

Preface

The entire body of European contract law is constantly changing. While many parts of consumer law were intended to be harmonised at the European level, there still remain quite a number of divergences between laws in the member states due to factors such as the minimum character of harmonisation or the legal context in which directives have to be implemented. At the time of writing Directive 2011/83/EU of the European Parliament and of the Council of 25 October has just entered into force (Consumer Rights Directive). The member states shall adopt and publish, by December 2013, the laws, regulations and administrative provisions necessary to comply with this Directive; and the provisions of the Consumer Rights Directive shall apply to contracts concluded after 13 June 2014. However, the Commission has recognised that it is not desirable to continue to adopt EU legislation in the same format; and, in this regard, the Green paper on policy options for progress towards a European contract law for consumers and businesses of 1 July 2010 probably marked a turning point at which the prospect of an optional instrument of contract law was given particular emphasis. As we already know from the work of the Expert Group, it is likely that this optional instrument will take the form of a revised DCFR.

Alongside the progress of the consumer *acquis*, the new technologies are transforming the tourism industry very rapidly by allowing the services to be sold at a distance. This area has been regulated in a highly fragmented way over the last 2 decades, i.e. the Distance Selling Directive, the E-Commerce Directive, the Package Travel Directive, Air Passenger's Rights Regulation (EC) No. 261/2004, among others, and this situation has brought about not only problems inherent to the harmonisation process of EU consumer law but also the enigmatic exclusion of tourism services from the scope of application of the distance selling rules. As is well known, Article 3 (2), second indent, of the Distance Selling Directive stated that Articles 4, 5, 6 and 7(1) were not applicable to contracts for the provision of accommodation, transport, catering or leisure services, where the supplier undertakes, when the contract is concluded, to provide these services on a specific date or within a specific period. The application of a particular right of withdrawal to contracts for the provision of these services has traditionally been considered

inappropriate. More recently, Article 3(3), points (g) and (h), of the Consumer Rights Directive states that this Directive shall not apply to contracts which fall within the scope of the Package Travel Directive or the new Timeshare Directive; a wide exclusion of transport from the scope of distance selling regulation is provided in Article 3(3), point (k); and according to Article 16, point (l), of the Consumer Rights Directive, the separation between distance selling regulation and contracts for the provision of accommodation, transport, catering or leisure services will remain in the future, but only with respect to the right of withdrawal. This means that some additional measures provided by regulation to protect the consumer in distance contracts are not applicable.

In addition to presenting the current separation between distance selling in EU law and tourism from a critical perspective, Chap. 1 aims at placing the subject in the context of the EU consumer *acquis*. Highly topical questions such as the fragmented character of the EU legislation, the new harmonisation resulting from the Consumer Rights Directive and the possible role of the DCFR as an optional instrument to be used in the field are spelt out for the reader. We consider that there is a need to bring travel law closer to contract law and to take a European approach beyond the current and ever more complicated jungle of EC Law and national laws.

After introducing the subject, information requirements is the first issue to be analysed with a view to exploring the impact of excluding distance selling protection in tourism (Chap. 2). The rationale behind EC legislation on distance selling is that the consumer is dealing with a remote trader, about whom very little may be known. So additional information requirements are provided in the Consumer Rights Directive regarding the extent, form and time for providing pre-contractual information, among other aspects, when the various means of distance communication are used, e.g. the Internet. The fact that consumers cannot inspect the goods before deciding whether to purchase them has an impact on their ability to make an informed decision. New rules on the provision of a withdrawal model form, or additional information requirements to be provided if a distance contract to be concluded by electronic means places the consumer under an obligation to pay, will mean a step forward. However, there is still much to do concerning the issue after the adoption of the directive regarding restrictions to information to be provided to the consumer, the medium used for providing the information, cases where a website should be qualified as a durable medium, or the harmonisation of remedies for non-fulfilment of information duties. Some special features of pre-contractual information requirements in tourism are examined in the book. As additional information requirements do not apply to all the contracts concluded for the provision of tourism services, some of these contracts will be kept separate from the modernising process of the consumer *acquis*.

Chapter 3 is concerned with withdrawal rules. Another additional measure provided in cases of distance selling is a particular right of withdrawal, by virtue of which the consumer is entitled to extinguish the contract within a relatively short period. The consumer does not have to give any reason for withdrawing from the contract and no liability for non-performance arises for doing so. It aims to allow the consumer time for further consideration and to obtain information.

The Consumer Rights Directive contains some rules on a particular right of withdrawal for distance and off-premises contracts (Articles 9–16). Some aspects of the right of withdrawal as provided in this regulation, however, are controversial for tourism, such as the cooling-off period, or the effects of withdrawal. For this reason whether there is room for a contractual right to withdraw is examined, i.e. a cancellation clause, to be used by the tourism industry.

Chapter 4 is devoted to the analysis of performance rules. Performance rules have also been regulated in EU law with a view to protecting the consumer when the purchase is not made face to face. Thus the consumer must be informed of the unavailability of goods or services ordered and must be able to obtain a refund of any sums paid as soon as possible and, at the latest, within 30 days. Additionally, member states can require the supplier to provide the consumer with goods or services of equivalent quality and price, if this requirement was stated prior to the conclusion of the contract. Unlike the other additional measures, performance rules remain mostly unaffected by the exclusion of tourism from the distance selling regulation. In this regard, specific performance rules for transport and package holidays are provided as well, e.g. the obligation to refund the passenger when the flight booked is cancelled as established in Air Passenger's Rights Regulation (EC) No. 261/2004 (Article 8(1), point (a), first indent in connection with Article 5(1), point (a)), or providing the consumer with a substitute package in accordance with the Package Travel Directive (Article 4(6), point (a)). This chapter makes a comparison between performance rules in the distance selling EU law with those performance rules specific for tourism. At this point, there is shown to be a need for a consumer's right to replacement—like that in sale of goods law—and additional information requirements.

Finally, some concluding remarks are made (Chap. 5). After adopting the Consumer Rights Directive, there is a need to coordinate the existing regulations. In particular, we consider that the current separation between distance selling and tourism should be fully revised. In addition, the research for this book confirmed that some of the current information requirements and withdrawal and performance rules of the consumer *acquis* are not fitting for selling tourism services at a distance. With regard to this, some proposals are made with the aim of making some of the rules more appropriate in the context of the review of the consumer *acquis* and a future optional European contract law.

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