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Articles

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Consumer protection, sexual services and vulnerability: Exploring social justice in European Contract Law

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Abstract: This paper offers a preliminary attempt to illustrate the disadvantageous implications of the EU legal framework – notably rules of European contract law and EU consumer law – for individuals who are socially and economically vulnerable through the case of commercial sex. It concludes that European contract law is currently in tension with the deep concerns of social justice shared in discourses on the contested moral status of exchanges of money for sex. The paper shows particularly how the rules that aim to protect consumers can exacerbate the vulnerable positions of women who provide sexual services on the EU internal market.

Résumé: Cet article constitue une tentative préliminaire d'illustrer les désavantages du cadre juridique de l'UE – notamment du droit des contrats et de la consommation – pour les personnes qui sont vulnérables socialement et économiquement, à partir du cas du commerce sexuel. Il aboutit à la conclusion selon laquelle le droit européen des contrats est actuellement en état de tension avec les préoccupations profondes de justice sociale qui font partie des discours politiques relatifs au statut moral du marché du sexe. Cet article montre en particulier comment les règles qui visent à protéger les consommateurs peuvent exacerber la position vulnérable des femmes qui fournissent des services sexuels sur le marché intérieur de l'UE.

Zusammenfassung: Der Beitrag bietet eine erste Bestandsaufnahme – und These – dazu, wie nachteilig sich das EU-Regelwerk – namentlich das Europäische Vertrags- und Verbraucherrecht – auf solche Personen auswirkt, die als Anbieter sexueller Dienstleistungen sozial und wirtschaftlich besonders verletzlich sind.

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Die Hauptschlussfolgerung geht dahin, dass das Europäische Vertragsrecht derzeit in einem Spannungsverhältnis steht zu den tiefen Bedenken in Fragen sozialer Gerechtigkeit, die im Diskurs über entgeltliche sexuelle Dienstleistungen und die Moralvorstellungen in diesen Fragen formuliert werden. Insbesondere wird gezeigt, dass Verbraucher und Verbraucherrecht die besonders schwache Stellung der Frauen noch verschärfen, die sexuelle Dienste im Binnenmarkt anbieten.

I Introduction

This paper is a preliminary attempt to show how the case of commercial sex on the internal market illustrates the ways in which the current advancement of European integration and European contract law is disadvantageous to some individuals who are socially and economically vulnerable, eg, women who sell sex on the market. Through this example, the paper marks a path through which to continue the exploration of social justice concerns in European contract law.

This paper considers moral variance in the status of exchanges of money for sex to be plausible (ie, some exchanges are immoral, while others are not). As such, it would seem that the current rules of European contract law are disadvantageous in three ways for women who provide sexual services. First, national contract law regimes that deem all exchanges of money for sex immoral and unenforceable are disadvantageous for female sexual service providers who voluntarily engage in them, because they reinforce their stigmatization and exclude them from the support of public enforcement mechanisms that would otherwise be available to help realize their pursuits. Second, general rules regarding service contracts are applicable under some regimes that recognize voluntary exchanges of money for sex as contracts. This disadvantages some women by failing to take into account prostitution's distinctive features (ie, those features that inform a shared concern for the special vulnerabilities of sexual service providers on the supply side of the market). Third, if and when exchanges of money for sex are recognized as contracts by national rules of contract law, the applicability of mandatory European consumer protection rules exacerbates the disadvantageous positions of female sexual services providers by protecting male consumers as the vulnerable parties to certain contracts for sexual services. This paper illustrates these points through a particular example of voluntary exchanges of money for sex, as engaged by women who offer sexual services under conditions of independence. The potential disadvantageous implications of European contract law, as described in this paper, seem equally likely in other cases

of voluntary exchanges of money for sex. This hypothesis should be tested by a further exploration of how rules of contract law impact (the potentially conflicting interests of) female service providers in various contexts.

The following section briefly outlines the plurality of applicable public law regimes across the EU and the underlying variety of European views on exchanges of money for sex, before transitioning into a focused discussion of the ways in which these views pattern different positions in polarized debates on the normative status of prostitution (section II). The paper then discusses the framework of European contract law as it relates to its demarcation of the moral limits of the market (section III), before showing the ways in which the current rules of European contract law can be disadvantageous for some women who voluntarily provide sexual services in exchange for money (section IV).

II European views on exchanges of money for sex

In 2014, the European Parliament adopted a resolution on sexual exploitation and prostitution and its impact on gender inequality.¹ The resolution states that *'prostitution, forced prostitution and sexual exploitation are highly gendered issues and violations of human dignity, contrary to human rights principles, among which gender equality, and therefore contrary to the principles of the Charter of Fundamental Rights of the European Union, including the goal and the principle of gender equality'*. As such the European Parliament sketched the demarcation of the moral limits of the internal market through gender equality and fundamental rights, suggesting the placement of sexual activities beyond the realm of commodification and commercialization. This political viewpoint closely resembles one side of a rather polarized debate on the normative status of (gendered manifestations of) exchanges of money for sex, which considers them to be coercive institutions and forms of violence against women.² On the opposing end of the spectrum, (some) exchanges of money for sex are (at least potentially) viewed as voluntary exchanges, ie considered more similar than dissimilar to other regular market exchanges, relative to the autonomy of contracting

¹ European Parliament resolution of 26 February 2014 on sexual exploitation and prostitution and its impact on gender equality (2013/2103(INI)).

