that the right to specific performance is not a consequence of the obligation but of non-performance. The author doubts whether this is a good idea.

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16 *Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses,* COM(2010)348 final.

17 Preamble 8 bis.

18 Preamble 8 bis.

19 Preamble 10 bis.

20 Preamble 14.

21 Preamble 8 bis.

22 Preamble 20 octies.

23 Articles 22 section 3 bis and 23 section 2.

24 Preamble 20 quater.

Jan-Jaap Kuipers and Sara Migliorini from the European University Institute in Fiesole then pay attention to a conflict between the French *Cour de cassation* and the German *Bundesgerichtshof* concerning the *lois de police.* Is the Rome I Regulation perhaps able to solve the conflict? Unfortunately, this does not appear to be the case. It will therefore be up to the European Court of Justice to do the job.

Governance and the family are two notions that, at first appearance, have little to do with one another, but this appearance will be taken away after reading the paper by the University of Antwerp's Henri Swennen. The inclusion of this paper in ERPL illustrates our continuing interest in family law as one of the pillars of private law.

The conferences of the *International Academy of Comparative Law (AIDC)* are a treasure trove of potential papers for publication in ERPL. In this issue, we publish the German national report by André Janssen and Reiner Schulze, submitted to the section legal history and ethnology of the 18th Congress in Washington, DC, 2010, on 'Legal cultures and legal transplants in Germany/past, present, and future'. Hopefully, there is yet more to come from the AIDC.

Yearworth v. North Bristol, an English case on the liability of sperm banks, raises interesting questions with regard to some basic legal principles. May sperm be considered an object in which one can have property rights? And what about cumul between contractual and extra-contractual liabilities?

One of the most important books on European private law to appear in 2010 has been the two-volume *Handwörterbuch des Europäischen Privatrechts,* edited by the three directors of Hamburg's *Max Planck Institut für ausländisches und internationales Privatrecht.* Stefano Troiano reviews this encyclopaedia for us. Readers who are not proficient in German need not despair. Oxford University Press has announced the forthcoming publication of an English language edition.

We finish this issue with an *Erfahrungsbericht* of a meeting of European Romanists. With the exception of Italy, Roman law as a teaching instrument is on the decline in Europe. Our editor, Jean-François Gerkens, reports on an Italian language conference to stem this development. This review is most interested in publishing essays on the common background of Europe's legal systems in classical and medieval Roman law.

Ewoud Hondius[25]
Co-Editor-in-Chief, ERPL

[25] Professor of European Private Law, University of Utrecht; Co-Editor-in-Chief, *ERPL*.