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Part 4.

Recommendations

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The following conclusions and recommendations are based on the analysis of legal issues carried out in this study. The results of the analysis illustrate and confirm the need for action in the field of EC consumer law for several reasons.

Firstly, the Directives are often incoherent, and contain a significant number of ambiguities, which makes it difficult to transpose them into domestic law, and to ensure correct application by the courts. Consequently, one key recommendation is to remove such incoherencies and ambiguities and at the same time to consolidate and harmonise issues currently distributed across several Directives. This should make EC consumer law easier to access.

Moreover, the comparative analysis has revealed areas where the laws of the member states in the field of the Directives differ considerably. Often, the reason for such variations is that the corresponding provision of the respective Directive contains a gap which the member states have tried to fill with national laws. Many of the recommendations made in this study are based on this observation. Finally, other proposals seek to overcome barriers to trade, which are due to differences between the laws of the member states. Such differences are mainly due to the minimum clauses and options contained in the directives, but sometimes also due to gaps in the Directives, or incorrect transposition. It is suggested to remove these differences in particular in the field of information duties, withdrawal rights and formal requirements. This should considerably facilitate cross border business, especially for SMEs.

A. Creating common uniform definitions and basic rules for all consumer law directives

Certain definitions and consumer protection devices are to be found in all, or at least several, of the consumer protection directives. In addition to the definition of consumer and the other party to the contract, the business, these are mainly information duties, withdrawal rights and rules making consumer rights mandatory.

The relevant rules in the individual directives show significant differences in wording, style and content. There seem to be practically no differences due to peculiarities of the particular aspect of consumer protection addressed by a directive. The vast majority of these discrepancies are simply inconsistencies resulting from the piecemeal approach in adopting EC legislation over more than 20 years. Such inconsistencies cause difficulties in the transposition and application of EC consumer law, which should be removed. This would identify a ‘common core’ within the EC consumer acquis. Therefore it is suggested that the following matters should be treated uniformly in the acquis:

- Definition of consumer;
- Definition of business;
- Some technical definitions like “in writing” or “durable medium”;
- Some basic information duties common to the contract law directives;
- General rules on the withdrawal period, the exercise of the withdrawal and its effect;
- A rule making consumer rights generally mandatory;
- Consumer rights in case of choice of law clauses;

B. Re-structuring the consumer acquis through a horizontal consumer protection measure

One possible way forward is to bring together the common EC consumer acquis elements listed above in a horizontal measure (whether that be a new Directive, or a Regulation similar to Regulation 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits, which has horizontal application), which would then contain key general rules applicable also to all relevant consumer protection directives.

Such a horizontal measure should also include those provisions of the existing directives which are applicable to all contracts concluded between a business and a consumer. These provisions, applicable not only to a certain type of contract, but to all contracts for the supply of goods and services, are mainly to be found in the Unfair Contract Terms Directive, the Doorstep Selling and the Distance Selling Directive.

The proposed horizontal measure could have the following basic structure:

Definitions

- Definition of consumer (*along the lines sketched out in Part 3.A.; in particular clarification with regard to mixed purpose cases*).¹
- Definition of business (*along the lines sketched out in Part 3.B; in particular clarification with regard to non-profit organisations and clarification that public bodies can also be business*).²
- Definition of “in writing”.³
- Definition of “durable medium” (*the latter along Art. 2(f) of Directive 2002/65*).⁴

General rules

- Scope of application of the horizontal measure
- Rule spelling out which rules are full harmonisation and which are minimum (*along the lines sketched out below under Point IV*).
- A rule making consumer rights mandatory.⁵
- Consumer rights in case of choice of law clauses (or – if possible – leaving this to a future Rome I Regulation).

General Information Duties (*along the lines sketched out in Part 3.D.; an indicative draft of the Acquis Group has been published*)⁶

- Pre-contractual information duties.

¹ Cf. Art. 1:201 Acquis Principles (ACQP), published under the title ‘Principles of the Existing EC Contract Law’ (Acquis Principles), Contract I, 2007 (Sellier); cf. also the Definition in the Annex to the Draft Common Frame of Reference (DCFR); *von Bar / Clive / Schulte-Nölke et.al., Principles, Definitions and Model Rules of European Private Law, 2008 (Sellier)*.

