

PURCHASE AND SALE FROM PRIVATE-TO-PRIVATE

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1. Introduction

In the last years different approaches of regulating European Sales Law have seen the light. The European Commission launched Directives on Consumer Sales, unfair contract terms and distance selling.¹ Recently a new Directive on consumer rights has been published and additionally, a proposal for a regulation on European Sales Law has been launched. Furthermore, national legislators revised their law of obligations and especially, their sales law. Furthermore, in some Eastern European Countries even complete new codes, including sales law, have realised the situation and in some cases are even in a final drafting stage. Next to these official approaches academics have been working on soft law proposals. For example, the team working on sales law of the Study Group on a European Civil Code² elaborated a set of principles for pan European use.³ Furthermore, initiated by the European Commission a Joint Network on European Private Law⁴ elaborated and published a draft proposal for the European common frame of reference.⁵ This draft proposal included a modified version of the Principles of European Law of Sales. In 2011 a committee of experts came up with a principles-based approach on European contract law, based on the draft common frame of reference and including sales contracts.⁶ Based on the works carried out

¹ Directives 1999/44/EC, 1993/13/EC and 1997/7/EC.

² www.sgecc.net.

³ HONDIUS–HEUTGER–JELOSCHKE–SIVESAND–WIEWIOROWSKA: *Principles on European Law of Sales*. Sellier Law Publishers, Munich, 2008. 485.

⁴ S. www.copecol.org.

⁵ The draft is available on-line at http://www.law-net.eu/en_index.html and http://webh01.ua.ac.be/storme/2009_02_DCFR_OutlineEdition.pdf.

⁶ Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law (2010/233/EU). A list of members of the expert group is published under <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/595&format=HTML&aged=>

by the expert group the Commission elaborated a new regulation for businesses and consumers⁷ as an opt-in instrument regulating sales transactions. Some policy decisions taken in the regulation are based on the reactions received on the green paper on policy options for progress towards a European Contract Law for consumers and businesses.⁸ As a model the expert draft has been followed, however, topics have been rearranged and structured differently in the proposed regulation. An economic assessment had shown the enormous impact of small and medium sized entities on cross border trade. Therefore, the regulation introduced a new category of parties: the small and medium sized entities. The impact on economy by small and medium sized entities seems to be more important to the single market than the impact of the rather high number of users of websites for selling and purchasing goods on the Internet. So far, none of the European policy papers have taken into account the constellation of one private person selling or buying from another private person, as we find it e.g. in standard eBay transactions.

When drafting a European Sales Law as well as at an academic level or by the Commission the various approaches took all the *acquis communautaire* into account on consumer sales as well as the international rules of the International Convention of the Sales of Goods, CISG. The chosen models, however, do not cover all kinds of transacting parties.⁹ Most scenarios cover only the relation between business and business or business and consumers. However, there are far more constellations possible. Five different sets of parties in a sale of goods can be identified:

1st The business to business relation. The CISG is a prominent model for regulating this setting. The new regulation offers a new constellation in the area of commercial law: a medium size entity versus a key player on the market. The constellation is so far only known in theory; therefore, I will not focus on this constellation. The 2nd constellation is the business to consumer relation, as we know it from the Directive 1999/44/EC on consumer sales. Here the consumer is defined by its counterpart, the professional. Since the Directive 1999/44/EC states that the consumer has some more rights than before, the burden of proof is in favour of the consumer in the first six months, the legal remedies are prioritised and any given guarantee must offer more than the legal rights. So far, the 3rd constellation of a consumer selling goods back to a professional is not regulated on European Level and the regulation is left over to the national legislator. Nearly no rules can be found on the 4th quite common setting of a non-professional selling or buying from another non-professional. This daily life transaction, with a steadily growing number of participants, is quite unregulated and it is left over to national law and rules on International private law to solve the growing number of cases. Recently, in autumn 2011, in the proposed regulation the

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⁷ Brussels, 11.10.2011, COM(2011) 635 final.

⁸ COM (2010) 348/3.

⁹ The group consisted out of researchers from all over Europe. The long term participants have been: Ewoud Hondius (The Netherlands), Viola Heutger (Germany), Christoph Jeloschek (Austria), Hanna Sivesand (Sweden) and Aneta Wiewiorowska (Poland).

Commission introduced a new category of parties: big business versus small and medium sized entities. I am quite doubtful whether this artificial differentiation will have a chance to become an accepted new category in regulating daily transactions. It is quite hard to imagine that SMEs voluntarily label themselves as small or medium. This new category is still in the drafting stage and has not been acknowledged so far. Therefore, I do not want to focus on this setting here. More importantly, seeing the growing numbers of daily transactions between these parties are the two private human beings, who are selling or buying goods on the World Wide Web.

Most national legislators, on a European as well as on a national level, do not have this group in mind. Furthermore, non-professionals dealing on the Internet and not face-to-face like in shops or at markets are even more unforeseen. The directive on consumer sales did not even deal with online transactions. The Directive from 1999 still had the face-to-face transactions in mind. The directive on distance selling on the other hand does not deal with two non-professional parties.¹⁰ It must be stated that so far, the transactions carried out by two non-professionals, are not regulated by harmonized European rules. That is quite astonishing in a time when millions of contracts are concluded by platforms like eBay on a daily basis. Even quite recent model laws have not taken into account the increasing group of non-professional sellers and buyers.

