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THE EUROPEANISATION OF CONTRACT LAW AND THE ROLE OF COMPARATIVE LAW: THE CASE OF THE DIRECTIVE ON CONSUMER RIGHTS

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THE EUROPEANISATION OF CONTRACT LAW AND THE ROLE OF COMPARATIVE LAW: THE CASE OF THE DIRECTIVE ON CONSUMER RIGHTS

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Cristina Amato♦

Abstract:

This paper shall concentrate on the revision attempts of the consumer *acquis* which are still on the European Institutions' agenda, making an effort to highlight the final goals that these attempts aim at, as well as the quality of their (prospective) rules. In particular, the Directive on Consumer Rights has redrafted and amended four directives on consumer contracts: the present paper focuses on the main contents of the Directive, with the intent of checking whether its goals and contents achieved a sustainable level of quality and harmonisation in the light of a comparative approach. The results of this enquiry are twofold: a correct use of the comparative method not only would have avoided questionable choices, but it would also have achieved a better level of harmonization without irritating MSs.

Keywords: Europeanisation; Contract Law; Comparative Law; Directive Consumer Rights.

♦ Associate Professor of Comparative Law, Università degli Studi di Brescia.

Summary*:* Part I - The Harmonisation Process: Confused paths and Goals of Community Institutions*;* 1. Introduction*;* **2.** In Defense of a 'Full Targeted Harmonisation'**; Part II - Some First Insights into Directive on Consumer Rights (25 October 2011) in Light of the comparative method*;* 1.** The Strucure of the DCR**; 2.** The Definitions of 'Consumer', 'Professional' and 'Consumer's Contracts', and Their Possible Extension**; 3.** Consumer Rights Concerning Unfair Contract Terms. The Grey and Black Lists; **4.** Sales Contracts and Associated Guarantees; **4.1.** The limitation period**; 4.2.** Time of delivery; **4.3.** Passing of risks**; A Few Brief Final Remarks.**

Part I - The Harmonisation Process: Confused paths and Goals of Community Institutions

1. Introduction

It is well known among private law scholars that several, separate official and private attempts to harmonise European Contract Law currently exist[1]. The former initiatives include EU directives, regulations, action plans, and green papers; examples of the latter include the Lando commission, the Acquis Group, and finally the Expert Group, which the Commission recently appointed to reach the goal of drafting a concise and range-restricted optional instrument (to be referred to herein as the CESL, Regulation for a Common European Sales Law)[2].

It is not possible to provide an exhaustive and coherent list of the relevant documents concerning European Contract Law, depending on whether we include or not the consumer's acquis. Most importantly, it is not clear whether the consumer acquis communautaire may be considered as the core of a European Contract Law, with the idea that such could lead to a codified European law of contract consisting of a general part/specific rules devoted to unbalanced transactions. Or - to the

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[1] For a complete account of the different projects and roles played by courts, public and academic projects in laying the groundwork of European private law, see E. HONDIUS, *Fifteen Years of European Private Law*, in *Opinio Juris in Comparatione*, 2 (2009), Paper 5; see also V. ROPPO, *Prospettive del diritto contrattuale europeo. Dal contratto del consumatore al contratto asimetrico?*, in *Corriere giuridico*, 2 (2009), 267.

[2] The *Expert Group on European Contract Law* had been appointed by the European Commission (see Decision 2010/233, 26 April 2010) in order to achieve a Proposal for a European Sales Contract 'of whatever legal form or nature'. On 11 October 2011 the European Commission has delivered the CESL (COM (2011) 635 Final), based on the 'feasibility study' issued by the Expert Group on August 19, 2011. The CESL is applicable to B2B and B2C contracts; the material scope of application covers sales contracts and service contracts associated with sales, digital contracts. See: C. CASTRONOVO, *L'utopia della codificazione europea e l'oscura realpolitik di Bruxelles. Dal DCFR alla Proposta di Regolamento di un diritto comune europeo della vendita*, in *Europa e diritto privato*, 4 (2011), 837 ff.; H. W. MICKLITZ, N. REICH, *The Commission Proposal for a "Regulation on a Common European Sales Law (CESL)" - Too Broad or Not Broad Enough?*, in *EUI Working Papers*, European University Press, 2012; W.M.HESSELINK, *How to Opt Into The Common European Sales Law? Brief Comments on the Commission's Proposal for A Regulation*, in *Centre for the Study of European Contract Law, Working Paper Series n. 2011-15*, Electronic copy available at: http://ssrn.com/abstract=1950107; ID., *The Case for a Common European Sales Law in an Age of Raising Nationalism*, Centre for the Study of European Contract Law, *Working Paper Series n. 2012.01,* Electronic copy available at: http://ssrn.com/abstract=1998174; G. LOW, *A Numbers Game- The Legal Basis for An Optional Istrument in European Contract Law*, Electronic copy available at: http://ssrn.com/abstract=1991070.

contrary - whether it is more convenient to ignore the bulk of the acquis (no matter whether dealing with B2B or B2C contracts) located in official documents, and consider them as a separate set of rules, and make way for private documents dealing with general contract law/special contracts only, as happened in the Draft on the Common Frame of Reference (from now on: DCFR), published in 2008 and again set aside in favour of a shorter and range-restricted optional instrument, the CESL)[3].

Keeping this chaotic background in mind[4], the present paper shall concentrate on the revision attempts of the consumer acquis which are still on the European Institutions' agenda, making an effort to highlight the final goals that these attempts aim at, as well as the quality of their rules. Such shall be done using a comparative method of analysis, that is balancing the knowledge of the national legal tradition with the need for a common EU legal order[5].

In this perspective, it is difficult to understand why the revision's efforts have again been fragmented, instead of aiming for a single, coherent re-statement of contract law, as initially planned by the European Commission in its 2003 Action Plan[6]. It should be remembered that this important foundational document[7] contains the original idea of a common frame of reference, which became the abovementioned DCFR 2008, having the ambitious goal of becoming the optional instrument mentioned in the Action Plan. By the same token, it is again in the 2003 Action Plan that the Commission announced the launch of a consolidation or 'recasting'[8] of existing instruments[9], which was followed by the Green Paper in 2006[10].

