

Proposals for a better protection of « digital » consumers

Hervé Jacquemin
UNamur (CRIDS), UCL and ICHEC
Member of the Brussels Bar

crids

CENTRE DE RECHERCHE INFORMATION, DROIT ET SOCIÉTÉ

www.unamur.be



- **Legal frameworks at the EU Level**

- EU sector specific regulation (electronic communications, information society services, audiovisual media services, etc.)
- EU horizontal regulation (unfair contract terms, unfair commercial practices, consumer rights, etc.)

→ Assessment must be made regarding :

- Scope of regulation
- Protection measures
 - Material protection measures
 - Procedural protection measures
- Latitude of the Member States (maximal/minimal harmonisation directive)

Agenda

1. Who is the « digital consumer »?
2. Strengths and weaknesses of the legal frameworks ?
3. Max or Min harmonisation directives ?

1. Who is the « digital consumer »?

- **Consumer?**
 - « any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession » (art. 2, 1°, CRD)
 - « any natural person who uses or requests a publicly available electronic communications service for purposes which are outside his or her trade, business or profession » (art. 2, i, FD)
- **Ratio of the legal frameworks protecting consumers :**
 - Consumer is considered as a weaker contract party (< lack of information and position of parties in the contract, with possible unfairness from trader)
 - + internal market and fair relationship between traders (comp. Art. 8 FD)

1. Who is the « digital consumer »?

- “Digital” consumer?

- Not defined by legal framework
- Specific weakness

< means used to conclude contract (e.g. through internet website)

- cf. DIR 2000/31/EC on electronic commerce
- cf. DIR 2011/83/EU on consumer rights (distance contracts)

< object of the agreement (e.g. digital content, ECS, AVMS)

- cf. Prop DIR on digital contents ; DIR 2011/83/UE on consumer rights (functionality and interoperability of digital content)
- cf. US DIR (quality, switching, etc.)

2. Strengths and weaknesses of legal frameworks

- **Good points :**
 - If not excluded from scope, application of complementary protection measures (e.g. if violation of information duties in ECS = unfair commercial practices → application of the civil penalty specific to UCP)
 - If minimal harmonisation directive, Member States could implement additional protection measures (taking into account protection measures prescribed in other contexts – e.g. portability)

2. Strengths and weaknesses of legal frameworks

- **Main issues**
 - Complex legal framework
 - Terminology not consistent
 - « online sales or service contracts » in Reg. 524/2013 : not consistent with « information society services » (DIR 2000/31/EC) or « distance contracts » (DIR 2011/83/EU)
 - « Digital content » : articulation with goods, services, sale contract, service contract, etc.
 - Circular cross references :
 - Cf. Art. 1 (4) DIR US : « *The provisions of this Directive concerning end-users' rights shall apply without prejudice to Community rules on consumer protection, in particular Directive-s 93/13/EEC and 97/7/EC, and national rules in conformity with Community law* ».
 - Whereas 11 of CRD : « *this Directive should be without prejudice to Union provisions relating to specific sectors, such as [...] electronic communications* »

2. Strengths and weaknesses of legal frameworks

- **Main issues**
 - Redundancy among protection measures
 - Various information duties are similar in other directives :
 - comp. information duties in DIR US, DIR 2011/83/EU, DIR 2000/31, DIR 2006/123/EC, etc.
 - Is it really an issue?

2. Strengths and weaknesses of legal frameworks

- Main issues

- Possible discriminations between digital and non-digital consumers :
 - Directive 2011/83/EU on consumer rights : specific provisions for distance contracts concluded by electronic means or trading websites (cf. art. 8, §§ 2-3). Why is it limited to « electronic means »?
 - Regulation 524/2013 on Consumer ODR : only applicable to out-of-court resolution of disputes concerning online sales or service contracts. Why is it limited to online contracts?
 - Comp. DIR 1999/44/EC and its transposition within national legislation and Prop of Dir. of 9 December 2015 : higher level of protection to the benefit of consumers in case of distance contracts (6 months / 2 years)

2. Strengths and weaknesses of legal frameworks

- **Main issues**
 - Possible discriminations among digital consumers :
 - Prop. Directive on digital content
 - Conformity of the digital content with the contract
 - Remedies for the lack of conformity
 - Termination of the contract
 - Etc.
 - Not applicable to electronic communication services (as defined in Framework Directive)
 - What about OTT, not qualified as ECS but that potentially competes with ECSs?

2. Strengths and weaknesses of legal frameworks

- Proposals

Horizontal	Sector specific	TO DO
V	V	Check whether protection measure in sector specific could be deleted
X	V	Check whether protection measure in sector specific could be moved to horizontal (with broad scope)
V	X	Check whether additional protection is needed in sector specific

2. Strengths and weaknesses of legal frameworks

- **Proposals**
 - Code of consumer rights at the EU level
 - One set of definitions
 - Consistent scope
 - Provisions applicable to both digital and non-digital consumers
 - Provisions only applicable to digital consumers (when necessary, taking into account the specific weakness of the digital consumer)
 - Consistent set of penalties
 - Main issues addressed : consistent terminology / no redundancy / no discrimination / no lack of protection

3. Max or Minimal harmonisation directive?

- **Initial observation**
 - Oldest directives are minimal harmonisation directives :
 - Directive 93/13/EEC on unfair contract terms
 - Directive 1999/44/EC on sales of consumer goods (and guarantees)
 - Directive 2000/31/EC on electronic commerce
 - Most latest directives are maximum harmonisation directives :
 - Directive 2005/29/EC on unfair commercial practices
 - Directive 2011/83/EU on consumer rights
 - Both proposals for directives dated 9 December 2015

3. Max or Minimal harmonisation directive?

- **Issues**
 - Objectives of maximum harmonisation directives achieved ?
 - Higher level of protection to the benefit of consumer and internal market.
 - However :
 - In some Member States, level of protection could finally be lower : e.g. in Belgium, legislation applicable to promotional practices (sales, sales at a loss, etc.)
 - Notwithstanding similar legal provision, enforcement could be different within MS (< historical practices ; MS remain competent for penalties ; national case law ; etc.)

3. Max or Minimal harmonisation directive?

- **Proposals**
 - Efficiency assessment of maximum harmonisation directives must be made
 - If max harmonisation directive, civil penalties should also be included
 - Consumer protection v. internal market?
 - Exceptions should remain (e.g. to protect minors)

Thank you for your attention!

Questions?

herve.jacquemin@unamur