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Implementation of CRD (Almost) Completed, Harmonisation Achieved?

Marco B.M. Loos

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The Member States were required to transpose the Consumer Rights Directive 2011/93/EU (CRD) by 13.12.2013 and to apply their implementation rules by 13.06.2014. Whereas the first deadline has been met by only a few Member States, most Member States appear to have met the second, more important deadline (and thus can avoid both an infringement procedure by the new European Commission and state liability for late transposition of the directive).

Recital 7 of the preamble indicates what the EU aimed for: the Consumer Rights Directive was to increase legal certainty for both consumers and traders by introducing full harmonisation of some key regulatory aspects. As a result ‘both consumers and traders should be able to rely on a single regulatory framework based on clearly defined legal concepts regulating certain aspects of business-to-consumer contracts across the Union’, the recital continues.

Now that most Member States have transposed the directive, the question arises whether that aim and that result have indeed been achieved. On 09 and 10.10.2014, the University of Ferrara (Italy) organised a symposium in which consumer lawyers from Austria, Belgium, France, Germany, Italy, the Netherlands, Poland, Portugal, Spain and the United Kingdom discussed the implementation of the CRD in their respective countries. The outcome was astonishing: even though full harmonisation was achieved in the mandatory points, all Member States have made use of the regulatory options to extend or decrease the scope of application of the national implementing provisions; unfortunately no two

countries seem to have made the same choices. For instance, where France has chosen not to exclude the contracts listed in Art 3 CRD from the trader’s general obligation to inform in case the contract is concluded on business premises, most Member States simply took over all exclusions. So when a trader offering to conclude a package travel contract in most legal systems is not required to inform the consumer of, for instance, his complaint handling policy or to remind her of the existence of the legal guarantee,¹ he is required to do so if the law applicable to the contract is French law. And under Art 6 Rome I regulation this may very well be the case if a French consumer was approached by, for instance, a Belgian tour operator and the French consumer subsequently travelled to Belgium to conclude the contract. And where consumers in some Member States must be informed in the language of that country,² other Member States³ have not included such a requirement, allowing the trader to provide the information in the trader’s own language.

The result is that even though the Directive has brought some uniformity in key areas, differences between the laws of the Member States remain and they are of some importance. And this observation is only based on ‘the law in books’: the laws ‘in action’ are likely to differ much more, because enforcement strategies differ greatly from one country to the next: whereas in the Netherlands a contract could be annulled on the basis of the law regarding unfair commercial practices if information required under the CRD is not provided and the consumer is likely to have concluded the contract as a result of the absence of such information, in most other legal systems the contract could only

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¹ Art 5 Para 1 d and e CRD. Package travel contracts are excluded from the scope of the CRD in Art 3 Para 3 g, CRD.

² For instance France and Portugal.

³ For instance Belgium, the Netherlands and the United Kingdom.

be avoided if the consumer proves that the requirements of mistake have been met. Moreover, the general opinion was that the information requirement of Art 5 CRD, applicable to on-premises contracts, is likely not to be enforced at all with regard to day-to-day transactions (such as groceries bought in a supermarket), whether or not a Member State has made use of the option of Art 5 Para 3 CRD to exclude such contracts from the scope of the information obligation.

The answer must, therefore, be that the CRD has not provided the expected uniformity and legal certainty. And in so far as some uniformity has been achieved, it has come at a price. Austria, for instance, had to abolish a very effective instrument against cold calling, which had stipulated that the cooling-off period would only start to run from the time when the consumer received the first bill. This seems to be a high price to pay for a directive, which has only led to a certain degree of harmonisation.

Consumer protection therefore remains to be diverse in the EU, and this deserves the attention of legislators, academics, practitioners *and* traders. Stakeholders need to meet one another on a regular basis. The International Association of Consumer Law offers such an occasion with its biannual conferences. The 15th conference will be held from 29.06.2015 to 01.07.2015 at the University of Amsterdam, under the topic 'Virtues and Consumer Law'. In addition to workshops, keynote speeches will be given by (amongst others) *Omri Ben-Shahar* (Chicago), former AG at the CJEU *Verica Trstenjak*, *Mark Wissink* (Groningen, AG at the Dutch Supreme Court) and *Ursula Pahl* (BEUC). For more information and registration, see the conference website at <csecl.uva.nl/iac12015>. On behalf of my co-organisers, *Joasia Luzak* and *Sacha Tamboer*, I hope to welcome many of the *euvr* readers there!