

Modernising and Harmonising Consumer Contract Law

Geraint Howells
Reiner Schulze (Eds.)



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Foreword

In October 2008 the European Commission published the Proposal for a Consumer Rights Directive; a Proposal that suggests far-reaching changes to the core of consumer contract law. Four current directives shall be replaced by a new, overarching piece of legislation and in doing so full harmonisation should for the most part take the place of the minimum standard presently in force in the European Union. In January 2009, legal experts from universities, practice and the civil service met in Manchester to address the question of the extent to which this Proposal can contribute to the modernisation and harmonisation of European consumer contract law. This event was organised under the auspices of the Consumer Law Academic Network (CLAN) jointly by the Manchester University Law School and Münster's Centre for European Private Law and benefited from support from the UK Department for Business, Enterprise and Regulatory Reform (BERR), Domestic and General and the Acquis Group. The papers presented at this conference analysed, criticised and suggested improvements for the Proposal and are published in this volume.

The editors would like to thank the contributors and the publisher for their efforts in making the publication possible in such an exceptionally short period. The results from this conference are thereby timely for the further discussions on a Consumer Rights Directive.

Further thanks are due to Eric Sitbon, legislative officer at DG SANCO, and Graham Branton of BERR for their important contributions and valued participation at the conference.

The editors would like to particularly thank David Kraft and Jonathon Watson for their conscientiousness and commendable dedication to the organisation of the conference and co-ordination of this publication, as well as Joana Tolle for her assistance.

Manchester/Münster, January 2009

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Part I
Introduction

Overview of the Proposed Consumer Rights Directive

Geraint Howells & Reiner Schulze

I. Introduction

On the 8 October 2008 the Commission published a Proposal for a Directive on Consumer Rights (hereafter referred to as Proposal or pCRD).¹ First mooted back in 2004,² when the project was firmly integrated into the general programme for reforming European contract law, the project began to take shape in 2007 with the Green Paper on the Review of the Consumer Acquis.³ Originally covering eight consumer directives⁴ the final Proposal focuses in on just four that lie at the heart of consumer contract law: Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises;⁵ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts;⁶ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts;⁷ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.⁸

¹ COM(2008) 614 final.

² See COM(2004) 651 final, OJ 2005 C 14/6.

³ COM(2006) 744 final.

⁴ The other four were Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ 1990 L 158/59; Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, OJ 1994 L280/83; Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ 1998 L 80/27 and Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ 1998 L 166/51.

⁵ OJ 1985 L 372/31.

⁶ OJ 1997 L 144/19.

⁷ OJ 1993 L 95/29.

⁸ OJ 1999 L171/12.

The project is now well focused on key areas of consumer contract law and although seeking to be informed by the Common Frame of Reference (hereafter: CFR) the project has been produced in advance of the CFR being available.⁹ Indeed one of our broad general observations about the Proposal in the next section concerns the way in which it uses and relates to the CFR. Another central theme addressed in this overview section is full harmonisation. The goal of full harmonisation has been modified in rhetoric to targeted full harmonisation. However, in practice full harmonisation remains at the core of the Directive. Linked to this is the question of whether the Proposal addresses the concerns of the internal market consumer. Building confident internal market consumers is the worthy objective underpinning this Proposal, but the unerring belief in full harmonisation combined with some of the policy choices risks reducing consumer protection in some Member States. Finally the attempts to modernise consumer contract law to take account of changes in technology and market practices will be discussed. After this overview key provisions will be briefly analysed.

II. General policy observations

1. The Consumer Rights Directive and general contract law – the influence of the CFR

The purpose of the CFR is a much debated topic.¹⁰ Indeed within the Commission there have been notable ebbs and flows in emphasis with at times the notion of an optional instrument being more prominent than at others. The notion of the CFR as a toolbox has, however, been a constant (even if recently the term “handbook” is becoming more popular¹¹); by which seems to be understood an aid to, amongst others, the European legislator when drafting laws. Under Commissioner Kyprianou there was a discernable drawing back of the engagement of DG SANCO so that its interest in the CFR was increasingly focused on its utility for the reform of consumer law – connected with the review

⁹ The basis of this project is the Action Plan for a more coherent contract law, COM(2003) 68 final, OJ 2003 C 63/1. For more details see D. Staudenmayer, *Weitere Schritte im Europäischen Vertragsrecht*, (2005) *Europäische Zeitschrift für Wirtschaftsrecht* 103. For recent developments of the CFR see Council documents 8286/08, (11.4.08) and 15306/08 (07.11.08) and the resolution from the European Parliament B6-0374/2008 (17.07.08).

¹⁰ Cf. H. Eidenmüller, F. Faust, H. Grigoleit, N. Jansen, G. Wagner, R. Zimmermann, *Der gemeinsame Referenzrahmen für das Europäische Privatrecht – Wertungsfragen und Kodifikationsprobleme*, (2008) 11 *Juristen Zeitung* 529-550.

¹¹ See, for example, COM(2007) 447 final, at p. 10.