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Standardisation of Agreement in EU Law. An Adieu to the Contracting Parties?

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I. Introduction

2014 will probably be remembered as the year in which the process to harmonise European contract law was abandoned. The withdrawal of the Proposal for a Regulation on a Common European Sales Law (CESL),¹ which occurred that year, interrupted a continuous trend of efforts to achieve a common private law instrument that had been going on for more than three decades. In short, the recent history of European contract law goes back to the Principles of European Contract Law (PECL) that the Commission on European Contract Law drafted, chaired by Ole Lando, which began its work in 1982 and completed it in 2003.² Subsequently, three important communications from the European Commission (on European contract law,³ an action plan⁴ and the way forward⁵) paved the way for the Draft Common Frame of Reference (DCFR) in 2009, prepared by the Study Group on a European Civil Code, led by Christian von Bar, and the

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¹ Commission, 'Proposal for a Regulation of the European Parliament and of the Council of 11 October 2011 on a Common European Sales Law' COM (2011) 635 final. It was withdrawn by the Commission, 'Commission Working Programme 2015' COM (2014) 910 final, Annex 2.

² O Lando and H Beale (eds), *The Principles of European Contract Law*, Parts I and II (combined and revised) (The Hague, Kluwer, 2000).

³ Commission, 'On European Contract Law' (Communication) COM (2001) 398 final.

⁴ Commission, 'A More Coherent European Contract Law – An Action Plan' (Communication) COM (2003) 68 final.

⁵ Commission, 'European Contract Law and the Revision of the Acquis: The Way Forward' (Communication) COM (2004) 651 final.

Research Group on Existing EC Private Law, chaired by Hans Schulte-Nölke.⁶ A Feasibility Study succeeded the DCFR in 2011,⁷ resulting in the CESL produced by an Expert Group.⁸

The breadth of the proposals ranged from model rules for a unified European general contract law (PECL) to an ambitious project to harmonise contracts and other areas of private law (DCFR) and an optional instrument for sales (CESL). However, they all had in common that they were backed by the European Commission, were prepared by networks of academics from the Member States (*Professorenrecht*) and had at their bases a thorough comparative law analysis. The consumer law *acquis communautaire* was also present in some of the proposals.

This is not the place to assess the success of the proposals, a task that has largely already been undertaken.⁹ Among their merits, the model rules impacted the modernisation of national contract laws, including the reform of the German and French civil codes, and have been used to refresh the interpretation, by courts, of other civil codes (such as Spain's) that have not undergone reform.¹⁰ A certain alignment in terms of legal thought of national general contract law and the proposals to harmonise European contract law could justify the latter's impact over the former. For the purposes of this chapter, it is important to highlight, with qualifications, the liberal stance on contract law, with the individual and corrective justice as cornerstones.¹¹ This standpoint explains the rules for the life cycle of contracts, which revolve around freedom of contract: formation (offer and acceptance), validity (defects of consent), interpretation (subjective or objective), terms (express and implied) and remedies (individual, private enforcement).

⁶ C von Bar and H Schulte-Nölke (eds), *Principles, Definitions and Model Rules on European Private Law: Draft Common Frame of Reference (DCFR)*, outline edn (Munich, Sellier, 2009).

⁷ See 'A European Contract Law for Consumers and Businesses: Publication of the Results of the Feasibility Study Carried Out by the Expert Group on European Contract Law for Stakeholders' and Legal Practitioners' Feedback', ec.europa.eu/justice/contract/files/feasibility_study_final.pdf.

⁸ For a detailed account, see H Beale, 'The Story of EU Contract Law – from 2001 to 2014' in C Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Cheltenham, Edward Elgar Publishing, 2016) 432–62.

⁹ S Grundmann, 'European Contract Law (s) of What Colour?' (2005) 1 *European Review of Contract Law* 184; S Vogenauer and S Weatherill (eds), *The Harmonisation of European Contract Law. Implications for European Private Law, Business and Legal Practice* (Oxford, Hart Publishing, 2006); H Eidenmüller, F Faust, HC Grigoleit, G Wagner and R Zimmermann, 'The Common Frame of Reference for European Private Law. Policy Choices and Codification Problems' (2008) 28 *OJLS* 659; HW Micklitz and F Cafaggi (eds), *European Private Law after the Common Frame of Reference* (Cheltenham, Edward Elgar Publishing, 2010); G Howells, 'European Contract Law Reform and European Consumer Law – Two Related but Distinct Regimes' (2011) 7 *European Review of Contract Law* 173; N Jansen and R Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford, Oxford University Press, 2018); F de Elizalde (ed), *Uniform Rules for European Contract Law? A Critical Assessment* (Oxford, Hart Publishing, 2018).

¹⁰ E Roca Trias, 'The Modernisation of the Law of Obligations Using the Principles of European Contract Law' in de Elizalde (ibid) 83–90; T Ackermann, 'Uniform Rules as Guidelines for National Courts and Legislatures: The German Experience' in de Elizalde (ibid) 91–102; B Fauvarque-Cosson, 'National Reforms: New Instruments towards Converging Rules within Europe? The Example of the French Contract Law Reform (2016)' in de Elizalde (ibid) 103–14.

¹¹ G Brüggemeier et al, 'Social Justice in European Contract Law: A Manifesto' (2004) 10 *European Law Journal* 653.

In parallel to the academic endeavours to harmonise contract law, a less noticeable movement seems to have advanced in the same direction, albeit with different means, methodology and philosophy. I refer to it as ‘mass EU contract law’ (MEUCL).

It is the working hypothesis of this chapter that EU law is developing core rules for the formation of contracts that could end up in a harmonised system (MEUCL), yet one that is of a different colour to the previous academic proposals in the field. These rules are enshrined in legislative instruments (mainly directives) that are later advanced by the Court of Justice of the European Union (CJEU) interpretation when resolving requests for preliminary rulings from national courts (Art 267 TFEU). Different to the proposals, MEUCL does not produce soft law model rules but mandatory law.

The system is under construction. Unified EU general contract laws have not been put in place and the controversy over the competences of the EU to pursue harmonisation in contract law remains unsolved, while the Union advances almost imperceptibly. Moreover, the horizontal relationship (cross-directive) between the diverse legal sources is unclear and their impact over contract law is heterogeneous. Therefore, the alleged harmonisation is close to spontaneous, which makes the case harder to prove. Complexity also arises from the pluralistic and multilayered character of EU law, on which the Union enshrines the rights and the Member States design the remedies for their infringement, following procedural autonomy, with limitations arising from the principles of effectiveness, equivalence, proportionality and dissuasiveness.¹²

Despite said complexities, this chapter claims that EU law is establishing general rules for the formation of contracts by following a radically new approach to procedural fairness. Agreement, the core element in contract formation, is being transformed by becoming standardised as it ignores the characteristics of the contracting parties. The transformation results from the use of legal standards to determine valid contract formation. Those legal standards include the ‘average consumer’ and the ‘average retail (investment) client’, which ignore individual knowledge, expertise and causation – a radical shift from traditional contract law. MEUCL treats all members of the class alike. It is claimed here that this transformation is occurring despite the recurrent affirmation that EU law is without prejudice ‘to contract law and, in particular, to the rules on the validity, formation or effect of a contract’.¹³

¹²N Reich, ‘The Principle of Effectiveness and EU Private Law’ in U Bernitz, X Groussot and F Schulyok (eds), *General Principles of EU Law and European Private Law* (Alphen aan den Rijn, Wolters Kluwer, 2013) 301; F Cafaggi and P Iamiceli, ‘The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions’ (2017) 25 *European Review of Private Law* 575.

¹³See Art 3(2) of 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

The claimed evolution of EU law has a direct impact on corrective justice, which becomes highly dependent on the pursuit of societal aims through market regulation. From the perspective of legal philosophy, MEUCL looks utilitarian and instrumental as it aims to improve the functioning of the internal market – most of its legal provisions being justified in Article 114 TFEU, which serves as a basis for EU legislative action in private law.¹⁴ This would be a fundamental change for traditional private law, which is set to face increased pressure from public policies,¹⁵ with even its autonomy being challenged.¹⁶ EU private law would thus have a unique character. The legal transformation affects the cornerstone of contract formation (agreement), with further consequences on freedom of choice, freedom to conduct a business, individual responsibility and market behaviour. Moreover, it might be the case that a standardised approach to agreement is already old-fashioned at the time of its conception against the backdrop of big data and artificial intelligence (AI), which allow personalisation in the online mass contracting of goods and services.¹⁷

This chapter aims to prove the existence of MEUCL and its innovative character. First, the chapter will briefly address agreement and the validity of contracts in national law, including references to the soft law proposals to harmonise European contract law. Then it will define the scope of MEUCL and reflect on the ‘contractual logic’ position of modern private law as opposed to the more homogeneous approach of traditional law. Within that framework, the chapter will delve into the use of legal standards in contract formation under EU law, which stems from a cross-legislative assessment.

Parliament and of the Council and Regulation (EC) 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22; Recital 14 of 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 and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64; Art 3(10) of Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1; Recital 18 of Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L136/28.

¹⁴ K Gutman, *The Constitutional Foundations of European Contract Law. A Comparative Analysis* (Oxford, Oxford University Press, 2014); M Hesselink, ‘Contract Theory and EU Contract Law’ (2015) Amsterdam Legal Studies Research Paper No 2015-39, 1, 9, papers.ssrn.com/sol3/papers.cfm?abstract_id=2674508; R Schulze and F Zoll, *European Contract Law* (Munich, CH Beck/Oxford, Hart Publishing/Baden Baden, Nomos, 2016) 13.

¹⁵ HW Micklitz, *The Politics of Justice in European Private Law. Social Justice, Access Justice, Societal Justice* (Cambridge, Cambridge University Press, 2018) 22–24.

