

Introduction

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Some of the contributions of this special issue were first presented at a workshop during the thirteenth Mediterranean Research Meeting organized by the EUI's Robert Schuman Centre in March 2012. The workshop examined the up-take of consumer protection and competition law rules in the nations of the Mediterranean Region and the interaction of such transplanted rules with existing private law regimes in those jurisdictions (a topic which we investigate in the EU context in an ERC funded project on European Regulatory Private Law). Two further contributions focus on jurisdictions from Central and Eastern Europe (Hungary and Poland) and provide an interesting counter-point to the experiences of the aspirant nations, given that Hungary and Poland have now been EU Member States for almost a decade.

The specific focus of the workshop was on the domestication of the EU consumer *acquis*, or to use the words of Antonina Bakardjieva Engelbrekt (2009) (who has spearheaded the research of institutional design in consumer enforcement) the domestic “ownership of reform” of consumer protection. The general approach was to seek to identify ways in which domestic actors may have taken ownership of the consumer rules, so as to allow these jurisdictions to move beyond mere recipients of EU rules. The conceptual departure point was the notion that such a process of domestication can occur at various stages of the “transplantation” of the EU consumer rules, including the processes of law-making and law amendment (in transposing the rules), the assignment of enforcement responsibilities or the creation of organizations and institutions responsible for representing consumer interests, as well as through the decision making of the bodies empowered to determine consumer cases. The focus on domestication of course invites two further questions, namely (1) what kinds of domestication are more likely to give results in terms of the effective enforcement of consumer laws, as well as (2) whether the enforcement of the consumer laws in fact improves the position of consumers in the jurisdictions examined, or simply creates work for administrators and lawyers or is foiled by vested interests or increases litigation costs, without a notable effect on consumers' welfare understood broadly. It is worth emphasizing that even isolated instances of individual consumer justice, while providing some indication, are not necessarily conclusive evidence of the general improvement of the status and well being of consumers. The cost and time taken to obtain such justice is also a relevant consideration, as well as the subsequent ripple effects of individual enforcement instances on other actors and the legal and economic system in general.

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Jurisdictions

All of the nations investigated in the following pages have differentiated levels of engagement with the EU, from some recent EU Member States to countries who are in various stages of the pre-accession process. The EU *acquis* in areas such as consumer and competition law is often used as a source of law for these nations, either because the pre-accession process envisages harmonization obligations or because EU law provides a ready-made template that can be adopted without reinventing the wheel in areas where there may be little or no prior domestic experience.

The majority of the contributions focus on the adoption of consumer law in nations of the Western Balkans, including one jurisdiction that has just joined the EU (Croatia), and three that are in the process of joining (Macedonia and Serbia as candidate countries and Albania as a potential candidate). On issues of consumer law and policy, the engagement with these jurisdictions has thus far been between the national and EU administrations and at the level of general law-making in the process of the incorporation of the consumer *acquis*. However, outside of the administrative interactions between the relevant national Ministries and their EU counterparts in the Commission's relevant units, with some expert input (one of us has been extensively involved in that process in South-Eastern Europe, including Turkey), there has not been a deeper academic engagement with or even understanding of the process of establishing consumer policy in these countries (Karanikić et al. 2012). Moreover, while the contributions show that the development of consumer policy across these jurisdictions faces similar obstacles and problems, it may well be that both the policy and academic discussion as between the countries investigated is also lacking or very limited. Our hope was that this special issue will open various channels of communication, within the region and between the region and the EU, as well as the wider neighbourhood, in which the EU consumer *acquis* and EU law more generally have a strong normative influence.

It is perhaps worth underscoring the paradoxical situation in which the “accession” jurisdictions examined in this issue have found themselves in respect of consumer protection since the mid 1990s. At least, the former Yugoslav states were part of the most decentralized economy of Eastern Europe, which nonetheless maintained a substantial role for the state and “socially”-owned enterprises in the production and distribution of goods and had a relatively underdeveloped services sector. The liberalisation of the economy meant a radically new environment both for consumers (regardless of whether the ordinary EU consumer can be regarded as reasonably circumspect, a consumer who has little experience of a market economy may well need some assistance in navigating the new waters) and for businesses (given that market competition, business ethics as well as legal constraints on business behaviour may be relatively weak). Therefore, arguably, the local need for consumer protection policy in such settings would have been considerably stronger than in a more mature market economy, though as we see from the contributions, this in itself does not guarantee either the adoption or effective enforcement of consumer laws.

Questions Posed

In light of the fact that most of the relevant jurisdictions have now adopted EU-inspired consumer laws for some time, we asked contributors to focus not only on the process of adoption of such laws, but also on the arrangements for their enforcement as well as the levels of activity of different implementation and enforcement bodies (both consumer

representatives, agencies, and courts). Furthermore, we invited analytic input in identifying the reasons and consequences for any observed trends through a number of possible analytic prisms.