² See for instance D. Satz, *Why Some things Should Not Be for Sale: The Moral Limits of Markets* (New York: Oxford University Press, 2010) 147, who terms prostitution a 'theatre of inequality' depicting a 'practice in which women are seen as the servants of men's desires'. For an overview of other opposing voices see R. Weitzer, 'Moral Crusade Against Prostitution' 43 *Society* (2006) 33–38.

parties.³ The European Court of Justice reflected this view more than a decade ago in stating that ‘*the activity of prostitution pursued in a self-employed capacity can be regarded as a service provided for remuneration*’.⁴

These differing European views closely pattern an enduring discourse on the normative status of market exchanges of money for sex – a case that is paradigmatic of a broader question on where the moral limits of our market, and the realm of contract law, ought to be drawn. Ought we consider sex as a thing that ‘money can’t buy’, as something that ‘should not be for sale’ on our market, as a subject matter that ought not be subject to contract, and therefore ought to fall beyond the application of the rules of contract law?⁵ These questions are posed in a context of presumed and institutionalized dichotomies that can be disadvantageous to individuals who are socially and economically vulnerable. These dichotomies include the idea of separate spheres between non-commercial categories of morality, care, intimacy, sex, and love, and market concepts of efficiency and economic transactions. An idea of separate spheres is also echoed in the current division of competence between the Member States and the Union, in which the former demarcates the moral limits of the market while the latter proceeds to advance its tasks of (digital) market building and enhancement.⁶ This set-up has potential disadvantageous ramifications for the positions of socially and economically vulnerable individuals in the European law-making context, exemplified by the application of rules of European contract law in the case of exchanges of money for sex.

1 The global sex panic in a European voice

The European Parliament’s adoption of the resolution on sexual exploitation and prostitution and its impact on gender inequality resonates with an on-going ‘sex

³ For an overview of various feminist positions see J. Halley, P. Kotiswaran, H. Shamir and C. Thomas, ‘From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism’ 29 *Harvard Journal of Law & Gender* (2006) 335–423.

⁴ Case 268/99 *Aldona Malgorzata Jany and Others vStaatssecretaris van Justitie*, 20 November 2001 (CJEU) 49–50.

⁵ See M. Sandel, *What Money Can’t Buy: The Moral Limits of Markets* (New York: Farrar, Straus and Giroux, 2012); Satz, n 2 above.

⁶ See for instance the *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final, 19–20, n 27 in which the European Commission aimed to enhance the functioning of the internal market, while leaving questions of contractual immorality at the national level.

panic' and 'moral crusade' against prostitution on a global level.⁷ This panic is characterized by the colonizing language of 'anti-trafficking' in the legal discourses on prostitution. Under this discursive shift, prostitution is often conflated with human trafficking and the two are treated as one homogeneous phenomenon that excludes the possibility of choice and agency, and in which *all* women who offer sexual services are *per se* identified as victims of violence.⁸ While the European Parliament's resolution makes an initial distinction between voluntary and forced prostitution, it presents the recommendation for a strategy to target 'human trafficking', 'sexual exploitation' and 'prostitution'⁹ by eliminating demand for sexual services entirely. While the proposal acknowledges 'the lack of reliable, accurate and comparable data among countries' it nevertheless calls upon the EU Member States to pursue the criminalization of the purchasing of sexual services, as a complementary strategy to the Directive on Human Trafficking.¹⁰

2 National pockets of liberal commodity exchange

Despite this recent increasing popularity of the criminalization of consumers of sex, ie the so-called Nordic model,¹¹ exchanges of money for sex and associated activities remain beyond the remit of criminalization in several Member States.

⁷ See Weitzer, n 2 above, 33–34, who identifies this sex panic on the basis of 'universalistic and often unverifiable claims' that exaggerate the evils of prostitution beyond what is warranted on the basis of available evidence.

⁸ See Weitzer, n 2 above; Halley, Kotiswaran, Shamir and Thomas, n 3 above; P. Kotiswaran, 'Born unto Brothels – Toward a Legal Ethnography of Sex Work in an Indian Red-Light Area' 33 *Law & Social Inquiry* (2008) 579–629; P. Kotiswaran, *Dangerous Sex, Invisible Labor: Sex Work and the Law in India* (Princeton: Princeton University Press, 2011).

⁹ As expressed by rapporteur Mary Honeyball and Commissioner Kristalina Georgieva in the presentation and debate on the report on sexual exploitation and prostitution and its impact on gender equality (2013/2103(INI)) on 24 February 2014.

¹⁰ See Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.

¹¹ The Nordic model has also been adopted and considered by several Member States. See for instance the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, which criminalizes paying for sexual services. A similar proposal was rejected in France by the *Senát* after being accepted by the *Assemblée Nationale* in 2013: <http://www.lefigaro.fr/actualite-france/2013/12/04/01016-20131204ARTFIG00436-la-penalisation-des-clients-des-prostituees-votee-a-l-assemblee.php> and <http://www.lefigaro.fr/actualite-france/2014/07/09/01016-20140709ARTFIG00207-prostitution-le-senat-rejette-la-penalisation-des-clients.php> and <http://www.lefigaro.fr/flash-actu/2015/03/31/97001-20150331FILWWW00339-prostitutionsenat-regression-scandaleuseps.php> (last visited: 3 April 2015).

