The Europeanisation of Contract Law

Current controversies in law

Second Edition

Christian Twigg-Flesner
The Europeanisation of Contract Law

A process of Europeanising contract law has been driven by the legislative activity of the European Union (EU), which has adopted a string of Directives touching on various aspects of contract law, mainly consumer law. Many of these Directives have dealt with a fairly isolated aspect of contract law. Consequently, the European influence has hitherto been rather fragmented, and lacks overall coherence.

This book traces the process of Europeanisation of contract law by critically examining the developments to date and their impact on English law, in particular, as well as the implications of the EU’s desire to move towards greater coherence. The arguments for and against greater convergence in the field of contract law are also covered. This second edition has been fully updated to reflect the most recent developments in EU contract law. It includes coverage of the Principles, Definitions and Model Rules of European Private Law (the Draft Common Frame of Reference), and the Consumer Rights Directive and its likely impact on consumer contracts as well as the proposed Common European Sales Law.

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This book is dedicated to my parents, David and Antje Twigg-Flesner.
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Preface to the second edition

Since the first edition of this book was published in 2008, there have been a number of significant developments in the Europeanisation of contract law. After protracted negotiations, the Consumer Rights Directive (2011/83/EU) was adopted late in 2011, although the changes it will introduce are rather more modest than envisaged in the first edition of this book. Prior to this, at the end of 2008, the academic research network submitted the final version of its Draft Common Frame of Reference, followed by the full version with notes and comments in mid-2009. Although its future was uncertain at that time, there has since been another Green Paper, and, in October 2011, a proposal for a Common European Sales Law, which, if adopted, would be the culmination of a lengthy process commenced in 2001. All of these developments are charted in this book.

In preparing a second edition, my aim has been to update the text and take account of the key developments noted above, as well as recent case-law from the Court of Justice of the European Union and some of the recent academic literature. The latter, in particular, has continued to grow at an exponential rate, and in a book of this kind, it is not possible to give a full account of the rich debate which is ongoing among contract scholars from around Europe, and beyond.

The main objective of this book has not changed – it is to provide a concise, but not superficial, account of the Europeanisation process to date, with a critical perspective on potential future developments. It is aimed as much at a reader new to the subject wishing to gain a good understanding of what has already been done and is still ongoing, as to those who wish to undertake more detailed study. As with the first edition, I also hope that seasoned scholars may find it useful to have a general overview of this field to hand.

I am grateful for the anonymous reviewers who commented on the first edition and made suggestions for the second. I have tried to take these on board as far as possible.

As always, I have benefitted from discussions with numerous colleagues over the years, particularly Hugh Beale, Roger Brownsword, Geraint Howells, Hans Micklitz, Martin Schmidt-Kessel and Stephen Weatherill, as well as members of the Acquis Group and SECOLA. However, responsibility for the
final product is mine alone. Thanks are also due to colleagues at Hull Law School for the supportive research environment, and to family and friends for offering a welcome distraction from academic work, with special thanks to Sophie Law-Clucas and Paul Kilford.
1 The concept(s) of Europeanisation

Introduction

This book is about the Europeanisation of contract law. This is a controversial topic which has given rise to a huge amount of scholarly literature – so much so that one can only agree with Thomas Wilhelmsson, who remarked some years ago that writings on this have ‘become so voluminous that it seems impossible to follow in all its details.’ Since the first edition of this book was published, the body of literature has continued to grow. The primary purpose of this work remains the provision of a critical account of the field as a whole. It attempts to take stock of developments to date, as well as ongoing activities. More generally, it will also consider the arguments advanced on both sides of the debate about the need and desirability of the process of Europeanisation. It is assumed that the reader will have knowledge of both contract law and some European Union law, but is not familiar with the Europeanisation of contract law itself.

In this opening chapter, the different facets of Europeanisation are explored. The driving force behind this process is, of course, the European Union (EU), and the following chapters concentrate on the EU’s achievements so far, as well as its future plans.

This is therefore predominantly a ‘European law’ book, concentrating on the EU’s impact on contract law. However, to regard the process of Europeanisation purely as a matter for the EU would be to ignore the work that has been undertaken by legal scholars across Europe in this sphere. The remainder of this chapter therefore provides the context within which the EU’s activities are being undertaken.


2 The Europeanisation of Contract Law

The context for Europeanisation

Contract law

This book focuses on contract law, i.e. the law relating to the formation, performance and discharge of contractual obligations. It may be distinguished from the law of torts, which is concerned with wrongful acts or omissions causing harm. Both are part of the law of obligations and the wider category of private law.

Trying to provide a succinct definition of contract creates problems in itself, because the notion of ‘contract’ varies from jurisdiction to jurisdiction. Whilst Treitel’s basic description of contract as ‘an agreement [of the contracting parties] giving rise to obligations which are enforced or recognised by law’\(^2\) goes a long way towards capturing the essence of what a contract is, particular jurisdictions may regard other forms of voluntarily created obligations as forming part of the law of contract. For example, English law does not regard a gift as a form of contractual obligations, unlike French law.\(^3\)

For present purposes, it is not necessary to explore this further, save to note that the different conceptions of ‘contract’ in the various Member States create an initial hurdle on the way towards Europeanisation, because there may be disagreement about the precise target area of such activity.

‘Europeanisation’ explored

For the purposes of this book, the term ‘Europeanisation’ is used to cover the various activities of the EU which affect contract law, whether it is the creation of free-standing EU rules on contract law, or the process of harmonisation of aspects of national contract law by EU legislation. Of course, the notion of ‘Europeanisation’ is open to different interpretations. For example, this term is also sometimes used in a much wider sense to cover e.g. scholarly activities.\(^4\) In her recent work, The Emergence of EU Contract Law, Lucinda Miller identifies three different (but related) ways in which ‘Europeanisation’ might be understood: first, it could refer to the development of contract law rules at the European level; second, it could

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describe the infiltration of EU law-derived rules into national contract laws; and, third, it could be regarded as synonymous with the process of harmonisation.\(^5\) This is generally the same way in which ‘Europeanisation’ is understood in this book.

Unification, harmonisation, approximation and convergence

A note on terminology: in the Europeanisation debate, there is often reference to terms such as ‘unification’, ‘harmonisation’, ‘approximation’ or ‘convergence’.\(^6\) Unification suggests that the legal systems of two or more jurisdictions cease to be distinct and are replaced by a single legal text.\(^7\) ‘Harmonisation’ and ‘approximation’ are synonymous with one another in the European context, and refer to the introduction of common rules on particular aspects in the Member State, although, as will be seen, there is a degree of freedom for each State as to how they give effect to these rules.

Lastly, there is the notion of ‘convergence’, which denotes similarity on particular aspects between different jurisdictions.\(^8\) According to Brownsword, one can determine convergence in different ways by focusing on:\(^9\)

(i) formal doctrine
(ii) underlying principles
(iii) the result which formal doctrine indicates in given fact situations
(iv) the actual result reached in given fact situations
(v) values and interests affected by particular disputes
(vi) contracting practice.

The process of Europeanisation seeks to achieve both harmonisation and convergence. It will be seen that the focus at the European level is largely on convergence with regard to formal doctrine and the results such doctrine indicates ((i) and (iii) in Brownsword’s classification), rather than any of the other factors. Unsurprisingly, this focus has not gone without criticism.\(^10\)

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6 For a very useful account, see L. Nottage, ‘Convergence, Divergence and the Middle Way in Unifying or Harmonizing Private Law’ (2004) 1 *Annual of German and European Law* 166–245.
9 Ibid., p. 174.
10 See Chapter 5.
4 The Europeanisation of Contract Law

A brief detour into legal history

Although the current debate about Europeanisation is of recent origin, to some it may seem as if history is turning full circle. In the twelfth century, continental Europe went through a process of re-developing and adopting Roman law (the *ius civile*), which evolved into the *ius commune*, that is, the ‘common law’. In essence, the many different principalities and kingdoms that existed across Europe at the time shared a common law, which served to supplement existing local laws and customs. In addition, the *ius commune* provided a common legal language, and it was deployed in interpreting local laws to achieve a degree of consistency.

The rise of the nation-State in the nineteenth century, and the creation of larger and stronger States on the continent, also resulted in the ‘nationalisation’ of the *ius commune*, producing such well-known codifications as the German Civil Code and the French *code civil*. A side-effect of this development was that legal scholarship, which until then was truly European, also became a national matter, and legal education, legal training and professional requirements started to diverge. Foreign judgments, as well as scholarly literature, were disregarded. Whereas previously, Latin had been the common legal language across Europe, it was replaced by the respective domestic languages.

English law was not part of the continental *ius commune*. It does not follow in the Roman tradition, unlike the continental legal systems; although some Roman law principles have found their way into English law, both in the common law and in the principles of equity. Unlike on the continent, there was never a wholesale codification of private law in England. Instead, the law of contract evolved through individual decisions by the courts. The different paths taken by English law on the one hand and the majority of the other European jurisdictions on the other is frequently referred to as the ‘common law–civil law divide’. This divide is still regarded as perhaps the greatest difficulty in the Europeanisation of contract law today. It is, of course, an over-simplification to refer to all the non-English jurisdictions in Europe

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collectively as the ‘civil law’ systems, because these sub-divide further, e.g. into those following the Romanistic legal tradition or the Germanic tradition, as well as the Nordic systems which form a distinct group and do not have a civil code. Their common features of these legal traditions permit their broad classification as ‘civil law’ systems. But even though the common law may appear very different from the civil law systems, Zimmermann has argued persuasively that these differences are less stark than widely assumed.\textsuperscript{16}

Whatever common origins there are, the situation that remains today is that there are more contract law systems in the EU than there are Member States,\textsuperscript{17} and several different legal traditions.

**The problem today – variety of legal systems and identifying the applicable law**

The variety of legal systems poses an obvious problem for any contract involving parties from more than one jurisdiction, particularly in the EU where the internal market relies on cross-border trade. Whenever there are contractual negotiations between parties based in different jurisdictions, there are two procedural questions to be tackled (in addition to whatever the substance of their agreement might be): (i) which court would deal with any disputes which might arise (jurisdiction); and (ii) which law would govern the resolution of that dispute (applicable law)?

These questions are resolved through the principles of private international law (also known as the conflict of laws).\textsuperscript{18} As an early example of Europeanisation, the Member States of the EU agreed separate conventions on jurisdiction (Brussels Convention\textsuperscript{19}) and applicable law (Rome Convention\textsuperscript{20}). Following the broadening of the EU’s competence\textsuperscript{21} in this field,\textsuperscript{22} the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters 1968 [1998] OJ C 27/1 (consolidated version). (Rome) Convention on the law applicable to contractual obligations 1980 [1998] OJ C 27/34 (consolidated version).


\textsuperscript{17} In Britain, English and Scottish contract law are different, for example.


\textsuperscript{21} The EU can only act within the areas of competence conferred upon it. This is discussed further in Chapter 2.

\textsuperscript{22} At the time of negotiating these, no competence had been conferred on the EU to adopt legislation on aspects of private international law. Since the Treaty of Nice, a new Title IV in the EU Treaty provides an appropriate legal basis for such legislation.
The Europeanisation of Contract Law

Convention has been replaced by the ‘Brussels’ Regulation (44/2001), and the Rome Convention by the ‘Rome I’ Regulation (593/2008).

It is beyond the scope of this book to examine either measure in depth. With regard to questions of jurisdiction, it suffices to note that, if the parties have not provided for this in the contract, the Brussels Regulation, in ‘matters relating to contract’, allocates jurisdiction to ‘the courts for the place of performance of the obligation in question’ (Article 5(1)(a)). For consumer contracts (i.e. those between a trader and a person acting for a purpose regarded as outside his trade or profession), there are separate provisions which apply primarily where a contract has been concluded in the consumer’s domicile, or where the trader directs his activities to that Member State and the contract is within the scope of these activities (Article 15(1)(c)). In deciding where to take legal action, the consumer has the choice between the courts of his domicile or that of the trader (Article 16(1)), but he may only be sued in his domicile (Article 16(2)).

As far as the applicable law is concerned, the Rome I Regulation provides the relevant rules to determine this. Fundamentally, the choice of the applicable law is down to the parties to a contract, who can select which law they wish to govern their contract. However, party autonomy in this regard is restricted in several ways: first, the law chosen must be the law of a particular jurisdiction, which means that ‘non-state laws’ (such as the Principles of European Contract Law (PECL)) cannot be chosen (although they can be incorporated into the contract). Second, if the parties choose one law, but ‘all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen’, then the rules of law of the country where ‘all the other elements are located’, and which cannot be derogated from by agreement between the parties, will apply. These rules are commonly known as ‘mandatory rules’, i.e. provisions which the parties cannot displace through the terms of their contract. Similarly, the choice of the law of a non-EU Member State cannot preclude the application of

25 ‘Contract’ must be given an autonomous meaning for the purposes of the Regulation, and may therefore be understood differently from what it might mean in any particular Member State. On autonomous interpretation, see Chapter 4, p. 122.
26 I.e. a ‘person who pursues commercial or professional activities’ (Article 15(1)(c)).
27 For the full scope, see Article 15.
28 This is explored more fully below.
29 Article 3(1) Rome I Regulation.
30 Recital 13.
31 Article 3(3) Rome I Regulation.
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‘mandatory rules’ of EU law where ‘all other elements relevant to the situation . . . are located in one or more Member States . . .’. The choice of law by the parties is therefore subject to the ‘mandatory rules’ of the jurisdiction with which the contract is otherwise connected.

As far as consumer contracts are concerned, the Rome I Regulation contains a separate provision in Article 6, according to which the applicable law is the law of the country where the consumer has his habitual residence. There are two alternative preconditions, one of which needs to be met for this provision to apply:

(i) The trader pursues his commercial or professional activities in the country where the consumer has his habitual residence; or
(ii) The trader by any means directs such activities to that country or to several countries including that country.

In addition, in either case the contract has to fall within the scope of the trader’s commercial or professional activities.

Even in consumer contracts, the parties can still choose the applicable law in accordance with Article 3, but where they do so, this will be subject to Article 6. For Article 6 to apply, the trader needs to either pursue his activities in the country where the consumer has his habitual residence, or direct his activities to that country. ‘Pursuing activities’ might include door-to-door sales or operating through a branch. The criterion that the trader has to ‘direct such activities’ to the country of the consumer’s habitual residence is more difficult to apply. As already noted, Article 15 of the Brussels Regulation uses the same concept. Recital 24 of the Rome I Regulation emphasises the need to interpret the concept of ‘directed activity’ in the same way under both Regulations.

It seems fairly clear that a trader will be ‘directing his activities’ where the trader has sent advertising or other material inviting the conclusion of a contract directly to the consumer. But as the focus of the EU is on encouraging both consumers and businesses to make more use of the internal market, and the popularity of electronic commerce (online shopping) offers a key opportunity in this regard, there are questions about how the online environment should be treated for the purposes of Article 6. The phrase ‘directed activity’ is not easily applied to a website which is widely accessible. In respect of the Brussels Regulation, a joint declaration by the Council and the Commission states, amongst other things, that:

32 Article 3(4) Rome I Regulation.
'the mere fact that an internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor.'

This only goes some way towards clarifying the scope of that phrase ‘directed activity’, but it does not answer all questions. In particular, it is not easy to identify the point at which websites which permit a consumer to place an order online must be treated as a ‘directed activity’. According to the joint declaration, the mere fact that the website is accessible is insufficient, but the mechanism by which distance contracts are concluded is a relevant factor. So where the website provides clear delivery information for a range of countries including that of the consumer’s habitual residence, this would be a strong indicator that the business has used the website to direct its activities to the country of the consumer’s habitual residence. The matter was considered by the Court of Justice of the European Union (CJEU) in Pammer v Schlüter, and offers further guidance. The CJEU first observed that by the very nature of the internet, websites are, in principle, accessible throughout the EU and beyond, but the mere accessibility of a website beyond the country where the trader is established does not mean that the trader directs his activities beyond the borders of this country. Instead, it must be shown that the trader has ‘manifested its intention to establish commercial relations with consumers from one or more other Member States, including that of the consumer’s domicile’. So it needs to be shown that the trader was willing to conclude contracts with consumers domiciled in Member States other than his own. To facilitate the application of this basic test, the CJEU offered a number of criteria to be considered by a national court. First, the CJEU held that the mere provision of the trader’s email or geographical address, or of his telephone number without the international dialling code, was irrelevant as such information had to be given under EU legislation even where the trader did not wish to enter into contracts with consumers from other Member States. Whilst it does enable the consumer to contact the trader electronically, this was insufficient. Second, a clear statement by the trader on the website that its goods or services are offered in one or more Member States mentioned by

35 See recital 24 of the Brussels I Regulation.
38 Ibid., paras 68–69.
39 Ibid., para. 75.
40 Ibid., paras 76–79.
name, or the paid inclusion in search engines accessed from particular Member States, would be relevant evidence (paragraph 81). Third, more specific factors might include:

‘the international nature of the activity at issue; . . . telephone numbers with the international dialling code; use of a top-level domain name other than that of the Member State in which the trade is established . . . or the use of neutral top-level domain names such as “.com” or “.eu”; . . . mention of an international clientele composed of customers domiciled in various Member States . . .’. 41

Fourth, if the website permits the use of a language or currency different from that of the Member State where the trader is established, then this can be taken as evidence that the trader directs his activities to other jurisdictions. 42

This ruling does not answer all the questions, but it goes some way towards clarifying the scope of Article 15(1)(c) of the Brussels Regulation, and the corresponding provision in Article 6 of the Rome I Regulation.

If the conditions of Article 6 are not satisfied, and the parties have not chosen a law in accordance with Article 3, then there are default provisions in Article 4(1) of the Rome I Regulation that apply. As far as the most common consumer contracts are concerned (sale of goods and supply of service), the applicable law would, in essence, be the law where the seller or service provider has his habitual residence.

The foregoing provides some indication of the contribution made by the private international law. However, whilst this area of law deals with the questions of jurisdiction and applicable law and consequently offers a higher degree of certainty for businesses and consumers on these matters, it does not remove all of the legal problems of cross-border contracting. In particular, whilst there may be clarity about the applicable law, the inevitable consequence is that the substantive rules of that law will probably be unfamiliar to at least one of the contracting parties (or rather, their legal advisers), if not both. 43 There will be a cost implication because of the need to seek additional expert legal advice on the unfamiliar jurisdiction. In a commercial setting, this may be less significant, because many rules of contract law are effectively operating as default rules and can be amended by the terms of the contract. However, some provisions are essential in order to recognise the binding force and validity of the contract, and knowledge of these provisions may be essential. Moreover, some provisions of national law are mandatory.

41 Ibid., para. 83.
42 Ibid., para. 84.
43 Parties may choose a ‘neutral’ law. In many international commercial contracts, English law has been chosen as the applicable law for contracts where neither party had any connection with England for example.
rules, and cannot be displaced by the terms of the contract. Although less of a problem in commercial contracts, there can still be occasional problems even there. To reduce the impact of this, there has been considerable activity in trying to align aspects of the substantive rules of the national laws of the Member States. This is the process of Europeanisation which is the focus of this book.

**Europeanisation by the EU**

Europeanisation of contract law is shaped by the adoption by the EU of Directives dealing with particular aspects of contract law. By adopting legislation which subsequently must be given effect to by each of the Member States in their domestic laws, the EU has effectively created various islands, or blots, of European law within national contract law. As will be seen, this is primarily done in order to pursue one of the EU’s fundamental objectives: the creation of an internal market free from obstacles to trade.

The activities of the EU are sometimes referred to as ‘top-down’ harmonisation, i.e. as the prescription of particular rules from above. This may be contrasted with ‘bottom-up’ harmonisation, which describes a progressive development towards greater assimilation, perhaps in substance rather than form, of national laws.

To date, this process has largely involved the adoption of discrete pieces of legislation dealing with issues that had been identified as a concern for the smooth operation of the internal market. Here, the focus has predominantly been on aspects of consumer contract law, rather than general contract law, or even the law specifically relating to business-to-business transactions. The reason for this may be that general contract law is essentially dispositive law, i.e. its rules are primarily there to fill any gaps in the bargain between the parties. The contract, as agreed between the parties on the basis of party autonomy, determines the relationship between the parties (although there are some rules of contract law affecting the validity of the contract which are extraneous to the bargain, of course). However, consumer law seeks to protect consumers, who are perceived as a weaker party to any contract and therefore in need of special protection, and rules on consumer contracts are usually mandatory. The existence of different consumer protection standards in the EU Member States (or the once near-total lack thereof in some countries) can therefore have an impact particularly on businesses seeking to

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operate throughout the internal market. But although consumer law is at the
centre of the EU’s activities, measures have been adopted outside the sphere of
consumer law. 47

The Europeanisation of contract law by the EU is therefore essentially
instrumental – its purpose is to improve the functioning of the internal
market. As can be seen in Chapter 2, this raises issues about competence and
the resulting extent to which legislation may be adopted at the European
level. Furthermore, because of the interaction between European and domestic
law in this area, national legislatures as well as national courts and the Court
of Justice all have a role to play in the process of Europeanisation.

This book is primarily concerned with how these elements have interacted
in Europeanising contract law. Before examining the EU’s contribution in
more depth, it is appropriate to outline other Europeanisation activities.

Spontaneous Europeanisation

A further instance of Europeanisation is what might be called ‘spontaneous
Europeanisation’. This is the situation where a national legislator extends the
rules or concepts introduced by an EU measure to areas not covered by EU law.
The effect of this is that a rule of European origin is applied to circumstances
falling outside the ambit of EU regulation. This may be done in order to retain
consistency, i.e. to avoid creating a situation whereby similar circumstances
are treated differently without clear justification. There is a risk that such
spontaneous harmonisation may have a negative impact on domestic law, if the
effect of extending an EU rule beyond its prescribed scope is to reduce existing
levels of regulation, particularly in the context of consumer protection. 48

Regulatory competition and Europeanisation

The economic concept of ‘regulatory competition’ 49 refers to the competition
between different jurisdictions for the most efficient rule. To the extent that
parties are free to choose the law applicable to their contract, they may seek to
use a law which they regard as the most efficient. Moreover, if they perceive
the law of one jurisdiction as more efficient generally, they might even
move their activities to that jurisdiction altogether. 50 In order to retain these
activities within their territory, national law might need to change, and might

47 A more detailed discussion is in Chapter 3.
50 The ability to move between jurisdictions is, of course, one of the opportunities which has
been greatly enhanced by the EU.
do so by adopting rules from other jurisdictions which appear to be more efficient. This may eventually lead to a degree of convergence between different jurisdictions.

In a similar vein, a court faced with an issue involving ambiguous law, or a gap in the law, might look to other European jurisdictions to consider how other national laws deal with the problem.\textsuperscript{51} It may be that this leads to the identification of an approach common to several jurisdictions which the court might, in turn, consider favourably for developing national law.\textsuperscript{52} It is, however, essential that the relevant economic and social circumstances are similar and that the various interests affected by the rule have similar concerns.\textsuperscript{53}

**Europeanisation as a scholarly endeavour**

A lot of activity on the Europeanisation of contract law has been undertaken by legal scholars, rather than the European institutions. On one level, individual scholars have undertaken research of a comparative kind, often studies on how different jurisdictions within Europe handle particular aspects of contract law. For this purpose, a number of dedicated academic journals have been launched within the last 20 years or so, including the *European Review of Private Law* and the *European Review of Contract Law*. These, together with general European law journals, regularly feature such comparative papers, as well as analyses of the contributions made by the EU to the Europeanisation process.

In addition, there are several well-known research groups focusing on the Europeanisation of contract law in one way or another. Their objectives and working methods differ, with some exploring the feasibility of even greater uniformity of contract law across the EU, whereas others concentrate on promoting an understanding of different legal systems. As can be seen in Chapter 5, their work has fed into developments at the European level, and a short overview of the most significant groups is given here.\textsuperscript{54}


\textsuperscript{52} For an interesting example of how divergent judge’s view on this issue may be, see the respective comments of Lords Millet and Hobhouse in *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 All ER (Comm) 332.


The so-called Lando Commission (named after its chairman, Professor Ole Lando) was founded in 1982, although its history dates back to discussions that were had following the initial proposal for a Convention on the applicable Law (which later became the Rome Convention). At that time, some scholars felt that what was needed was a uniform private law, rather than a uniform conflict of laws system. The Lando Commission was a private initiative of (self-selecting) legal scholars, taken from all the EU Member States at the time. Its objective was to undertake a comparative analysis of the laws of all the Member States with the intention of developing fundamental rules, or principles, of European contract law. It may be observed that the term 'principles' may be a misnomer, as the work undertaken resulted in the creation of model rules of contract law. That work became the PECL, and are widely known. They were published in three parts, with the final part completed in 2001. The PECL only deal with general contract law, and there are no provisions on specific categories of contracts, such as consumer or employment contracts; nor do the PECL deal with matters other than contract law.

The Lando Commission pursued a dual objective: first, it sought to identify, through comparative research, what was common to the various jurisdictions already, and to restate this in the form of coherent principles (adopting the US ‘restatement’ approach). Second, it considered which rule might be best for a ‘common European’ approach. The Commission therefore did not seek to defend particular national rules, nor identify merely the lowest common denominator; instead, it attempted to come up with the most suitable rule for the European context.

For each topic, there are model rules, followed by comments which explain what the rules mean and how they should be interpreted. There are then simple illustrations of how each rule might be applied in practice. This is followed by detailed national notes, which explain how the law of each of the Member States relates to the principle stated.

With regard to the purposes which the finished product might serve, a number of possible uses were mentioned. First, the PECL could be the basis of further EU legislation. Second, parties to a contract could incorporate the PECL as terms of their contract, and could thereby effectively disapply much of the national law that would otherwise be applicable to the contractual

58 Lando and Beale, op. cit., n 56, pp. xxiii–xxiv.
relationship. Third, the PECL could be a guide to interpreting the law, in particular by offering solutions for filling gaps in the national law. In that sense, the PECL could also provide inspiration for national legislatures in considering improvements to domestic contract law. It will not come as a surprise that, in the Lando Commission’s view, the PECL might ultimately be a precursor to European Contract Code.

The Lando Commission completed its work in 2001. Many of its members have gone on to join the Study Group on a European Civil Code (SGECC), which was also given the authority to develop the PECL further, as necessary.

**SGECC**

The SGECC was founded in 1998, inspired by two resolutions by the European Parliament which called for the development of a draft European Civil Code. In many ways, it is the successor to the Lando Commission, most obviously because it is not only using the PECL as a springboard for its work, but also because it has assumed the task of reviewing the PECL. The working methods also resemble those of the Lando Commission. Its purpose is to extend the PECL work to other aspects of private law, both by considering a wider range of topics and by taking into account the laws of the many countries that have joined the EU since the PECL were first drafted. As part of this process, any changes that need to be made to PECL to reflect the principles developed in related areas of private law are dealt with, and the work of the SGECC will eventually result in a revised version of the PECL. The SGECC became one of the two principal drafting groups responsible for creating the ‘Common Principles of European Private Law’, i.e. the draft Common Frame of Reference. This aspect of the SGECC’s activities is considered in more detail in Chapter 5.

**Acquis Group**

The EU has already adopted a considerable body of legislation in the field of contract law, but has done so largely in a piecemeal fashion. The Acquis Group has set itself the objective of analysing the existing *acquis communautaire*, i.e. the body of rules found in EU secondary legislation and judgments of the ECJ, in order to identify which, if any, principles of general application may be derived from the hodgepodge of individual Directives. The work of the Acquis Group is particularly significant in the ongoing debate about greater EU intervention in the field of contract law, and is considered in more depth in Chapter 5.

Accademia dei Giusprivatisti Europei (Pavia)

The Pavia Group was founded by Professor Gandolfi in Pavia in 1990, also with the purpose of creating uniform rules of private law. Its primary purpose has been to create a contract code for all the EU Member States. Motivated by a perceived need for European codification based on the shortcomings of the existing approaches (notably the Directives adopted by then), particularly its randomness, the Pavia Group wanted to present a more consistent and coherent approach. Whilst Ole Lando was merely hopeful that the PECL might be the first step towards a European code, Gandolfi and his colleagues pursue this aim more directly.

Although the purpose of the Pavia Group is to create a code that could become a model for all the European jurisdictions, their methodology is a rather different one from that adopted by the Lando Commission. There are essentially two sources used by the Group: the main inspiration being the sections of Italian civil code dealing with contract law, which, in the view of the Group, is a good synthesis of French and German approach and thereby already presents a degree of harmonisation of contract law. However, the obvious gap here is a link to the common law jurisdictions, especially England. Here, the Pavia Group was able to find a ‘trump card’ in the form of the so-called ‘McGregor Contract Code’, a draft codification of English contract law prepared in early 1970s, initially at the request of the Law Commission, although this later abandoned any moves towards codification of contract law. The draft code had not been published at the time, but was made available to the public for the first time as a result of the work by the Pavia Group.  

The essence of the Pavia Group’s code therefore is a synthesis of the Italian code and the McGregor code, although other jurisdictions were also considered in drafting the detailed sections of the code. Initial work was completed in 1998 and the draft code was published in French (which was the Group’s working language).

Common Core Project (Trento)

A different scholarly approach has been adopted by the Common Core Project (commonly referred to as the Trento project) which was founded in 1994 by Professors Bussani and Mattei, then based in Trento (Italy). Its objective is not the harmonisation or unification of private law across Europe. Rather, it seeks to identify whether there is a core common to the various European jurisdictions in particular areas of private law. Its goal is to promote

understanding of the various legal systems, and to create a ‘map’ of current European private law.

Its methodology is also very different. It follows the ‘functional’ approach to comparative law, focusing on substance rather than terminology; indeed, legal ideas need to be divorced from the various national terminologies for this process to work.\textsuperscript{62} For each topic, questionnaires are devised based around hypothetical fact scenarios. The various national correspondents are then asked to analyse how their national law would ‘solve’ each scenario. One of the interesting features of this project is that it does not limit its focus to a specific area of law where the solution to a particular problem requires the use of provisions from another area of law.\textsuperscript{63} Around 12 books have been published to date; those on contract law include volumes dealing with the enforceability of promises,\textsuperscript{64} good faith,\textsuperscript{65} mistake and duties to inform,\textsuperscript{66} and pre-contractual liability.\textsuperscript{67}

\textbf{Europeanisation and legal education}

Away from any immediate attempts towards harmonisation, or at least systematisation of the substantive law, Europeanisation also occurs with regard to legal education.\textsuperscript{68} On the whole, legal education is still predominantly a domestic affair, despite the various European integration efforts and exchange schemes such as Erasmus and Socrates. Law students spend the vast majority of their studies on areas of domestic law, perhaps with the exception of some coverage of the fundamental aspects of EU law, and rarely study law in a comparative context. Basedow notes that law students ‘are marked by a nationalism which is unknown in other sectors of higher education’.\textsuperscript{69} He is critical of the fact that law curricula across Europe focus on national law only,

\begin{itemize}
\item \textsuperscript{63} Brownsword, op. cit., n. 9, pp. 175–176, comments that some of the Trento work seems to focus rather too much on formal doctrine and insufficiently on underlying principles or values.
\item \textsuperscript{64} J. Gordley (ed.), \textit{The Enforceability of Promises in European Contract Law}. Cambridge: Cambridge University Press, 2001.
\item \textsuperscript{67} J. Cartwright and M. Hesselink (eds), \textit{Precontractual Liability in European Private Law}. Cambridge: Cambridge University Press, 2011.
\item \textsuperscript{68} Of course, many of the other scholarly initiatives can have an educational purpose, too. For example, the PECL could be used in the context of a ‘comparative contract law’ course.
\end{itemize}
The concept(s) of Europeanisation particularly during the first two or so years of study. This is then often contrasted with EU law, which is fragmented and appears to disrupt the order of the national legal system. Basedow pleads for the introduction of more European-focused teaching in areas such as contract law, in order to gain a better appreciation of the relevance of European law to domestic law and not to be perturbed by the impact of European law on the domestic legal system.

One possible route towards Europeanisation of contract law is therefore a change in the way law is taught at universities. An inspiration is the approach adopted in the USA. There is a considerable degree of diversity in the private law systems of the individual States. However, this diversity is handled well in the manner in which law is taught in the USA. Indeed, Kötz observed that diversity is a lesser problem for a federal system such as the USA ‘if the lawyers working in that system have been trained on the basis of the same legal material, speak the same legal language, share a common learning experience, and have therefore no trouble talking with each other in their professional capacity.’

US legal education therefore examines what is common to the jurisdictions. Legal education could be enhanced by adopting a similar approach in Europe: rather than restricting law teaching to national law, perhaps interspersed with a bit of comparative law, the focus could be on what is common to the jurisdictions within Europe instead. The objective of such an educational approach would be to increase familiarity with other jurisdictions, including the terminology used elsewhere.

There might be difficulties with such an approach: in England and Wales, for example, the Law Society and Bar Council impose clear requirements on university law schools about the content of degree programmes which concentrate on domestic law rules and principles. Moreover, knowledge of one’s ‘own’ law is essential, and introducing comparative elements too early could result in students not knowing enough about their national laws to evaluate what is common to the European jurisdictions, and where there is diversity.

Ius Commune Casebook Project

Nevertheless, efforts are made to promote a more European approach to legal education. One of the many academic initiatives in this field, the Ius Commune

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71 An interesting example is H. Kötz and A. Flessner, European Contract Law, Oxford: Clarendon Press, 1997, which is a comparative textbook on key aspects of contract law.
The objective of these casebooks is to compile important court decisions and legislation, together with appropriate commentary, explanations and comparative overviews, on particular areas of law. Again, the primary purpose is not harmonisation, but rather the discovery of similarities and divergences in the private laws of the EU Member States. Its findings may be useful for lawyers and legal scholars in understanding how different legal systems approach particular problems, as well as serving as a tool for legal education. It does not take an all-encompassing approach, with the main focus tending to be on French, German and English law, because these are perceived as the ‘main representatives’ of the legal traditions within Europe. This project is the paradigm of the ‘bottom-up’ approach to Europeanisation. Volumes already published deal with tort, contract, unjust enrichment, non-discrimination law, property law and consumer law. Others are in preparation.

This short overview of the different facets of Europeanisation shows that it is a rich area for study.

**Europeanisation by the EU – themes and arguments to be explored**

The previous section set out the general context for this book by identifying the different facets of the term ‘Europeanisation’. As indicated, the focus of this book is on the specific activities undertaken by the EU and their impact on national contract laws, particularly English contract law. Subsequent chapters set out and examine the different facets of this in more depth. At this point, it is necessary to set out a number of general themes and arguments which will underpin the discussion that follows.

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80 For details, see www.casebooks.eu (accessed 13 August 2012).
In order to appreciate the process of Europeanisation, it is now possible to distinguish two distinct phases in this process. The first phase has been characterised by a process of identifying particular areas of law, largely in the field of consumer law (on which more below), and to attempt to harmonise (‘approximate’) the various national laws in these areas through the adoption of Directives. Directives are one of the two types of legislation which can be adopted by the EU, the other being Regulations. The essential difference between the two is that Directives specify a result to be achieved (e.g. that a consumer should be able to have faulty goods repaired or replaced), but that this is done through the adoption of national laws in order to give effect to the requirements of a Directive; whereas a Regulation is to be directly applicable and therefore takes effect as an EU measure, rather than as national law giving effect to a Directive. In essence, national laws have become Europeanised through the introduction of national rules to comply with EU law. This brings with it a whole host of difficulties, not least the challenge of integrating EU-derived rules on selected aspects of the law into national law, and to ensure that those provisions of national law which give effect to an EU Directive are interpreted so as to ensure consistency with European law.

Moreover, one of the most significant issues is the fact that this process only changes national laws, rather than creating a set of legal rules which are applicable throughout the EU. This, however, has been (and continues to be) the dominant justification for the entire process of Europeanisation. One of the core objectives of the EU is to create an internal market throughout the territory of the EU. In essence, this means that the market conditions for buying and selling goods and services should be the same throughout the EU. This entails that the legal rules relating to all such transactions should be the same, irrespective of where in the EU a transaction occurs. Whilst this might be the ideal way of ensuring that there is a truly European market, the political and practical reality is such that it is simply not possible to create an exhaustive legal framework for the whole of the EU. It would not only undermine but also displace the various legal traditions which exist within the EU, and that is something for which there is no political, nor indeed popular, support. Indeed, the powers of the EU to adopt legislation to affect the field of contract law are rather limited; as is discussed more fully later, there is no explicit power in the EU Treaties which confer direct authority on the EU institutions to adopt legislation in the field of contract law. Instead, the Treaty powers of the EU to legislate in respect of the establishment and functioning of the internal market (Article 114 TFEU) has been the basis for almost all legislation in this area. As will be seen, this Article permits the approximation of

81 The distinction between Directives and Regulations is discussed more fully in Chapter 2.
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national laws as they relate to the internal market, and consequently is the constitutional reason why the process of Europeanisation has, at least in the first phase, proceeded by harmonising aspects of national laws. The key features of this initial phase are therefore (i) provisions of national law have been introduced and/or amended in order to reflect the requirements of various EU measures; (ii) there is consequently not one single set of free-standing EU rules, but a body of 27 national rules which are broadly similar, but not identical; and (iii) no distinction has been drawn between transactions which are of a purely domestic character, and those which have a cross-border dimension.

Although it would be wrong to suggest that this first phase has come to an end, it has nevertheless reached a stage beyond which one would not expect too many further initiatives to emerge. The reason for this is that ambitious plans to adopt a comprehensive Directive on consumer rights, first proposed in 2008, failed to meet sufficient support from the Member States, which were seemingly unwilling to tolerate further significant intrusions by EU law into their domestic consumer laws, and so the Directive which was eventually agreed is a much more modest achievement.83

The second phase of Europeanisation commenced with the well-known Communication on European Contract Law by the European Commission in 2001.84 Whereas the first phase of Europeanisation had, with a few minor exceptions, largely concentrated on the regulation of consumer contract law, the Communication now opened up the suggestion that the EU might move towards much more comprehensive legislation in the field of contract law as a whole. Crucially, from a very early stage in this second phase, the idea of a separate EU framework for contract law was put on the table, and as this second phase progressed, the idea of a set of EU contract rules adopted by means of a Regulation, potentially applicable only to transactions with a cross-border element, has taken hold. Indeed, a proposal for a so-called ‘Common European Sales Law’ (CESL) was presented in October 2011. Two key features of this proposal are that, if adopted, it would take the form of a Regulation and it would apply to cross-border transactions only.

The foregoing is a brief sketch of the stages of Europeanisation to date, and the following chapters examine these stages in more depth. In doing so, a number of (recurring) issues need to be considered:

1. The constitutional constraints: the EU does not have a general power to regulate contract law, and so has to justify any legislation on the basis of other powers. One question is which of the available legal bases should

83 The Directive is included in the analysis of the extent of Europeanisation to date in Chapter 3.
be utilised. Moreover, the exercise of any available powers is subject to the principles of subsidiarity and proportionality. These act as a further restraint on the EU’s ability to legislate in this area.

2 **The contribution of the CJEU:** the court has the power to interpret legislation adopted by the EU. A ruling by the CJEU can have the effect of requiring changes to national law, as well as revealing the full extent of a harmonising measure.

3 **The suitability of Directives as against Regulations as a means of Europeanisation:** although Directives have been widely used, it will be argued that they do not help to achieve the wider purpose of creating a legal framework to assist traders and consumers seeking to enter into transactions in the internal market. Regulations might be better for this purpose.

4 **The scope of EU measures:** to date, no distinction has been made between domestic and cross-border transactions, and the various Directives in this area apply to domestic transactions and cross-border transactions alike. It will be considered whether there is a case for restricting EU action to cross-border transactions, an idea now under serious consideration in light of the proposal for the CESL.

It will become apparent from the discussion in this book that harmonisation by Directives is not the best means of creating a legal environment suitable for increasing transactions in the internal market because of the difficulties associated with their transposition and subsequent accessibility of the law, and that the use of Regulations should be favoured. Moreover, it is argued that the focus of EU legislation, at least for the future, should be on the cross-border context.

In order to develop this argument, there is, first, a discussion of the constitutional and institutional framework for the Europeanisation of contract law, with a particular focus on the relevant Treaty provisions, the respective merits of Directives and Regulations, and the role of the CJEU. There is then a survey of what has been achieved to date. This shows that whilst there has been a significant degree of legislation affecting consumer contracts, this is not so in the case of non-consumer contracts. Moreover, even in the field of consumer contract law, there remain gaps, and rulings by the CJEU have complicated this picture. The task for Chapter 3, therefore, is to offer a reasonably detailed overview of the current state of Europeanisation. Chapter 4 then considers the impact of the Directives adopted so far from the perspective of English law, and the difficulties caused by the implementation of the various Directives, and the subsequent need to interpret and apply the relevant national law. Taken together, these chapters provide a critical survey of the first phase of Europeanisation.

The chapters which follow then turn to the second phase and consider the debate launched by the European Commission’s 2001 Communication, as well as the initiatives which followed, right up to the proposed CESL. In the
concluding chapter, it is then argued that, whilst the move towards a Regulation with a cross-border scope heralded by the proposed CESL is not unwelcome, there are a number of unresolved questions that need further consideration, not least the treatment of consumer versus non-consumer transactions, as well as the design of the substantive rules of whatever measure is ultimately adopted.
2 Framework of Europeanisation

Introduction

This chapter and Chapters 3 and 4 concentrate on the process of ‘top-down’ Europeanisation of contract law, i.e. the various harmonisation measures adopted at the European level which have had to be implemented into national law (also known as ‘positive harmonisation’). However, in addition, it may also be possible to strike out those contract law rules which might affect the free movement of goods or services, which are part of the four fundamental freedoms enshrined in the EU Treaties (‘negative harmonisation’). This chapter first examines the extent to which national contract law rules might infringe the prohibition against rules which affect the free movement of goods. It then concentrates on the framework at the European level within which Europeanisation takes place by examining the competence of the European legislator to act in the field of contract law, the legal instruments used, and lastly the particular contributions made by the CJEU.

National contract rules and free movement

The first issue to consider is whether national contract law rules could be in conflict with the provisions on the free movement of goods. If that is the case, then a degree of Europeanisation could be achieved by challenging rules which conflict with the objectives of the EU. Article 34 TFEU prohibits quantitative restrictions and all measures having an equivalent effect, on the import of goods into a Member State (Article 35 TFEU deals with similar restrictions on exports). As such, this provision has a deregulatory effect, i.e. it can be used to strike down national measures which have the effect of hindering trade. It is well-known that Article 34 TFEU has a very broad reach, applying to ‘[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade . . .’.

Many trading rules, however, are not restricted to imports and

apply generally, although they may affect imports more severely than domestic goods. The *Dassonville* formula is not restricted to overtly discriminatory rules and can equally cover national rules which apply to both imports and domestically produced goods (‘indistinctly applicable measures’). In the famous *Cassis de Dijon* case,2 the CJEU confirmed that Article 34 TFEU applied also to indistinctly applicable measures, which would be contrary to the prohibition if they satisfied the *Dassonville* criteria. However, the Court acknowledged that not all such domestic measures would be struck down and that some restrictions on the marketing of products had to be accepted:

‘[...] insofar as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.’3

Article 34 TFEU was therefore given a very wide scope, and it was not until 1993 that the CJEU took steps to restrict its reach in its judgment in *Keck and Mithouard*.4 It held, in the context of a preliminary reference to consider the compatibility of a prohibition on resale below cost, that ‘certain selling arrangements’ were no longer caught by the *Dassonville* formula, provided that these affected domestic and imported goods in the same manner, in law and in fact. Only rules which relate to ‘requirements to be met’ by goods were still subject to Article 34 TFEU.

However, it remains difficult to assess domestic contract law rules in the context of Article 34 TFEU. Several questions arise: are matters of substantive contract law caught by Article 34 TFEU at all? Differences in the substantive contract laws of the Member States can adversely affect the operation of the internal market and thereby the free movement of goods and services by increasing the reluctance of businesses and consumers to buy abroad out of concerns over variations in national laws. But it remains uncertain whether such rules can be challenged under Article 34 TFEU. Even if that is so, would they be regarded as ‘requirements to be met’, and therefore subject to Article 34 TFEU, as ‘selling arrangements’ or something else altogether? In fact, can one even try to undertake a classification of private law rules on the basis of this distinction? The position is not at all clear, and the case-law of the CJEU provides limited assistance.

In *Alsthom Atlantique v Compagnie de construction mechanically Sulzer SA*,5 the CJEU had to consider the compatibility with Article 35 TFEU of a provision

3 Ibid., para. 8.
in the French civil code imposing strict liability on the supplier of goods for any latent defects.\footnote{Note that, historically, for a national provision to fall foul of Article 35 TFEU, it must be discriminatory, and a rule of reason approach is not available. See L. Woods, \textit{Free Movement of Goods and Services}. Aldershot: Ashgate, 2004, chapter 6.} The facts involved a dispute about the quality of ship engines fitted in two cruise liners which had been supplied to a Dutch company. Alsthom sued Sulzer, the engineering manufacturer, before the French courts. Under Article 1643 of the French civil code, a seller was liable for hidden defects even if he was not aware of them, unless he expressly excluded this liability in the contract. According to French case-law, this Article creates an irrebuttable presumption that the seller is aware of any defects in the goods, and that this presumption can only be excluded in a contract with another professional operating in the same line of business (see para. 5). Sulzer argued that this case-law means that French law differs from that in any other Member State, and that this had the effect of obstructing the free movement of goods. The Court held that it did not constitute an unlawful restriction. This was because it was not directed at exports, but applied to all contracts to which French law applied. Moreover, the parties to an international sales contract are free to choose the law applicable to their contract and thereby avoid the application of the French rule altogether (para. 15).

In \textit{CMC Motorradcenter GmBH v Pelin Baskiciogullari},\footnote{C-93/92 \textit{CMC Motorradcenter GmBH v Pelin Baskiciogullari} [1993] ECR I-5009.} CMC sold to customers in Germany Yamaha motorcycles which had been obtained through parallel imports. Whilst the guarantee given with the motorcycle could be invoked against any authorised Yamaha dealer, German authorised dealers generally refused to do so. Under German Law (\textit{culpa in contrabendo}), CMC should have disclosed this information to a customer (Mrs B), but did not do so. CMC argued that this rule was contrary to what is now Article 34 TFEU. The CJEU held that this rule applied to all contractual relationships governed by German law, and that it was not designed to regulate trade (para. 10). Furthermore, the obligation to provide information did not create the risk of obstructing trade; rather, it was the practice of the German dealers that caused concern (para. 11). The Court concluded that the impact of the rules was ‘too uncertain and too indirect’ to be regarded as hindering trade between Member States.

Neither case is unequivocal in ruling out the applicability of Articles 34 and 35 TFEU to domestic contract law rules. \textit{CMC} seems to take the view that it will generally be very difficult to demonstrate any effect on inter-state trade, which would mean that national provisions of contract law could generally not be challenged under Articles 34 and 35 TFEU. Furthermore, \textit{Alsthom} makes the point that the adverse effect of certain rules could be avoided through an appropriate choice of law clause. That may be true as a matter of legal principle but, in practice, it may often be very difficult for one contracting
party to agree with the other on the appropriate law to govern that contract. Moreover, this analysis only works to the extent that the national rules are regarded as non-mandatory. Those rules of domestic law which are mandatory cannot be evaded by choosing the law of another jurisdiction.\(^8\)

It remains to be seen if such rules (many of which are found in consumer law) would be caught by Articles 34 and 35 TFEU. Of course, if that were the case, the consequence would be that the rule challenged would be struck down. That would leave a gap in domestic law, and something would have to take its place – but the CJEU has neither the power to substitute legislation that is compliant with Article 28, nor to offer guidance to the Member State concerned on amending domestic law to remove the infringement. The better view is that it would generally be possible to justify these rules, particularly in the consumer contract law field, on the basis of the \textit{Cassis de Dijon} ‘mandatory requirements’.\(^9\) Indeed, it has been suggested that all private law rules (not just contract law) could be treated as ‘mandatory requirements’ to avoid the consequences of finding that they might breach Article 34 TFEU.\(^10\)

\section*{Europeanisation and competence}

The Europeanisation of contract law has largely proceeded on the basis of legislation which seeks to harmonise aspects of domestic law. However, the harmonisation of domestic laws in any particular area is not an objective pursued by the EU as an end in itself – there is no overarching desire to unify all the laws of the Member States. Indeed, the competence of the EU to adopt legislation is constrained by a number of matters. The EU, in exercising its legislative powers, has to act subject to three key constraints: the principles of conferral, proportionality and subsidiarity (Article 5 TEU\(^11\)). The principle of conferral limits EU action to the competences conferred on it by the Treaties (Article 5(2) TEU). In some areas, the EU has exclusive competence,\(^12\) but in many areas, competence is shared between the EU and the Member States.\(^13\) Where the EU has exclusive competence, its ability to act is wider than in areas of shared competence. Where competences are shared, the principle of subsidiarity should act as a limitation on the EU’s power to adopt legislation, and thereby ensure that action is taken at the most appropriate level, be that the EU level or the Member States. Thus, Article 5(3) TEU states that:

\begin{itemize}
  \item Distinguishing between mandatory and non-mandatory rules is more difficult in practice than the basic distinction suggests: see M. Hesselink, ‘Non-Mandatory Rules in European Contract Law’ (2005) 1 European Review of Contract Law 44–86.
  \item These are set out in Article 3 TFEU.
  \item See Article 4 TFEU.
\end{itemize}
'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'

There is nothing in Article 3 TFEU or Article 4 TFEU on a specific competence for contract law. However, there are two shared competences which relate to contract law: consumer protection (Article 4(2)(f) TFEU) and the internal market (Article 4(2)(a) TFEU). Thus, in either area, the principles of subsidiarity require that there should only be EU action where the 'objectives of the proposed action' cannot be achieved at Member State level. Quite how this could be applied in the context of contract law, whether consumer contract law or contract law generally, is uncertain. Member States are clearly able to provide for contract law rules at the national level, which means that they can certainly 'sufficiently achieve' this particular objective. But this still leaves open the difficulty that each national set of contract law rules will be different in some way, and this will affect the operation of the internal market. Tackling this is something which individual Member States will not be able to do, as it would require action at the EU level. However, this does not mean that the EU would have a blanket competence for the harmonisation of contract law rules as they apply to all types of transactions. If the focus is on the internal market, then this would mean ensuring that transactions can operate across national jurisdictional boundaries. Thus, in that regard, encouraging businesses and consumers to contract across borders might mean that the EU's primary (if not exclusive) focus should be on establishing rules for cross-border transactions only.