¹⁶ HW Micklitz, Y Svetiev and G Comparato, ‘European Regulatory Private Law – The Paradigms Tested’ (2014) EUI Law Working Paper 2014/04, cadmus.eui.eu/handle/1814/31137.

¹⁷ See A Porat and L Starhilevitz, ‘Personalising Default Rules and Disclosure with Big Data’ (2014) 112 *Michigan Law Review* 1417; C Busch, ‘Implementing Personalized Law: Personalized Disclosures in Consumer Law and Data Privacy Law’ (2019) 86 *University of Chicago Law Review* 309.

II. The Formation of Contracts under National Law. The Proposals to Harmonise European Contract Law

A. Agreement and Its Interpretation

It is a shared tradition in national contract law of the Member States of the EU (although not to a uniform one) that a contract is formed by an agreement, represented as an offer, which contains sufficient and definite terms to bring about an acceptance.¹⁸ Two possible approaches to agreement diverge therefrom: an 'objective' one, prevailing in the common law tradition, and a 'subjective' one, existing in the civil law tradition, although not exclusively.

According to the objective approach, the offeror is bound by its offer based on the reliance that it creates upon a reasonable person.¹⁹ In this way, the offeror may be bound even though in fact it had no such intention insofar as the offeree was ignorant about it.²⁰ From the perspective of the interpretation of express terms, which concerns the meaning of agreement and hence completes the picture of it, the objective criterion also reigns. In this context, it is further defined that the reasonable person is put in the position of the parties and has 'all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed'.²¹

In civil law, agreement (*consensus ad idem*) is usually explained as the meeting of the parties' minds, an expression that highlights the need for an actual common intention. The subjectivity inherent in this approach is further reflected in the interpretation of the terms agreed by the parties. Civil codes provide for canons of interpretation according to which the true intention of the parties prevails when in contradiction with the literal meaning of the declaration of intent (eg in France, Article 1188 of the Code civil (CC)). Nevertheless, civil law is not purely subjective. Objective criteria that address the protection of reliance are also present, including determining the existence and meaning of agreement according to good faith and usages (eg in Germany, § 157 of the Bürgerliches Gesetzbuch (BGB)). The exact balance between subjective and objective criteria varies from country to country and remains a controversial issue in many jurisdictions.

Beyond a different stance on agreement (objective or subjective), national laws share the fact that agreement and the interpretation of it is restricted to the

¹⁸ H Beale, B Fauvarque-Cosson, J Rutgers, D Tallon and S Vogenauer, *Cases, Materials and Text on Contract Law* (Oxford, Hart Publishing, 2010) 241.

¹⁹ M Chen-Wishart, 'Formation of Contract' in H Beale (ed), *Chitty on Contracts* (London, Sweet & Maxwell, 2015) 193–94.

²⁰ *ibid.*

²¹ G Treitel and E Peel, *The Law of Contract* (London, Sweet & Maxwell, 2011) 241.

contracting parties. The task of courts is to ascertain if a contract has come into existence by looking at the actual contracting parties and the ‘meaning of the language that the parties have chosen to express their agreement.’²² It is thus possible to consider this approach as ‘individual’ or ‘particular’ in contrast to a model that primarily looks beyond the parties. Moreover, this classic (national) way to address agreement is largely designed for negotiated contracts; the *contra proferentem* rule, according to which obscure terms are to be interpreted against their drafter, later extended to standard form contracts, was also created for bargained-for contracts.

The soft law proposals to harmonise European contract law adhere to the perspective of national law, which ascertains agreement focusing on the contracting parties. They also consider sufficient agreement to be the basis for a valid contract and, as regards interpretation of the agreed terms, the proposed model rules search for the common intention of the parties – opting for the subjective approach, in the first place, which is supplemented by objective criteria (Articles 5:101 PECL, II.8:101 DCFR and 58 CESL).

B. Validity of Contracts

National law recognises the binding force of agreements based on freedom of contract or party autonomy, which is a general principle enshrined as such in the proposals to harmonise European contract law (Articles 1:102 PECL and II.1:102 DCFR). Freedom of contract requires procedural fairness, ie that agreement was formed with actual freedom and intent. Such procedural fairness is traditionally controlled with the ‘vices’ or ‘defects’ of consent (mistake, misrepresentation, undue influence, etc), which lead to invalidity of contracts, on occasion coupled with damages. Only in more recent times, and recurrently following the implementation of the Unfair Contract Terms Directive (UCTD)),²³ have national laws of the Member States introduced a substantive control of terms (beyond the historical institution of *laesio enormis*, existent in some jurisdictions such as Austria, §934 of the Allgemeines bürgerliches Gesetzbuch), usually restricted to standard form contracts and mostly in the context of business-to-consumer (B2C) relationships.

The assessment of the validity of contracts in national law is largely consistent with the approach that a particular jurisdiction adopts towards agreement. Jurisdictions that rely on an objective criterion (eg England and Wales) are normally more reluctant to rescind a contract under a defect of consent, unless the reliance that the non-aggrieved party has placed on the contract does not deserve protection. Again, the ‘reasonable person’ test appears, as in the case

²² *Wood v Capita Insurance Services* [2017] UKSC 24.

²³ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.

of misrepresentations in English law, to determine the objective meaning of statements.²⁴ A parallel, yet different scenario is visible in civil law. There, too, the vices of consent relate to the stance that national law takes on agreement, which primarily refers to the common intention of the parties. A vitiated agreement should give the affected party the remedy to invalidate it – the actual understanding of the parties being the paradigm to assess the validity of the contract. However, this is not at all straightforward because, as stated, civil law balances actual intention (subjective approach to agreement) with the reliance placed by the parties (resorting to objective criteria). Therefore, for example, an action for mistake is not granted if the error was inexcusable for the mistaken party (eg Article 1132 CC).

Replicating what occurs with the existence of agreement and the interpretation of the terms created by it, national laws coincide in analysing the defects of consent ‘individually’, ie restricted to the contracting parties. In addition to other requirements, an action for invalidity does not succeed if the consent of one of the parties (or both) is actually not vitiated. This happens, for example, when one party does not rely on the incorrect information given by the other.²⁵ Moreover, the analysis of invalidity includes the personal characteristics of the aggrieved party. This is considered, for example, to assess an action for misrepresentation under English law (‘the known characteristics of the actual representee’)²⁶ or an action for mistake in civil law. A similar, individual approach is the one underlying the soft law proposals to harmonise European contract law (Articles 4:103 PECL and II.7:201 DCFR).

III. The Bases of MEUCL

A. Overview

The hypothesis underlying this chapter is that partial harmonisation of EU law is ongoing, which stems from a radically new understanding of agreement and contractual validity – core elements in the formation of contracts. It is claimed here that legal standards are replacing agreement to determine procedural fairness (the process that leads to a valid contract), which would entail an innovative intervention of EU law to alter the long-established framework of contract formation. The change would arise from the fact that, under MEUCL, agreement appears not to be individually assessed (party-based), but instead is benchmarked against objective legal standards that determine the validity of contracts: the ‘average consumer’ and the ‘average (investment) client’. The change would be even more significant

²⁴ Treitel and Peel (n 21) 361.

²⁵ *ibid.*

²⁶ *ibid.*

if, as the CJEU has decided, the legal standard ignores individual knowledge and expertise, which represents a 180-degree shift from traditional contract law.

The transformation of the rules on contract formation, beyond more express intervention of EU law, seems restricted to what this chapter calls ‘protective’ or ‘asymmetric’ contracts. These are contracts in which one of the parties is in an asymmetric position vis-à-vis its business counterparty. Protective contracts include not only B2C contracts,²⁷ but also other private law relationships such as those arising from investment law (eg the Markets in Financial Instruments Directive (MiFID) regime).

MEUCL is EU mandatory law that stems from a cross-directive interpretation of the regulation of protective contracts and is completed with the remedies recognised in national law. Hans Micklitz and his research group on European regulatory private law (ERPL) should probably be credited for stressing the private law elements in a variety of markets regulated by EU legislative instruments.²⁸ However, they consider each market’s vertical regulation isolated from the rest (a ‘silo’).²⁹ In consequence, ERPL would reject general rules in EU private law that apply horizontally across sectors. In an assessment of ERPL, Martijn Hesselink opposed this view and flagged the Unfair Contract Terms Directive (UCTD) as an example of EU law that applies horizontally to all markets to control unfair terms in B2C standard form contracts.³⁰ This chapter shares this assumption, ie that it is possible to recognise contract rules in EU law that apply horizontally, with the said extended scope beyond the boundaries of consumer law.

Having stated this, the word ‘mass’ (of the acronym MEUCL) and its relationship with the formation of contracts needs further explanation. Classic general contract rules from national law were designed for individual transactions, according to the reality of the time. As mentioned, the soft law proposals to harmonise European contract law shared that assumption. Instead, the contract law system that is allegedly being built in the EU seems designed for mass, asymmetric transactions, which are customary in today’s economies of scale. This does not mean that the application of EU law always requires repetitive contracts,³¹ but, instead, that regulation is planned for contracts that are directed towards a broad number of people. The disruptive character of EU private law (and the partial harmonisation in the formation of contracts stemming from MEUCL) is perceived in its innovative approach to a binding agreement, which, as stated, shifts away from a millenary understanding.

²⁷ See V Roppo, ‘From Consumer Contracts to Asymmetric Contracts: A Trend in European Contract Law’ (2009) 5 *European Review of Contract Law* 304, 310 ff.

²⁸ See HW Micklitz, ‘The Visible Hand of European Regulatory Private Law – The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation’ (2009) 28 *Yearbook of European Law* 3, 21–29.

²⁹ Micklitz et al (n 16).

³⁰ M Hesselink, ‘Private Law, Regulation and Justice’ (2016) 22 *European Law Journal* 681, 683.