For instance, in the Netherlands and Germany prohibitions against brothels were lifted in 2000 and 2002 respectively, decriminalizing such institutions and the activities associated with voluntary prostitution and the exchange of money for sex.¹² In both jurisdictions, exchanges of money for sex are in principle recognized as legally binding contracts that can give rise to enforceable rights and duties. In several other Member States legal regimes are in place under which the exchange of money for sex is not itself illegal, but where associated activities such as procurement and soliciting are subject to criminal law.¹³

3 An underlying normative current: a concern for women on the supply side

The political dissension on the matter of prostitution within the Member States, as well as the plurality of the applicable legal regimes across the Union, reflects the normatively contested nature of exchanges of money for sex. Legal, philosophical and sociological scholarship yields a very rich and divergent picture of possible responses to the question: what, if anything, is wrong with prostitution? These responses offer justifications for the various legal regimes that are in place in the European Union.¹⁴ A radical feminist position views the exchange of money for sex (in its gendered manifestation) as intrinsically degrading to women and frames commercial sex as a matter of female subordination to male sexual desire.¹⁵ For some, the problem with commercial sex is located in a universal claim regarding the true purpose of human sexuality that can only be

12 See under Dutch law, *Wet van 28 oktober 1999*, *Staatsblad* 1999, 464; under German law, *Prostitutionsgesetz* 2001. Before decriminalization the buying and selling of sexual services itself was not subject to criminalization, though such transactions could still encounter morality objections under the respective regimes of contract law, affecting their enforceability and status as legally binding contracts.

13 See in the UK (*Policing and Crime Act 2009*, Part 2 Sexual Offences and Sex Establishments); in France (*Code pénal*, Book 2, Title 2, Chapter 5, Section 2 Du proxénétisme et des infractions qui en résultent).

14 It will not be possible to do justice to the richness and nuance of the variety of normative justifications here; this section therefore offers only a broad overview of (simplified) positions on a wide-ranging spectrum.

15 C. Pateman, *The sexual contract* (Stanford: Stanford University Press, 1988); A. Dworkin, 'Prostitution and Male Supremacy', 1 *Michigan Journal of Gender & Law* (1993) 1–12; C.A. Mac Kinnon, 'Prostitution and Civil Rights' 1 *Michigan Journal of Gender & Law* (1993) 13–31; C.A. Mac Kinnon, 'Trafficking, Prostitution, and Inequality' 46 *Harvard Civil Rights – Civil Liberties Law Review* (2011) 271–310.

fulfilled in the context of certain relationships, eg monogamous heterosexual marriages. Others hold that sexual activity and personhood are inseparably linked, such that the provision of sexual services to others for money violates and corrupts one's personhood and the moral worth of sex.¹⁶ While these positions identify intrinsic objections to exchanges of money for sex, others consider them objectionable as the result of current background conditions, in which prostitution represents a '*theater of inequality*' that '*displays for us a practice in which women are seen as servants of men's desires*' and thus perpetuates the general socially inferior status of women.¹⁷ For others prostitution should be evaluated on the basis of its potential harmful consequences – eg, the physical and mental impact it may have on the women who provide sexual services – which can offer a liberal justification for certain legal restrictions.¹⁸ Advocates of sex work, however, focus on the ways in which commercial sex can be liberating and empowering for women who choose to provide sexual services, thereby countering accounts that aim to detail the moral objectionability of prostitution.¹⁹ Close scrutiny of accounts that detail the moral(istic) disapproval of exchanges of money for sex, yields a critique of the stigmatization of women who provide sexual services.²⁰ In many cases, it seems puzzling why articulated concerns regarding features of prostitution dissipate, or are at least severely weakened in relation to the same features of other activities. Many activities that are not contested when exchanged for money (and not subject to criminalization) entail features that may be identified as a form of female subordination to male desires, extremely intimate and connected to personhood, displaying a practice of gender inequality, or entailing harmful consequences.²¹ The analysis of analogous cases brings to the fore the idea that, on

16 This position regards the question of the corruptive effect of commercial sex on the moral worth of sex, and on our understanding of what it means to be human, as explored by eg, M.J. Radin, *Contested Commodities. The Trouble with Trade in Sex, Children, Body Parts, and Other Things* (Cambridge: Harvard University Press, 1996) and Sandel, see n 5 above.

17 Satz, n 2 above, 146–147.

18 P. de Marneffe, *Liberalism and Prostitution* (Oxford: Oxford University Press, 2009).

19 Others have also showed how market exchanges for sex can be regarded as morally valuable: freeing the participants from the moral burden of hypocrisy that may be experienced when feigning a relationship of love. Commercial exchanges are free from (potential) insincerity that may be entailed in personal relationships. See: M. Prasad, 'The Morality of Market Exchange: Love, Money, and Contractual Justice' 42 *Sociological Perspectives* (1999) 204–205.

20 M. Nussbaum, 'Whether from Reason or Prejudice. Taking Money for Bodily Services', in M. Nussbaum, *Sex and Social Justice* (Oxford: Oxford University Press, 1999) 276–298.

21 Nussbaum, n 20 above, compares prostitution to, amongst others, factory work, domestic services and massage services.

the one hand, many objections to prostitution are attached to beliefs about female sexuality and about the proper context for ‘good’ women to have ‘good’ sex;²² while on the other hand, the problems associated with commercial sex are generally manifestations of social injustices, reflecting and identifying a lack of social and economic opportunities for women and embodying the patterns of class, gender, race and ethnic inequalities within national contexts and across borders.²³ In this context the case of exchanges of money for sex can function as illustrative for broader issues of social justice affecting female service providers. The idea that exchanges of money for sex are more similar than dissimilar to other market exchanges also informs a middle-ground position between abolitionists and advocates, through which women who provide sexual services can be identified as potential victims of injustice and violence, but also as capable agents who negotiate and choose.²⁴ This position informs inquiries that seek to expand the analysis of commercial sex in order to recognize internal diversity between women who provide sexual services for money and the ways in which different legal regimes impact – to different degrees and in opposing directions – conflicting interests between them.²⁵

The remainder of this paper builds on three ideas from these debates on prostitution’s normative status. First, the idea that women’s pathways into prostitution are nuanced in ways that suggest that exchanges of money for sex are diverse in morally salient ways. It is plausible that some exchanges of money for sex are immoral (eg, because they are coercive or exploitative), while others are not. Second, the features that inform the shared concerns for the positions of female sexual service providers suggest that exchanges of money for sex are special, even in those instances in which they are not immoral (eg, because commercial sexual activity is stigmatized, and women and men are overrepresented on the supply and demand side, respectively). Third, in spite of the fundamentally different viewpoints that the various normative explorations of prostitution yield, one can discern among them a shared concern for the ways in which exchanges of money for sex and their legal treatment impact those who are socially and economically vulnerable on the supply side of the market. Whether the concern arises from ideas of intrinsic corruption or alienation, or from harm and stigmatization, those who seek to justify (diverging) legal treatments of

²² Nussbaum, n 20 above, 297.

