

Quo Vadis EU Consumer Law? The Unsolved Issue of Consumer Contracts with Blockchain-based Smart Contracts

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Issues in EU Consumer Law

- Theoretical level: What is EU consumer law?
- Policy level: Clash of consumer protection v other EU interests
- Substantive level: Is EU consumer law fit for purpose?

Structure of Presentation

1. Introduction: Unde Venis EU Consumer Law? How the Field Developed
2. Unde Nunc es EU Consumer Law? Where the Field is Now
3. Unsolved Issue in EU Consumer Law: Consumer Contracts Involving Blockchain-based Smart Contracts
4. Conclusion: Quo Vadis EU Consumer Law? Where the Field is Heading

1. Introduction: Unde Venis EU Consumer Law? How the Field Developed – in Brief



1.1 How EU Consumer Law Developed I

Starting point – 1975:

Council Resolution and Preliminary Programme of the European Economic Community for a consumer protection and information policy
([1975] C92/01 and [1975] OJ C92/02)

Since then:

Piecemeal regulation of diverse consumer-related topics

1.1 How EU Consumer Law Developed II



1.2 Theoretical Issue: What is EU Consumer Law?

- Art. 169 TFEU¹: European consumer law as a **law to protect consumers**
 - Health, safety
 - Economic interests
 - Right to information
 - Education
- But 'consumer' not defined!
- Many slightly different definitions; some legislation does not use term at all
 - => No uniform precise definition of 'consumer' but common core notion

¹ TFEU: Treaty on the Functioning of the EU, [2019] OJ L328/7

1.2 Issues in EU Consumer Law

- Theoretical level: What is EU consumer law?
 - 'A' consumer law or 'laws of consumers'?
- Policy level: Clash of consumer protection v other EU interests
- Substantive level: Is EU consumer law fit for purpose?

1.3 Policy Issue: Conflict of Interests

- **EU economic interests**
→ (potential) **conflict**
- **E.g.: EU Geographical indications system** (quality scheme)



Protected designation of origin (PDO)



Protected geographical indication (PGI)



Geographical indication (GI)



Traditional speciality guaranteed (TSG)

1.3 Issues in EU Consumer Law

- Theoretical level: What is EU consumer law?
 - Is it consumer law or 'laws of consumers'?
- Policy level: Clash of consumer protection v other EU interests
 - Consumer law = means in itself, or means to an end (internal market)?
- Substantive level: Is EU consumer law fit for purpose?
 - Unsolved issue – consumer contracts with blockchain-based smart contracts

2. Unde Nunc es EU Consumer Law? Where the Field is Now



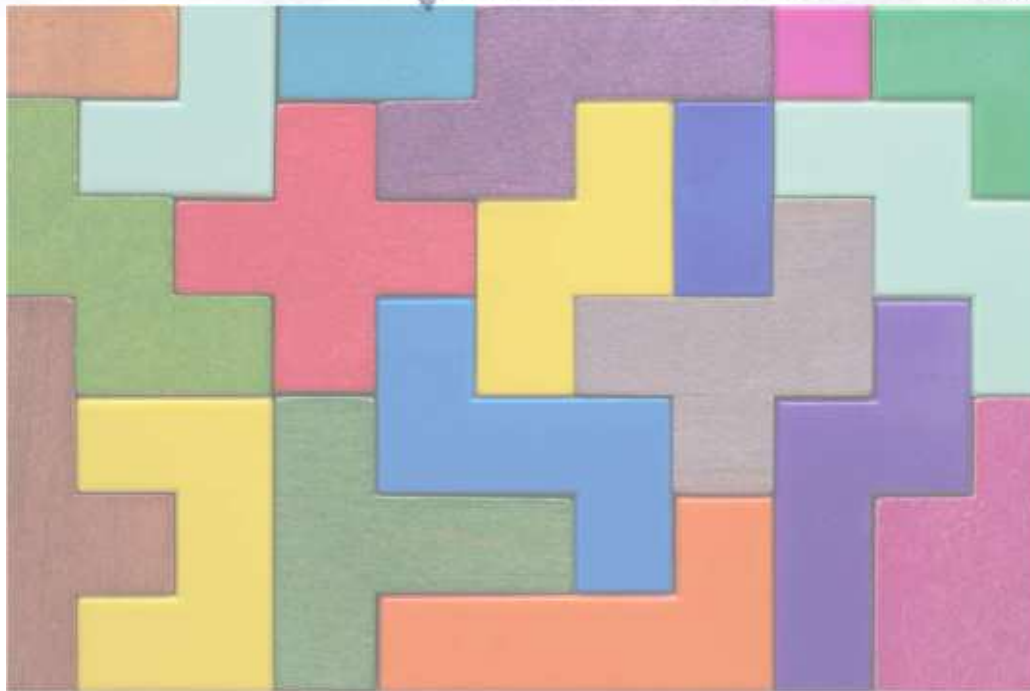
2. Issues in EU Consumer Law

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- 2015: Initiation of the ‘regulatory fitness and performance programme’ (REFIT)
 - 2017: extensive yet positive report published on six major directives
 - 2018~2019 legislative wave
 - Digital Content Directive
 - Sale of Goods Directive
 - Modernisation and Enforcement Directive (‘Omnibus Directive’)
 - Digital Services Act
 - Digital Markets Act
- => gaps filled...?