³¹ Case C-388/13 *Nemzeti Fogyasztóvédelmi Hatóság v UPC Magyarország kft* ECLI:EU:C:2015:225, para 41.

Agreement has been the historical cornerstone in the formation of a valid contract, which is a requirement shared (with variations) by diverse legal traditions. Starting from a restricted application in classical Roman law, agreement went on to become the basis for a valid contract, and the criterion for corrective justice. Following the expansion of economies of scale and the standardisation of contracts, legal systems intervened in the twentieth century to control the substantive fairness of terms in standard form contracts: the assessment of unfair terms. However, in EU law, the control did not reach contract formation (procedural fairness). Additionally, the essential elements of the contract (the definition of the subject matter and the adequacy of price in relation to the product or service, Article 4.2 UCTD) were also left to party autonomy (agreement) and competition.³² Respect for agreement has characterised EU private law, even beyond standard form contracts. Arguably, EU law has assumed a classic economic analysis (parties as rational agents) that revolves around agreement, with legal intervention being mostly restricted to correct traditional market failures such as information problems.³³

As stated, the hypothesis underlying this chapter is that the concept of agreement, as it has been understood for centuries, is being disrupted by legal standards that determine procedural fairness in contract formation, ie the 'average consumer' and the 'average retail (investment) client'. The average consumer and the average retail client are legal standards that apply following a contractual-position logic, be it B2C or investment firm/client, that remain alien to the actual agreement and would disregard individual knowledge and expertise. As will be explained in the following section, MEUCL protects all members of the class alike, which represents a regulatory policy of 'maximum welfarism' (ie one that is not targeted).³⁴

The use of a legal standard (the 'average') to assess the formation of contracts, if proven, would represent a major shift from traditional private law. In terms of validity of contracts, the classic 'vices' or 'defects' of consent look at flaws in the agreement of the actual contracting parties. To that end, for example, actual non-reliance of the claimant on the pre-contractual information provided by the defendant bars the action of the former. EU law replaces defects of consent with, among others, the notion of 'lack of transparency', according to the understanding of an 'average consumer' – ignoring the actual knowledge of the parties, which is immaterial to the claim. Thus, even the person who understood or was capable of understanding the pre-contractual information of a term, ie was above 'average', would be protected. This has never been the case from a comparative perspective, not even in a system like English law, which adopts an objective approach to

³² AG Trstenjak in Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v Ausbanc* ECLI:EU:C:2009:682.

³³ G Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 *Journal of Law and Society* 349.

³⁴ C Willet, *Fairness in Consumer Contracts. The Case of Unfair Terms* (Aldershot, Ashgate, 2007) 377–78.

agreement. Therefore, the validity of contracts in EU law would become standardised for the first time, leading to a major shift from traditional rules.

B. The Contractual Position Logic

An important characteristic of contract law today is the logic of the ‘contractual position’. Modern contract law increasingly takes the condition of the parties into consideration in applying one set of rules or another.³⁵ The most extended application of this logic is the classification of contract rules following the B2B, B2C and C2C distinction.

The variety of rules is not at all new and is well documented in history. The special status for merchants is a good example of it. However, general contract law beyond a specific status (eg the rules contained in civil codes) was meant to apply equally to all. A political purpose underlying liberal contract law was precisely freedom of contract for parties that were assumed to be equal, with equally applicable rules.

The recognition of asymmetries in the bargaining power of the parties as well as information asymmetries have put an end to homogeneity in private law. The result, in national law, is usually a mixed system of general contract law, with rules that take the position of the parties into consideration (clearly, consumer law) and others that do not (eg unreformed provisions in civil codes). For example, English law has two layers of liability for the seller of a good: no liability unless otherwise agreed in C2C contracts (*caveat emptor*) and an implied term of satisfactory quality in B2B and B2C contracts (Sale of Goods Act 1979, section 14 and Consumer Rights Act 2015, section 9 – non-mandatory in the former, mandatory in the latter). In French law and other systems from the civil law tradition (not German law due to the 2001 reform), the Roman system of latent defects (B2B, C2C) coexists with the principle of conformity (B2C), which was introduced by the Consumer Sales Directive.³⁶

EU contract law, which started to develop in the late twentieth century, already follows the modern conception of contract rules. Accordingly, EU contract law ‘almost never addresses contracting parties simply as persons, as [traditional] private law normally does, but always as members of a certain category, in particular consumers and professionals.’³⁷ Consumer law, for example, is the

³⁵ Hesslink, ‘Contract Theory’ (n 14) 11.

³⁶ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of consumer goods and associated guarantees [1999] OJ L171/12. In French law, the system of latent defects survives in Art 1641 CC. For a comparative approach, see F de Elizalde, ‘Should the Implied Term Concerning Quality Be Generalized? Present and Future of the Principle of Conformity in Europe’ (2017) 25 *European Review of Private Law* 71.

³⁷ Hesslink, ‘Contract Theory’ (n 14) 11. See also F Cafaggi, ‘From a Status to a Transaction Based Approach? Institutional Design in European Contract Law’ (2013) 50 *CML Rev* 311.

clear result of B2C. But other legislative interventions in the field, such as the Commercial Agents Directive³⁸ and the Late Payment Directive,³⁹ are exclusively aimed at regulating B2B relationships. In other legislative instruments, such as the e-Commerce Directive,⁴⁰ distinctions are made for consumers with an added reference to the general framework of consumer protection. In investment law, the MiFID regime⁴¹ classifies investors in retail, professionals and eligible counterparties, with a different level of protection.⁴²

A special characteristic of the contractual-position logic, in EU private law, is that belonging to a certain category is objectively defined.⁴³ The corresponding EU legal instruments determine the category of persons that are included in its scope of application, ignoring individual circumstances. Usually the business is defined in a positive way, while the protected party (the consumer or the retail investor) is negatively defined. For example, under the UCTD, a 'seller or supplier' means any natural or legal person who 'is acting for purposes relating to his trade, business or profession' (Article 2c UCTD); while a consumer means any natural person who 'is acting for purposes which are outside his trade, business or profession' (Article 2b UCTD). Similar definitions can be found in the Unfair Commercial Practices Directive (UCPD, Article 2a and b)⁴⁴ and the Consumer Rights Directive (CRD, Article 2[1] and [2]).⁴⁵ It is not surprising that in *Kamenova* the CJEU decided that the concept of 'trader' under the UCPD and the CRD, which are almost identical, should be interpreted uniformly as, additionally, both instruments are based in the same treaty provision (Article 114 TFEU – the predecessor of which also justified the UCTD).⁴⁶

Furthermore, in *Costea*, the CJEU clarified that the category of consumer (and the protection arising therefrom under the UCTD) is to be determined solely by the purpose of the contract, with the actual knowledge or expertise of the actual

³⁸ Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] OJ L382/17.

³⁹ Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions [2011] OJ L48/1.

⁴⁰ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.

⁴¹ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L173/349 (MiFID II) and Level 2 Provisions.

⁴² M Kruithof, 'A Differentiated Approach to Client Protection: The Example of MiFID' in S Grundmann and Y Atamer (eds), *Financial Services, Financial Crisis, and General European Contract Law: Failures and Challenges of Contracting* (Alphen aan den Rijn, Wolters Kluwer, 2011) 114–15. See also D Busch and G Ferrarini (eds), *Regulation of the EU Financial Markets: MiFID II and MiFIR* (Oxford, Oxford University Press, 2017).

⁴³ E Terryn, 'Consumers, By Definition, Include Us All' ... But Not For Every Transaction' (2016) 24 *European Review of Private Law* 271, 273–74.

⁴⁴ Directive 2005/29/EC (UCPD).

⁴⁵ Directive 2011/83/EU (CRD).

⁴⁶ Case C-105/17 *Komisia za zashtita na potrebitelite v Evelina Kamenova* ECLI:EU:C:2018:808, paras 27–29.

consumer being immaterial.⁴⁷ The claimant of the case was a commercial lawyer who challenged the validity of a credit agreement into which he had entered for non-professional purposes. Therefore, at least under the UCTD, a consumer is treated and protected as such even if he is, in fact, a knowledgeable and experienced person. The CJEU interpreted the notion of consumer in the same way under the Brussels Regulation in *Schrems*⁴⁸ and *Jana Petruchová*.⁴⁹

I have called this ‘contractual-position’ logic and not ‘status-based’ logic because the applicable rules of EU law vary depending on the type and purpose of the contract. They are functional.⁵⁰ Following the example of Mr Costea, he would be treated as a consumer when he concludes a credit agreement for non-professional purposes or when he shops at the supermarket, but he would be classified as a professional when acting as an attorney and as a retail investor (with a high level of protection) if he invests in a financial market (not being a professional client under MiFID II).

The contractual-position logic is fundamental to MEUCL. The recognition of categories of legally protected parties to a contract (consumers, retail investors, etc), which are objectively defined, results in the same legal treatment for all members of the class. *Costea* is clear in this sense. Even a knowledgeable and experienced person deserves consumer protection when acting for non-professional purposes.

If we apply the contractual-position logic to the formation of contracts, it points to a radical change. The existence and validity of contracts, according to classic contract law, pivots on the actual contracting parties (not on categories of parties), and on their actual knowledge and expertise. For example, any incorrect statement made while bargaining is to be assessed against that backdrop to determine a possible defect of consent. For those purposes, it is certainly not the same situation with an experienced party as with a layperson. However, if all members of the class are to be treated alike during contract formation, the outcome could be a standardised criterion to determine the validity of contracts. The contractual-position logic would therefore be fertile terrain for the development of a legal standard in the formation of contracts. The hypothesis of this chapter is that the standards of the ‘average consumer’ and the ‘average retail (investment) client’ serve that function to the detriment of agreement.

⁴⁷ Case C-110/14 *Horațiu Ovidiu Costea v SC Volksbank România SA* ECLI:EU:C:2015:538, para 21.

