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

Klijnsma, J.G.

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8 Pre-contractual information duties

8.1 The CRD and the CESL

The proposal for a Common European Sales Law was published shortly after the Consumer Rights Directive was enacted. The drafting process of the CESL had already been underway for some time when the CRD was adopted. It was clearly the intent that the CESL should, where possible, be in line with the recently adopted acquis. As the CRD fully harmonised pre-contractual information duties the Commission did not want the CESL to materially – and where possible also not in terminology – differ from the CRD. This has certainly been the case with regard to pre-contractual information duties, as the CRD and CESL are very similar in content, albeit somewhat different in structure.\footnote{Schulze (ed.) 2012, pp.129-130.}

Chapters II and III CRD deal with pre-contractual information requirements. The main distinction made in the directive is between requirements for distance or off-premise contracts (Chapter III) and other contracts (Chapter II), where more extensive requirements exist with regard to the former.\footnote{Hall, Howells and Watson 2012, pp. 142-143.} Characteristic of the approach is that the Directive obligates traders to provide specifically indicated types of information.\footnote{Howells and Schulze 2009, p. 12.}

Besides this distinction, the CRD contains an important limitation to the pre-contractual duties it imposes: such duties exist for traders only in B2C relations. In the CESL, Chapter 2 deals with pre-contractual information duties. Section 1 contains the rules for business to consumer transactions, while section 2 contains rules for B2B transactions. In section 1, the CESL like the CRD, makes a distinction between information duties for distance and off-premise contracts and information duties for other contracts.\footnote{Cravetto and Pasa 2011, pp. 761-762.} The rules on pre-contractual information duties are mandatory in nature.
Article 6 CRD sets out the pre-contractual information duties with regard to distance and off-premise contracts. The article contains an extensive and detailed enumerated list of pre-contractual information requirements. The list contains 20 specific information duties. Here I will focus only on the most important ones. First of all, the trader has to provide information on the main characteristics of the goods or services (a), his identity (b) and contact information like phone number and address of where it is established and, if different, the address of the place of business where a consumer can file complaints (c, d). The trader also has to inform the consumer of the total price of the goods and services, the additional costs beyond standard rates, if any, of using distance communication for concluding the contract and the way in which payment is to be fulfilled (e, f, g). If the trader has not fulfilled his requirement to inform about additional costs the consumer will not bear those additional costs Article 6(6) CRD. The trader has to comply with another important requirement: to provide information on the right of withdrawal, where it exists, and the conditions and time limits of such a right (h). A failure to do so has important consequences for the duration of such a right, extending it from 14 days to 12 months (Article 10 CRD), as will be discussed in more detail in Chapter 9 on rights of withdrawal. Additionally, the trader has to inform the consumer that he will have to bear the cost of returning the goods when exercising his right of withdrawal (i).

In the CESL the information requirements for distance and off-premise contracts are found in Articles 13 through 19. The requirements are materially the same as those in the CRD and they offer a similarly detailed enumerated list of pre-contractual information duties. Again, the most important information duties pertain to the main characteristics of the goods (Article 13(a) CESL), the total price and any additional costs (Article 14 CESL) the identity of the trader (Article 15 CESL), information on a right of withdrawal (Article 17 CESL).
Both the CRD and the CESL require that this information should be provided in a clear and comprehensible matter.\textsuperscript{359} Moreover, the information has to be an integral part of the contract and not be altered unless both parties expressly agree to do so (Article 6(5) CRD/Article 13 (2) CESL). Furthermore, the burden of proof lies with the trader with regard to compliance to the pre-contractual information duties in distance and off-premise contracts (Article 6(9) CRD/Article 21 CESL).\textsuperscript{360} Additionally, for the first time in European contract law, the CESL introduces a duty to ensure that any information supplied is correct (Article 28 CESL).\textsuperscript{361} Where the CRD of course requires that the information the trader is obliged to share under the CRD be correct, the CESL expands this duty to any information given, even if the disclosure of that information was not required by the CESL.\textsuperscript{362}