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[3] See recently: P. BRULEZ, *From the Academic DCFR to a Political CFR – Conference on European Contract Law*, Trier, 18-19 March 2010, in *European Revue of Private* Law, 5 (2010), 1041 ff.

[4] In the different view of a common lawyer, the inconsistency and incoherence of EC legislation does not raise the same reactions as for civil lawyers. Due to the absence of a code, the production of a fragmented and taylor-made legislation fits within the traditional view of isolated irruptions into private law: S. WHITTAKER, *A Framework of Principle for European Contract Law?* , in *Law Quarterly Review*, 125 (2009), 625.

[5] M.P. MADURO, *Interpreting European Law – Judicial Ajudication in a Context of Constitutional Pluralism*, in *Working Paper IE Law School*, Electronic copy available at: http://ssrn.com/abstract=1134503, 5.

[6] COM (2003) 68 fin.

[7] Later supported by the Communication of the European Commission of 11 October 2004: *European Contract Law and the Revision of the Acquis: the Way Forward.*

[8] Consolidating and recasting do not constitute the same action. Consolidation means 'grouping together in a single non-binding text the current provisions of a given regulatory instrument, which are divided between the first legal act and subsequent amending acts' (Action Plan 2003, footnote 55). Recasting means 'adopting a single legal act, which makes the required substantive changes, codifies them with provisions remaining unchanged from the previous act, and repeals the previous act…' (Action Plan 2003, footnote 57).

[9] See previously: COM (2001) 726 final, where the Commission indicated that 'improving the quality of legislation already in place implies first modernising existing instruments. The Commission intends to build on action already undertaken consolidating, codifying and recasting existing instruments centered on transparency and clarity. Quality of drafting could also be reviewed; presentation and terminology could become more coherent. Apart from those changes regarding the presentation of legal texts, efforts should be systematically focused on simplifying and clarifying the existing legislation. Finally, the Commission will evaluate the effects of Community legislation and will amend existing acts if necessary'.

[10] Green Paper on the Review of the Consumer Acquis COM (2006) 744 final (8 February 2007), concerning the review of 8 directives on consumer *acquis:* Dir. 85/577/EEC (contracts concluded away from business premises); Dir. 90/314/EEC (on package travel, package holidays and package tour); Dir. 93/13/EEC (on unfair terms in consumer contracts); Dir. 94/47/EC (on timesharing); Dir. 97/7/EC (on distance contracts); Dir. 98/6 (on the indication of the prices of products offered to consumers); Dir. 98/27 (on injunctions); Dir. 99/44/EC (on consumer sales and guarantees).

The project of adopting a single legal act amending and/or filling in the gaps of the previous consumer contract law seems to have been set aside without providing an adequate explanation. Recently the European Parliament and the Council have passed two new directives, one on consumer credit (2008/48)[11] and another on timesharing (2008/122). Eventually, apart from the abovementioned revisions, four directives[12] have been jointly redrafted and amended by the European Commission in the Directive on Consumer Rights (hereinafter: "DCR")[13]. According to a document issued by the European Commission – Directorate-General Justice, on 1-2 September 2010, the DCR should have become part of the optional instrument, provided that the full harmonisation option is maintained. The CESL has introduced separate special rules governing B2C contracts, thus rendering the present legislative offer in the area of consumer law even richer. Here is an initial list of difficult questions that still need to be answered: (i) why does the DCR not include from the outset the entire acquis on consumer protection? E.g.: consumer credit contracts, timesharing, travel packages, and so forth; (ii) should the CESL be considered as a second legal order for cross-border transactions, that does not replace national consumer law, but runs parallel to it, what would the relationship be between the CESL and the DCR, being some special contracts (such as contracts negotiated away from business premises, distance contracts and digital contracts) regulated in both instruments, one of which (the CESL) is an optional one?; (iii) consequently, what is the relationship between the CESL and the CISG, 1980? Should the latter be considered as superseded by the former[14], at least as concern B2b contracts[15]? ; (iv) how can an 'optional' instrument be associated with a consumer legal area that is of a mandatory nature? In truth, the CESL creates even more legal uncertainty[16].

To sum up, it seems that - notwithstanding the official statements – the European Institutions are pursuing at least two different paths: one consists of elaborating an optional instrument, certainly not exclusively devoted to consumer's v. traders negotiations, entrusting for this

[11] I did not mention Dir. 2009/22 on collective injunctions and Dir. 2006/123 on internal market services as they both only affect European contract law indirectly.
At present, the EU is studying the revision of the directive on package travel, and it is also considering the possibility of a directive concerning collective redress.

[12] Directive 85/577/EEC on contracts negotiated away from business premises and Directive 97/7/EC on distance contracts have been amended, while Directive 93/13/EEC on unfair terms in consumer contracts and Directive 1999/44/EC on consumer sales and guarantees have been repealed.

[13] Dir. 2011/83/EU, 25 October 2011. The Proposal for a DCR (COM (2008) 614/3) 'non-link' with the DCFR had previously been highlighted by E. HONDIUS, *The Proposal for a European Directive on Consumer Rights: A Step Forward*, in *European Revue of Private* Law, 1 (2010), 115 ff. See also M.E. STORME, *Consumer Rights Proposal and Draft CFR*, in *European Revue of Private* Law, 1 (2010), 1 ff.

[14] See N. KORNET, *The Common European Sales Law and the Cisg. Complicating or Simpifying the Legal Environment?*, Maastricht European Private Law Institute, Working Paper 2012/4, Electronic copy available at: http://ssrn.com/abstract=2012310, where she argues that rather than simplifying the legal environment the CESL might render it even more complex.

[15] Though according to art. 7(1), the scope of application of CESL is limited to B2b contracts, that is contracts where at least one of the parties is a small or medium - size enterprise (SME), as defined by art. 7 (2).

[16] As promptly underlined by two resolutions of the UK Parliament (14.12.2011, Council Doc. 18547/11) and of the German Parliament (30.11.2011).

purpose private commissions with the difficult task of creating rules adaptable to general contract law, but whose range of application might reveil too narrow. The second path consists of reviewing the consumer acquis communautaire 'for the promotion of a real consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring respect for the principle of subsidiarity' (Recital 4, DCR).

