Contract law as fairness: a Rawlsian perspective on the position of SMEs in European contract law

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As it is the aim of this book to assess the position of SMEs in European contract law from a Rawlsian perspective, it is important to present an overview of the main rules in this area and their underlying principles. The European Union has been concerned with small and medium-sized enterprises for some time on a policy level, as is witnessed by e.g. the Small Business Act for Europe and the “Think Small First”-principle.\footnote{COM(2008) 394 final.} However, the title of the present Chapter might be slightly misleading, as there are few contract law rules specifically concerned with SMEs in current European contract law. Instead, the weaker party protection rules the EU has enacted thus far have been almost exclusively within the realm of consumer protection.\footnote{Augenhofer 2011, pp. 201-202; Hondius 2012, p. 168. With some exceptions, see Roppo 2009.} As previously mentioned, one of the characteristics of the manner in which the EU has approached weaker party protection in contract law is that it categorically protects weak parties instead of particular weak parties.\footnote{Rösler 2009, p. 743.} Accordingly, I take consumer law as the current benchmark of weaker party protection in European contract law. At least prima facie, SMEs (or some of them) seem to share a number of important characteristics with the category of consumers that led to their designation as ‘weaker party’. So, the question is whether SMEs should also be treated as weaker parties.\footnote{See e.g. Beale 2008, pp. 80-81.} In the lingo of European contract law: should business-to-SME (B2SME) contracts be considered as ‘normal’ business-to-business (B2B) contracts or rather as business-to-consumer (B2C) contracts (or another category entirely)?

More specifically, I will focus on three particular sets of EU contract law rules: pre-contractual information duties, rights of withdrawal and unfair terms control. This choice is based on the fact that they represent the three main legal mechanisms employed by the European legislature to strengthen the position of weaker parties.\footnote{Colombi Ciacchi 2010, pp. 303-305; Hartlief 2004, pp. 254-256.} Phrased differently, these are the three legal mechanisms that most obviously depart

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286 Rösler 2009, p. 743.
287 See e.g. Beale 2008, pp. 80-81.
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from the paradigm of freedom of contract and *pacta sunt servanda*.\(^{289}\) They deny enforceability of an otherwise valid agreement or impose additional duties for its conclusion. Hence, to gain an insight into the most important European rules on weaker party protection, these three elements merit special consideration.

In order to describe these three types of rules in European contract law, I will take a number of sources into consideration. Generally European law (or: *acquis communautaire*) is comprised of two levels of sources: primary law and secondary law. Primary EU law consists of the treaties that establish the European Union (currently the Treaty on the European Union, or TEU, the Treaty for the Functioning of the European Union, or TFEU and the Charter of Fundamental Rights of the European Union).\(^{290}\) Secondary law is law enacted by the European legislator – typically the European Parliament and Council of the EU acting together, usually on the initiative of the European Commission, also called the ‘ordinary legislative procedure’ – on the basis of the competences attributed by primary EU law. The two main ways in which the EU legislator can adopt secondary law is by legislating through directives or regulations. The main difference between these two instruments is that a directive merely sets a certain goal for the Member States to reach, and hence requires transposition into national law,\(^{291}\) while a regulation is directly applicable in the Member States and hence does not require any further implementation. Finally, the EU can opt either for minimum harmonisation or for full harmonisation when adopting directives. In the case of minimum harmonisation, the EU sets a minimum threshold to be achieved, but the Member States are free to go beyond that threshold, e.g. offer a higher level of consumer protection. In the case of full harmonisation, on the contrary, the goal set by the EU is precise and Member States are not allowed to go beyond (nor below) the terms of the directive. However, even for full harmonisation directives,

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\(^{289}\) See e.g. Loos 2009, p. 243; Eidenmüller et al. 2011, pp. 1096-1097; Micklitz 2004, pp. 343-346.

\(^{290}\) Although not formally codified as such, these treaties are sometimes also referred to as the constitution or constitutional framework of the EU.