⁴⁸ Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* ECLI:EU:C:2018:37, para 39. It was solved under Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1 (Brussels I Regulation).

⁴⁹ Case C-2018/18 *Jana Petruchová v FIBO Group Holdings Limited* ECLI:EU:C:2019:825, para 55. It was solved under Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1 (Brussels I Regulation recast).

⁵⁰ N Reich, HW Micklitz, P Rott and K Tonner, *European Consumer Law* (Cambridge, Intersentia, 2014); Terryn (n 43) 280–81.

As noted, EU law has frequently resorted to the contractual-position logic as an instrument of protection of the weaker party in asymmetric contracts, be it a consumer or a retail investor (Recital 86 MiFID II). It is only in respect of them ('protective contracts') that MEUCL operates. A general contract law, applicable to all contracts in the same way (an assumption that underlay the soft law proposals to harmonise European contract law) is currently not the driving force of EU hard law. Beyond 'protective' or 'asymmetric' contracts, the interference of EU law instruments with traditional rules on the formation of contracts is minimal and mostly restricted to the introduction of information duties.⁵¹ In respect of negative harmonisation, EU law, at the most, introduces limitations to freedom of contract, with competition law being a good example of this (Articles 101 and 102 TFEU).

IV. The Legal Standard: The 'Average'

The EU legislative *acquis* remains piecemeal despite certain shared concepts and some overarching instruments that provide it with at least partial coherence.⁵² Systematisation is enhanced by the CJEU through its concern for the consistency of the *acquis*.⁵³ Despite this, the chapter aims to prove that harmonisation of the rules on formation of 'protective contracts' arises from a cross-EU secondary law analysis.⁵⁴ To achieve that objective, the chapter will assess the main legislative instruments that impact the formation of contracts.

EU law is notoriously frugal in defining how a contract comes into existence.⁵⁵ Unlike national law, references to the process of formation as a result of acceptance mirroring an offer are scarce. This is a logical outcome of the lack of express competences of the Union to regulate contract law as such. The measures undertaken in this field are justified, to a large extent, in a better functioning of the internal market (Article 114 TFEU).

⁵¹ See, eg the e-Commerce Directive and the Prospectus Regulation (Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC [2017] OJ L168/12.

⁵² S Weatherill, 'The Relationship of the Unfair Commercial Practices Directive to European and National Contract Laws' in S Weatherill and U Berniz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29. New Rules and New Techniques* (Oxford, Hart Publishing, 2007) 122; Hesselink, 'Private Law' (n 30) 685.

⁵³ See Case C-694/17 *Pillar Securitisation Sàrl v Hildur Arnadottir* ECLI:EU:C:2019:345, para 34.

⁵⁴ In respect of this methodology, see V Mak, 'Harmonisation through 'Directive-Related' and 'Cross-Directive' Interpretation: The Role of the ECJ in the Development of European Consumer Law' (2008) Tilburg Institute of Comparative and Transnational Law Working Paper 2008/8, ssrn.com/abstract=1276191. See also A Johnston and H Unberath, 'European Private Law by Directives: Approach and Challenges' in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law* (Cambridge, Cambridge University Press, 2010) 85.

⁵⁵ Schulze and Zoll (n 14) 118.

The CJEU assumed that a contract is formed by means of offer and acceptance in *Rudolf Gabriel*, in the context of the Brussels Convention.⁵⁶ Therein the Court decided that a contract came into existence when the consumer ordered the goods that had been offered by the business, ‘thereby demonstrating his acceptance of the offer – including all conditions attaching thereto – which that company had sent to him in person.’⁵⁷ Consumer legislation sometimes refers to the conclusion of the contract via offer and acceptance, although not in such clear terms. For example, Article 8(6) CRD states that when a contract is to be concluded by telephone, ‘Member States may provide that the trader has to confirm the offer to the consumer who is bound only once he has signed the offer or has sent his written consent’ – so that the signature or written consent entails an acceptance.⁵⁸ Either by express reference in EU law or as a result of national law, European contract law still relies on the theoretical model of offer and acceptance (with options of protective nature),⁵⁹ which results in agreement.

Despite this basis, it is claimed here that agreement and validity of contracts are being disrupted by the application of the legal standards of the average consumer and the average retail investment client. This section is aimed at proving that. Additionally, it traces signs of the new remedies (at an EU level) to control invalid contract formation, showcasing how the traditional ones could be affected. The analysis includes three main B2C horizontal (cross-sectorial) directives: the Unfair Contract Terms Directive (UCTD), the Unfair Commercial Practices Directive (UCPD) and the Consumer Rights Directive (CRD). It also showcases contract formation in other non-consumer protective contracts, such as those regulated by the Markets in Financial Instruments Directive (MiFID regime).

A. The Unfair Contract Terms Directive

One of the pillars of EU private law is the control of unfair terms, as established in the UCTD⁶⁰ and following the interpretation of the CJEU. The UCTD controls the

⁵⁶ 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L299/32.

⁵⁷ Case C-96/00 *Rudolf Gabriel* ECLI:EU:C:2002:436, para 48.

⁵⁸ However, the time of formation of the contract remains uncertain. See G De Cristofaro, ‘After the Implementation of the Consumer Rights Directive in the Member States. Are the National Provisions on Consumer Sales Effectively Harmonised?’ in G De Cristofaro and A De Franceschi (eds), *Consumer Sales in Europe. After the Implementation of the Consumer Rights Directive* (Cambridge, Intersentia, 2016) 11.

⁵⁹ I am referring here to the binding effect of public statements, which in many jurisdictions are considered as mere invitations to treat. See Beale et al (n 18) 252 ff. Instead, on occasion, EU law makes public statements binding, eg Art 6(1) of Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] OJ L326/1 (Package Travel Directive); Art 7(1)d of Directive 2019/770 (Consumer Sales Directive).

⁶⁰ Hesselink, ‘Private Law’ (n 30) 684–85.

substantive fairness of non-negotiated B2C contracts, which constitutes a major inroad into traditional contract law.

The UCTD follows the above-stated logic of regulation by contractual position – B2C in this case. The aim of the UCTD is to re-establish the equality between the parties by correcting the imbalance that exists between the consumer and the seller/supplier due to the weaker position of the former as regards its bargaining power and level of knowledge.⁶¹ It also includes the ‘mass’ aspect of MEUCL as it deals exclusively with non-negotiated terms, which is a characteristic of mass contracting.

The UCTD controls the substantive fairness of ancillary terms included in standard-form contracts directly if grey-listed in the Annex or when they reunite the characteristics of the general criteria set forth in Article 3(1) UCTD (contrary to good faith, the term causes a significant imbalance in the rights and obligations of the parties, to the detriment of the consumer). This type of control, which was certainly an inroad into freedom of contract, did not affect procedural fairness. Moreover, agreement remained unaltered in respect of the *essentialia negotii* as the control of terms under the UCTD does not reach the ‘essential obligations under the contract’, namely, ‘the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange’ (Article 4(2) UCTD). This was an amendment to the original draft of the UCTD, as a sign of respect for agreement and competition.⁶² This chapter suggests that the approach to agreement is now changing.

Those essential obligations under the contract can be controlled if they are not drafted in ‘plain intelligible language’ (Article 4(2) UCTD), which is the requirement of transparency and is additionally set forth in Article 5 UCTD for all terms (ancillary or main). The CJEU advanced the interpretation of the UCTD by defining that transparency has the same substantive meaning throughout the UCTD (*CIB Bank, Gutiérrez Naranjo, Kásler, Matei*),⁶³ which exceeds mere grammatical control. Moreover, the Court has decided that this substantive interpretation depends on the capacity of an ‘average consumer’ to understand the legal and

⁶¹ *Costea* (n 47) para 18, among many.

⁶² S Cámara Lapuente, ‘The Innovative Role of the CJEU’s Case Law in the Review of Price-Related Terms in Standard Form Contracts’ in Y Atamer and P Pichonnaz (eds), *Control of Price Terms in Standard Form Contracts* (Cham, Springer, 2019) 72. For a critic of the formalistic approach of the CJEU in the definition of a core term, see F Gómez Pomar, ‘Core versus Non-core Terms and Legal Controls over Consumer Contract Terms: (Bad) Lessons from Europe?’ (2019) 15 *European Review of Contract Law* 177, 189–93.

⁶³ Case C-621/17 *Gyula Kiss and CIB Bank Zrt. v Emil Kiss and Gyuláné Kiss* ECLI:EU:C:2019:820, para 36; Joined Cases C-154, 307 and 308/15 *Francisco Gutiérrez Naranjo v Cajasur Banco SAU; Ana María Palacios Martínez v Banco Bilbao Vizcaya Argentaria SA (BBVA) and Banco Popular Español SA v Emilio Irlés López and Teresa Torres Andreu* ECLI:EU:C:2016:980, para 49; Case C-26/13 *Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt* ECLI:EU:C:2014:282, para 69; Case C-143/13 *Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA* ECLI:EU:C:2015:127, para 73.

economic implications of a term – a major definition which was introduced in *Kásler*.⁶⁴

The ‘average consumer’ benchmark was developed by the CJEU and is already decades old.⁶⁵ It refers to that consumer that is ‘reasonably well-informed, reasonably observant and circumspect’.⁶⁶ The achievement of this benchmark requires businesses to adequately inform the consumer,⁶⁷ which is an obligation that the Court developed,⁶⁸ despite the existing challenges arising from behavioural literature to the effectiveness of mandated information duties.⁶⁹

The average consumer is not a statistical conception but a legal standard.⁷⁰ When applying the benchmark in the context of the UCTD, judges should take into consideration ‘the nature of the goods or services for which the contract was concluded and ... all the circumstances attending the conclusion of the contract’ (Article 4(1) UCTD).⁷¹ Therefore, the standard is contextualised.