²³ See Kotiswaran, n 8 above; B.G. Brents, C.A. Jackson and K. Hausbeck, *The State of Sex: Tourism, Sex and Sin in the New American Heartland* (New York: Routledge Press, 2010) chapter 6–7.

²⁴ Halley, Kotiswaran, Shamir and Thomas, see n 3 above, 409–411.

²⁵ See notably the work of Kotiswaran, n 8 above.

contested exchange of money for sex, do so in reference to the law's purpose and ability to abate the disadvantageous positions of women, generally, and of those who provide sexual services, specifically.²⁶ However, social justice concerns regarding prostitution are in tension with European contract law's justifications for the legal protections for male clients/consumers vis-à-vis female service providers. The multi-layered legal regime applicable to exchanges of money for sex on the EU internal market may in fact exacerbate rather than alleviate the social and economic vulnerabilities of women who provide sexual services. This aggravation follows from the possibility that 1) some exchanges of money for sex are not immoral, and 2) these exchanges may still be affected by special concerns for the positions of female sexual service providers. In order to offer a preliminary illustration, the remainder of this paper focuses on a particular case of voluntary exchange of money for sex, engaged by women who offer sexual services under conditions of relative independence compared to other contexts and forms in which exchanges of money for sex may occur.

III An EU multi-layered legal regime: moral limits and consumer protection

In the context of European integration, divergences between different national regimes of general contract law, have long been perceived, presumed, and presented by the European Commission as an obstacle to the functioning of the internal market. However, as the actualization of a comprehensive Europeanization of general contract law failed,²⁷ transactions on the internal market remain to be governed by rules of contract law that originate from a structure of *multi-level*

²⁶ While the dominant focus is on criminal law, see Kotiswaran, n 8 above, this paper explores the potentially disadvantageous impact of contract law regimes in the EU for women who provide sexual services.

²⁷ The first initiatives took a comprehensive form in the shape of a *European Civil Code (ECC)*, see for instance M.W. Hesselink, 'The Politics of a European Civil Code' (2004) 10 *European Law Journal* 675–697 and L. Miller, *The Emergence of EU Contract Law. Exploring Europeanization* (Oxford: Oxford University Press, 2011), while the latest initiative proposed a regulation for an optional regime of contract law applicable to cross-border B2B and B2C contracts for the sale of goods, the supply of digital content and for the provision of related services, see art 3 and 4 *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final. This proposal is now subject to modification 'in order to fully unleash the potential of e-commerce in the Digital Single Market'. See: http://ec.europa.eu/atwork/pdf/cwp_2015_withdrawals_en.pdf (last visited: 20 February 2015).

law making that includes rules of both national and European origin.²⁸ Within this structure, there is no promise of a resolution by an ultimate authority in the event that the different objectives of law-making institutions conflict or possibly create undesirable outcomes.

1 Contract law-based moral limits of the internal market

On the subject of the legal consequences of morally contested exchanges, such as exchanges of money for sex, the Member States have always remained the competent law-making authority. In particular, whether an exchange (either on the basis of its content, the parties motivations or its implications) lacks contractual recognition for reasons of immorality depends on the rules of national contract law. On the basis of their national private laws, all Member States in the European Union refuse the recognition and enforcement of certain exchanges deemed contrary to society's fundamental values. Under such rules of contractual immorality, social justice aims may be pursued, as they allow the refusal of state support for the realization of exchanges that have detrimental impact on the parties, others or society as a whole.²⁹ However, between Member States, divergences exist regarding the exchanges that are identified as 'immoral'. Due to the multi-level character of Europe's legal structure it is possible that certain exchanges that are blocked from the market for moral reasons by some Member States – but not by others – are permissible on the European internal market. Namely, the European Union assumes no legal competence for creating a legal basis for blocking exchange for reasons of morality on the internal market. In fact, the European Union refers these matters to the Member States.³⁰ Thus, the moral limits of the internal market that follow from general contract law are drawn at the national level and are plural and diverging.

28 C. Joerges, 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective' (1997) 3 *European Law Journal* 378–406; C. Joerges, 'European challenges to private law: on false dichotomies, true conflicts and the need for a constitutional perspective' (1998) 18 *Legal Studies* 146–166.

29 See for instance L.K.L. Tjon Soei Len, *The Effects of Contracts Beyond Frontiers. A Capabilities Perspective on Externalities and Contract Law in Europe* (Doctoral Thesis, Amsterdam 2013).

30 See for instance the proposal for the CESL, which stated that it does not deal with 'topics that are either very important for national laws or less relevant for cross-border contracts – such as rules on legal capacity, illegality/immorality', see European Commission, *Communication on: A Common European Sales Law to facilitate cross-border transactions in the single market*, COM (2011) 636 final, 8 and *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final, 19–20, n 27.