² Cf. Art. 1:202 Acquis Principles (ACQP), published under the title ‘Principles of the Existing EC Contract Law’ (Acquis Principles), Contract I, 2007 (Sellier); cf. also the Definition in the Annex to the Draft Common Frame of Reference (DCFR); *von Bar / Clive / Schulte-Nölke et.al., Principles, Definitions and Model Rules of European Private Law, 2008 (Sellier)*.

³ Cf. Art. 1:306 Acquis Principles (ACQP), published under the title ‘Principles of the Existing EC Contract Law’ (Acquis Principles), Contract I, 2007 (Sellier); cf. also Art. I.-1:105 (1) Draft Common Frame of Reference (DCFR); *von Bar / Clive / Schulte-Nölke et.al., Principles, Definitions and Model Rules of European Private Law, 2008 (Sellier)*.

⁴ Cf. 1:305 Acquis Principles (ACQP), published under the title ‘Principles of the Existing EC Contract Law’ (Acquis Principles), Contract I, 2007 (Sellier); cf. also Art. I.-1:105 (3) Draft Common Frame of Reference (DCFR); *von Bar / Clive / Schulte-Nölke et.al., Principles, Definitions and Model Rules of European Private Law, 2008 (Sellier)*.

⁵ Cf. Art. 1:203 Acquis Principles (ACQP), published under the title ‘Principles of the Existing EC Contract Law’ (Acquis Principles), Contract I, 2007 (Sellier).

⁶ Article 2:201 – 2:207 Acquis Principles (ACQP), published under the title ‘Principles of the Existing EC Contract Law’ (Acquis Principles), Contract I, 2007 (Sellier); cf. also Art. II.-3:101 - 3:107 Draft Common Frame of Reference (DCFR); *von Bar / Clive / Schulte-Nölke et.al., Principles, Definitions and Model Rules of European Private Law, 2008 (Sellier)*.

- Contractual information duties.
- Formal requirements of information.
- Language in which information to be provided.
- Sanctions for breach of information duties.

Withdrawal (*along the lines sketched out in Part 3.C; an indicative draft of the Acquis Group has been published*).⁷

Rights to withdraw from a contract

- Contracts concluded outside business premises (Doorstep and Distance Selling).
- Reference to other withdrawal rights granted outside the horizontal measure.

Exercise and Effects of Withdrawal

- Length of period.
- Start and computation of period.
- Rights and obligations during the period for withdrawal.
- Obligation to inform about right of withdrawal.
- Sanctions in case of breach of this obligation.
- Exercise of right of withdrawal.
- Effects of withdrawal.
- Credit agreements.
- Unravelling of contract after withdrawal.

Unfair Terms (*along the lines sketched out in Part 2.C; an indicative draft of the Acquis Group has been published*)⁸

- Definition.
- General clause.
- etc

⁷ Article 5:101 – 5:202 Acquis Principles (ACQP), published under the title ‘Principles of the Existing EC Contract Law’ (Acquis Principles), Contract I, 2007 (Sellier); cf. also Art. II.-5:101 - 5:202 Draft Common Frame of Reference (DCFR); *von Bar / Clive / Schulte-Nölke et.al.*, Principles, Definitions and Model Rules of European Private Law, 2008 (Sellier).

⁸ Article 6:101 – 6:306 Acquis Principles (ACQP), published under the title ‘Principles of the Existing EC Contract Law’ (Acquis Principles), Contract I, 2007 (Sellier); cf. also Art. II.-9:103, II.-9:401 - 9:411 Draft Common Frame of Reference (DCFR); *von Bar / Clive / Schulte-Nölke et.al.*, Principles, Definitions and Model Rules of European Private Law, 2008 (Sellier).

It would then have to be decided whether the remaining contract law consumer acquis, mainly the Consumer Sales, Package Travel, Timeshare, and Consumer Credit Directives (the latter outside the scope of this study), but also, for example, the specific information duties in the field of Distance Selling and Distance Selling of Financial Services, should remain in separate directives or be included in the proposed horizontal measure.