The UCTD provides a valuable insight into the validity of non-negotiated contracts, which are customary in mass contracting (and hence form the basis of MEUCL). Beyond the substantive control of ancillary terms, the current interpretation of transparency that the CJEU developed impacts on the formation of contracts, affecting procedural justice. The purpose of transparency is to enable the comparison between offers in the market,⁷² which prevents the consumer from entering into a contract in error.⁷³ To avoid an unwanted choice, businesses are additionally required to provide information.⁷⁴ These are all concepts that, in

⁶⁴ *Kásler* (n 63) paras 71–75.

⁶⁵ M Durovic, *European Law on Unfair Commercial Practices and Contract Law* (Oxford, Hart Publishing, 2016) 24 ff; V Mak, ‘Standards of Protection: in Search of the “Average Consumer” of EU Law in the Proposal for a Consumer Rights Directive’ (2010) TISCO Working Paper Series on Banking, Finance and Services 4/10, 4 ff, papers.ssrn.com/sol3/papers.cfm?abstract_id=1626115.

⁶⁶ *Kásler* (n 63) para 74.

⁶⁷ Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* ECLI:EU:C:2013:180, para 50.

⁶⁸ HW Micklitz and N Reich, ‘The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)’ (2014) 51 *CML Rev* 771, 786.

⁶⁹ Howells (n 31); O Ben-Shahar and C Schneider, ‘The Failure of Mandated Disclosure’ (2011) 159 *University of Pennsylvania Law Review* 647; O Ben-Shahar and C Schneider, *More Than You Wanted to Know. The Failure of Mandated Disclosure* (Princeton, Princeton University Press, 2014); O Seizov, AJ Wulf and J Luzak, ‘The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU’ (2019) 42 *Journal of Consumer Policy* 149.

⁷⁰ Recital 18 of Directive 2005/29 (UCPD). See V Mak, ‘Standards in European Private Law. A Model for European Private Law Pluralism’ (2013) Tilburg Law School Legal Studies Research Paper Series 15/20129; papers.ssrn.com/sol3/papers.cfm?abstract_id=2302562, 18. On the use of empirical evidence, see BB Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Cham, Springer, 2015) 20 ff.

⁷¹ Case C-186/16 *Ruxandra Paula Andriciuc and Others v Banca Românească SA* ECLI:EU:C:2017:703, para 47.

⁷² Cámara Lapuente, ‘The Innovative Role’ (n 62) 78.

⁷³ Case C-191/15 *Verein für Konsumenteninformation v Amazon EU Sàrl* ECLI:EU:C:2016:612, para 71.

⁷⁴ *RWE Vertrieb* (n 67) para 50.

national law, relate to the formation and validity of contracts. It is therefore possible to argue that the Court's stance towards agreement and its validity is enshrined in the concept of transparency, at least in the context of the UCTD, with transparency being benchmarked against the legal standard of the 'average consumer'.

Therefore, if an average consumer were unable to understand a term, it would be non-binding⁷⁵ and, if the term were a main one, it could even result in the invalidity of the contract due to a 'lack of transparency', which is to be objectively asserted, following the CJEU in *Pereničová*.⁷⁶ Moreover, as mentioned above, the CJEU decided in *Costea* that the actual knowledge and expertise of the contracting consumer is immaterial to the claim.⁷⁷

If the concept of 'consumer' is analysed against the backdrop of the requirement of transparency, the result is that the application of the 'average consumer' test cannot take actual knowledge into account. Hence, a term and also a contract could be invalid, in the absence of transparency, even if an actual consumer understood and could foresee the consequences of the term.

This is a radically different outcome to agreement and validity compared to national law, where no action for invalidity is granted if agreement is not actually vitiated because one party did not or could not rely on the information received from its counterparty. This was assessed subjectively or objectively, but always in the position of the actual contracting parties. This is not the case for the average consumer under the UCTD, which makes the approach to agreement and validity innovative and particular to EU law.

However, it should be noted that in a more recent thread of cases under the UCTD (*Banco Primus*,⁷⁸ *Dunai*⁷⁹ and *GT v HS*⁸⁰), the Court related the transparency control with the general substantive unfairness assessment (Article 3(1) UCTD). This could imply that the assessment of transparency of main terms is moving along the timeline of the life cycle of contracts: from formation to the content of contracts (terms).⁸¹ According to some, the Court could have overstepped its constitutional boundaries in granting a remedy that remained in the realm of procedural autonomy.⁸² Moreover, the CJEU could be interpreting the

⁷⁵ On the similarities of this remedy with invalidity, see C Leskinen and F de Elizalde, 'The Control of Terms That Define the Essential Obligations of the Parties under the Unfair Contract Terms Directive: Gutiérrez Naranjo' (2018) 55 *CML Rev* 1595, 1607–10.

⁷⁶ Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s.r.o.* ECLI:EU:C:2012:144, paras 31–34.

⁷⁷ *Costea* (n 47) para 21.

⁷⁸ Case C-421/14 *Banco Primus SA v Jesús Gutiérrez García* ECLI:EU:C:2017:60, para 64.

⁷⁹ Case C-118/17 *Zsuzsanna Dunai v ERSTE Bank Hungary Zrt* ECLI:EU:C:2019:207, para 49.

⁸⁰ Case C-38/17 *GT v HS* ECLI:EU:C:2019:461, para 37.

⁸¹ As anticipated by P Nebbia, *Unfair Contract Terms in European Law* (Oxford, Hart Publishing, 2007) 137.

⁸² S Cámara Lapuente, 'Un examen crítico de la STJUE de 21 diciembre 2016: nulidad retroactiva sí, falta de transparencia 'abusiva' de las cláusulas suelo no' (2017) 9 *Cuadernos de Derecho Transnacional* 383, 389–91. On the lack of harmonisation, see M Ebers, 'Unfair Contract Terms Directive (93/13)' in

Directive through the lens of German law (§ 307.1 BGB, which, according to the prevailing interpretation, links transparency with the general assessment test) and not through the UCTD.⁸³

This interpretation diverges from the more recent regulation of standard terms in EU law, more specifically B2B contracts in the context of online intermediation services, according to which a non-transparent term is null and void.⁸⁴ In any case, the interpretation of the CJEU does not necessarily imply a change in national law as the UCTD seeks minimum harmonisation, and Member States could raise the level of protection by sanctioning non-transparency directly; thus remaining an issue of formation of contracts.⁸⁵

B. The Unfair Commercial Practices Directive

The UCPD is an important instrument in the consumer *acquis* as it sets the standard of commercial behaviour horizontally (Article 3(1) UCPD). The scope of application of the UCPD *ratione materiae* is broad: ‘any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers’ (Article 2(d) UCPD).⁸⁶ The CJEU has confirmed this broad meaning by interpreting the UCPD as applying to all commercial practices that distort consumers’ economic behaviour.⁸⁷

The UCPD regulates commercial behaviour in the pre-contractual stage; during the formation and performance of a contract; and at the post-contractual phase.⁸⁸ As in the case of the UCTD, the UCPD also assumes the contractual-position logic, limiting its scope of application to B2C relationships (Article 3(1) UCPD).

The unfairness assessment of a commercial practice should follow a three-step hierarchical mechanism.⁸⁹ The first step is to check whether the commercial

H Schulte-Nölke, C Twigg-Flesner and M Ebers (eds), *EC Consumer Law Compendium. The Consumer Acquis and its Transposition in the Member States* (Munich, Sellier, 2008) 201–02. See also Commission, ‘Report from the Commission on the Implementation of Council Directive 93/13/EEC, of 5 April 1993, on Unfair Terms in Consumer Contracts’ COM (2000) 248 final, 18–19.

⁸³ Cámara Lapuente, ‘The Innovative Role’ (n 62) 93.

⁸⁴ Art 3.3 of Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57.

⁸⁵ See Commission, ‘Guidance on the Interpretation and Application of Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts’ (Notice) C (2019) 5325 final, 18 and 37.

⁸⁶ See also *UPC Magyarország* (n 31) para 34.

⁸⁷ Case C-281/12 *Trento Sviluppo srl and Centrale Adriatica Soc. coop. arl v Autorità Garante della Concorrenza e del Mercato* ECLI:EU:C:2013:859, para 32.

⁸⁸ S Whittaker, ‘The Relationship of the Unfair Commercial Practices Directive to European and National Contract Laws’ in Weatherill and Berniz (n 52) 155.

⁸⁹ Durovic, *European Law* (n 65) 12.

practice is included in the blacklist of the UCPD (Annex I). If it is not, the practice must be assessed against the backdrop of three clauses on misleading actions, misleading omissions and aggressive practices (Articles 6–9 UCPD). In these scenarios, the commercial practice would be unfair if it causes or is likely to cause an ‘average consumer’ to take a ‘transactional decision’ (defined in Article 2(k) UCPD) that he would not have otherwise taken.⁹⁰

Lastly, if the practice passes the two first tests, the general clause applies: the commercial practice is unfair if

it is contrary to the requirements of professional diligence and it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.⁹¹

In the case of consumers who are vulnerable (for reasons of ‘mental or physical infirmity, age or credulity’), the assessment is conducted from the perspective of the average member of that group (Article 5(3) UCPD).

Article 3(2) UCPD splits unfair commercial practices from their consequences in contracts, stating that ‘This Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract’. Concurrent reasons could explain this provision, which, although reasonable from a traditional private law perspective, departs from a twofold enforcement (private and public), which is frequent in the consumer *acquis*.⁹²

However, as was advanced at the time of the enactment of the UCPD⁹³ and confirmed 10 years later,⁹⁴ the UCPD has had a strong impact on contractual relationships, at both the national and EU level. In fact, all three general clauses of the UCPD (misleading actions, misleading omissions and aggressive commercial practices) require that the practice affects or is likely to affect a ‘transactional decision’ of the consumer. A transactional decision is defined as

any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting.⁹⁵

In other words, it relates to those decisions that affect the life cycle of contracts, including formation.