2 EU legal protection for internal market consumers

The approach to maintaining the existing divergences regarding the contractually defined moral limits of the internal market, contrasts with the general approach taken with regard to EU protection for internal market consumers. Many changes in the area of contract law in Europe have taken place through the enactment of Union Directives and Regulations in the area of consumer law, which have aimed, generally, at the creation of a uniform minimum level of consumer protection on the EU's internal market.³¹ In order to create uniformity and achieve the desirable level of protection, consumer protection often takes the form of mandatory and uniform rules that offer all those who fall under the definition of a 'consumer' a similar degree of safeguards against their transactional counter-parties. In the context of EU market integration, the establishment of a high level of consumer protection is justified in light of the economic importance of consumption for the internal market, that is, in its contribution to market efficiency.³² The image of the consumer that fits this framework of market efficiency is the idea of the average consumer as 'reasonably well-informed and reasonably observant and circumspect'.³³ The contemporary market efficiency-justification for consumer protection, contrasts with the broader '*genesis of consumer law [which] lies in the idea of protection*' itself.³⁴ The original idea behind consumer protection law engaged the image of consumers as representative of a category of 'weaker' contracting parties, in need of protection against more powerful transacting-parties. On the basis of that characterization of vulnerability, 'the consumer' has been an archetype example to illustrate social justice

31 A latest example of European legislation in this area is the Consumer Rights Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC (Unfair Terms) and Directive 1999/44/EC (Consumer Sales) of the European Parliament and of the Council and repealing Council Directive 85/577/EEC (Doorstep Selling) and Directive 97/7/EC (Distance Selling) of the European Parliament and of the Council. See: H.-W. Micklitz, J. Stuyck and E. Terryn (eds), *Cases, Materials and Text on Consumer Law* (Oxford: Hart Publishing, 2010) 165–166.

32 See for instance its justification in the European Commission, *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final, 20.

33 See case 210/96 *Gut Springenheide GmbH, Rudolf Tusky vOberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung* [1998] ECR I-4657 (CJEU), para 31–32; H.-W. Micklitz, 'Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought Provoking Impulse' 32 *Yearbook of European Law* (2013) 266–367, 271 and 292–293.

34 Micklitz, see n 33 above, 270.

considerations in private law.³⁵ The original image of the vulnerable consumer, ie as a weaker party in need of protection, now coexists in European law with that of the average consumer; both justify protective rules.³⁶

3 Issues of social justice

At first sight, there seems to be no conflict between the plurality of moral limits of the internal market in national contract laws and the EU's approach to consumer protection. In fact, both can be properly regarded as legal mechanisms through which social justice aims can be, and are, pursued in European contract law. Yet, tensions may arise in the simultaneous applicability of the national general rules of contract law – including national standards of contractual morality – and specific consumer protection rules that have originated on the European level. This is particularly true with regard to exchanges that are morally contested due to concerns for the vulnerabilities of individuals who operate on the supply side of the market, eg, exchanges of money for sex. In these cases, the justification of consumer protection rules goes against intuitions about whom the law should protect (see section II.3). Moreover, the pursuit of consumer protection on the European level risks exacerbating social justice concerns that can arise in relation to the application of national contract law to exchanges of money for sex. First, the national demarcations of the moral limits of the market may impose severe burdens on women who provide sexual services, particularly where exchanges of money for sex are categorically regarded as immoral and unenforceable under rules of contract law. Second, where national rules of contract law are applicable, concerns may arise regarding the balance of rights and obligations between contracting parties, ie, male clients vis-à-vis female service providers. The following section illustrates these issues on the national level, before detailing the aggravating implications of European consumer protection rules in the case of exchanges of money for sex.

35 Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto' 10 *European Law Journal* (2004) 661; M.W. Hesselink, *CFR & Social Justice* (Munich: Sellier European Law Publishers, 2008) chapter 5.

36 There have been recent calls for rethinking and reforming consumer policy and law on the basis of a deeper understanding of the heterogeneity of vulnerabilities among consumers see eg, Micklitz, n 33 above and the 2013 'Opinion on consumers and vulnerability' by the European Consumer Consultative Group, see http://ec.europa.eu/consumers/archive/empowerment/docs/eccg_opinion_consumers_vulnerability_022013_en.pdf (last visited: 20 February 2015).

IV European contract law: exacerbating social and economic vulnerability?

As outlined in section II.2 of this paper, the criminal legal treatment of exchanges of money for sex varies significantly across the EU Member States. While some legal regimes criminalize consumers of sex under the Nordic model, other Member States merely criminalize associated activities (such as soliciting, pimping or procuring), while yet others have decriminalized voluntary prostitution and associated activities entirely, notably by lifting bans on brothels. The national contract laws of the Member States are similarly divergent in their treatment of exchanges of money for sex.

1 Immoral and unenforceable

In some Member States exchanges of money for sex are excluded from contractual recognition – lacking the status of legally binding contracts. The unenforceability of such exchanges follows from rules of contract law in a setting where prostitution (or its consumption and/or associated activities) is subject to criminalization³⁷ or where independent norms of contractual immorality preclude enforcement. In such cases, transactions that serve to advance prostitution may similarly lack the support of the power of the state for their enforcement.³⁸ The exclusion of exchanges of money for sex from contractual recognition and enforcement raises concerns regarding the potential disadvantageous implications for women who provide sexual services in two ways. First, the exclusion from contractual enforcement for reasons of immorality or illegality disadvantages women by reinforcing their stigmatization. By categorizing exchanges of money for sex as invalid contracts for reasons of immorality, contract law reflects the idea that women's activities in voluntarily providing sexual services for money are objectionable and worthy of (moral) disapproval. In doing so, contract law denies female sexual service providers a particular form of valuable recognition, i.e. contractual recog-

³⁷ Such is likely the case under in Sweden and Ireland, see A.H. Persson and T. Ingvarsson, 'Sweden' and A. McCann, 'Ireland', in A. Colombi Ciacchi, C. Mak and Z. Mansoor (eds), *Immoral Contracts in Europe* (forthcoming).