The present paper will focus on the main contents of the DCR, through the lenses of the comparative method. However, before dealing in depth with the Directive, a preliminary issue must be faced, that is, the choice between a minimum or maximum level of harmonisation.

2. In Defence of a 'Full Targeted Harmonisation'

Choosing to go down the path of minimum rather than maximum harmonisation[17] implies the adoption of a normative approach. In other words, within the parameters of the subsidiarity and proportionality principles, the EU's intervention must be qualified as necessary in order to provide adequate and equivalent levels of consumer protection. On the other hand, one could argue whether consumer law must necessarily remain an exclusively European concern, or to the contrary, whether consumer protection may be shared between member state (MS) and EU jurisdiction (as happens in the United States of America), without compromising the effectiveness of the protective rules[18].

In truth, a preference for a protective policy designed at a European rather than a national level was expressed years ago[19], and although it could be properly challenged, such a (political) choice has apparently been accepted by MS lawmakers, courts and legal scholars. It seems to view the harmonisation process brought about at a legislative level as a help to the existence of Europe.

Thus, for thirty years the European-level lawmaker has certainly encroached upon the MS' legislative competence as regards certain contracts, and consumer contracts in particular. This encroachment necessarily raises the question of to what extent we are willing to accept the EU institutions' intrusion into spheres of national private law, or - using legal rather than political terminology - the question that EU institutions are facing now is whether a maximum harmonisation process would solve the various problems raised by the minimum harmonisation approach that has been followed so far.

One of the most striking rules of the DCR is the option in favour of full harmonisation, stated in art. 4.

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[17] The problem was raised in the Green Paper 2006 (see footnote 10), considering the replies of stakeholders on this issue.

[18] See J. SMITS, *Full Harmonization or Consumer Law? A Critique of the Draft Directive on Consumer Rights,* in *European Review of Private Law,* 1 (2010), 11 ff.; C. PONGIBÒ, *Some Thoughts on the Methodological Approach to EC Consumer Law Reform*, in *Loyola Consumer Law Revue,* 21 (2009), 367 ff.

[19] On the debate over the harmonisation of consumer contract law by the EU, see: C. AMATO, *Per un diritto europeo dei contratti con i consumatori* (Milan, 2003), 27 ff.

Striking as it may appear, it may in fact be argued that if achievable, a (very) high level of protection, and one that does not stifle European competitiveness, would obviously require full harmonisation. With this said, however, problems due to the different levels of protection provided (or permitted) to date by the different MSs and the rules' compatibility with the subsidiarity principle may still yet arise[20].

In turn, minimum harmonisation would certainly permit the survival (and even strengthening) of national peculiarities, allowing a theoretical race of protection to the top. However, the country of origin principle, if applied to the consumer, would either hinder the growth of a fully integrated internal market (the costs, especially for SMEs, would remain high) or encourage the hardening of market players in their attitudes and practices in the preparation of general contract rules. In both cases, the outcome would be inconsistent with the aims of harmonisation

On the other hand, full harmonisation implies a more politically difficult set of choices, and it would be criticised for freezing the level of protection (at either a too high or a too low one) and for frustrating national cultural legal identities[21].

Clearly, alternatives might better serve the aims of reducing internal market barriers in a legal environment characterised by a high level of consumer protection. For instance, minimum harmonisation, coupled with a very highly protective optional instrument developed by co-regulation with market players, could provide the backdrop for a constructive competitive tension, both among the MSs and among market players, in order to identify the best available set of rules suitable for a given type of transaction\market\set of stakeholder interests. Minimum sufficient harmonisation would reduce consumer worries in cross-border transactions, while the optional instrument would offer incentives to balance out the costs of a higher level of protection and the benefits of a less fragmented market.

In short, the goal of full harmonisation would not in principle lead to a 'race to the bottom', but it may actually lead to a 'race to the top', provided that it be clarified which issues are 'not completely harmonised'. In order to simplify and clarify the acquis, without annoying those MSs that already have chosen a higher level of consumer protection, it is necessary to identify the issues to be included in the full harmonisation programme, and also outline those which could be left to MS discretion under the mutual recognition clause. One criterion could be to include in the full harmonisation programme all the issues linked to the subjective and objective scope of the horizontal instrument, i.e.: consumer/professional definitions, the types of contracts and their purposes. A second criterion could be the identification of rules which by their 'neutrality' would not offend any single MS, but at the same

[20] See in particular: J. SMITS, *Full Harmonization or Consumer Law? A Critique of the Draft Directive on Consumer Rights*, in *European Review of Private Law,* 1 (2010), 5.
[21] The argument *contra* is argued by E. HONDIUS, *Fifteen Years of European Private Law*, in *Opinio Jurs in Comparatione*, 2 (2009), Paper 5, 5.

time could not significantly differ from one state to the next, without creating an incomprehensible disparity among consumers of different nationalities (e.g.: the notification of the lack of conformity).

This is in fact what a 'targeted full harmonisation' should consist of. This concept was first suggested in the Working Document issued by the European Parliament and followed up in the consolidated version of the Proposal issued on 9 June 2010, after the European Parliament comments[22]. It seemed to be the 'way out', or the correct compromise between full and minimum harmonisation policies[23], but it has now been completely modified by the abovequoted art. 4 of DCR, where the 'targeted full harmonization' has been cancelled in favour of a maximum harmonisation policy. So therefore, according to the 'new' art. 4, "Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive".

As shall be argued herein, working with a comparative method would involve the contextualization of the rules and the selecting of them according to two fundamental considerations: the maintenance of the flexibility to correct the (European) rules, and the ease of adapting them to the national systems[24]. Both arguments involve, therefore, the application of the comparative method to test the main set of rules dealt with in the DCR[25]. In order to render this test more effective, references to the former Proposal 24 March 2011 of the DCR shall be made[26]. The choice for a maximum harmonisation set out in art. 4, as well as the general framework of the DCR, are therefore seriously questioned.