⁹⁰ *Trento Sviluppo* (n 87) para 36.

⁹¹ Art 5(2) UCPD.

⁹² Whittaker (n 88) 140–41.

⁹³ *ibid* 143–45.

⁹⁴ M Durovic, ‘The Subtle Europeanization of Contract Law. The Case of Directive 2005/29 EC on Unfair Commercial Practices’ (2015) 23 *European Review of Private Law* 715, 716.

⁹⁵ Art 2(k) UCPD.

Misleading actions (Article 6 UCPD), including communicating wrong or deceptive information, as well as misleading omissions of material information (Article 7 UCPD), are typical situations of defects of consent in national law (mistake, misrepresentation), whereas the aggressive commercial practices of coercion and undue influence (Articles 8 and 9 UCPD) are also usual instances of defects of consent (duress, undue influence).⁹⁶ Therefore, the UCPD impacts the national law of those Member States which have, in fact, resorted to these remedies directly or indirectly, or have even created specific contractual remedies for the breach of the UCPD.⁹⁷

However, all those practices require that unfairness is benchmarked against the ‘average consumer’ or the ‘average member of the group’ when the practice is aimed at them, or the ‘vulnerable consumer’, in the conditions defined. Therefore, unlike the technique of the defects of consent, the actual parties are immaterial in the determination of the validity of the contract. Hence, the defects of consent might not be effective remedies to deal with infringements of the UCPD unless the UCPD is seriously disrupted.⁹⁸ The same could be argued in respect of any remedy that involves causation, as is the case in the UK, where individual redress against an unfair commercial practice requires that the practice was ‘a significant factor in the consumer’s decision to enter into the contract.’⁹⁹ The benchmark of the ‘average consumer’ ignores the subtleties of an individual decision.

Standardisation is enhanced by the new remedies that Directive 2019/2161 has incorporated into the UCPD¹⁰⁰ as a result of the reform that was planned under the New Deal for Consumers.¹⁰¹ Following the recommendations of the Fitness Check,¹⁰² the reform introduced remedies for individual redress into the UCPD. The new Article 11a UCPD foresees private law remedies to cure a breach of the UCPD, including damages and, ‘where relevant’, reduction of price or termination of the contract. At least the latter are clear contractual remedies (damages could follow a contract or, instead, be grounded in tort or unjust enrichment).

⁹⁶ Whittaker (n 88) 152; Durovic, ‘The Subtle Europeanization’ (n 94) 743.

⁹⁷ Durovic, ‘The Subtle Europeanization’ (n 94) 743–46; FP Patti, ‘“Fraud” and “Misleading Commercial Practices”: Modernising the Law of Defects in Consent’ (2016) 12 *European Review of Contract Law* 307, 319–25; Civic Consulting for the European Commission, ‘Study for the Fitness Check of EU Consumer and Marketing Law’ (2017), ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332.

⁹⁸ H Collins, ‘EC Regulation of Unfair Commercial Practices’ in H Collins (ed), *The Forthcoming EC Directive on Unfair Commercial Practices* (Alphen aan den Rijn, Wolters Kluwer, 2005) 37; Durovic, *European Law* (n 65) 161.

⁹⁹ Consumer Protection from Unfair Trading Regulations 2008, s 27A(6). See also S Whittaker, ‘Consumer Contracts’ in H Beale (ed), *Chitty on Contracts*, II (London, Sweet & Maxwell, 2015) 1022.

¹⁰⁰ Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L328/7.

¹⁰¹ Commission, Council and the European Economic and Social Committee, ‘A New Deal for Consumers’ (Communication) COM (2018) 183 final.

¹⁰² n 97.

The reform of the UCPD has bridged the gap between unfair commercial practices and contract law. In respect of the formation of contracts, this seems to reinforce the claim that agreement has become standardised. If the breach of the UCPD is to be benchmarked against the ‘average consumer’ (or the alternative legal standards), an effective design of the contractual remedies should not depart from that standard. Even though Article 11a UCPD dictates that ‘Member states may determine the conditions for the application and effects of those remedies’, national procedural autonomy should comply with the principle of effectiveness of EU law.¹⁰³ Arguably, it would be ineffective to deny a remedy when a breach of the UCPD affects the transactional decision of the average consumer (Articles 5–9 UCPD), even though an individual consumer is not influenced by the unfair practice.¹⁰⁴ However, it cannot be omitted that the reform did not address individual causation, which leaves the control of effectiveness in the realm of the judiciary.

In that respect, it could be argued that the standardised understanding of agreement under the UCPD is further supported by the concept of ‘consumer’. In a similar vein to other legislative instruments of the *acquis*, the UCPD defines who a consumer is in an objective manner, stating that it is any natural person who acts for purposes outside of his trade, craft, business or profession (Article 2a UCPD).

The CJEU has not yet had the opportunity to rule on the specific question of whether the knowledge and experience of a particular consumer justifies a departure from its protection under the UCPD. The answer to this question is important because, if personal circumstances were deemed irrelevant, it would entail an insurmountable barrier to the application of the defects of consent (at least in their traditional shape) to control infringements of the UCPD. It would also mean that the new contractual remedies of the UCPD would be granted even if a consumer could not have been affected by an unfair commercial practice because of its higher knowledge or expertise. It should be recalled that in *Costea* the Court rejected taking personal knowledge and expertise into account, in the context of unfair contract terms.¹⁰⁵ A consistent interpretation of EU law¹⁰⁶ would presumably extend the *stare decisis* of *Costea* to the UCPD. There does not seem to be a justifiable divergence in the definition of the consumer in the UCTD and the UCPD, unlike what could be said of the type of control that each directive aims at.¹⁰⁷

¹⁰³ See n 12.

¹⁰⁴ cf M Loos, ‘The Modernization of European Consumer Law (Continued): More Meat on the Bone After All’ (2019) Amsterdam Law School Legal Studies Research Paper 2019-32, 4, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3445448.

¹⁰⁵ *Costea* (n 47) para 21.

¹⁰⁶ Whittaker (n 88) 150; *Kamenova* (n 46) paras 25–29.

¹⁰⁷ *Pereničová* (n 76) para 43; Case C-109/17 *Bankia SA v Juan Carlos Mari Merino and Others* ECLI:EU:C:2018:735, para 36.

In support of this argument, in *Kamenova*, the Court gave a uniform interpretation for the UCPD and the CRD to the concept of ‘trader’,¹⁰⁸ the ‘B’ party of the B2C contract who, unlike the consumer, acts for purposes relating to his trade, business, craft or profession. The ‘trader’ is defined in a positive way (who it is) and is the other side of the coin of the ‘consumer’, who is negatively defined (it is not a trader). The argument of the Court was that both the UCPD and the CRD are based on Article 114 TFEU and, as such, pursue the same objectives of contributing to the proper functioning of the internal market and ensuring a high level of consumer protection.¹⁰⁹

The UCTD, in the context of which *Costea* was decided, has the same constitutional basis as the UCPD: Article 100A EEC Treaty (Recital 1), which is the predecessor of Article 114 TFEU.¹¹⁰ Moreover, both the UCTD and the UCPD share the assumption that the consumer is in a weak position vis-à-vis the trader.¹¹¹ Therefore, it seems reasonable that the uniform interpretation of who a trader is will be shared. Consequently, the concept of the counterparty to the contract (ie the consumer, who is not a trader) would also become harmonised, with all its implications. Thus, it is sensible for the Court to extend *Costea* to the UCPD and ignore the personal circumstances of a particular consumer. This outcome would reinforce the doubts concerning the ‘defects of consent’ (or any other remedy that takes personal circumstances into account) as an effective remedy to cure an unfair commercial practice. It would also enable the interpretation of the contractual remedies of the UCPD without resorting to individual causation.

C. The Consumer Rights Directive

The CRD regulates duties to provide pre-contractual information in B2C contracts horizontally. The CRD contains a pointillist list of information that should be disclosed in contracts other than distance and off-premises ones (Article 5(1) CRD), both of which have a specific regulation within the CRD (Articles 6–16 CRD), as they proceeded from previous EU legal instruments. However, the duty to disclose pre-contractual information is also set forth for those contracts (Article 6(1) CRD).

The obligation imposed upon the trader to provide information to the consumer before it is bound by a contract completes the legal framework of contract formation horizontally in B2C contracts, which is also composed by the UCTD and the UCPD. However, in line with the latter, Article 3(5) CRD states that “This Directive shall not affect national general contract law such as the rules

¹⁰⁸ *Kamenova* (n 46) para 29.

¹⁰⁹ *ibid* para 28.

¹¹⁰ S Weatherill and U Berniz, ‘Introduction’ in Weatherill and Berniz (n 52) 1.

¹¹¹ *UPC Magyarország* (n 31) para 53; *Pereničová* (n 76) para 27.

on the validity, formation or effect of a contract, in so far as general contract law aspects are not regulated in this Directive'. Consistent with this approach, remedies for the breach of the pre-contractual duty to provide information were left to the procedural autonomy of Member States, the efficacy of which should be assessed according to the interpretation given to the CRD.¹¹² The referral to national law remedies is restricted to contracts other than distance and off-premises ones. In respect of distance and off-premises contracts, the CRD does foresee some specific remedies.¹¹³ Moreover, for these, the information that the trader must disclose becomes an 'integral part of the contract' (Article 6(5) CRD), which leads to contractual remedies in the event of breach.¹¹⁴

Unlike the UCPD, the CRD does not resort to general clauses but, instead, lists the information that the trader ought to disclose. The existence of a list could explain why there was no need to benchmark the obligation to inform against the 'average consumer'. However, the quality of that information and the way in which it is presented do require a benchmark. Should the information be comprehensible for an actual consumer, taking its personal characteristics into account? Or, instead, should it be understandable for an average consumer? The answer is important in analysing agreement and determining if the stance of EU law remains within classic economics (information duties to correct market failures) or instead whether agreement has ceased to be the criterion to determine a valid contract formation.