³⁸ See for instance in the English case *Pearce v Brooks*, 1866 LR 1 Exch 213, where the court held that a contract for hire of a carriage by Mr Pearce to Ms Brooks served an immoral purpose and was therefore unenforceable, as Ms Brooks used it in the exercise of her profession, ie prostitution, and Mr Pearce was aware of this fact (although he had denied having such knowledge).

dition, denying them the status of contracting parties who are capable of making legally binding agreements. Moreover, to the extent that the exclusion is based on a moralistic public standard (eg, one informed by ideas about ‘good’ female sexuality and ‘good’ sex) the exclusion from public enforcement also qualifies as disrespectful towards members of societies who hold conflicting, yet reasonable conceptions of the good, which is problematic in a liberal society. Second, in these cases the denial of contractual recognition excludes women from the benefits that state support for the enforcement of contractual arrangements would otherwise offer. The degree to which this affects contracting parties is an empirical question, and may depend largely on their awareness of the law. Under a regime of criminalization, female service providers are more vulnerable to male clients who are unwilling to pay, as clients are likely to be aware that the service providers cannot rely on, otherwise available, enforcement mechanisms.³⁹

2 Enforceable rights and duties under rules of national contract law

To the extent that rules of contract law are applicable to market exchanges for sexual services, contractual recognition would allow women, in principle, to rely on the power of the state for the realization of their agreements. However, in Member States where prostitution is decriminalized it is not entirely evident what the enforceable rights and duties of the contracting parties are.⁴⁰ In principle, exchanges of money for sex – even though not illegal – may still be regarded as contrary to legal standards of contractual morality (see above). However, in the absence of contractual immorality, the exchange of money for sex constitutes a legally binding, contractual relationship, giving way to the question of what

39 The contract law implications are independent of the ways in which criminalization disadvantages sexual service providers. In contexts where, for instance, consumption is subject to criminalization the risk of prosecution or fines pushes the activities into less visible settings and unsafe conditions that increase women’s vulnerability to violence. In such settings women cannot rely on the support that could otherwise be available in a context in which people are aware of the activities and knowledgeable about potential courses of action in the case of (escalating) disputes. Moreover, criminalization negatively impacts the ability of women to bargain and assess the risks involved in a particular exchange, as information may not be as readily available to them (due to increased risks of reputation damage) or the negotiation process may be under time pressure (because consumers want to decrease the chance of getting caught).

40 I will illustrate some implications of the application of rules of specific Dutch contract law, which represents one example of a context in which prostitution is decriminalized (ie, voluntary exchanges of money for sex, as well as associated activities are beyond the realm of criminal law).

enforceable rights and duties follow from that relationship and the consequences of breach.⁴¹ In order to accurately identify the legal relationship, the degree of independence under which a woman provides sexual services is likely to be an important factor. For instance, under rules of Dutch contract law, the applicable rules will depend on whether the exchange occurs in the context of an employment relationship (eg in the context of a brothel) or in the form of a service.⁴² For the latter, a certain degree of independence that shapes the professional activities of the women who provide sexual services is required, while for the former she is presumed to work for pay under the direction of a third party, ie, the employer.⁴³ To the extent that a woman agrees to provide sexual services to a male client independently from the involvement of a third party, the rules regarding service contracts would be applicable.

The legal framework regarding contracts for services offers women enforceable claims in the event that clients are unwilling to pay. Conversely, female sexual services providers are never at risk of court enforcement of specific performance, such performance would be incompatible with rules of criminal law that counter all forms of coercion and sexual exploitation under human trafficking frameworks.⁴⁴ In principle, the services framework thus improves the position of women who provide sexual services compared to the situation in which they are excluded from contractual recognition. However, the legal framework for services brings its own distinct set of worries regarding the balance of the rights and obligations between contracting parties.

The character of a service relationship shapes the interpretation of the rights and duties that parties have on the basis of such contracts. A fundamental

⁴¹ See for instance in the Dutch context G.J. Segers and J. Pot, 'Het normaliseren van prostitutiewerk', *NJB* 2013, 1777; and Kantonrechter Breda, *Prg* 1992, 3684.

⁴² L.K.L. Tjon Soei Len and C. Mak, 'The Netherlands', in Colombi Ciacchi, Mak and Mansoor (eds), n 37 above.

⁴³ In practice, it may be difficult to determine to what degree relationships of dependence exist and what factual structure corresponds to the existing legal relationship. See K. Boonstra, R. Zuidema and T. Ridder, 'De (on)mogelijke rechtspositie van de prostituee', *SR* 2007/2.

⁴⁴ Notwithstanding the steadfast progressive image the Netherlands regarding its liberal stances towards many morally contested issues, the Dutch legislator has struggled with its legal treatment of prostitution. Legal history shows the rise and fall of criminalization of prostitution through the prohibition of brothels in the Dutch criminal code. See: J.J. Wiarda, 'De Wetgeving Inzake de Opheffing van het Algemeen Bordeelverbod', 49 *Ars Aequi* (2000) 653–658. While the ban on brothels was lifted in 2000, the legislator has simultaneously set more severe punishments for all forms of coercion, through the framework of human trafficking, see Dutch Criminal Code art 273f. On 1 October 2002 the prohibition of exploitation of sex workers was expanded by also criminalizing indirect involvement in the exploitation of sex workers, and on 1 July 2009 and 1 April 2013 the punishments for human trafficking have increased.