However, this view does employ a particular reading of the subsidiarity principle, and one that is not congruent with the general consensus as to its application. The general view about subsidiarity seems to be that it is rather a more procedural, and therefore political, issue than about the proper distribution of competences between EU and Member States. Moreover, the whole process of Europeanisation to date has proceeded by harmonising aspects of national law, even after the introduction of the subsidiarity principle into the TEU by the Treaty of Maastricht 1992. It is nevertheless appropriate to consider whether harmonisation of national contract laws is in line with the subsidiarity principle. The protocol on subsidiarity requires that any legislative proposal:

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'should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal’s financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators.\textsuperscript{17}

It is difficult to find clear statements on whether harmonisation in the field of contract law would be in compliance with subsidiarity. One instance where the Commission did present arguments in favour of such compliance can be found in the compliance statement which was part of the proposal for the Consumer Rights Directive.\textsuperscript{18} There, the Commission stressed the need for action to encourage cross-border transactions,\textsuperscript{19} but then seemed to assume that this necessitates harmonisation to cover both national and cross-border consumer transactions, rather than exploring the case for this explicitly. Instead, the Commission identified legal fragmentation as the main problem – and that reducing legal fragmentation cannot be achieved by the Member States themselves.\textsuperscript{20} Only by harmonising national consumer law would there be a single set of rules to encourage consumers and traders to make the most of the internal market. Consequently, according to the Commission, the harmonisation of national (consumer) laws is compatible with the requirements of the principle of subsidiarity.\textsuperscript{21} The Commission’s reasoning assumes that the internal market would work better only if national laws were harmonised, but this would seem to require further elaboration. In particular, a stronger justification would be needed for allowing harmonisation to extend to rules which apply to purely domestic transactions, and not be limited to cross-border transactions only. It is perfectly arguable that – contrary to the Commission’s position – the subsidiarity principle sets a much higher threshold for justifying harmonisation of national laws over restricting action to cross-border transactions than seems to have been assumed. So whether it would be possible to proceed with a sweeping harmonisation of the whole field of contract law, or even the narrower field of consumer contract law, is certainly debatable.

But even if, for the sake of argument, harmonisation is compatible with subsidiarity, there is a further hurdle to overcome: EU action also has to

\textsuperscript{17} Article 5 of the Protocol on the application of the principles of subsidiarity and proportionality.
\textsuperscript{18} COM (2008) 614 final.
\textsuperscript{19} Ibid., p. 7.
\textsuperscript{20} Ibid., p. 6.
\textsuperscript{21} Ibid., p. 7.
comply with the proportionality principle. This requires that the ‘content and form of Union action’ does not exceed what is necessary to achieve the particular objective. One can ask whether harmonisation of national laws, which is both intrusive and disruptive to national legal systems, complies with the proportionality principle, particularly if the standard of harmonisation pursued would be full rather than minimum harmonisation.22

If one takes both principles together, then this would at least suggest that there is a prima facie case against significant EU activity in respect of legal rules which extend beyond the cross-border context, i.e. the harmonisation of national laws irrespective of the kind of transaction to which they are applied. Whether this view has support in practice would depend on how both principles are interpreted. On the few occasions when the CJEU was asked to consider this issue, it refused to uphold challenges to EU legislation on the grounds that such legislation was incompatible with subsidiarity or proportionality. In *ex parte BAT*,23 the Court noted that subsidiarity in the context of the internal market competence in Article 114 TFEU (Article 95 EC)24 applied ‘inasmuch as that provision does not give it exclusive competence to regulate economic activity on the internal market, but only a certain competence for the purpose of improving the conditions for its establishment and functioning’.25 The Court said little more than that, so offered scant guidance on just how subsidiarity should operate in this context. Moreover, with regard to the principle of proportionality, the CJEU has said that the EU legislature has a ‘broad discretion in areas which involve political, economic and social choices on its part’.26 A successful challenge on the grounds of a violation of the proportionality principle would have to demonstrate that the ‘measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue’.27 The requirement of ‘manifest inappropriateness’ sets a high threshold for any challenge to the harmonisation of national laws on basis of disproportionality. The CJEU’s position therefore suggests that harmonisation of contract law would not be incompatible with subsidiarity and proportionality in principle,28 and subsidiarity might be a ‘bark but

23 C-491/01 *The Queen v Secretary of State for Health ex parte British American Tobacco (Investment) Ltd and others* [2002] ECR I-11543.
24 Discussed below.
25 *ex parte BAT*, above, n. 23, para. 179.
26 C-344/04 *The Queen on the application of International Air Transport Association, European Low Fares Airline Association v Department for Transport* [2006] ECR I-403, para. 80.
27 Ibid.
28 See also C-58/08 *R ex parte Vodafone and others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR-n.y.r.
not bite’. Nevertheless, an attempt to harmonise contract law on a large scale could run into greater difficulties than the present piecemeal approach (set out more fully in Chapter 3) has done.

Having examined the general constraints on the EU’s power to legislate, the discussion now needs to turn to a further factor, which is to identify an appropriate legal basis in the TFEU for the adoption of legislation in the contract law field.

**Legal bases for adopting contract law measures**

The constitutional confines within which the process of Europeanisation operates are outlined above. This section turns to the candidates for an appropriate legal basis for Europeanisation measures in the field of contract law. Of course, with a significant number of Directives already adopted, there are legal bases already in use (notably Article 114 TFEU), but these have their limitations and other provisions may be considered as alternatives in the future.30

**Article 114 TFEU**

Most of the measures adopted in the field of contract law are based on what is now Article 114 TFEU (formerly Article 95 EC). The predecessor of this Article was first introduced by the Single European Act 1986 (SEA) with a view to speeding up the creation of the single market. Prior to the SEA, harmonisation measures had to be adopted on the basis of what was then Article 100 EEC, later Article 94 EC (and now Article 115 TFEU), which provides for the adoption of harmonising Directives which directly affect the establishment or functioning of the internal market. It requires unanimity within the Council, and only involves the Parliament by way of consultation (the ‘special legislative procedure’). Prior to the introduction of what is now Article 114 TFEU, this was the main legal basis used for the adoption of legislation in the field of contract law.

Article 114 TFEU provides for a more efficient procedure, allowing for harmonisation measures to be adopted by qualified majority voting. Furthermore, the ordinary legislative procedure (formerly known as the ‘co-decision procedure’), giving Parliament greater involvement and the power to block the adoption of legislation, must be followed. Article 114(1) TFEU provides that:

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Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.\textsuperscript{31}

Article 114 TFEU can form the basis for measures which have the object of establishing the internal market, as well as measures which relate to its functioning. Article 114 TFEU is used to reduce or remove altogether competitive disadvantages which are the result of higher costs of having to comply with rules which are stricter in some Member States than in others.

Article 114 TFEU has formed the basis of most consumer protection Directives, as well as Directives in many other areas. For many years, it was assumed that Article 114 TFEU had a wide scope, allowing for the adoption of broad legislation which may have had only a tenuous link to the internal market objective. This assumption was proved incorrect in \textit{Germany v Parliament and Council},\textsuperscript{32} resulting in annulment of Directive 98/43/EC on Tobacco Advertising and Sponsorship. In that case, the Directive prohibited outright advertising of and sponsorship by tobacco, including on products such as parasols and ashtrays. The CJEU held that Article 114 TFEU was an inappropriate legal basis for the Directive because it not only failed to improve competition but, in effect, sought to eliminate it altogether. The main significance of the case is that the Court took the opportunity to clarify the scope of Article 114 TFEU. Advocate-General Fennelly urged caution in using Article 114 TFEU as a legal basis:

‘the pursuit of equal conditions of competition does not give carte blanche to the Community legislator to harmonise any national rules that meet the eye . . . it would risk transferring general Member State regulatory competence to the Community if recourse to Article 100a [now 114 TFEU] . . . were not subject to some test of the reality of the link between such measures and internal market objectives.’\textsuperscript{33}

If the effect on the competitive conditions was ‘merely incidental’,\textsuperscript{34} Article 114 TFEU would not be the correct legal basis. The CJEU itself took

\begin{footnotesize}
\begin{itemize}
\item Article 26 TFEU sets out the objectives of ‘establishing or ensuring the functioning’ of the internal market.
\item Ibid., Opinion, para. 89.
\item Ibid., para. 91.
\end{itemize}
\end{footnotesize}
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a very similar line. It first noted that Article 114 TFEU could form the basis only for measures which are intended to improve the conditions for the establishment and functioning of the internal market. Crucially, this did not mean that it gave a general power to the EU to regulate the internal market. To hold otherwise would bring about a conflict with Article 5 TEU which provides that the EU must act within its powers. The Court went on to say that:

‘a measure adopted on the basis of Article 100a [now Article 114 TFEU] of the Treaty must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market.’

In many cases, Article 114 TFEU formed the legal basis for measures which did not merely seek to remove existing divergences, but also harmonised aspects where there was a potential for the emergence of future obstacles to trade which could be caused by the diffuse development of the national legal systems. Article 114 TFEU could legitimately be used for such a purpose if ‘the emergence of such obstacles [is] likely and the measure in question [is] designed to prevent them’, but a ‘mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition’ could not justify the adoption of a measure on the basis of Article 114 TFEU. The distortions sought to be eliminated must be ‘appreciable’ so as to avoid giving ‘practically unlimited’ powers to the EU.

There is therefore a burden on the EU legislator to identify obstacles to the functioning of the internal market before adopting harmonising legislation on the basis of Article 114 TFEU. It is necessary to establish first of all that disparate national laws actually constitute a barrier to free movement or distort competition, and then that EU action actually contributes to the establishment and functioning of the internal market and goes no further. This may require a detailed analysis of the competitive conditions prevailing in a particular sector in order to establish whether an identified obstacle to free movement or competition is appreciable such as to justify EU action. More recently, in Vodafone, the CJEU restated the conditions for utilising Article 114 TFEU as follows:

35 Ibid., para. 83.
36 See above.
37 Germany v Parliament and Council, above, n. 32, para. 84. Emphasis added.
38 Ibid., para. 86.
39 Ibid., para. 84.
40 Ibid., para. 107.
41 C-58/08 The Queen, on the application of Vodafone Ltd and others v Secretary of State for Business, Enterprise and Regulatory Reform [2010] ECR I-4999.
'According to consistent case-law the object of measures adopted on the basis of [Article 114 TFEU] must genuinely be to improve the conditions for the establishment and functioning of the internal market . . . While a mere finding of disparities between national rules and the abstract risk of infringements of fundamental freedoms or distortion of competition is not sufficient to justify the choice of [Article 114 TFEU] as a legal basis, the Community legislature may have recourse to it in particular where there are differences between national rules which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market . . . or to cause significant distortions of competition . . . . Recourse to that provision is also possible if the aim is to prevent the emergence of such obstacles to trade resulting from the divergent development of national laws. However, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them . . .'42

However, with little evidence – Tobacco Advertising itself aside – that the CJEU has found reason to question the validity of measures adopted on the basis of Article 114 TFEU, it can be questioned just how much of a limitation these criteria really are on the possibility for utilising this legal basis.43

It may be thought that the limited – if any – applicability of Article 34 TFEU to contract law rules,44 even in the consumer law field, might rule out any kind of action on the basis of Article 114 TFEU. After all, if a particular provision does not constitute an obstacle to the free movement of goods, how could its existence be a distortion of the competitive conditions for the internal market? Although, in the absence of CJEU case-law addressing this issue, this question remains unresolved,45 the uses to which Article 114 TFEU has been put suggests that its scope is wider, and that harmonisation is possible even though a national rule is not caught by Article 34 TFEU.46

**Consumer contract law and the internal market**

The difficulties of finding sufficient competence in the EU Treaty for adopting legislation in the field of contract law is illustrated by focusing on consumer contract law. When first plans were made for a legislative programme in the
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field of consumer law, the lack of a clear legal basis for this purpose made it necessary to find an alternative existing provision on which consumer law could ‘piggy-back’. The obvious candidate was what was Article 94 EC (now Article 115 TFEU), dealing with the ‘establishment or functioning of the internal market’, and it became the basis for the adoption of consumer protection Directives in the mid-1980s. Only after the Maastricht Treaty of 1992 was consumer policy given a specific legal basis in the Treaty with the addition of Articles 3(s) and 129a (later Articles 3(1)(t) and 153 respectively, now Articles 4(2) TFEU and 169 TFEU). However, a brief look at the legal basis of the various measures on consumer contract law shows that the relevant legal basis was first Article 94 EC (now Article 115 TFEU), and then Article 95 EC (now Article 114 TFEU). The adoption of Directives in the consumer protection field has therefore become inextricably linked with the establishment and functioning of the internal market. This has had an inevitable impact on the scope of the legislation adopted, as it is not primarily concerned with the creation of a coherent body of consumer protection, but rather with harmonising those areas of domestic consumer law where the existing variations were such as to affect the operation of the internal market.

Initially, the use of the predecessors to Article 115 TFEU was simply justified on the basis that ‘. . . legislation differs from one Member State to another [and] any disparity between such legislation may directly affect the functioning of the common market’. This bold assertion that the mere fact that laws are different between Member States was sufficient to harmonise would clearly not withstand scrutiny after Tobacco Advertising. However, it appears that the weakness of this assertion was recognised relatively quickly, and a more sophisticated argument evolved. First, a gloss was added in later Directives, according to which the variation in national laws in the areas covered had the effect of distorting competition, which justified action on the basis of what is now Article 114 TFEU.

However, evidence in support of these assertions remained slender, and a variation on this began to emerge: the idea that consumer confidence in the internal market suffered because of variations in consumer protection. Thus, Directive 90/314/EEC on Package Travel was justified, amongst other things, on the basis of ‘disparities in rules protecting consumers in different Member States are a disincentive to consumers in one Member State from

49 See the recitals to Directive 85/577/EEC on doorstep selling.
50 See e.g. recital 2 of Directive 93/13/EEC on unfair contract terms or recital 1 of Directive 94/47/EC on Timeshare.
buying packages in another Member State . . .’\textsuperscript{51} The ‘consumer confidence’ argument has become the dominant justification for action in the consumer field. The gist of it is that consumer confidence is adversely affected by variations in domestic consumer laws, and that harmonisation is required to boost consumer confidence. On that basis, harmonising consumer laws will encourage consumers to shop in another Member State, safe in the knowledge that businesses elsewhere in the EU must comply with the same rules as apply in consumers’ home Member States. Whether this is really borne out in practice remains to be seen. Scholars have certainly been sceptical about this.\textsuperscript{52} For example, Goode has famously (and somewhat controversially) expressed his reservations thus:

‘This conjures up a vision of a woman from, say, Ruritania, who visits Rome and there, in the Via Condotti, sees a fabulous dress, a dress to die for. She is about to buy it but then caution prevails: I must not buy this dress because I am not familiar with Italian law. Clearly a very sophisticated consumer, and one who by inference is familiar with Ruritanian law.’\textsuperscript{53}

Nevertheless, the consumer confidence argument continues to be advanced in support of legislation adopted on the basis of Article 114 TFEU. For example, the recitals to Directive 2005/29/EC on unfair commercial practices\textsuperscript{54} state that:

‘These disparities cause uncertainty as to which national rules apply to unfair commercial practices harming consumers’ economic interests and create many barriers affecting business and consumers . . . Such barriers also make consumers uncertain of their rights and undermine their confidence in the internal market.’

And more recently, recital 6 to Directive 2011/83/EU on Consumer Rights\textsuperscript{55} states that:

‘Certain disparities create significant internal market barriers affecting traders and consumers. Those disparities increase compliance costs to

\textsuperscript{51} Recital 7 of Directive 90/314/EEC.
\textsuperscript{54} This Directive is not concerned with consumer contract law (see Article 3(2) of the Directive), although there are overlaps with the contract law Directives.
\textsuperscript{55} [2011] OJ L 304/64.
traders wishing to engage in the cross-border sale of goods or provision of services. Disproportionate fragmentation also undermines consumer confidence in the internal market."

So the ‘consumer confidence’ argument is alive and well, despite the doubts that have been expressed about its strength. Just as there may be doubts about the strength of the ‘consumer confidence’ argument,\textsuperscript{56} so one can take issue with the wider suggestion that variations in law are real barriers to trade. In most instances, variations in national law do not make cross-border transactions impossible; rather, they become more costly because of the need to compile information about the law in another Member State. The variations may also make it more difficult for companies to operate across the EU using one set of contract terms and one marketing strategy, but that in itself does not make trade impossible.\textsuperscript{57}

**Consumer protection: Article 169 TFEU**

As mentioned, Article 169 TFEU has been introduced into the Treaty specifically on consumer protection. Article 169(1) TFEU sets out the general objective:

‘In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.’

This needs to be read in combination with Article 12 TFEU, which requires that consumer protection requirements must be taken into account in the context of other EU policies and activities. Consumer protection therefore should assume greater prominence in the context of EU activity generally.

However, as an independent legal basis, Article 169 TFEU is of limited use. Thus, Article 169(2)(a) links the pursuit of consumer protection firmly to the internal market competence in Article 114 TFEU, providing additional legislative competence only for ‘measures which support, supplement and monitor the policy pursued by the Member States’ (Article 169(2)(b)). Such measures must be adopted using the ordinary legislative procedure in Article 294 TFEU, and, crucially, will leave Member States the option of ‘maintaining or introducing more stringent protective measures’ (Article 169(4) TFEU) as

\textsuperscript{56} Although for a more positive view, see S. Weatherill, ‘Reflections on the EC’s Competence to Develop a European Contract Law’ (2005) *European Review of Private Law* 405–418.

long as they are compatible with the Treaty. To date, only one (non-contract law) Directive has been adopted on the specific legal basis in Article 169(2)(b) TFEU. This provision has therefore largely been ignored for consumer law Directives that have been adopted since this legal basis became available.

**A limited competence for Europeanisation?**

The threshold for using the most popular basis to date, Article 114 TFEU, has been raised in the wake of *Tobacco Advertising*, although there has not yet been a challenge to a contract law Directive on this basis. However, it may make it more difficult to adopt further measures in the future. In the consumer law field, the scope of Article 169 TFEU remains unexplored and no proposals for a contract-law measure has been put forward on this basis. The confines of the Treaty provisions granting competence to Europeanise contract law by a ‘top-down’ approach renders this process essentially instrumental to the overarching objective pursued by the EU: the functioning of the internal market. These limitations need to be borne in mind when discussing the substance of the measures adopted thus far.

**Europeanisation by Directives**

The process of Europeanisation by the EU has largely been carried out through the adoption of Directives harmonising particular aspects of the domestic laws of the Member States. The Treaty itself does not use the language of harmonisation but, instead, refers to ‘approximation’ of the laws of the Member States. Harmonisation is not the same as ‘unification’, dealing with selected aspects of a particular area of law, although the extent to which there may be differences in the domestic laws of the Member States after the implementation of a harmonising measure depends on the type of harmonisation pursued by it.

**Legislative procedure**

Measures adopted on the basis of Article 114 TFEU follow the ordinary legislative procedure in Article 294 TFEU. Both the European Parliament and the...
Council of Ministers (representing national governments) must agree to a measure for it to be adopted. All proposals are made by the Commission (Article 294(2) TFEU). Parliament gives the proposal a first reading and may suggest amendments. This becomes the European Parliament’s ‘position’. The Council then considers whether to adopt position agreed by the Parliament. If it wishes to make amendments, it adopts its own position. This is returned to Parliament, together with the Commission’s evaluation of the position. Parliament will then give the amended proposal a second reading (within three months of receiving the communication from the Council/Commission), and may approve or reject the Council’s position. Alternatively, it may make further amendments to the Council’s position. The Commission is then required to give its opinion on the Parliament’s amendments, before the Council reconsiders the proposal. The amended Council position may be adopted by the Council by qualified majority voting, except with regard to those amendments on which the Commission has given a negative opinion; for the latter, unanimity is required. If the Council does not adopt the amended position, a Conciliation Committee comprising Parliament and Council representatives is convened to develop a compromise text. If that fails, or if Parliament and/or Council do not approve the compromise text, the act is not adopted.

The ordinary legislative procedure is the most democratic of the various legislative procedures available at the European level and seeks to ensure that both the elected representatives and the national governments can influence a European act before it becomes law. However, the Commission has considerable control over the process and can influence the substance of proposals, albeit at the risk of losing a proposal altogether.

According to Article 288 TFEU, a Directive is ‘... binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.’ Member States are then obliged to implement a Directive into their domestic laws.

Implementing Directives – general obligations

A Directive only specifies a result to be obtained, requiring Member States’ laws to be amended to ensure that the outcome required by a Directive can be reached under the relevant domestic measures. Member States have the freedom to choose the appropriate ‘form and methods’ to achieve this, and a ‘copy-out’ approach by which the text of a Directive is given effect in domestic law in unamended form is not required. There may be good reasons for not doing so: first, there may be a clash in the terminology used by a Directive and established domestic rules, and adopting a different wording in the

62 Approval results in adoption of the act; rejection will bring the procedure to an end and the act will not be adopted.
implementing legislation might avoid this. Second, the rules contained in a Directive may be difficult to fit into existing domestic legislation, unless these are expressed differently and in a language more suitable for the domestic context. In the context of contract law, this will often be due to the fact that a Directive will only address a small number of matters, leaving important related aspects unaddressed. Third, there may already be domestic legislation which achieves the result required by a Directive, obviating the need for further legislative action.

The CJEU has confirmed that the use of terminology which differs from a Directive, but which does not produce a substantive variation from the Directive is permissible. In addition, the Court has held that:

‘the transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation’

although this is subject to the overriding requirement that domestic legislation must:

‘... guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights...’

Thus, the results-based obligation under Article 288 TFEU does not require the adoption of a dedicated domestic measure, nor is it necessary to adopt the terminology used in a Directive. The ‘general legal context’ could be sufficient, provided that the Directive is applied in a sufficiently clear and precise manner. However, where national law departs from the wording and structure of a Directive, the burden on the Member State to demonstrate compliance with EU Law in such circumstances is a high one.

The additional requirement that individuals are able to ascertain the full extent of their rights could, however, necessitate the adoption of legislation even where the case-law of a Member States has already developed such as to achieve the result required by a Directive. The CJEU has accepted that case-law which applies and interprets domestic legislation is relevant in assessing compliance with EU law, but where such case-law is not

63 See e.g. Case 29/84 Commission v Germany [1985] ECR 1661.
64 Case 363/85 Commission v Italy [1987] ECR 1733.
66 Ibid.
68 E.g. case C-70/03 Commission v Spain [2004] ECR I-7999.
unanimous or sufficiently well established to ensure an interpretation in conformity with EU law, a Member State may be found in breach of its obligation to give full effect to a Directive.\(^{70}\)

Moreover, exclusive reliance on case-law is unlikely to be sufficient. In *Commission v Netherlands*,\(^{71}\) the Commission claimed that the Dutch implementation of the Unfair Contract Terms Directive\(^{72}\) was inadequate, and the Dutch government responded that the relevant provisions of Dutch law were capable of case-law interpretation in accordance with the Directive. The CJEU sided with the Commission and held that:

> ‘... even where the settled case-law of a Member State interprets the provisions of national law in a manner deemed to satisfy the requirements of a directive, that cannot achieve the clarity and precision needed to meet the requirement of legal certainty [which] is particularly true in the field of consumer protection.’\(^{73}\)

From the UK’s perspective, where the doctrine of precedent (*stare decisis*) ensures that case-law has a particularly strong standing, this decision is worrying because it appears to indicate that the existence of case-law, even where settled, reaching the same result as a Directive might not be sufficiently clear and certain to ensure compliance with EU law.\(^{74}\) Consequently, legislation would be required to enshrine the relevant rules of law in statute. However, this does not mean that only verbatim reproduction of the Directive in domestic law would suffice, and more suitable terminology can still be used.\(^{75}\) Nevertheless, whilst the full implications of this judgment remain uncertain, it does point in the direction of codifying even well-established domestic case-law in order to meet the demands of legal certainty. In practice, the UK has tended to implement Directives by adopting free-standing Regulations which largely copy-out the text of the Directive to minimise the risk of being found to have failed to implement a Directive correctly.

The obligations of the Member States will often extend beyond ensuring that domestic provisions are in place which correspond to the rules from a Directive. Harmonising Directives often only deal with selected aspects of the area of law concerned, and there will consequently be gaps which will need to be filled by domestic legislation. Sometimes, such gaps will be acknowledged

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\(^{71}\) Case C-144/99 *Commission v Netherlands* [2001] ECR I-3541.

\(^{72}\) Directive 93/13/EEC.

\(^{73}\) Case C-144/99 *Commission v Netherlands*, above, n. 71, para. 21.


explicitly in the text of a Directive, and require that national legislation is adopted to fill the gap, but not postulate a particular approach. Thus, many Directives may specify that an individual, such as a consumer, is to be given a specific right, but it will be left to domestic law to come up with an appropriate sanction for circumstances where that right has been interfered with.

In other instances, the implementation of a Directive will require that domestic rules which are not directly within the scope of the Directive, but deal with related matters, may have to be amended so as not to undermine the effectiveness of the harmonising measure.

Using Directives for harmonisation, rather than directly applicable Regulations, has the advantage that each Member State can choose the most appropriate means of achieving the required result. Moreover, whilst the same substantive rule will be applicable in every jurisdiction, it will take effect as a provision of domestic law. However, the selective coverage of aspects of contract law can also be problematic, particularly for codified legal systems, because of the difficulties caused by having to amalgamate a European rule with existing national law. Moreover, the effectiveness of Europeanisation by Directive depends heavily on how seriously each Member State takes its obligation to implement the Directive into national law. Unfortunately, instances of incorrect implementation, or even non-implementation, are not uncommon.

Consequence of non-implementation – state liability

If a Member State has failed to implement a Directive properly, action may be taken in accordance with Article 258 TFEU, discussed further below. Also, national courts need to consider if they can interpret and apply national law in such a way as to achieve the outcome required by the Directive. However, if this is not possible, or if a Member State has failed to implement a Directive altogether, there is the possibility for an individual affected by this to bring a claim against the State itself under the principle of state liability. The Francovich and Brasserie du Pecheur line of cases, has established that a Member State may be liable to an individual in circumstances where a rule of EU law has been infringed and:

(i) the rule of law infringed by the Member State concerned was intended to confer rights on individuals;
(ii) the breach by the Member State must be sufficiently serious;
(iii) there must be a direct causal link between the breach of the obligation on the Member State and the damage sustained by the parties.

76 This is known as the doctrine of ‘indirect effect’, considered in more detail in Chapter 5 when dealing with the role of the national courts.

Its application in the context of (consumer) contract law is demonstrated by the case of Rechberger. This case involved Directive 90/314/EEC on Package Travel. Article 7 of the Directive requires, in very broad terms, that the organiser of a package holiday is required to provide ‘sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency’. Austria, which joined the EU in January 1995, had implemented the Directive, but applied the domestic provisions dealing with financial protection only for contracts with a departure date after 1 May 1995. A newspaper had arranged with an organiser for an offer of package holidays at a very low price for its subscribers. The offer was taken up by more people than anticipated, causing financial difficulties for the organiser, and eventually the organiser’s bankruptcy. Some customers were covered by the guarantee scheme which Austria had adopted to comply with Article 7 of the Directive, but the sums paid were insufficient to cover all the money paid by the customers; others were not protected at all because their departure date fell between January and May 1995. As part of their action before the Austrian courts, the claimants argued that Austria was liable under the state liability doctrine. The CJEU held that Austria was in breach by not applying the legislation implementing Article 7 from 1 January 1995, and additionally for not implementing Article 7 fully to ensure that consumers could recover their pre-payments, and that this breach was sufficiently serious. Consequently, as the national court had already indicated that the other criteria for state liability were satisfied, Austria was liable and had to pay compensation.

However, although a claim in state liability is a possibility, it seems unlikely that this will happen regularly. The conditions under which a Member State is liable are not easily satisfied and, often, the damage sustained by an individual may not make it worth their while to pursue such a claim. Nevertheless, the possibility of such action needs to be borne in mind as, in those areas of contract law which have been subject to Europeanisation, an individual will have an alternative remedy in circumstances where domestic law fails to reflect fully the requirements of EU law.

Minimum and maximum harmonisation

As can be seen in Chapter 3, there are two different types to harmonisation: ‘maximum’ and ‘minimum’ harmonisation. Although the implications of both types are most obviously considered from the perspective of national law

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79 This provision is considered again further below.
80 It is conceivable that there may be actions in the consumer contract field if steps towards improving the enforcement of consumer law result in the possibility of collective action, i.e. legal action on behalf of many individual consumers. See Commission, EU Consumer Policy Strategy 2007–2013 (COM (2007) 99 final), p. 11.
(see Chapter 4), a basic explanation of these two concepts is necessary at this stage and before discussing the substance of the various contract law Directives.

**Maximum harmonisation**

A maximum (or ‘full’) harmonisation measure specifies a level of regulation from which the Member States cannot deviate. It is not possible to derogate from this to create a higher level of protection, even where such a higher level would appear to be justified for the protection of particular interests, such as consumers.  

The effect of a maximum harmonisation measure is generally to pre-empt the Member States’ competence to act in the area it covers. However, matters in related areas but falling outside the scope of the harmonising measure are not pre-empted, and Member States continue to have a power to legislate. Establishing the extent of Member States’ freedom to act therefore requires a careful analysis of the scope of a total harmonisation measure to establish the boundaries of the occupied field and therefore the extent to which Member State competence has been pre-empted. In essence, this is a question of construction, or interpretation, of the EU measure concerned.

Moreover, Member States may continue to have a limited power of action within the occupied field, if the harmonising measure itself permits derogation from the EU standard in specific areas. This is frequently done by granting Member States an option whether to adopt a particular rule. However, it is important to appreciate that any permission to derogate from a maximum harmonisation measure is restricted to the specific circumstances set out in that measure, and it will not be permissible to depart from the standard adopted in such a measure in any other respect.

**Minimum harmonisation**

A minimum harmonisation measure will adopt a base-line standard of regulation which all the Member States must attain in their domestic laws. It is not
permissible to fall below the minimum standard. However, in contrast to maximum harmonisation, Member States retain the power to exceed the minimum level and to adopt a higher standard of regulation, subject to the overarching requirement that this must still be compatible with the EU Treaty. Minimum harmonisation therefore does not altogether eliminate divergent national rules, but instead reduces the substantive differences between them by such an extent that the functioning of the internal market is no longer seriously affected. In practice, however, minimum harmonisation only narrows Member State freedom to regulate. Sometimes, the level of regulation adopted in a minimum harmonisation measure is high and the actual freedom left for Member States to adopt higher standards is very limited. Often (and particularly in the context of consumer law), there is considerable scope for divergence between the Member States above the minimum level, which may raise questions about the effectiveness of a particular harmonisation measure: minimum harmonisation does not eliminate the diversity in the laws and regulations between the Member States, but merely serves to reduce its breadth. Differences remain, and may continue to pose a barrier to the functioning of the single market. Of course, this raises the question whether a Member State can require, e.g. a business from another State to comply with higher levels of protection, if that business already complies with the minimum required by the Directive. The bulk of the Directives on consumer protection were adopted as minimum harmonisation Directives, but in view of the continuing variation in the domestic consumer laws and the perceived obstruction to the smooth operation of the internal market this may cause, there was an attempt towards maximum harmonisation (or ‘targeted full harmonisation’), although, as can be seen in Chapter 3, this has not been altogether successful.

**Directives and Europeanisation**

The process of Europeanisation largely involves the approximation, or harmonisation, of national law, rather than the creation of a European layer of contract law, through the adoption of Directives which need to be implemented into domestic law. An obvious problem is that the success of the entire process depends on the degree of compliance by the Member States. Their obligation is first and foremost to ensure that national law fully reflects the requirements of the relevant Directives. However, as can be seen in Chapter 3, Directives do not provide a complete ‘code’, but depend on their effectiveness on related areas of national law, as well as appropriate action by the Member States. Chapter 4 considers how the UK, in particular, has responded to this challenge.

Role of the CJEU

Before turning to the substance of the Europeanisation programme, it is necessary to consider the role of one key actor in the Europeanisation of contract law: the CJEU.\(^87\) In addition to the EU legislature, the CJEU can also affect the development of European contract law, and we have seen that it has fleshed out the obligations of the Member State with regard to the implementation of Directives into domestic law. The CJEU will become involved in the sphere of contract law primarily in two situations: either when asked by a domestic court to give a preliminary ruling on the interpretation of an EU measure under Article 267 TFEU, or in the context of enforcement proceedings taken by the European Commission against a Member State under Article 258 TFEU.

**Preliminary rulings – Article 267 TFEU**

Article 267 TFEU empowers the CJEU to give preliminary rulings, amongst other things, on the interpretation of European legislation at the request of a ‘national court or tribunal’.\(^88\) National courts generally have a discretion to request such a ruling from the CJEU if an answer to a question regarding the interpretation of EU law is necessary to dispose of a case before that court (Article 267(2) TFEU). But if the national court is one ‘against whose decision there is no judicial remedy under national law’ (Article 267(3) TFEU), a preliminary ruling must be sought. However, there is no obligation to request a ruling if a previous decision by the CJEU has already dealt with the same question of interpretation\(^89\) or if the question of EU law is irrelevant. Furthermore, if the ‘correct application of the law is so obvious as to leave no scope for reasonable doubt’,\(^90\) then there is also no need for a reference.\(^91\) In other words, if the national court is of the view that the matter is ‘reasonably clear and free from doubt’,\(^92\) a reference is unnecessary. It can be seen in Chapter 4 that the English courts have frequently taken this view in deciding not to make a reference, sometimes on fairly tenuous grounds.

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\(^88\) Somewhat controversially, this does not include an arbitration panel except where arbitration is compulsory. So in C-125/04 *Denuit v Transorient-Mosaïque Voyages & Cultures SA* [2005] ECR I-923, an arbitration panel set up to resolve disputes, amongst other things, in respect of package holidays was not a ‘court or tribunal’ because the parties were not obliged to refer their dispute to arbitration (para. 16).


\(^90\) Case 283/81 *CILFIT*, ibid.

\(^91\) The latter point is often referred to as *acte clair*.

\(^92\) Per Lord Denning in *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401.
The preliminary rulings procedure is available only to resolve questions of EU law, which includes the interpretation of national law implementing EU legislation. In the field of contract law, the relevant EU Directives tend to deal with certain aspects of the law only, and Member States have some freedom to broaden the scope of their national law beyond that of the corresponding Directive (e.g. by applying legislation to areas not included within the scope of a Directive). In such circumstances, the CJEU has been prepared to give an interpretation of the relevant EU measure, even though the case before the national court fell outside the scope of that measure.\(^9\)

Crucially, where a reference is made, the CJEU has no power to resolve the dispute before the national court; it can merely give guidance on how the relevant provisions of EU law should be interpreted. This is done in the context of the facts about the case provided by the national court when it requests a preliminary ruling, and the CJEU may give some indication how EU law might be applied to those facts.\(^9\) Ultimately, it is for the national court to come to a decision regarding the application of the relevant provisions in light of the CJEU’s guidance to the dispute before it.

With regard to the Europeanisation of contract law, it is through the preliminary reference procedure, in particular, that the CJEU has shaped important aspects of this process. Its rulings in this field have generally helped to clarify the scope of the various Directives in this area although, occasionally, its judgments have raised more questions than were answered.\(^9\) However, whilst the CJEU’s role in this context should only be concerned with the interpretation of legislation, it has sometimes taken a rather liberal view of its jurisdiction which, on occasion, appears to have broadened the scope of EU legislation unexpectedly. The Court’s case-law is considered further in Chapter 4 in discussing the EU’s contribution to contract law to date, but a number of examples here illustrate how the CJEU’s judgments impact on Europeanisation.

For example, the Package Travel Directive (90/314/EEC) requires that the organiser and/or retailer of a package holiday has to provide sufficient evidence of the arrangements they have made to secure the refund of payments made by the consumer as well as the cost of repatriation, in the event of their insolvency (Article 7). Although this has been expressed in slightly odd terms, referring only to the evidence of such arrangements, it seems clear that


\(^9\) On occasion, this has been unequivocal, leaving national courts with little room for departing from the CJEU’s view (e.g. C-206/01 *Arsenal Football Club v Reid* [2002] ECR I-10273), although it may be that the facts are more complicated than stated in the request for the preliminary ruling, giving the national court some leeway in coming to a different conclusion. See also C-392/93 *R v HM Treasury ex parte British Telecommunications plc* [1996] ECR I-1631, where the CJEU effectively resolved the dispute.

\(^9\) See e.g. the body of case-law that has built up under the Doorstep Selling Directive. See Chapter 3, p. 57.
there is an underlying obligation on the retailer/organiser to make suitable arrangements of this kind. In *Dillenkofer*, questions arose over Germany’s implementation of this provision. In particular, it was not at all clear from its wording whether Article 7 was intended to grant individual consumers a specific right guaranteeing the refund of payments they had already made. The CJEU first established that the result to be achieved by this provision was an obligation on the organiser of a package holiday to make suitable arrangements to protect consumers’ pre-payments and to ensure their repatriation in the event of insolvency. The Court went on to say that:

‘The purpose of Article 7 is accordingly to protect consumers, who thus have the right to be reimbursed or repatriated in the event of the insolvency of the organizer from whom they purchased the package travel. Any other interpretation would be illogical, since the purpose of the security which organizers must offer under Article 7 of the Directive is to enable consumers to obtain a refund of money paid over or to be repatriated.’

The argument by the German and UK governments that Article 7 was effectively only an obligation to provide information was rejected on the basis that an obligation to provide evidence ‘necessarily implies that those having that obligation must actually take out such security’; otherwise, the obligation to provide evidence would be ‘pointless’.

On the one hand, the CJEU’s ruling on the meaning of Article 7 is to be welcomed for ensuring that the consumer protection objective pursued by this Directive is given its full effect. On the other hand, the wording of Article 7 appears to have restricted the obligation on the organiser to one of information to the consumer, and a more plausible reading of that provision would have been to say that the obligation exists where such arrangements had been made by the organiser. If the organiser had not put into place any arrangements, he would not be able to provide any evidence to that effect, and the consumer may, on the basis of that information, have chosen not to book that particular holiday, or to run the risk of the organiser becoming insolvent. So an alternative interpretation that could have been reached by the CJEU is that there is an obligation to provide evidence of arrangements ‘where these have been made’. Indeed, had there been an intention of the legislator to make it mandatory for an organiser to put such protection into place, the Directive could have been expected to have been much more precise on this point.

97 Ibid., para. 34.  
98 Ibid., para. 36.  
99 Ibid., para. 41.  
100 Ibid.
One can see, therefore, that the CJEU does, on occasion, take a rather expansive view of what interpretation of legislation might entail, and there is a strong argument that in *Dillenkofer*, the CJEU exceeded its remit and effectively engaged in making the law, rather than merely interpreting it.

*Dillenkofer* is not the only instance where the CJEU’s interpretation is getting perilously close to law-making. In the context of (consumer) contract law, the *Leitner* decision\(^\text{101}\) has become the paradigm of expansive interpretation. This was another case under the Package Travel Directive, this time involving Article 5, which imposes liability on the organiser and/or retailer of a package holiday where there has been an improper performance of the contract. The claimant in that case was a child who became ill with salmonella after eating contaminated food whilst on holiday. This affected much of the holiday and, on returning home, the claimant brought an action for damages to cover both the personal injury suffered and the non-material damage caused by the loss of enjoyment. The Directive does not explicitly refer to non-material loss, and Member States vary as to whether they allow recovery for such loss. The CJEU observed that this variation could constitute a distortion of competition and, as the objective of the Directive was to reduce such distortions in the market for package holidays, a consistent line on the meaning of ‘damage’ had to be adopted.\(^\text{102}\) The Court then observed that:

‘... the fact that the fourth subparagraph of Article 5(2) provides that Member States may, in the matter of damage other than personal injury, allow compensation to be limited under the contract provided that such limitation is not unreasonable, means that the Directive implicitly recognises the existence of a right to compensation for damage other than personal injury, including non-material damage.’\(^\text{103}\)

The court has, in part, taken the harmonising objective of the Directive as a basis for the expansive interpretation of ‘damage’ for the purposes of the Package Travel Directive. The reasoning is not entirely convincing – from a rule which, in effect, prohibits a limitation of damage in the case of personal injury, the court derives a need to give that term a broad interpretation.\(^\text{104}\)

However, despite such apparently expansive views of its jurisdiction under Article 267 TFEU, the CJEU has adopted a more cautious attitude when asked directly to deal with the application of legislation to the facts of a given case. In *Freiburger Kommunalbauten GmBH Baugesellschaft & Co KG v Hofstetter*,\(^\text{105}\)

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102 Ibid., para. 21.
103 Ibid., para. 23.
the CJEU was asked whether a particular term satisfied the fairness test in Directive 93/13/EEC on unfair terms in consumer contracts. The Court declined to do so, noting that:

‘in the context of its jurisdiction under Article [267 TFEU] to interpret Community law, the Court may interpret general criteria used by the Community legislature in order to define the concept of unfair terms. However, it should not rule on the application of these general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question.’

This is entirely in accordance with the Court’s jurisdiction under Article 267 TFEU. However, it has raised questions among commentators about the risks posed to the aim of harmonisation by divergences in how national courts apply a particular provision. A general and flexible provision, such as the unfairness test in the Unfair Contract Terms Directive, leaves a great deal of discretion to national courts, and there is concern that this may result in opposing views on the application of such a provision to a particular case. However, such a view may be overstating the problem: there is invariably a risk with any legal rule that requires a court to use its discretion in applying that rule to the circumstances of a particular case in that two courts, even in the same Member State, may come to conflicting views.

Giving the CJEU a more prominent position in applying the law to individual cases would significantly alter the nature of EU law, and elevate the Court to a supreme court for all the Member States. Whilst those striving for greater uniformity might welcome such an approach, it would be such a fundamental shift in the relationship between national jurisdictions and the EU that it should not be considered seriously at this point in time.

**Enforcement action – Article 258 TFEU**

A further opportunity to provide an interpretation of provisions of EU law may arise in the context of enforcement proceedings under Article 258 TFEU. This empowers the Commission to take action against a Member State which has not complied with its obligations under EU law. One such instance is a failure by a Member State fully to implement a Directive – sometimes by not doing so at all or, as is also often the case, by implementing it incorrectly. The Commission will first persuade the Member State concerned to bring its national law into line, but if its attempts are unsuccessful, it can ask the Court...
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to declare that the Member State concerned has failed to fulfil its obligations under EU Law.

Where a case comes before the CJEU, the Court will have an opportunity to give its views on how the relevant provision of EU law should be interpreted in order to establish whether the Member State concerned is in breach of its obligations. For example, if a Member State relies on legislation that existed before a Directive was adopted, the CJEU has to consider what the EU measure means before comparing this to the corresponding national law.  

However, as such rulings are handed down without the factual context of a specific dispute, unlike judgments under Article 267 TFEU, the interpretation of a specific provision of EU law is usually of a more general nature. In addition, the Commission has tended to focus on how the provisions from a Directive have been transposed into domestic law, without necessarily considering more closely whether the objective pursued by a Directive has been fully attained. Its focus is largely on textual correspondence. The CJEU has similarly not looked much beyond finding correspondence, or preferably equivalence, between the text of a Directive and the text of the implementing legislation. However, a lack of congruence in form may not inevitably mean that the result in applying the domestic rules by the national courts will fail to achieve the result prescribed by the Directive. This is particularly so where legal terminology is used which has not been defined in a Directive and where there are differences in the national understanding of such terminology.

If the CJEU finds that a Member State is in breach, changes must be made to national law to bring this into line with EU law. A continuing failure to do so may result in further proceedings before the court under Article 260 TFEU, and the CJEU may then impose a financial penalty on the Member State.

Conclusions – the role of the CJEU

The CJEU clearly has a central role to play in the Europeanisation of contract law, and, through its judgments on the interpretation of the Directives in the field of contract law, it clarifies the impact EU legislation in this sphere has. However, the CJEU has, on occasion, pushed the boundaries of its powers to interpret legislation to its limits (and, as some may argue, beyond), and has thereby engaged in law-making. Nevertheless, the CJEU’s essential role as the body charged with the interpretation, rather than application, of

110 E.g. C-144/99 Commission v Netherlands, above, n. 71 (unfair contract terms).


EU law allows it to make important contributions to the Europeanisation of contract law.

**Conclusion**

This chapter has sought to provide an overview of the framework within which the process of Europeanisation takes place. The EU’s competence in this field is not unfettered, although quite where the limits are remains to be explored. Despite these constraints, the impact of EU law can be felt in many areas of contract law. Chapter 3 turns to examine the contribution made by the various EU measures in this field.
3 Europeanisation – the story so far

Introduction

The purpose of this chapter is to provide an overview of the impact EU law has had on contract law to date. Essentially, this is in the form of a discussion of the acquis communautaire on contract law, taking into account any relevant case-law from the CJEU. However, it is not the objective of this chapter to offer an exhaustive account of all the features of each of the various measures adopted thus far; rather, the chapter explains how EU measures have affected the various stages of the contracting process: the pre-contractual phase; contract formation and validity; the substance of the contract; performance; and remedies. In respect of each of these, it is possible to identify relevant EU law, although it will soon become clear that the current pattern of Europeanisation of contract law can be characterised as rather patchy.

It is also possible to divide the acquis broadly into consumer and non-consumer measures, although the allocation of a particular measure to either area is likely to be somewhat arbitrary. One criterion for making a distinction was to regard those measures which fell within the responsibilities of DG SANCO, the directorate-general in charge of consumer protection, as ‘consumer law’, and those which were the responsibility of other directorates-general (especially DG MARKT, the directorate-general for the internal market) as ‘non-consumer’ measures. However, since 2010, the lines of responsibility have been blurred, with DG JUSTICE taking over the responsibility for some of the measures previously within the domain of DG SANCO. Measures discussed in this chapter fall into three broad categories: first, there are those squarely focusing on consumer law; second, there are measures which have a wider aim, but contain consumer-relevant provisions; and, third, there is a small number of measures which apply only to non-consumer (i.e. business) contracts.

So whilst the consumer Directives have been the driving force for the Europeanisation of contract law, this process has not been of exclusive concern for consumer law. Nevertheless, even a cursory examination of the *acquis communautaire* soon reveals that the impact of Europeanisation has largely been felt in respect of consumer contracts; even the few measures outside the field of consumer law are generally concerned with protecting a party to a transaction which is thought to have a noticeably weaker bargaining power than the other party. What has been lacking so far is a wider attempt to Europeanise (i.e. harmonise) core areas of contract law.3

This chapter provides an overview of Europeanisation as it has happened so far. The focus in this chapter is on the contract law elements of the various Directives, and other matters also regulated in these measures are not discussed at all, or only mentioned in passing.

### Areas not covered

Defining what constitutes the contract law *acquis* is an inexact science, and one may disagree as to which areas of law should be included.4 For present purposes, several areas are excluded outright. These include public procurement and services of general interest.5 An emerging area which may eventually add significantly to the landscape of European contract law is the field of travel law,6 most famous for Regulation 261/2004 on denied boarding and overbooking,7 a significant addition to the arsenal of consumer protection instruments, albeit a controversial one.8 In addition, there are now Regulations on the rights and obligations of rail passengers9 and of sea and inland waterway passengers.10 The implications of these provisions for the Europeanisation of contract law are not considered further here.11

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3 Although see the discussion in Chapter 6 on the idea of an optional instrument and the proposal for a Common European Sales Law.
Another field which may have a significant impact on contract law is non-discrimination. Although Directives in this field are largely concerned with employment law, two Directives are of broader application: Directive 2000/43/EC on equal treatment between persons irrespective of racial or ethnic origin, and Directive 2004/113/EC on equal treatment between men and women in the access to and supply of goods and services. Both Directives have an effect on contract law; indeed, non-discrimination is perhaps one of the EU’s noteworthy contributions to contract law. Again, these are not considered in depth in this chapter.

Unfair commercial practices

One particular consumer law Directive is also not discussed in depth: Directive 2005/29/EC on Unfair Commercial Practices (UCPD). The UCPD introduces a prohibition of all unfair commercial practices in consumer transactions. A ‘commercial practice’ is defined as ‘any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers’ (Article 2(d)), which covers activities both before and after the conclusion of a contract. The Directive therefore provides a means of policing the behaviour of traders when dealing with consumers. Around 30 practices, listed in Annex I to the UCPD, are prohibited outright, but all commercial practices can be assessed against a general clause (Article 5(2)). The general clause is supplemented by Article 6 (prohibiting misleading actions, including false information, or deceptive information relating to various matters listed); Article 7 (misleading omissions) and Article 8 (aggressive commercial practices involving harassment, coercion or undue influence). According to Article 3(2), this Directive is ‘without prejudice to contract law and, in particular, to the rules on the validity

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formation or effect of a contract’. Crucially, this does not mean that national (or EU) contract law rules must not be influenced by the UCPD, but merely that there is no obligation under the Directive to make changes to contract law. Indeed, the UCPD does not contain any provisions which can be relied upon directly by consumers against a trader – so under the Directive, there is no individual right of redress for a consumer against a trader where the trader has been involved in an unfair commercial practice towards that consumer.

However, the UCPD can still have an indirect effect on contract law, e.g. by influencing the manner in which some of the contract law Directives are interpreted.\(^\text{18}\) Thus, it is now accepted that a finding that a commercial practice was unfair could be one (but not a conclusive) factor in determining whether a term is unfair under the Unfair Contract Terms Directive (see below).\(^\text{19}\) However, a finding that a commercial practice is unfair does not affect the validity of a particular contract term, or the contract as a whole.\(^\text{20}\)

Also, in view of the proximity of some of the UCPD’s concepts to doctrines of national contract law, there could be a progressive adjustment of contract law to follow the pattern of the UCPD.\(^\text{21}\)

Overview – key Directives

The consumer acquis

Before turning to the substantive provisions, it is useful to set out the Directives in the field of consumer contract law which have been adopted to date.\(^\text{22}\) In essence, there are two types of Directives: those dealing with particular marketing or selling methods and those focusing on specific types of contract. From the short overview, it can be seen that many of the Directives falling into the first category contain many exclusions from their scope, some of which have given rise to litigation. These exclusions are not consistent across the Directives.