Article 5 CRD and Article 20 CESL deal with pre-contractual information duties in contracts other than distance and off-premise contracts.\textsuperscript{363} These are very similar to the duties mentioned above. The main difference is that no information has to be provided on rights of withdrawal, as such rights are only available in distance and off-premise contracts. Day to day transactions that are performed immediately are excluded from these information requirements (Article 5 (3) CRD/Article 20(2) CESL). While under the CRD the burden of proof that the required information has been given lies on the trader only in the case of distance and off-premise contracts, under the CESL this burden of proof is extended to all other contracts within its scope (Article 21 CESL).

Finally, the CESL contains several elements that are completely new compared to the CRD. First of all, the proposal for the CESL starts out with a pre-contractual information duty that is specific to its character as an optional instrument. Article 9 of the proposed regulation determines that the trader shall inform the consumer of the intended application of the CESL in B2C relations. The trader must do so by providing

\textsuperscript{359} Hall, Howells and Watson 2012, p. 149.
\textsuperscript{360} Hall, Howells and Watson 2012, pp. 152-153.
\textsuperscript{361} Cravetto and Pasa 2011, p. 765. This duty is inspired by the Unfair Commercial Practices Directive 2005/29.
\textsuperscript{362} Schulze (ed.) 2012, pp. 172-175.
\textsuperscript{363} Piers 2012, pp. 871-873.
the consumer with the Standard Information Notice (SIN) as contained in Annex II CESL. This SIN sets out in comprehensible language that the contract is governed by the CESL. Further, it details the main rights this legal regime offers the consumer.\textsuperscript{364} Failure to provide the SIN leads to the result that the consumer is not bound by the agreement to use the CESL and hence effectively is free to choose whether to rely on the CESL or on the otherwise applicable law.

More importantly for our purpose, Chapter 2 Section 2 CESL governs the pre-contractual duties a trader owes when trading with another trader. In contrast with the B2C situation, here an open norm determines which information is to be disclosed.\textsuperscript{365} Article 23 CESL states that before the conclusion of a contract a trader has the duty to disclose any information regarding the main characteristics of the goods, digital content or related services, which the trader has or can be expected to have and which it would be contrary to good faith and fair dealing not to disclose to the other party.\textsuperscript{366} Factors that help determining which information is to be disclosed include: whether the supplier has special expertise, the cost of acquiring the information for the supplier, whether it was easy for the other trader to acquire the information, the nature and likely importance of the information, and good commercial practice.\textsuperscript{367}

Finally, the CESL is more comprehensive with regard to remedies. Remedies under the regime of the CRD are mostly left to national law, except for the fact that consumers are not liable to pay for additional costs where the trader has not informed about them (which features in both the CRD as well as the CESL). This conforms to the general EU principle of procedural autonomy. As the CESL aims to be as much freestanding as possible, it contains its own rules on remedies in Chapter 2 section 5. The main remedy that this section provides is that a party who did not comply with any of the pre-contractual information duties imposed by the CESL is liable for any loss such failure caused (Article 29 CESL).\textsuperscript{368} Only in B2C relations are these rules on

\textsuperscript{365} Beale and Howells 2011, pp. 52-53.
\textsuperscript{366} De Boeck 2011, p. 792.
\textsuperscript{367} Cravetto and Pasa 2011, p. 763.
\textsuperscript{368} See e.g. Cravetto and Pasa 2011, p. 769.
remedies mandatory. Finally, parties can resort to the general rules of the CESL on avoidability in case of mistake (Article 48 CESL) or fraud (Article 49 CESL).

This discussion of the main rules on pre-contractual information duties shows the main differences in how consumers and SMEs are treated under the CRD and the CESL. As the CRD does not contain any rules applying to B2B relations, the comparison between consumers and SMEs is a simple one. Whereas consumers are entitled to all the pre-contractual information required by the CRD, SMEs are entitled to no such information on the basis of the directive.\(^{369}\) The CESL, however, does contain pre-contractual information duties for B2B situations and since the CESL is only applicable in principle when at least one of the parties is an SME, this effectively boils down to the requirement that SMEs are supplied with pre-contractual information as well.\(^{370}\) Accordingly, a more elaborate comparison is possible under the CESL. Here, three main differences exist between consumers and SMEs.