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22 This was the amended text of Art. 4 of the Proposal: Article 4, *Targeted* full harmonisation: "1. Save as otherwise provided by this Directive, Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection. *Member States shall forward the text of diverging provisions of national law to the Commission".*

23 In the Working Document 3 March 2010, rapporteur A. Schwab, we read that: 'While most Committee Members acknowledge that the legal fragmentation issue must be tackled, the general view is that the full harmonisation approach proposed by the European Commission is in fact not feasible at this stage given the nature and the scope of the Proposal. In accordance with the European Parliament's Resolution on the review of the consumer acquis, and, as already stated in the IMCO working document of 2009, Committee Members prefer a *targeted full harmonisation* approach, limited therefore to specific aspects of certain contracts, whilst maintaining high levels of consumer protection'.

24 See also V. MAK, *Review of the Consumer Acquis: Towards Maximum Harmonization?*, in *European Revue of Private* Law*,* 1 (2009), 58; J. SMITS, *Full Harmonization or Consumer Law. A Critique of the Draft Directive on Consumer Rights*, *ibidem*, 8 ff., questioning both the European consumer policy and the full harmonisation principle.

25 See also C. PONGIBÒ, *Some Thoughts on the Methodological Approach to EC Consumer Law Reform*, in *European Revue of Private Law,* 1 (2009), 353, at 359-361, who argues that comparative private law arguments should be linked to new modes of governance, thus building bridges between private and public law following a 'hybrid method'.

26 The first draft of the Proposal for a Directive on Consumer Rightss was presented on Ocotber 10, 2008 (COM (2008) 614/3). It has been significantly reviewed on March 24, 2011: the text can be read at the European Parliament's website. For a critical approach to the Proposal, see: K. LILLEHOLT, *Notes on the Proposal for a New Directive on Consumer Rights,* in *European Review of Private Law* 3 (2009), 335; M. LOOS, *Consumer Sales Law in the Proposal for a Consumer Rights Directive*, in *European Review of Private Law,* 1 (2010), 15. For a defense of the Proposal, see: E. HONDIUS, *The Proposal for a European Directive on Consumer Rights*: *A Step Forward*, in *European Revue of Private Law*, 1 (2010), 103.

Part II: Some First Insights into Directive on Consumer Rights (25 October 2011) in Light of the comparative method

1. The Strucure of the DCR

The DCR has largely betrayed the original setting of the Proposal 2008, as it repeals two previous consumer's Directives, leaving almost untouched the other two Directives (see supra, footnote 12). As for its contents, it mainly deals with information requirements, the right of withdrawal, formal requirements and delivery (Chapters II and III). Distance and off-premises contracts have a separate discipline than other contracts to which the DCR applies; while special applications of the general regime are prescripted in art. 17 to contracts for the unlimited supply of water, gas or electricity, and to district heating or the supply of digital content not supplied on a tangible medium. Last, only a few provisions (Chapter IV) are devoted to 'other rights', concerning delivery, passing of risk, communication by telephone and payments. In truth, the structure itself is complicated, the framework confusing, and the contents excessively detailed, but lacking of the expected thickness that might have resulted should a comparative analysis be applied.

2. The Definitions of 'Consumer', 'Professional' and 'Consumer's Contracts', and Their Possible Extension

As regards the definition of 'consumer', the DCR contains a definition that certainly matches the traditional strict definition and interpretation provided, respectively, by the previous consumer Directives and by the Court of Justice[27]: thus, according to art. 2(1) DCR "'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession"[28]. Nevertheless, no substantive grounds would justify the categorical distinctions adopted in certain consumer directives[29].

Notwithstanding its coherence with the previous acquis communautaire, this definition does not take into account the European debate questioning such a strict definition, and therefore raises issues concerning the relationship between "intellectual" professionals and their clients/patients, as well as the exclusion of legal persons, non-profit organizations in particular, small and medium-sized enterprises, and any other person acting for purposes to some extent on a mixed basis with his/her trade, craft or profession[30].

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[27] ECJ 20 January 2005, Case C-464/01 Gruber/Bay Wa AG [2005] ECR p. I-439.
[28] This narrow definition has also been adopted by the CESL, art. (2)(f).
[29] M. W. HESSELINK, *Towards a Sharp Distinction Between B2B and B2C Contracts. On Consumer, Commercial and General Contract Law After the Consumer Rights Directive*, in *European Revue of Private Law,* 1 (2010) 57.
[30] This is in particular present in the case most recently discussed by the ECJ: see Footnote 26, Case C-464/01 Gruber/Bay.

As regards the first issue, that is the definition of consumer and professionals, a comparative analysis would show that 'consumer' may also include a client or a patient, as happens in France[31]. Although at the outset the word 'professional' employed in the acquis would not distinguish between "intellectual" professionals and commercial traders, at this stage the acquis seems to separate traders (this is in fact the preferred definition in the DCR: art. 2(2)) from intellectual services. This is certainly true as regards medical care provided in a hospital. This kind of relationship was recently excluded from the scope of Dir. 2006/123/EU concerning the internal market services. Although the DCR also includes contracts dealing with both goods and services, in the broad definitions of 'sales contract' and 'service contracts' (arts. 2(3)-(6)), art. 3, par. 3(b), providing for the scope of the DCR, clearly exludes contracts for healthcare services, provided by health professionals to patients in accordance with Dir. 2011/24/EU, but does not clearly excludes other intellectual services.

As regards the second issue, that is, the exclusion of legal persons, small enterprises and mixed-purpose contracts, a comparative approach has highlighted the non-harmonised application of the acquis in the MSs, and the need for a broader discussion. Spain, for example, has extended the definition of consumer to legal persons, and in Germany the recent reform of the BGB (Book II, on obligations) has extended certain specific rules (especially dealing with unfair contract terms) to B2B contracts. In the UK, there is a debate within the Law Commission on the potential extension of such definition to small enterprises. One of the most controversial issues is, in fact, the extension of the revised provisions on unfair terms in contracts to small-medium businesses (that is, businesses with nine or fewer staff) [32]. Having regard to the objective scope of consumer contracts, the DCFR contains a broader notion including transactions "primarily for purposes which are not related to his or her trade, business or profession". To solve the ambiguity pertaining to the adverb 'primarily', an express indication could be given on the basis of the competence and of the distinction (already adopted in some MSs) between 'acts of the profession' and 'acts relative to the profession', in order to include the latter in the scope of consumer protection. This could provide a solution to the complex question of 'mixed use' contracts, permitting one to identify the borderline between 'consumer acts' and professional ones based on the prevailing purpose. The aim of this extension would be to include under consumer acts also mixed-purpose acts[33]. This issue is particularly important having in mind the

[31] For a comparison between France and Italy as regards the relationship between professionals and their clients see C. PERFUMI, *Disciplina consumeristica e contratto di spedalità*, in *Obbligazioni e Contratti*, 10 (2010) 685 ff.