These Directives were adopted over a 20-year period, and it is easy to tell how their drafting has evolved, not only in terms of detail but also in response to developments in marketing practices and, of course, the rise of electronic commerce. The early Directives all adopted a minimum harmonisation

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20 Article 3(2) UCPD, and see C-453/10 Jana Pereníčová and Vladislav Pereníč v SOS financ spol. s r. O, ibid., paras 45–46.
approach, i.e. Member States were free to introduce or maintain provisions in the field covered by a Directive which granted consumers a higher level of protection. More recent Directives have moved away from this approach towards full or maximum harmonisation. Indeed, the European Commission stated that its preferred approach in the consumer law field would be full harmonisation wherever possible.\(^2\) It undertook a process of reviewing the existing acquis with a view to improving the current Directives and moving towards full harmonisation in areas where there has previously only been minimum harmonisation. As part of this process, a research study was commissioned to examine how eight consumer law Directives were implemented into the domestic laws of 27 EU Member States. This revealed that there were noticeable variations in the national laws even after harmonisation, not helped by the fact that there were also many shortcomings in transposing these Directives.\(^2\) The findings of this study informed the preparation of a Green Paper on the Review of the Consumer Acquis, published in February 2007.\(^2\) This, in turn, resulted in a very ambitious proposal for a Directive on Consumer Rights in October 2008. The proposal was based on a full harmonisation standard, and would have brought together four existing Directives (on doorstep selling, distance selling, unfair terms and consumer sales) in one new measure, together with additional rules on delivery and risk. Unsurprisingly, the proposal resulted in intense academic debate, both about the substantive changes to existing law and the policy shift towards full harmonisation.\(^2\) The proposal to adopt a broad full harmonisation approach was largely treated with scepticism and received very little support from legal scholars.\(^2\) Some were willing to concede that selective, or targeted, full harmonisation of a few aspects could be achieved, but nothing as extensive as had been proposed by the Commission.\(^2\) It was therefore not surprising that the proposal had a rough ride through the legislative stages, and when a new Commission took office in 2010, responsibility for the proposal was transferred from DG SANCO to DG JUSTICE. The new Justice Commissioner, Viviene Reding, conceded that a broad full harmonisation approach would not succeed, although she also noted that ‘targeted harmonisation where it is


practical should still be pursued. After some tussling during the legislative process, political agreement on a Consumer Rights Directive (CRD) was secured in June 2011. The final Directive no longer makes any changes to the Directives on unfair contract terms or consumer sales; it is largely restricted to standardising pre-contractual information duties and the right of withdrawal in ‘off-premises’ and ‘distance’ contracts.

One of the perennial difficulties with the various Directives has been a degree of inconsistency in the definition of key concepts (such as ‘consumer’ and ‘seller’ or ‘trader’) and terminology (such as ‘durable medium’). Although the CRD was initially conceived of as a ‘horizontal measure’ which would standardise many definitions, this has not, in fact, happened with the Directive as adopted. Whilst this is a problematic issue, this chapter does not examine the various definitions and terminology in any detail.

Key Directives – overview

Before this chapter examines the impact of the substantive provisions of the various Directives on contract law, it is necessary to outline, in broad terms, the scope and purpose of the various Directives.

The first two Directives mentioned are those on ‘doorstep selling’ and ‘distance selling’. Both have been repealed by the CRD. However, they are retained for the discussion in this chapter because of their contribution to the overall process of Europeanisation of contract law, not only with regard to the specific matters covered in those Directives, but also the case-law to which both have given rise (some of which was subsequently taken on board in the CRD).

Doorstep Selling (85/577/EEC)

Among the first contract law Directives was the ‘Doorstep Selling’ Directive, which is a minimum harmonisation measure (Article 8). It applies to

31 See Schulte-Nölke, Twigg-Flesner and Ebers, op. cit., n. 24, parts 4A and 4B.
32 The Directive is a very basic measure, ostensibly designed to contribute to the operation of the common market. However, in light of the threshold established in the Tobacco Advertising jurisprudence, the argument put forward in the recitals that the laws on doorstep selling varied between the Member States and that approximation was therefore required, is, at best, unconvincing: S. Weatherill, EU Consumer Law and Policy, 2nd edn. Cheltenham: Edward Elgar, 2006 describes it as ‘extraordinarily terse’ (p. 94). See also Anonymous, ‘On the Way to a European Contract Code?’ (editorial comments) (2002) 39 Common Market Law Review 219–255: 222.
34 Total bans on doorstep selling may therefore be justified, unless they conflict with the Treaty: Case 382/87 Buet v Ministere Public [1989] ECR 1235.
contracts concluded between a consumer and a trader (or anyone acting on behalf of, or in the name of, the trader\textsuperscript{35}) for the supply of goods or services,\textsuperscript{36} which are concluded either during an excursion organised by a trader away from his business premises, or where the trader has visited the consumer’s home (or that of another consumer), or the consumer’s place of work, and that visit has not been requested expressly by the consumer (Article 1(1)). Furthermore, if the consumer did invite the trader, but the contract is for goods or services in respect of which the consumer had no knowledge, or could not reasonably have had the knowledge, that the trader also supplied these, the Directive also applies (Article 1(2)). However, a number of contracts are excluded from its scope, including those which relate to the construction, sale or rental of immovable property, as well as contracts for other rights relating to immovable property\textsuperscript{37} — although contracts for the repair of such property are included (Article 3(2)(a)).\textsuperscript{38} Insurance contracts (Article 3(2)(d)), contracts for securities (Article 3(2)(e)), and those for the supply of foodstuffs, beverages and other goods for current consumption which are supplied by regular roundsmen (Article 3(2)(b)), are also excluded. Contracts concluded on the basis of a catalogue which the consumer can read without the trader being present, in respect of which there is to be continuity of contact between trader and consumer, and which provides information about the right to cancel within 7 days, are also not covered by the Directive (Article 3(2)(c)). Lastly, Member States are given the option to apply the rules from the Directive only to contracts for which the consumer would have to pay at least €60.

\textsuperscript{35} It has been held that where a third party is acting on behalf of the trader, the trader need not know that the particular contract was concluded in circumstances to which the Directive applies: C-229/04 Crailsheimer Volksbank v Conrads and others [2005] ECR I-9273.

\textsuperscript{36} It has been held that the latter term includes a contract guaranteeing the repayments under a credit contract, but also that the Directive does not cover contracts of guarantee entered into by a consumer where the corresponding credit is between a bank and a business: C-45/96 Bayerische Hypotheken- und Wechselbank AG v Dietzinger [1998] ECR I-1199. Cf. N. Bamforth, ‘The Limits of European Union Consumer Contract Law’ (1999) 24 European Law Review 410–418.

\textsuperscript{37} But a contract which includes a timeshare agreement may be within the scope of the Directive if the contract also covers the provision of services of a higher value than the timeshare right: C-423/97 Travel Vac SL v Sanchis [1999] ECR I-2195.

\textsuperscript{38} Loans secured on an immovable property are essentially credit agreements, and the creation of the security over immovable property is insufficient for the exclusion to apply: C-481/99 Heininger v Bayerische Hypo- und Vereinsbank AG [2001] ECR I-9945.
Distance Selling (97/7/EC)

The Directive on Distance Selling[^39] also concerns a selling method, but also contains provisions on contract performance.[^40] It is also a minimum harmonisation Directive (Article 14). It applies to contracts which are concluded exclusive by means of distance communication (Article 2(1)), i.e. means which are used without the simultaneous presence of the supplier and consumer to conclude a contract (Article 2(4)). However, once again, not all contracts are covered, and there is a list of exclusions.[^41] Key exclusions are contracts for the construction and sale of immovable property; those relating to other rights in immovable property, with the exception of rentals; and contracts concluded at an auction (Article 3(1)). The rules on the provision of information (Articles 4–5), the right of withdrawal (Article 6), and the obligation to perform within 30 days (Article 7(1)) do not apply to contracts for the supply of foodstuffs, beverages or other goods intended for immediate consumption supplied to the consumer’s home or workplace by regular roundsmen; nor do these apply to contracts for accommodation, transport,[^42] catering or leisure services where a specific date or period for performance is fixed at the time of concluding the contract (Article 3(2)).

Consumer Rights Directive (2011/83/EU)

As mentioned, both the Doorstep and Distance Selling Directives have been repealed by the CRD,[^43] which introduces a new standardised set of pre-contractual information obligations, as well as a single set of rules on the right of withdrawal. The CRD applies to any contract concluded between a consumer and a trader, be it a contract of sale, for the supply of services, or for the supply of digital content. In the CRD, ‘consumer’ is defined as ‘any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession’.[^44] In order to deal


[^40]: Other provisions deal with exempting a consumer from having to pay for unsolicited goods or services (inertia selling; Article 9; note that inertia selling was prohibited under Directive 2005/29/EC on Unfair Commercial Practices, para. 29 of Annex I) and restrictions on the use of automated calling systems and fax machines without having obtained prior consent from a consumer (Article 10).

[^41]: See Article 3 for the full list.

[^42]: Which has controversially been held to include contracts for hiring a car: C-336/03 easyCar (UK) Ltd v Office of Fair Trading [2005] ECR I-1947.


[^44]: Article 2(1).
with an issue which has arisen in CJEU case-law, the situation where a contract is concluded by a natural person for items which could be used partly for personal and partly for professional purposes is covered in recital 17: 'however, if the contract is concluded for purposes partly within and partly outside the person’s trade (dual purpose contracts) and the trade purpose is so limited as not to be predominant in the overall context of the supply, that person should also be considered as a consumer'.

A ‘trader’ is ‘any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive’. Although the CRD applies to all consumer contracts, many of its provisions, particularly on pre-contractual information and the right of withdrawal, apply only to off-premises and distance contracts. According to Article 2(8), an ‘off-premises contract’ is:

any contract between the trader and the consumer:

(a) concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader;
(b) for which an offer was made by the consumer in the same circumstances as referred to in point (a);
(c) concluded on the business premises of the trader or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the business premises of the trader in the simultaneous physical presence of the trader and the consumer; or
(d) concluded during an excursion organised by the trader with the aim or effect of promoting and selling goods or services to the consumer.

‘Business premises’ are ‘(a) any immovable retail premises where the trader carries out his activity on a permanent basis; or (b) any movable retail premises where the trader carries out his activity on a usual basis’ (Article 2(9)). The definition of ‘off-premises contract’ is a broader definition than that of the Doorstep Selling Directive. It is worth noting that there is no longer a distinction made between solicited and unsolicited visits – all contracts concluded off-premises are covered. Also, paragraph (c) addresses a situation

45 See, in the context of Articles 13–15 of the ‘Brussels’ Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [1978] OJ L 304/36 in C-464/01 Johann Gruber v BayWa AG [2005] ECR I-439. It held that in the context of a dual purpose contract, the trade or professional purpose must be ‘so limited as to be negligible in the overall context of the supply’ and that it was irrelevant whether the private element was dominant.
which would otherwise have allowed a trader to turn what would generally be an ‘off-premises’ contract into an ‘on-premises’ situation in a rather artificial manner.

A ‘distance contract’ is ‘any contract concluded between a trader and a consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded’ (Article 2(7)). Thus, for there to be a distance contract: (i) the trader must operate an organised distance selling scheme; (ii) consumer and trader do not meet face-to-face until the contract has been concluded; and (iii) the contact between trader and consumer must be entirely through means of distance communication until the contract has been concluded. The basic definition is supplemented by the following explanation in recital 20:

‘[The definition] should also cover situations where the consumer merely visits the business premises for the purpose of gathering information about the goods or services and the subsequent negotiation and conclusion of the contract takes place at a distance. By contrast, a contract which is negotiated at the business premises of the trader and finally concluded by means of distance communication should not be considered a distance contract. Neither should a contract initiated by means of distance communication, but finally concluded at the business premises of the trader be considered a distance contract. Similarly, the concept of distance contract should not include the reservations made by a consumer through a means of distance communications to request the provision of a service from a professional, such as in the case of a consumer phoning to request an appointment with a hairdresser. The notion of an organised distance sale or service-provision scheme should include those schemes offered by a third party other than the trader but used by the trader, such as an online platform. It should not, however, cover cases where websites offer purely information on the trader, his goods and/or services, and how the trader can be contacted.’

One unusual situation mentioned here is where a consumer visits the trader’s premises to browse goods but then negotiates and concludes the entire contract at a distance. This could be treated as both a ‘distance’ and an ‘on-premises’ contract, although it has features of both. So this clarification avoids a potential doubt about the scope of this provision. It is worth noting that there is no definition of ‘organised distance selling scheme’ in the CRD. It seems that it is necessary that the trader concludes contracts at a distance with a degree of regularity or as an integral part of his business activities. A website which can be used to place orders would undoubtedly satisfy this definition, as would a catalogue which contains an order form which the consumer completes and returns by post, fax or as a scanned email attachment.
Both the Doorstep and Distance Selling Directives excluded a number of contracts from their scope. In the CRD, there is a fairly lengthy list of exclusions in Article 3, some of which are familiar from earlier Directives, whereas others are new and deal with specific types of contract. Moreover, a fairly long list of additional types of contract in respect of which there is no right of withdrawal is found in Article 16. What is worth noting is that Article 16 is expressed in mandatory terms (‘Member States shall not provide for the right of withdrawal . . .’), which is due to the full harmonisation nature of the CRD. Member States are now precluded from extending the right of withdrawal to contracts covered by Article 16. Taken together, both Articles restrict the scope of the various rights provided in the CRD.

_Distance Marketing of Financial Services (2002/65/EC)_

When the Distance Selling Directive was adopted, the provision of financial services was excluded from its scope, and the Distance Marketing of Financial Services Directive\(^47\) was adopted in September 2002 to fill this gap. This Directive, unlike many other consumer Directives is therefore a maximum harmonisation Directive. To a large extent, it mirrors the framework of the Distance Selling Directive, and there are many corresponding provisions (e.g. on inertia selling (Article 9) and restrictions on automated calling systems (Article 10)). Indeed, the definitions of the essential concepts, such as ‘distance contract’ and ‘means of distance communication’, are aligned. The Directive only applies to financial services sold at a distance, although the definition of such services is broad, covering ‘any service of a banking, credit, insurance, personal pension, investment or payment nature’ (Article 2(b)).

_Unfair Contract Terms (93/13/EEC)_

Unlike the Directives mentioned so far, the Unfair Contract Terms Directive\(^48\) directly affects the substance of all contracts concluded between a consumer and a seller or supplier (Article 1(1)).\(^49\) It renders ineffective all non-negotiated terms which fail to meet its standard of fairness.

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\(^46\) Emphasis added.  
\(^49\) According to recital 10, contracts of employment, contracts relating to succession rights, contracts relating to rights under family law, and contracts relating to the incorporation and organisation of companies, and partnership agreements, are excluded from the scope of the Directive.
A further Directive dealing with a particular type of contract is the Package Travel Directive. This is also a minimum harmonisation measure (Article 8). The definition of ‘consumer’ for the purposes of this Directive is unusually broad, covering not only the person who buys the package, but also other beneficiaries under the package and any person to whom the original purchaser transfers the package (Article 2(4)). This broadens the level of protection beyond the immediate parties to any package travel contract, and is therefore an exception to the principle of privity of contract.

A package is a pre-arranged combination of at least two of accommodation, transport and other tourist services not ancillary to transport and accommodation, offered or sold at an inclusive price, covering a period of at least 24 hours or including overnight accommodation (Article 2(1)). Whether an arrangement is a package is determined when the contract is made; consequently, a package put together at the request of a consumer is also covered. Invoicing the various components separately will not take the arrangement outside the scope of the Directive. Although largely concerned with providing pre-contractual information, it also contains several provisions on performance.

The Directive which has undoubtedly had the greatest impact on contract law to date is the Consumer Sales Directive. It contains rules on the conformity of goods sold to consumers with the contract of sale, and remedies which a consumer can exercise against a seller if goods do not conform. There is also a provision dealing with consumer guarantees. It applies to contracts for the sale of consumer goods (‘any tangible movable item’ with the exception of: (i) goods sold by execution or otherwise by authority of law; (ii) water and gas when not ‘put up for sale’ in a limited volume or quantity; and (iii) electricity (Article 1(2)(b)). Although there is no complete definition of sale, Article 1(4) states that sales include ‘contracts for the supply of consumer goods to be manufactured or produced’, and Article 2(5) extends the Directive’s provisions to contracts for the supply and installation of goods ‘if installation forms part of the contract of sale . . . and the goods were installed by the seller.

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or under his responsibility'. Member States may exclude second-hand goods sold at public auction where consumers have the opportunity of attending the sale in person from the scope of the definition of 'consumer goods' (Article 1(3)).

**Consumer Credit (2008/48/EC)**

A Directive on aspects of consumer credit was first adopted in 1987, but market developments and a desire to deepen the level of regulation made it necessary to adopt a new Directive. The new Directive deals with pre-contractual and contractual information, the Annual Percentage Rate (APR) of interest, a right of withdrawal, and contains provisions on the early repayment of credit. Most provisions are intended to be of a full harmonisation standard (in contrast to the earlier Directive, which was a minimum harmonisation Directive). It applies to a wide range of credit agreements for amounts between €200 and €75,000 (cf. Article 2(2)(c)), which are agreements 'whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a loan, or other similar financial accommodation' (Article 3(c)), although it excludes 'budget-plan'-style arrangements often used for paying for utility services such as gas or electricity. However, a range of credit agreements are excluded from the scope of the Directive, including mortgages (Article 2(2)(a)), those relating to property interests in land (Article 2(2)(b)), hire-purchase and leasing agreements (Article 2(2)(d)), overdrafts to be repaid within one month (Article 2(2)(e)), credit on which no interest is charged (Article 2(2)(f)), credit granted by an employer (Article 2(2)(g)), deferred repayments (Article 2(2)(j)), pawn-brokering (Article 2(2)(k)) and several less common arrangements.

**Timeshare (2008/122/EC)**

A Directive dealing with timeshares was first introduced in 1994, but in view of the changing nature of the market for timeshares and similar product, a new Directive was adopted in 2008. It now applies to timeshare contracts ('a contract of a duration of more than one year under which a consumer, for

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consideration, acquires the right to use one or more overnight accommodation for more than one period of occupation’ (Article 2(1)(a)), long-term holiday product contracts (‘a contract of a duration of more than one year under which a consumer, for consideration, acquires primarily the right to obtain discounts or other benefits in respect of accommodation, in isolation or together with travel or other services’ (Article 2(1)(b))), resale contracts (‘a contract under which a trader, for consideration, assists a consumer to sell or buy a timeshare or a long-term holiday product’ (Article 2(1)(c))), and exchange contracts (‘a contract under which a consumer, for consideration, joins an exchange system which allows that consumer access to overnight accommodation or other services in exchange for granting to other persons temporary access to the benefits of the rights deriving from that consumer’s timeshare contract’ (Article 2(1)(d))). The Directive provides for a number of rules regarding the marketing and sale of such contracts, primarily through detailed information requirements and the availability of a right of withdrawal.

**Beyond consumer law**

The Directives mentioned above are all part of the consumer *acquis*. However, as already noted, whilst much of the Europeanisation of contract law has occurred in the sphere of consumer contracts, EU law has occasionally tackled non-consumer contracts, or adopted measures which contain incidental rules on consumer contracts. The most significant measures are set out below.

**Commercial agency (86/653/EEC)**

One of the earliest Directives in the field of contract law is the Directive on commercial agents. A commercial agent is a ‘self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person . . . called the “principal” or to negotiate and conclude such transactions on behalf of and in the name of that principal’ (Article 1(2)). The Directive deals with the respective rights and obligations of principal and agent; the agent’s remuneration, and aspects relating to the conclusion and termination of the agency contract. Similar to the consumer protection Directives, it has been held that its provisions are mandatory and cannot be evaded through the choice of a non-Member State law where the commercial agent operates in an EU Member State.

60 This includes authority to conclude a single contract which is extended, if the agent had continuing authority to negotiate extensions: C-3/04 Poseidon Chartering v Zeeschip [2006] ECR I-2505.
Electronic Commerce (2000/31/EC)

The so-called E-Commerce Directive is primarily concerned with the free movement of ‘information society service providers’, and deals with matters such as their establishment, the use of commercial communications, contracts concluded by electronic means, and the liability of intermediary service providers. This measure also contains several provisions of relevance to the process of contract formation by electronic means.

Insurance Mediation (2002/92/EC)

Largely concerned with setting out basic rules for the taking-up and pursuit of insurance and reinsurance mediation (Article 1), this Directive also contains some pre-contractual information obligations.

Life Assurance (2002/83/EC)

The Directive on Life Assurance largely focuses on harmonising the regulatory conditions regarding life assurance businesses. Chapter 4 of Title 3 of the Directive (Articles 32–36) contains provisions specifically on contract law.

Services (2006/123/EC)

Controversial whilst it made its way through the legislative process, the Services Directive is primarily concerned with the freedom of establishment of service providers and the free movement of services. A short section on the ‘quality of services’ has some impact on contract law in that it requires that certain information is given before a contract is concluded.

Payment Services (2007/64/EC)

This Directive, which replaces an earlier Directive on cross-border credit transfers, applies to both consumer and non-consumer contracts. If one

64 Article 32 deals with the law applicable to the insurance contracts, and Article 34 with a prohibition on prior approval of policy conditions and scales; neither is relevant for present purposes.
contracting party is a consumer, then many of the rules, such as those imposing information duties, are mandatory; in a business-to-business (B2B) context, they are only default rules. The Directive applies a broad range of payment services (such as payments into and withdrawals from accounts and fund transfers, as well as the use of credit cards (Article 4 and Annex)), although certain transactions are excluded (e.g. payment in cash, charitable collections, cash-back, cash machines (ATM), and others (Article 3 contains a detailed list of exclusions)). The Directive is rather technical in how it deals with the regulation of payment services, dealing first (Articles 5–22) with the general requirements imposed on payment service providers (defined in Article 1), and then with various aspects regarding the payment service itself. Many of these rules deal with the contractual rights between a payer (i.e. the person who asks for a payment to be made) and the payment service provider. These relate to both the provision of information at various stages of the transaction as well as the performance of a payment transaction. To a large extent, these rules are adopting a full harmonisation standard, and they do not permit Member States to derogate (although the contracting parties may agree more favourable terms and conditions to payment service users than those required by law (Article 78(3)).

**Late Payment of Commercial Debts (2011/7/EU)**

A matter of some concern in commercial transactions has been delay in payment, particularly for small and medium-sized enterprises (SMEs). A Directive on late payment was first adopted in 2000, but this was replaced by an updated Directive in 2011. This Directive therefore puts into place rules that deal with late payment, i.e. payment which has not been made within the ‘contractual or statutory period of payment’ (Article 2(4)), in the context of commercial transactions (‘transactions between undertakings, or between undertakings and public authorities, which lead to the delivery of goods or the provision of services for remuneration’ (Article 2(1))).

**Pre-contractual phase**

A hallmark of many European contract law measures is that they contain detailed rules affecting the period leading up to the conclusion of a contract, particularly through the imposition of pre-contractual information duties (PCIDs). This is the case with both consumer and non-consumer specific measures. There are various Directives which contain PCIDs. Some of these

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merely state the items of information that must be provided, to which others add rules on the form in which this is given, and others still expressly refer to the language to be used. The field of PCIDs is one where the EU has been the most active.

Content of information

In the (now repealed) Doorstep Selling Directive, the only item of pre-contractual information that needed to be given relates to the right of withdrawal.\(^{70}\) The (also repealed) Distance Selling Directive contained more detailed obligations on pre-contractual information. Thus, the supplier had to provide the consumer with certain items of information before a contract is concluded (Article 4): (i) the supplier’s identity, and, where pre-payments are required, his address; (ii) main characteristics of the goods or services; (iii) price, including all taxes; (iv) delivery costs, where appropriate; (v) arrangements for payment, delivery or performance; (vi) where it is available, the existence of the right of withdrawal; (vii) the cost of using the means of distance communication if it varies from the basic rate; (viii) period during which the offer/price remain valid; and (ix) the minimum duration of the contract, where the goods or services are to be supplied permanently or recurrently. In the case of telephone communications, there is an additional obligation on the supplier to make clear his identity and the commercial purpose of the call (Article 4(3)).

These requirements have now been replaced by those in the CRD. In addition, the CRD also contains a requirement to provide pre-contractual information in contracts other than off-premises/distance contracts. This is found in Article 5(1), which requires that information is given before a consumer is bound by a contract (or any corresponding offer) on:

(a) the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services;

(b) the identity of the trader, such as his trading name, the geographical address at which he is established and his telephone number;

(c) the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;

(d) where applicable, the arrangements for payment, delivery, performance, the time by which the trader undertakes to deliver the goods or to perform the service, and the trader’s complaint handling policy;

\(^{70}\) See below.

\(^{71}\) There are restrictions on the right of withdrawal imposed by Article 6(3); see below.
(e) in addition to a reminder of the existence of a legal guarantee of conformity for goods, the existence and the conditions of after-sales services and commercial guarantees, where applicable;

(f) the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;

(g) where applicable, the functionality, including applicable technical protection measures, of digital content;

(h) where applicable, any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of.’

This information must be given in a clear and comprehensible manner. It must only be provided to the extent that the information is not ‘already apparent from the context’. If goods are bought in a shop, a lot of the information will, presumably, be apparent from the context already. In addition, with regard to ‘day-to-day transactions’, which are ‘performed immediately at the time of their conclusion’, Member States have the choice not to require that information is provided as required by this Article.\(^{72}\) There is no guidance as to which transactions would be covered by this — Article 3(3) already excludes contracts under which a trader regularly delivers ‘foodstuffs, beverages or other goods intended for current consumption in the household’ from the scope of the Directive altogether. So the permission to derogate from Article 5(1) must relate to other types of everyday transactions. Presumably, daily groceries purchases, as well as drinks and food bought in cafes, and newspaper purchases would be covered. Moreover, in a departure from the ‘full harmonisation’ character of the CRD, Member States retain the freedom to provide additional pre-contractual information duties with regard to contracts covered by Article 5.

With the focus of the CRD on distance and off-premises contracts, there is a separate and more detailed list of items of pre-contractual information which must be provided to a consumer, again in a clear and comprehensible manner. Thus, Article 6(1) requires that the following information is given:

‘(a) the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services;

(b) the identity of the trader, such as his trading name;

(c) the geographical address at which the trader is established and the trader’s telephone number, fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and communicate with him efficiently and, where applicable, the geographical address and identity of the trader on whose behalf he is acting;

\(^{72}\) Article 5(3).
(d) if different from the address provided in accordance with point (c), the geographical address of the place of business of the trader, and, where applicable, that of the trader on whose behalf he is acting, where the consumer can address any complaints;

(e) the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable. In the case of a contract of indeterminate duration or a contract containing a subscription, the total price shall include the total costs per billing period. Where such contracts are charged at a fixed rate, the total price shall also mean the total monthly costs. Where the total costs cannot be reasonably calculated in advance, the manner in which the price is to be calculated shall be provided;

(f) the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate;

(g) the arrangements for payment, delivery, performance, the time by which the trader undertakes to deliver the goods or to perform the services and, where applicable, the trader’s complaint handling policy;

(h) where a right of withdrawal exists, the conditions, time limit and procedures for exercising that right in accordance with Article 11(1), as well as the model withdrawal form set out in Annex I(B);

(i) where applicable, that the consumer will have to bear the cost of returning the goods in case of withdrawal and, for distance contracts, if the goods, by their nature, cannot normally be returned by post, the cost of returning the goods;

(j) that, if the consumer exercises the right of withdrawal after having made a request in accordance with Article 7(3) or Article 8(8), the consumer shall be liable to pay the trader reasonable costs in accordance with Article 14(3);

(k) where a right of withdrawal is not provided for in accordance with Article 16, the information that the consumer will not benefit from a right of withdrawal or, where applicable, the circumstances under which the consumer loses his right of withdrawal;

(l) a reminder of the existence of a legal guarantee of conformity for goods;

(m) where applicable, the existence and the conditions of after-sale customer assistance, after-sales services and commercial guarantees;

(n) the existence of relevant codes of conduct, as defined in point (f) of Article 2 of Directive 2005/29/EC, and how copies of them can be obtained, where applicable;
(o) the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;
(p) where applicable, the minimum duration of the consumer’s obligations under the contract;
(q) where applicable, the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader;
(r) where applicable, the functionality, including applicable technical protection measures, of digital content;
(s) where applicable, any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of;
(t) where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it.

This is clearly a very extensive list, and a trader needs to take some care in ensuring that all this information is given. This task is made slightly easier by providing model instructions on the right of withdrawal (in Annex I of the Directive), and if a trader adopts these, he is deemed to have complied with items (h), (i), and (j). This still leaves a long list of other items which need to be complied with. However, leaving aside the information items as they relate to the right of withdrawal, this is a very long and poorly structured list of information requirements.

The CRD contains the most extensive list yet of pre-contractual information obligations. However, it does not apply in respect of those Directives which contain separate requirements as to the provision of pre-contractual information.

Thus, the Directive on the Distance Selling of Financial Services contains an obligation to provide very detailed items of pre-contractual information, grouped under the following broad headings: supplier (five items), financial service (seven items, including the main characteristics of the financial service, and various items relating to cost), contract (seven items, including details of the right of withdrawal and the minimum duration of a contract to be performed permanently or recurrently), and redress (Article 3(1)). Moreover, although the Directive is otherwise a maximum harmonisation measure, there is scope for derogation in respect of pre-contractual information obligation in two circumstances: (i) existing Community rules on financial services imposing additional pre-contractual information obligations continue to apply; and (ii) until there is further harmonisation, Member States may maintain or introduce more stringent provisions, provided that these are compatible with EU law (Article 4).

73 The PCIDs in the Distance Selling of Financial Services Directive overlap with those in other Directives, notably the Consumer Credit and Payment Services Directives. Both contain provisions addressing this overlap to avoid the duplication of information duties.
Several Directives on particular types of contracts also contain detailed PCIDs. In the Package Travel Directive, a distinction is made between the general marketing of a package holiday, and the information to be provided specifically in the run-up to the conclusion of a contract. With regard to the former, a brochure about a package holiday must contain a wide range of information about the package, and this information is binding on the organiser\(^74\) or retailer\(^75\) of the package,\(^76\) unless either changes have been communicated to the consumer before a contract has been concluded, or changes are agreed subsequently by the parties to the contract (Article 3(2), final part). Before a contract is concluded, a consumer must be provided with written information about passport and visa requirements, as well as health formalities (Article 4(1)(a)). Travel and contact details, as well as information about insurance to cover the cost of cancellation or repatriation, must be provided in writing before the consumer departs (Article 4(1)(b)).

Similarly, the Timeshare Directive imposes pre-contractual information obligations at the marketing stage as well as in the immediate pre-contractual phase. Article 4(1) indicates what sort of information must be provided, with detailed standardised information forms for the various types of contract (timeshare, long-term holiday product, resale, and exchange contract) provided in the annexes to the Directive. Moreover, at the advertising stage, a consumer must be told where the relevant information can be obtained (Article 3(1)), and if the consumer is offered one of the relevant contracts at a promotional event, then the information required by Article 4(1) must be available at the event (Article 3(3)). The information provided by virtue of Article 4(1) forms an integral part of the contract (Article 5(2)). The parties may agree changes to this information, but other than that, the only changes that are permitted are those which result from circumstances beyond the trader’s control (Article 5(2)). The contract itself must be in writing, and in addition to the information required by Article 4(1) it must include details of the identify, place of residence and signature of each of the parties, and the date and place of the conclusion of the contract (Article 5(3)).

The Consumer Credit Directive also has separate information obligations applicable to the general marketing stage and pre-contractual stage respectively. When credit is advertised together with an interest rate, a representative example to illustrate the full costs of the agreement must be included. This example must contain the applicable borrowing rate and applicable charges, the total amount borrowed, the APR duration, any advance payments, number of instalments and total amount payable (Article 4). As the

\(^{74}\) A person who organises packages and offers them for sale, whether directly or through a retailer: Article 2(2).

\(^{75}\) A person who sells or offers for sale a package which has been put together by an organiser: Article 2(3).

\(^{76}\) This is an instance where public statements can become contractually enforceable.
Directive is a full harmonisation measure with regard to many of its provi-
sions, it introduced a standardised ‘European Consumer Credit Information’
(ECCI) form (a template for which is provided in Annex II to the Directive).
Article 5 specifies 19 items of information that must be included on this form,
which includes basic information about the credit provider and details of the
proposed credit agreement, including the APR,\textsuperscript{77} total amount borrowed and
repayable, details of repayments, penalties for failing to maintain regular
payments and information about early repayment. However, where the
agreement relates to an overdraft that must be repaid within 3 months or
on demand (Article 2(3)), is between members of a credit unions (Article 2(5))
or is a rescheduling of an existing debt (Article 2(6)), only 14 items of
information must be provided, and the ECCI form is optional.

The pattern of imposing PCIDs is also found in those Directives falling
outside the narrow consumer \textit{acquis}. Thus, the \textit{Electronic Commerce} Directive
contains specific PCIDs for contracts concluded by electronic means, except
for those concluded exclusively by electronic mail or equivalent individual
communications (Article 10(4)). It is possible for non-consumers to agree to
waive these particular requirements, but the information must be provided to
consumers in all cases. The specific information to be provided includes: (i)
the different technical steps that need to be followed in order to conclude the
contract; (ii) whether the contract will be filed by the service provider, and
whether it will be accessible; (iii) how input errors can be identified and
corrected before an order is placed; and (iv) the languages in which the contract
may be concluded (Article 10(1)). With regard to item (iii), ‘appropriate,
effective and accessible technical means’ must be provided to enable the iden-
tification and correction of input errors before an order is placed (Article 11(2)).
In addition, information about relevant codes of conduct must be given
(Article 10(2)). A further requirement is that, where the terms of the contract
and general conditions are made available, this must be done in a way that
will allow the recipient to store and reproduce them (Article 10(3)).

According to the \textit{Insurance Mediation Directive}, before an insurance contract
is concluded (or amended/renewed), a customer must be given information
on: (i) the name and identity of the intermediary; (ii) registry details; (iii)
voting rights of more than 10 per cent in an insurance undertaking; (iv) voting
rights of more than 10 per cent in the insurance intermediary held by an
insurance undertaking; (v) complaints procedures; and (vi) whether advice is
given on behalf of one or several insurance undertakings, or based on fair
analysis of available insurance contracts (Article 12(1) and (2)). Furthermore,

\textsuperscript{77} The CJEU has held (in the context of the earlier \textit{Consumer Credit Directive} (87/102/
EEC) that failure to include the APR in the credit agreement can be a relevant factor in
establishing whether terms setting out the cost of the credit are in plain and intelligible
language for the purposes of Article 4(2) of the \textit{Unfair Contract Terms Directive}
(see below): C-76/10 \textit{Pohotovost s.r.o. v Iveta Korčkovská} [2010] ECR I-n.y.r. (16 November
2010).
before a specific insurance contract is concluded, the intermediary must specify (based on the information given by the customer), the demands and needs of the customer and the reasons for the advice given to the customer in respect of a particular insurance product (Article 12(3)).

Similarly, Article 36 of the Life Assurance Directive requires that a (prospective) policy holder is given detailed information about both the assurance undertaking and the ‘commitment’ (i.e. the substance of the insurance policy), including the right of withdrawal and applicable law, before a contract is concluded. Annex III to the Directive sets out the specific items of information.

The Services Directive also adds to the field of pre-contractual information duties, particularly with regard to the quality of services. The key provision is Article 22, which specifies that 11 items of information must be given, broadly relating to the main characteristics of the service; price and related costs; the identity of the service provider; contract terms, especially choice of law and jurisdiction clauses; any applicable redress procedures; and – in respect of service providers required to have professional indemnity insurance in accordance with Article 23 of the Directive – details of that insurance. Additionally, the recipient of a service may request information on the professional rules applicable to the regulated professions; multidisciplinary activities and partnerships and measures taken to avoid conflicts of interest; and any relevant codes of conduct, including dispute resolution mechanisms available under a code or through membership of a trade association (Article 22).

Lastly, a complex set of provisions on PCIDs is found in the Payment Services Directive, with different duties depending on whether a particular payment transaction is a single transaction or within the context of a framework contract (i.e. a contract which ‘governs the future execution of individual and successive payment transactions and which may contain the obligation and conditions for setting up a payment account’ (Article 4(12)), such as a current account). For either type of transaction, there are information duties before a transaction is entered into, once a payment order has been received by a bank, and lastly once a payment transaction has been executed.

With regard to a single transaction, the information to be provided before an order is placed covers the information/unique identifier which the payer must provide, the maximum execution time, the charges payable and (where applicable), the applicable exchange rate (Article 37).

In the context of a framework contract, there is information that must be provided before such a contract is concluded, as well as when a transaction is...
ordered in the context of this contract. There is a detailed catalogue of items of information to be given in Article 42, grouped under seven broad headings: (i) payment service provider; (ii) use of payment service; (iii) charges, interest and exchange rates; (iv) communication; (v) safeguards and corrective measures; (vi) changes and termination; and (vii) redress. For each individual payment transaction, information must be provided about the maximum execution time and the charges payable (Article 37).

In addition, the recipient of the payment is required to provide information to the payer where certain payment instruments (such as credit or debit cards) are used; this information must cover any additional charges raised by the payee, or any reductions offered (Article 50(1)). Furthermore, if the payment service provider imposes a charge for using a particular payment instrument, this information must be given before the payment transaction is initiated (Article 50(2)).

Form, language and related requirements

In addition to the various items of information to be provided, most of these Directives also specify the form in which this should be given. Some Directives additionally contain rules as to which language should be used. There are significant variations between the Directives, and the following can only give an impression of the divergence, but is not exhaustive.

Form and style

Older Directives contain rather basic form requirements. Thus, under the Doorstep Selling Directive, a consumer had to receive written notice of the right of withdrawal by the time of concluding the contract (Article 4).\(^\text{79}\) The Package Travel Directive specifies that the consumer must be given a copy of the contract in writing, but adds to this as an alternative ‘another form which is comprehensible and accessible to the consumer’.

Since then, the common requirement found in most Directives is that information should be provided ‘on paper or on another durable medium’.\(^\text{80}\) This is found, amongst other things, in the Directives on Consumer Credit (Articles 5(1) and 6(1)); Insurance Meditation (Article 13(1)), Distance Marketing of Financial Services (Article 5(1)) and Payment Services (Article 25(1)).

\(^\text{79}\) Note that, according to Article 1(3) and (4), the Directive also applies to contracts where the consumer has made an offer which was subsequently accepted by the trader. In such circumstances, the information about the right of cancellation must be given when the consumer makes his offer.

\(^\text{80}\) Not all the Directives contain an appropriate definition, and this phrase is often cited as an instance of insufficient clarity in EU legislation: see House of Lords, European Contract Law – the way forward? (HL Paper 95, 2005), para. 40.
In the case of the Insurance Mediation Directive, the customer may request to receive the information orally; it may also be given orally where immediate cover is required (Article 13(2)). According to the Distance Marketing of Financial Services Directive, a consumer must be (Article 5(1)) in good time before the consumer is bound by a distance contract, or immediately after conclusion of the contract if the contract is concluded by a means of distance communication which does not make it possible to provide the required information on paper or another durable medium (Article 5(2)).

As for style, the various Directives also have different requirements. In the Package Travel Directive, any descriptive matter regarding the package must be free from misleading information (Article 3(1)). For the Insurance Mediation Directive it must be in a clear and accurate manner, comprehensible to the customer (Article 13(1)). The Payment Services Directive stipulates that information is provided in easily understandable words and in a clear and comprehensible form (Article 25(1)).

The Distance Selling Directive required that the information is given in a clear and comprehensible manner, and it must be appropriate to the means of distance communication used (Article 4(2)). Due regard is to be had to the principles of ‘good faith in commercial transactions’ and those relating to the protection of those unable to give their consent under relevant domestic laws, ‘such as minors’ (Article 4(2)).

According to the Services Directive, information must be communicated in a clear and unambiguous manner, and in good time before a contract is concluded, or, where there is no written contract, before the service is provided (Article 22(4)). The information required by Article 22 must be easily accessible, including by electronic means, to the recipient where the service is provided or the contract concluded, and must also appear in any documentation providing a description of the service provided (Article 22(2)).

The CRD contains a fairly detailed set of form requirements. Article 7 deals with formal requirements in off-premises contracts. The first relates to the way in which the information required under Article 6(1) is to be supplied to a consumer. The default position is that this information must be given on paper, although, with the consumer’s agreement, it may instead be provided on another durable medium. The information must be given in plain and intelligible language, and be legible. As seen above, the former requirement is familiar, whereas the explicit reference to legibility is an additional requirement. It remains to be seen how the requirement of ‘legibility’ is to be interpreted. A second formal requirement is that the consumer must receive a copy of the signed contract, or the confirmation of the contract. Again, the default requirement is that this must be provided on paper, although another durable medium can be utilised with the consumer’s agreement.

81 These are exhaustive and Member States cannot impose any additional formal requirements: Article 7(5).
If the contract involves the supply of digital content not supplied on a tangible medium, and the consumer has consented expressly to performance of the contract commencing, then the right of withdrawal which would otherwise be available is lost, and so as an additional formal requirement, the copy of the contract/contract confirmation must include confirmation of the consumer's consent that performance is to begin, and his acknowledgement that the right of withdrawal will be lost as a result.

Similarly, in order for the performance of a service to commence during the withdrawal period, the trader is obliged to ask the consumer to make an express request to that effect, and this request must be made on a durable medium. However, the consequences of not complying with this requirement are not spelled out in the Directive. As the obligation is on the trader to ensure that the consumer makes the request in the appropriate manner, this would imply that a trader should not commence performance unless a request made in the correct manner has been received.

Lastly, there is a specific formal requirement in respect of off-premises contracts where the consumer has called out a trader to carry out repairs or maintenance and where the payment to be made by the consumer does not exceed €200. In this situation, the trader must only provide information about his identity and address together with the price or an estimate of the total price on paper (or another durable medium if the consumer agrees). Information about the main characteristics of the service, and the fact that a right of withdrawal is not available, can be given orally if the consumer so agrees.

Article 8 CRD then deals with formal requirements in distance contracts. As with off-premises contracts, information must be provided in plain and intelligible language. However, rather than stipulating that it must be given on paper or another durable medium, the trader must provide the information in 'a way appropriate to the means of distance communication used'. If it is given on a durable medium, there is again the requirement that the information must be legible.

There is then a special requirement for contracts concluded by electronic means, where this places the consumer under an obligation to pay. Before the consumer places his order, information about the main characteristics of the goods/service, price, contract duration and the minimum contract period must be given in a clear and prominent manner. The consumer is required to acknowledge explicitly that there is an obligation to pay once the order is placed. Article 8(2) is unusually precise in that it stipulates that if the

82 Article 16(m)
83 Article 7(4).
84 Again, these are exhaustive and Member States cannot impose any additional formal requirements: Article 8(10).
85 Article 8(1).
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consumer must activate a button to place the order, then this must be labelled with the words 'order with obligation to pay' or word to that effect. Failure to comply with this requirement has the consequence that the consumer is not bound by the contract/order.

There are then a number of fairly technical requirements:

– Trading websites must specify any delivery restrictions and accepted methods of payment at the start of the ordering process\(^\text{86}\)
– Where the means of distance communication used for concluding the contract allows limited space or time to display information (presumably SMS messages, for example), then only certain key items of information must be given\(^\text{87}\)
– If the trader contacts the consumer by telephone, he must disclose his identity and the commercial purpose of the call at the start of the conversation\(^\text{88}\)
– The familiar confirmation requirement, according to which the trader must provide confirmation of the pre-contractual information on a durable medium (if not already so provided).\(^\text{89}\)

In addition, Member States are given the option that where a distance contract is concluded by telephone, the consumer must receive confirmation of the offer and the consumer will only be bound once he has signed the offer or sent his written consent.

Lastly, for the supply of a service to commence during the withdrawal period, the trader must require the consumer to make an express request to that effect.\(^\text{90}\)

The formal requirements of the CRD are therefore rather more detailed than what has been seen in the past.

**Language**

Some Directives contain rules on the language to be used. The Timeshare Directive requires that both the information document and the contract itself should be in writing and drafted in the language of the Member State where the consumer is a resident, or the language of which the consumer is a national (provided it is an official language of the EU). The purchaser has the choice in this case (Article 5(1)).

Similarly, the Insurance Mediation Directive states that information must be given in one of the official languages of the Member State of commitment, or

\(^{86}\) Article 8(3).
\(^{87}\) Article 8(4).
\(^{88}\) Article 8(5).
\(^{89}\) Article 8(7).
\(^{90}\) Article 8(8).
one agreed by the parties (Article 13(1)). In the Life Assurance Directive, the Annex adds a language requirement, according to which the information must be given in an official language of the Member State of commitment, or in another language requested by the policy-holder, if permitted by national law (or where the policy-holder can chose the applicable law).

The Payment Services Directive also requires the official language of the Member State where the payment service is offered or in the language agreed between the parties (cf. Articles 36(1) and 41(1) respectively).

**Other provisions**

The Payment Services Directive contains two rules of relevance to information duties. Article 32 makes it clear that no charge may be imposed for providing information in respect of a payment service that is required by the Directive. In addition, Article 33 establishes that the burden of proof to show that the information has in fact been provided falls on the payment service provider. These provisions apply to all three stages at which information has been provided. In the CRD, the burden of proof for showing that the information duties under Article 6 have been complied with is also placed on the trader, rather than on the consumer.\(^{91}\) Therefore, a consumer must only allege that information required under the Article was not given, and then it would be for the trader to prove otherwise.

**Sanctions**

One of the main shortcomings with most of the Directives is the lack of any rules which deal with the consequences of a trader failing to comply with some, or all, of the pre-contractual information duties imposed by those Directives. This matter was usually left to domestic law, with the consequence that there was a significant degree of variation between the Member States in this regard.\(^{92}\) Although this is addressed to some extent in the CRD, it still does not contain a clear set of provisions on the consequences of failing to provide information as required. Some steps have been taken towards ensuring more consistency at national level in this regard. Thus, Article 5(5) provides that all the items of information are part of the contract between trader and consumer (similar to e.g. the Timeshare Directive), which means that there may be instances where a failure to provide information correctly could give rise to an action for breach of contract. Moreover, once part of the contract, the information cannot be amended except with the express agreement of the parties.\(^{93}\) Whilst this creates a route for a potential sanction for at least

\(^{91}\) Article 6(9).

\(^{92}\) Schulte-Nölke, Twigg-Flesner and Ebers, op. cit., n. 24, pp. 482–496.

\(^{93}\) Article 5(5), final sentence.
some instances of non-compliance, it still falls a long way short of a clear set of remedies/sanctions for non-compliance.

Comment

It is clear from the preceding overview that the imposition of PCIDs is a feature common to many Directives which affect contract law. Their popularity may, at least in part, be explained on the basis that the provision of better information is less interventionist than the introduction of substantive rules, and therefore easier to justify at the European level. One of the main concerns with the *acquis* is the lack of a consistent approach in creating new PCIDs, a situation not significantly improved after the adoption of the CRD. Moreover, there seems to be little consideration of whether the information that is provided will assist the recipient in making a more informed decision.94 Also, the variations regarding form and style between the Directives are a cause of unnecessary confusion. One can therefore ask whether the extensive (and possibly even excessive) use of PCIDs really is a valuable means of assisting recipients of the information in deciding whether to proceed with a particular contract.95

Contract formation and validity

In addition to the pre-contractual stage, there is some legislation affecting the process of contract formation. Although there are no specific rules dealing with the formation of contracts as such, several Directives have introduced a right of withdrawal for consumers, allowing them to withdraw from a contract without penalty for a short time after formation.96

Beyond the right of withdrawal, there are several Directives requiring that information about the contract is provided once it has been formed. One can also identify provisions which could affect the validity of a contract.

Right of withdrawal

The provision of a right of withdrawal (sometimes referred to as a right of cancellation, although ‘right of withdrawal’ has now become the accepted phrase) has been a common feature of several EU Directives. It is also one of a few key aspects of the *acquis* which show how its piecemeal evolution has

96 Sometimes referred to as a right of cancellation, but for the sake of consistency, the term ‘withdrawal’ is used throughout in this chapter.
produced a range of different rules on the right of withdrawal, and the minimum harmonisation feature of the Directives which initially provided for a right of withdrawal meant that there remained a significant degree of variation between the national laws of the Member States.\textsuperscript{97}

Although now only of historical relevance, it is worth explaining how the right of withdrawal evolved through the \textit{Doorstep and Distance Selling Directives}. The Doorstep Selling Directive paved the way for the popularity of rights of withdrawal. With regard to those contracts falling within the scope of this Directive, Article 5 provided that a consumer had a right to withdraw from a contract\textsuperscript{98} for a period of not less than 7 days,\textsuperscript{99} starting from the point when the consumer was given information about this right to cancel the contract.\textsuperscript{100} The withdrawal period commenced once the information on the right had been received in accordance with Article 4. If this was not given, the withdrawal period could, in effect, have been of indeterminate duration; consequently, the CJEU held that national law could not impose a restriction of, for example, one year from the date of concluding the contract for exercising the right of withdrawal,\textsuperscript{101} although this position has now changed under the CRD (discussed below).\textsuperscript{102} To exercise his right of withdrawal, it was sufficient for the consumer to give notice before the period had expired (Article 5(1)). Once notice has been given, the consumer is released from all the obligations under the contract (Article 5(2)). No charge may be made to the consumer for withdrawing from a contract in this context.\textsuperscript{103}

National law also had to lay down the consequences of exercising the right of withdrawal, and there was a degree of discretion. In the context of a loan agreement, it was held that an obligation to repay a loan in full and immediately, together with interest at the market rate, would not be incompatible

\textsuperscript{98} Although the rationale for the right of withdrawal in this context is that the consumer may feel pressured into signing a contract, the availability of this right does not require evidence of such pressure: C-423/97 Travel Vac SL v Sanchis, above, n. 37.
\textsuperscript{99} This seems to mean ‘calendar days’, if Article 2(b) of Regulation 1182/71 determining the rules applicable to periods, dates and time limits [1971] OJ L 124/1 is applied in this context.
\textsuperscript{100} See above for the requirement to give this information.
\textsuperscript{101} C-481/99 Heininger v Bayerische Hypo- und Vereinsbank AG, above, n. 38. However, the CJEU also held that it was permissible for national law to provide that the period ends one month after both parties have performed fully their obligations under the contract: see C-412/06 Annelore Hamilton v Volksbank Filder eG [2008] ECR I-2383.
\textsuperscript{102} The CJEU has also held that Article 4 of the Doorstep Selling Directive does not preclude a national court raising the lack of appropriate notice of its own motion, without the consumer raising this, and determining that the contract is void as a result: C-227/08 Eta Martin Martin v EDP Editores SL [2009] ECR I-11939.
with the Directive.104 Somewhat cryptically, the CJEU modified this position in circumstances where the consumer was not informed about the existence of the right of withdrawal. Whilst this does not change the obligation, in principle, to repay the loan with interest once the consumer does withdraw, there is an obligation on the Member States to ensure that consumers who were exposed to a risk because they were not informed about their right of withdrawal can avoid ‘bearing the consequences of the materialisation of those risks’.105 The cases concerned involved a loan agreement used to finance the acquisition of a property with a view to letting this, but the rental returns that had been promised failed to materialise. It seems that the CJEU took the view that a consumer should not have to suffer any more than he would have done, had he withdrawn from the contract after having been informed correctly about the right of withdrawal, although the precise implications of this ruling remain somewhat unclear.106

Unlike later Directives containing a right of withdrawal, the Doorstep Selling Directive makes no provision for so-called linked contracts, i.e. contracts such as a separate credit agreement used to provide the finance for the purchase of goods. However, the CJEU has upheld a national rule whereby a consumer’s withdrawal from a loan agreement had no effect on the supply contract.107 In the particular case, the matter was complicated by the fact that the main contract concerned an interest in immovable property, which falls outside the Directive altogether. Both contracts were part of a larger investment scheme, but the CJEU rejected an argument that these contracts should be treated as an economic unit.108

A further instance of a right of withdrawal arising was provided by the Distance Selling Directive. Here, a consumer could withdraw from the contract, without giving any reasons, for a period of at least 7 working days.109 However, subject to agreement between the parties to the contrary, there were several contracts in respect of which there was no right of withdrawal. These included contracts for services where performance has begun with the consumer’s agreement before the withdrawal period has expired; contracts for personalised or customised goods, or those which by their nature either cannot be returned or deteriorate rapidly; for audio or video recordings, or computer software, once the packaging has been unsealed by the consumer; for the supply of newspapers, periodicals and magazines, and for gaming and lottery services (Article 6(3)).