\(^{291}\) Even though directives require implementation, the CJEU has decided that non-implemented or poorly implemented directives can still have direct effect, i.e. be binding on the Member States. Whether directives should also have horizontal direct effect is a controversial issue. In any case, such direct effect does not release the Member States of their responsibility to transpose a directive properly.
Member States are allowed to apply the rules of that directive to situations beyond the formal scope of the directive, as matters beyond the formal scope is considered unregulated and hence still open to the Member States.

In this overview of the three mechanisms of weaker party protection, the focus will be primarily on secondary EU law. First and foremost, there are the directives the European legislator has adopted in this field. The directives that deal with the issues to be discussed are Directive 2011/83/EU on consumer rights (Consumer Rights Directive or CRD) and Directive 93/13/EEC (Unfair Terms Directive) on unfair terms in consumer contracts. The CRD recently replaced the Directives on doorstep selling and distance contracts and harmonizes the rules on pre-contractual information duties and rights of withdrawal. It tries to accomplish this aim through targeted maximum harmonisation, i.e. Member States are not allowed to go beyond (or below) what the Directive established on specific issues. The Unfair Terms Directive, as the name suggests, harmonises the rules with regard to unfair terms protection. This directive is characterized by minimum harmonisation, meaning that Member States are allowed to go beyond the level of harmonisation required by the Unfair Terms Directive. Additionally, the relevant case law of the Court of Justice of the European Union (CJEU) will be taken into account in explaining the acquis.

The current acquis communitaire will be analysed along with the proposal for a Common European Sales Law (CESL). The CESL is a regulation proposed by the European Commission that aims at introducing an optional European sales law. This proposal is largely based on a preceding Feasibility Study completed by an Expert Group appointed by the Commission. The CESL will give contracting parties to

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292 Directive 85/577/EEC and Directive 97/7/EC respectively. There are other information requirements under European law, for example due to the Unfair Commercial Practices Directive, but the CRD is the preeminent directive in European contract law.

293 This method of harmonization has not been uncontroversial. See e.g. van Boom 2009, Loos 2008.

294 See Unfair Terms Directive Article 8. Originally unfair terms control was also meant to be part of the CRD and hence was meant to be transformed to maximum harmonization, but eventually the chapter on unfair terms was dropped from the CRD proposal. See e.g. Hesselink and Loos 2012, pp. 6-7.


296 See Hesselink 2012; Whittaker 2011.

cross-border transactions the choice between the first (traditional) regime of national contract law and a uniform European sales law. The CESL is hence meant to introduce a second system of sales law next to the already existing national sales laws. The European Parliament and European Council are currently debating the proposal.\textsuperscript{298} As the CESL endeavours to be a self-standing instrument it covers all three areas: pre-contractual information duties, rights of withdrawal and unfair terms protection.\textsuperscript{299} What makes the CESL even more interesting for the aims of this book, however, is that it marks the first time European contract law explicitly deals with the position of SMEs.\textsuperscript{300} SMEs are mentioned seven times in the first two pages of the Explanatory Memorandum to the CESL. More concretely, the CESL is applicable between businesses only if at least one of the traders is an SME (as defined in the regulation).\textsuperscript{301} This means that most provisions in the CESL regarding B2B contracts effectively refer to SMEs. To show what (and how) the CESL changes with regard to the current position of SMEs in European contract law, I will compare the proposed regulation to the rules in the directives. Accordingly, the comparison will focus mainly on the differences between the legal instruments.

At this point, it is important to point to the interaction between EU law and national law. As discussed above, there is an essential difference between directives and regulations, as, in our case, the CRD and Unfair Terms Directive require implementation into national law whereas the CESL does not. Even more strongly, the CESL aims to be as freestanding from national law as possible. This also means that national law can add to what the directives require in a way that is impossible with regard to the rules of the CESL. As we will see below, SMEs fall outside the formal scope of these directives, hence Member States are allowed to extend the rules

\textsuperscript{298} The European Parliament has voted in favour, but it is still unclear if and if so in what form the current proposal will be adopted. This, however, has not stopped a Europe-wide discussion from being held. See e.g. Schulte-Nölke 2012, pp. 260-267. For the latest legislative activities, see http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2011/0284%28COD%29&l=en#tab-0. Last referenced 31-12-2013.