[32] Law Commission Report, 2005 and Unfair Terms Draft Bill, 2005, following-up the 'Unfair Terms in Contracts: A Joint Consultation Paper', 2002, where those consulted were originally asked whether they agreed or not to treat 'all businesses alike in being able to benefit from the protection, allowing the courts to take into account the size of the business, and whether it makes transactions of the kind in question regularly or only occasionally, in assessing the fairness of the terms complained of'.

[33] This proceeding corresponds to the "reality of social and economic life, in which mixed situations are increasingly frequent". See M. E. STORME, *Editorial: Consumer Rights Proposal and the Draft CFR*, in *European Revue of Private Law,* 1 (2010) 2.

contractual position of digital services consumers, to which the DCR also applies [34], where it is sometimes impossibile to distinguish 'mixed' acts from 'acts outside the trade'; and where each 'consumer' may act as professional.

With this said, the scope of consumer and professional definitions should be widened to all contracting parties, either natural or legal persons, acting within an 'asymmetric contract' (including SMEs, corporate bodies acting for non-profit/not-for-profit purposes, such as foundations, associations, committees and consortiums). In this way, it should be possible to provide a clearer, more coherent definition of the 'weaker' contractual party, considering that the scope of consumer protection aims at assessing contractual equilibrium in light of the asymmetric power available to market players/operators. Based on a broader notion of 'asymmetric contracts', consumer acts should even include a special, restricted category of B2B contracts, to be qualified as 'unbalanced'[35]. This category may be inferred by considering a set of rules issued by European lawmakers and addressed not only to consumers (as narrowly defined by the acquis communautaire), but also to a business, "which for some reason is the weak party and therefore needs legal protection"[36]. This is particularly evident in supply of services contracts in which the weakness of the party is related to the fact that the recipient is subject to the supplier's control over the elements which constitute the characteristic performance of the contract[37]. We can find an initial clear-cut example of this trend in Directive 2000/31, applying to persons that "for professional ends and otherwise" use an information technology company service. In addition, the Directive on distance marketing of consumer financial services[38] seems to leave an open possibility to MSs of extending the scope of the directive to ".. non-profit organisations and persons making use of financial services in order to become entrepreneurs" (Recital 29), that is investors that they may find themselves unprepared to properly judge or consider such investments, being in the same position as that of an ordinary consumer. By the same token, the Markets in Financial Instruments Directive[39] (hereinafter 'MiFID'[40]), should be addressed to retail clients that are not necessarily consumers: the protection of financial services consumers should not disregard the

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34 See also Recital (19) DCR. A special protection shall be granted to these kinds of transactions, as their economic importance in the market is proportionally increasing in relation to the spreading of new and innovative 'mass technologies': the CESL does apply to digital service contracts, but it is still a Proposal for a Regulation.

35 C. AMATO, *Per un diritto europeo dei contratti con i consumatori*, (Milan, 2003), Ch. IX.

36 See V. ROPPO, *From Consumer Contracts to Asymmetric Contracts*, in *European Revue of Contract L*aw, 2 (2009), 339. This category includes small or micro-businesses; business parties that economically/legally depend on the other party or that are exposed to financial risks (as, for example, the risk of late payment) *vis-à-vis* the other party. The 'feasibility study' seems to have adopted this view, so far as it extends some protective rules (like the special provision against unfair terms) to B2b contracts (part III, ss. 3-5).

37 V. ROPPO, *From Consumer Contracts to Asymmetric Contracts*, in *European Revue of Contract L*aw, 2 (2009) 315.

38 Dir. 2002/65, art. 2d): "consumer means any natural person who, in distance contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession".

39 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.

40 The MiFID (Dir. 2004/39/EC) is now under review: see Proposal for a Directive of the European Parliament and of the Council on market financial instruments, repealing Dir. 2004/39/EC, COM (2011) 656 Fin

subjective characterisation of the investor based on his/her low professional, moderately professional or highly professional level of investing sophistication. The consumer purchasing financial services suffers from psychological and clear inferiority complexes in his/her contractual position, both from the points of view of information and actual freedom of choice. To sum up, consumer law legislation should review investor protection at the European level, first by including this definition in consumer protection legislation; and secondly by simplifying remedies and access to justice through the establishment of a hierarchy of remedies.[41] On the ontrary, according to Art. 3.3(d) of the DCR[42], financial services contracts are excluded from the scope of application of the Directive[43].

The number of EU directives regulating unbalanced business contracts is increasing, due to the special attention being paid to the crucial role of SMEs in the internal market. Directives on Commercial Agents (Dir. 1986/653) and on Late Payments in Commercial Transactions (Dir 2000/35) aim to regulate the weaker position of business parties that may be economically or legally dependant on the other party, or exposed to a financial risk in relation to the other party. Similarly, the Rome I Regulation considers situations in which 'contracts (are) concluded with parties regarded as being weaker', stating that 'those parties should be protected by conflict-of- law rules that are more favourable to their interests than the general rules' (Recital 23). This is, for example, the case not only in consumer contracts, but also concerning franchise and distribution agreements. It thus aims at understanding and interpreting the scope of consumer protection in a more effective "real life" sense, with the goal of assessing the contractual equilibrium in light of the asymmetric power held by market players/operators. The present DCR does contain a recital (13) allowing MSs to extend the aplication of consumer rights to legal or to natural persons who are not consumers within the strict meaning of the DCR; but this extension is delegated to MSs freedom. This is a clear example of undesired effects of the exceptions to maximum harmonisation, leading to non-harmonisation and uncertainty: as a matter of fact, the scope of application of a protective law should not be left to theMSs freedom; on the contrary, it should represent the outcome of a lively debate, conducted through a comparative approach, aiming at reaching a shared and broader definition of 'consumer'.