105 Ibid.; C-229/04 Crailsheimer Volksbank v Conrads and others, above, n. 35.
107 C-350/03 Schulte v Deutsche Bausparkasse Badenia AG, above, n. 104.
108 Ibid., para. 78.
109 Periods expressed in working days exclude public holidays and weekend days: Article 3, Regulation 1182/71.
The right of withdrawal was linked to the provision of information at the time of contract formation. To complement the provision of information before the contract was concluded, the Distance Selling Directive also required that certain items of information were confirmed subsequently. In particular, the information mentioned in Article 4(a)–(f) needed to be provided to the consumer in writing, or in another durable medium, in good time during the performance of the contract, and, in the case of goods, at the latest by the time of delivery, unless the information had already been provided in this form before the conclusion of the contract (Article 5(1)). Furthermore, the consumer had to be given information about the procedure for exercising the right of withdrawal, a geographical address to which any complaints may be addressed, information about any available guarantees and after-sales services, and the conditions for cancelling the contract where it is either of unspecified duration or lasting for more than one year (Article 5(1)).

Assuming that the obligation to provide written information under Article 5 had been complied with, the 7-day withdrawal period started, in the case of goods, on the day the consumer received them, and in the case of services, either at the time of concluding the contract, or once the information required under Article 5 had been provided (Article 6(1), first part). If the supplier had not complied with Article 5, the period during which the right of withdrawal could be exercised extended to 3 months, starting from the day of receipt in the case of goods or the day of concluding the contract in the case of services; if, however, the information required by Article 5 was given during this 3-month period, the 7-working-day period commenced at that point (Article 6(1), second part).

Once the consumer had exercised his right of withdrawal, he was to be refunded all sums paid to the supplier as soon as possible and at the latest within 30 days, although the consumer could be charged for the direct cost of returning the goods (Article 6(1) and (2)). Where the consumer’s purchase of the goods or service was financed wholly or in part by a credit arrangement, either with the supplier, or with a third party on the basis of the agreement between supplier and consumer, the credit agreement will also be cancelled without penalty when the consumer exercises his right of withdrawal (Article 6(4)). It was for the Member States to come up with the detailed rules for dealing with the cancellation of the credit agreement.

As mentioned earlier, both Directives have now been repealed by the CRD, but in order to put the provisions of the CRD into context, it is necessary to be aware of its predecessors. Standardising the right of withdrawal was a key objective of acquis review, and as a result, there is now a fully harmonised set

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110 It is not sufficient to provide this information via a hyperlink, as this does not satisfy the requirement that the information is ‘given’ to or ‘received’ by the consumer; in any event, a website does not satisfy the requirement of ‘durable medium’: C-49/11 Content Services Ltd v Bundesarbeitskammer [2012] ECR I-n.y.r. (5 July 2012).
of provisions dealing with the right of withdrawal in the CRD, but only in respect of off-premises and distance contracts within the scope of the CRD. There are eight Articles dealing with the right of withdrawal, its exercise and its consequence.

Article 9(1) introduces a standard withdrawal period of 14 days for all distance and off-premises contracts, although, as noted earlier, there is a fairly long list of exceptions set out in Article 16.

In general terms, the point at which the withdrawal period commences differs depending on whether the contract is one for goods or services: in the case of services, it starts on the day the contract is concluded.\footnote{Article 9(2)(a).} In the case of goods, it starts on the day the consumer receives the goods.\footnote{Article 9(2)(b).} There are a number of amplificatory provisions in respect of contracts where multiple goods, or goods consisting of multiple pieces are delivered separately, or where the contract is for the regular delivery of goods. In the former two situations, the withdrawal period starts when the last item has been delivered;\footnote{Article 9(2)(b)(i) and (ii).} in the latter, it starts once the first delivery has occurred.\footnote{Article 9(2)(b)(iii).}

Article 11 CRD sets out how a consumer can exercise the right of withdrawal. A consumer is required to inform a trader of the decision to withdraw, and can do so either by using the model withdrawal form (Annex I(B) to the Directive) or by an unequivocal statement of his decision to withdraw.\footnote{Article 11(1).} Additionally, a trader may give the consumer the option of completing the withdrawal form or equivalent directly on the trader’s website. If the consumer withdraws by that route, the decision to withdraw must be acknowledged by the trader on a durable medium and without delay.\footnote{Article 11(3).}

The right is deemed to have been exercised as long as the consumer has sent his communication of withdrawal before the expiry of the withdrawal period,\footnote{Article 11(2).} although the consumer bears the burden of proof.\footnote{Article 11(4).} Once exercised, the parties’ respective obligations under the contract are terminated.\footnote{Article 12.}

Once the consumer has exercised his right of withdrawal, there are a number of obligations on the trader and consumer respectively. The trader must reimburse all payments received from the consumer without undue delay and no later than 14 days from the date of being informed of the consumer’s decision to withdraw. The reimbursement must include the costs of delivery, where
However, the trader can delay the reimbursement until he has received back the goods, or evidence from the consumer that the goods have been sent back to the trader, unless the trader has offered to collect the goods himself.\footnote{120}{Article 13(1), which reflects the CJEU in C-511/08 Handelsgesellschaft Heinrich Heine GmbH v Verbraucherzentrale Nordrhein-Westfalen eV [2010] ECR I-3047 that Article 6 of the Distance Selling Directive precluded national legislation which allowed the trader to still charge the consumer for the cost of postage where the consumer has exercised the right of withdrawal.}

The reimbursement must include the cost of delivery, where applicable, although if the consumer selected a method of delivery other than the standard method offered by the trader, then the trader is not required to reimburse that cost.\footnote{121}{Article 13(3).}

The consumer is required to return the goods to the trader within 14 days of communicating his decision to withdraw from the contract, unless the trader has offered to collect the goods.\footnote{122}{Article 13(2).} This deadline is met if the consumer sends back the goods before the expiry of this 14-day period. The only cost the consumer must bear is the direct costs of returning the goods to the trader, unless: (i) the trader has agreed to bear this cost; or (ii) the trader did not inform the consumer that he would have to bear this cost.\footnote{123}{As required under Article 6(1)(i).} This is modified in the case of off-premises contracts where the goods were delivered to the consumer’s home at the time of concluding the contract and, by their nature, the goods cannot be returned by post. In such a situation, the trader is required to collect the goods at his own expense.\footnote{124}{Article 14(1).}

However, in addition to bearing the direct cost of returning the goods, the consumer may also be liable for any diminution in the value of the goods if this has been caused by handling the goods beyond what is necessary to ‘establish the nature, characteristics and functioning of the goods’.\footnote{125}{Article 14(2).} The example given in the recitals is of a consumer who does not merely try on clothes to see if they fit, but wears them. However, the consumer will not be liable if the trader has failed to provide information about the right of withdrawal as required by Article 6(1)(h).\footnote{126}{In C-489/07 Pia Messner v Firma Stefan Krüger [2009] ECR I-7315, a case decided under the Distance Selling Directive, the CJEU had held that that Directive precluded a national rule which allowed the seller to claim compensation for the value of using the goods before the right of withdrawal was exercised. As a second issue, the CJEU left open the application of principles of national doctrines such as unjust enrichment or good faith in this regard, however, provided that the efficiency and effectiveness of the right of withdrawal are not undermined. This second issue would seem to remain of relevance to Article 14 CRD.}
In addition, in the case of contracts for a service, where performance has begun during the withdrawal period at the consumer’s request, but the consumer then exercises his right of withdrawal, he will be required to pay for the proportion of the contract services received up to the point of withdrawal.\textsuperscript{128}

However, in the case of services or the supply of gas, electricity or water, the consumer will not be liable for anything provided during the withdrawal period if information about the right of withdrawal has not been given, or if the consumer has not given his consent to performance commencing;\textsuperscript{129} a similar proviso exists in respect of digital content not supplied on a tangible medium.\textsuperscript{130} There is no other liability on a consumer as a consequence of exercising the right of withdrawal.\textsuperscript{131}

Lastly, exercising the right of withdrawal in respect of an off-premises or distance contract also has the effect of terminating any ancillary contract automatically. If the ancillary contract is a consumer credit contract, then the relevant provisions of the Consumer Credit Directive on the termination of credit agreements will apply.

All in all, the provisions of the CRD are much more detailed than those found in previous Directives, but even here, not every matter has been addressed fully. For example, there is still a lacuna as to what should happen if the consumer has despatched the goods back to the trader, but they are lost in transit.

Although the CRD now provides the most detailed set of rules on the right of withdrawal, its provisions do not extend to other Directives which also provide for such a right. Thus, the Distance Selling of Financial Services Directive also provides for a right of withdrawal, which is fixed at 14 calendar days. By way of exception, in the case of contracts falling within the Life Insurance Directive,\textsuperscript{132} and personal pension operations, the withdrawal period is 30 calendar days (Article 6(1)). The withdrawal period starts either from the day of concluding the contract (although for life insurance contracts, it starts from the day the consumer is informed that the contract has been concluded) or from the day the consumer receives the written terms and conditions and other information if this is after the date of conclusion of the contract (Article 6(1), second part). However, a right of withdrawal is not available in respect of financial services where the price depends on fluctuations in the financial markets which are outside the supplier’s control; travel or baggage insurance policies of less than one month’s duration; and contracts which have been fully performed before the consumer seeks to exercise his

\textsuperscript{128} Article 14(3).
\textsuperscript{129} Article 14(4)(a).
\textsuperscript{130} Article 14(4)(b).
\textsuperscript{131} Article 14(5).
right of withdrawal (Article 6(2)). In addition, Member States have been given the option not to make available a right of withdrawal in respect of contracts for credit for the purpose of acquiring or retaining property rights in land or building, including for the purpose of renovating or improving a building; or credit secured either by a mortgage on immovable property or another right in immovable property (Article 6(3)(a) and (b); paragraph (c) also excludes declarations by consumers using the services of an official).

As with other instances where a right of withdrawal has been made available, a consumer is entitled to exercise this without penalty, and he does not have to give any reasons for exercising this right (Article 6(1)). A consumer seeking to withdraw must follow the 'practical instructions' which were given to him before the contract was concluded, 'by means which can be proved in accordance with national law' (Article 6(6)). It should be noted that these provisions do not apply in respect of credit agreements connected with a distance contract to which the Distance Selling Directive, or the Timeshare Directive, applies (Article 6(7)).

The consumer is entitled to a refund of all pre-payments, although he can be required to pay for a service that has already been provided, but this is subject to the requirements that the consumer must have been informed about the amount payable before the contract was concluded and, where performance of the contract commenced before the expiry of the withdrawal period, that the consumer consented to the start of performance (Article 7). Similarly, the consumer is required to return any sums or property received from the supplier. Both consumer and supplier must comply with their obligations in this regard within 30 calendar days.

In the context of specific contracts, the Timeshare Directive also provided for a right of withdrawal. When the new Directive was adopted in 2008, the provisions on the right of withdrawal became subject to 'full harmonisation'. Provided that the contract includes all the required information, the consumer has the right to withdraw from the contract without having to give a reason within 14 calendar days of the conclusion of the contract or any binding preliminary contract (Article 6(1) and (2)(a)), or from the date the consumer receives the contract if this is later (Article 6(2)(b)).

If the consumer is not given a completed standard withdrawal form (as required by Article 5(4)), the withdrawal period extends to one year and 14 calendar days (Article 6(3)(a)). Also, if the consumer is not given the standard information form (see above), the withdrawal period ends after 3 months and 14 calendar days. Presumably, a failure by a trader to comply with either requirement would simply trigger the longer period. In either case, if the required information is given within the one year/3-month time period, the 14-day withdrawal period starts from the date the information is given.

The right of withdrawal is exercised by notifying the trader on paper or another durable medium before the end of the withdrawal period (Article 7). On exercising the right of withdrawal, both parties are discharged from their obligation to perform the contract (Article 8(1)). A consumer will not be
liable to pay any costs, nor pay for any value of a service received before exercising his right to withdraw (Article 8(2)). Furthermore, any ancillary contracts are also terminated automatically, at no cost to the consumer (Article 11). Lastly, there is a prohibition on the consumer being required to make any advance payments before the end of the withdrawal period (Article 9).

In the Consumer Credit Directive, there is also first an obligation to provide the contract document on paper or another durable medium (Article 10(1)). This must provide specified details in a clear and concise manner (Article 10(2)). Article 10(3) lists 21 items of information which must be included in the credit agreement.

A consumer has the right to withdraw from a credit agreement within 14 calendar days, starting either from the date the agreement was concluded or the day when the consumer has received a written copy of the agreement as required by Article 10 if this is later (Article 14(1)). The consumer must notify the creditor in accordance with the information given in the credit agreement, and national law may specify what is required to prove that notification has been given. If the notification is on paper or on another durable medium available and accessible to the creditor, it is sufficient that it is despatched before the end of the withdrawal period (Article 14(2)(a)). The capital and any interest accrued between the date the credit was received and subsequently repaid must be paid back to the creditor without delay, and within 30 calendar days from dispatching the withdrawal notification (Article 14(2)(b)). No other costs may be imposed on the consumer, except where the creditor had to pay non-returnable charges to a public administrative body (Article 14(2)(b)).

In circumstances where a consumer has obtained goods or services with the assistance of a credit agreement, and the supply contract has exercised a right of withdrawal under applicable EU law, the credit agreement is also cancelled (Article 15(1) – a ‘linked credit’ agreement).

Outside the core consumer acquis, the only Directive with a right of withdrawal is the Life Assurance Directive. A policy-holder who concludes an individual life assurance contract has a right of withdrawal (Article 35), although Member States are given the discretion to determine the duration of the withdrawal period (which may be no less than 14 days and no more than 30 days from the date the policy-holder was informed about the conclusion of the contract). Once the policy-holder has given notice of the withdrawal, he is released from all future obligations under the contract. Beyond this, the conditions for withdrawing and the legal consequences are determined by the national law applicable to the contract.

133 I.e. domestic legislation which implements a Directive providing for a withdrawal right, such as legislation on doorstep or distance selling.
Comment

As mentioned earlier, the right of withdrawal is often cited as the paradigm of inconsistent EU legislation,\(^\text{134}\) with each measure providing a right of withdrawal taking a slightly different approach. Although recent Directives have all moved towards a fully harmonised set of rules, setting the withdrawal period at a standard of 14 days, there is still some variation between the various Directives. It is, perhaps, surprising that the fully harmonised provisions on the right of withdrawal were introduced in the Consumer Credit and Timeshare Directives before the CRD had been finalised – as this was intended to be the cornerstone of the *acquis* review, one might have expected that whichever provisions were agreed for the CRD would then become the template for other Directives.

Post-formation information duties

As already mentioned, the Directives on *Distance Selling*, *Timeshare* and *Package Travel* link the commencement of the withdrawal period with the provision of information after contract formation. The provision of information on formation is also a feature of the *Payment Services Directive*, which requires that specific items of information are given\(^\text{135}\) once a payment order has been made, again distinguishing between single transactions and those made in the context of a framework contract. In respect of a single transaction, the information to be provided covers a reference number for the transaction, the amount of the payment, any charges, the applicable exchange rate and the date the payment order was received (Article 27). Similar information must be provided in respect of individual transactions made in the context of a framework contract, although in this case, the information may be provided periodically at least once a month, e.g., on a bank statement. (Article 36).

Formation by electronic means

In the *Electronic Commerce Directive*, there is an obligation on the Member States to ensure that contracts can be concluded by electronic means, and that any relevant legal requirements regarding the process of contract formation applicable under domestic legislation do not impede the formation of contracts by electronic means (Article 9(1)).\(^\text{136}\) The validity and legal effectiveness of

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135 The related provisions on cost, form and burden of proof are noted above, p. 79.
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contracts should not be affected by the fact that they were concluded by electronic means. It can be noted here that this particular provision simply sets out a result, and does not seek to prescribe how the Member States should adjust their domestic laws to ensure that contracts can be concluded electronically. Importantly, there are no concrete rules dealing with the point at which a contract concluded by electronic means comes into existence.\textsuperscript{137} Several types of contracts are excluded from this requirement, however: contracts creating or transferring rights in real estate (except for rental rights); those which, by law, require the involvement of the courts, public authorities or professions exercising public authority; non-commercial contracts ‘of suretyship and on collateral securities’; and those governed by family and succession law (Article 9(2)).

Although not directly on the formation of contracts, the Directive does state that if an order is placed, the receipt of the order must be acknowledged without undue delay by electronic means (Article 11(1), first indent). Furthermore, an order and an acknowledgement of receipt are deemed to have been received when the respective recipients are able to access them.

\textbf{Validity}

An area in respect of which there is hardly anything in the acquis thus far is the validity of contracts. One exception is the Commercial Agency Directive, which has a rule on the validity of the contract based on compliance with form.\textsuperscript{138} Each party is entitled to receive a signed written document setting out the terms of the agency agreement, and Member States can make the validity of an agency agreement subject to the requirement that it is evidenced in writing (Article 13). This optional requirement is the only specific restriction on the validity of a commercial agency contract that may be imposed by national law. It is therefore not possible for national law to make the entry of the commercial agent in a domestic register a condition of the validity of the contract,\textsuperscript{139} although national law may impose other sanctions for a failure to register a commercial agent, provided that these do not undermine other provisions in the Directive.\textsuperscript{140}

However, away from specific Directives, the TFEU contains provisions which can affect the validity of certain contract terms in circumstances where these

\textsuperscript{137} This may be contrasted with an earlier draft of the Directive, which included a provision on the formation of contracts.

\textsuperscript{138} Note that the unfairness of a term (see below) is sometimes treated as a question of validity; in this chapter, the policing of unfair terms is treated as an issue affecting the substance of a contract.


\textsuperscript{140} C-485/01 Caprini v Conservatore Camera di Commercio, Industria, Artigianato e Agricoltura [2002] ECR I-2371.
violate the rules on competition law. Articles 101 TFEU (on anti-competitive agreements) and 102 TFEU (abuse of market dominance) can both affect the validity of some contract terms, particularly in contracts between commercial parties (‘undertakings’) by prohibiting certain terms which could be regarded as having an anti-competitive effect. In particular, Article 101 TFEU renders void any terms/agreements which have the effect of:

(i) directly or indirectly fixing purchase or selling prices or any other trading conditions;
(ii) limiting or controlling production, markets, technical development, or investment;
(iii) sharing markets or sources of supply;
(iv) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(v) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

In addition to these Articles, there are a number of Regulations, so-called block exemptions, which can also affect the substance of contracts by prohibiting the use of certain terms. A detailed consideration of these rules is beyond the scope of this book, however.

Substance of the contract

This section considers rules which have a direct impact on the substance of a contract. It will be seen that there are far fewer EU measures in this regard, leaving considerable freedom to the contracting parties, as well as domestic law, to determine the substance of their respective rights and obligations. One notable, and significant, exception is the Unfair Contract Terms Directive, which can be deployed to police most terms in a broad range of consumer contracts.

Unfair terms in consumer contracts

Scope

The Unfair Contract Terms Directive renders inapplicable all those terms in a consumer contract which are unfair. However, not all terms can be reviewed:

those which are ‘individually negotiated’ fall outside the scope of the Directive (Article 3); as do those ‘which reflect mandatory statutory or regulatory provisions, or provisions of international conventions to which the Member States or the Community are party’ (Article 1(2)). The restriction to non-negotiated terms is primarily justified on the basis that at the time the Directive was adopted, ‘national laws allow only partial harmonisation to be envisaged’. The main concern is, therefore, the control of standard form contracts, used for the vast majority of consumer transactions. Control over individually negotiated terms has been left to the Member States, with some extending their national laws to such terms.

It is for the seller or supplier to prove that a term was individually negotiated, rather than for the consumer to prove that it was not (Article 3(2), final sentence). A term will clearly not be individually negotiated where the contract is a ‘pre-formulated standard contract’ (Article 3(2), second sentence). Moreover, a term should not be regarded as individually negotiated if: (i) it has been ‘drafted in advance’; and (ii) the consumer has not been able to influence the substance of the term (Article 3(2)). Furthermore, the fact that ‘one specific term’ or ‘certain aspects of a term’ have been individually negotiated does not preclude the application of the unfairness test to the remaining terms of the contract, if the overall appearance of the contract is that it is a standard form contract.

The assessment of fairness does not relate to the ‘main subject matter’ or the ‘adequacy of the price and remuneration’ (Article 4), subject to the proviso that these terms must be in plain intelligible language (Article 4(2)). This means that the main subject matter of the contract cannot be reviewed, nor can the adequacy of the price as compared to the goods or services supplied. The CJEU has stressed that this provision needs to be interpreted restrictively, holding that Article 4(2) only deals with the terms which ‘describe the essential obligations of the contract’.

144 It has been suggested that the unfairness test would apply if those terms were not in plain and intelligible language (Cf. Advocate-General Tizzano in C-144/99 Commission v Netherlands [2001] ECR I-3541, para. 27), although the consequences of finding that such a term is unfair remain unclear. See also Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (COM (2000) 248 final), p. 15.

145 The application of this to contracts of insurance has caused particular difficulties: according to recital 19, ‘the terms which clearly define or circumscribe the insured risk and the insurer’s liability’ are not assessed as to their fairness because they are factored into the premium, but do particular exclusions from the scope of an insurance policy define the subject matter, or are they simply a restriction of the insurer’s liability and therefore subject to review?

146 C-484/08 Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc) [2010] ECR I-4785. The ruling confirms that Member States are free to extend the unfairness of these to the terms covered by Article 4(2) in national law, as the Directive is only of a minimum harmonisation character.
by Article 4(2) only escape an assessment as to whether they are unfair if they are drafted in plain and intelligible language.147 But as far as price terms are concerned, the exclusion in Article 4(2) does not extend to a term which permits the seller or supplier to vary unilaterally the price charged for the goods or services supplied.148

Unfairness test

According to Article 3(1), a term will be unfair if ‘contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer’. The notion of good faith is central to the Directive, but it is not clear whether ‘good faith’ and ‘significant imbalance’ are cumulative, or merely alternative means of expressing the same substantive test – i.e. a term which creates a significant imbalance to the detriment of the consumer is contrary to the requirement of good faith, and therefore unfair under the Directive.

Indeed, the meaning of ‘good faith’ is somewhat uncertain.149 Unlike English law, most national laws are familiar with the concept, but EU law requires that good faith is interpreted autonomously.150 However, the Directive offers only limited guidance, and the CJEU has yet to be given the opportunity to interpret this concept.151 For example, there could be greater clarity on whether there is both a procedural and a substantive aspect to this test, although there is an assumption that it does.152 In its procedural meaning, it would generally be concerned with a lack of choice and unfair surprise.153 This would mean that good faith requires the disclosure of all terms, and particular attention being drawn to terms which are onerous on a consumer. It might also mean that there should be the possibility for a consumer to

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147 Not mentioning the APR in a consumer credit contract could render terms specifying the amount of repayments as not being in plain and intelligible language: C-76/10 Pohotovost s.r.o. v Iveta Korčkovská, above, n. 77.
150 See Chapter 4, p. 122.
151 In C-237/02 Freiburger Kommunalhauten v Hofstetter [2004] ECR I-3403, it only noted that the Directive defined the factors which render a contractual term unfair, without expanding on this.
153 Ibid., p. 245.
negotiate some of the terms rather than being presented with the standard contract on a take-it-or-leave-it basis in all circumstances.\textsuperscript{154}

The substantive element of the test would focus on whether a particular term is inherently unfair, be it by excluding or limiting certain rights of the consumer or by putting him at a disadvantage if compared to the position of the seller/supplier.

The Directive offers support for both a procedural and a substantive meaning of good faith. Some guidance is given in recital 19, which specifies that in making an assessment of good faith:

\begin{quote}
‘particular regard shall be had to the strength of the bargaining position of the parties; whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer’.
\end{quote}

This points towards good faith having a procedural aspect – bargaining strength is a matter which will have little bearing on the substantive impact of the relevant term, but is a factor if the term was imposed on the consumer, or if the consumer was induced to accept it.

There are indicators in the Directive that good faith also has a substantive aspect. Thus, recital 19 also states that the requirement of good faith may be satisfied by a seller or supplier by dealing fairly and equitably with the other party whose legitimate interests he must take into account. It has been suggested that this reflects an element of co-operation, disapproving of the unilateral pursuit by the seller or supplier of its own interest and instead favouring a degree of co-operation, by taking into account the legitimate interests of the consumer.\textsuperscript{155}

In order to facilitate the application of the unfairness test, the Directive includes an Annex of an ‘indicative and non-exhaustive list of the terms which may be regarded as unfair’ (Article 3(3)). This is often referred to as a ‘grey’ list, because it does not prohibit certain terms outright, but rather suggests that there is a strong likelihood that terms which resemble those in the Annex are unfair (recital 17). Nevertheless, terms which feature in the list should, at the very least, be treated with some suspicion. The CJEU has noted that a term included in the list may not necessarily be unfair, just as the absence of a term from the list did not mean that it was fair.\textsuperscript{156} However, if a particular case involves a challenge to a term which is mentioned in the Annex, then this is a factor a court should include in its assessment of unfairness under Article 3(1), and the CJEU has held that, in the case of a price variation clause (covered by points 1(j) and 2(d) of the Annex), it is generally relevant whether

\begin{flushright}
\textsuperscript{154} Brownsworth, Howells and Wilhelmsson, op. cit., n. 149; Willett, op. cit., n. 149, p. 40.  
\end{flushright}
any reasons for varying the price are stated in the contract and whether the consumer has a right to terminate the contract without penalty when a price is changed on the basis of this clause.\textsuperscript{157} The CJEU has thereby helpfully clarified how the Annex fits with the unfairness test.

The Annex also provides further guidance on the scope of the unfairness test. Generally speaking, all of the terms in the Annex, with one exception, are concerned with a substantive imbalance, dealing with exclusions of legal rights or imposing an undue burden on a consumer without a similar burden being assumed by the seller or supplier. Only one term appears to refer to procedural matters: indicative term (i) has the object or effect of ‘irrevocably binding a consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract’. This suggests that insufficient disclosure or unfair surprise may render a term unfair. Although the Annex presents in the context of terms which are in themselves unfair, it nevertheless lends some support to the suggestion that certain procedural matters could have an impact on the assessment of a term’s unfairness.

In any event, the bulk of the terms in the indicative list is clearly concerned with substantive unfairness. In many cases, it is possible to identify a ‘significant imbalance’ in these indicative terms in that the seller/supplier will be entitled to do something without the consumer having a corresponding entitlement. Others, however, are less obviously concerned with an imbalance in the respective obligations of seller/supplier and consumer. Thus, indicative term (e) is concerned with a requirement imposed on a consumer to pay a disproportionately high sum in compensation if he fails to fulfil his contractual obligations, term (h) relates to automatic extensions to fixed-term contracts and term (p) refers to assignment by the seller/supplier of its contractual rights to a third party without the consumer’s consent.

This problem was highlighted by the Economic and Social Committee (ESC)\textsuperscript{158} when responding to the European Commission’s report\textsuperscript{159} on the implementation of the Directive. The ESC noted, in particular that there are different interpretations of Article 3(1), that different language versions are ‘diametrically opposed’\textsuperscript{160} and that ‘the principle of good faith and how it relates to the notion of contractual imbalance also need to be clarified at Community level . . .’.\textsuperscript{161} The ESC goes so far as to question whether it is appropriate to continue to use this concept as a supplementary criterion for

\textsuperscript{157} C-472/10 Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt, above, n. 148.
\textsuperscript{159} COM (2000) 248 final.
\textsuperscript{160} Paragraph 4.2.1 ESC opinion.
\textsuperscript{161} Paragraph 4.2 ESC opinion.
determining whether a term is unfair.\textsuperscript{162} However, no changes have been made to date.\textsuperscript{163}

In applying the test to a particular term, the Directive requires that a number of factors are taken into account. Thus, it is necessary to consider the nature of the goods or services for which the contract was concluded. More significantly, reference should be made, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract. Lastly, regard should be had to all the other terms of the contract, or of another contract on which the term under consideration is dependent (Article 4(1)). At this point, the relationship of the Unfair Contract Terms Directive and the Unfair Commercial Practices Directive is potentially relevant: in \textit{Pereničová and Perenič}\textsuperscript{164} the question arose whether a finding that there had been a misleading commercial practice regarding the APR for a credit agreement could be relevant in applying the unfairness test. The CJEU held that, as Article 4(1) referred to ‘all the relevant circumstances’, the finding that a commercial practice was unfair would be a relevant circumstance. However, such a finding would not mean that the relevant contract term would automatically be unfair, nor would such a finding be sufficient of its own to conclude that the term is unfair.\textsuperscript{165} A finding that a commercial practice is unfair therefore has no ‘direct effect on whether the contract’ as a whole is invalid.\textsuperscript{166}

Because of these factors, the assessment of the unfairness of a particular term is a matter for the national courts, and the CJEU will not respond to a request for a preliminary reference regarding the unfairness of a particular term. In \textit{Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter},\textsuperscript{167} the CJEU was asked by the German Bundesgerichtshof whether a clause in the claimant’s standard terms and conditions was unfair. The Court refused to answer that question, referring merely to Article 4 which specifies the various factors to be taken into consideration, as well as the fact that ‘the consequences of the term under the law applicable to the contract must also be taken into account’,\textsuperscript{168} i.e. the overall legal context of national law in which the contract operates is relevant to the assessment of unfairness. The CJEU concluded that it ‘may interpret general criteria used by the Community legislature in order to define the concept of unfair terms. However, it should
not rule on the application of these general criteria to a particular term . . .’.\textsuperscript{169}

So although the CJEU would be prepared to interpret the concept of good faith generally, it will not comment on how the unfairness test would deal with a specific term.\textsuperscript{170}

**Consequences of unfairness**

Article 6(1) requires Member States to provide that unfair terms ‘shall, as provided for under their national law, not be binding on the consumer . . .’. Thus, a term which has been found to be unfair will not be enforceable against a consumer. The immediate consequence is that the particular term is effectively struck from the contract. This may not necessarily be fatal to the contract as a whole, and the remainder of the contract will continue to bind both parties provided that the removal of the unfair term does not make the contract incapable of ‘continuing in existence without the unfair terms’ (Article 6(1)).

The Directive does not offer any further guidance on how it can be determined whether the contract can continue in force without the relevant term(s), and this is therefore a matter to be decided by the domestic courts using their own established principles. However, it is not possible for a court to rewrite the term in order to remove the unfairness, a matter confirmed by the ECJ in Banco Español.\textsuperscript{171} A court would have to consider how crucial the term in question is to the contract as a whole, and whether the removal of the term would require a contractual performance significantly different from that which would have been within the parties’ expectations, before concluding whether the contract could be maintained. However, Article 6(1) does not permit a national court to decide that the contract as a whole should be set aside on the sole basis that it would be more advantageous to the consumer than trying to maintain the contract without the unfair terms.\textsuperscript{172} Nevertheless, as the Directive is of a minimum harmonisation character, national law can provide that the contract can be set aside on this basis.\textsuperscript{173}

\textsuperscript{169} Ibid., para. 22.

\textsuperscript{170} This approach is often contrasted with the approach in C-240–244/98 Oceano Grupo Editorial SA v Rocio Quintero and others [2000] ECR I-4941, where the CJEU said that a jurisdiction clause was unfair, before holding that domestic courts can decide on its own motion whether a term is unfair when deciding on the admissibility of a claim. In this situation, however, the domestic court had not asked the CJEU to consider the unfairness of the term in question, and the CJEU ultimately left the decision on the unfairness of the particular term to the domestic court.


\textsuperscript{172} C-453/10 Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o, above, n. 19.

\textsuperscript{173} Ibid.
Plain and intelligible language

In addition to the unfairness test, the Directive further requires that where ‘all or certain terms’ are provided to the consumer in writing, they must be drafted in plain, intelligible language (Article 5). Similar provisions are used in other Directives, particularly where certain information is to be made available to a consumer in connection with a particular transaction. It is surprising, however, that the consequences of presenting a particular term in something other than plain, intelligible language are rather limited. Thus, all that is provided in Article 5 is a rule of interpretation that where there is some ambiguity in the meaning of a particular term, the interpretation that is most favourable to the consumer should prevail (in dubio contra stipulatorem). However, in contrast to the consequences of a term being found unfair under Article 3, a term which fails to satisfy the ‘plain and intelligible language’ requirement will not be ineffective.

An interesting question is which standard should be applied in determining whether a term is presented in sufficiently plain and intelligible language. It seems likely that an objective standard should be adopted, and the question to be asked is whether a consumer faced with the term in question would regard it as having been drafted in plain and intelligible language. The objective standard in this context is likely to be the benchmark developed by the ECJ, although it is arguable that a lower standard should be used, such as that of the ‘naïve and inexperienced consumer’.

Consumer guarantees

Another Directive with a limited impact on the substance of contracts is the Consumer Sales Directive, particularly the provision dealing with guarantees. A guarantee is usually given by a manufacturer, and promises that goods are free from defects in workmanship and materials. For the purposes of the Directive, a guarantee is ‘any undertaking by a seller or producer to the consumer, given without extra charge, to reimburse the price paid or to replace, repair or handle consumer goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising’ (Article 1(2)(e)). This emphasises that not only guarantee documents included

174 It has been argued that this might extend to the language type, i.e. an official language, although the position is unclear: S. Whittaker, ‘The Language or Languages of Consumer Contracts’ (2007) 8 Cambridge Yearbook of European Legal Studies 229–257.
175 See e.g. Article 6 Directive 99/44/EC.
176 Note the Commission’s invitation to comment on whether a sanction should be introduced for terms which are not in plain and intelligible language: COM (2000) 248 final, p. 18.
with the goods are relevant, but also that statements in advertising may be taken into account in determining the scope of a guarantee; indeed, guarantees may be based entirely on undertakings given in general advertising. Guarantees are legally binding on the offeror of the guarantee, but this is subject to the conditions mentioned in the guarantee document and the associated advertising (Article 6(1)). The guarantee must make it clear that the consumer’s legal rights in respect of the sale of consumer goods are not affected by it (Article 6(2), first indent). Further, the guarantee must provide, in plain intelligible language, ‘the contents of the guarantee and the essential particulars necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee as well as the name and address of the guarantor’ (Article 6(2), second indent). Moreover, the consumer is entitled to request that the guarantee is made available to him in writing, or in another durable medium available and accessible to him (Article 6(3)). Member States are given the option to require that guarantees are drafted in one or more of the official languages of the European Union (Article 6(4)). Lastly, a failure to comply with the requirements on guarantees does not affect the validity of a guarantee and consumers can still rely on it (Article 6(5)).

Late payment of commercial debts

The Late Payment of Commercial Debts Directive\(^\text{179}\) establishes that interest (set at eight percentage points above the central bank base rate (Article 2(6) – definition of ‘interest for late payment’)\(^\text{180}\) is payable either from the contractual date of payment (Article 3(3)(a)), or, if no date is fixed in the contract, after a period of 30 days from receipt of the invoice; alternatively, or after 30 days from the date of receipt of the goods or services where the invoice date is uncertain, or where the invoice was sent before the goods or services were received (Article 3(3)(b)).

The entitlement to interest applies to the extent that the supplier has completed his contractual and legal obligations, and he has not received the due amount, except where the recipient is not responsible for the delay in payment being made to the supplier (Article 3(1)).\(^\text{181}\) In addition to interest, reasonable compensation for any recovery costs incurred as a result of the late

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\(^{180}\) For Member States participating in Monetary Union, the European Central Bank’s base rate applies; for others, it is their domestic central bank’s base rate (such as the Bank of England) – see the definition of ‘reference rate’ in Article 2(7).

\(^{181}\) In C-306/06 01051 Telekom v Deutsche Telekom AG [2008] ECR I-1923, the CJEU held that a payment can only be said to have been ‘received’ in time if the funds have been credited to the creditor’s account within the period for payment.
payment, may be claimed by the supplier, including expenses incurred in instructing a lawyer\textsuperscript{182} or a debt collection agency (Article 6(3)).

The Directive also controls agreements regarding the due date for payment or the consequences of late payment which vary from the rules laid down in the Directive. Such variations will either not be enforceable, or give rise to a claim for damages, if this is regarded as grossly unfair to the creditor, taking into account the circumstances of the case including good commercial practice and the nature of the goods or services supplied (Article 3(3)). It is also relevant whether the debtor would have any objective reason to deviate from the rules on late payment set down in the Directive. This is an instance where EU law provides a means of controlling the fairness of a contractual term in a non-consumer context.

\textit{Specific terms}

\textit{Retention of title clause}

The \textit{Late Payment Directive} requires that the Member States ensure that a clause which retains title to goods until paid for is effective if agreed prior to delivery of the goods. However, this seems to be limited to requiring Member States to recognise a retention of title clause; the precise conditions, particularly their effectiveness as against third parties, are matters for national law.\textsuperscript{183} Member States are also given permission to adopt or retain rules dealing with any ‘down payments’ made by the recipient of the goods (Article 4).

\textit{Restraint of trade clause}

In the \textit{Commercial Agency Directive}, it is provided that an agent may be subject to a restraint of trade clause after the contractual relationship has otherwise come to an end. The clause must be in writing and relate to the geographical area or group of customers, and the goods covered by the agency agreement, and may only be of a duration of no more than 2 years (Article 20).

\textit{Other provisions}

The CRD introduces a few provisions which affect the substance of a contract. Thus, Article 20 CRD provides that where the trader despatches the goods, the risk of loss or damage will not pass to the consumer until he, or a

\textsuperscript{182} This changes the result in C-235/03 \textit{QDQ Media SA v Lecha} [2005] ECR I-1937, where the CJEU held that where the cost of using a legal representative to lodge an initial claim for interest was not recoverable under applicable national law, the Directive could not be used as a basis to override the national rule.

\textsuperscript{183} C-302/05 \textit{Commission v Italy} [2006] ECR-10597.
nominated third party, has acquired physical possession of the goods. So handing the goods to a carrier will not normally have the effect that risk will have passed to the consumer then, although if the consumer commissioned a carrier and that choice was not offered by the trader, risk will pass once the carrier has acquired physical possession of the goods.\textsuperscript{184}

There are then three provisions dealing with aspects of fees and payment in a consumer contract. Article 19 requires the introduction of a prohibition against charging consumers fees for the use of a particular payment method which exceed the actual cost to the trader. This means that charges imposed for the use of certain card payments must be limited to the actual cost to the trader of the card payment being processed by the relevant card issuer. Moreover, if a trader offers a telephone line for consumers to use in connection with a contract already concluded between them, Article 21 requires that this should cost the consumer no more than the basic rate. This means that premium rate lines should no longer be used as the primary means of contacting a trader.

Lastly, Article 22 deals with so-called ‘tick boxes’ for automatically adding items to an order about to be place by a consumer. Thus, if the trader is seeking payment in addition to the price agreed for the trader’s main contractual obligation, then the express consent of the consumer for this must be obtained. Importantly, the trader must not use default options which a consumer must reject in order to avoid an additional payment. If this happens, the consumer can request a refund of the additional payment made.

\textbf{Performance}

There is greater regulation of aspects of the performance of contractual obligations in the \textit{acquis}, although this is the case predominantly in the consumer \textit{acquis}. Some of the performance rules are, in essence, simple information rules, but others effectively prescribe how the parties to the contract should perform their respective obligations. Also, it needs to be borne in mind that the way traders deal with consumers during the performance of a contract is subject to the rules of the UCPD. Misleading and aggressive behaviour, as well as generally unfair behaviour, is prohibited, but, as already noted, the UCPD does not directly affect the individual contract.

\textbf{Information}

A basic information rule can be found in the \textit{Distance Selling of Financial Services Directive}: a consumer can, at any time during the contractual

\textsuperscript{184} Article 20 CRD, second sentence. The transfer of risk under this Article is without prejudice to the rights of a consumer against the carrier, e.g. with respect to his obligations as custodian of the goods (e.g. under the principles of bailment in English law).
relationship, request a paper version of the terms and conditions of the contract. The consumer is also entitled to change the means of distance communication to be used, provided that this is not incompatible with the contract or the nature of the financial service contracted for (Article 5(3)).

**Timing and substitute performance/variation**

**Consumer Rights Directive**

Article 18 CRD\(^{185}\) requires that, unless agreed otherwise, a trader must deliver goods without undue delay, and in any event no later than 30 days from the conclusion of the contract. Delivery is effected 'by transferring the physical possession or control of the goods to the consumer'.\(^{186}\)

If the trader does not deliver within this time period, the consumer must first call on the trader to deliver 'within an additional period of time appropriate to the circumstances'.\(^{187}\) If the trader still fails to deliver by then, the consumer can terminate the contract. However, if the trader refuses to deliver, delivery within the agreed delivery period is essential or where the consumer had informed the trader that delivery by a specific date is essential, the consumer can terminate immediately and does not have to call for delivery within an additional period of time.

On termination of the contract, the trader must reimburse all payments made under the contract to the consumer without undue delay.\(^{188}\) Also, the consumer retains the right to exercise any additional remedies provided for by national law.

**Package Travel**

The **Package Travel Directive** deals with a number of aspects of contract variation, both on the part of the consumer and trader. Thus, a consumer is entitled to transfer his package to another person eligible to use the package by giving reasonable notice to the retailer or organiser, in which case both the consumer and transferee will be liable for the cost of the package and any additional expenses arising from the transfer (Article 4(3)). Prices may not be varied, except where the contract expressly provides for upward or downward adjustments, including precisely how such variations are to be calculated,

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185 This effectively replaces Article 7 Distance Selling Directive (97/7/EC), which required a supplier of goods or services to perform within 30 days (Article 7(1)), and if the goods/services are unavailable, any pre-payments had to be refunded within 30 days (Article 7(2)). The provision permitting the provision of substitute goods/services of equivalent value (Article 7(3)) has been repealed altogether.

186 Article 18(1).

187 Article 18(2).

188 Article 18(3).
which are due to changes in transportation costs, exchange rates, or relevant
dues, taxes and chargeable fees (Article 4(4)(a)). The price may not be varied
in the 20-day period before departure (Article 4(4)(b)).

If, prior to the consumer’s departure, the organiser needs to make signifi-
cant changes to essential parts of the package, he must notify the consumer.
The consumer then has the choice to withdraw from the package, or to accept
a variation to the package (Article 4(5)). If the consumer withdraws or if the
package is cancelled by the organiser, he may either take a substitute package
of equivalent or higher value (or a package of lower value together with a
partial refund) or receive a full refund of all sums paid by him. Additional
compensation may be payable to the consumer in accordance with national
rules, except where the package was cancelled because the minimum number
of bookings required had not been reached and the consumer was aware of this
or the cancellation is the result of force majeure (Article 4(6)).

Similarly, if a significant part of the package is not provided once the consumer
has departed, or if the organiser discovers that he will not be able to provide a
significant proportion of the package, the organiser is required to make alterna-
tive arrangements. These must be provided at no extra cost to the consumer, but
the consumer may be entitled to compensation if the value of what is provided
by way of substitution is lower than the package contracted for. If no alternative
arrangements can be made, the organiser must arrange for transport back to the
point of departure at no extra cost to the consumer (Article 4(7)).

More generally, the Directive specifies retailer or organiser are liable to the
consumer for the proper performance of the contract, including those elements
which are to be provided by a third party (Article 5(1)). This effectively
broadens the basis of liability beyond the immediate obligations assumed by
the party with whom the consumer has contracted.

Sale of goods

A Directive which goes to the heart of many consumer contracts is the
Consumer Sales Directive.189 The central requirement of the Directive is that the
seller must deliver goods which are in conformity with the contract
(Article 2(1)). Article 2(2) creates a rebuttable presumption that the goods
conform to the contract if certain requirements are satisfied. These are:

(i) they comply with the description given by the seller and possess the
qualities of the goods which the seller has held out to the consumer as a
sample or a model;
(ii) they are fit for any particular purpose required by the consumer,
provided that the consumer has made this purpose known at the time of
concluding the contract, and the seller has accepted this;

189 Directive 99/44/EC.
(iii) they are fit for those purposes for which goods of the same type are normally used;
(iv) the goods show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or labelling.

In respect of the public statements referred to in Article 2(2)(d), the seller will not be liable if he can show that: (i) he was not, and could not reasonably have been aware of the statement; (ii) at the time of conclusion of the contract the statement had been corrected; or (iii) the consumer’s decision to buy the goods could not have been influenced by the statement.

Furthermore, there will be deemed to be no lack of conformity if, at the time the contract was concluded, the consumer was aware of it or could not reasonably have been unaware of the matters which would otherwise mean that the goods were not in conformity. The seller is also not liable for any lack of conformity which ‘has its origin’ in materials supplied by the consumer (Article 2(3)).

Article 2(5) extends the conformity requirement by treating a lack of conformity resulting from incorrect installation of the goods as a lack of conformity in the goods in certain situations, including where the consumer has installed the goods himself and there was ‘a shortcoming in the installation instructions’.

**Consumer credit – early repayment**

The Consumer Credit Directive contains a provision on the early repayment of a credit. A consumer is entitled to make partial or full repayment and, where this is done, is entitled to a reduction in the overall cost by deducting the interest yet to be paid as well as any costs that would arise during the remaining part of the agreement (Article 16(1)). Where the agreement is subject to a fixed borrowing rate, the credit provider is entitled to ‘fair and


191 Although the Directive refers to installation instructions, it does not consider operating instructions in any way. Inadequate operating instructions are not obviously a source of non-conformity under the Directive. Cf. Council Resolution of 17 December 1998 on operating instructions for technical consumer goods [1998] OJ C 411/1 inviting the Commission to consider the adoption of standardised operating instructions. An Annex to the resolution provides ‘indications for good operating instructions for technical consumer goods’.
objectively justified’ compensation for possible costs which are directly linked to the early repayment (Article 16(2)). If more than one year is left between the date of early repayment and the agreed date of repayment, the compensation may be no more than 1 per cent of the amount repaid early; if it is less than one year, only half of 1 per cent may be charged by way of compensation (Article 16(2)). National law may set a threshold which the early repayment must reach before compensation can be claimed, but this may be no higher than €10,000 in any 12-month period (Article 16(4)).

Commercial agency – performance and remuneration

The Commercial Agents Directive states that both agent (Article 3(1)) and principal (Article 4(1)) are under an obligation to act dutifully and in good faith, which is effectively imposing an obligation to act in good faith in the performance of contractual obligations. It also entails an obligation to keep each other informed of relevant information (Articles 3(2)(b) and 4(2)(b)).

As far as the agent’s remuneration is concerned, he is entitled to the level of remuneration customary where he is active; in the absence of customary practice, there should be reasonable remuneration (Article 6(1)). Often, remuneration will be based partly or wholly on commission, and the Directive provides a fairly detailed set of rules setting out the entitlement of a commercial agent to receive commission. These provisions are protective of the agent, and seek to ensure he receives commission where transactions are concluded as a result of his actions (Article 7(1)(a)) or with a customer previously acquired for similar transactions by the agent (Article 7(1)(b)). Furthermore, where the agent is in charge of a particular geographical area or group of customers and transactions are entered into with a customer from that group or area, he is also entitled to commission (Article 7(2)), even if he had no active involvement in attracting that customer, except where transactions concluded by customers from that area with a third party were brought about without the direct or indirect involvement of the principal. It may be difficult to establish that a particular customer was from the agent’s geographical area, particularly in the case of a company operating in different places; whilst the place where the company carries on its commercial activity is the key factor, it may also be relevant where negotiations should have taken place, where the goods were delivered, and from where the order was placed.

The right to receive commission may extend beyond the termination of the agency agreement (Articles 8–9). Commission becomes payable once the transaction arranged by the agent has been executed (Article 10), and there are

193 C-19/07 Heirs of Paul Chevassus-Marche v Groupe Danone, Société Kro beer brands SA (BKSA) and Société Évian eaux minérales d’Évian SA (SAEME) [2008] ECR I-159.
194 C-104/95 Georgios Kontogeorgas v Kartonpak AE, above, n. 192.
provisions protecting the agent if the principal fails to execute the transaction when he should have done so (Articles 10(2) and 11, second indent).

Commercial Agency contracts may be of indefinite duration, or for a fixed period; however, if the parties continue to perform after the fixed period has expired, the contract is deemed to be converted into one of indefinite duration (Article 14). Such contracts can be terminated by giving notice, and the number of months of notice which are required are set and are correlated to the number of years the contract has existed (Article 15). Contracts which have been in place for 3 years or more will be subject to a notice period of 3 months, although Member States are given the option to extent the correlational approach up to the sixth year of the contract, reaching a maximum notice period of 6 months (Article 15(3)). These notice requirements are binding, although the parties may agree longer periods, provided that the notice period available to the principal is not shorter than that for the agent (Article 15(4)).