characteristic of a service relationship is the priority of the client's interest; the service provider ought to treat her own interests as secondary to that of her client within the context of their relationship.⁴⁵ The legal form of a sexual service contract thus patterns the primacy of the male client interest in an experience that satisfies his specific desires. Under Dutch contract law, clients have the right to direct and provide instructions to the female service provider that she, in principle, must follow.⁴⁶ The independence and autonomy of the women who provide sexual services are located in their ability to determine and perform the specific activities that are required for the fulfilment of that desire. As a service provider, she has a duty of care to perform the sexual services in a manner that conforms to the reasonable expectations that one may have of sexual service providers.⁴⁷ As such, the legal framework on services embeds and reinforces elements of female prostitution that are identified by some as objectionable, eg, because damaging to the equal social standing of women. In particular, the male client's right to direct and instruct in the context of sexual services advances the male client's authority and reflects the subordinate position of the female service provider to his sexual desire.⁴⁸

Other distinct worries arise in relation to the specific (balance of) rights and duties between contracting parties, such as the male client's right to terminate the contract at any time,⁴⁹ while female service providers, in principle, would only have the right to terminate on the basis of significant reasons.⁵⁰ A female service provider may terminate, for instance, if the client gives her irresponsible instructions that require the performance of activities that are too risky. However, it is unclear whether a mere change of heart regarding the provision of sexual services itself would suffice as a justification for termination. While contracting parties can derogate from the rules applicable to service contracts, the right of termination for male consumers of sexual services without liability for damages is mandatory.⁵¹

45 Asser/Tjong Tjin Tai 7-IV 2014/99.

46 Dutch Civil Code Book 7 art 402. A similar rule is articulated in European instruments of contract law, see for instance DCFR IV.C.-2:107.

47 Dutch Civil Code Book 7 art 401, also DCFR IV.C.-2:105.

48 Those who oppose female prostitution on these grounds may oppose to the legal recognition of such a thing as 'sexual services' altogether.

49 Dutch Civil Code Book 7 art 408 sections 1 and 3. Depending on the reason for termination, the client would have a duty to pay (a reasonable part of) the price, see art 411 section 1 and 2. Parties cannot derogate from this rule to the disadvantage of the client. Also DCFR IV.C.-2:111.

50 Dutch Civil Code Book 7 art 408 sec 2.

51 Dutch Civil Code Book 7 art 408 1 and 3 and art 413 sec 1 and 2.

3 Protecting consumers of adult erotic vacations: a case illustration

Provided that exchanges of money for sex are regarded as valid contracts in at least some of the EU Member States, a significant question arises. What potential disadvantageous implications follow from the multi-level legal structure that governs the EU's internal market, in particular, as it pertains to the applicability of mandatory consumer protection? This paper does not intend to provide a comprehensive picture; much will depend on the context in which the exchange of money for sex occurs. With the aim of illustrating some potential disadvantageous implications of EU consumer protection law, this section will focus on the case of relatively independent female service providers when they provide adult erotic vacations.

The Internet websites through which one can book 'adult vacations' are abundant. Such websites generally offer a variety of travel packages, ranging from pre-established combinations of travel services (eg, Fantasy Travel Packages that include a 'girlfriend experience' (GFE)) to those that are entirely customizable on the basis of a traveller's desire. Besides the provision of sexual services, these packages also include travel services such as transportation, accommodation, and/or excursions. While third party retailers can be involved in selling these packages, women may also fulfil the role of organizer themselves, independently running their own business by offering package travels to clients. In any case, such adult erotic vacations constitute a travel package under the European legal framework that aims to offer a high level of consumer protection when they arrange for their holidays on the Internet.

From the outset, the European Union has enacted consumer protection law in sector specific areas such as package travel.⁵² Recently, the European Commission proposed the modernization of its current framework that aims to '*ensure that, as the most vulnerable party to the contract (...) consumers enjoy a general set of rights which limit problems and guarantee acceptable service throughout the EU.*'⁵³ In order to enhance the internal market, the proposal introduces several additional mandatory rules of consumer protection applicable to travel packages compared to the Package Travel Directive 90/314/EEC. For instance, the proposal grants travellers cancellation rights, such that the '*traveller may terminate the contract before the start of the package*' paying reasonable compensation for the costs that

52 See the EC Directive 90/314/EEC on package travel, package holidays and package tours.

53 Commission, *Communication on: Bringing the EU Package Travel Rules into the Digital Age*, COM (2013) 513 final.

the organiser incurs.⁵⁴ Other examples of consumer protective measures contained in the proposal maintain the previously granted right of the traveller ‘to transfer the contract to a person who satisfies all the conditions applicable to that contract’,⁵⁵ and the requirement that the organizer should remedy a lack of conformity (unless disproportionate) if ‘the services are not performed in accordance with the contract’, or make alternative arrangements at no extra cost for the continuation of the package if ‘a significant proportion of the services cannot be provided as agreed in the contract’.⁵⁶

While the worries for the position of female sexual service providers that arise in the context of national contract laws on services partly overlap with those associated with the European legal framework, contracting parties may derogate from the former to the advantage of service providers, while the latter enacts rules of a mandatory nature. The set of rights that aims to protect the consumer-traveller as the most vulnerable party to the contract exacerbates the disadvantage for women who provide sexual services in the context of travel packages by imposing a particular balance of the rights and duties between contracting parties. For instance, where male consumer-travellers have the right to terminate the contract without giving reasons – albeit while paying reasonable compensation – female travel organizers-sexual service providers do not have an equivalent right and cannot, in principle, terminate the contract unless there are exceptional circumstances.⁵⁷ Thus while the Directive reflects the right of male consumer-travellers to change their minds at will about travelling – and without providing reasons – it does not reflect a similar right to women about providing sexual services in this context. The balance of the rights of termination between the male consumer-traveller and the female sexual service provider imposes a higher burden on the service provider’s change of heart about having sex and does not, for instance, provide her with the right to change her mind without having to provide reasons.⁵⁸ While a female service provider of course cannot be forced to

54 *Proposal for a Directive on Package Travel and Assisted Arrangements, amending Regulation (EC) No 2006/2004, Directive 2011/83/EU and repealing Council Directive 90/314/EEC*, COM (2013) 512 final, art 10 sec 1.