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[41] C. AMATO, C. PERFUMI, *Financial Investors as Consumers: Recent Italian Legislation from a European Perspective,* in M. KENNY, J. DEVENNEY (eds.) *European Consumer Protection: Theory and Practice,* (Cambridge University Press, 2012), 13 ff .

[42] Directive 2011/83/UE of the European Parliament and of the Council of 25 October 2011.

[43] The reason is clarified in Recital 32 (Dir. 2011/83): "The existing Union legislation, inter alia, relating to consumer financial services, package travel and timeshare contains *numerous rules on consumer protection.* For this reason, this Directive should not apply to contracts in those areas. With regard to financial services, Member States should be encouraged to draw inspiration from existing Union legislation in that area when legislating in areas not regulated at Union level, in such a way that a level playing field for all consumers and all contracts relating to financial services is ensured"

3. Consumer Rights Concerning Unfair Contract Terms. The Grey and Black Lists

As regards unfair terms in contracts, the most important novelty previsoulsy introduced in the Proposal, 2011 was represented by the black list of terms, that is, terms which are considered unfair in all circumstances (art. 34 and Annex II, Proposal 2008). That novelty may be considered as a product of a comparative study: most Member States had in fact already provided a list of terms considered as unfair in all circumstances. This is the case of Italy (art. 36 Consumer Code), France (art. R132 Code de la Consommation), Germany[44]. The British Law Commission has also recommended the adoption of a double list in the 'Unfair Terms in Contracts', Report 2005 (at 3.41-3.47). For instance, some of the terms considered unfair in all circumstances as listed in Annex II of the Proposal have already been deemed as such by France[45], or by Italy and France[46]. Nevertheless, the terms contained in the Annex II were more restrictive and less protective than the lists provided by France and Italy[47]. This raised the broader question of the risks of full harmonisation in the special case of unfair terms. As highlighted by the European Parliament (Committee on the Internal Market and Consumer Protection, Rapporteur Mr. Andreas Schwab) in the Working Document of 3 March 2010, at this stage the black and grey lists should not be (fully) harmonised, in order to prevent the deletion of terms (or a strict construction of them) from the lists provided for at a national level.

In amending the Proposal the Council and the Parliament have completely removed art. 34 (that is, the former mandatory black list) from the DCR, and have added art. 8a to Dir. 93/13, according to which Member States are free to keep or adopt lists of terms, and to qualify them as unfair in all circumstances (art. 32 DCR)[48]. However, this is subject to the proviso that such national provisions shall be notified to the Commission, which shall make that information public in an accessible way. As argued above, a 'targeted full harmonization' together with a correct use of comparative law would have reached the same goal, without introducing the useless but dangerous control of the Commission over the MSs legislative prerogative.

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[44] See AGB-Gesetz, 19 December 1976, as modified by L. 19 July 1996, and now introduced into the BGB after the *Gesetz zur Modernisierung des Schuldrechts*, 26 November 2001 (in force from January 2002): § 309 in particular contains the '*schwarze Liste*', where certain clauses are considered as ineffective *juris et de jure* and despite any contrary advise by the judge (*Klauselverboten ohne wertungsmöglichkeit*). D. VANNI, *Clausole abusive nel diritto tedesco e spagnolo*, electronic copy available at: www.ratioiuris.it, vol. December 2007.

[45] This is the case of special kinds of limitations on a trader's liability related to entire agreement clauses: see lett. b) Annex II: 'limiting the trader's obligation to respect commitments undertaken by his agents or making his commitments *subject to compliance with a particular formal requirement*. In art. R132-1 of the French Consumer Code, n. 2, one may read: 'Restreindre l'obligation pour le professionnel de respecter les engagements pris par ses préposés ou ses mandataires'. The French provision is wider and therefore more protective, as it does not restrict the scope of the unfair term to formal requirements.

[46] This is the case of terms excluding or limiting the trader's liability in case of death or physical injury of the consumer.

[47] The so-called 'surprise clauses' (listed in the French and Italian consumer codes) have been excluded from the black list in Annex II. It is worth noting that in the 'feasibility study' delivered by the Expert Group the surprising terms are listed among the unfair terms in B2B transactions.

[48] The same art. 32 DCR amends Dir. 93/13 (inserting art. 8a) under another important and controversial aspect: MS are now allowed to introduce their own provisions extending the unfairness assessment to individually negotiated contractual terms.

4. Sales Contracts and Associated Guarantees

The amendments brought by the DCR to Dir. 99/44 consists of allowing MSs to adopt more stringent provisions as regards the limitation period, also concerning second-hand goods, and the non-binding nature of contractual agreements concluded with the seller before the lack of conformity is brought to the seller's attention. As in the amendments to Dir. 93/13, this is subject to the proviso that such national provisions shall be notified to the Commission, which shall make that information public in an accessible way (art. 33, DCR). First, I shall deal briefly with the interpretation and assessment of the first amendement, concerning the limitation period (par. 4.1.). Further on I shall underline how two new rules introduced by the DCR, that is time of delivery and passing of risk, have de facto also amended Dir. 99/44, as they indirectly affect the regime of contractual remedies in the sales of goods (parr. 4.2. and 4.3.).

4.1. The limitation period

The original Proposal, 2008, had limited the seller's liability to a two-year period from the time when the risk has passed, that is, the time of delivery (art. 28(1)). However, some MSs had already provided for a longer liability period. In the Netherlands and in Finland, for example, the trader's liability period depends on the expected lifespan of the product (to be assessed by the judge on a case by case basis). In Belgium, France and Luxembourg, traders can be held liable if a hidden (major) defect is discovered by the consumer after the initial period of two years (subject to a limitation period – rather short in France, longer in Belgium) and if the consumer can prove that the defect in question already existed at the time of delivery (in this case, the consumer shall not benefit from a reversal of the burden of proof). In Italy the period of a seller's liability is set at two years from delivery. However, by adding the 2 months time limit to provide notice of defects - consumers have up to 26 months to take action. In other words, the provision set forth in art. 28(1) of the original Proposal would have seriously diminished consumers' acquired rights in most MSs. Moreover, art. 28(4) of the original Proposal, 2008, mandated a duty of notice for consumers in order to benefit from their rights: to inform traders of the lack of conformity within two months of the date on which he/she detected the lack of conformity. Thus, the original Proposal had made compulsory a duty of notice that - to the contrary - was only optional in Dir. 99/44, leaving MSs free to adopt or reject it[49]. And in fact, the period of notice suggested in art. 5(2) Dir. 99/44 was considered by most of the MSs as a useless limitation of consumer's rights. Therefore, only six states introduced this period of notice: Denmark, Finland, Italy, the Netherlands, Slovenia and Spain. Most of them chose the two months' period. The

[49] Dir. 99/44 art. 5(2). 'Member States may provide that, in order to benefit from his rights, the consumer must inform the seller of the lack of conformity within a period of two months from the date on which he detected such lack of conformity'.