**Payment services – information and performance**

The Payment Services Directive requires that information is provided once a payment order has been executed, again distinguishing between single transactions and those made in the context of a framework contract. In respect of a single transaction, the payee (i.e. the recipient of the funds) must be given information which provides a reference number for the transaction, the amount of the payment, any charges, the applicable exchange rate and the date the payment was credited (Article 39). The same information must be given where the payment was made in the context of a framework contract (Article 48). In addition, under a framework contract, it is possible to request the terms and conditions regarding the contract at any time (Article 43). Changes to the contract must be notified no later than two months before they are to take effect, with the exception of changes to exchange or interest rates (Article 44).

The Directive also includes more detailed rules than previously found in EU law regarding the authorisation of payment transactions, including an obligation to repay unauthorised payments (Articles 51–63). In addition, there are several provisions dealing with the performance of a payment transaction. Many of these deal with the time orders have been received and the time within which such orders must be executed (Articles 64-73). A final section deals with the respective liabilities of the payment service provider and the user. Thus, a payment service provider is generally responsible for the correct execution of a payment transaction and must re-credit the account with the value of the payment if it has not been executed properly; in addition, steps must be taken to trace the payment made (Article 75).

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195 The related provisions on cost, form and burden of proof are noted above.
A framework contract may be terminated by the user at any time, unless the contract contains a notice period; in that case, this may not exceed one month. If the contract intended to last for more than 12 months, or for an indefinite period, no charges may be imposed for terminating the contract once 12 months have expired. Similarly, a payment service provider may terminate the contract on giving 2 months’ notice, if a term to that effect is included in the contract (Article 45).

Remedies for non-performance

Lastly, an area in which there has been more limited EU action is that of remedies for non-performance of a contractual obligation. There are notable exceptions to this, both with regard to consumer sales contracts generally, as well as package travel contracts.

Damages

As already noted, the Package Travel Directive imposes liability on the retailer or organiser for the proper performance of the contract. A consumer is entitled to compensation for damage resulting from a failure fully to perform the contract by the retailer or organiser, except where neither are at fault (Article 5(1) and (2)). This is one of the very few instances in EU law where there is a specific entitlement to monetary compensation.

Remedies for non-conforming goods

The Consumer Sales Directive contains a detailed system of remedies for circumstances where the seller has failed to perform his obligation to deliver goods in conformity with the contract. In such a situation, the consumer is entitled to invoke the various remedies made available under Article 3. The consumer is only entitled to claim a remedy from the final seller, rather than an intermediary or the producer directly (Article 3(1)).

The seller’s liability is restricted to any lack of conformity manifesting itself within 2 years of delivery of the goods (Article 5(1)). By way of derogation, Member States may provide that, in the case of second-hand goods, a consumer and seller may agree on a reduced period of seller’s liability, but this may be not less than one year (Article 7(1)). Furthermore, where a lack of conformity becomes apparent within 6 months of delivery of the goods, it is rebuttably presumed that the goods were not in conformity with the contract at the time of delivery (Article 5(3)). This presumption does not apply where

196 It has been held by the CJEU that this includes non-material damage: C-168/00 Simone Leitner v TUI Deutschland GmbH & Co KG [2002] ECR I-2631.
it would be incompatible with either the nature of the goods or the nature of the lack of conformity. Member States are given the option to provide that a consumer must inform the seller of the lack of conformity within a period of 2 months from the date on which he discovered this lack of conformity (Article 5(2)).

The seller can offer the consumer any of the four remedies of repair, replacement, price reduction or rejection (recital 12). If he chooses not to accept this offer, Article 3 applies. This divides the four remedies into a two-stage hierarchy. The relationship between them is one of the most difficult aspects of the Directive. In the first instance, the consumer is entitled to require the seller to repair or replace the goods. If neither of those is available, or if the seller fails to complete the required remedy as specified, the buyer can resort to the remedies of rescission or price reduction. The objective is to hold both parties to their bargain, so primacy is given to requiring the seller to cure his defective performance.

Initially, the choice is between repair and replacement. Repair is defined as ‘in the event of lack of conformity, bringing consumer goods into conformity with the contract of sale’ (Article 1(2)(f)). Repair and replacement must both be provided free of charge. The CJEU held in Quelle\(^\text{197}\) that it was not permissible to require a consumer to pay compensation for having been able to use non-conforming goods before their replacement. In this case, the consumer had bought a cooker which she was able to use for about 18 months before it broke down, and a replacement was provided. The seller’s request for payment of a sum by way of compensation for use of the appliance prior to its return was permitted by German law, but this was found to be incompatible with Article 3 of the Directive.\(^{198}\)

However, a consumer cannot require the seller to repair or replace the non-conforming goods if, in either case, the remedy is impossible or disproportionate (Article 3(3) final part). It will therefore be necessary, first, to consider whether it is possible to provide the remedy chosen by the consumer and, second, whether it is disproportionate in comparison to another remedy. The impossibility of repair may depend, for example, on the availability of spare parts. Moreover, it is suggested that the replacement of second-hand goods will generally be impossible (cf. recital 16).

The more significant consideration is likely to be whether a remedy is ‘disproportionate’. This will be so if the remedy ‘imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable’.

\(^{197}\) Article 3(4) provides that ‘free of charge’ refers to ‘the necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials’.

\(^{198}\) C-404/06 \textit{Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverb"ande} [2008] ECR I-2685.

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(Article 3(3)). A basic difference in cost between the two remedies is not sufficient; rather, the costs of one remedy must be significantly higher to be regarded as unreasonable (recital 11).

In assessing whether the costs of a particular remedy are unreasonable, three factors are relevant:

(i) the value the goods would have had if they had been in conformity with the contract
(ii) the significance of the lack of conformity, and
(iii) whether the alternative remedy could be completed without significant inconvenience to the consumer.

This is an objective test, requiring consideration of the cost to the seller of providing the given remedy and the benefit to the buyer, as well as the cost/benefit balance of the comparator remedy. In Weber and Putz, the CJEU was asked whether the proportionality test has a ‘relative’ or ‘absolute’ character, i.e. could repair only be regarded as disproportionate when compared to replacement (and vice versa), or could repair/replacement be disproportionate without comparing it to any other remedy. The Court held that:

‘Article 3(3) defines the term “disproportionate” exclusively in relation to the other remedy, thus limiting it to cases of relative lack of proportionality. Furthermore, it is clear from the wording and purpose of Article 3(3) of the Directive that it refers to two remedies provided for in the first place, namely the repair or replacement of the goods not in conformity.’

This confirms, therefore, that proportionality test is a relative criterion, only applied as between repair and replacement.

If the goods are of low value, the availability of repair might be limited. Where the cost of providing repair would, because of the cost of labour and parts required, exceed the market value of the goods themselves, repair would probably be disproportionate, and replacement would offer a better solution. Conversely if the goods are of high value, even an expensive repair might not be disproportionate.

Similarly, where there is only a small difference in value between the goods as delivered and their market value, replacement might be regarded as disproportionate, especially if repair could be effected easily and at low cost.

202 C-65/09 Weber v Wittmer and C-87/09 Putz v Medianess Electronics, ibid., para. 68.
The cost of the chosen remedy must also be weighed against the significance of the lack of conformity. Thus, if the effect of the particular lack of conformity is to make the goods useless, expensive repair may be justified if the (conforming) goods are of high value. Conversely, replacement may be more appropriate if the goods are of low value. In some cases the lack of conformity may be so severe that there is little point in attempting repair. In contrast, if a particular lack of conformity is very slight, repair may be more appropriate than replacement.

Lastly, the degree of inconvenience that may be caused to the consumer by the provision of the particular remedy must be considered. This seems to be the only factor where the consumer’s interests matter. Its effect may be that the consumer can insist on a remedy which would otherwise be considered disproportionate.

Any repair or replacement must be provided within a reasonable time and without any significant inconvenience to the consumer (Article 3(3)), taking into account the nature of the goods and the purposes for which the consumer required them. If the seller fails to do so, the consumer may demand either rescission of the contract or reduction of the price (Article 3(5)). In addition, if neither repair nor replacement produce the desired result, or neither is available, it may be possible for the consumer to ask for a price reduction (effectively a partial refund) or, ultimately, rescission (full refund) (Article 3(5)).

Rescission will not be available where the lack of conformity is minor (Article 3(6)). Moreover, where the consumer does exercise his right of rescission, he should be given a refund of the purchase price, although Member States may provide that account may be taken of the use the consumer has had of the product (recital 15).

Despite this fairly complex remedial scheme, it is not complete: there is no reference to damages that might be recoverable for additional losses, and this matter is left to national law. The absence of any attempt to include damages within the remedial framework might explain the very difficult decision in Weber and Putz. In Putz, the consumer had bought a dishwasher on the internet, and had paid a third party to install it. The dishwasher was faulty and had to be replaced. In Weber, the consumer had bought floor tiles from a builders’ merchant and laid them himself before noticing a flaw in the glaze. Again, the tiles had to be replaced. Although the Directive requires that repair or replacement should be provided free of charge, the question was whether that meant the seller could be required to pay for the cost of

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203 On the other hand a relatively minor lack of conformity might not justify expensive repair. This would be especially so if comparison with the remedies of price reduction and rescission were permitted.
204 Joined Cases C-65/09 Weber v Wittmer and C-87/09 Putz v Medianess Electronics, above, n. 201.
uninstalling the faulty goods and installing the replacement, even though installation was not part of his contractual obligation. The CJEU said that if the consumer was not able to recover the cost of uninstalling the faulty goods and installing the replacement, he would suffer an additional financial burden which would not have arisen had the goods been in conformity from the outset, and this would not be a remedy provided ‘free of charge’. However, the cost of removing and reinstalling the goods was high: in Weber, for example, the tiles had cost approximately €1,380, whereas the full cost of replacing them would amount to €5,830. Having held that it was only permissible to consider whether replacement would be disproportionate as against repair, the CJEU said that a seller cannot refuse to replace goods simply because the costs would be disproportionate when compared to the value of the goods without a lack of conformity and the significance of the lack of conformity. The Court tempers the effects of this by holding that the consumer’s right to have the costs of removing the non-conforming goods and installing the replacement reimbursed by the seller can be limited by requiring the seller to pay a proportionate amount. This goes beyond the Directive itself, and creates a new, separate, proportionality criterion, justified by the CJEU in stating that Article 3:

‘aims to establish a fair balance between the interests of the consumer and the seller, by guaranteeing the consumer, as the weak party to the contract, complete and effective protection from faulty performance by the seller of his contractual obligations, while enabling account to be taken of economic considerations advanced by the seller.’

However, any reduction to a proportionate amount should not ‘result in the consumer’s right to reimbursement of those costs being effectively rendered devoid of substance’. This leaves national courts with quite a difficult balancing exercise: on the one hand, the consumer can have the cost of removing defective goods and installing replacements covered, but on the other hand, the seller cannot be made to cover disproportionate costs. This has left the situation as complex, if not more so, than before this particular reference was made.

But as indicated above, the CJEU might have been dealing with this question in the wrong way from the outset. It seems that the Court has conflated two separate issues here, i.e. the right to free-of-charge replacement, and the right to claim damages for consequential losses. As the Directive does not deal with the latter, this would be a question for national law to resolve, applying its own rules on damages. So the Court’s ruling, whilst consumer-friendly, can be criticised for over-interpreting the idea of ‘free-of-charge replacement’. It

205 Ibid., para. 75.
206 Ibid., para. 76.
would have been more appropriate to hold that the additional costs of uninstalling faulty goods and reinstalling their replacements should, in principle, be recoverable by way of a claim for damages in national law, and that under the principle of effectiveness (effect utile), excluding such a claim outright would be precluded.

**Liability under linked credit agreement**

A provision dealing with the person against whom a remedy may be sought, rather than a specific remedy as such, is provided in the Consumer Credit Directive. Where goods or services, which are financed through a linked credit agreement, are not provided fully, or where they are not in conformity with the contract, the consumer may be able to ask for a remedy from the credit provider, provided that attempts to seek a remedy from the supplier of the goods or services have been unsuccessful (Article 15(2)). The conditions for exercising this right and its extent are to be determined by national law, however. Also, Article 15(3) preserves national rules which allow a consumer to hold the creditor jointly and severally liable in circumstances where the purchase of goods or services from a supplier was financed by the credit agreement.

**Commercial agency – termination payments**

The Commercial Agency Directive contains provisions dealing with the termination of the agency contract. Here, the commercial agent is entitled either to an indemnity or to compensation. At the time of adopting the Directive, Germany and France had in place two rather different systems for dealing with the financial consequences of terminating an agency contract, and in order to reach agreement on the Directive, it became necessary to include both systems, leaving each Member State to choose one or the other. The first system is to indemnify the agent (Article 17(2)). The indemnity should reflect the number of new customers secured by the agent, and it should be equitable having regard to all the circumstances (although if the principal belongs to a group of companies, benefits accruing to other

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209 E.g. in the UK, this would be section 75 of the Consumer Credit Act 1974.
companies of that group might not have to be taken into account when calculating the indemnity\textsuperscript{211}). It is subject to a cap based on the average annual remuneration of the agent calculated over a 5-year period (or a shorter period if the contract was of shorter duration).

The alternative system is the compensation system (Article 17(3)). It is intended to compensate the agent for the damage suffered because of the termination, particularly the loss of commission and the inability to amortise the costs and expense incurred during the performance of the contract.

However, no payment is made to an agent where the principal terminated the agency agreement because the agent was in default, justifying immediate termination (Article 18(a)). The CJEU has confirmed that for this provision to apply, the contract must have been terminated because of the agent’s default; therefore, if the contract is terminated after the contractual notice period and a default only comes to light after the expiry of the notice period, the agent is still entitled to payment – although in calculating this payment, the agent’s conduct can be taken into account.\textsuperscript{212}

Other instances when no payment is made are where the agent has terminated the contract (unless the principal was at fault, or the termination was on grounds of age, infirmity or illness) or where the agent has assigned his rights and duties under the agreement to another person (Article 18(b) and (c)). It is not permissible for the parties to derogate from Articles 17 and 18 if this would be detrimental to the agent (Article 19); consequently, it is not permissible to calculate an indemnity on the basis of criteria other than those in Article 17(2), except where such alternative criteria would always be more favourable to the agent.\textsuperscript{213}

The CJEU has made it clear that whilst the Directive specifies that each Member State must provide for either compensation or an indemnity, there is no specific requirement under European law with regard to the method used for calculating either, and Member States have some discretion.\textsuperscript{214} However, the CJEU has held that, in applying Article 17(2), it would not be acceptable to limit the indemnity to the amount of commission lost as a result of the termination of the agency, thereby providing some additional guidance how to calculate the indemnity.\textsuperscript{215}

\textsuperscript{211} C-348/07 Turgay Semen v Deutsche Tamoil GmbH [2009] ECR I-2341.
\textsuperscript{212} C-203/09 Volvo Car Germany GmbH v Autobof Weidensdorf GmbH [2010] ECR I-10721.
\textsuperscript{213} C-465/04 Honeyvem Informazioni Commerciali Srl v Mariella De Zotti [2006] ECR I-2879 (in the context of a collective agreement setting out different criteria which were less favourable in the circumstances of the case).
\textsuperscript{214} C-381/98 Ingmar GB Ltd v Eaton Leonard Technologies Inc, above, n. 61, para. 21 and C-465/04 Honeyvem Informazioni Commerciali Srl v Mariella De Zotti, above, n. 213, para. 35.
\textsuperscript{215} C-348/07 Turgay Semen v Deutsche Tamoil GmbH, above, n. 211.
Beyond contract law – enforcement by injunction

This chapter is primarily concerned with charting the impact of EU law on domestic contract law rules. However, it would be wrong to ignore one other significant contribution made by EU Law, both in the context of specific Directives such as those on Unfair Contract Terms (Article 7) and Late Payment (Article 3(4) and (5)), but also more generally in Directive 2009/22/EU (a re-cast version of Directive 98/27/EC) on injunctions for the protection of consumers’ interests. The combined effect of these provisions is that enforcement of all the consumer protection Directives are not only a matter for individual consumers seeking to enforce their contract with a trader, but may also be undertaken by appropriate organisations. Indeed, in the context of the Unfair Contract Terms Directive, the CJEU has held that national courts faced with a consumer dispute may be required to adopt a pro-active approach: starting with Oceano Grupo Editorial SA v Quintero, the CJEU held that a domestic court could decide, of its own motion, that a term in a consumer contract is unfair and refuse to apply it:

‘In disputes where the amounts involved are often limited, the lawyers’ fees may be higher than the amount at stake, which may deter the consumer from contesting the application of an unfair term . . . there is a real risk that the consumer, particularly because of ignorance of the law, will not challenge the term pleaded against him on the grounds that it is unfair . . . ’

This approach was developed in a string of further references. Thus, in Mostaza Claro, the ECJ held that a national court hearing an action for the annulment of an arbitration award must determine of its own motion whether the arbitration clause in a contract is void for being an unfair term, even though the consumer has not raised the unfairness of the term himself in the course of the arbitration proceedings, but only in the subsequent action for annulment. This was followed by Pannon v Győrfi, where the Court reiterated the position that an unfair term is not binding on a consumer, without the consumer having to contest the unfairness of a term during relevant proceedings. Moreover, if a national court has all the factual and legal information available to it to assess the unfairness of a term, it is required to do so of its own motion (rather than merely having the power to do so, which seemed to be the tenor of its ruling in Oceano). If the court concludes that a term is unfair, then it must not uphold it. However, the CJEU also said that if the consumer, aware

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217 C-240–244/98 Oceano Grupo Editorial SA v Rocio Quintero and others, above, n. 170.
218 Ibid., para. 26.
of the court’s assessment on unfairness, does not seek the non-application of the term, then it can remain binding. This also applies in the context of a hearing for enforcement of a final arbitration award at which the consumer is not present, 221 although whether a national court can be required to consider the unfairness of an arbitration agreement depends on national rules of procedure – if this would not be possible where the case involves a provision of national law, then there is also no obligation on a national court to act merely because the consumer would be relying on a right granted under EU law, provided that the principles of effectiveness and procedural equivalence have been adhered to. 222

Most recently, the CJEU has also confirmed that where a term in the standard business conditions of a seller or supplier have been found to be unfair in injunction proceedings, it is possible for national law to provide that this will also mean that the term under challenge will be ineffective in contracts based on these standard business conditions already concluded between consumers and that seller/supplier. 223

These wider policing mechanisms introduced by the EU are a significant feature of consumer contract law, and have certainly had a noticeable impact in many Member States, but it is beyond the scope of this book to examine this in greater depth.

Conclusion

This chapter has attempted to sketch the impact of EU legislation on contract law as it has happened thus far. The focus has been on those measures which directly impact on the law of contract, although there are, of course, related areas, such as public procurement, which have also, to an extent, contributed to the Europeanisation of contract law.

As seen above, the bulk of the measures in force are concerned with consumer contracts, and consequently deal with a class of contracts, and contract law, which are apart from what is usually referred to as ‘general contract law’. The acquis communautaire has therefore largely focused on providing rules which ostensibly alleviate the imbalance that exists between a consumer and a commercial contracting party and, as such, the acquis is concerned with a specific regulatory objective.

Moreover, even outside the field of consumer contracts, the focus of EU legislation has been on particular issues, often to protect a party with a significantly weaker bargaining position. There has been no specific attempt as yet to harmonise aspects of the general law of contract.

221 C-76/10 Pohotovost s.r.o. v Iveta Korčkovská, above, n. 77.
223 C-472/10 Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt, above, n.148.
The discussion in this chapter shows that a significant problem with the consumer acquis in its current state has been its lack of overall coherence. Over a period of more than 20 years, Directives have been adopted dealing with particular issues, but little regard has been had to the relationship between the various measures. The result is a patchwork of measures which do not fit together well. Although an attempt was made to rectify this situation with the so-called Acquis Review, the final result is a rather modest achievement, and the grand plans put forward in the Green Paper on the Review of the Consumer Acquis have resulted in the rather thin CRD, a measure which barely justifies its title.

The contribution of the CJEU has been to clarify, but also seemingly to extend, some of the provisions in the various Directives. At times, the CJEU seemed to struggle with the fact that the acquis only deals with selective matters, and that certain issues are not covered at all. This has resulted in some rather strained reasoning to provide an answer to the questions referred, but it has not necessarily clarified the scope and interpretation of the provision concerned.

Moreover, this chapter illustrates how patchy the acquis is. Taken together with the fact that the bulk of the legislation in this field has taken the form of Directives which need to be transposed into national law, and embedded in the wider national legal context, one can see that the process of Europeanisation so far has not produced a clear and accessible legal framework.

A practical effect of the EU’s activity is that it has effectively carved out a competence to regulate aspects of contract law. Quite how extensive that competence is remains to be seen. Whilst there can be little doubt about the EU’s competence to legislate for consumer contracts, the position is less clear when it comes to commercial contracts; and, here, it might be much more difficult not only to make out a case that EU action is needed in the first place, but also to agree on the extent of potential EU action in this regard. These are questions to be considered in the following chapters.
4 Impact on national law

Introduction

The previous chapters concentrated on the framework at the European level within which the process of Europeanisation occurs. It was seen there that this is largely done through the adoption of Directives, and supplemented by relevant judgments of the CJEU. The overview of the core acquis in the contract law field revealed that EU law permeates most areas of contract law, albeit only with regard to consumer contracts, or other particular types of contract.

The reliance on Directives means that Europeanisation involves a considerable amount of interaction between the national jurisdictions of the 27 Member States and the European level, and the adoption of a harmonising measure by the European institutions is only the first step. The effectiveness of Europeanisation depends almost entirely on the correct implementation into national law of the various Directives discussed previously. Every Member State is under an obligation to ensure that steps are taken fully to implement a harmonising measure into their domestic laws. This obligation may be divided into two distinct stages, ensuring that: (i) the relevant legal framework meets the requirements of the harmonising measure; and (ii) the application of the domestic rules giving effect to a harmonising measure does not undermine the effectiveness of the European measure.

The purpose of this chapter is therefore to consider the impact of the harmonisation programme on domestic contract law, focusing in particular on English law. In considering the impact of EU law on domestic contract law, three broad areas merit consideration. First, there is the process of implementing the various Directives into domestic law. In Chapter 2, it was seen that Member States have some freedom in the methods they choose in order to give effect to a Directive in their national law. English law is different from many other EU countries because its contract law is largely uncodified, and this chapter focuses on the approach taken in this jurisdiction. Second, it is necessary to consider how the domestic courts have interpreted and applied legislation which implements an EU Directive. Lastly, at a more general level, it may be considered to what extent the Europeanisation process has affected domestic contract law generally, e.g. by considering whether it has resulted in
a change to established principles or doctrines. It is not possible within the confines of this book to undertake a full survey of the impact of all the Directives on domestic law; instead, a number of key issues are identified, and particular areas are selected by way of illustration.

Implementation into domestic law – general considerations

For the Europeanisation process to work, Member States need to take care when implementing Directives into national law. In Chapter 2, it was seen that the results-focused nature of a Directive leaves a degree of freedom to the Member States in choosing the method of implementation. Exclusive reliance on case-law is unlikely to be acceptable even in a jurisdiction such as England, making it necessary to adopt or amend legislation. However, there is a reasonable leeway in drafting the implementing legislation in that it is not obligatory to retain the text of a Directive verbatim in domestic law. Rather, terminology and a drafting style appropriate to each national law can be chosen, provided that the overall aim of the Directive, as well as the need to ensure that rights can be easily identified, are not undermined. Where there is pre-existing legislation in the field covered by a Directive, it may be sufficient to amend, or even retain, this, as long as it meets the requirements of the Directive.

A bigger problem is the piecemeal approach of EU legislation. As seen in Chapter 3, Directives deal with particular issues, and introduce provisions for a limited range of contracts. This will inevitably pose a risk to the coherence and consistency of national law, and it will have to be considered carefully whether legislation should be adopted in separate provisions and limited to the scope of the Directive, or whether there should be wider changes to national law.

Having considered these fundamental questions, there are then the following matters each Member State needs to consider as part of the implementation process.

Minimum harmonisation

Some of the Directives in the contract law field are minimum harmonisation measures, or contain at least some provisions which are not subject to a full harmonisation rule. As explained earlier, Member States retain the freedom to adopt provisions which offer greater protection, e.g. to consumers, than required by such a Directive, provided that these are compatible with the
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Consequently, a Member State must consider whether it wishes to exceed the minimum standard and provide a higher level of protection. In practice, it will often be the case that the minimum harmonisation principle facilitates the retention of existing rules, rather than the introduction of rules which are more protective than the corresponding Directive. Minimum harmonisation might, on occasion, encourage a slapdash approach to implementation, relying on existing provisions without giving sufficient consideration as to how existing and new rules fit together.

The exact implications of a minimum harmonisation clause for the residual legislative freedom of the Member States in the field occupied by a Directive remain something of a grey area. One difficulty with exceeding a minimum standard is that it has never been explored by the CJEU just how much leeway there is for national law to depart from the core of a Directive. Rott has argued that the freedom of the Member State may be more limited than is often thought, particularly with regard to those aspects of a Directive which were the focus of protracted negotiations during the legislative procedure. For example, Rott suggests that the provisions of the Consumer Sales Directive (99/44/EU) on the goods’ conformity with the contract (Article 2) and the consumer’s remedies in case of non-conformity should be transposed into domestic law without altering their substance. With regard to the remedies, this implies that the strict hierarchy should be maintained and that changes to it, as well as making available other remedies such as damages concurrently with the Directive’s remedial hierarchy, are not permissible. Although his arguments are persuasive, Rott relies on case-law developed in the context of the Product Liability Directive (85/374/EEC), which does not contain a minimum harmonisation clause, and consequently has been held to be of a full harmonisation standard. Consequently, there may be more flexibility with minimum harmonisation measures than suggested by Rott.

Regulatory options

Aside from minimum harmonisation clauses, Directives also frequently include regulatory options, i.e. provisions which grant Member States permission to introduce a particular provision, without making it mandatory for all countries

3 See e.g. C-441/04 A-Punkt Schmuckhandels GmBH v Schmidt [2006] ECR I-2093 on the compatibility of a total prohibition of selling jewellery door-to-door.
4 An example from English law is the implementation of the Consumer Sales Directive (99/44/EU).
5 This might be one of the reasons behind the increasing shift towards abandoning minimum harmonisation.
7 Ibid., pp. 1123–1129.
to do so. A decision must therefore be taken whether a particular option should be utilised and the relevant provision transposed into national law. For example, in the Consumer Sales Directive (99/44/EU), there are four separate regulatory options: exclusion of second-hand goods sold at public auction (Article 1(3)); obligation on consumer to notify lack of conformity within 2 months (Article 5(2)); a reduced period of liability for second-hand goods (Article 7(2)); and a language requirement for guarantees (Article 6(4)). In respect of each of these options, Member States can choose whether to introduce a corresponding provision into their domestic law.\(^9\)

**Matters left for Member States to resolve**

A third feature of many Directives is that they leave certain matters for national law to decide. It is then for each Member State to come up with appropriate rules to ensure that national law responds to the obligation of introducing a rule. For example, Article 4 of the Doorstep Selling Directive (85/577/EEC) stated that ‘Member States shall ensure that their national legislation lays down appropriate consumer protection measures in cases where the information referred to in this Article is not supplied’, but leaves it to the Member States to come up with appropriate measures.\(^10\)

Indeed, deciding on appropriate sanctions for failing to comply with substantive provisions in Directives is often left to the Member States. Thus, Article 20 of the E-Commerce Directive (2000/31/EU) states that ‘Member States shall determine the sanctions applicable to infringements of national provisions adopted pursuant to this Directive . . .’, adding that such sanctions ‘. . . shall be effective, proportionate and dissuasive’. Similar provisions can be found in many other Directives.\(^11\)

**Ambiguities in a Directive**

A particular challenge for a Member State will arise if the text of a Directive is ambiguous. Such ambiguities may arise both with regard to definitions of core terms and substantive rules. Moreover, although the Directives in the field of contract law contain definitions of many of the terms used in these measures, specific legal concepts, such as ‘damage’ or ‘breach of contract’,

\(^9\) Evidence from the Member States suggest that the use of these options has varied: see H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers, *EC Consumer Law Compendium – Comparative Analysis*. Munich, Sellier, 2008, pp. 407–452.

\(^10\) These may, of course, be subject to review by the CJEU, as has indeed been the case with this particular provision: see Chapter 3, p. 79.

\(^11\) This is in line with the case-law developed by the CJEU on effectiveness and national remedies: see J. Steiner and L. Woods, *EU Law*, 10th edn. Oxford: Oxford University Press, 2009, chapter 8, section 8.5.
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remain undefined altogether. It might be assumed that these concepts are the same, or sufficiently similar, in all the Member States, but whilst it may be possible to provide a translation of the word(s) that make(s) up a particular legal concept, the substance is likely to be different. This can make it more difficult for a Member State to identify what exactly a Directive requires.

In such a situation, Member States need to consider the respective merits of copying-out the provision of a Directive to demonstrate compliance with EU law, at least at the formal level of the legislative text, against those of attempting to clarify the law by adopting more detailed rules and increasing the risk of state liability for incorrect implementation.

Furthermore, when adding to provisions of a Directive in domestic law, Member States need to be mindful of the overarching obligation under EU law to ensure that the effectiveness of a Directive is not undermined. One example was the CJEU took a dim view of a Member State’s decision to add to a Directive is Cofidis SA v Fredout in the context of the Unfair Contract Terms Directive. A French court requested a preliminary ruling on whether a domestic law prohibition that prevented a national court, on expiry of a limitation period, from ruling on the unfairness of a contract term was precluded by the Directive. The CJEU, having considered the Oceano judgment, held that a limitation period on the court's power to set aside an unfair term, whether of its own motion or based on a plea by the consumer, would undermine the effectiveness of the relevant provisions of the Directive. In particular, such a period would enable a seller or supplier to wait until that limitation period had expired before commencing legal action which sought to rely on the terms that might otherwise be unfair.

It is clear, therefore, that the obligation of implementing a Directive requires a significant amount of care in order for it to be successful. The number of issues that must be considered may raise concern about the overall effectiveness of the practice of Europeanisation by Directives – there are

13 Although if a Directive is ambiguous and a Member State implements it in a manner which is reasonably consistent with what the Directive is capable of meaning, it is likely that a claim in state liability would be unsuccessful: C-392/93 R v HM Treasury, ex parte British Telecommunications plc [1996] ECR I-1631 and C-319/96 Brinkman Tahakfabriken v Skatteverket [1998] ECR I-5255.
16 In basing its decision on the general principle of effectiveness, the CJEU had to distinguish its earlier jurisprudence on time limits, such as C-33/76 Reue [1976] ECR 1989 and C-261/95 Palmisani [1997] ECR I-4025.
several systemic flaws which can make it difficult to attain the driving goal of a more integrated common market.

**Post-implementation issues**

Although a review and adjustment of domestic legislation in the field occupied by a harmonising measure is essential to ensure consistency and compliance at a technical level, this alone is unlikely to be sufficient to ensure the full and effective operation of a Directive in the domestic legal context. The subsequent application of the law, particularly by the courts, is just as relevant in this regard. Domestic courts need to ensure that they interpret the national implementing legislation in such a way as not to undermine the objective pursued by the relevant Directive.

**Autonomous interpretation of EU law**

A long-established principle of EU law is the obligation on national courts to adopt an ‘autonomous interpretation’ of European legislation. This means that the approach to interpreting domestic legislation implementing an EU Directive must reflect the European origins of the legislation by not relying on established national law, or the national laws of another Member State, in interpreting such a provision.\(^\text{17}\) Thus, the court has observed that:

‘... [t]he need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question.’\(^\text{18}\)

This has been justified on the basis that:

‘The reason for this approach is that only autonomous interpretation can achieve the full effectiveness of a directive, as well as its uniform application by the Member States.’\(^\text{19}\)

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18 Case C-287/98 Luxembourg v Linster [2000] ECR I-6917; see also Case 327/82 Ekro v Produktschap voor Vee en Vlees [1984] ECR 107, para. 11.
A problem with the obligation of autonomous interpretation is that the meaning given to the same term in the context of several Directives may vary as between these measures.\textsuperscript{20} Although there will be a European meaning in the particular context, there may not be a single European interpretation.\textsuperscript{21}

In essence, therefore, the interpretation of legislation implementing an EU Directive should not follow whatever approach may already have been established in a particular domestic law previously.\textsuperscript{22} Instead, a separate ‘European’ interpretation should be adopted. This is perhaps less of a challenge in those areas where a Directive introduces provisions which are new to a particular jurisdiction,\textsuperscript{23} but where existing domestic provisions or established domestic terminology, is used, this may be more difficult. Indeed, reliance on existing provisions/terminology may cause greater confusion for domestic law, because of the need for autonomous interpretation in respect of aspects falling within the scope of the relevant EU measure. Often, existing rules will have a wider scope, which may result in different interpretations having to be adopted based on whether or not a particular situation falls within the ambit of EU law.

The domestic courts are, of course, not entirely left to their own devices, and can seek a preliminary ruling from the CJEU under Article 267 TFEU, which would provide guidance on the interpretation of a particular provision.\textsuperscript{24} However, such references can take up a significant amount of time, which may delay the resolution of a dispute by such an extent that the parties might prefer to abandon their case altogether or proceed without seeking further guidance.

\textit{Challenges for national courts}

Although the principle of autonomous interpretation seems easy enough to state, it may be challenging for national courts to honour it in practice. In particular, whilst interpretation needs to be autonomous (i.e. European), national courts enjoy more discretion with regard to the application of the legislation to specific cases.

\textsuperscript{20} Contrast the meaning of ‘damage’ in the context of Directive 85/374/EEC on product liability, as interpreted by the CJEU in C-203/99 \textit{Vedjfeld v Aarhus Amtskommune} \cite{ECR I-3569} with the meaning given to the same term in the Package Travel Directive in C-168/00 \textit{Simone Leitner v TUI Deutschland} \cite{ECR I-2631}.


\textsuperscript{22} See also C-296/95 \textit{R v Commissioners of Customs and Excise ex parte EMU Tabac SARL} \cite{ECR I-1605}.

\textsuperscript{23} Although cf. the response by the English courts under the Commercial Agents Regulations. See pp. 135.

\textsuperscript{24} See further Chapter 2, p. 45.
In dealing with the challenges for national courts regarding correct interpretation, an initial distinction needs to be made between the situation where a Directive has (in a formal sense) been correctly transposed into domestic law and where there are shortcomings in the implementing legislation.

Assuming that a Directive has been correctly implemented into domestic law, the obligation of ensuring an autonomous European interpretation is clear. Whether the courts will in fact do so may depend on whether the Directive was implemented by adopting new legislation, or if existing law was deemed sufficient to give effect to the requirements of a Directive. Where existing legislation was regarded as sufficient, the problems of interpretation are similar. A domestic court which can look to an established line of cases applying the domestic legislation may not realise that established domestic law is now ‘polluted’ by a harmonising measure, and that this may necessitate a different approach to interpreting and applying such legislation.

A further factor is the terminology employed in the national legislation. Where new legislation has been adopted, but the terminology resembles familiar domestic concepts, there is a risk that existing practice will be maintained, and the legislation will be interpreted by following the established understanding, which would undermine the correct interpretation of the Directive.

Even where the terminology that is used in domestic law is new and therefore unfamiliar, especially because national law is a verbatim implementation of a Directive, there is a risk either that a domestic court may come up with an interpretation which is not shared by the courts of the other Member States or that a court may consider how the courts in other Member States have approached this issue and follow their lead. In the latter case, whilst a comparative approach may be welcomed by some, it does not inevitably guarantee the correct and effective application of a harmonising measure.

The task for the domestic courts may be made more difficult if there is a defect in the formal implementation of a Directive into domestic law, e.g. because a Member State has taken no steps to implement a Directive, or the implementing legislation contains gaps or other defects. In other areas of EU law, the doctrine of direct effect may assist.\(^\text{25}\) This permits a domestic court to consider the text of a Directive itself, where there has been no, or a defective, implementation of a Directive, and permit an individual to enforce rights conferred by that Directive. This doctrine only applies to provisions which are sufficiently clear and precise, unconditional and leave no room for discretion in implementation.\(^\text{26}\) Moreover, it can only be invoked in circumstances where an individual is seeking to enforce rights against a public body (‘vertical direct effect’).\(^\text{27}\) It cannot therefore be invoked where an individual is seeking to rely

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27 Case 152/84 Marshall v Southampton & South West Hampshire Area Health Authority (Teaching) [1986] ECR 723; C-188/89 Foster v British Gas plc [1990] ECR I-3461.
on a Directive against another individual (‘horizontal direct effect’). The CJEU has time and again denied the availability of direct effect in such circumstances.\footnote{28}{In the context of contract law Directives, see C-91/92 \textit{Faccini Dori v Recreb SRL} [1994] ECR I-3325 and C-192/94 \textit{El Corte Inglés SA v Rivero} [1996] ECR I-1281.}

However, in order to fill this possible gap in the protection of individuals, the CJEU has developed the principle of indirect effect, or consistent interpretation, which can be invoked both when domestic legislation has been expressly adopted to implement a Directive, and where pre-existing legislation is deemed to be sufficient. In the seminal \textit{Marleasing} decision,\footnote{29}{C-106/89 \textit{Marleasing SA v La Comercial Internacional de Alimentacion SA} [1990] ECR I-4135.} the CJEU established that domestic courts are obliged to interpret domestic legislation, in so far as possible, in accordance with corresponding EU legislation.\footnote{30}{On the potential of this decision for the Europeanisation of private law, see M. Amstutz, ‘In-between Worlds: \textit{Marleasing} and the Emergence of Interlegality in Legal Reasoning’ (2005) 11 \textit{European Law Journal} 766–784.} This obligation applies to the domestic law in the field covered by the Directive, irrespective of whether it was adopted before or after the Directive, except where national law cannot reasonably be interpreted in this way.\footnote{31}{C-334/92 \textit{Wagner Miret v Fondo de Garantira Salaria} [1993] ECR I-6911.}

Where the principle applies, it may allow a person to enforce a particular right against another person, although it must be emphasised that this method of interpretation may not result in the creation of entirely new obligations on an individual, nor produce a form of ‘indirect horizontal direct effect’. In the context of contract law, the principle may therefore be of limited assistance.

As can be seen, there are strict obligations on the national courts to ensure that national legislation is interpreted in a European sense. However, it is equally clear that when it comes to the application of the law in particular cases, national courts enjoy a greater degree of discretion. The CJEU has, particularly in recent times, drawn a clear distinction between interpretation and application. For example, as noted earlier, in \textit{Freiburger Kommunalbauten},\footnote{32}{C-237/02 \textit{Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter} [2004] ECR-I 3403; see p. 48.} the interpretation of the unfairness test in the Unfair Contract Terms Directive was held to be a matter for the CJEU, but the application to the facts of the case was a matter for national law.\footnote{33}{See also case C-465/04 \textit{Honeyvem Informazioni Commerciali Srl v Mariella De Zotti} [2006] ECR I-2879 in the context of commercial agency, discussed below.} This neatly demonstrates that the CJEU’s role is limited and that national courts retain some discretion regarding the application of EU-based rules. Whilst this might pose a risk of divergent outcomes in similar cases, it also reflects the recognition of national (and even local) factors which influence the outcome of particular cases.
Implementing EU law in the UK

Having considered the general issues that arise with regard to the implementation of Directives, the specific approach taken in the UK is now examined.\(^34\) First, the UK’s general approach to implementing EU Directives is outlined. This is followed by an analysis of how the English courts have handled the interpretation of implementing legislation in two key areas – unfair terms and commercial agency.

**Framework for implementation**

EU Directives, particularly in the field of contract law, have been implemented in regulations under section 2(2) of the European Communities Act 1972 (ECA), as amended. Many of the Directives in question deal with matters on which there is no pre-existing domestic legislation, and their implementation consequently occurs through free-standing Regulations. However, where there already is legislation in place, the UK has sometimes attempted to amend this legislation to bring it into line with its obligations under EU law,\(^35\) but at other times maintained existing legislation and adopted regulations to give effect to EU law. One obvious example where the implementation of a Directive resulted in the adoption of Regulations that operated alongside pre-existing legislation is the field of unfair contract terms, where the Unfair Contract Terms Act 1977 was retained when the Unfair Terms in Consumer Contracts Regulations 1999\(^36\) were adopted. Eventually, the Law Commission was asked to propose new legislation that would combine the two measures into one more coherent piece of legislation.\(^37\) These proposals have yet to be enacted, and a fresh consultation for updating the proposals was launched in 2012.\(^38\)

Section 2(2) ECA enables the adoption of orders, rules, regulations or schemes to implement Directives or any other EU obligations, as well as to deal with ‘matters arising out of or related to any such obligation’ (section 2(2) (b)). On the one hand, this power is broad in that it can be used to enact provisions which would otherwise have to be adopted by primary legislation (i.e. an Act of Parliament), including amendments to existing primary legislation. On the other, the use of section 2(2) has historically been problematic,

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\(^35\) E.g. on timeshare and sale of goods.

\(^36\) SI 1999/2083.


because the power it granted was limited to measures necessary to give effect to EU obligations. This meant that wider reforms to domestic law to ensure that the EU-derived provisions fit better with existing law could not be undertaken by using section 2(2), and primary legislation was necessary. This explains the retention of two separate measures dealing with unfair contract terms, for example. The relevant Directive only deals with unfair terms in consumer contracts, whereas the earlier Unfair Contract Terms Act 1977 also applies to non-consumer contracts, as well as terms which have been negotiated.

This position was modified by the Legislative and Regulatory Reform Act 2006 (LRRA). The LRRA empowers the government to adopt regulations which can remove or reduce any burden resulting from existing legislation, e.g. where the legislation imposes unnecessary costs or administrative inconvenience, or is a general obstacle to efficiency, productivity or profitability (section 1(3)); this includes burdens which are caused by legislation which is difficult to understand (section 1(4)). Until the LRRA was enacted, it would often have been impossible to implement EU legislation under section 2(2) ECA and amend related domestic law to reduce the overall burden, because the relevant procedure to be followed under the ECA would often be different from that under other legislation. The changes introduced by the LRRA make it possible to combine the order-marking powers under the ECA and the LRRA, even where different procedures need to be followed for particular provisions.

However, these changes are only a limited improvement: they only operate where there is scope for reducing any burden as a result of the enactment of legislation. Perhaps the combination of the two unfair terms regimes could be undertaken on this basis, if only because revised legislation might be better understood. But if the intention is to broaden the scope of legislation beyond what is required by an EU Directive, then primary legislation will almost certainly still be needed, unless such an approach can be shown to reduce the overall burden. Thus, with respect to the extension of the UK’s rules on doorstep selling contract to circumstances where a trader’s visit was solicited, the enactment of a new enabling power in the Consumers, Estate Agents and Redress Act 2007 was required.

39 The adoption of statutory instruments may be adopted either by the negative resolution procedure (the instrument will enter into force unless Parliament resolves not to pass it) or the affirmative resolution procedure (requiring a vote by Parliament to give effect to the instrument).

40 For further discussion of the LRRA, see e.g. P. Davis, ‘The Significance of Parliamentary Procedures in Control of the Executive: a Case Study: the Passage of Part 1 of the Legislative and Regulatory Reform Act 2006’ [2007] Public Law 677–700.

41 See Chapter 3 on the exclusion of such visits from the scope of the Directive, and below for a more detailed account of the Directive’s implementation into UK law.

42 See section 59.
Minimum harmonisation

With regard to minimum harmonisation Directives, the general approach in the UK is to adhere to the minimum standard only and not to engage in what is known as ‘gold-plating.’\(^43\) However, in the field of consumer law, it has generally sought to maintain existing levels of consumer protection, and a degree of gold-plating has been accepted.

An example of heavy reliance on a minimum harmonisation clause is the implementation of the Consumer Sales Directive (99/44/EU). The decision was taken to retain the existing Sale of Goods Act 1979, but to add the remedial regime from Article 3 of the Directive\(^44\) to the legislation. Thus, instead of introducing the ‘conformity with the contract’ test, the existing implied terms that goods must correspond with their description,\(^45\) be of satisfactory quality\(^46\) and reasonably fit for any particular purpose made known to the seller,\(^47\) were retained on the basis that these fulfilled the same purpose. More controversially, the right to terminate the contract of sale for breach of the implied terms was also retained, and exists alongside the new remedies.\(^48\) The retention of existing provisions was generally justified on the basis that they met or exceeded the minimum standard set by the Directive. This may be so, but it seems that the existence of the minimum standard was used as a smoke-screen to avoid having to consider more carefully how the requirements of the Directive could be integrated into domestic law. As a result, the remedies available to consumers are complex and difficult to understand. Unsurprisingly, the government has been urged to amend the legislation,\(^49\) and the Law Commission made proposals for a revision to the remedial scheme but these have yet to be put into effect.\(^50\)

Open issues

Although about to be repealed by the Consumer Rights Directive (2011/83/EU), the implementation of the Doorstep Selling Directive remains a good example of how the UK dealt with aspects in respect of which action was


\(^{44}\) See Chapter 3, p. 107.


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required without there being specific instruction in the Directive itself. As seen in Chapter 3, the Doorstep Selling Directive only required that consumers are given a right of withdrawal for contracts to which the Directive applied, and that consumers are adequately informed about this right. This was the full extent of the ‘result’ to be achieved.\(^{51}\) Many matters related to both the right of cancellation and the obligation to provide information about this right were left for the Member States to address. Thus, it was for domestic law to provide ‘appropriate consumer protection measures’ (Article 4, final sentence) if the consumer is not given the requisite information about the right of cancellation. The procedure for exercising the right of withdrawal was also for the Member States to decide upon (Article 5(1)), as were the legal effects of exercising the right to cancel, especially with regard to the return of any pre-payments and goods supplied under the contract (Article 7).

The Directive was implemented into UK law in the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987.\(^{52}\) This was one of the first contract law Directives, and the text of the Regulations differs significantly from that of the Directive in that the language is more familiar to an English lawyer. For present purposes, the focus is on how the UK dealt with the various aspects that needed to be regulated at national level without there being prescriptive rules in the Directive itself. Thus, with regard to a failure to provide information about the right of withdrawal at the correct time, the Regulations provided that the contract was not enforceable against the consumer.\(^{53}\) This appeared to be a permanent consequence, and even if the consumer was subsequently informed about this right, the contract remained unenforceable. In light of how later Directives dealt with this issue,\(^{54}\) the retention of this approach was surprising. In addition to the unenforceability of the contract, criminal sanctions for failing to provide information about the right of withdrawal were introduced.\(^{55}\)

The right of withdrawal itself had to be exercised by giving notice in writing to the trader.\(^{56}\) The Regulations provided a model cancellation form, but its use is not mandatory.

National law also had to address the legal effects of the consumer’s decision to withdraw from the contract. The main consequence is that the contract was treated as if it had never been entered into by the consumer.\(^{57}\) Regulations

\(^{51}\) Cf. Article 288 TFEU.

\(^{52}\) SI 1987/2117. These have since been replaced by the Cancellation of Contracts made in a Consumer’s Home or Place of Work etc. Regulations 2008 (SI 2008/1816). However, this section looking at the earlier Regulations has been retained here as this example is a good illustration of the particular issue under discussion.

\(^{53}\) Regulation 4(1).

\(^{54}\) Generally, the withdrawal period starts to run once the information has been provided, even if this is done a long time after the conclusion of the contract.

\(^{55}\) Regulations 4A–4H, added in 1998.

\(^{56}\) Regulation 4(5).

\(^{57}\) Regulation 4(6).
5–8 dealt with the related consequences of withdrawal. Any money paid by the consumer had to be repaid, and if the consumer had in his possession any goods supplied under the contract, he had a lien (a security interest) over those goods with regard to any money that is repayable to him.\textsuperscript{58} If the contract included a credit element, this was deemed to continue until the consumer had repaid the whole or portion of the credit either within one month of cancelling or, where the credit was repayable by instalments, before the date on which the first instalment was due.\textsuperscript{59} Regulation 7 obliged the consumer to ‘restore’ the goods to the trader and to take reasonable care of them until this has happened, which means that they had to be available for collection from his home. The consumer was permitted to return the goods himself, but he was not obliged to do so; where he did, he needed to take reasonable care to ensure that the goods were received and not damaged in transit.\textsuperscript{60}

The duty to restore did not apply to goods which were perishable; goods which by their nature were consumed by use and had been so consumed by the time the contract was cancelled; goods supplied in an emergency, or goods incorporated into land or another thing not part of the contract. Where this was the case, the consumer had to pay for the goods and any services provided in connection with the goods in accordance with the terms of the contract. This seems surprising as the effect of the withdrawal was that the contract never existed, yet the consumer is obliged to pay at the contract price. Hellwege argued that the better solution would have been to require the consumer to pay for the value of the goods,\textsuperscript{61} rather than their contract price, although this would have been unacceptable if the contract price had been lower than the value of the goods.

Lastly, if the consumer had provided goods in part-exchange and the trader had already received them, he must return them in a condition ‘substantially as good as when they were delivered to the trader’ within 10 days from when the contract was cancelled. If this was not possible, the consumer was entitled to receive a sum of money equal to the value given to the part-exchange goods.

From this brief overview of the UK’s implementation of the Directive, it can be seen that a very short instruction in a Directive can bring about a detailed set of national rules. In view of the limited guidance given in the Directive, it is not surprising that there is a considerable degree of variation across the Member States, particularly with regard to the effects of withdrawing from a contract.\textsuperscript{62}

\textsuperscript{58} Regulation 5.
\textsuperscript{59} Regulation 6.
\textsuperscript{60} Presumably, this means that they should be sent in appropriate packaging and, possibly, by recorded delivery, although there is no express obligation to that effect in the Regulations.
\textsuperscript{62} See Schulte-Nölke, Twigg-Flesner and Ebers, op. cit., n. 9, pp. 471–482.
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Evaluation

The general context within which the UK can give effect to Directives suggests that the implementation of contract law related measures into domestic law could be problematic, not least because the Directives frequently deal with isolated and specific issues which have some impact on general contract law without introducing a fundamental change. In a sense, the UK, and English law in particular, can absorb EU contract law measures with a degree of ease, because most areas of contract law remain common law-based and therefore uncodified. Most other European jurisdictions have a codified system of contract law, and greater effort may be required to slot EU-derived rules into the system of such codes. However, whilst free-standing legislation can be enacted to satisfy EU obligations, there is a risk that separate measures may be insufficiently co-ordinated with one another, which might result in unnecessary incoherence in domestic law. Hellwege, for example, has argued that the implications of introducing a right of withdrawal in various consumer protection measures lacks coherence as between these measures, as well as with wider principles of contract law and restitution, although this view seems to be influenced by a desire for a more systematic and rigidly coherent approach more familiar to other jurisdictions. However, unnecessary discrepancies within national law may cause problems, and greater thought may need to be given to the relationship between new and existing implementing measures in related areas of contract law.