First, contributors were asked to explore the match between the nature of local problems and the consumer protection templates adopted based on the EU *acquis*. In other words, do the consumer protection instruments provide appropriate responses or settings in which to resolve the types of problems thrown up locally, and are local consumers and businesses sufficiently aware of the rules and capable of complying with them or of using the instruments to achieve effective solutions?

Secondly, we invited an exploration of the links between political governance and the regulatory efficacy of consumer protection instruments in adopting jurisdictions. Do local governments and legislators enact such instruments merely to tick a regulatory reform box in their relationship vis-à-vis the EU, as opposed to a genuine commitment to the normative and problem-solving ideas underlying consumer policy? If so, what factors may have provided impetus for the take up of these instruments by local actors? Sudden changes in the local environment, for example, may make certain regulatory instruments more relevant for local actors, such as liberalization of markets of public services (telecommunications or energy) or the impact of the recent financial crisis in the credit markets.¹

Thirdly, we specifically invited an analysis of the interaction of old and new laws and institutions in jurisdictions that have recently adopted consumer protection regulations following EU patterns. For instance, of particular interest is the interaction between new consumer protection laws with existing local legal orders, such as the general private law (contract and tort) or more specific vertical or horizontal instruments, such as sectoral regimes for public services, product liability, or financial regulation (oftentimes, the latter are themselves supplied from EU templates).

Here of course, we must also acknowledge limitations related to methodology and the availability of evidence. It becomes clear from the contributions that sometimes evidence of the actual practice in enforcing the consumer laws can be difficult to obtain for researchers. Even the formal court practice is often not made publicly available and, as is evident from some of the contributions, consumer law practice can sometimes be at its most effective outside of and before the courts become involved, where it is even less scrutable for research and scholarly analysis. Thus, some of the contributors have themselves been involved in various capacities in either the drafting or the enforcement of the local consumer laws and have drawn on those experiences. Similarly, while the contributors are all lawyers, they were asked to the extent possible to go beyond standard legal methodologies of analysis to probe into reasons for the adoption of rules and their broader effects.

The Contributions

There are seven case studies in total, plus an opening article that seeks to pull together analytically the common themes that emerge from the various case studies. There are two contributions examining the situation in Serbia, one principally focused on the process of law-making (by Karanikić-Mirić) and one on the enforcement mechanisms of the new Serbian consumer law (Fejős). These are followed by contributions that examine both the transposition of the consumer rules and their enforcement in Albania (Djurović), Croatia

¹ A number of the contributors refer to consumer protection laws being used in the financial services sector due to recent problems, such as foreign currency denominated consumer loans.

(Josipović), and the Republic of Macedonia (Gavrilović). The final two contributions examine the more recent transposition of the EU rules on unfair commercial practices and the effects this has had in two of the new(er) Member States, Poland (Namysłowska) and Hungary (Cseres and Balogh). While most of the contributions address the transposition of the EU consumer *acquis* generally, the principal substantive focus tends to be on the rules on unfair contract terms and unfair commercial practices.

Serbia has recently advanced a stage in the process of accession to the EU and is expected to begin pre-accession negotiations shortly. It is the jurisdiction examined in greatest detail with two contributions, focusing both on the law-making and the enforcement structure for the current Serbian consumer law.

Karanikić-Mirić describes the process of transposition in Serbia, a process with which she is familiar through her involvement in the drafting of the new law. Among other things, her contribution recounts the interaction between the ministry working group responsible for drafting the law and the group of EU law experts who was charged with assisting the process. Her overall conclusion is that the collaboration was not structured in the most productive way to allow for mutual learning and the exploitation of synergies or the development of innovative enforcement solutions. She identifies this as one of the reasons for the weaknesses in the subsequent enforcement structure and practice in producing benefits for consumers in Serbia.

Fejős focuses in further detail on the current mixture of old and new enforcement mechanisms for the Serbian consumer law. Her analysis, like that of Karanikić-Mirić, suggests that the weakness of consumer organizations is a key impediment to effective enforcement. Yet Fejős also points to some relative success stories through the consumer advice centres, the adaptation of some alternative dispute resolution mechanisms and the organization Efektiva representing consumers in the financial sector. Furthermore, Fejős' contribution identifies possible ways to strengthen consumer law enforcement in Serbia, suggesting a specialised consumer alternative dispute resolution mechanism and giving the competition commission the mandate to enforce the consumer laws. Interestingly, both Karanikić-Mirić and Fejős suggest there may be cultural reasons for the failure of the local take-up of consumer laws in Serbia. Yet Karanikić-Mirić also observes that such resistance is not always negative, as it may “expose weak spots in a plan for change, support organizational stability, and even help devising better options.”