Netherlands implementation imposes a 'reasonable time' upon consumers, while Slovenia went even further, pressuring consumers to inform traders of the lack of conformity 'as soon as possible'.

A better use of the comparative method has highlighted the legal debate in the MSs, thus showing that imposing a strict time limit on consumers in the case of remedies cannot be considered a preferred 'better rule' in order to fully harmonise national laws[50]. In this perspective it should be read and interpreted the new discipline introduced by the DCR through the amendments to Dir. 99/44 mentioned in art. 33. Although the resulting regime on time limits should be welcome as a good novelty, once again what is questionable is the extreme freedom left to MSs, leading to the undesirable effect of non-harmonisation. As argued above, the legislative panorama of MSs has revealed possible tracks to be adopted at a European level: that is a longer limitation period, coupled with a reversal of the burden of proof in favour of consumers and with the abrogation of the duty of notice. In this case it should be evident how a 'targeted full harmonisation' perspective, supported by a comparative research, might in turn have provided the 'better rule'.

4.2. Time of delivery

Art. 18, par. 1 concerns the time for delivery: it gives traders a maximum of 30 days from the conclusion of the contract to deliver, by transferring the material possession of the goods. This can be considered as a 'neutral' provision in itself, meant to speed up the delivery process (that otherwise might create obstacles to the market, especially if connected to distance sales, out of premises sales or e-commerce sales) without affecting the traders interests (see Recital (51), DCR). At the same time, this rule affects the recourse to national contractual remedies, such as granting the trader an additional time for delivery, enforcing the performance of the contract, witholding payment, seeking damages, terminating the contrat. Therefore, the subsequent paragraphs of art. 18 contain the discipline to be applied should the trader fail to fulfil his obligation to deliver the goods within the time limit set out in par. 1 (or agreed upon with the trader). In particular, the consumer shall give the trader a reasonable additional period of time to make the delivery, after the expiry of which he shall be entitled to terminate the contract should the trader fail to deliver the goods even within that additional period of time[51]. This rule does not apply neither when the trader has unequivocally refused to deliver the goods, nor where the delivery period is essential as such, or where the consumer informs the trader that delivery on a specified date is essential.

[50] In the consolidated version of the Proposal, incorporating the Amendments by Parliament to the Commission Proposal (24 March 2011), art. 28 has been deleted and substituted with a proviso (par. 5a) having the same effects as th final version of the DCR.

[51] The same regime as for the time of delivery and termination for late delivery can be found in the CESL, arts. 95 and 115.

In truth, such a discipline is not 'neutral' in itself, as it implies the acceptance of a general principle, the preservation of the contract. It also implies a preference for the perfomance of the contract in lieu of damages: a choice that may not entirely convince the common lawyers.

On the other hand, the debated issue of the hiererchy of remedies in case of lack of conformity has not been faced by the DCR. It is well known that Dir. 99/44 had listed four different tools favouring consumers: (i) to have the goods repaired or (ii) replaced, at the traders' choice, free of charge (performing remedies); (iii) to make an appropriate reduction in price or (iv) to rescind the contract, if the performance remedies are impossible or disproportionate, or if the seller has not completed the remedy within a reasonable time or with a significant inconvenience to the consumer. The most questioned result of this provision was the so-called 'hierarchy' of remedies. There was no choice for consumers, but rather a strictly normative tool-box decided on by lawmakers, giving some minimum choice to traders. Evidence of the doubtful quality of these provisions is provided by national implementation of such, as well as the solutions provided by the DCFR and the CESL[52]. As regards national implementation, suffice it to say that five MSs did not fully accept the hierarchy: Poland, Germany, Greece, Lithuania, and Slovenia. United Kingdom and Ireland have adapted the new regime of remedies introduced by the SoGA. In particular, the rejection of goods is suspended for a reasonable time until the goods have either been repaired or replaced at the consumer's choice. In the Italian Consumer Code, implementing Dir. 99/44 (as amended by d.lgs 2007/221), the consumer may ask to have the goods repaired or replaced, at the consumer's choice. Moreover, Italian regulations offer a new set of rules – outside of the strict hierarchy, and provide a free choice to consumer - should the trader offer different remedies to consumer (art. 130 Cons.Code). As regards the DCFR (art. III-3:101(1)) and the CESL (art. 106), a creditor may resort to any of the available remedies; moreover, remedies may be cumulated if not incompatible. Even in international commercial sales, the solution provided by the CISG, 1980 is fairer for the purchaser: he/she can choose among the remedies, giving the seller first a chance to remedy non-performance at his own expense without unreasonable delay or inconvenience (art. 48(1)).

In this background, the former Proposal, 25 march 2011 at art. 26 (24 March 2011), had suggested one paragraph modifying the previous rules on remedies[53]: the new provision would have allowed MSs to adopt or maintain national laws giving consumers the right to terminate the contract (after a short period of delay within which the trader might cure his performance), or the free choice

[52] On the specific issue of the remedies available to the buyer in case of breach of the seller's obligation in the CESL, see. C. AMATO, *Proposition de Règlement pour un Instrument Optionnel (IO). Les Moyens d'action, sanction de l'inexécution de l'obligation*, Proceeding of the Conference promoted by the International Research Group on New Normativity in Europe, Paris, 28 November 28, forthcoming.