Interpretation and application by national courts

The role of the domestic courts has already been outlined in general terms. In addition to their obligation to ensure that domestic legislation is interpreted in an EU law compliant manner, the courts may also be called upon to consider the wider implications of particular implementing measures for contract law generally. Unfortunately, there are few reported cases of relevance. One example for a situation where a domestic court had to deal with the impact of EU-based legislation on contract law was Commissioners of Customs and Excise v Robertson’s Electrical Ltd. Here, the Scottish Inner House had to consider the effect of a right of withdrawal under the legislation implementing the Distance Selling Directive (97/7/EU) in the context of determining the tax point for charging value added tax (VAT). It was argued that a contract in respect of which there was a right of withdrawal was equivalent to a contract for the supply of goods on approval, which would mean that the tax point was the end of the withdrawal period. This was rejected by the Court, which

63 Hellwege, op. cit., n. 61.
64 Commissioners of Customs and Excise v Robertson’s Electrical Ltd [2006] SCLR 493.
65 There is no concluded contract in such circumstances until the goods supplied have been approved.
held that the existence of a right of withdrawal does not change the fundamental nature of the transaction; rather, it is a concluded contract with a 'statutory right to annul it'. The legislation did not address this particular issue, and so it was for the court to provide clarification.

On the limited evidence available, the English (and Scottish) courts recognise the European background to domestic law and generally seek to respect the principle of autonomous interpretation. For example, when the Court of Appeal had to consider, in light of the definition of 'goods or services', whether the legislation implementing the Unfair Terms Directive (93/13/EU) applied to a situation in which a local council provides housing to tenants, Laws LJ was quick to emphasise the European origins of the legislation. He undertook an extensive review of the Directive's legislative history, as well as other language versions of the Directive, and discovered that the equivalent phrase in other versions of the Directive was capable of including both immovables and movables. Laws LJ rejected the suggestion that the legislation only applied 'to “contracts for goods and services as an English lawyer would understand those terms”' by saying that:

'European legislation has to be read as a single corpus of law binding across the member states. And the proposition leads to absurdity... In our domestic law, these distinctions [between movables and immovables] have a long history and a present utility. In the context of a Europe-wide scheme of consumer protection, they could be nothing but an embarrassing eccentricity.'

This approach is commendable because it reflects a clear recognition of the EU law background of the legislation and the need to avoid maintaining an interpretation that might correspond with a domestic understanding, but would undermine the Europeanisation objective. However, this particular example also illustrates the difficulties for the national courts – the phrase 'goods or services' had to be interpreted in a manner that seems at odds with their natural, or even previously established legal, meaning.

66 Commission of Customs and Excise v Robertson's Electrical Ltd, above, n. 64, para [17].
67 The number of reported cases involving EU contract law measures in the UK is rather small.
68 It would appear that this is not so in many other Member States – see L. Niglia, 'The non-Europeanisation of Private Law' (2001) 4 European Review of Private Law 757–599.
70 Ibid., [57].
71 Notably, the French, Italian, Spanish and Portuguese versions.
72 Newham, above, n. 69, [78]: Mr Underwood, counsel for the public authority, cited by Laws LJ.
73 Ibid., [78].
The following section will examine in more depth how the English courts (and, in some instances, the Scottish courts) have dealt with both the interpretation and application of national legislation based on EU Directives, focusing on the areas of unfair contract terms and commercial agency.

Example 1 – unfair contract terms and good faith

The Unfair Contract Terms Directive (93/13/EEC) was implemented into domestic law in two attempts, first in the Unfair Terms in Consumer Contracts Regulations 1994, replaced with a new version in 1999. As seen earlier, the Directive introduces a general test of fairness applicable to all non-negotiated terms in a consumer contract. One of the elements of that test is the criterion of ‘good faith’, a concept which had not previously found its way into English contract law. The implementation of the Directive resulted in an intense debate about the meaning, scope and implications of the ‘good faith’ principle, and whether the courts would be able to apply this concept sensibly. Early signs (albeit at county court level) were not promising.

This changed when the House of Lords was given an opportunity to consider the test in Director-General of Fair Trading v First National Bank. The key issue in this case was the fairness of a term inserted by the respondent bank into its loan agreements which permitted it to charge further interest on the outstanding part of a loan, even after a court had, in default proceedings, made an order regarding the repayment of the loan. The judge in the High Court concluded that the term was fair, but the Court of Appeal disagreed. Both courts focused on whether the obligation to pay post-judgment interest contained in the term challenged was unfair to the consumer. The House of Lords, concluding that the term was not unfair, took a different approach. It was found that the legislative framework on consumer credit agreements did not allow for the county court to award statutory interest on


75 With the exception of the Commercial Agency Directive.


77 Director-General of Fair Trading v First National Bank [2001] UKHL 52, [2001] 1 All ER 97, HL.

78 Ibid., [2000] 1 WLR 98.

79 Ibid., [2000] 2 WLR 1353, CA.

80 In particular, the County Courts (Interests of Judgment Debts) Order 1991 (SI 1991/1184).
a judgment debt for agreements subject to the Consumer Credit Act 1974. The bank could therefore only charge interest after such a judgment if the loan agreement contained a term to that effect. The law on consumer credit did not include anything that prohibited an agreement to charge further interest after a judgment. Whilst such a term and its consequences would cause surprise to a consumer, as well as entail potentially serious financial consequences, the problem was with consumer credit legislation rather than the term itself.

Nevertheless, the Law Lords took the opportunity to express their views on the unfairness test generally, as well as the notion of good faith specifically. Lord Bingham considered the ‘significant imbalance’ and ‘good faith’ elements in turn. With regard to the former, he said that:

‘The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties’ rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty. . . . This involves looking at the contract as a whole. But the imbalance must be to the detriment of the consumer; . . .’

In dealing with ‘good faith’ criterion, Lord Bingham returned to his obiter in Interfoto Library Ltd v Stiletto Visual Programmes Ltd, a case under the Unfair Contract Terms Act 1977. Based on this, he suggested that good faith was about:

‘... fair and open dealing. Openness requires that terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer’s necessity, indigence, lack of experience, weak bargaining position . . . Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice. . . .’

81 Director-General of Fair Trading v First National Bank, above, n. 77, [17].
82 Interfoto Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433. He noted that good faith ‘does not simply mean that [parties] should not deceive each other . . .; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as “playing fair”, “coming clean” or “putting one’s cards face upwards on the table”. It is in essence a principle of fair and open dealing . . ’ (at 439).
83 Director-General of Fair Trading v First National Bank, above, n. 77, [17].
Lord Bingham concluded that the fairness test ‘lays down a composite test, covering both the making and the substance of the contract . . .’ 84 Lord Steyn agreed that the fairness test had both a procedural and a substantive element. 85 ‘Good faith’ is an objective standard which demands open and fair dealing. 86 The ‘significant imbalance’ criterion relates to the substantive unfairness of a term. 87 To this, Lord Millett added that:

‘It is obviously useful to assess the impact of an impugned term on the parties’ rights and obligations by comparing the effect of the contract with the term and the effect it would have without it. But the inquiry cannot stop there. It may also be necessary to consider the effect of the inclusion of the term on the substance or core of the transaction; whether if drawn to his attention the consumer would be likely to be surprised by it; whether the term is a standard term, not merely in similar non-negotiable consumer contracts, but in commercial contracts freely negotiated between parties acting on level terms and at arms’ length and whether, in such cases, the party adversely affected by the inclusion of the term or his lawyer might reasonably be expected to object to its inclusion and press for its deletion. The list is not necessarily exhaustive; other approaches may sometimes be necessary.’ 88

The speeches of the Law Lords is the authoritative statement on the unfairness test in English law, and subsequent cases have followed it. However, some of Lord Bingham’s reasoning might suggest that he is adopting an ‘English’ interpretation of the ‘good faith’ test, rather than one that respects the need for an autonomous European reading. Whilst his earlier observations in Interfoto were based on an assessment of how good faith is used generally in those jurisdictions familiar with the concept, this does not mean that this corresponds with the European interpretation that might be adopted by the CJEU, and lingering doubts remain as to whether this was the correct approach. 89

**Example 2 – commercial agency**

The attempts by the English (and Scottish) courts to apply the legislation implementing the Commercial Agency Directive (86/653/EEC) show that the courts can struggle to understand concepts introduced through the process of

84 Ibid.
85 Ibid., [36].
86 Ibid., [36].
88 Ibid., [54].
89 See below for a discussion of the refusal to request a preliminary ruling under Article 234 in this case.
Europeanisation into domestic law. The Directive was implemented into national law in the Commercial Agents (Council Directive) Regulations 1993,\(^\text{90}\) largely by copying-out the text of the Directive. As explained earlier, Article 17 of the Directive gives Member States a choice as to what should happen when an agency contract terminates, i.e. whether the agent should receive an indemnity or compensation. UK law has given effect to both possibilities, with compensation as the default position, but the parties are able to specify in their contract that an indemnity should be provided on termination instead. Either concept was new to domestic law: the protection of a commercial agent on termination of the agency relationship was limited to damages for breach of contract, where the termination constituted such a breach. If an agency contract had simply expired, there was no entitlement to any form of payment from the agent’s principal.

This changed with the coming into force of the Commercial Agents Regulations. Now, on termination of the relationship, the agent could demand compensation (or an indemnity). Such compensation should cover the damage suffered as a result of this termination. The courts soon realised that ‘termination’ in this context did not only refer to termination of the contract as a result of a breach, but also the mere expiry of the agreement (e.g. where it was a fixed-term agreement or where appropriate notice was given).\(^\text{91}\) So compensation is not equivalent to the award of damages for breach of contract, but it was not at all clear what the purpose of awarding compensation would be, and how the amount the agent is to receive should be calculated. This section examines how the UK courts have sought to deal with the application of these provisions. The focus is not on the detailed criteria developed, but rather the process by which the courts have arrived at these.

As noted earlier, the notions of compensation and indemnity have their origins in French and German law respectively and, whilst they are different, their common objective is to reward an agent for the work undertaken in using their skill and expertise to create a customer-base for the principal from which orders will continue to be received.\(^\text{92}\) This, too, was something which the domestic courts readily accepted.\(^\text{93}\) In *Lonsdale v Howard & Hallam*,\(^\text{94}\) Lord Hoffmann said that ‘the agent is treated as having lost something of value for this termination and is entitled to compensation for this loss.’\(^\text{95}\) He continued:

\(^{90}\) SI 1993/3053.  
\(^{91}\) See e.g. *Tigana Ltd v Decoro Ltd* [2003] EWHC 23 (QB); *King v Tunnock* [2000] EuLR 531.  
\(^{93}\) E.g. in *Moore v Piretta PTA Ltd* [1999] 1 All ER 174 and *Barret McKenzie v Escada (UK) Ltd* [2001] ECC 50.  
\(^{94}\) *Lonsdale v Howard & Hallam Ltd* [2007] UKHL 32, [2007] 4 All ER 1.  
\(^{95}\) Ibid., [8].
'As this part of the Directive is based on French law, I think that one is entitled to look at French law for guidance, or confirmation, as to what it means. . . . The French jurisprudence . . . appears to regard the agent as having had a share in the goodwill of the principal’s business which he has helped to create. The relationship between principal and agent is treated as having existed for their common benefit . . . The agent has thereby acquired a share in the goodwill, an asset which the principal retains after termination of the agency and for which the agent is therefore entitled to compensation . . .'96

Whilst this provides a useful explanation of the underlying purpose of the compensation provision in the Directive/Regulations, Lord Hoffmann’s comments raise an important fundamental question: he immediately turns to French law to identify the rationale for the provision on compensation. However, UK law is not based on French law, but rather a European Directive. It may therefore be asked to what extent it is permissible to consider other national laws in trying to give substance to an unfamiliar concept. The reason to be cautious is the principle of ‘autonomous interpretation’ mentioned earlier, according to which principles and concepts introduced by EU legislation should be treated as European concepts. Consequently, the fact that a provision in a Directive was inspired by a particular national rule does not invariably mean that all the other Member States are bound by that national law, unless the Directive explicitly states as much. Indeed, Member States should avoid following another national law so as not to undermine the need for an autonomous interpretation.

This does not mean, however, that Lord Hoffmann’s approach is wrong. It seems perfectly possible for a UK court to consider the position in another jurisdiction in order to assist with establishing the overall purpose of a specific provision. However, identifying that purpose on the basis of the national law which clearly inspired the European provision does not mean that the criteria for its application should also be drawn from that jurisdiction. This is indirectly supported by the CJEU’s observations in Honeyvem v De Zotti,97 made in the context of the indemnity provision in Article 17(2) of the Directive, that ‘. . . Member States may exercise their discretion as to the choice of methods for calculating the indemnity . . .’.98 On the one hand, the CJEU does not say that German law99 must be followed, but on the other hand, the Court also does not expressly rule it out. This leaves open the possibility that courts in other jurisdictions could adopt the French or German approach respectively, but they are not obliged to do so.

96 Ibid., [9].
97 Case C-465/04 Honeyvem Informazioni Commerciali Srl v Mariella De Zotti, above, n 33.
98 Ibid., para. 35.
99 Which was the inspiration for the indemnity provision.
The UK courts have not adopted a consistent approach in this matter. Initially, the courts were quick to look to either French or German law. In *Moore v Piretta Ltd*, the only reported case on the indemnity provision, Judge Mitting QC said that:

‘...the primary purpose of the directive is the harmonisation of Community law by requiring all member states to introduce rights and duties similar to those already subsisting in at least two of the member states of the Community, the Federal Republic of Germany and France. ... Consistent with the purpose of achieving harmony between member states, it is in my judgment permissible to look into the law and practice of the country in which the relevant right originated ... and to use them as a guide to their application.’

Although Judge Mitting QC did not follow German law entirely in his assessment of the indemnity due to the agent in that case, the relevant German law was clearly a material factor. Although the judge did not go so far as to say that following German law was obligatory under the Directive, his words appear to reflect the assumption that the harmonising purpose of the Directive means that, in principle, German law should be followed.

In Scotland, Lord Hamilton in *Roy v MR Pearlman Ltd* agreed with Judge Mitting QC’s approach and rejected arguments by counsel that French law was irrelevant to the interpretation and application of the Regulations. He also did not accept that considering French law required expert evidence to be provided, regarding this approach as ‘in the nature of a comparative law exercise, for the purposes of which a Scottish court is entitled to have direct regard to sources of foreign law.’

Similarly, the Scottish Court of Session in *King v Tunnock Ltd*, this time dealing with the compensation provision, was urged by counsel not to follow French practice, but declined. Having emphasised that the harmonisation of the law to ensure that conditions for commercial agents are equivalent throughout the internal market was the aim of the Directive, the Court observed that this would fail if national courts applying the corresponding domestic rules would come to different outcomes. It then favourably considered submissions made about the relevant French law, and came to a conclusion.

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100 *Moore v Piretta Ltd* [1999] 1 All ER 174.
101 Ibid., at 177, emphasis added.
103 Ibid., 1170.
104 *King v Tunnock Ltd* [2000] IRLR 570.
105 The Court did express its agreement with a suggestion made by counsel that both parties might present an agreed statement from an expert as to the position under another Member State’s law, suggesting perhaps a recognition of the practical difficulties associated with attempts to follow slavishly another jurisdiction’s approach.
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squarely based on the general approach adopted by the French courts when applying the compensation provision.\(^{106}\)

In these cases, no consideration was given to the principle of autonomous interpretation. In *King*, counsel made strong representations about the approach that should be adopted, but the Court chose to follow the French approach. But doubts about the correctness of this approach were soon expressed by other courts. In *Jeremy Duffen v FRA Bo SpA*,\(^{107}\) Judge Hallgarten in the Central London County Court urged caution:

‘... a better understanding of the regulations may be gained from having some idea of the principles applicable within the legal system or stems from which those regulations may have been derived. But at this point I hesitate... It seems to me that once an English Court is diverted from the general into the particular, it will find itself drawn into attempting to mimic what a French Court would actually have done, a task which it is ill-equipped to perform.’\(^{108}\)

Thereafter, the tide began to turn. Bowers J in *Barrett McKenzie v Escada (UK) Ltd*\(^{109}\) expressed his scepticism of the approach in *King v Tunnock* thus:

‘... how do we know in the United Kingdom, how do I know how the French would deal with this particular case?... It does seem to me that it is important to realise we are dealing with United Kingdom legislation and, whilst this ‘foreign animal’ has been created that is unknown to common law, the compensation principles have in practical terms to be sufficiently United Kingdom based and developed so as to be interpreted and enforceable by United Kingdom judges, English judges, without requiring in any single case, it seems to me, an expert in French law to determine the case.’\(^{110}\)

Rather, what mattered in order to achieve harmonisation was to ensure that where there was a breach of a right, there would be a domestic remedy. It would be ‘extraordinary... for one Member State to be required to impose not just a remedy from Europe but in fact from another Member State’.\(^{111}\) He explicitly disagrees with *King v Tunnock* by concluding that the Directive was

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\(^{108}\) Ibid., at 197–198.

\(^{109}\) *Barrett McKenzie v Escada (UK) Ltd* [2001] ECC 50.

\(^{110}\) Ibid., [21].

\(^{111}\) Ibid., [22].
concerned with establishing the entitlement to compensation generally but that the method of assessment was a matter for the domestic courts.\textsuperscript{112}

This position has been endorsed by the House of Lords in \textit{Lonsdale v Howard & Hallam}.\textsuperscript{113} Lord Hoffmann rejected a submission that the Commission in its report on the Directive\textsuperscript{114} had, by commenting favourably on the French approach, endorsed this as the appropriate method of calculating the compensation payable. First, Lord Hoffmann – correctly – stated that the Commission’s report did not, nor could it, contain any endorsement; it merely summarised the position as it obtained in national law at that time.\textsuperscript{115} Second, both the English and French Courts agree on the purpose of the compensation provision, but differ with regard to the method of calculation. Following the \textit{Honeyvem} case, that is a matter for each Member State.\textsuperscript{116} Third, the market conditions for commercial agents in France and England are different,\textsuperscript{117} further justifying varying national approaches in the method for calculating compensation. Taken together, this meant that the English courts were free to develop their own criteria for calculating compensation and were not bound to follow the methods developed in another Member State.\textsuperscript{118}

What lessons can be drawn from this discussion? There are several noteworthy points about the Europeanisation of contract law reflected in these decisions. It can be seen that the underlying purpose of Europeanisation, i.e. to achieve greater harmonisation across the EU, may not permeate every last detail of the area concerned. Thus, the objective of providing for better protection for commercial agents pursued by the Directive can be attained without harmonising the method for calculating compensation. Of course, if the purpose of the Directive had been to harmonise not only the general protection of commercial agents, but also the method for calculating compensation (and indemnity), then a different approach by the national courts may have been required. The CJEU has made it clear that national courts retain significant discretion in this regard without undermining the Directive’s overall aims. Furthermore, Europeanisation as a result of an EU measure does not mean that national legislation which may have inspired that measure becomes the yardstick which the courts in all the other jurisdictions are bound to follow. Quite unlike Lord Hamilton’s view in \textit{Roy v Pearlman}, this seems to be much less of a comparative law exercise than might be the case in other areas.

\begin{footnotesize}
\begin{enumerate}
\item[112] Ibid., [26].
\item[113] \textit{Lonsdale v Howard & Hallam Ltd}, above, n. 94.
\item[115] \textit{Lonsdale v Howard & Hallam Ltd}, above, n. 94, [16].
\item[116] Ibid., [17].
\item[117] Ibid., [18].
\item[118] The remainder of Lord Hoffmann’s speech was concerned with the factors that would be relevant in calculating compensation, the detail of which is not relevant for present purposes.
\end{enumerate}
\end{footnotesize}
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Domestic courts and Article 267 TFEU references

In Chapter 2, it was seen that national courts can (and, in some instances, must) request a preliminary ruling from the CJEU on the interpretation of particular questions of EU law. However, despite the fact that there are now many Directives in the contract law field, with some in place for more than 20 years, the number of preliminary rulings requested from the national courts of all the Member States remains small.119 There may be various reasons for this.120 Many of the Directives concerned are consumer law measures, and there appears to be a considerable degree of variation between the Member States in the number of reported cases involving consumer claims.121 Moreover, if a case does reach a court, there may not necessarily be a recognition that the dispute turns on a question of EU law that needs to be clarified through a preliminary ruling. But even where there is awareness of the relevance of EU law, there may be a reluctance to refer questions to the CJEU because of the not inconsiderable delay this would cause to resolving the dispute before the national court – many cases now take at least 2 years before the CJEU hands down its judgment. Furthermore, there may also be an element of protectionism involved, in that contract law – as all areas of private law – is a central feature of each national legal system, and by not referring matters to the CJEU, national courts retain an element of control even in those areas where Europeanisation has already occurred.

The number of English cases involving legislation giving effect to an EU Directive in the field of contract law is small. The main areas where a body of case-law has developed are those already considered – Unfair Contract Terms and Commercial Agency. In both areas, the courts have had to consider whether to request a preliminary ruling from the CJEU on the interpretation of the corresponding Directives. In almost all cases, the courts (including the House of Lords) concluded that this was not necessary.

A somewhat pointed observation about the (lack of a) need for a reference was made by Staughton LJ in Page v Combined Shipping and Trading Co Ltd:122

'It may well be that . . . we shall have to refer the problem to the European Court, and it will take another two years after that before a decision emerges as to what the regulation really means. Maybe the parties will think there are better methods of spending their time and their money than disputing that for a long period of time.'123

119 Although it is difficult to give a precise number because of the various issues raised by cases that have been referred (e.g. some involve questions of fundamental EU law, such as direct effect or state liability), there are probably fewer than 30 preliminary rulings on contract law Directives.
121 Schulte-Nölke, Twigg-Flesner and Ebers, op. cit., n. 9.
122 Page v Combined Shipping and Trading Co Ltd [1997] 3 All ER 656.
123 Ibid., at 661.
Such an observation might reflect a more widespread feeling that the delays associated with the preliminary reference procedure make it deeply unattractive, which would have significant implications for the future harmonious Europeanisation of contract law. Rather than prolong the dispute by an undefinable period for the CJEU to answer the questions referred, national courts may seek to resolve any questions of EU law on the basis of previous CJEU jurisprudence, or on the basis of the legislation itself.

So why have the courts decided that references were not necessary? In *Lonsdale v Howard & Hallam Ltd*, the House of Lords was invited to ask for a preliminary ruling on the scope of the compensation provision in Article 17(3) of the Commercial Agency Directive, because there had been differences of opinion between the domestic courts involved in earlier cases in this field. Having reviewed both the Directive and the existing CJEU case-law, Lord Hoffmann concluded that there was no need for a reference because the Directive was clear on what was required and CJEU case-law had established that the method of calculating the amount of compensation to be awarded was within the discretion of the domestic courts. The real problem in the earlier cases had been the exercise of that discretion, which had caused uncertainty. It was for the House of Lords as the highest national court to resolve that uncertainty, rather than the CJEU.

Similarly, in *Director-General of Fair Trading v First National Bank*, Lord Bingham of Cornhill made the following observations about the Directive and its implementing regulations:

‘One of [the Directive’s] objectives was partially to harmonise the law in this important field among all member states of the European Union. The member states have no common concept of fairness or good faith, and the Directive does not purport to state the law of any single member state. It lays down a test to be applied, whatever their pre-existing law, by all member states. If the meaning of the test were doubtful, or vulnerable to the possibility of differing interpretations in differing member states, it might be desirable or necessary to seek a ruling from the European Court of Justice on its interpretation. But the language used in expressing the test . . . is in my opinion clear and not reasonably capable of differing interpretations. . . .’

Lord Bingham acknowledged that the fairness test needs to be interpreted autonomously, rather than on the basis of any existing domestic principles. Lord Steyn similarly noted that ‘the concepts of the Directive must be given autonomous meanings so that there will be uniform application of the

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124 *Lonsdale v Howard & Hallam Ltd*, op. cit., n. 94.
125 Ibid., [40].
126 *Director-General of Fair Trading v First National Bank*, above., n. 77, [17].
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However, Lord Bingham also immediately ruled out any need for a preliminary reference under Article 267 TFEU to obtain guidance from the CJEU on the interpretation of the fairness test, by stating that the language is clear and not capable of differing interpretations. It has been suggested that the lack of a common understanding and the need for consistent, autonomous interpretation necessitated that a preliminary ruling was sought, but if – as here – the criteria of the test appear clear to the court, there is no need. Of course, referring a question to the CJEU would have created an opportunity to ‘European’ interpretation of ‘unfairness’ and ‘good faith’, particularly in view of the previous divergences between the Member States regarding their notions of fairness. Nevertheless, if the House of Lords was happy that the test was sufficiently certain, then no guidance from the CJEU was needed.

In both instances, the House of Lords therefore asserted its competence to deal with the case without seeking guidance from the CJEU, ostensibly in accordance with established EU law that references are not necessary where the interpretation of EU law is clear, and where the matter involves merely a question of application.

Most recently, the Supreme Court again refused to request a preliminary ruling under the Article 267 TFEU procedure in a major case dealing with the scope of the exclusion of certain matters from the assessment of unfairness under Article 4(2) of the Unfair Terms Directive. In Office of Fair Trading v Abbey National plc and others, the so-called ‘bank charges litigation’, there was some debate as to whether the exclusion in Article 4(2) (‘the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other’) would apply to charges consumer had to pay if they exceeded their authorised overdraft limit. In determining whether a reference should be made, the Justices of the Supreme Court were influenced by a number of considerations. Thus, Lord Walker said that:

[48] This court, as the national court of last resort, is under an obligation to make a reference to the Court of Justice under [Article 267 TFEU] if a decision on the correct interpretation of the Directive is necessary to enable...
the court to give judgment, and the point is not *acte clair*. Neither side showed any enthusiasm for a reference, because of the further delay that would be occasioned in a very large number of claims at present stayed. The court is entitled to take the likely delay into account, although not as an overriding consideration, in deciding whether to make a reference.

[49] If (as I understand to be the case) the court is unanimous that the appeal should be allowed, then in my opinion we should treat the point as *acte clair*, and decide against making a reference. It may seem paradoxical for a court of last resort to conclude that a point is clear when it is differing from the carefully-considered judgments of the very experienced judges who have ruled on it in lower courts. But sometimes a court of last resort does conclude, without any disrespect, that the lower courts were clearly wrong, and in my respectful opinion this is such a case.

[50] Even if some or all of the court feel that the point is not *acte clair*, I would still propose that we ought not to incur the delay involved in a reference under [Article 267 TFEU], since a decision on the correct construction of art 4(2) of the Directive is not essential for the determination of this appeal. The correct construction of art 4(2) is a question of Community law, but the application of the Article, properly construed, to the facts is a question for national law. . . .'

Lord Phillips looked at the matter somewhat differently:

‘[91] I have not found this an easy case and I do not find the resolution of the narrow issue before the court to be *acte clair*. I agree, however, that it would not be appropriate to refer the issue to the European Court under [Article 267 TFEU]. I do not believe any challenge to the fairness of the Relevant Terms has been made on the basis that they cause the overall package of remuneration paid by those in debit to be excessive having regard to the package of services received in exchange. In these circumstances the basis on which I have answered the narrow issue would seem to render that issue academic. It may be that, if and when the OFT challenges the fairness of the Relevant Terms, issues will be raised that ought to be referred to Luxembourg. That stage has not yet been reached.’

Lord Mance’s position was this:

‘[115] Taking the view that I do of the meaning of both the Directive and the Regulations, the question arises whether it is nevertheless incumbent on us to refer the interpretation of the Directive to the Court of Justice. . . . In the present case, we are concerned with a relatively simple sentence, using simple and basic concepts, and the scope for different readings of different language texts seems very limited. The complex and unpredictable value judgment involved in the Court of Appeal’s approach was based in large measure upon a clear error, in treating the existence or
absence of negotiation as significant in a context dealing by definition only with non-negotiated terms. . . . Bearing in mind the general Community aim of legal certainty, the likelihood of the Court of Justice (or any other Member State’s courts) accepting the Court of Appeal’s approach to the interpretation of art 4(2) seems to me remote indeed. I would regard the position as *acte clair* and not as requiring a reference.’

He continued to say that even if the matter was not *acte clair*, the real issue was not one of interpretation anyway, but rather one of application, and this was a matter for the domestic court anyway. Lastly Lord Neuberger (at [120]) shared Lord Phillips’s scepticism as to whether the matter was *acte clair* but also said that it was not necessary to resolve the question before the court to make a reference. The reasons by the Supreme Court Law Lords for not making a reference seem largely to be based on need for a timely resolution of the issue, but this is not a criterion which should influence the decision. The refusal to make a reference has rightly been criticised by many commentators, although it reflects a consistent reluctance by the highest court in the jurisdiction to seek guidance from the CJEU on matters within the contract law area.

**Impact on contract law generally**

So far, the analysis in this chapter has focused on how the UK ensures that there is legislation which implements Directives, and how the courts ensure that they interpret and apply this legislation in accordance with relevant European principles. However, Europeanisation reaches beyond these aspects, and also requires consideration of how contract law generally has been affected by the various Directives. Teubner famously argued that the effect of some harmonising measures may be to introduce ‘legal irritants’ into national law which take on a life of their own after implementation and may ultimately result in new divergences between the Member States.

To some, there may be a simple answer: most of the Directives are only concerned with consumer law (whether in the narrow or wider sense), which seeks to modify general rules of contract law in order to protect consumers. There are no Directives which go to the heart of the general law of contract – i.e. there has been no legislation on how contracts are concluded, how they are to be performed, vitiating factors, remedies and so on.

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134 As explained in Chapter 3, some Directives with consumer contract provisions do not fall within the responsibility of DG SANCO, but other DGs, and are therefore often not regarded as consumer law at all.
This might be too narrow a view, however. Whilst it is correct that the various consumer-specific measures have left the common law of contract largely unaffected, this does not mean that their impact might not eventually be felt there, too. Three aspects have been singled out by way of example: pre-contractual information duties, specific performance and good faith.

**Pre-contractual information duties**

Pre-contractual information duties are in widespread use in EU contract law Directives (both in the consumer field and beyond). In contrast to other European jurisdictions, English contract law is traditionally reluctant to impose pre-contractual information duties. With the exception of a small category of contracts _uberrimae fidei_, English contract law does not have a general duty of disclosure in the pre-contractual context, reflecting its adversarial rather than co-operative ethic. Not providing relevant information is therefore not in itself a legal wrong, and _caveat emptor_ remains the basic principle. Instead, the provision of information in the pre-contractual stage is controlled primarily through the doctrine of misrepresentation, but this generally depends on some information having been given by one of the parties. If the information given before a contract was concluded is a statement of fact rather than simply one of opinion, but incorrect to such an extent as to constitute an actionable misrepresentation, the contract is voidable and may be rescinded, and damages may be claimed. The information given must be untrue; if it is ambiguous, the person supplying the information will be liable if there was an intention to convey an untrue meaning which is understood in that way by the recipient, but not if his interpretation was honestly held. A misrepresentation can arise where the conduct of one of the contracting parties suggests something which is not, in

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136 Mainly contracts of insurance.


139 E.g. _Esso Petroleum Co Ltd v Mardon_ [1976] QB 801.

140 The latter are largely governed by the Misrepresentation Act 1967.

141 The circumstances in _Sykes v Taylor-Rose_ [2004] EWCA Civ 299 illustrate this. The vendor of a house had to complete a standard questionnaire for the buyer, which asked, amongst other things, if there was any other information which, in the vendor’s view, the purchaser may have a right to know. The vendor did not disclose that a murder had taken place in the house previously. This was only discovered by the purchaser subsequently, after watching a television documentary, which also suggested that there might still be undiscovered body parts hidden in the house. A claim in misrepresentation failed, because the answer to the question had been given honestly.
fact, true.\textsuperscript{142} An active attempt to conceal information could amount to a misrepresentation,\textsuperscript{143} as could partial non-disclosure.\textsuperscript{144} Also, a statement which is literally true but still misleading because not all the relevant information has been given could amount to a misrepresentation.\textsuperscript{145} The same holds in respect of a statement which, whilst true when given, becomes false before the contract is concluded.\textsuperscript{146} The misrepresentation must be material, i.e. affect the decision of a reasonable person to conclude the contract on the particular terms. Lastly, the recipient of the information must rely on it in concluding the contract. What therefore matters is actual reliance on the misrepresentation,\textsuperscript{147} although if a reasonable person would have relied on the wrong information, it is presumed that the particular claimant did, too.\textsuperscript{148} Materiality and reliance are separate requirements and both need to be established.\textsuperscript{149}

With the introduction of express pre-contractual information duties in so many areas, it may be the case that the reluctance of English law to impose such duties may slowly be eroded more generally. As yet, there is no obvious sign that this may happen, but that is not to say that it will remain so forever.\textsuperscript{150} Indeed, the Law Commission has put forward proposals for a statutory extension of private remedies in cases where there has been a failure to provide information which would be an unfair commercial practice under the Consumer Protection from Unfair Trading Regulations 2008, which implement the Unfair Commercial Practices Directive (2005/29/EC).\textsuperscript{151}

Specific performance

A second area where English law may come under pressure, this time as a result of the Consumer Sales Directive (99/44/EU), is the remedy of specific performance. As seen earlier, the primary remedies under the Directive are to have non-conforming goods repaired or replaced. This is in contrast to English law, which grants a consumer an immediate right to terminate the

\textsuperscript{142} Spice Girls Ltd v Aprilia World Service BV [2002] EMLR 27.
\textsuperscript{143} Schneider v Heath (1813) 3 Camp 506.
\textsuperscript{144} Peek v Gurney [1871–73] All ER Rep 116.
\textsuperscript{145} Notts Patent Brick and Tile Co v Butler (1866) 16 QBD 778.
\textsuperscript{147} Museprime Properties Ltd v Adhill Properties Ltd [1990] 2 EGLR 196.
\textsuperscript{148} Smith v Chadwick (1884) 9 App Cas 187.
\textsuperscript{149} Pan Atlantic Insurance Ltd v Pine Top Insurance Ltd [1995] 2 AC 501.
Requiring a seller to repair or replace goods is equivalent to ordering specific performance of the contract of sale. In English law, specific performance is rarely granted. The courts have only exercised their discretion to award this remedy where the contract was for goods which are (almost) unique, but not for ordinary items of commerce. Generally, there will be no order for specific performance where another, more appropriate remedy is available, which in most cases will be damages.

There is therefore a very obvious clash between the reluctance of English law to order specific performance and the Directive’s focus on repair and replacement as the main remedies in consumer sales contracts. The implementation of the Directive might therefore have necessitated a fundamental change to English practice, albeit confined to the context of consumer sales. Whilst making specific performance more widely available may be a positive step, doing so merely for one particular type of contract seems unattractive. The solution adopted in the implementing legislation has been to give the courts the power to order specific performance of either repair or replacement in the context of consumer sales, but the court is also able to order an alternative remedy if this is more appropriate. This seems to reflect the existing approach of English law, and does not give full effect to the requirements of the Directive. It remains to be seen if, over time, there will be a shift towards a greater willingness to award specific performance.

**Good faith**

Moving beyond particular rules and doctrines, English law may also find itself under pressure at the level of principle. Unlike most other jurisdictions within Europe, English law does not recognise a general principle of good faith.

152 Subject to various limitations which are not relevant for present purposes. See e.g. Bradgate and Twigg-Flesner, op. cit., n. 48, chapter 4.
153 *Behnke v Beke Shipping Co* [1927] 1 KB 640.
154 *Cohen v Roche* [1927] 1 KB 169.
155 *Co-operative Insurance Society v Argyll Stores (Holdins) Ltd* [1998] AC 1.
158 Section 48E(3) and (4).
160 A further pressure may come from an altogether different direction. Should the UK ever decide to ratify the UN Convention on the International Sale of Goods, there would be a similar remedial scheme for international commercial contracts (cf. Article 46), although there is a provision to the effect that specific performance would only have to be awarded if this was also available under national law (Article 28).
Indeed, such a principle (in the context of negotiating in good faith) was famously rejected by Lord Ackner in *Walford v Miles* as ‘repugnant to the adversarial position of the parties when involved in negotiations’. Instead, English law continues to rely on individual doctrines and rules in response to particular problems. However, EU legislation does rely on good faith in several instances, most prominently in the context of unfair terms and commercial agency, and it has found its way into domestic law in those particular areas. As familiarity with the concept develops, the debate over the acceptance of a good faith principle in English contract law increases. As can be seen in Chapters 5 and 6, the hand of English law may be forced by developments at the European level: the proposal for a Common European Sales Law, made in October 2011, contains an obligation on the parties to ‘act in accordance with good faith and fair dealing’ in Article 2(1). Such a development could eventually result in the acceptance of a general good faith principle in English contract law. Indeed, there are early signs that the English courts could be softening their attitude towards a ‘good faith’ principle. In *Petromec v Petroleo Brasileiro*, Longmore LJ considered whether a term in an existing contract to negotiate additional costs ‘in good faith’ would be enforceable. Longmore LJ considered three objections to such a duty. The first objection was that an obligation to negotiate in good faith would be too uncertain to be enforceable, but he noted that in the context of the specific agreement to negotiate costs, a court would be able to ascertain what would be reasonable costs in the absence of any agreement. Second, because of the uncertain outcome of requiring negotiations in ‘good faith’ it would be difficult to ascertain the specific losses which would result from a breach of such a duty. Longmore LJ thought that this would not have been problematic in the case before him because the reference point would have been an assessment of reasonable costs. Lastly, the strongest objection was the difficulty of determining whether negotiations were terminated in good or in bad faith. However, ‘the difficulty of a problem should not be an excuse for the court to withhold relevant assistance from the parties by declaring a blanket unenforceability of the obligation’. Longmore LJ’s obiter comments are indicative of some judicial unease with the position adopted in *Walford v Miles*, but as the latter is a House of Lords’ ruling, it continues to reflect the general attitude of English law towards a general principle of ‘good faith’.

164 *Petromec v Petroleo Brasileiro* [2005] EWCA Civ 891, CA.
165 Ibid., [115]–[121].
166 Ibid., [119].
Conclusion

The preceding discussion demonstrates that the process of formal Europeanisation by the EU is shaped by several restrictions imposed by the Treaty itself, and depends on a significant degree of interaction between the European level on the one hand, and the domestic one on the other hand.

As seen in Chapter 3, Europeanisation by Directive is essentially a form of piecemeal harmonisation which may lead to greater approximation between the laws of the Member States, but it can also result in a disruption to unity of domestic law.\(^{167}\) This chapter has sought to identify the main challenges, as well as to consider how the implementation of Directives is handled in the UK. On the whole, the UK seeks to comply at a formal level, but may be criticised for not taking sufficient care in considering the relationship of implementing legislation with related areas of domestic law. The attitude of the English courts with regard to the interpretation of domestic legislation enacting EU Directives reveals that they are more able than might have been expected to interpret EU-derived legislation in a manner that seeks to be consistent with the need for autonomous interpretation, whilst closely safeguarding the responsibility of the national courts to apply the legislation to the circumstances of individual cases.

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5 Deeper Europeanisation – the common frame of reference

Introduction

In Chapter 3, the extent of the EU’s legislative activity in the field of contract law was examined. From this, it can be seen that it has done little more than to create ‘islands’ of Europeanisation in the domestic contract law field, but – perhaps with the exception of consumer contracts – there has been little interference with the fundamental aspects of the (general) contract law system in the European jurisdictions so far. However, in 2001, the European Commission kick-started a process towards much greater Europeanisation of domestic contract laws. Although the review of the Consumer Acquis, which was at one stage regarded as being a key component of this process, has not resulted in further significant inroads into domestic consumer law, there have been other activities which have laid the foundations for greater European action. This chapter focuses on the creation of a ‘Common Frame of Reference’ (CFR) on European Contract Law, starting with the Commission’s 2001 Communication on European Contract Law and subsequent documents. Chapter 6 then examines the possibility of there being an optional instrument on contract law, which at the present time will most likely focus on contracts of sale.

Commission’s trilogy on European contract law

The basis of developments over the last decade are three Commission documents, published in 2001, 2003 and 2004 respectively. They are well-known and examined in many contributions to the literature, and a brief account here will suffice. The Commission’s Communication on European Contract Law was

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intended to provoke debate and invite evidence on the necessity of further EU action in the field of contract law. In particular, the Commission identified shortcomings both in the quality of the various harmonisation Directives adopted so far and in their implementation into national law. The Commission set out four possible courses of action, some of which might overlap:

(i) No EU action (i.e. the ‘do nothing’ option).
(ii) Promote the development of common contract law principles, for improving EU legislation, as guidance to domestic courts applying a foreign law, and as a template for domestic legislators when adopting legislation in the contract law field.
(iii) Improve the quality of legislation already in place, by improving the coherence of the terminology used; and revising current exceptions from the scope of existing Directives to increase coherence in the scope of application of the acquis.
(iv) Adopt new comprehensive legislation at EU level, resulting in ‘an overall text comprising provisions on general questions of contract law as well as specific contracts’. This could be purely optional, to be selected by the parties; an ‘opt-out’ or default framework, which would apply unless the parties excluded it; or a non-excludable framework – effectively replacing national contract laws.

In February 2003, the Commission presented the follow-up document A More Coherent European Contract Law – An Action Plan. At that point, the Commission had received 181 responses to its Communication on European Contract Law, from which it derived broad support for options (ii) and (iii), but few respondents were in favour of option (i), and the majority opposed option (iv). Specific suggestions for further action were presented for further consultation, and subsequently confirmed in European Contract Law and the Revision of the Acquis: the Way Forward. First, the quality of the acquis in

2 The Annex to the Communication on European Contract Law contains a long list of measures which arguably have some effect on contract law, or even private law generally, although quite what that relationship might be is not always apparent (see N. Reich, ‘Critical Comments on the Commission Communication “On European Contract Law”’ in S. Grundmann and J. Stuyck (eds), An Academic Green Paper on European Contract Law. The Hague, Kluwer Law International, 2002).
3 Commission, Communication on European Law, op. cit. n. 1, paras 52–55.
4 Ibid., paras 57–60.
5 Ibid., para. 61
6 Ibid., para. 66.
the field of contract law should be improved, with a view to ensuring greater consistency.

The main tool in this process would be a CFR on European contract law, providing common principles and terminology. Separate research on the implementation of eight consumer law Directives across the 27 Member States had been commissioned, and any proposals for reform were to have been based on the CFR.\(^{10}\) The Commission envisaged three possible purposes for this CFR: (i) to help with reviewing existing legislation, and proposing new measures, especially by providing common terminology and rules on fundamental concepts; (ii) to promote convergence between domestic legal systems both within and outside the EU;\(^{11}\) and (iii) to consider the usefulness of an optional instrument on contract law.\(^{12}\)

Second, the elaboration of EU-wide standard contract terms would be promoted. In particular, the Commission planned to facilitate the exchange of information, perhaps via a Commission-hosted website, and to offer guidance on the use of standard terms and conditions within the EU’s legal framework, particularly on unfair contract terms and competition law.\(^{13}\)

Lastly, there would be ‘further reflection’ on non-sector specific measures such as an optional instrument on contract law. In particular, the suitability of the CFR for such an instrument would be considered.\(^{14}\)

Several parallel initiatives in the field of contract law have therefore emerged from the process launched with the Communication on European Contract Law in 2001: work on EU-wide standard contract terms, the CFR, the review of the consumer acquis, and further exploration of the scope for an optional instrument on EU contract law. As already noted in Chapter 3, the acquis review was completed with the adoption of the Consumer Rights Directive in 2011. Despite the Commission’s intention to utilise the CFR for the purpose of revising the consumer acquis, there is little evidence of this in the final Directive.

### EU-wide standard contract terms

In view of the fact that standard terms, i.e. terms pre-drafted for repeated use in numerous similar transactions, are popular in certain industry sectors, and could usefully reduce transaction costs, the Commission intended to promote the establishment of such terms, with its role limited to that of facilitator, or ‘honest broker’. There were plans for a website for exchanging information, but the Commission decided to refrain from drafting specific guidelines on

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13 Ibid., paras 81–88.
14 Ibid., p. 5.
The Europeanisation of Contract Law

the creation of standard contract terms. In addition, the Commission planned to identify legislative obstacles to the use of standard contract terms on an EU-wide basis, and to consider how to reduce or eliminate them.\(^\text{15}\)

The Commission subsequently announced that it had abandoned plans to host such a website, partly because of the practicalities of keeping such a site up to date, but primarily because EU-wide standard contract terms would have to be compatible with the most restrictive national rules, making them unattractive to the vast majority of businesses.\(^\text{16}\)

The pursuit of EU-wide standard contract terms might not have been a good thing for other reasons. The standard terms would have to be drafted in one language, and then be translated into all the other official languages. Translating a set of standard terms from one language into another could be a very difficult enterprise, not only due to the inherent difficulties associated with translating any kind of text,\(^\text{17}\) but also because of the additional difficulty posed by variations in legal terminology.\(^\text{18}\) Second, the variations regarding the default rules applicable to certain types of contract in the domestic contract laws of the Member States could make standard contract terms difficult to agree upon, and might make them rather unattractive.\(^\text{19}\)

Third, jurisdictions adopt different approaches to interpreting contracts,\(^\text{20}\) creating some concern about the practical application of agreed standard terms. That, too, would reduce the effectiveness of such terms.\(^\text{21}\) Lastly, concerns have been expressed about the legitimacy of promoting EU-wide standard contract terms by sector on the basis that this effectively puts law-making powers in the hands of private actors.\(^\text{22}\)

Whilst these reasons for being cautious about developing standard terms all sound plausible, it may be asked whether they are not overstating the problems. The development of international standard terms (particularly those developed by the International Chamber of Commerce (ICC), such as the INCOTERMS, or the UCP on documentary credits\(^\text{23}\)) demonstrates that it seems entirely possible to prepare standard terms for use in international transactions. Rather strangely, the Commission largely failed to consider the

\(^{15}\) Ibid., pp. 6–8.


\(^{19}\) Ibid., pp. 61–63.


\(^{21}\) Whittaker, op. cit., n. 18, pp. 63–67.


activities of the various international organisations, including the ICC. The Commission has rightly been criticised for failing to recognise the significant work that has already been done in the field of international standard terms, and this failure might be the primary reason for the lack of support from businesses for the Commission’s proposals in this regard.

There is work which the Commission could undertake in this area to make the use of standard contract terms easier. In particular, the identification of legislative obstacles to the use of standard contract terms on an EU-wide basis, with a view to reducing or eliminating them, remains necessary.

CFR

The one concrete outcome of the current process is the development of the so-called ‘Draft Common Frame of Reference’ (DCFR), completed at the end of 2008. A draft version was delivered at the end of 2007, and the pace of this project had been described as ‘breathtaking’ by the co-ordinators of the research teams involved in its preparation. This section examines the process leading up to the DCFR more closely. In the Commission’s documents, reference is made to a ‘Common Frame of Reference’, i.e. CFR. In the following sections, CFR is used to refer to the Commission’s conception of what would emerge, whereas DCFR refers to the final product.

Nature and substance of the CFR

The nature of the CFR was an issue in respect of which there was, for a long time, a degree of uncertainty. The Commission had stated that it regards the CFR as a ‘non-binding’ instrument, which, presumably, meant that it would have no independent legal status. But what would it contain? In terms of sources, the CFR should draw on domestic legislation and case-law, as well as the existing acquis and international instruments such as the UN Convention

24 The only reference is to an organisation called Orgalime, which is cited as an example of an organisation that has managed to produce standard terms for cross-border transactions.
29 The way forward, op. cit., n. 10, pp. 10–13. As the review of the consumer acquis (see below) was also due to be completed by 2009, this timetable must be rather flexible.
30 The way forward, op. cit., n. 10, p. 5 (section 2.1.3).
on the International Sale of Goods (CISG), and provide general rules on all the fundamental aspects of contract law.

The Commission’s initial conception of the CFR suggested that it should provide ‘common terminology and rules’. As such, the CFR would be a ‘toolbox’ to assist with improving existing legislation and for the adoption of future measures. It would have three broad features: definitions of relevant legal terms, fundamental principles and coherent model rules. This was to be achieved through some sort of amalgam drawing on the acquis and best solutions derived (or rather, divined) from the domestic laws of the Member States.

The Commission envisaged that the CFR would commence with a number of fundamental principles of contract law. There should also be an indication of when there would be an exception to these principles. Three examples of such fundamental principles were given: (i) freedom of contract; (ii) the binding force of contract (pacta sunt servanda); and (iii) good faith. An exception to (i) would be mandatory rules of contract law (such as consumer law), and to (ii) the existence of a right of withdrawal.

Unsurprisingly, there was a lot of criticism of the fact that the tension between freedom of contract at one end of the spectrum and co-operation or fairness at the other appeared to have been largely skimmed over by the Commission; a debate on where to strike the balance was necessary but never really took place.

An important contribution to be made by the CFR would be a single legal terminology with clear definitions. One of the problems with the acquis was, and to some extent still is, its use of legal terms-of-art not defined at the European level, which have very different connotations in the various national laws. Although whatever definitions would be adopted would invited debate, the CFR terminology would provide a reference point as to what otherwise undefined terms in EU legislation should mean. This would not solve all the problems because the vagaries of translating legal terminology from one language into another, even if the CFR

32 The way forward, op. cit., n. 10, p. 3.
33 See ‘Drafting the CFR’, below.
34 See Annex I to The way forward, op. cit., n. 10.
38 I.e. from English into all the other official languages, as English has become the dominant language for the drafting process.
Deeper Europeanisation – the (D)CFR

termiology is intended to be neutral, would be likely to create some variations.\(^{39}\)

As far as definitions were concerned, there was also some uncertainty as to what was expected here. The Commission talked of ‘some definitions of abstract legal terms of European contract law in particular where relevant for the EU acquis.’\(^{40}\) As already seen, one of the difficulties with the acquis has been that terms which appear in more than one Directive are defined differently. The intention here might have been a review of the various definitions already found in the acquis, with a view to coming to a single definition for each term applicable across the acquis (although subsequent developments show little evidence of this having been done).