First of all, the SIN is only required in B2C relations and hence an SME does not have to be provided with such a notice. Secondly, there is a substantive difference between the information requirements for consumers and for SMEs. Whereas for consumers a list of enumerated types of pre-contractual information has to be provided, SMEs must rely on a general clause. This clause is more restricted than the consumer information requirement in two regards. It covers only information regarding the main characteristics of the goods, not e.g. information on the identity of the other trader, and it only covers information that the supplier has or can be expected to have and which it would be contrary to good faith and fair dealing not to disclose to the other party.\(^{371}\) Thirdly, while the rules protecting consumers are mandatory in nature, this is not the case for SMEs.\(^{372}\) This manifests itself in three areas: 1) the general duty to disclose information is not mandatory, 2) the duty to

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\(^{369}\) There are some small, related information requirements in B2B relations, for example in the case of unfair commercial practices.

\(^{370}\) I leave the situation aside here where an SME sells to a larger company to focus instead on the SME as a buyer (see also Chapter 6).

\(^{371}\) Piers 2012, pp. 873-875.

\(^{372}\) Lando 2011, p. 724; De Boeck 2011, p. 790.
ensure that supplied information is correct is not mandatory and 3) the rules regarding remedies are not mandatory.

8.2 Underlying rationales

To require a trader to provide certain information pre-contractually has been a popular method of weaker party protection with the European legislator. The popularity of this measure is due to the procedural nature of the protection: by merely requiring information to be provided, the autonomy of the parties is only infringed upon marginally. More importantly, autonomy might even be perceived to be enhanced by the availability of more information. A more informed person will act more in line with his goals and hence more autonomously. Hence, this method of weaker party protection does not violate or violates only minimally freedom of contract. This has made pre-contractual information duties less controversial among advocates of freedom of contract than e.g. the more substantive unfair terms control.

But how do pre-contractual information duties function as weaker party protection? The underlying idea is that consumers, because of a lack of information and clarity, are prone to make mistakes. Consequently, sellers have an information advantage over the consumer. By requiring the trader to provide information on key elements of the contract the information advantage the seller has is mitigated. A duty to disclose requires the trader to provide information he might have otherwise kept to himself. Take note: this does not presuppose that a seller is in bad faith. Rather, it pertains to assigning responsibility to the seller for the consequences of the buyer being uninformed, i.e. a reversal of the caveat emptor rule. A mandatory disclosure can be societally desirable when the cost to the trader to obtain and provide the information is outweighed by the other party’s benefit to receive the information.

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373 Wilhelmsson and Twigg-Flesner 2006, p. 452. This popularity is not necessarily shared by consumer groups and academics.
374 Beale and Howells 2011, p. 50.
This tends to be the case where the trader already has the information and where it would be costly for the buyer to obtain it.\textsuperscript{376} The main information duties of both the CRD and the CESL contain mainly points of information the seller has easy access to, and in most cases no good reason to hide in the first place, such as the core characteristics of the goods he offers for sale or his identity, while the buyer does not share these points of information.\textsuperscript{377}

Furthermore, it prevents the trader from actively hiding certain facts with the goal to seduce the consumer into buying a product he is not interested in.\textsuperscript{378} Although the rules on fraud and mistake primarily deal with such cases, a good example with regard to pre-contractual information duties concerns additional costs. By requiring the trader to provide information on all additional costs he is prevented from exploiting an inattentive consumer. In this manner, a pre-contractual information duty enforces both a duty of honesty for the seller as well as helps maintain the substantive fairness of the contract for the consumer.\textsuperscript{379}

