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

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11 Part II – Conclusions

The argument developed in Part II started from the notion that weaker party protection in contract law can be seen as a way to implement (part of) the difference principle and hence contributes to a more just society from a Rawlsian perspective. However, what these rules should amount to is subject to the burdens of judgment and hence to democratic decision-making. Accordingly, I have not tried to spell out the perfectly just rules of weaker party protection and ascertain how SMEs would fit into that picture. That would in essence come down to arguing that only one basic structure could be just, regardless of democratic input. This does not seem to be what Rawls had in mind for the implementation of his principles of justice, nor is it otherwise an attractive position from a Rawlsian perspective.

Instead, a more fruitful approach asks who, taking the current weaker party protection rules into consideration, should count as a weaker party. This type of question underscores the categorical approach to weaker party protection that follows from the Rawlsian framework set out in Part I. Such a categorical approach to weaker party protection is in line with the emphasis on social groups that characterizes the difference principle.465 Furthermore, the focus on categories rather than specific persons means that the institutional division of labour between the basic structure and rules directly applying to individuals is safeguarded. Because of the normative appeal of categorical weaker party protection in contract law as fairness, excluding parties from such protection without proper justification is unjust from a Rawlsian perspective.

With regard to the position of SMEs in European contract law, then, the question becomes whether they, or an identifiable subgroup of them (e.g. micro businesses), should be regarded as weaker parties. Since the criteria as to who should be part of a specific category are determined by the rules and their underlying rationales, I turned to weaker party protection in the current acquis communautaire. As the acquis consists almost exclusively of consumer protection law, I took this consumer law as the current

465 Van Parijs 2003. See also Chapter 3.4.
benchmark of weaker party protection and focused on the question of what differences exist between the position of consumers and that of SMEs in this field.

Part II analysed how the CRD and the Unfair Terms Directive, as well as the CESL employ the legal mechanisms of pre-contractual information duties, rights of withdrawal and unfair terms control to strengthen the contractual position of the weaker party. Pre-contractual information duties and rights of withdrawal do so more procedurally, either by providing more information or by offering the possibility to renege on an agreement. Unfair terms protection is more substantive, regulating the content of non-individually negotiated terms.

Furthermore, Part II set out how these rules apply to consumers and SMEs. Through a comparison of the rules under the directives with the rules under the CESL, it has become clear that the position of SMEs has come within view in European contract law.\footnote{Micklitz 2013, p. 302.} The directives apply only in B2C relations and contain furthermore a very strict notion of the term consumer. The strict notion of consumer means that an SME cannot rely on consumer protection under the directives, under any circumstance. Under the CESL, the same strict notion of consumer protection remains and hence SMEs still cannot claim consumer protection. However, for the first time in EU contract law, the CESL introduces pre-contractual information duties and unfair terms control for B2B contracts. Since the CESL is in principle only applicable to B2B contracts if at least one of the parties is an SME, this can effectively be seen as incorporating duties and rights for B2SME contracts. Evidently, then, from an EU perspective SMEs are offered more protection under the CESL than under the directives.\footnote{Remember though the caveat that Member States are allowed to extend the protection offered by the Directives also to SMEs.} Compared to the position of consumers, however, SMEs are still clearly in a less favourable position, even under the CESL. There are no rights of withdrawal in B2SME contracts and the pre-contractual information duties and unfair terms control is less far-reaching for SMEs than for consumers.

Accordingly, it is clear that European Union contract law makes a distinction between consumers and SMEs. To establish whether such a distinction could be
justified, the underlying rationales of the three legal mechanisms and their personal scopes were discussed. In each case the conclusion was reached that these underlying rationales could not in fact justify distinguishing between consumers and SMEs. On the contrary, most SMEs typically share the characteristics that justify the protection consumers receive and hence in principle, SMEs should be included in the category that is offered weaker party protection. At the same time, the case for equal treatment for SMEs and consumers is stronger when the SMEs under consideration for protection are smaller and the other parties are larger. Hence, the same argument cannot be made when SMEs deal with other SMEs, but only applies when SMEs contract with a larger, non-SME business. Furthermore, from this perspective, a focus on micro and small enterprises would probably be justified. However, the Rawlsian perspective cannot provide an exact definition of what should count as an SME.

So, what does this imply for the future of European contract law? I would argue that, from a Rawlsian perspective, it would make normative sense to re-conceptualize consumer law as weaker party protection law. Furthermore, there are no legitimate grounds for distinguishing between consumers and SMEs with regard to who should count as a weaker party. Or to put it more formulaic: instead of focusing on B2C, we should focus on B2WP, where WP (Weaker Party) = C + SME and where B is not WP.\textsuperscript{468} Formulating weaker party protection rules in this manner would do justice to the position of small businesses in European contract law from a Rawlsian perspective.

\textsuperscript{468} It is a possibility that other groups, e.g. employees, should also be part of the category of weaker parties. However, exploring that idea would be something for another study.