However, it was not limited to that, because it was also suggested that there could be a definition of ‘contract’ itself. To this, it was added that ‘the definition could for example also explain when a contract should be considered as concluded’.\(^{41}\) That, however, would have been very difficult to narrow down to a definition. A brief look at the PECL shows that as many as 20 articles deal with aspects of contract formation. A section on definitions should be restricted to terms which could be defined clearly (such as ‘consumer’ or ‘durable medium’), with other matters left to more detailed rules. Indeed, attempting to define ‘contract’ runs into the fundamental difficulty that the various jurisdictions within Europe each have their own conception of contract, as well as varying underlying philosophies.\(^{42}\) In particular, there are differences in how the supply of certain public services, such as the public utilities, health care and education, are classified.\(^{43}\)

In this context, it is also important to bear in mind the dual function performed by definitions in EU law. On the one hand, they explain what is meant by specific terms used in legislation, and also serve to determine the scope of application. On the other hand, definitions in EU legislation serve to define the ‘occupied field’, i.e. the extent to which a particular area of law is ‘Europeanised’. Matters not within the occupied field are within the competence of the national legislator. Whilst the intention to arrive at common

\(^{39}\) It has been suggested that the EU’s aim of maintaining cultural and linguistic diversity is difficult to square with established practice and the desire for one common legal terminology: N. Urban, ‘One Legal Language and the Maintenance of Cultural and Linguistic Diversity?’ (2000) 8 European Review of Private Law 51–57.

\(^{40}\) The way forward, op. cit., n. 10, p. 14.

\(^{41}\) Ibid.


definitions for legal terms-of-art is uncontroversial, the same could not be said for more fundamental issues, including the notion of contract itself.

The main part of the CFR would comprise ‘model rules’ on contract law. A suggested structure of these model rules was given in Annex I to The way forward. These were to include aspects of contract formation, validity, authority of agents, interpretation, contents and effects, followed by pre-contractual obligations, performance, plurality of parties, assignment and prescription. There were then to have been specific rules on sales and insurance contracts, and also a section dealing with service contracts. Moreover, it was thought that it might be necessary to include provisions on the transfer of title to goods, and retention of title clauses.

The inspiration behind the CFR were undoubtedly the PECL. One of the hallmarks of the PECL is the combination of a stated principle with a detailed explanation, and, crucially, notes which explain how the various national contract laws relate to the principle. Following this approach for the CFR would undoubtedly make it valuable as a toolbox, especially by drawing out both commonalities and significant differences in the national laws.

Relevance of consumer law

In the CFR, consumer contracts were to be given ‘specific attention’. Indeed, as already discussed in Chapter 3, the focus of EU legislation has been on consumer contract law, which is really largely a set of rules which derogate from general contract law principles. Whilst the CFR was intended to be a toolbox on all aspects of contract law, once drafted, there were plans to put it to immediate use in the field of consumer contract law, rather than general contract law. The Commission emphasised that it expected the CFR to be drafted on the basis of both domestic law and the acquis. With the acquis primarily comprising rules on consumer contract law, this meant that there would have to be specific rules on consumer law issues in the CFR. These could have been derived directly from the acquis, although it is clear that the law as it was could not simply have been transposed into the CFR. This is because the acquis suffered from incoherence (and still does), necessitating adjustments to any acquis-derived rules to provide the ‘best solution’ the CFR was intended to provide.

The difficulty with this is that decisions about the substance of consumer law are clearly policy-based, and are a conscious departure from general contract law in the interest of consumer protection. For example, it was clearly felt that when consumers conclude a contract at their doorstep or via the internet, the general rule that a contract is binding once validly formed should

44 The Way Forward, op. cit., n. 10, p. 11.
45 See below, p. 164.
be made subject to a right of withdrawal.\textsuperscript{46} Identifying the circumstances when protection is needed, and determining what that protection might be, therefore requires policy choices.\textsuperscript{47}

A further complication was that, according to the Commission's expectations about the structure of the CFR, the circumstances in which there might be a departure from fundamental principles of contract law needed to be identified clearly. Consumer-specific rules are usually such departures, and these would have had to be linked to relevant fundamental principles, together with possible justification for departing from them.

More than in respect of other aspects of the CFR, the Commission's plans seemed to require not one 'best solution', as might be expected, but rather a number of options. The CFR should include several possible solutions to particular consumer protection problems, identify the underlying policy choices and then leave it to the legislature to select one solution when adopting new legislation.

\textit{Purpose(s) of the CFR}

There were a number of different possible uses envisaged for the CFR. According to the \textit{Action Plan}, its primary function was to be as a toolbox for improving the \textit{acquis}, but this could mean several different things.

In providing model rules, the CFR might have provided a blueprint for future legislation, whether entirely new measures, or improvements of existing ones. As explained further below, the CFR should have identified those areas where there might be more than one answer to a particular problem, and have offered several approaches for selection by the EU legislator.\textsuperscript{48} The relevant model rules from the CFR could have been adopted expressly in new legislation, or been incorporated by reference to the relevant parts of the CFR.\textsuperscript{49}

With the model rules in the CFR to be accompanied by detailed notes on the corresponding domestic rules, it would have had a second important function: when drafting legislation, the EU legislator could identify what each national law might understand by a particular rule. Thus, both substantive similarities expressed in doctrinal forms which differ as between the Member States and identical terminology with different substantive meanings could be identified in these notes.\textsuperscript{50} This would be particularly important where European legislation is proposed which would impact on a matter where there

\textsuperscript{46} See Chapter 3, p. 80.
\textsuperscript{47} See below, p. 166.
\textsuperscript{50} Ibid, p. 264
are significant differences between the Member States. A particular concept or model rule might be understood in different ways at national level, and the CFR could assist the EU legislator by identifying these different conceptions. This should enable the legislator to draft rules which are sufficiently precise, thereby avoiding unnecessary ambiguity. In a sense, the CFR would be a translation tool, creating awareness of what different national laws understand by particular concepts and rules. As the CFR was to contain a ‘best solution’ model rule, it would be possible to identify those jurisdictions which do not have this rule. As an example, one only needs to recall the Leitner case, which revealed that some Member States, including Austria, did not include non-pecuniary loss within the notion of ‘damages’. Had there been a reference point to illustrate these differences, an express provision could have been included in the Directive and thereby have avoided the uncertainty which eventually produced the CJEU’s ruling.

The CFR as conceived by the Commission would have a number of additional functions which could contribute to the further Europeanisation of domestic contract laws. Thus, the CFR could assist Member States faced with the task of implementing an EU Directive into their domestic legal systems in trying to consider how the Directive relates to neighbouring areas of contract law. The transposition of Directives has often been limited to doing whatever is necessary to comply with basic obligations under the EU Treaty, without spending too much time on dealing with any knock-on effects. The suggestion appeared to be that, by looking to the CFR, Member States could examine how the provisions from the Directive relate to other areas of contract law, and further consider to what extent their domestic law might be at variance with the position under the CFR. This approach, if carried out systematically, certainly would have the potential of contributing to the evolution of a more coherent Europeanised contract law (albeit in the form of ‘creeping Europeanisation’).

It would also be of concern, however: the adoption of a Directive dealing with what might be a small aspect of contract law could mean that some Member States might feel compelled to adjust their domestic contract law in related areas in order to ensure that the transposition does not undermine the effectiveness of that Directive. Depending on the subject matter of the Directive, and the extent to which domestic law departs from the CFR, this might result in much further-reaching changes to domestic law than required by the Directive, which might turn Directives into a form of Trojan horse, driving a wider range of CFR-based rules into domestic law. This might not be palatable to a Member State for all sorts of reasons, e.g. because the costs

51 Ibid., p. 268.
52 C-168/00 Simone Leitner v tUI Deutschland [2002] ECR I-2631.
53 Beale, op. cit., n. 49.
54 The Way Forward, op. cit., n. 10, p. 5.
55 See Chapter 4.
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associated with changes to domestic law going beyond the immediate implementation of a Directive might be too high, or because of a reluctance to accept further encroachment of European legislation into domestic law. The difficulty here was that it was never made entirely clear if this purpose of the CFR would merely create an opportunity for a domestic legislator, or reflect an expectation to go further. In this regard, the reach of the general principle of effectiveness (effet utile) of EU law might be significant. In essence, this obliges Member States to ensure that EU rules are fully effective in national law and not restricted by provisions of national procedural or substantive law. On a broad interpretation, it might lead to the conclusion that a Member State could be in breach of its EU law obligations by not adjusting the domestic legislation in areas linked to a Directive in accordance with the CFR. However, without a legal obligation to follow the CFR, it would be difficult to see how a decision by a Member State not to make changes to related areas of law could conflict with effet utile.

A related purpose envisaged by the Commission was that Member States might look to the CFR when adopting legislation on contract law at the national level, where there is no corresponding EU legislation. As such, it would do no more than to offer a possible solution for a domestic legislator to consider, but it would leave Member States free to adopt a rule that differs from the relevant CFR provision. Although not mentioned explicitly in The Way Forward, the CFR could similarly provide guidance to national courts when interpreting domestic law, particularly if that law contains a gap or is ambiguous (thereby supporting ‘spontaneous Europeanisation’).

Beyond this, the CFR could assist the CJEU when it is dealing with a request for a preliminary ruling on the interpretation of particular provisions of EU contract law. This might ensure that a decision by the CJEU does not have the effect of creating varying meanings for particular concepts used in the acquis communautaire. At a more general level, the CFR could be of use in arbitration. It is suggested that arbitrators might be guided by the substance of the CFR in dealing with particular conflicts. Other potential uses are that the CFR could be incorporated into contracts which the Commission (and other EU bodies) enter into with its contractors.

The foregoing has sketched the Commission’s conception of the CFR. The discussion now turns to the drafting process which resulted in the DCFR (also sometimes referred to as the ‘academic CFR’).

**Drafting the CFR – CoPECL research network**

As mentioned earlier, the CFR was intended to combine ‘best solutions’ found in the domestic laws of the Member States and the existing acquis communautaire.
to form a coherent whole.\textsuperscript{57} It was therefore necessary to undertake a detailed comparative study of the contract laws of the Member States to analyse and evaluate the various rules on each aspect of contract law. From this, one (or more) best solutions needed to be distilled.\textsuperscript{58} To this, it was necessary to add aspects of the \textit{acquis}, particularly rules on consumer contract law. This task was formidable and, had it been started from scratch, would have been likely to require many years of thorough comparative law research. However, the Commission was, of course, aware of the significant amount of scholarly work that had already been undertaken, and saw no merit in starting afresh. In particular, the work of the Lando Commission had already gone a long way towards identifying best solutions based on the laws of the Member States. That work was initially based on a much smaller group of countries, and some revisions were needed to take into account both developments in the countries which were subject of the original work and the new Member States that joined the EU in the first decade of the new millennium.\textsuperscript{59} To this, the solutions already included in the \textit{acquis} needed to be added.

The initial task of creating a draft version of the CFR was given to the leading academic research groups. A research network was established within the context of the FP6-research programme. This research network comprised many of the leading European research groups on contract law, headed by the Study Group on a European Civil Code\textsuperscript{60} and the Research Group on the Existing EU Private Law (Acquis Group).\textsuperscript{61} Other groups participating in the network were the Project Group on a Restatement of Insurance Contract Law, the French Association Henri Capitant, the Common Core (Trento) Group, the so-called Database Group, as well as the Tilburg Group of economists responsible for preparing an impact assessment of the work undertaken, and the European Academy of Law in Trier.\textsuperscript{62} Its task was to prepare the DCFR based on both domestic laws and the acquis; this draft version was often referred to as the ‘Common Principles of European Contract Law’, or CoPECL.

\begin{enumerate}
\item With regard to the latter, this task may not be as complicated as might be thought, because some of the new Member States have been inspired both by the Lando Principles, and the \textit{UNIDROIT Principles on International Commercial Contracts}, Rome: International Institute for the Unification of Private Law, 2010.
\item Under the leadership of Professor Christian von Bar (University of Osnabrück, Germany).
\item Co-ordinated by Professor Hans Schulte-Nölke (University of Bielefeld, Germany); its speaker is Professor Gianmaria Ajani (University of Turin, Italy).
\item The existence of only one network, and the exclusion of other leading academic groups and individuals, has been criticised in particular by S. Grundmann, ‘European Contract Law(s) of What Colour?’ (2005) 1 European Review of Contract Law 184–210.
\end{enumerate}
At the same time, the Commission established its network of stakeholders (‘CFR-net’), and a programme of workshops on specific aspects of the DCFR were held in the early stages of preparing the DCFR. The research teams submitted draft reports on particular aspects in advance of the workshops, and CFR-net participants were invited to prepare written comments after the relevant workshop had taken place.\(^{63}\) Mance has noted that the balance of representation seemed inadequate, with both certain business sectors and geographical areas inadequately represented in this network.\(^{64}\) Moreover, it was not entirely clear what purpose this network was; the input from stakeholders into a drafting process seemed to be of limited relevance at the stage of producing a toolbox, and might be of more significance once specific legislation is proposed.

In the whole process, some felt that the leading role taken by the Study Group was of concern, because it seemed to be in conflict with the Commission’s position that it had no intention of proposing a civil code for the EU;\(^{65}\) indeed, Kenny claimed that ‘the symbiotic relationship between Commission and Study Group ... is clearly a central paradox in this initiative’.\(^{66}\) This might be one factor which contributed to the fact that progress at the initial round of CFR workshops was hampered by a degree of misunderstanding among CFR-net members about the purpose of the exercise. In particular, there was some confusion as to whether a ‘European Civil Code’ was on the agenda.\(^{67}\) Moreover, the topics considered in the early workshops were on specialised areas (service contracts and long-term contracts) rather than general contract law. A later workshop to discuss the structure of the CFR turned into a debate about its purpose and content instead, with the result that the primary focus of the CFR would be on general contract law and matters relevant to the \textit{acquis}.\(^{68}\) Following the initial series of workshops in 2005, the Commission adjusted its programme of workshop to focus on topics which will be of particular relevance to the review of the consumer \textit{acquis},\(^{69}\) and after a series of workshops during the first half of 2006,\(^{70}\) no further workshops were arranged.

\(^{63}\) For a detailed description of the process, see \textit{First Annual Progress Report}, op. cit., n. 16, pp. 3–6.
\(^{65}\) \textit{The Way Forward}, op. cit., n. 10, p. 8.
\(^{67}\) Undoubtedly not helped by the fact that some of the work presented to the workshops was headed ‘Study Group on a European Civil Code’ – see Mance, op. cit., n. 64, p. 94.
\(^{69}\) \textit{First Annual Progress Report}, op. cit., n. 16, pp. 5–6.
\(^{70}\) A summary of these is reported in the \textit{Second Progress Report on the Common Frame of Reference} (COM (2007) 447 final), pp. 3–8.
The Europeanisation of Contract Law

Incorporating the acquis – the work of the Acquis Group

The bulk of the CFR was to be based on a comparative analysis of the contract laws of the Member States to find ‘best solutions’, but that the acquis already in place was also to be reflected in the CFR. This was a major challenge, because the sources in the acquis are fragmented, and may not offer anything greatly coherent — indeed, that was why one of the main objectives of the CFR was to provide the tools for making the acquis coherent (even if this was seemingly not done subsequently). There were, however, good reasons for taking account of the acquis in the CFR. The acquis comprises rules which have generally met the broad agreement of the Member States, and therefore have some value as a core of European contract law, as well as a degree of European legitimacy.

The task of providing rules derived from the acquis was undertaken by the Acquis Group. Its objective was to analyse the various Directives, regulations and judgments by the CJEU in order to create a coherent set of rules on contract law.

The Acquis Group faced several challenges: as seen, the acquis has not had a significant effect on general contract. It is therefore difficult to derive principles or model rules on general contract law from much of the acquis because the acquis, largely comprising consumer law, generally tends to provide rules which form an exception from a general principle. From the position of consumer law as a derogation, the task was to identify that hidden general principle which has been derogated from. The Acquis Group therefore needed to decide whether one can identify unexpressed underlying principles which are sufficiently well reflected in existing law to be suitable for generalisation, a

73 It must be borne in mind that measures are generally adopted on the basis of Article 114 TFEU, and that only a qualified majority is required for legislation to pass. Not all the Member States have supported all the contract acquis measures. Moreover, the new Member States have not had an opportunity for voting on most of the acquis because it predates their accession.
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process which was not without controversy.\textsuperscript{77} In particular, the fragmentary nature of the *acquis* and the danger of turning an exception into a general rule through generalisation are of concern.\textsuperscript{78}

Furthermore, many of the measures which constitute the existing *acquis* adopt a minimum harmonisation standard. Whilst this may have been acceptable to all (or most) of the Member States as a minimum standard, it does not mean that it is the standard that should have become the norm in the CFR. This would have conferred on it a status of *de facto* full harmonisation, and the experience of the CRD shows just how much resistance to widespread full harmonisation there is among the Member States.

In addition, the *acquis* measures were not designed to operate independently of domestic law; instead, they need to be applied as part of, and through interaction with, related national rules. Incorporating the *acquis* in the CFR was therefore a task that needed to be handled with considerable care. It might have been more appropriate to identify the particular contributions made by the *acquis*, but to return to the drawing board to develop provisions that could fit into the CFR. Key areas were pre-contractual information duties, rights of withdrawal, unfair contract terms and non-discrimination – all hallmarks of the *acquis*.\textsuperscript{79} Provisions on these clearly needed to appear in the CFR, but the *acquis* was too incoherent to offer instant solutions. Some thought therefore had to be given to the development of model rules from what is already in the *acquis*. Inspiration could, for example, have been gained from the way the Member States have implemented these Directives and their subsequent application by domestic courts, as well as additional guidance given by the CJEU.\textsuperscript{80} However, this was not without difficulties, because this could easily have resulted in creating provisions without clear foundations in the *acquis* or domestic law. Moreover, Collins suggests that as parts of the *acquis* are a hybrid of private law and regulatory measures, finding principles of contract law ‘appears to be as futile as trying to distil beer from grapes, or as wishful as turning a toad into a handsome prince’.\textsuperscript{81} although he concludes that the

\begin{itemize}
  \item \textsuperscript{80} The *Consumer Compendium and Comparative Analysis*, prepared by H. Schulte-Nölke with C. Twigg-Flesner and M. Ebers and published on the Commission’s website, provides detailed information for most of the consumer *acquis* on the implementation, including use of the minimum harmonisation clauses.
  \item \textsuperscript{81} Collins, op. cit., n. 78, p. 220.
\end{itemize}
character of modern private law generally has been infused with regulatory principles, making this process not impossible.

The extent to which the Acquis Group has mastered its challenge can be assessed on the basis of its own Principles of the Existing EC Contract Law, published in two volumes (Contract I and Contract II). One difficulty with these so-called Acquis Principles is that they were drafted under time-pressure to meet the deadline for the DCFR, and so the objective of examining the acquis to identify underlying principles as well as current gaps – which would have been a helpful exercise in itself – was overtaken by the need to produce a set of rules for insertion into the DCFR.

**Policy choices**

The CFR is intended as a toolbox for improving and developing legislation. However, during the drafting process, there will be instances when policy choices are identified, e.g. with regard to consumer protection. These will need to be explained in the CFR, and it would be wrong to skim over such choices by stating a single rule as ‘the best solution’. Those preparing the CFR need to ‘recognise policy issues for what they are, and [set] out the arguments on each side. A failure to do that . . . would not only be an academic failure; it would be an improper abrogation of decision-making powers.’

The task of the scholars developing the toolbox is to identify policy choices and present a range of options. A decision on which of the various policy choices should be favoured is only needed once actual legislation is being considered.

**A critical view**

There was concern about the way the DCFR was to be created. An exercise undertaken by academics (the CoPECL network), based on a comparative research and the acquis to provide ‘best solutions’, might sound like an ideal way to undertake the groundwork that was needed in order to create the CFR. However, this approach was criticised because it seemed to have reduced the entire process to a technical matter without taking due account of the fact that there are economic, social and cultural factors which also affect the determination of whether a particular solution qualifies as a ‘best’ solution.

82 Contract I, op. cit., n. 79; Contract II, op. cit., n. 77.
84 See above, p. 159.
Drawing on the work already undertaken by legal scholars alone might not have been the best means of creating the CFR: ‘The coupling of a useful Commission project with a useful academic project which had its own direction and momentum has not proved entirely happy. Academic freedom has in some ways provided more a problem than an advantage.’ Indeed, the pace with which the project proceeded, and the fact that insufficient room was being given for addressing fundamental questions about the project are of concern.

Beyond the DCFR

The creation of the DCFR was only a staging post on the way to a final CFR. The Commission envisaged a follow-up process once the DCFR was presented, which would have encompassed several stages. There was to be a period of evaluation, during which the Commission intended to submit the DCFR to a practicability test. In essence, this might have involved preparing a revision to one (or more) of the Directives in the consumer law field, using the provisions of the DCFR as a guide. Quite how this was supposed to have been done remained unclear, and it seems that the influence of the DCFR on the CRD has been negligible. The Commission had intended to concentrate on those aspects of the DCFR which would have been directly relevant to the review of the consumer *acquis*, whilst also including aspects of general contract law as well as other areas where EU legislation was envisaged. General contract law could clearly not be ignored altogether because consumer law is largely a derogation from general principles, and if the (D)CFR was to serve its toolbox function, there needed to be clarity as to what the consumer *acquis* departs from.

Following consultation with other European institutions and Member State experts, the Commission had planned to present a revised, pared-down version of the DCFR (the ‘Commission’s CFR’). This was to have been followed by a White Paper on the CFR, which would have required the translation of the Commission’s CFR into all the official languages of the EU. There would then have been a 6-month period of consultation to enable stakeholders to comment on this version of the CFR, and to deal with any differences in the various language versions of the CFR. The latter aspects would have helped with a systemic problem of EU legislation that has not been addressed.

90 *Second Progress Report*, op. cit., n 70, pp. 10–11.
properly to date: the difficulties of translating legal terminology from one
language into another.92 The ‘adoption’ of the CFR by the Commission and its
publication had been scheduled for 2009.

The Commission also promised that ‘mechanisms for updating the CFR
will be identified’.93 This was a somewhat aspirational statement because
keeping the CFR updated would be just as monumental a task as the initial
drafting process. National contract laws would have to be monitored regularly
to keep track of significant developments, and there would need to be some
sort of threshold that would need to be reached before amendments are made
to the CFR. However, regular updating would have been essential for the
CFR to remain useful. In particular, as national laws continue to change, the
notes on the national rules accompanying each Model Rule would need to be
amended to ensure that the CFR retains its toolbox function.

A confusing picture?

There was much speculation about what the CFR would look like and what
its ultimate uses would be. As discussed above, the Commission’s documents
suggested that, on the one hand, it would be a ‘toolbox’ that could be used for
improving the acquis; on the other hand, it might form the basis of an optional
instrument (discussed in more detail in Chapter 6). This ‘tension between
[its] twin aims’94 caused a degree of confusion regarding the substance of the
CFR, and also its form. If it was solely to be a toolbox, its key function
would be to provide coherent definitions and consistent terminology, and
perhaps basic coherent rules on recurring themes (such as rights of withdrawal
or pre-contractual information duties). The analysis of the laws of the Member
State and the possible ‘solutions’ revealed by this could lead to the identifi-
cation of a ‘best solution’, but alternative solutions were essential for inclusion
in the CFR; indeed, there might have been more than one candidate for a
‘best solution’ on any given aspect of contract law. The CFR should not be a
ready-made law of contract in a form that could be adopted ‘as is’; rather,
where necessary, it should identify the options that are available to both the
EU and national legislators for developing the law. However, as a blueprint
for specific legislation in the form of an optional instrument, it would have to
contain detailed model rules on general contract law, as well as some specific
contracts.95

94 H. Beale, ‘The European Commission’s Common Frame of Reference Project: a Progress
95 Ibid.
Social Justice Manifesto

Sustained criticism of the entire process came in the shape of the Manifesto of the Study Group on Social Justice in European Private Law. It claimed that the process initiated by the European Commission was not merely concerned with improving the operation of the internal market; rather, it reflected a political goal of creating a union of ‘shared fundamental values concerning the social and economic relations between citizens’.

The Manifesto’s concern was that the approach adopted by the EU towards greater Europeanisation of contract law was too technocratic a process and failed to address concerns over social justice. According to the Manifesto, national private laws reflect ‘basic principles of justice and social ordering in a market society’, and are therefore not concerned with merely technical rules. The rules of contract law, and private law generally, reflect contemporary ideals of social justice. Any move towards a comprehensive European contract law system therefore needed to consider where the balance should be struck between party autonomy (freedom of contract) and principles of social solidarity.

The Manifesto was critical of the drafting process for the DCFR – particularly if this would lead to an optional instrument or even a Contract Code – regarding it as purely technocratic for its stated aim of promoting market integration. The combination of legal experts and business interests promoted an integration agenda, which was largely concerned with rules which are uniform, transparent and effective, but there was no scope for considering questions of social justice. But, it was argued, if the CFR were to become binding law at a later stage, the drafting process for the CFR should have been a political process where questions of social justice could have been presented and debated, in order to give the entire process ‘regulatory legitimacy’.

The concerns of the Manifesto were particularly relevant at the time it was published because of the uncertainties which surrounded the potential future uses of the CFR. It was entirely appropriate to suggest that a more political process to consider questions of social justice at an earlier stage was needed.

97 Ibid, p. 657.
99 Manifesto, op. cit., n. 96, p. 655.
100 Ibid., p. 656.
101 Ibid., p. 660.
102 Ibid., p. 663.
103 Ibid, p. 664.
Indeed, the failure to engage with such fundamental issues early on remains of concern, particularly because a debate about social justice has yet to take place among the European institutions.

**DCFFR and beyond**

*Interim DCFR (2007) and final DCFR (2008)*

At the end of December 2007, the research network submitted an interim version of the DCFR to the Commission, and the text of the definitions, principles and model rules (without any accompanying commentary or national notes) was made available to the public in book form. This interim version also contained an introductory section in which the co-ordinators of the research network set out their approach towards creating the DCFR. A final version of the DCFR rules was submitted in late 2008; the full DCFR including notes and comments became available in six volumes in mid-2009.

The DCFR opens with a statement of four key principles (‘freedom’, ‘security’, ‘justice’ and ‘efficiency’) and an explanation of how these are reflected in the model rules. The DCFR itself is divided into ten ‘books’ containing the model rules (reflecting the continental approach to civil codes) and an Annex (containing definitions). Book I provides ‘general provisions’, which include provisions on interpretation, good faith and fair dealing, computation of time, as well as several key definitions. Book II then deals with ‘contracts and other juridical acts’, the latter phrase reflecting the fact that the DCFR extends beyond what might be regarded as general contract law. This book covers ‘non-discrimination’, ‘marketing and pre-contractual duties’, ‘formation’, the ‘right of withdrawal’, ‘representation’ (agency), ‘grounds of invalidity’, ‘interpretation of contracts’, and ‘contents and effects of contracts’. Book III then deals with all types of obligations, not merely contractual ones. Here, one can find material on ‘performance’, ‘remedies for non-performance’, ‘plurality’, ‘change of parties’, ‘set-off and merger’ and prescription. Book IV covers various specific contracts, including sales, leases of goods, services, mandate contracts, commercial agency and franchising/distribution, loans, personal securities and donation. There are also ‘books’ on benevolent intervention in another’s affairs, non-contractual liability (tort), and unjustified enrichment. Their immediate relevance to contract law, particularly EU contract-related legislation, is far from obvious. The omission of provisions dealing with


107 Ibid., pp. 3–56.
aspects of property law, such as the transfer of property in movables, from the interim DCFR was corrected, with Book VIII on ‘acquisition of loss and ownership of goods’, Book IX on ‘proprietary rights in movable assets’ and Book X dealing with ‘trusts’.

The DCFR is clearly much broader in terms of its scope than the Commission required. It was therefore interesting to see what would happen after the final DCFR was submitted to the Commission, and if the various plans previously mentioned in the Commission documents would come to fruition. It had, of course, already become apparent that the DCFR has had a limited role, at best, in helping with the reform of the consumer acquis. The first signs that there might be further developments came when the responsibility for contract law was transferred to DG JUSTICE. The next concrete step occurred in April 2010, when the Commission established an Expert Group tasked with creating a ‘CFR’ out of the academic DCFR. This seemed to reflect the Commission’s earlier plans to develop a ‘Commission CFR’, but the Expert Group was soon asked to concentrate on studying the feasibility of drafting an optional instrument on European contract law. This, and the fact that this Expert Group largely comprised academics who had been involved in drafting the DCFR, did not go without criticism.

More significant still was the fact that, whilst the work by the Expert Group was still in progress, the European Commission published a Green Paper on Policy Options for Progress towards a European Contract Law for Consumers and Businesses on 1 July 2010. The purpose of this Green Paper was to consider possible future action by the EU in the field of contract law, both in respect of business-to-consumer (B2C) and business-to-business (B2B) contracts. With regard to B2C contracts, the Green Paper repeated the all-too-familiar assertion that differences in national consumer laws have the effect of deterring both consumers and traders from engaging in cross-border transactions. However, unlike earlier policy documents, it was also noted explicitly that linguistic and other practical barriers are just as problematic as differences between the various national laws. It also marked an official confirmation that the Consumer Rights Directive, which had not been adopted at the time, would not achieve one of its primary aims to reduce the problem of legal diversity because the negotiations over the proposal ‘have highlighted that there are limits to an approach based on
full harmonisation’. With this acknowledgement that full harmonisation is unlikely to be achieved, the focus must shift to other forms of action if the objective of creating a set of legal rules to support the internal market is to be achieved. Broadly speaking, the *Green Paper* set out seven potential options for some sort of future instrument on European contract law:

(i) The Expert Group’s text (then still thought to become a CFR) could become a ‘source of inspiration’ for European and national legislators when developing new legislation. In addition, it might be included in higher education and professional training programmes to promote a better understanding of contract law in the EU. The focus of this option would therefore be on the voluntary convergence of national contract laws. It is conceded in the *Green Paper* that a non-formal text would have little immediate impact on the current diversity of contract laws.

(ii) The second option also focuses on the potential use of the text prepared by the Expert Group text. Rather than simply using this as a ‘source of inspiration’, it could be given the status of an official toolbox for the legislator. As such, when new legislation is proposed, it could be made binding either on the Commission only, or, through an inter-institutional agreement between the Commission, Council and Parliament, on all of the EU institutions. There is still concern expressed in the *Green Paper* that this would not remove current divergences – at least not until legislation utilising the toolbox is adopted. It would, however, make it more likely that future legislation would be more coherent.

(iii) A third option would be for the Commission to adopt a Recommendation, which would try to encourage the Member States to adopt, over time and to fit with national legislative priorities, an agreed set of EU contract rules as part of their national legal systems. It is left open whether this would replace existing national contract law rules, or offer an optional alternative to existing national law. The voluntary nature of a Recommendation would mean that this option would also not remove current divergences; moreover, as Member States would be free to select which provisions to adopt (on a ‘pick-and-mix basis’), this might result in the incomplete or incoherent adoption of the recommended text by the Member States.

(iv) The fourth option returns to an idea that has been around from the early stages of the whole process – the possibility of an ‘optional instrument’ on EU contract law, adopted as a binding Regulation. This would co-exist with national laws and could provide the parties to a contract with an alternative to choosing a national law as the applicable law. It is noted that consumer confidence, and consequently

114 Ibid., p.5.
115 Ibid., p.7
their willingness to agree to using the optional instrument, would depend on the level of consumer protection it provides. Also, it would be necessary to deal with national mandatory rules on consumer protection; for the optional instrument to be able to operate effectively, such national rules would have to be disapplied if the optional instrument is chosen; otherwise, the objective of providing a clear single set of rules for the internal market would be undermined. This might be problematic if the level of consumer protection in the optional instrument was significantly below that provided by the national law that would otherwise be applicable.

(v) Option five would be that instead of using a Regulation, a Directive on European Contract Law, which would harmonize national contract laws, could be adopted. For reasons not made explicit (but perhaps reflecting the emerging political realities about the lack of support for extensive full harmonisation), the Green Paper suggests that this would be of a minimum standard and allow Member States to retain more protective rules. Unsurprisingly, it is noted that this would still result in unacceptable diversity between national contract laws. Indeed, it is acknowledged that past experience demonstrates that Directives do not always result in uniform rules, let alone consistent interpretation of those rules. The Green Paper suggested, therefore, that Directives would not provide the degree of legal certainty required by business.

(vi) Option six goes beyond the idea of an optional instrument, suggesting that there could be a Regulation establishing one European contract law to replace all the existing national laws. This would mean one single text would be applicable throughout the EU, i.e. there would be a uniform EU contract law. Despite the fact that this is something which might best reflect the requirements of the internal market, the Green Paper notes that such a Regulation might be difficult to justify on the basis of the fundamental principles of proportionality and subsidiarity, especially if this Regulation applied to domestic as well as cross-border transactions.

(vii) The final option seems to have included more for offer a complete range of options rather than any real desire of pursuing this in earnest: option seven suggested the idea of a European Civil Code. It would have the advantage of covering the entirety of the law of obligations, and consequently provide even greater legal certainty across the EU. However, it, too, would probably fail at the subsidiarity and proportionality hurdles.

In addition to these policy options, the Green Paper raised two questions of scope: first, it asked whether – irrespective of which policy option is followed – any measure should apply to both B2B and B2C transactions, or to

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one of these only. Second, it asked, with particular reference to the idea of an optional instrument, whether this should apply to both domestic and cross-border contracts, or to cross-border contracts only. This is interesting because hitherto, no distinction had been drawn between domestic and cross-border transactions – harmonising Directives applied to all types of transactions. As far as the Commission’s position on this is concerned, the Green Paper repeats reservations already made in the earlier Green Paper on the Review of the Consumer Acquis that consumers would be confused by the existence of two regimes operating in parallel. However, it is also conceded that ‘an instrument covering cross-border contracts only, capable of resolving the problems of conflicts of laws could make an important contribution to the smooth functioning of the internal market’. This observation recognises expressly that there might be benefits to restricting legislation such as an optional instrument to cross-border transactions only, although crucially, the notion of ‘cross-border’ is not explored further.

The Green Paper therefore reopened the debate on future action by putting a broad range of possible options up for debate. This might seem remarkable but one can still detect that the Commission had a preference for some options. For example, with regard to the less interventionist options ((i)–(iii)), the Commission spells out the drawbacks for the internal market, suggesting limited support. And, of course, the options based on the Expert Group’s text had been overtaken by events, as the Group, which, instead of creating a CFR, had been asked to prepare a draft optional instrument instead. In effect, options (i) and (ii) were off the table even before the consultation had closed.

Following the publication of the Green Paper, the Expert Group completed and published a Feasibility Study on a European Contract Law for Consumers and Businesses. This is, effectively, a draft optional instrument, and nothing like a CFR. As is discussed more fully in Chapter 6, the Feasibility Study became the basis for a legislative proposal for an optional instrument, known as the Common European Sales Law. So the Commission has plumped for option (iv) in its Green Paper. Although these developments have left unanswered the question as to whether there might ever be a CFR endorsed by the Commission, it seems unlikely now that a separate toolbox, distinct from the DCFR, will emerge.

**Conclusion**

This chapter has sketched the progress towards greater Europeanisation of contract law from the Commission’s much-debated 2001 Communication on
European Contract Law up to the 2010 Green Paper. This process has been anything but smooth, with frequent changes of direction and scaling-down of proposals for future action. Starting with quite ambitious plans around 2003, the focus is now on the idea of enacting an optional instrument (discussed in Chapter 6) which would become the main result of this very lengthy process. The development of the CFR is as interesting as it is bizarre: the resources invested in producing the DCFR – a six-volume tome running to over 6,500 pages – were vast, but the end result seems destined to collect dust on the shelves of legal scholars throughout the EU. If this is really to be the DCFR’s fate, then this is disappointing to say the least. Although the DCFR itself undoubtedly suffered from the fact that some of the key players might have gotten carried away by the opportunities presented by this project, resulting in a DCFR which goes (too) far beyond contract law, there would still be huge value in developing a CFR on contract law which could act, at the very least, as a ‘legal dictionary’ or ‘toolbox’ to assist with the future development of contract law at both the EU and national levels. The DCFR does have its shortcomings: for example, there is some uncertainty as to the criteria that were ultimately employed in deciding why a certain rule should be a ‘best solution’, and the lack of options (with the exception of the infamous square brackets in Article II.9:403 around the phrase ‘which has not been individually negotiated’, marking the only instance where the DCFR appears to give a choice of policy options) is regrettable. However, it is also a major achievement in pan-European scholarship, and there is significant potential for utilising it for legal education as well as for improving both national and EU legislation. For the time being, however, the DCFR appears to have resumed its role as the Sleeping Beauty of EU law.

119 See Draft Common Frame of Reference, op. cit., n 106, para. 79.
6 Towards an optional instrument on EU contract law

Introduction

Chapter 5 discussed on the various initiatives launched by the Commission towards broader action in the field of EU contract law. The focus there was primarily on the development and subsequent fate of the CFR on European contract law. As was seen there, following the submission of the DCFR in 2009 and a period of silence, a fresh impetus towards further action came with the publication of the Green Paper on Policy Options for Progress towards a European Contract Law for Consumers and Businesses on 1 July 2010.¹ In the wake of this, the Commission put forward a proposal for a Regulation on a Common European Sales Law (CESL).² This chapter first considers the idea of an ‘optional instrument’ as it emerged in the wake of the 2001 Communication on European Contract Law,³ before considering the proposal for a CESL made in 2011.

An optional instrument

Chapter 5 covered two strands of the Commission’s plans towards a European contract law, the aborted work on standard contract terms, and the creation of the CFR. The third element is the development of an ‘optional instrument’ on European contract law. In the early stages, the possibility of such a development was approached with some caution. Thus, in the 2003 follow up, A More Coherent European Contract Law – An Action Plan,⁴ talk was of ‘reflection on the opportuneness’ of an non-sector specific measure, also known as an ‘optional instrument’. Although there had been wide opposition to option (iv) from the 2001 Communication on European Contract Law, which considered

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comprehensive EU regulation of contract law, the possibility of broader intervention in the sphere of contract law had not been taken off the table completely. The Commission refrained from making any firm proposals, although it hinted even then that it was contemplating a legal framework on contract law to operate alongside the existing domestic laws, possibly applicable only to cross-border transactions or through the parties’ choice; largely based around default rules, with some mandatory rules; and based on the content of the then yet-to-be-developed CFR.

This was, inevitably, all rather vague at that stage, but it would have been too controversial to come forward with concrete ideas about a more comprehensive intervention. There was, unsurprisingly, concern that the notion of an ‘optional instrument’ was really an obscure reference to a European Contract Code. Thus, Kenny argued that the ‘Commission’s linguistic contortions should be understood as a warning: what does the Commission mean by arguing for a frame of reference and an optional instrument, yet insisting that it is not to be understood as a nascent pan-European Civil law?’.

Moreover, there were claims that the optional instrument is really a ‘camouflage for a European Contract Code’. There were therefore only vague indications of the Commission’s thinking. For a while, it seemed that the development of an optional instrument on general contract law was a very distant prospect. Instead, more concrete action in the field of financial services was more of a possibility. In its First Annual Progress Report, the Commission had noted that exploratory work in the field of financial services might lead to a so-called ‘28th regime’ for life-insurance or savings products, and also potentially for mortgage credit. Limiting the discussion to such areas certainly helped to take the heat out of the debate about an optional instrument and focused attention on the work already underway, i.e. the creation of the CFR.

When the idea of an ‘optional instrument’ was first raised, a number of different models were mooted. However, the label used by the Commission suggested from the outset that the thinking behind this was not to introduce a framework on contract law which would have to be adopted by the Member States instead of their domestic contract laws. Rather, the optional instrument would exist alongside domestic laws and provide an alternative legal framework for contracting parties.

Also inherent in the idea was the element of optionality, i.e. contracting parties may choose not to be bound by the optional instrument. In the Action

8 Ibid., p. 11.
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Plan, the Commission left open whether this optionality would mean that the parties could choose to ‘opt in’ to or ‘opt out’ of the optional instrument.

The assumption was that an ‘opt-out’ model would apply only to cross-border situations. This makes some sense: in a purely domestic context, it would be very unusual to have a conflict of laws, as both contracting parties will be based in the same jurisdiction and expect the contract law of that jurisdiction to govern their relationship. Although the notion of ‘cross-border’ had not been explored fully by the Commission, the assumption seemed to be that this would cover contracts where goods or services cross borders, rather than a situation where the contracting parties are based in different jurisdictions. There was a presumption that the optional instrument would apply to all cross-border contracts, unless the parties expressly chose not to apply it, but to subject their contract to a particular domestic regime.

The ‘opt-in’ model would, in essence, make available the optional instrument as an alternative to existing domestic laws, but leave it up to the contracting parties to choose whether to use a national law or the optional instrument. Their choice would be reflected through a choice of law clause in their contract. This suggestion does give rise to a possible problem: parties opting-in would choose a non-national law, and that raised concerns about the conceptual difficulties for private international law to accept the choice of a non-national law. This obstacle could, however, be overcome because the EU can adopt appropriate legislative provisions in the field of private international law to permit contracting parties to choose a non-national legal framework.10

It is certainly true that there may be problems with trying to fit an optional instrument into the existing framework on private international law,11 but recital 14 of the Rome I Regulation12 states that if the EU were to ‘adopt in an appropriate legal instrument rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules’. This seems to create the possibility of enabling the choice of an optional instrument as an alternative to national law. It does not go as far as Article 3(2) of the original proposal for the Rome I Regulation,13 but appears sufficient for creating the private international law basis needed for an optional instrument.

Any proposal to adopt an optional instrument is likely to be controversial, because it would introduce a new system of contract law to sit alongside all the national regimes.

A ‘28th regime’ might fail because it could add to the confusion already caused by the existing 27 regimes, adding just another layer of complexity. Certainly, the adoption of a 28th regime would not have the immediate effect of reducing transaction costs. The uncertainty that prevails about the contract rules in another jurisdiction would be no less acute with an entirely new legal framework. Indeed, in the short term, such a regime would create higher transaction costs because there would be greater unfamiliarity for lack of practical experience with the new rules, as well as uncertainty about its application across the EU.\(^\text{14}\)

To this, one might respond that reliance on ‘jurisdictional competition’ is just as unlikely to provide an answer.\(^\text{15}\) Moreover, if one is in favour of diversity and utilisation of choice of law by the parties to a contract, there seems to be no logical basis for rejecting the possibility of an optional instrument as an alternative choice to a domestic law.\(^\text{16}\)

**Scope of the optional instrument**

There were then questions of scope: the optional instrument could apply to all types of contract (i.e. B2B, B2C, business-to-government (B2G) and private) or be more limited.

The Commission indicated that, in view of the link of all of the activities in the sphere of European contract law with the internal market, the optional instrument should also contribute to the operation of the internal market. In that context, B2C transactions are significant, and for this reason, the optional instrument would almost certainly include provisions on consumer law.\(^\text{17}\)

If the optional instrument were to cover B2C transactions, then there would be mandatory provisions.\(^\text{18}\) Assuming this to be so, then a further issue is what would happen to existing national mandatory rules in this field. The purpose of mandatory rules in private international law is to prevent the evasion of

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15 Von Bar and Schulte-Nölke, op. cit., n. 10, p. 168.


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particular rules in one jurisdiction by choosing the law of another jurisdiction which does not provide similar rules. If the optional instrument were chosen by the parties to a contract, then the expectation would be that only the mandatory provisions of the optional instrument would be applicable. However, it seems that domestic mandatory rules would not be excluded through choosing the optional instrument rather than another national law, unless the rules of private international law were amended in such a way that domestic mandatory rules of consumer law would not apply if the chosen ‘law’ is the optional instrument. There was recognition of the importance of co-ordinating the Rome I Regulation with an eventual proposal for an optional instrument.

As for the B2B context, the Commission was keen to rely on freedom of contract as a fundamental principle not just for the CFR but also the optional instrument, and in B2B transactions, the parties would be free to modify the optional instrument to suit their own needs. However, in the B2B context, there is already a measure in place which deals with one type of cross-border contracts, i.e. contracts for the sale of goods: the UN Convention on the International Sale of Goods (CISG). So making available an optional instrument for B2B cross-border sales contracts would create the danger of treading on the toes of a well-established instrument dealing with cross-border sales between businesses. To avoid this, the optional instrument could either copy-out the CISG (which would add nothing to the existing situation) or it could deliberately provide alternative rules which would compete with the CISG. The latter option seems undesirable, because it could cause difficulties for businesses contracting with both EU and non-EU based partners who might rely on the CISG for all types of transaction.

Substance

The development of the optional instrument would not occur in isolation, but take into account the CFR. The Commission was careful in saying that the CFR ‘would be likely to serve as a basis for discussions’ on the optional instrument. Had the CFR materialised as a real ‘toolbox’ presenting options rather than one complete set of rules as it eventually turned out as, then subsequent steps towards an optional instrument could have chosen whichever of these options would be most appropriate for the kind of instrument envisaged, particularly in respect of matters which require clear policy choices such as issues of consumer protection. Of course, the DCFR did not contain any options, and the creation of the Feasibility Study, which formed the blueprint for the proposal for the CESL, similarly did not identify areas where different approaches might be considered. One might ask why this is important. It could, of course, be argued that as long as there is a clear and coherent set of

20 Ibid., p. 19.
rules in place, that is all that businesses and consumers require to be able to participate in cross-border contracting. However, this, in effect, assumes that ‘any rule will do’, and it avoids the question as to what the underlying objective of the optional instrument as a whole, or particular provisions such as those dealing with consumer contracts, is, and how this is, reflected in the substance of the rules proposed. It seemed that, having committed significant resources to the creation of the (D)CFR, it would be inevitable that whatever eventually emerged would have to become the basis for further action.

Competence – the perennial problem

There are concerns about the EU’s competence to adopt wide-ranging rules on general contract law. Creating the (D)CFR, even if it had been turned into some sort of Recommendation, or even an inter-institutional agreement between the various EU institutions, was not that controversial from a competence perspective.21 But going one step further and moving towards a concrete proposal for a legally binding optional instrument would mean that questions of competence will become more significant. If there were to be an optional instrument, some thought would have to be given to its legal form. If the optional instrument were to be developed within the scope of the Treaties, the choice of binding instruments would be between a Regulation, Decision or Directive; alternatively, there might be a non-binding Recommendation. A Directive, however, would make no sense: its objective is to specify a result only, with form and method of giving effect to this result left to the Member States.22 The choice is therefore between a binding Regulation and a non-binding Recommendation. For an ‘opt-in’ model, both legal forms are possible, particularly if the choice-of-law rules in private international law are amended in the Rome I Regulation. An ‘opt-out’ model assumes a binding legal framework that would apply unless the parties decided against this, and a regulation would be the appropriate legal instrument to use.23

For a legally binding instrument, one needs an appropriate legal base in the Treaty.24 Article 114 TFEU may be the obvious candidate, but – as seen in Chapter 2 – the threshold for basing legislation on this provision might be too high unless strong evidence of a beneficial effect on the establishment and functioning of the internal market is adduced.25

22 Article 249 EU; see Chapter 2, p. 37.
24 See Chapter 2.
25 Whether surveys such as the one reported by Vogenauer and Weatherill are sufficient is questionable for the reasons they themselves give: S. Vogenauer and S. Weatherill, ‘The EC’s Competence to Pursue the Harmonisation of Contract Law – an Empirical Contribution to the Debate’ in S. Vogenauer and S. Weatherill (eds), Harmonisation of European Contract Law. Oxford: Hart Publishing, 2006, pp. 138–139.
But there are other provisions in the Treaty which could also be a possible legal basis, whether for narrower fields, such as consumer protection (Article 169 TFEU),\(^{26}\) or more widely, e.g. the EU’s residual power to act where there is no other suitable legal basis (Article 352 TFEU). At one point, it was thought that the Treaty provision on judicial co-operation in civil matters (Article 81 TFEU) might also be a suitable legal basis, but this seems unlikely, particularly in light of the changes made to this provision in the TFEU.

Article 81 TFEU – judicial co-operation in civil matters

Article 67 TFEU opens Title V of the Treaty and sets out the aim of establishing an ‘area of freedom, security and justice’. Chapter 3 of that Title is concerned with judicial co-operation in civil matters. Article 81 TFEU provides that ‘[t]he Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such co-operation may include the adoption of measures for the approximation of the laws and regulations of the Member States.’ The predecessor to Article 81 TFEU, Article 65 EC, was phrased differently and provided a basis for the adoption of ‘measures in the field of judicial co-operation in civil matters having cross-border implications . . . necessary for the proper functioning of the internal market’\(^{27}\).

Article 81 TFEU also provides a list of those areas which should be the focus of legislative activity, which includes ‘eliminating obstacles to the good functioning of civil proceedings’, which might appear to be concerned solely with matters of civil procedure.\(^{28}\) However, at the European Council at Tampere in October 1999, it was concluded that the creation of a ‘genuine European area of justice’ did not only require improvements in access to justice and the mutual recognition of judicial decisions. The Council also resolved that ‘as regards substantive law, an overall study is requested on the need to approximate Member States’ legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings.’\(^{29}\)

Of course, the use of Article 81 TFEU (and its predecessor) as an alternative legal basis for the adoption of legislation in the contract law field remains unexplored. It had been suggested that the ongoing process of deeper

\(^{26}\) See Chapter 2, p. 36.


\(^{29}\) Paragraph 39 of the Tampere Conclusions.
Europeanisation might more appropriately be treated as a matter of justice.\(^\text{30}\) Indeed, in its Hague Programme on freedom, security and justice, adopted in 2004, the Council explicitly referred to the need for improving the quality of EU law in the field of contract law through consolidation, codification and rationalisation of legislation in force and developing the CFR.\(^\text{31}\) This seemed to assume that ‘judicial co-operation in civil matters’ extends as far as the approximation of substantive law (including contract law), which is a very generous reading of Article 81 TFEU.\(^\text{32}\)

It seems unlikely that Article 81 TFEU could be a basis for adopting measures on substantive contract law, even if a close reading of the Hague Programme on justice suggests that serious consideration was being given to its use. It is arguable that differences in substantive law have the effect of creating obstacles to the functioning of civil proceedings,\(^\text{33}\) thereby bringing Article 81 TFEU into play, but this kind of reasoning would be strangely reminiscent of the simplistic reasoning deployed to invoke Article 114 TFEU in pre-Tobacco Advertising times, and would be stretching the scope of this Article rather too far. The reason it still seems to crop up in discussions about an appropriate legal basis might simply be due to the fact that the TFEU does not have a specific legal basis for legislation in the field of private law, and so all possible candidates for such legislation need to be explored. But realistically, the choice is only really one between Articles 114 TFEU and 352 TFEU, unless an optional instrument was exclusively concerned with consumer contracts; in that case, Article 169 TFEU would also be available.