In any case, such a horizontal measure would have to take into account some other fields of EC legislation related to consumer contract law, e.g. the Unfair Commercial Practices Directive, the E-Commerce Directive, the Product Liability Directive, the Insurance Law Directives, Investment Services Directive, the Brussels I Regulation, and the possible Rome I Regulation.

The Injunctions Directive, the Enforcement Regulation and the Unit Prices Directive mainly deal with matters unrelated to contract law and therefore could remain as stand-alone measures. However, the definition of ‘consumer’ could be applied uniformly across all these measures.

C. Issues concerning individual directives

The analysis has revealed a number of inconsistencies, as well as gaps and barriers to trade, affecting particular directives, which should be tackled in the course of the consumer acquis review. These proposals are summarised at the end of the Executive Summaries of the report on each of the Directives and therefore do not need to be repeated here in detail. Core proposals are

I. Doorstep Selling

- Incorporation of the Directive into the horizontal measure.
- Inclusion of contracts concluded in public places outside business premises.
- Uniform rules on withdrawal period, exercise of withdrawal, effects of withdrawal (see above).

II. Package Travel

- Definition of ‘consumer’: adaptation to a coherent definition in EC consumer law by incorporation of the definition into the horizontal measure.
- Definition of ‘organiser’: adaptation to a coherent definition of the business by incorporation of the Definition into the horizontal measure.
- Inclusion of tailor-made packages offered by travel agencies in accordance with the ECJ ruling *Club-Tour*.
- Clarification that Article 5 also grants a right to compensation for non-material damage, in particular, that such compensation can arise from the loss of enjoyment (ECJ *Simone Leitner*).

III. Unfair Terms

- Incorporation of the Directive into the horizontal measure.
- Definition of ‘consumer’: adaptation to a coherent definition in EC consumer law.
- Definition of ‘seller or supplier’: adaptation to a coherent definition of the business.
- Clarifications, e.g., with regard to the scope of application, the unfairness test and the consequences of unfairness and intransparency (as sketched out in Part 2 under C).

IV. Timeshare

- Definition of ‘consumer’: adaptation to a coherent definition in EC consumer law by incorporation of the Definition into the horizontal measure.
- Definition of ‘vendor’: adaptation to a coherent definition of the business in EC consumer law by incorporation of the Definition into the horizontal measure.
- Extension of the scope of application to contracts where timeshares rights are resold by another consumer through a professional agent.
- Dropping or lowering the requirements of the minimum duration of 3 years and the minimum annual period of a 7 days.
- Inclusion of timeshare objects other than buildings like camping grounds, caravans, boats mobile homes and other movables, which can be used for the purpose of accommodation.

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- Inclusion of holiday clubs.
- Reducing the detailed lists of information to be provided by using a general clause (to be included in the Horizontal Directive), supplemented by an indicative list of core information; in particular on costs including maintenance costs.
- In principle, uniform rules on withdrawal period, exercise of withdrawal, effects of withdrawal (to be included in the Horizontal Directive), but adaptations due to the peculiarities of timeshare contracts (possibly longer withdrawal period).

V. Distance Selling

- Incorporation of the Directive into the horizontal measure.
- (New) definition of “auction”, clarifying that Ebay auctions do not fall under this exception.
- Harmonisation of the pre-contractual information duties with Directive 2002/65 and the law of those member states which made use of the minimum clause.
- Uniform rules on withdrawal period, exercise of withdrawal, effects of withdrawal (to be included in the Horizontal Directive).

VI. Consumer Sales

- Definition of ‘consumer’: adaptation to a coherent definition in EC consumer law by incorporation of the Definition into the horizontal measure.
- Definition of ‘seller’: adaptation to a coherent definition of business in EC consumer law by incorporation of the Definition into the horizontal measure.
- Definition of ‘goods’, in particular with regard to software and other digital products.
- Further considering of a direct producer liability.