Moreover, this can help to create real consent on the content of the exchange.\textsuperscript{380} In other words, it obligates the trader to better equip the buyer to act rationally.\textsuperscript{381} This has the added beneficial effect that by helping the consumer to make better-informed decisions, it allows for better competition, as knowledge is a requirement for competition.\textsuperscript{382} After all, when consumers are unaware of the real costs they have to pay for a product, it is impossible to properly compete on price. In other words, it fixes a market failure on the demand side, where competition law takes care of market failures on the supply side. Simply put: a better-informed consumer is a better-protected consumer. A common counterargument, however, is that additional information only helps consumers marginally, as they cannot or will not process all or

\textsuperscript{376} Eidenmüller et al 2011, pp. 1114-1115.  
\textsuperscript{377} Wilhelmsson and Twigg-Flessner 2006, pp. 452-453  
\textsuperscript{378} Bar-Gill 2012, pp. 17-23  
\textsuperscript{379} Sefton-Green 2005, pp. 11-15.  
\textsuperscript{381} Wilhelmsson and Twigg-Flessner 2006, pp. 449-450.  
\textsuperscript{382} De Boeck 2011, p. 795.
even most of the information provided.\textsuperscript{383} It can even work counter-productively especially when they are confronted with too much information.\textsuperscript{384} However, it is not necessary for our purposes to assess the effectiveness of these information duties, but rather to consider whether the rationales underlying them provide a justification for distinguishing between consumers and SMEs.

\textbf{8.3 Are the differences between consumers and SMEs justified?}

As we have seen in the comparison above, under the existing information duties SMEs are to be provided with less information than consumers. In the CRD no pre-contractual information duties protecting SMEs exist whatsoever, although Member States are allowed to expand the scope of this directive to include SMEs in their national laws.\textsuperscript{385} The CESL does provide some pre-contractual information duties with regard to SMEs, but noticeably less than those for consumers. Furthermore, the information duties are not mandatory in the case of SMEs and so might be set aside contractually. Do the underlying rationales of pre-contractual information duties offer a justification for these differences?

While large businesses might be presumed to acquire the information that would be provided through compliance with pre-contractual information duties for themselves, the same assumption does not hold with regard to SMEs. A small business buying office supplies online, for example, will be in the same situation as a consumer buying similar items for private use. The information asymmetry between the buyer

\textsuperscript{383} Howells 2005, p. 357. An interesting question is whether these duties could be better understood not as pre-contractual information duties but rather simply as contractual information duties. The information provided then would not so much, or not primarily, function as informing the consumer whether or not to contract, but rather help the consumer assess if and how he has a case against the seller if conflict arises later on. For example, the information on a guarantee makes it easier for the consumer to see whether he can still e.g. return the goods and find the address of the trader where to return the goods. See e.g. Article 69 CESL.

\textsuperscript{384} Eidenmüller et al 2011, p. 1118.

\textsuperscript{385} Since SMEs are beyond the formal scope of the directive, this does not conflict with the maximum harmonization character of the CRD.
and seller that these duties attempt to remedy is typically the same, whether the buyer is a consumer or an SME.  

Two of the other underlying rationales actually focus on the seller. The fact that the seller has easy access to much of the information that he has to provide makes it suitable for him to provide that information. In this regard, it makes no difference whether the buyer is a consumer or an SME. The same can be said with regard to upholding the duty of honesty and creating real consent. Preventing a company from withholding information about e.g. additional costs has this function, regardless of whether the buyer is a consumer or an SME. As I argued above, it should not be permitted to exploit an SME just because it has a commercial purpose.

The main reasons for weaker party protection in contract law as fairness are that it distributes advantages towards weaker parties and helps create access to the market. Of the three legal mechanisms – the others being the rights of withdrawal and unfair terms control, as we will see in the next two chapters – pre-contractual information duties arguably contribute the least to these goals. However, given the assumption that these duties at least minimally do so, through e.g. preventing exploitation by hiding additional costs, not extending this protection without any proper justification is unjust from a Rawlsian perspective.

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386 Eidenmüller et al 2011, p. 1116.