\textsuperscript{299} Although it excludes other important parts of contract law, like capacity and immorality.

\textsuperscript{300} See e.g. V. Mak 2011b, pp. 258-260.

\textsuperscript{301} Though Article 13 CESL allows Member States to make the instrument also available for B2B contracts where none of the parties is an SME.
contained therein to SMEs, even in the case of full harmonisation.\textsuperscript{302} However, for our purposes, this does not stand in the way of a meaningful comparison. As outlined in the introduction to Part II, the goal of discussing the positive law on weaker party protection in the EU is to establish whether the rules or their underlying rationales themselves provide a justification for distinguishing between categories – in our case between consumers and SMEs. If it turns out that such a justification does not exist, the EU should not treat consumers and SMEs differently. From a European perspective, such a conclusion does not change depending on whether or not Member States are still allowed to treat SMEs in the same manner as they treat consumers in national law. This also means that the implementation of the CRD and Unfair Terms Directive in national law falls mainly outside the scope of this enquiry.\textsuperscript{303}

What we do need to know in order to evaluate whether a distinction is justified, are the underlying principles or rationales of the rules under consideration. The focus here will be on the rationales for the rules that were given by the European legislature. Furthermore, these rationales will be fleshed out through a discussion of the academic literature on the subject.\textsuperscript{304} Doing so will prove helpful in the discussion of the position of SMEs from a Rawlsian perspective. As I argued in the introduction, the central question to be considered is whether the legislator can justify a distinction between consumers and SMEs, i.e. whether or not SMEs should be considered weaker parties in the same sense as consumers are considered to be weaker parties. This method has two implications. First, attention will be paid to the legislator's underlying rationales (and how they are elaborated in the literature) rather than on the actual or effective protection these rules provide. Secondly, and related to that, it means that the rationales discussed below will be discussed only insofar as they justify the current rule as weaker party protection. For example, some of the more economically oriented underlying rationales might suggest the application of the rules to any B2B context,

\textsuperscript{302} A number of Member States actually have done so, in particular with regard to unfair terms. See Schulte-Nölke, Twigg-Flesner and Ebers (eds.) 2008.

\textsuperscript{303} For a comprehensive overview of the implementation of the European consumer acquis up until 2008, see Schulte-Nölke, Twigg-Flesner and Ebers (eds.) 2008.

not merely B2SME. However, it is not necessary to examine that line of argument beyond what is needed to see whether consumers and SMEs should be treated alike. Instead, the focus will lie on the possible rationales that are given by the European legislator and on how these rationales are elaborated on in the academic debate.

The remainder of Part II will be structured as follows. I will start with a description of the formal, personal scope of the directives and the proposed CESL, i.e. the definitions of consumer, trader and SME and the rationales for distinguishing between them and evaluate whether in general a differentiation between consumers and SMEs is justified (Chapter 7). I will then go on to discuss pre-contractual information duties (Chapter 8), rights of withdrawal (Chapter 9) and unfair terms protection (Chapter 10) and will examine whether these particular legal mechanisms and their particular rationales provide a justification for treating SMEs differently from consumers. All three sections will be organized in the same manner. First, the current rules under the directives and the CESL will be discussed. I will also compare the position of consumers and that of SMEs under these rules in this section. Secondly, the specific underlying rationales for these rules will be presented. And thirdly, I will discuss whether the rules and their underlying rationales provide a convincing justification for distinguishing between consumers and SMEs. Finally, I will conclude with some suggestions on the way forward for the position of SMEs in European contract law (Chapter 11).