Unlike the UCPD, there is no express reference in the CRD to the 'average consumer'. Also unlike the UCPD, the CRD does not foresee categories of addressees of the information (average consumer, vulnerable consumer, targeted consumer). However, in Recital 34 CRD it is stated that the trader should give 'clear and comprehensible information', taking into account the specific needs of vulnerable consumers, the definition of whom is identical to the one enshrined in Article 5(3) UCPD. Therefrom, it has been interpreted that the 'vulnerable consumer' represents a subsidiary benchmark to assess the information required under the CRD (as in the UCPD) and that, consequently, the 'average consumer' would be the main benchmark.¹¹⁵

In fact, the CRD requires that the information be provided in a 'clear and comprehensible manner' (Article 5(1) CRD). Furthermore, as a formal requirement for off-premises contracts, the information should be given on paper or another durable medium, in a way that is 'legible, and in plain intelligible

¹¹² Art 23(1) CRD. De Cristofaro (n 58) 11–13.

¹¹³ Arts 6(6), 10(1) and 14(1) CRD. See E Hall, G Howells and J Watson, 'The Consumer Rights Directive – An Assessment of Its Contribution to the Development of European Consumer Contract Law' (2012) 8 *European Review of Contract Law* 139, 152–53; L Tigelaar, 'How to Sanction a Breach of Information Duties of the Consumer Rights Directive?' (2019) 27/1 *European Review of Private Law* 27, 34 ff.

¹¹⁴ A Nordhausen Scholes, 'Information Requirements' in G Howells and R Schulze, *Modernising and Harmonising Consumer Contract Law* (Munich, Sellier, 2009) 225.

¹¹⁵ Durovic, 'The Subtle Europeanization' (n 94) 721.

language' (Article 7(1) CRD). For distance contracts, the information must be made available to the consumer in a way appropriate to the means of distance communications used 'in plain intelligible language' (Article 8(1) CRD). Insofar as that information is provided in a durable medium, it should be 'legible' (Article 8(1) CRD). If a distance contract is to be concluded by electronic means and places the consumer under an obligation to pay, some of the information listed should be given in a 'clear and prominent manner' (Article 8(2) CRD).

The terminological conundrum ('clear and comprehensible manner', 'legible', 'plain intelligible language', 'clear and prominent') has rightfully been criticised.¹¹⁶ In the absence of definitions, it confuses (creating different standards?) and sheds no light on the quality of the information that has to be provided. However, the CJEU in *Purely Creative* used some of those terms in the context of the UCPD in relation to the 'average consumer', even though they are not mentioned therein, which could reinforce the argument of a uniform meaning of transparency in consumer contracts.¹¹⁷

Furthermore, in *Verbraucherzentrale Berlin*, the CJEU introduced the benchmark of the 'average consumer' into the CRD to ascertain whether a stand at a trade fair should be classified as 'business premises' (within the meaning of Article 2(9) CRD).¹¹⁸ In *Walbusch*, the Court extended its use to the provision of information. Specifically, in the interpretation of Article 8(4) CRD, the Court referred to the criterion of the 'average consumer targeted by that communication' to assess whether in a specific case the complete list of information requirements of the CRD (Article 6(1) CRD) could be displayed.¹¹⁹ *Walbusch* could have far-reaching consequences in filling in the existing gaps of the CRD. The 'average consumer targeted by that communication' could be the standard 'average consumer' or a particular group of consumers targeted by the communication. Finally, it could be the vulnerable consumer if the communication targets that group, which is referred to in Recital 34 CRD.

If, following *Kamenova*, the concept of trader in the CRD and the UCPD is uniform¹²⁰ and, inversely, the concept of consumer should also be uniform, the CRD could make headway in the interpretation of the quality and format of the information disclosed according to the 'average consumer'. Furthermore, considering the shared constitutional justification of the CRD and the UCTD (Article 114 TFEU), and the common approach to consumer protection,¹²¹ the

¹¹⁶ Hall et al (n 113) 150–51.

¹¹⁷ Case C-428/11 *Purely Creative Ltd and Others v Office of Fair Trading* ECLI:EU:C:2012:651, paras 55–56.

¹¹⁸ Case C-485/17 *Verbraucherzentrale Berlin eV v Unimatic Vertriebs GmbH* ECLI:EU:C:2018:642, para 43.

¹¹⁹ Case C-430/17 *Walbusch Walter Busch GmbH & Co. KG v Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV* ECLI:EU:C:2019:47, para 47.

¹²⁰ *Kamenova* (n 46) para 29.

¹²¹ *ibid* para 28.

concept of consumer defined in *Costea* (objective, disregarding experience and knowledge)¹²² could be extended to the CRD.

The ‘average consumer’ benchmark to assess the quality of information was used in *Romano* in the context of Directive 2002/65/EC, which regulates distance consumer contracts for financial services (excluded from the CRD, ex Article 3(3)(d)).¹²³ In parallel to the CRD, this directive sets forth a list of information that the business must disclose prior to the contract, also (as in Articles 5(1) and 6(1) CRD) ‘in a clear and comprehensible manner’ (Articles 3(1) and (2) Directive 2002/65/EC). As in the CRD, there is no benchmark against which to assess the quality of the information that should be disclosed. In *Romano*, the Advocate General understood that the definition of consumer in the UCTD, the UCPD and Directive 2002/65/EC (Article 2 (d)) is uniform, and includes the benchmark of the ‘average consumer’ as defined by the CJEU for the UCTD and the UCPD.¹²⁴ The CJEU followed the Advocate General.¹²⁵

Therefore, it seems that this benchmark is the one that should be used to assess the quality and format of the information disclosed under the CRD. Information that is not comprehensible to an average consumer, if central to the contract, could result in invalidity (due to lack of transparency?) even if the claimant is experienced or knowledgeable. The use of the average consumer to benchmark information could minimise the criticism directed at mandatory disclosure, as transparency is different to mere disclosure of information. The model of the ‘average consumer’ (rational or, instead, including behavioural aspects) could determine the change in contract formation from a rational individual to a more realistic criterion, but in either case standardised.

D. The MiFID Regime

Disruption in the formation of ‘protective’ or ‘asymmetric’ (mass) contracts is not restricted to B2C relationships. This section will explore the traces of MEUCL in sectorial legislation beyond consumer protection – more precisely, in investment law under the MiFID regime.

The MiFID framework provides a high level of harmonised investor protection (Recital 70 MiFID II). It comprises not only the MiFID II, but also the MiFIR¹²⁶ and a significant number of implementing instruments (Level 2 provisions) of which, for the purposes of this chapter, the Commission Delegated

¹²² *Costea* (n 47) para 21.

¹²³ Case C-143/18 *Antonio Romano and Lidia Romano v DSL Bank* ECLI:EU:C:2019:701.

¹²⁴ Opinion of AG Pitruzzella in Case C-143/18 *Romano* ECLI:EU:C:2019:273, para 78–79.

¹²⁵ *Romano* (n 123) paras 54–55.

¹²⁶ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 [2014] OJ L173/84 (MiFIR).

Regulation (EU) 2017/565 is of importance.¹²⁷ The current regime replaced the MiFID I¹²⁸ legislative framework and tightened it in the aftermath of the 2008 financial crisis.¹²⁹

The MiFID II (as did the MiFID I) classifies investors into three categories with a decreasing degree of protection: retail clients, professional clients and eligible counterparties. A retail client is defined in a negative way (as EU law does with consumers) as he ‘who is not a professional client’ (Article 4(1)(11) MiFID II). Professional clients are listed: regulated or authorised professional participants in financial markets, large undertakings meeting the established criteria, major public entities and other (non-regulated) institutional investors (Article 4(1)(10) and Annex II MiFID II).¹³⁰ An investor that is not automatically classified as professional may request to be treated as such if it meets qualitative and quantitative requirements, specified in MiFID II, that prove that it ‘possesses the experience, knowledge and expertise to make its own investment decisions and properly assess the risks that it incurs’ (Annex II MiFID II).¹³¹ Lastly, the eligible counterparties (open) listed receive the least degree of protection (Article 30 MiFID II).

In respect of the investment firm–client relationship, the MiFID II adopts the contractual-position logic (that is the basis of MEUCL) by providing different rules according to the category of client, which does not follow the already more established B2B, B2C, C2C model. Retail clients include consumers, but also small and medium-sized enterprises (SMEs) and other legal entities that are not listed as professional clients nor eligible counterparties.¹³² Thus, the subjective scope of those treated as retail clients and, hence, that receive the highest level of protection under MiFID II is broader than that envisaged in consumer law.

Investment firms have the obligation to act ‘honestly, fairly and professionally in accordance with the best interests of their clients’.¹³³ The key provisions specifying this duty are:¹³⁴ the obligation of investment firms to adequately inform their clients or potential clients (Article 24(3)–(7) MiFID II) and, when required, to

¹²⁷ Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive [2017] OJ L87/1 (CDR).

¹²⁸ 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 [2004] OJ L145/1 (MiFID I).

¹²⁹ Busch and Ferrarini (n 42) v.

¹³⁰ Kruithof (n 42) 116–17.

¹³¹ *ibid*; R Steennot, ‘Protecting Investors through Information Requirements’ (2011) 4 *International Journal of Private Law* 111, 114–15.

¹³² Kruithof (n 42) 121–23.

¹³³ L Enriques and M Gargantini, ‘The Overarching Duty to Act in the Best Interest of the Client in MiFID II’ in Busch and Ferrarini (n 42) 85–122.