Djurović's contribution examines the evolution of consumer law and policy in Albania, a country which is furthest back in the process of accession (being only a “potential candidate country”), and yet among the first to have adopted a special consumer law already back in 1997. Albania was the most isolated of the socialist economies during the period of the Cold War and subsequently sought to effectuate a very radical break with the past during the 1990s. Yet poorly regulated markets brought the country to near collapse as a direct result of the collapse of pyramid savings schemes in 1996 and 1997. Djurović describes the successive enactments of consumer laws and the influence of the EU accession process on the creation of Albanian consumer policy. Interestingly, his contribution suggests that it was the charging of a specialized administrative authority with the consumer protection mandate that has produced a considerable consumer law practice, which is outlined in the article.

By contrast, Croatia has recently joined the EU in July 2013 as its latest member. Josipović's article provides a detailed description of both the evolution and the substantive and procedural provisions of the Croatian consumer law, as well as related legislation. While she demonstrates that Croatia has sought to transpose the EU consumer *acquis* both in timely fashion and accurately, as well as to incorporate subsequent EU feedback so as to strengthen the enforcement structure, she also suggests that further progress is necessary to ensure full

effectiveness in protecting consumer rights. While there are references to some cases, the main effects of consumer policy are felt in lower stakes problem resolution through advice centres and similar mechanisms.

The departure point of Gavrilović's case study of the Republic of Macedonia is the paucity of evidence of the use of the transposed rules on unfair contract terms in Macedonian practice. He points to a number of cases in which the unfair contract rules would have been relevant, though notes that in such cases, both courts and parties tend to refer to the protective rules of the general civil law of obligations, rather than the transposed consumer *acquis* provisions despite their mandatory nature. He proposes a number of arguments to explain this state of affairs, including the lack of clarity about the subject matter falling within the scope of the transposed rules on contract terms, the unsettled relationship with the existing civil law (which seems to be more familiar to and preferred by local actors), as well as the weakness and complexity of the enforcement structure.

The final two contributions focus on the transposition of one of the newer pieces of the consumer *acquis*, the Unfair Commercial Practices Directive, in two of the new Member States, Poland and Hungary. Namysłowska analyses the interaction of the Polish transposition of the Directive with the existing Polish law of unfair competition. She identifies a substantive incoherence between the transposed rules on unfair commercial practices in business-to-consumer relationships with the law on unfair competition left in place for business-to-business purposes. Moreover, she suggests that as a procedural matter, limiting standing to enforce the unfair commercial practices rules to consumers would lead to their underutilization, as it is often competitors of the offending trader who have the greatest incentive to enforce such rules. Furthermore, she criticizes the Commission for the failure—in its recent report on the operation of the Directive—to even consider the possibility of amendment of the instrument.

Cseres and Balogh present the administrative enforcement structure for the transposed rules on Unfair Commercial Practices in Hungary and some local practice. Administrative enforcement of consumer rules has played an important role in Hungary, given that country's early decision (in the 1990s) to introduce antitrust, consumer rules, and unfair competition provisions in its Competition Act, which was enforced by the Hungarian competition authority. When transposing the unfair commercial practices rules, the Hungarian legislator afforded a broader scope of enforcement to include the Hungarian competition authority, the National Consumer Protection Authority, and the Financial Supervisory Authority. Such a diffuse structure allows for some specialization (with the competition authority focusing on cases that affect competition, the consumer authority covering also cases involving individual consumer justice, while the financial authority focusing on the special consumer problems thrown up in financial services) and diversity in remedial approaches, while also requiring coordination and cooperation between the authorities involved.

The contributions reveal that, while EU consumer law instruments can provide a platform for convergence in consumer protection levels, as Knill and Lenshow (2005) have argued, formal harmonization often disguises persistent divergences that may be related to the heterogeneity of local problems and environments. As such, as we investigate in the research project on European Regulatory Private Law, the EU influence extends beyond that of a mere harmonizing force, to act also as a source of hybridization in procedures and remedies, which can provoke a re-evaluation of ineffective enforcement regimes and comparison with solutions adopted elsewhere. At the same time, the EU provides ready-made approaches to the regulation of the network sectors, including for relationships between business and consumers in such sectors, leading to even further specialization in the governance of private relationships and displacement or substitution of national private law.

References

- Bakardjieva Engelbrekt, A. (2009). Toward an institutional approach to comparative economic law? In A. Bakardjieva Engelbrekt & J. Nergelius (Eds.), *New directions in Comparative Law* (pp. 213–251). Cheltenham: Edward Elgar.
- Karanikić, M., Micklitz, H.-W., & Reich, N. (Eds.). (2012). *Modernising consumer law: the experience of the Western Balkan*. Baden Baden: Nomos.
- Knill, C., & Lenshow, A. (2005). Compliance, competition, and communication. Different approaches of European governance and their impact on national institutions. *Journal of Common Market Studies*, 48, 583–606.