VII. Injunctions Directive

- Definition of ‘consumer’: adaptation to a coherent definition in EC consumer law by incorporation of the Definition into the horizontal measure.
- Clarification of the relationship with Directive-specific enforcement mechanisms such as Art.11 of Directive 97/7/EC and Art.7 of Directive 93/13/EEC; possibly deletion of the specific provisions.

VIII. Unit Prices

- Definition of ‘consumer’: adaptation to a coherent definition in EC consumer law by incorporation of the Definition into the Horizontal Directive.
- Establishing a definition of “small retail businesses” with the aim of achieving more coherent national legislation.

D. Full harmonisation and remaining scope for member states

The study, in particular the analysis of the transposition measures enacted by the member states, shows to what extent member states have made use of minimum clauses and options. The results permit an assessment of the possible effects of moving towards full harmonisation in the areas covered by this study. Some, but not as many as may be expected, aspects are likely to be controversial for some member states, where full harmonisation would force them to reduce their established level of consumer protection. Should the shift to full harmonisation become reality, it would have to be considered whether these areas should not be subject to this approach, and remain subject to minimum harmonisation. member states might also be keen to have an ‘safeguard procedure’, allowing them to enact urgent short term consumer protection measures in full harmonisation areas, as long as the EC does not act. The provisions of Article 95 EC would serve as a useful model; indeed, it is unfortunate that those provisions do not currently include consumer protection within its scope.

With regard to the Unit Prices Directive, it must be borne in mind that this Directive has been enacted on the basis (of the predecessor) of Art. 153 of the EC Treaty. Because of Art. 153

para 5 EC Treaty, the Directive would continue to be just a minimum harmonisation measure even if its Art. 10 were deleted.

The analysis reveals also that even a broad shift from minimum to full harmonisation in the field of the EC consumer directives would leave the member states regulatory freedom for all areas outside the scope of the directives or not regulated therein, e.g. with regard to persons other than consumers, other types of contracts or other consumer protection instruments not provided for in the directives.

With regard to all of these considerations, there is no, or at least not a very strong, argument against a selective shift to full harmonisation in those areas where the use of minimum clauses by the member states has clearly caused barriers to trade without substantially increasing consumer protection. Such fields may be, as already said, rules on pre-contractual information duties, in particular on brochures, and the information of the consumer about his right of withdrawal. The latter would consequently also require full harmonisation of certain general elements of the technicalities of the withdrawal rights like the length, the beginning and the calculation of the period, and the formalities for exercising the withdrawal right

E. Other matters to be considered

I. Translation issues

The analysis of the laws of the member states in the areas covered by the Directive revealed numerous instances of variation, which, as already noted above, tend to be caused by ambiguities or inconsistencies in the relevant directives. On occasion, it seems that these problems might have been caused also by variations in the substantive meaning of particular provisions in the different language versions of the directives. This might be the result of the inherent differences in legal terminology between the various member states, but may also, in part, be the consequence of the challenges posed by the task of having to translate the text of a directive into the many official languages of the EU, where there is a risk that inconsistencies might creep in. The full success of a wholesale reform to the consumer acquis might depend on addressing this risk during the review process.

II. A cross-border measure?

Some consideration could be given to the possibility of adopting a measure dealing specifically with cross-border consumer transactions, to give a boost to consumer utilisation of the internal market, particularly once the Common Frame of Reference project has come to fruition. Such a measure would apply across the EU, and any consumer transaction which is conducted across borders would be covered by this measure. A number of difficult questions would need to be addressed if that option were to be pursued, including (i) would such a measure be mandatory?; (ii) would consumers be permitted to opt-out in favour of a more protective domestic law; (iii) would this measure complement or replace the programme of harmonising domestic consumer law? This possibility would require further careful analysis which exceeds the boundaries of this project.

III. Improving cross-border redress

A gap in the current acquis which is often pointed out is that there continue to be difficulties in enforcing consumer rights across the EU. Although consumers can be confident that they enjoy a similar level of protection, no matter where they shop, they may be put off doing so by the difficulty of taking action if something they have bought is faulty. The question of cross-border redress in individual consumer cases also falls outside the scope of this study, but it may be desirable to investigate this further as part of the overall improvements to the consumer acquis.

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