¹³⁴ *ibid* 89.

conduct the suitability and appropriateness tests of a service or product ('know-your-customer' duties, Article 25 MiFID II). The European Commission identified these duties as being among the ones that are most likely to be found in private claims against investment firms.¹³⁵

Private enforcement of the MiFID regime was not expressly foreseen in MiFID I, which only set forth administrative sanctions (Article 51). However, when deciding on the non-compliance of know-your-customer duties under MiFID I, the CJEU in *Genil* interpreted it thus:

In the absence of EU legislation on the point, it is for the internal legal order of each Member State to determine the contractual consequences of non-compliance with those obligations, subject to observance of the principles of equivalence and effectiveness.¹³⁶

Thus, the prevailing view thereon was that Member States could choose the private law remedy but should necessarily recognise one.¹³⁷

The last paragraph of Article 69(2) MiFID II reinforces this understanding:

Member States shall ensure that mechanisms are in place to ensure that compensation may be paid or other remedial action be taken in accordance with national law for any financial loss or damage suffered as a result of an infringement of this Directive or of [MiFIR].

This remedy is subject to the principles of effectiveness and equivalence, and coexists with public enforcement of the MiFID regime (Article 70 MiFID II).¹³⁸

For the purposes of MEUCL, it is important to determine whether the MiFID regime provides a benchmark against which to assess the effectiveness of a private law remedy recognised in national law. In the context of contract formation, which is under analysis, the assessment has to relate to the overarching information duties imposed upon investment firms. Information, especially about the risks associated with a certain investment service or product, is crucial in the decision of an investor to enter into a contract.¹³⁹ Therefore, non-compliance with those duties has a direct impact on a valid contract formation.

Article 24(3) MiFID II requires that all information, including marketing communications, that an investment firm addresses to clients or potential

¹³⁵ Commission, 'Public Consultation: Review of the Markets in Financial Instruments Directive', 8 December 2010 (Review of Markets in Financial Instruments).

¹³⁶ Case C-604/11 *Genil 48 SL and Comercial Hosteleria de Grandes Vinos SL v Bankinter SA and Banco Bilbao Vizcaya Argentaria SA* ECLI:EU:C:2013:344, para 57.

¹³⁷ S Grundmann, 'The Bankinter Case on MiFID Regulation and Contract Law' (2013) 9 *European Review of Contract Law* 267, 278; D Busch, 'The Private Law Effect of MiFID: Genil and Beyond' (2017) 13 *European Review of Contract Law* 70, 73–74.

¹³⁸ Busch (n 137) 74.

¹³⁹ M Wallinga, 'Why MiFID & MiFID II Do (Not) Matter to Private Law: Liability to Compensate for Investment Losses for Breach of Conduct of Business Rules' (2019) 27 *European Review of Private Law* 515, 519–20.

clients is ‘fair, clear and not misleading.’ Article 24(4) MiFID II establishes that ‘Appropriate information shall be provided in good time to clients or potential clients with regard to the investment firm and its services, the financial instruments and proposed investment strategies, execution venues and all costs and related charges’, and adds details to this respect. Article 24(5) MiFID II states that such information

shall be provided in a comprehensible form in such a manner that clients or potential clients are reasonably able to understand the nature and risks of the investment service and of the specific type of financial instrument that is being offered and, consequently, to take investment decisions on an informed basis.

Additionally, ‘Member States may allow that information to be provided in a standardised format’ (Article 24(5) MiFID II).

However, against which benchmark should it be assessed that the information is ‘fair, clear and not misleading’, ‘appropriate’ and ‘provided in a comprehensible manner’? An individual investor or an average one according to the classification of clients set forth in MiFID II?

The answer is hidden in the Commission Delegated Regulation (EU) 2017/565 (CDR), a Level 2 instrument of the MiFID regime. Article 44 CDR gives guidance in respect of the benchmark against which the information should be assessed. It specifies the conditions that the information must meet in order to be ‘fair, clear and not misleading’ (as required by Article 24 MiFID II) when investment firms disseminate it to ‘retail or professional clients’ or ‘potential retail or professional clients’. As regards the quality of that information, Article 44(2)(d) CDR states that the information must be ‘sufficient for, and presented in a way that is likely to be understood by, the average member of the group to whom it is directed, or by whom it is likely to be received’ – ie the average retail client or the average professional client.¹⁴⁰

Furthermore, in the provision of non-complex services, reference is made to the standard of the average investor, which in that case is the ‘average retail client’. A financial instrument is non-complex if, among other things,

adequately comprehensive information on its characteristics is publicly available and is likely to be readily understood so as to enable the average retail client to make an informed judgment as to whether to enter into a transaction in that instrument.¹⁴¹

Therefore, it seems that for a national private law remedy to effectively cure an infringement of MiFID in the formation of contracts, a requirement that stems from the CJEU case *Genil* and the last paragraph of Article 69(2) MiFID II,¹⁴² it must be benchmarked against the standard of the group targeted by the

¹⁴⁰ *cf* Steennot (n 131) 115.

¹⁴¹ Art 57(f) CDR.

¹⁴² See n 137.

information – an average retail client or an average professional client. As retail clients are defined in an objective manner (who is not a professional client), the particular knowledge or expertise of the investor might not be taken into account so as not to hinder the protection enshrined in MiFID II, which is one of the key objectives of the directive (Recital 70).¹⁴³ This is the same reasoning that the CJEU developed in *Costea*,¹⁴⁴ yet in a different protective context: that of B2C contracts. Hence, a remedy in national law (as a defect of consent) that requires investigation of the particular knowledge or expertise of the investor might not be effective, even though guidance from the CJEU, in the specific context of MiFID II, has not yet been given.¹⁴⁵ Against this, it could be argued that it is not possible to define a homogeneous standard for retail investors as such, as it is a class that encompasses heterogeneous parties – from consumers to SMEs.

The solution could be more straightforward when the investor is a consumer and the non-compliance by the investment firm with its information duties causes or is likely to cause the average consumer to take a transactional decision that it would not otherwise have taken. This would entail an unfair commercial practice (Articles 7(1) and 7(5) and Annex II UCPD; Article 94 MiFID II),¹⁴⁶ with the envisaged contractual law consequences. This express cross-reference reinforces the argument of a harmonised system for contract formation arising from a cross-directive interpretation.

V. Conclusion

The information model has been the hallmark of EU private law, following a classic economic analysis (parties as rational agents) that revolves around agreement. It uses mandated disclosure to correct market failures arising from information asymmetries. If applied to individual transactions, it interacts easily with traditional general contract law. While requiring the strong party to disclose information indicates an inroad into the rules on formation of contracts (especially in the common law), it does not impact the assumption that agreement is the parameter of validity in the formation of contracts.

Instead, the ongoing transformation of EU law, which standardises contract formation, implies a radically new understanding of agreement and contractual validity. The use of a legal standard (the ‘average’) to determine procedural fairness entails an innovative intervention of EU law. Indeed, the common thread that can be found in several EU law instruments shapes general contract law in a manner that is new and, at the same time, seems incompatible with traditional contract

¹⁴³ Busch (n 137) 88.

¹⁴⁴ *Costea* (n 47) para 21.

¹⁴⁵ Busch (n 137) 89.

¹⁴⁶ Steennot (n 131) 115–16.

rules. Reframing agreement could also affect how consent is interpreted in other (not necessarily contractual) areas, such as data protection.

MEUCL is still an untidy patchwork and it is therefore too early to call it a 'system'. Some legal instruments show a more defined picture than others. It is a work in progress, but it is, indeed, in progress. Rules that were aimed to intertwine with national law are being reshaped by the CJEU in a way that pushes the boundaries of national law backwards. A standardised, average-dependent EU contract law casts doubt on the effectiveness of traditional contract law remedies, which pivot around agreement and take individual knowledge and expertise into account. Unsurprisingly, the CJEU has been creating new remedies leading to invalidity, which are benchmarked against the average consumer.

The common design of EU law for mass contracting reaches exclusively relationships in need of particular protection, precisely those in which agreement was underperforming. Therefore, MEUCL does not lead to full harmonisation of European contract law. Although partial in its scope, MEUCL has the potential to reinvigorate, from a new angle, studies on harmonisation of European contract law, including harmonisation by mandatory law and the use of legal standards to deal with the intrinsic complexities of EU law as a pluralistic legal system.¹⁴⁷

The standardised criterion to assess valid contract formation would lead to a system of contract law that is technologically more efficient. Standardisation enhances legal solutions that are more homogeneous and produce less varied big data, which increases the reliability of the outcomes that AI produces from that data. Disrupting contract law in this manner could be a game changer in the global competition for supremacy in AI, placing EU law at the forefront of innovation in law.

MEUCL could also enhance collective enforcement of EU law, a task that the EU has undertaken under the New Deal for Consumers.¹⁴⁸ Standardised rules would make EU law more apt for collective redress as the requirement of commonality (a shared question of law or fact that predominates over individual issues) is easier to meet than agreement, which necessarily has to be individually assessed.

However, concerns about the pressures of the instrumental character of MEUCL (which aims at the improved functioning of the internal market) on corrective justice would probably arise under Article 16 of the Charter of Fundamental Rights of the EU ('Freedom to conduct a business'), which is increasingly referred to in decisions of the CJEU concerning private law.¹⁴⁹ The debate should probably be framed within a broader discussion on the

¹⁴⁷ See n 70.

¹⁴⁸ See n 101.

¹⁴⁹ *Walbusch* (n 119) para 42; Case C-649/17 *Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV v Amazon EU Sàrl* ECLI:EU:C:2019:576, para 44.

relationship between law and efficiency, which is not limited to the established analysis of economic efficiency but, instead, should comprise technological efficiency as well. It should also consider private autonomy, freedom of choice and individual responsibility against the backdrop of market regulation and consumer protection. The disruption of such a core notion of contract law as agreement opens a number of topics up that require further reflection. Hopefully, this chapter will serve as a springboard to some of them.