55 *Proposal for a Directive on Package Travel*, see n 47 above, art 7; *Travel Package Directive* art 4 sec 3.

56 *Proposal for a Directive on Package Travel*, see n 47 above, art 11; *Travel Package Directive* art 4 sec 7, art 5.

57 *Travel Package Directive* art 4 sec 5; implemented in Dutch law in Book 7 art 504 sec 1 Civil Code. See Asser/Tjong Tjin Tai 7-IV 2014/503.

58 For an interesting perspective on the moral significance of sexual promises see H. Liberto, ‘Promising Sex’, 2015: <http://politicalphilosopher.net/2015/03/14/featured-philosopher-hallie-liberto/> (last visited: 3 April 2015).

perform sexual services, she would have to provide compensation for the services that she is unable to provide or fails to (properly) perform, which includes compensation for non-economic loss (eg the loss of pleasure).⁵⁹ The financial burdens that fall on female service providers who have a change of heart (if resulting in a failure of proper performance) increase worries regarding consent. The abilities of female services providers to refuse to engage in sexual activities are negatively impacted by the liabilities that result from protective rights for male consumer-travellers.

Other worries arise regarding the right of male consumer-travellers to transfer their travel packages to other persons. The Directive qualifies the right to transfer the package only by two conditions: 1) the consumer-traveller must give reasonable notice if he is prevented from taking part, and 2) the transferee consumer-traveller must satisfy all the conditions applicable to the contract.⁶⁰ The applicable conditions can generally not be so restrictive as to require that the traveller must be the person who entered the contract initially; such conditions would negate the right to transfer. Usually the applicable conditions describe a target group (eg, of a certain age, gender, physical ability) allowing the transfer of the travel package to a range of people who are able and willing to participate in the activities included in the package.⁶¹ The right of male consumer-travellers to transfer the travel-sexual services packages to another person in a target group significantly diverges from deeply held ideas about sexual autonomy. In particular, the right to transfer is granted independent of consent to the transfer by the organizer – in this context independent of the consent of the female service provider. While female service providers can of course refuse to provide sexual services, the implications of non-performance represent a burden on their abilities to truly choose to whom they would want to provide sexual services to.

In the attempt to re-balance the power disparity between consumers vis-à-vis service providers on the internal market, mandatory consumer protection rules risk deepening and exacerbating concerns of social justice, as expressed in debates on the normative status of gendered manifestations of exchanges of money for sex. It is of course clear that neither the national rules of contract law nor the Directive have been proposed and enacted with the idea of (gendered

⁵⁹ *Travel Package Directive* art 4 sec 7, art 5 respectively. A loss of pleasure for the consumer-traveller entitles him to a maximum amount of the total travel package under Dutch law; see Book 7 art 510 and 511 Civil Code.

⁶⁰ *Travel Package Directive* art 4 sec 3; implemented in Dutch law in Book 7 art 506 Civil Code, which offers the right to transfer even if the consumer-traveller is not prevented from travel. See Asser/Tjong Tjin Tai 7-IV 2014/514.

⁶¹ Asser/Tjong Tjin Tai 7-IV 2014/514.

manifestations of) exchanges of money for sex or adult erotic vacations in mind. The unintended implications of the current rules of European contract law raise worries regarding the social and economic vulnerabilities of women who are active on the supply side of the market, particularly in the following ways: by reinforcing stigma and gender inequality, by excluding women from the benefits otherwise offered by state support for the enforcement of contractual arrangements, and by imposing burdens on the abilities of female sexual service providers to refuse performance and truly choose the clients to whom they want to provide sexual services. The analysis in this paper shows that these concerns arise both when exchanges of money for sex are placed beyond the moral limits of contract law and when rules of European contract law are deemed applicable. Thus, this paper does not lead us to ask whether exchanges of money for sex should be recognized as contracts under rules of European contract law, but rather how rules of European contract law can be re-envisioned to take into account the special character of the gendered manifestation of sexual services and the positions of female sexual service providers. In other words, this paper contains arguments both *against* categorically deeming all exchanges of money for sex immoral and unenforceable, and *for* the formulation of specific rules on sexual service contracts. In particular, this paper finds that mandatory consumer protection rules are ill fitting in the case of sexual services, suggesting that the latter should be excluded from the scope of such rules.

V Conclusion

This paper offers a preliminary illustration of the disadvantageous implications of rules of European contract law for women who provide sexual services on the EU internal market. It shows how deep concerns of social justice (ie, for individuals who are socially and economically vulnerable) arise in the tensions between market exchanges involving sexual services and European contract law and are exacerbated through the application of mandatory consumer protection rules. The illustration of adult erotic vacations does not provide, nor does it intend to provide, a comprehensive picture of the disadvantages that the EU legal framework may entail for women who provide sexual services. It is important that those implications be examined in a more nuanced and detailed way, such as to distinguish between different contexts and forms in which exchanges of money for sex occur, and to provide a response to the question of how European contract law ought to treat exchanges of money for sex. Disadvantages and vulnerabilities are not homogenous among women who offer sexual services for money, but are internally diverse, across categories such as class, race, ethnicity, and nationality.

Thus, the legal framework applicable to their market activities has diverging implications that are not easily discerned. The question of how the rules on sexual service contracts ought to balance the rights and duties between contracting parties requires further examination of contract law's implications for female sexual service providers in various contexts. More work must be done to examine the ways in which EU contract law and the dominant narrative of consumer vulnerability may impact those on the supply side of the market, ie, those who are deserving of protection on the basis of their social and economic vulnerabilities.