2. Substantive Issue: Is EU Consumer Law Fit for Purpose?

3. Unsolved Issue: Consumer Contracts with Blockchain-based Smart Contracts



3.1 Defining Blockchain-based Smart Contracts

- Blockchain-based Smart Contracts:
computer code for automatically executing a particular task (transaction) under set conditions, based on blockchain technology
- Blockchains:
ledgers / record books containing transactions in individual blocks that are linked together with cryptographic signatures (hash pointers)

3.2 Smart Contracts in EU (Consumer) Law I

- Technology use growing → European Blockchain Observatory and Forum's interactive map, <https://www.eublockchainforum.eu/initiative-map>
- Combination of conventional contracts and smart contracts feasible
 - eg, written lease contract with smart contract for lease payment
- No 'Smart Contract Act'
- No 'contractual' rules
- Data Act Proposal ((2022) COM 68 final)

Data Act Proposal

- Definition: ‘a computer program stored in an electronic ledger system wherein the outcome of the execution of the program is recorded on the electronic ledger’ (art 2 para 16)
- Standards for interoperability
- Four requirements (art 30 para 1)
 - Robust
 - Stop mechanism
 - Auditing function
 - Access control mechanism

3.2 Smart Contracts in EU (Consumer) Law II

3.3 Issues in EU Consumer Law

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4. Conclusion: Quo Vadis EU Consumer Law?



4. Where EU Consumer Law is Heading

- Remain fragmented – no one ‘Consumer Code’ like English Consumer Act
- Consumer interests second to economic interests – consumer law as means to end (internal market)
- Fit for purpose but lagging behind?
- Smart contracts as unsolved issue – no further regulation planned

Thank you for your
attention!

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References

How EU Consumer Law Developed II

Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising [1984] OJ L250/17.

Council Directive 85/374/EEC of 25 July 1985 concerning liability for defective products [1985] OJ L210/29.

Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31.

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29, as amended by the Consumer Rights Directive (fn 11).

Council Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19.

Council Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12.

Council Directive 2002/65/EC of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC [2002] OJ L271/16.

Council Directive 2002/87/EC of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council [2003] OJ L35/1.

Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22.

Council Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers [2008] OJ L133/66.

Council Directive 2011/83/EU of 25 October 2011 on consumer rights [2011] OJ L304/64.

Council Directive 2015/2302/EU of 25 November 2015 on package travel and linked travel arrangements [2015] OJ L326/1.

Council Directive 2019/770/EU of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1.

Council Directive 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods [2019] OJ L136/28.

Council Directive 2019/2161 of 27 November 2019 amending several directives as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L328/7.

What is EU Consumer Law?

Art. 169 TFEU *

“1. In order to promote the interests of consumers and to ensure a high level of **consumer protection**, the Union shall contribute to protecting **the health, safety and economic interests** of consumers, as well as to promoting their **right to information, education and to organise themselves** in order to safeguard their interests.” (emphasis added)

* TFEU: Treaty on the Functioning of the EU, [2019] OJ L328/7

What is a Consumer under EU Law?

- No uniform notion of ‘consumer’
- Many consumer legislation have slightly different definitions or do not use term at all
- Core notion:
 - **Natural person**
 - **Not** acting for **business reasons**, i.e., normally, in a private capacity – wholly private, unless connection to business or trade is marginal → Case C-464/01 *Gruber v Bay Wa AG* [2005] ECR I-439
 - **Not** companies or small- and medium-sized business (**SMEs**) → Case C-541/99 *Cape v Ideal Service* [2001] ECR I-9049

What is a Consumer?

Art. 2 Unfair Consumer Contract Terms Directive (1993)

“(b) ‘consumer’ means any *natural person* who [...] is *acting for purposes which are outside his trade, business or profession*” (emphasis added).

Art. 3 Package Travel Directive (2015)

“(6) ‘traveller’ means **any person** who is **seeking to conclude a contract**, or is entitled to travel on the basis of a contract concluded [...]” (emphasis added).

The EU Geographical Indications System

Objective: “**to promote** the [...] unique characteristics, linked to the [...] geographical origin as well as traditional know-how [of **products**, ... thus **enabling**] **consumers to trust and distinguish quality products** while **also helping producers to market their products better.**”

→ sales promotion before consumer information

https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/quality-schemes-explained_en



Protected designation of origin (PDO)
Denominazione di origine protetta (DOP)



Protected geographical indication (PGI)
Indicazione geografica protetta (IGP)



Geographical indication (GI)
Indicazione geografica (IG)



Traditional speciality guaranteed (TSG)
Specialità tradizionale garantita (STG)

Where EU Consumer Law is Now

Commission, Report of the Fitness Check on Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'); Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts; Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers; Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees; Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests; Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising SWD (2017) 209 final