[53] See Proposal 25 March 2011, Art. 26, par. 5b. *:* 'Member States may adopt or maintain provisions of national law giving consumers, in the event of lack of conformity, the right for a short period to terminate the contract and receive a full reimbursement or a free choice from among the remedies referred to in paragraph 1, in order to ensure a higher level of consumer protection.

among the remedies listed in art. 26. This provision did take into account the European debate over the undesirable 'hierarchy of remedies', but it misteriously disappeared from the final text of the DCR.

4.3. Passing of risks

Art. 20 DCR has introduced a rule passing to consumer the risks of loss of or damages to the goods only when he/she has acquired the physical possession of the goods. It is well known that Dir. 99/44 did not take any position on the issue of passing of risks[54], on the assumption that this was too difficult a task to be dealt with by European lawmakers, as it would have encroached upon an area of private law which was intimately related to the law of property (on the one hand), and to commercial law (on the other). After several years, the Council and the European Parliament have changed their position. Art. 20 of the DCR clearly postpones the passing of risk related to supervening events. This choice has been adopted on the assumption that delivery itself is a risky moment, and that risk should be shifted to traders, not to consumers[55]. This new rule has a substantial impact on Italian contract and commercial law, as the general rule in our Civil Code (art. 1376, as specified by art. 1465, par. 1)) - derived from the French Code Napoléon - provides that risk of loss and damages passes together with the passing of title (that is, at the very moment when consent is exchanged). Notwithstanding the importance of the rules on the passing of title and risk within national systems, it cannot be stated that this rule might turn into a 'legal irritant'. In my opinion, the passing of risk can be defined as a 'neutral' rule, certainly deriving from specific national history, but not necessarily linked to general principles seriously impacting the system itself. In fact, this is exactly the case: the severance of the passing of risk from the passing of property does not upset the property or commercial rules concerning their very nature: it simply provides a protective shield to a contractual party presumed as weaker. The same would not have been true had the rules on the passing of property been changed. As a comparative approach highlights, consensual systems as opposed to tradition or delivery systems adopting the conveyance rules, are based on profoundly divergent technicalities rooted in the legal past, which cannot be changed with a simple rule contained in a European Directive[56].

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[54] See in particular Recital (14): 'Whereas the references to the time of delivery do not imply that Member States have to change their rules on the passing of the risk'.

[55] Unless the consumer has commissioned the delivery to a carrier: in this case the risk shall pass to consumer on delivery of goods to the carrier: art. 20, second sentence.

[56] Under the consensual system, the example *par excellence* of which is French law, the contract in and of itself transfers ownership from one party to another without the need for a physical transfer of the item (*traditio*) or other requirements. In this case, the only purpose of registering the right to the real property is to be able to enforce the transfer against third parties. Under the tradition or delivery system, the most famous example being the German system, the transfer of ownership occurs, in the case of real property, pursuant to registration in the land register. The contract only gives rise to the personal obligation of the transferor to deliver the property or right *in rem*. The parties state their consent to transfer ownership by means of the so-called 'real agreements', but ownership is actually validly transferred upon registration, which can only be performed with a new formal authorisation, which is the authorisation of the party prejudiced (*i.e.* losing rights) by the registration. Effectiveness in all transfers of rights in real property is achieved in all systems by means of registration in the land register, but the possible effects of registration (declarative or constitutive) vary depending on whether the legal system is based on consensul or delivery principles. B. MCFARLANE, *The Structure of Property Law*, (Hart Publishing, 2008); E.

Evidence for this argument is provided by Regulations 2002, no. 3045, implementing Dir. 99/44 in the United Kingdom. Regulation 4 has added subsection (4) to s. 20 of the Sale of Goods Act 1979 that eventually shifts the risk[57] to the seller until delivery of goods to the consumer[58]. In other words: the abovementioned Regulations had already achieved the solution (now adopted by the DCR) by implementing Dir. 99/44, thus improving consumer protection without either misinterpreting the European Directive or conflicting with national legal systems.

By applying the comparative method to the issue at stake, that is analyzing the different national implementation approaches of Dir. 99/44 in search of a 'harmonising rule' that may be easily transplanted into different legal systems, art. 20 of the DCR appears to be an innocent and highly effective rule at the same time, as contractual remedies are at the consumer's disposal even after the occurrence of supervening events, util delivery has been accomplished.

A Few Brief Final Remarks

It becomes clear that, after this quick and limited review of some of the DCR's provisions, the correct use of comparative law is a useful tool of objective knowledge and understanding that can be used to avoid the making of 'bad law'. 'Bad law' results as such if a previous (comparative) study has not been seriously carried out (in order to clearly highlight the main objectives of European legislation, the historical background of specific provisions, and their effectiveness in each national system). Such comparative study also takes into account the role of courts and interpreters in evaluating the effects of rules.

Through recourse to this cautious methodology, it is possible to achieve that which has been defined as 'targeted full harmonisation', resulting neither in a race to the bottom (that is, a lowering of consumer protection levels), nor in the creation of dangerous 'legal irritants'.

The present version of the DCR though it is not far away from this methodology, it still suffers of (at least) two main critical aspects: the legislative technique is poor; the political choice in favour of a maximum harmonisation, coupled with some discretional powers still left to MSs, leads to the undesirable effect of uncertainty and partial harmonization. It is time for the European Institutions to stop and think seriously to the goals they want to achieve, in order to offer to lawyers and practitioners competitive rules.

FERRANTE, *Consensualismo e trascrizione*, (Cedam, 2008) ; A. GAMBARO, *Il diritto di proprietà*, Trattato di diritto civile, (Giuffré, 1995), 183-231; U. MATTEI, *La proprietà immobiliare,* (Giappichelli, 1995).
See also Recital (51) DCR

[57] Though the law is not clear on this issue, it may be inferred that the risk involves perishment of and damages to goods.

[58] As specified in s. 32(4) SoGA, delivery of goods to a carrier is not deemed to be a delivery for transmission of title should the goods be delivered to the carrier: "In a case where the buyer deals as consumer or, in Scotland, where there is a consumer contract in which the buyer is a consumer, subsections (1) to (3) above must be ignored, but if in pursuance of a contract of sale the seller is authorised or required to send the goods to the buyer, delivery of the goods to the carrier is not delivery of the goods to the buyer".