**Article 352 TFEU – residual competence**

In addition to the legal bases in Articles 114 and 115 TFEU, Article 352 TFEU provides a residual power for the EU ‘if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers . . .’. This provision was historically significant to deal with matters which were part of the Union’s general aims, but for which there was no specific Treaty base. With the various additions made to the EC Treaty (now the TFEU) by the amending treaties, this provision has become less significant. Its existence has sometimes given rise to ‘competence creep’, i.e. concern that the EU would use it to claim competence in areas not


\(^\text{31}\) Hague Programme, para. 3.4.4 (under the heading ‘Judicial Co-operation in Civil Matters’). The CFR is discussed in Chapter 5.


\(^\text{33}\) Tampere Declaration 1999.
explicitly conferred on it by the Treaty, on the basis that this would be necessary to pursue the EU’s objectives.

The potentially wide scope of this Article is mitigated by the legislative procedure to be followed in this regard, which requires unanimity to adopt legislation on this basis. Also, whilst the consent of the European Parliament is required, it is not granted the power of co-decision it would have if the ordinary legislative procedure applied, and this is a matter of potential concern, because the European Parliament is not as heavily involved in the legislative process as it would be if another Treaty basis was in issue.

Although it may be of more limited use today following the introduction of legal bases for action in specific areas in the various amending treaties, there are circumstances where Article 352 TFEU will be significant. A key case in this regard is European Parliament v Council of the European Union.\(^\text{34}\) Here, the CJEU had to consider the relationship between Articles 352 TFEU and 114 TFEU (then Articles 308 and 95 EC)\(^\text{35}\) in the context of a challenge to the legality of Regulation 1435/2003 on the Statute for a European Co-operative Society (SCE).\(^\text{36}\) This created a new legal structure, the European co-operative society, which is a new legal entity to be recognised in all the EU Member States. As initially proposal, the legal basis for Regulation would have been Article 114 TFEU, but the Council substituted Article 352 TFEU, on the basis of which the Regulation was adopted. This was challenged by the European Parliament, undoubtedly because its involvement under the then Article 308 EC was even more restricted than it is now. The Council’s argument was that Regulation created a new European entity which exists alongside domestic co-operative societies. Measures based on Article 114 TFEU are intended to approximate domestic law and remove the barriers created by the divergence in domestic legislation, but because the SCE could not be created through domestic law, this did not involve the approximation of national law.

The CJEU emphasised that Article 352 TFEU could only be used where there is no other legal basis in the Treaty on which a measure can be adopted.\(^\text{37}\) Article 114 TFEU was the appropriate base for measures which genuinely have as their object a contribution to the establishment and functioning of the internal market, and this includes circumstances where obstacles to the internal market are likely to be caused by the heterogeneous development of domestic laws.\(^\text{38}\) As the Regulation did not aim to approximate domestic laws on co-operative societies, but rather to create a new type of co-operative


\(^{35}\) For the sake of simplicity, the new Article numbers are used in this discussion.


\(^{37}\) C-436/03 European Parliament v Council of the European Union, above, n. 34, para. 36.

\(^{38}\) Ibid., paras 37–38.
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society, Article 352 TFEU was the correct legal basis. This was so notwithstanding the fact that the SCE Regulation referred back to national law for certain operational rules affecting the SCE.

From this judgment, it is clear that Article 114 TFEU can only form the basis of legislation approximating the national laws (which includes the replacement of divergent national rules with a uniform EU procedure enacted by way of regulation and the creation of a monitoring agency), but not for the creation of new, supranational legal forms. For this, Article 352 TFEU is the appropriate legal basis.

This is potentially relevant to the future adoption of an optional instrument. Article 114 TFEU could be difficult to justify as a legal basis if the optional instrument is not regarded as a measure which harmonises national laws. If one then pursues the reasoning in Parliament v Council, the creation of an optional instrument on the basis of Article 352 TFEU, to co-exist with national contract laws, seems to be a possibility, although the limited involvement of the European Parliament in the legislative process, as well as the need for unanimity in Council, would make this an unattractive proposition.

Deciding on a legal basis for an optional instrument is difficult. Certainly, a broad harmonisation of national contract law seems to be beyond the competence of the EU. More targeted action, as well as the adoption of an optional instrument, might be possible; however, it might still require use of an alternative to Article 114 TFEU. Article 352 TFEU is a contender, but its use would create serious political difficulties because of the limited role of the European Parliament (which has been driving the entire process), and the requirement of unanimity.

From an optional instrument to a CESL?

The previous section considered general issues associated with the idea of an optional instrument, particularly the matters that were debated prior to 2010. As already discussed in Chapter 5, with the publication of the Green Paper, with its thinly disguised preference for proceeding with the idea of an optional

39 Ibid., para. 44.
40 Ibid., para. 45.
43 The CJEU, amongst other things, referred to its Opinion 1/94 [1994] ECR I-5267, where it held that Article 352 TFEU would be the appropriate basis for the creation of a new intellectual property right which would exist in addition to national rights.
44 Although J. Rutgers argues that an optional instrument could be based on Article 114 TFEU because it would not create entirely new rights, but enhance existing (national) contract laws: ‘An Optional Instrument and Social Dumping’ (2006) 2 European Review of Contract Law 199–212: 207–208.
instrument, as well as the work of the Expert Group towards preparing a Feasibility Study for an optional instrument, the prospect of some kind of proposal came closer. In October 2011, the Commission published its proposal for a CESL,\(^\text{46}\) and thereby committed to the idea of an optional instrument, albeit one that focuses on a narrow range of contracts. The proposal for CESL has already given rise to a number of edited collections\(^\text{47}\) and journal articles examining its provisions in some depth; it is not intended to subject the proposal to extensive scrutiny in this chapter, but instead, the focus is on the general matters raised by this proposal, particularly in light of the foregoing discussion of the background leading up to 2010.

**General overview**

The CESL is proposed as a Regulation, rather than a Directive. This is clearly desirable, as an optional instrument should be based on one single text, and not depend on individual Member States to give effect to this through their national laws. As noted earlier, the experience of using Directives has shown that this does not create a more accessible legal framework, even if it promotes greater approximation in the substance of the various national laws. The proposed Regulation is divided into two parts. The first part, known as the ‘chapeau’ part of the proposed Regulation, is in the familiar form of an EU Regulation, containing recitals, the scope of the proposed Regulation, definitions, and some substantive provisions. However, the provisions which make up the substance of the CESL are not found in this part, but rather in Annex I to the proposed Regulation. Although a discussion of the substance of the CESL is beyond the scope of this book, a few observations can be made. First, the substantive rules in the Annex are largely based on the text presented by the Expert Group in May 2011, albeit with some modifications made after the Expert Group’s text was published, and further adjustments to reflect the final text of the CRD, which was agreed in June 2011 and adopted formally by the Council on 10 October 2011. As explained in Chapter 5, the Expert Group text was based on the DCFR, but focused on contract law in a narrower sense, and therefore excluded many of the provisions on obligations more generally. Consequently, the text of the proposed CESL is a continuous progression of the work on the DCFR. At one level, this is understandable because of the amount of time and resource put into the development of the DFCR. On the other hand, however, it is also regrettable because what appears to be lacking in this process is an examination of what the particular problems

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\(^{47}\) German scholars were particularly quick off the mark: M. Schmidt-Kessel (ed.), *Ein einheitliches europäisches Kaufrecht?* Munich: Sellier, 2012; H. Schulte-Nölke, F. Zoll, N. Jansen and R. Schulze (eds), *Der Entwurf für ein optionales europäisches Kaufrecht.* Munich: Sellier, 2012.
for businesses and consumers in respect of cross-border transactions are. It would have been preferable had such an assessment taken place in advance of drafting the CESL, because this might have resulted in rules which would genuinely make cross-border transactions easier.\footnote{For similar criticisms, see Law Commission, \textit{An Optional Common European Sales Law: Advantages and Problems – Advice to the UK Government}. London: Law Commission, November 2011.}

Second, the proposed CESL would only apply to three types of contracts:\footnote{‘Contract’ itself is defined in Article 2(a) of the proposed Regulation as ‘an agreement intended to give rise to obligations or other legal effects’.}

(i) sales contracts (defined as ‘any contract under which the trader (“the seller”) transfers or undertakes to transfer the ownership of the goods to another person (“the buyer”), and the buyer pays or undertakes to pay the price thereof; it includes a contract for the supply of goods to be manufactured or produced and excludes contracts for sale on execution or otherwise involving the exercise of public authority.’\footnote{Article 2(k) of the proposed Regulation.});

(ii) digital content (defined as ‘data which are produced and supplied in digital form, whether or not according to the buyer’s specifications, including video, audio, picture or written digital content, digital games, software and digital content which makes it possible to personalise existing hardware or software’\footnote{Article 2(j) of the proposed Regulation. This definition is more detailed than that in the CRD, according to which ‘digital content’ is ‘data which are produced or supplied in digital form’ (Article 2(11) CRD). A number of matters are excluded from the definition of ‘digital content’ for the purposes of the CESL: (i) financial services, including online banking services; (ii) legal or financial advice provided in electronic form; (iii) electronic healthcare services; (iv) electronic communications services and networks, and associated facilities and services; (v) gambling; (vi) the creation of new digital content and the amendment of existing digital content by consumers or any other interaction with the creations of other users.’}, irrespective of whether supplied in exchange for payment of a price; and

(iii) related service contracts, even if no separate price was agreed for the related service (defined as ‘any service related to goods or digital content, such as installation, maintenance, repair or any other processing, provided by the seller of the goods or the supplier of the digital content under the sales contract, the contract for the supply of digital content or a separate related service contract which was concluded at the same time as the sales contract or the contract for the supply of digital content; it excludes: (i) transport services, (ii) training services, (iii) telecommunications support services; and (iv) financial services’\footnote{Article 2(m) of the proposed Regulation.})

It can be seen, therefore, that far from being an optional instrument on contract law in a general sense, the proposed CESL will primarily apply to...
contracts of sale, with an extension to digital content and the inclusion of service elements. The CESL would not extend to service contracts generally, for example. What seems surprising is that, although the CESL focuses on 'sales', there are no provisions on the non-contractual aspects of contracts of sale, such as rules for the transfer of ownership.53

Whilst it is not appropriate to discuss the substantive provisions of the proposed CESL in detail here, it will be useful to set out the overall structure. There are eight parts, divided into 18 chapters, dealing with a range of topics as they related to the sale of goods and supply of digital content:

   Ch.1: General Principles and Application

Part II: Making a binding contract
   Ch.2: Pre-contractual information
   Ch.3: Conclusion of contract
   Ch.4: Right of Withdrawal in distance and off-premises consumer contracts
   Ch.5: Defects in Consent

Part III: Assessing what is in the contract
   Ch.6: Interpretation
   Ch.7: Contents and effects
   Ch.8: Unfair Contract Terms

Part IV: Obligations/Remedies in contracts of sale or contracts for the supply of digital content
   Ch.9: General
   Ch.10: Seller’s Obligations (delivery and conformity)
   Ch.11: Buyer’s Remedies
   Ch.12: Buyer’s Obligations
   Ch.13: Seller’s Remedies
   Ch.14: Passing of Risk

Part V: Obligations/Remedies in relate service contracts
   Ch.15: Obligations and remedies of the parties

53 The DCFR did include an entire book (VIII) on the transfer of ownership in goods, although the core provision (Article VIII.-2:101 (1) DCFR) tied the transfer of ownership – in the absence of party agreement – to the moment of delivery (which has an extended meaning – see Articles VIII.-2:104/5 DCFR). Without specific provisions on insolvency protection, such a rule would be risky for buyers who have pre-paid for their goods.
It can be seen that the substance of the proposed CESL would go beyond the basic contractual aspects of contracts of sale (the CISG deals with far fewer issues), but, as mentioned, it does not, at the same time, address all of the issues associated with sales transactions.

Specific observations

Types of contract covered

The proposed Regulation would only apply if the seller of goods (or supplier of digital content) is a trader (‘any natural or legal person who is acting for purposes relating to that person’s trade, business, craft, or profession’\(^54\))\(^55\). Provided that is the case, the proposed CESL can apply if the buyer is a consumer (‘any natural person who is acting for purposes which are outside that person’s trade, business, craft, or profession’\(^56\)), or another trader. However, if both parties are traders, then at least one of them must qualify as a small or medium-sized enterprise (SME)\(^57\). So the proposed CESL cannot apply where both traders fail to qualify as an SME. That said, Article 13(b) of the proposed Regulation permits Member States to make the CESL available where all the parties are traders but none qualifies as an SME. Introducing such an option does mean that traders would still need to consider which law will be applicable to the contract (see discussion below), because some jurisdictions might make available the CESL, whereas others might not. There seems to be no reason why the CESL could not be available in this situation in any event.

The proposed CESL will also not apply where the consumer is acting as a seller and the trader as a buyer, which seems a little bit surprising. The reason for this might well be the fact that the proposed CESL imposes extensive...

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54 Article 2(e) of the proposed Regulation.
55 Article 7(1) of the proposed Regulation.
56 Article 2(f) of the proposed Regulation.
57 Defined in Article 7(2) of the proposed Regulation as ‘a trader which (a) employs fewer than 250 persons; and (b) has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million’ (or equivalent in a non-euro jurisdiction).
obligations on the seller of goods (or supplier of digital content), which seems appropriate where the seller is a trader but would be far too onerous to be imposed on a consumer. However, this would leave contracts where the consumer is acting as a seller outside the scope of the CESL, and subject to the relevant applicable national law. It would seem appropriate to consider introducing provisions which would deal with the situation where the consumer is a seller of goods to a trader.\^58

\textit{Cross-border application}

The proposed Regulation is limited to ‘cross-border’ contracts. In principle, the idea of limiting this to such contracts seems sensible because cross-border contracts are likely to require different rules from those used for domestic transactions. Admittedly, it might strike some as odd to suggest that in an EU with a single internal market, a distinction should be drawn between domestic and cross-border contracts. As Weatherill has noted:

\begin{quote}
\textquote{An internal market requires regulation of some matters that might appear of purely local interest: it verges on the paradoxical to treat matters as internal to a single Member State within an EU market that is itself “internal”}.\textsuperscript{59}
\end{quote}

There is some logic to this, of course – one of the functions of the EU is to create and maintain an internal market which is a level playing field, which would suggest that conditions for trading should be the same irrespective of where the parties to a transaction are based. However, this notion of the internal market has met the realities of an EU with 27 Member States and even more legal jurisdictions, where the sheer diversity of legal systems and national, regional and local cultures makes it simply impossible to have a single set of rules in place. The relative failure of the full-harmonisation approach pursued in the consumer law field is a good indication of this. Recognising that the EU can achieve more by concentrating its regulatory activity on those matters where national law finds its limits is therefore a much more realistic way to proceed, and limiting the scope of the proposed CESL to cross-border transactions is appropriate. Moreover, if Member States wish to extend the availability of CESL to domestic contracts, they have the option of doing so.\textsuperscript{60} Inevitably, some will complain that this restriction will mean that traders operating both domestically and in a cross-border context

\^58 Compare, for example, the UK’s Sale of Goods Act 1979, where certain provisions regarding the quality of the goods supplied only apply where the seller is acting in the course of a business.


\^60 Article 13(1) of the proposed Regulation.
will have to comply with two different legal regimes rather than just having
one single regime, but that would still be a significant improvement to the
current status, where a trader may be confronted with at least 27 different
legal regimes.

However, the definition of ‘cross-border contract’ in the proposed
Regulation is not ideal. A distinction is made between contracts between
traders only, and those between a trader and a consumer. For contracts where
both parties are traders, a contract will be a cross-border contract if the
habitual residence of the parties is in different countries, of which at least one
must be a Member State (Article 4(2)). The habitual residence of a trader
which is a company is the place of its central administration, and if the trader
is a natural person, it is that person’s principal place of business (Article 4(4)).
The determining factor is therefore the location of the parties, rather than
whether goods cross any borders.

For contracts between a consumer and a trader, the criterion is more
complex. Article 4(3) of the proposal states that:

‘For the purposes of this Regulation, a contract between a trader and a
consumer is a cross-border contract if

(a) either the address indicated by the consumer, the delivery address
for goods or the billing address are located in a country other than the
country of the trader’s habitual residence; and

(b) at least one of these countries is a Member State.’

The first element of this definition has two reference points: (i) the trader’s
habitual residence; and (ii) the consumer’s address, the delivery address or the
billing address. These must be in different countries. This means that
the proposed Regulation would apply to face-to-face as well as distance/
online contracts. However, whether a trader in a face-to-face context would be
able to offer the choice of the CESL as an alternative to the applicable domestic
law would depend on the disclosure by the consumer of at least one of the
three addresses mentioned in Article 4(3), and then the willingness of
the trader to agree to use a different law than ‘his’ own law. With distance/
online contracts, this is unproblematic, but in a face-to-face situation, the
availability of the CESL as an alternative requires that the trader is aware of
one of the three addresses. The availability of the CESL in a face-to-face
context might therefore be quite erratic, and limiting its scope to distance and

1272–1273.
62 A similar criterion is used in CISG, Article 1(1).
63 Note that in the German version of the proposal, instead of ‘the address indicated by the
consumer’, there is simply reference to ‘Anschrift’, which would simply be ‘address’. It is
not clear why there is such a discrepancy and whether it would make a difference in
practice.
online cross-border transactions would be preferable. The second element – the fact that one of the countries must be a Member State, presumably relates to the territorial extent of the regulation, and the need for a connecting factor with the EU. Overall, this proposed test does seem rather complicated, and a clearer test would be needed. If one were to adopt a slightly cynical perspective, it might be suggested that the proposed test is deliberately complex so as to lead to the conclusion that it is not possible to come up with a workable definition of ‘cross-border’ at all, but with some further thought, it should be possible to define this more clearly.

**Optionality**

The proposed Regulation would be optional, i.e. it would only apply if the parties agreed to use it. With consumer contracts, the notion of choice is, of course, more apparent than real, because realistically, the trader will decide whether or not to enter into the contract on the basis of the CESL, and the consumer will be presented with a take-it-or-leave-it choice (particularly because most cross-border consumer sales will be conducted online, where there is no scope for negotiation). Nevertheless, the proposed Regulation contains a detailed, and perhaps even too complex, provision aimed at ensuring a consumer makes an informed choice about whether to agree to the CESL, in Article 8. If a trader is willing to enter into a contract on the basis of CESL, then the consumer would have to consent explicitly to this, and this consent must be a separate step from the consumer’s statement indicating his agreement to conclude a contract. For this purpose, a Standard Information Notice is provided in Annex II of the proposed Regulation and this must be given to a consumer before a contract on the basis of the CESL is concluded. One may doubt whether the approach chosen in the proposal would really result in a fully informed choice made by the consumer, or whether it would simply put another hurdle in the way of concluding a contract.

**Legal basis**

The legal basis suggested for the proposed Regulation is Article 114 TFEU. The Regulation is therefore seen as a measure which ‘approximates’ the laws of the Member States. According to Article 288 TFEU, a Regulation is

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Towards an optional instrument

‘directly applicable’, which means that it does not require further action by the Member States to become effective. National laws can be approximated by a Regulation which takes the place of corresponding national rules, so the use of a Regulation on the basis of Article 114 TFEU itself is not problematic.

However, what is unclear is whether this particular type of Regulation, expressly limited to the cross-border context and therefore not approximating national laws, but rather adding to them, could be adopted on the basis of this Article. The answer to this question will depend on how the CJEU’s reasoning in European Parliament v Council of the European Union66 on the legal basis of the ECS (discussed above) would apply to this situation. In that case, the creation of the ECS was held to be adding an additional feature and that this did not, therefore, involve the approximation of national laws. On that basis, Article 114 TFEU would not be the appropriate legal basis, but Article 352 TFEU should be used instead. In the Explanatory Memorandum to the proposed Regulation, the Commission does not refer to this case, but instead asserts that ‘the proposal provides for a single uniform set of fully harmonised contract law rules’67 but as a second, alternative system of contract law. As a way of invoking Article 114 TFEU, this is quite ingenious reasoning,68 but whether it would withstand scrutiny is open to debate.69 In particular, the fact that national law can continue to apply to cross-border transactions as well as the CESL might be a stumbling block, because there is no replacement of national laws as they apply to cross-border transactions (in accordance with the Rome I Regulation), but rather, an alternative is introduced.

Use of a Regulation and private international law issues70

The use of a Regulation as a harmonising measure adopted on the basis of Article 114 TFEU has a secondary benefit, at least according to the Commission’s explanatory memorandum. As mentioned, the assumption is that because the proposed CESL would be adopted as a Regulation, it will become part of the national laws of all the Member States as a second system of contract law.71 Consequently, the Commission argues, this would mean

68  It should not be ignored that the legislative procedure under Article 114 TFEU is the ordinary legislative procedure, utilising qualified majority voting, whereas Article 352 TFEU requires unanimity.
69  See also Anonymous, op. cit., n. 61, pp. 1276–1277 for a similarly sceptical view.
71  See also recital 9 to the proposed Regulation.
The Europeanisation of Contract Law

that there is a choice within each national law between two legal regimes – the existing domestic one, and the CESL.\(^{72}\) So when the choice is made between a national law and the CESL, the Commission argues that opting for the CESL would not be a separate choice of law, but rather a choice between two alternative rules of national law.

This reasoning is deployed to get around the problem of mandatory rules, particularly on consumer protection, in the national laws. The assumption is that opting for CESL would displace the mandatory rules of the law otherwise applicable to the contract (cf. recital 12 of the proposed Regulation), because a consumer would effectively have made a choice between two alternative sets of mandatory rules within his own domestic law.

Consequently, Article 6 of the Rome I Regulation dealing with the law applicable to consumer contracts would not be of any practical relevance if the CESL is chosen because, so the argument goes, CESL is part of whichever national law would be applicable by virtue of that Article as one choice within the relevant national law. Whether this is correct depends on the exact nature of a Regulation and its location within domestic legal systems. Although a Regulation is directly applicable before the national courts, it does not necessarily follow that it is part of domestic law in the same way as legislation adopted at the domestic level,\(^{73}\) even if the Regulation is treated as equivalent to the rules of domestic law.\(^ {74}\) And even if that is the case, there might still be doubts whether the choice of the CESL would really have the effect of rendering domestic mandatory rules inapplicable.\(^ {75}\) So there may be a need for some further thought here. If the Commission's reasoning is correct and withstands scrutiny by the CJEU, then this would avoid the need to consider changes to the Rome I Regulation. Such changes would be needed if the CESL was to be regarded as a separate legal regime, because the choice of the CESL as a choice of law in accordance with Article 3 of the Rome I Regulation would mean that Article 6 of Rome I would still operate to apply rules of the consumer’s domestic law. It would therefore be necessary to disapply Article 6 in cases where CESL is chosen.

At the very least, therefore, it seems necessary for the Commission to substantiate its reasoning with a rigorous legal analysis, something which has not been provided in the Explanatory Memorandum.

\(^{73}\) Cf. M. Hesselink, op. cit., n. 65, pp. 203–204.
\(^{74}\) See also Anonymous, op. cit., n. 61, pp. 1274–1276.
\(^{75}\) Recital 14 to the Rome I Regulation states that ‘[s]hould the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.’ This only relates to the choice of EU contract law rules, but does not resolve the effect of mandatory rules of domestic law.
Comment

In putting forward the proposal for a CESL, the Commission has done one of two things: either it has taken a decisive step forward in creating a contract law framework which will facilitate cross-border contracting within the EU or it is making a last-ditch effort to salvage something from a project which was far more, if not too, ambitious but lacked sufficient support. The reality is probably somewhere in between both extremes. There can be little doubt that abandoning the idea of action on EU contract law after the publication of the DCFR would very much have looked like unfinished business, and so one cannot help but feel that there is an element of face-saving on the Commission’s part at play here. However, that is perhaps too cynical an assessment. On a more positive note, by putting forward a concrete proposal, it is now possible to embark on more focused discussions about the desirability of an optional instrument, as well as its scope and relationship with national contract laws.

In general terms, proposing a Regulation and limiting its scope of application to cross-border contracts is to be welcomed, although the definition of ‘cross-border contract’ might benefit from further consideration.

That said, whether the substance of the CESL, based on a modified version of the Expert Group text, provides the most appropriate set of rules for a cross-border sales Regulation is certainly debatable. Its use is unsurprising because of the considerable investment of time, effort and money over the last decade which eventually resulted in the Expert Group text. However, it seems that there has been insufficient consideration of the practical challenges of cross-border transactions and how they could be alleviated through an appropriate set of legal rules. Instead, the primary focus seems to have been to create a common set of rules which is reasonably coherent, in the hope that this might be better than nothing to encourage traders and consumers to make more use of cross-border contracting.

Lastly, the fact that the proposed CESL is branded as an ‘optional instrument’ might well be misleading, at least as far as consumer transactions are concerned. In reality, it will be the case that the choice as to whether to offer to enter into a contract using the CESL or the applicable national law will be the trader’s, and the only option given to the consumer will be whether or not to enter into the contract. If optionality is more apparent than real, then one should consider seriously whether: (i) it really is best to have one CESL for both B2B and B2C contracts, instead of having a separate B2C CESL; and (ii) whether a B2C CESL should simply be automatically applicable to all cross-border consumer transactions, without requiring a fairly artificial procedure to bring about an appearance of choice that is not really there.

76 As suggested in Twigg-Flesner, op. cit., n. 64.
The future of Europeanisation

Introduction

This book has examined the various aspects of the Europeanisation of contract law. Although still largely a piecemeal framework on discrete issues, the completion of the DCFR and the recent proposal for a CESL appear to mark the start of a broader contribution by the EU to the law of contract. An optional instrument on contract law, albeit one limited to contracts of sale, is reasonably likely to become a reality. However, whether this will be a final result of the process, or merely an intermediate stage towards even more comprehensive EU legislation on contract law, remains to be seen.

Europeanisation – summary and evaluation

In Chapter 1, four broad recurring themes in the process of Europeanisation were identified. The constitutional restraints on the powers of the EU to adopt legislation in this field have been considered repeatedly. This is an issue which has arisen both in respect of legislation already adopted (particularly in the consumer acquis), and with the proposed Regulation on a Common European Sales Law. The link with the internal market via Article 114 TFEU and the consequent need to proceed on the basis of some form of harmonisation approach is becoming increasingly more difficult to sustain – the scope of that provision is being stretched to breaking point by the Commission when suggesting that the proposed CESL would become a second contract law system in the national laws of the Member States. This view is anything but contentious. Whilst there is a legal basis specifically for consumer law in Article 169(2)(b) TFEU, there appears to be no real willingness to consider this and proceed with a measure purely concerned with consumer contracts. For arguments in support of such an approach, see N. Reich, ‘A European Contract Law, or an EU Contract Law Regulation for Consumers?’ (2005) 28 Journal of Consumer Policy 383–407; and C. Twigg-Flesner, A Cross-Border-Only Regulation for Consumer Transactions in the EU – A Fresh Approach to EU Consumer Law. New York, NY: Springer, 2012.
of legislation in the field of contract law, the process of Europeanisation will continue to be wedded to the internal market competence of Article 114 TFEU. This, combined with the restrictions imposed by the principles of subsidiarity and proportionality, has made it difficult to put forward legislation which is sufficiently comprehensive, a situation which might not improve significantly in the future.

The one promising development is the shift towards a Regulation as a means of legislatting, although it is far from clear that this will mean the end of the Directive as the preferred vehicle for Europeanisation, especially if there remains a desire to harmonise national laws and not to draw a general distinction between cross-border and domestic transactions. However, there is now significant evidence that Directives really do no more than ‘approximate’ (to use the wording of Article 114 TFEU), i.e. things come closer together but they are not quite the same. It might reduce the differences in the substantive rules of the national laws of the Member States, but variations remain, something which even full harmonisation would not be able to rectify. The shift towards using a regulation is therefore something that would be welcomed as a general policy shift. Professor Monti is one prominent voice lending support for such a shift. In his report *A New Strategy for the Single Market*, he says that:

‘Currently, 80% of the single market rules are set out through directives. These have the advantage of allowing for an adjustment of rules to local preferences and situations. The downsides are the time-lag between adoption at EU level and implementation on the ground and the risks of non implementation or goldplating at national level. . . . There is thus a growing case for choosing regulations rather than directives as the preferred legal technique for regulating the single market. Regulation brings the advantages of clarity, predictability and effectiveness. It establishes a level playing field for citizens and business and carries a greater potential for private enforcement. However, the use of regulation is not a panacea. Regulations are appropriate instruments only when determined legal and substantial preconditions are satisfied. . . .’

He then goes on to say that:

‘Harmonisation through regulations can be most appropriate when regulating new sectors from scratch and easier when the areas concerned allow for limited interaction between EU rules and national systems. In other instances, where upfront harmonisation is not the solution, it is

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3 Ibid., p. 93.
worthwhile exploring the idea of a 28th regime, a EU framework alternative to but not replacing national rules. The advantage of the 28th regime is to expand options for business and citizens operating in the single market: if the single market is their main horizon, they can opt for a standard and single legal framework valid across Member States; if they move in a predominantly national setting, they will remain under the national regime . . .  

Although Monti refers to ‘new sectors’ where EU legislation might be needed in the future, there is no logical reason why the same should not be true in respect of areas where EU legislation is already in place, especially when it is clear that the use of Directives has not fully achieved its purpose. Whether there will be a shift on a wider scale is uncertain, although it would certainly seem preferable from the point of view of improving the quality of EU legislation. Indeed, the Commission itself has conceded that ‘replacing directives with regulations can, when legally possible and politically acceptable, offer simplification as they enable immediate application and can be directly invoked before courts by interested parties.’

Such a shift would have to be linked with a refocusing of EU legislation to dealing with cross-border transactions. As discussed in Chapter 6, whilst such an approach might seem counter intuitive when set against the context of an internal market operating throughout the EU, the realities of an EU with more than 27 jurisdictions is that one cannot create a set of legal rules which will be acceptable for everyone, nor, indeed, suit the cultural and political contexts of each jurisdiction. Ensuring that cross-border transactions can operate smoothly might therefore not only be easier, but also result in a more coherent and comprehensive legal framework than the bit-by-bit approach of harmonising by Directives.

But in whichever way the process of Europeanisation will develop, the CJEU will continue to have an important role to play. Its contributions to the process have been a mix of simply clarifying the meaning of certain provisions (as it is to do under the Article 267 TFEU preliminary reference procedure) and interpreting the law in quite an extensive fashion, sometimes advancing the process of Europeanisation, sometimes creating more difficulties than were solved by the ruling. Numerous examples of this are mentioned in Chapter 3. As the process of Europeanisation advances, there is a risk that the CJEU could be overwhelmed by the volume of cases. The time may come sooner rather than later for establishing a special chamber of the European

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4 Ibid., p. 93.
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Court, as provided for in Article 257 TFEU. This permits the creation of specialised courts attached to the General Court (formerly the Court of First Instance) for certain classes of action or proceedings. It would be possible to create such a specialised court for contract law issues, either generally or those arising under the proposed CESL. There could also be a right of appeal (potentially on grounds of both law and fact) to the General Court. The creation of such a specialist chamber would have the potential of facilitating the further process of Europeanisation, although it would depend on exactly what sort of functions such a specialist court would assume and if it would be dealing purely with reference from national courts or take on the role of a reviewing court, with direct access for private individuals.

Overall, then, the process of Europeanisation continues to be affected by a number of factors which make this a more difficult process than might be expected otherwise. Whether the arrival of the regulation on a CESL will significantly change matters is as yet difficult to predict, and further developments are awaited with interest.

One issue which seems to have been taken off the agenda, but continues to be in the background in the overall debate is the question whether there is a need for a comprehensive European contract law. Indeed, one of the options in the Green Paper on Policy Options for Progress towards a European Contract Law for Consumers and Businesses was to consider the adoption of a Regulation which would replace domestic contract laws altogether, rather than the introduction of an optional instrument to provide an alternative to domestic law. This continues to be a policy option, albeit one with limited support. It is nevertheless instructive to review the main arguments of debate about a European Contract Code, which is the task for the following section.

A European Contract Code?

In this section, the main strands of the debate about a European Code are raised, but it is beyond the scope of this book to cover this in all its facets. The Commission’s activities discussed in Chapters 5 and 6 have prompted a major academic discourse on the desirability, or otherwise, of a European Contract Code, or, indeed, a ‘European Civil Code’. The Commission has attempted to dispel any such speculation by firmly rejecting the suggestion that there are plans for harmonising all of domestic contract law. It has stated

7 A reader interested in more depth on this topic is advised to consult the many contributions to journals such as the European Review of Private Law or the European Review of Contract Law, as well as the excellent collection of essays in S. Grundmann and J. Stuyck (eds), An Academic Green Paper on European Contract Law. The Hague: Kluwer Law International, 2002.
that it is not ‘the Commission’s intention to propose a “European Civil Code” ’. And yet, the debate over greater harmonisation, even the creation of a European contract code, lingers on – undoubtedly not helped by the ambiguity surrounding the objectives of the CFR project. Getting a grip on this debate is difficult because of its multi-faceted nature, with different background assumptions, particularly about the nature and function of law, influence the positions adopted in this debate. Whilst this chapter cannot offer a full account of all the arguments in this debate, the following paragraphs offer a flavour.

**Economic argument**

The economic case concentrates on market integration, i.e. making the internal market work more smoothly. The fundamental argument that is often advanced in favour of greater harmonisation, or even unification of contract law, is that the diversity between the domestic contract laws effectively constitutes a non-tariff barrier to trade between the Member States. The existence of numerous different contract laws within the EU creates additional information costs for businesses seeking to engage in cross-border transactions. Compliance with different, and possibly contradictory, laws also increases costs, although this is likely to be a problem for SMEs, rather than large multinational companies. A unified legal framework would reduce transaction costs considerably, and consequently, a European Contract Code is needed for business.

Of course, the replacement of existing national laws with a uniform European framework would itself create costs, not only in reaching agreement on a single code, but also in adapting related areas of national law as well as the considerable amount of re-training that would be required. Admittedly, whilst such costs may be substantial, they would also be transitional, and after


11 The constitutional limitations on the EU for imposing a full code are considered in Chapter 6 and are not repeated here.


a period of adjustment, there would be a cost saving flowing from the
harmonisation of the legal framework across the EU.  

But agreeing on common rules itself would not ensure uniformity. There
would be no guarantee of common interpretation, i.e. sufficient certainty
that these rules will also be applied uniformly in all the Member States unless
a new EU-wide court system were established.

A practical difficulty with economic arguments is the difficulty of compiling
the quantitative data needed properly to compare the benefits and costs. An
ex ante assessment is hampered by a lack of clarity as to what degree of
unification is envisaged and what the substance of those rules would be.

Moreover, it remains at least uncertain whether the existence of diverse
contract laws in itself is a real barrier to trade, particularly if one focuses on
the law itself, rather than the context within which it operates. There is
certainly clear evidence to suggest that the law itself is not inevitably the
deciding factor in business relations.

Collins urges caution in this regard by emphasising that the notions of ‘barriers
or obstacles to trade’ and transaction costs ought not to be conflated. Legal
obstacles effectively prevent cross-border trade because they prevent a business
from selling its goods or services in the manner adopted for its home jurisdiction
when seeking to sell in another territory. Transaction costs, on the other hand, are
simply the costs associated with entering into a contract. Undoubtedly, the
higher transaction costs associated with cross-border contracting may make such
trade less attractive, but they do not form a barrier to trade as such.

According to Collins, there are only two circumstances where the law forms
a real obstacle to trade. The first situation arises where what is being sold by
the business is the contract itself, such as an insurance policy. Variations in
the domestic legal frameworks on such contracts can form a real obstacle
to trade, because a business may not be able to sell its contracts in another
Member State. The second instance is where marketing techniques are
regulated differently and a business may not be able to utilise its established
marketing techniques when moving into a new jurisdiction. In respect of such
genuine barriers to trade, action to harmonise may be justified.

16 H. Collins, ‘Transaction Costs and Subsidiarity in European Contract Law’ in S. Grund-
mann and J. Stuyck (eds), An Academic Green Paper on European Contract Law. The Hague:
17 van den Bergh, op. cit., n. 15, p. 257.
18 Collins, op. cit., n. 16, p. 276.
19 For a fuller discussion of this issue, see J. Haage, ‘Law, Economics and Uniform Contract
Law: A Sceptical View’ in J. Smits (ed.), The Need for a European Contract Law. Groningen:
20 J. Smits, ‘Diversity of Contract Law and the European Internal Market’ in J. Smits (ed.),
21 Collins, op. cit., n. 16.
22 Ibid., p. 271.
Diversity in national contract laws generally, therefore, does not constitute a barrier to trade. Instead, the barrier is more psychological, i.e. there is a perception that businesses do not engage in more cross-border trade because of the differences in the law, but it is no more than that.\(^{23}\)

Beale has argued with some force that, whilst further harmonisation of certain aspects of contract law may be needed, there is no reason for a full-blown unification attempt.\(^{24}\) Instead, that harmonisation should be restricted to what he calls ‘hidden traps’, i.e. domestic rules which produce different substantive outcomes that could be detrimental to the contracting parties who are unaware of them.\(^{25}\)

Concerns about over-emphasising the role of law in the process of building the internal market are not restricted to the specific question of a full-blown European code; one can also raise objections in the context of targeted Directives seeking to harmonise national laws in the interests of the internal market. Particularly in commercial contract law, which is largely unaffected by national mandatory rules that could prove problematic, the economic case for intervention fails to take into account the fact that in business relations, the law is not usually the dominating factor.\(^{26}\) The formalist focus on clear and certain legal rules in the context of Europeanisation may therefore be misguided.\(^{27}\) However, what will matter is the ability of businesses to use their standard form contracts across Europe, without having to make changes in light of particular national mandatory rules which invalidate certain terms.\(^{28}\) Ensuring that there is appropriate EU-wide regulation of this aspect would be more significant, and it is to be regretted that the EU’s work on standard contract terms never turned to this issue before it abandoned all activities in this field.\(^{29}\)

**Arguments from culture**

**Common law–civil law divide**

In Chapter 1, it was noted that the legal landscape in Europe is characterised by a significant divide between two legal cultures, the civil and the common

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23 Ibid., p. 272.
25 Ibid., p. 70.
26 Wilhelmsson, op. cit., n. 10, p. 543.
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law. Space precludes a detailed consideration of this difference. Put very simply, the civil law tradition is based around a civil code which provides abstract legal norms, clearly defined areas of law, and a rather rigid approach to legal classification. The legal system is generally regarded as complete and does not contain any gaps. A new problem needs to be resolved within the existing framework of legal principles, as contained in the code. Legal thinking is more abstract. Systematisation and classification of legal rules is the focus of the civil lawyer. The English common law, on the other hand, is found in continuously evolving case-law, and cases are vital (despite the various statutory interventions). Its thinking is concrete and based around actual cases. It shirks away from generalisation, preferring instead a gradual development through resolution of individual disputes. It does not seek to plan ahead for all future eventualities, and is generally more responsive. If a particular solution to a legal problem is seen as desirable, there is no need to consider how this might affect the overall system of the law. In short, in the civil systems, law is regarded as a science, whereas the common law is better seen as art.

The existence of these two legal cultures is often mentioned as a principal obstacle to the creation of a European Civil Code. The very notion of a Code, with its focus on systematisation, is an anathema to the common law.

The most vociferous opponent of greater European harmonisation efforts is Pierre Legrand, whose work is well-known and controversial for its clear opposition, based primarily on the fundamental differences between the two legal families. His arguments are complex and occasionally overstep the boundaries, but provide much food for thought. In arguing against the suggestion that there is considerable convergence between the legal families, he highlights the concern with formal rules and insufficient consideration of the cultures within which such rules operate. Because of such cultural variations, congruence in the content of specific legal rules does not mean that there is real convergence, as these rules will be understood differently. His concern about the focus on rules should be taken seriously – not merely in the debate about a Civil Code, but also in the context of the ongoing developments. Whilst many of Legrand’s concerns focus on the common

30 Note the earlier reservations about this distinction, and the separate position of the Nordic legal systems in this regard.
32 He has singled out Professor von Bar for a personal attack in P. Legrand, ‘Antivonbar’ (2005) 1 Journal of Comparative Law 13–40. The risk of such a confrontational approach is that may of his arguments are overlooked out of concern about his style.
34 Benchmark (i) in Brownsword’s classification: see Chapter 1, p. 3.
35 See Chapter 5.
law–civil law divide (although even he concedes that ‘there can be no sharp
and fixed distinctions between legal traditions’)\textsuperscript{36}, his observations about
different legal cultures also apply within the context of the civil law family
itself, as even here there are different cultural factors at play. Overall, he
argues that the focus in the debate centres too heavily on rules with insuffi-
cient regard for legal cultures and traditions, and that the real obstacles
towards greater convergence are largely ignored, possibly because they are
essentially insurmountable.\textsuperscript{37}

Yet, some have argued that whilst there may be differences between the
common and civil law worlds, there is also a lot of similarity between them,
not least because of common historical roots.\textsuperscript{38} That may be true in respect
of specific doctrines, but that does not inevitably mean that there is
sufficient commonality to justify the imposition of a single European rule.
Lando goes beyond a focus on legal rules by arguing that the differences
of legal method between the various European systems are overstated, and
that even the common law, in the shape of textbooks, pursues a degree of
systematisation.\textsuperscript{39} He asserts that the conflict between the common law
and civil law should not be exaggerated and that there is more cultural
congruence than often assumed. He has even gone as far as to assert that
‘the legal values of the European brotherhood of lawyers are very similar’,\textsuperscript{40}
drawing on his experiences within the Lando Commission (a rather small,
self-selecting sample).\textsuperscript{41}

The extent to which the common law–civil law debate is a true obstacle to
greater Europeanisation remains insufficiently explored to come to firm
conclusions. Legrand’s extreme opposition may have prompted active disen-
gagement by scholars in the field, although the debate is shifting towards the
cultural dimension.\textsuperscript{42} What is needed is greater understanding of what is
meant by culture, and an acceptance that culture should not be an absolute
bar to Europeanisation,\textsuperscript{43} but should certainly act as a brake.

\textsuperscript{36} Legrand, op. cit., n. 32, p. 20.
\textsuperscript{38} E.g. R. Zimmermann, ‘Roman Law and the Harmonisation of Private Law in Europe’ in
\textsuperscript{40} O. Lando, ‘Optional or Mandatory Europeanisation of Contract Law’ (2000) 8 European
\textsuperscript{41} See Chapter 1, p. 13.
\textsuperscript{42} See e.g. T. Wilhelmsson, E. Paunio and A. Pohjolainen (eds), \textit{Private Law and the Many
\textsuperscript{43} S. Weatherill, ‘Why Object to the Harmonisation of Private Law by the EC?’ (2004) 12
Lack of a European legal culture

One step up from the concerns about cultural variations between the Member States (whether in terms of legal traditions or more widely), is the question whether the foundations of a common European culture have emerged to form the basis for greater Europeanisation. Some assistance is offered by the Tuori’s analysis of European law. He suggests that law can be divided into three levels: the surface level, comprising legislation and case-law; the middle level, formed by legal culture, which relates to legal methodology and techniques of adjudication; and the deep structure of law, where the fundamental normative principles of the law can be found. In Tuori’s analysis, these different levels make up a mature legal system, but he also applies this in assessing whether a legal system, such as EU law, has reached a sufficient degree of maturity. He suggests that EU law operates largely at the surface level, and that there has been no ‘sedimentation’ into the middle and bottom layer, leading him to conclude that an independent European legal culture has not yet developed.

This view is not shared by Lando, who argues that ‘contract law is more a question of ethics, economics and techniques that are common to all Europeans than it is question (sic!) of conserving ancient relics of a dead past’, which suggests that the seeds for a common European culture have not only been planted but are already germinating.

Wilhelmsson is more sceptical, adopting the view that there are, as yet, no elements of a common legal culture that could support a European codification. He argues that pressing ahead now would invariably result in a return to more liberalist values at the expense of social justice, and that it would become more difficult to introduce more welfarist provisions into such a code. Moreover, the existing opportunity for piecemeal development and experimentation, particularly in the field of consumer protection, would be lost. He advocates limited intervention in favour of a ‘free flow of legal ideas’ instead.

A case for maintaining the existing diversity can be made for reasons other than cultural ones. Each Member State has its own economic and social structures that may require laws to suit, which is a further source of diversity.
Maintaining diversity permits the parties to a contract to select the law that will best suit their needs, although there is the practical difficulty that the necessary information for comparing the advantages of one jurisdiction over another will be costly to acquire. Jurisdictions can learn from one another, as indeed has been the case for a long time. The work of comparative lawyers is to identify, compare and evaluate different approaches to a particular problem and, armed with the fruits of this labour, national legislatures and courts have the opportunity of improving their domestic laws. Although one might observe that there has been enough time for competition and that the time has come for synthesising the best rules and to harmonise contract law accordingly, that view would be based on the fallacy that there could never be new problems for which there may be competing solutions.52

Much of the debate focuses on the idea of a European Code which would be similar to the various national codifications, i.e. very much a code containing black-letter rules. It has been suggested by Hugh Collins that a code which would seek first and foremost to foster common underlying values and principles is needed rather more than a code comprising formal rules.53 Such a development would have to be a second stage.

**Different views of social justice**

Concerns over the role of welfarism or social justice have already been mentioned.54 These reflect the fact that contract law is not value-neutral, and that attempts at Europeanisation cannot ignore the fact that a political dimension applies in determining the substance of particular model rules. Kennedy has demonstrated that substantive contract law doctrines and rules can be characterised as fitting somewhere on a spectrum ranging from individualism (each party to look after its own interests) to altruism (co-operation between contracting parties).55 Quite where each particular doctrine can be placed on this spectrum will vary between jurisdictions, as some are more individualistic, whereas others tend to emphasise altruism. The overall point, however, is that it is misleading to reduce contract law to a question of technicalities, and that the compromise between individualist and altruist rules needs to be discussed explicitly. That, of course, is also the concern of the Study Group on Social Justice, which criticises the lack of debate over social justice in the process of drafting the CFR.

52 Wagner, op. cit., n. 14, p. 10.
54 Wilhelmsson, op. cit., n. 10; also the Social Justice Manifesto, discussed in Chapter 5, p. 169.
A political vision

For some, the idea of creating a European Contract Code (or a wider Civil Code) also has elements of seeking to foster a common identity, just as the civil codes of the nineteenth century helped to create the strong national identities of countries such as Germany and France. Consequently, the adoption of Europe-wide private law would promote a shared identity between the various Member States. Such a view, however, is opposed to what is the prevailing European identity, which is one that encourages plurality of languages and cultures.

An alternative? – the open method of co-ordination

Instead of pursuing greater harmonisation, or even a full Code, it has been argued by van Gerven that, if there is a desire to pursue a greater degree of convergence in the field of contract law, or private law more generally, a more successful approach might be to utilise the so-called ‘open method of co-ordination’ (OMC), rather than binding legislation. Instead of adopting Directives or Regulations, Member States agree on broad objectives, leaving it to each Member State to take appropriate action in response. The Commission assumes a co-ordinating role and monitors progress towards the agreed objectives. This approach has the advantage of giving greater leeway to Member States for taking action, but also the drawback that there will not be the same enforcement principles that apply in the context of binding legislation. Although a firm Treaty basis for this can be found in the context of social rights (Article 153(2)(a) TFEU), its use on a wider basis has been recommended. As the experience with this approach is limited, it is difficult to assess whether it could be a viable alternative to formal legislation in the field of contract law.

Europeanisation – conclusions

The Europeanisation of Contract Law is a complex topic, and in order to understand it fully, one requires a firm grasp of national contract law, EU law and comparative law. Where EU legislation has been adopted, the corresponding area of contract law is characterised by an interaction of national and EU law, with general principles of EU law affecting the operation of national law.

The development to date has focused primarily – but by no means exclusively – on consumer law, where the greatest density of EU legislation

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56 Cf. the discussion in Chapter 1.
57 Wilhelmsson, op. cit., n. 10, p. 90.
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can be found. But in respect of both consumer and non-consumer law, the intervention by the EU has dealt with specific problems which (arguably) affected the operation of the internal market. Dealing with discrete issues in separate measures has had the side-effect of producing legislation which lacks coherence and consistency with related measures, particularly with regard to definitions of key concepts. In addition, EU measures are based on assumptions about the substance of national law, but these are often not made explicit, which causes further confusion, evidenced by some of the cases that have reached the CJEU under the preliminary reference procedure.

From the perspective of English law, the requirement to give effect to EU Directives has on the whole been largely unproblematic, resulting largely in the introduction of free-standing measures. In contrast, the civil law jurisdictions with a fully codified system of private law have occasionally struggled in dealing with the random interference of EU law with the internal system of their civil codes. It is therefore not surprising that the drive for greater coherence has come from the civil law jurisdictions, because concern over maintaining a complete system are greater there than in the common law jurisdictions, or the Nordic countries. The purpose of the CFR – and the review of the consumer acquis – was to improve the quality of European law-making. However, the idea of creating a proper CFR seems to have been abandoned, with the focus now firmly on the idea of an optional instrument; moreover, the acquis review has turned out to be a fairly modest achievement.

As seen both in this chapter and in Chapter 6, detailed European intervention raises difficult issues about the fundamental values inherent in such legislation. This applies both to a more limited intervention as may occur in the field of consumer law, and a broad approach towards contract law generally. The European level has, so far, failed to engage fully with the wider political implications of deeper Europeanisation. Eventually, however, such a debate cannot be avoided – at the latest, at the point when the European institutions are debating legislative proposals that would result in measures of wider reach than is the case at present. Any action beyond remedying existing and widely recognised defects in the acquis is likely to prove controversial.

Where next, then, for the Europeanisation of contract law? Whether there will be many more Directives on aspects of contract law depends, to some extent, on the fate of the proposal for a CESL. If this is adopted and becomes a success in practice, then the way forward might be to extend this approach to other types of contract, or even contract law generally. This would mean that legislation would be adopted in the form of Regulations rather than Directives, and the scope generally restricted to cross-border transactions. This, in itself, would not be problematic for the reasons given in this book. However, there will be a number of matters that will require further exploration, not least the complexity of the interface between national laws and measures such as CESL, both with regard to areas not covered by EU legislation and areas covered by EU legislation for cross-border issues but national law for domestic issues. Also, if this approach were to become the
norm for future legislation, then there might need to be a more fundamental debate about the nature of the internal market – perhaps something which is already overdue in an EU with 27 (and soon to be more) Member States. So whilst it seems that the rapid pace over the last few years in this area is showing signs of slowing down, there is a lot yet to happen, and legal scholars throughout Europe will have their work cut out to advance the debate.
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