More attention should be drawn to this specific group. In this article I would like to elaborate the specific needs of these non-professional buyers and sellers, their rights and duties and the existing gaps in legislation.

2. The notion of Consumer

Who negotiates on the World Wide Web? On the one hand we can find professional sellers and non-professional sellers. On the other hand professional and non-professional buyers are also acting. To receive consumer protection a buyer would need a professional as its counterpart. At least, that is how all Directives by the European Commission define a consumer. Having a look into the *acquis communautaire*, provides us with some good definitions. Along the line of the Directive 1999/44 on the sale of goods as consumer: shall mean any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession. The proposal for a new directive 2008/614 on consumer rights adds that the buyer also acts outside its craft.¹¹ The same proposal defines a professional, whom is named there a trader, a person acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of the trader.

¹⁰ Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

¹¹ Art. 2, (1). COM(2008) 614 fin.

The consumer therefore needs the professional as a counterpart¹² in order to be a real consumer according to the Directives. Therefore, when a private person wants to sell a product to another private person the counterpart has no other characteristics' than the seller himself. Generally speaking one can state, that there is no weaker party in such a transaction.

On the worldwide market, as offered by eBay, we quite often find constellations of a non-professional buying from another non-professional. Due to the missing imbalance between the two parties, we can therefore not speak of a consumer to consumer transaction. The stronger party as a counterpart is missing in this transaction. Both parties are on an equal footing. While drafting a proposal for a European Law of Sales the Study Group on a European Civil Code has, therefore, chosen the term private-to-private transaction. To protect the non-professional seller in a sale the Study Group drafted a rule in order to protect the non-professional seller from exorbitant damages claims.¹³

The question must arise, whether in private-to-private transactions general contract law may be applied? Would it make sense to adapt some of the consumer protection rules for these transactions, where both parties are not professionals? Or do we need a new regime in order to offer fair rules for this setting?

To have an idea of who is busy selling on the web, it makes sense to analyse the different kind of sellers.

According to eBay statistics, different kind of users of eBay can roughly be identified. Some only sell for fun. Others hope to make money on eBay and are very well informed on selling practices. Others even make a business out of selling on eBay and a small group makes a great profit (enterprise sellers). Normally a potential seller registers on eBay, makes a photo of the goods he or she wants to sell and writes down a short description. The Internet facilitates the easy way of finding mutual interests. Internet. Via a search engine a potential buyer can find the offers.

Not only in times of the credit crisis and economic recession is it attractive to sell goods one does not need any more, even-though the goods are still usable. Many people do so, even though selling goods is not their daily life business. Mothers, who realized that their children do not play anymore with some toys; students who want to sell their laptop in order to have money for the next generation notebook, or researchers who want to get rid of some books in their collection. All this can easily be found on the World Wide Web, irrespective of whether you are looking for a law

¹² S. E. HONDIUS: The notion of Consumer: European Union versus Member States. *Sydney Law Review*, 2006, vol. 5, 4c.

¹³ DCFR IV. A. – 4:202 and PELS Article 4:207: Limitation of liability for damages of non-business sellers

(1) *If the seller is a natural person acting for purposes not related to that person's trade, business or profession, the buyer is not entitled to damages for lack of conformity exceeding the contract price.*

(2) *The seller is not entitled to rely on paragraph (1) if the lack of conformity relates to facts of which the seller, at the time when the risk passed to the buyer, knew or could reasonably be expected to have known and which the seller did not disclose to the buyer before that time.*

This article will also apply in the case where a non-professional sells goods to a professional.

dictionary or a sailing boat for the next season. Websites like eBay have a successful corporate strategy. So eBay concentrates on local and international trade, eBay offers distinct local sites and is accessible in the respective local language of the country and the company has also built up a global presence with users in more than 150 nations. Along with eBay and similar like platforms, they act as a kind of virtual flea market.

In the Netherlands, throughout the years, Queens's day on the 30th of April became the national day where one half of the Dutch sold their old stuff to the other half. Flea markets like this annual event in the Netherlands do exist all over Europe, and even local supermarkets have a spot where small advertisements can be attached on a wall. Numerous potential sellers and buyers do not only make use of the local possibilities to find and sell goods but they even make use of the Internet for their transactions. Goods, found on the Internet, may be also paid for on the net. These online marketplaces are supported by companies facilitating the financial transactions for paying the price.¹⁴ Some of these payment methods are so new, that there is no special regulation as we know it for example for credit card payments.¹⁵

3. Consumer protection for all kinds of consumer goods on sale?

But now the question arises again: should buyers of such products sold for example via the Internet by non-professional sellers fall under a strict consumer protection regime? Or should the seller be protected like a consumer? The company eBay offers goods on a national, a European and a global basis. Nevertheless, irrespective of the high amount of users, the European legislation so far focuses only on business to consumer sales, not on the "non-professional party to non-professional party" transactions, or as they are quite often called: Consumer to Consumer transactions.

The eBay formula

On eBay, products are sold and on the webpage where the article is offered, the name and location of the seller, and the professional/non-professional status of the seller are stated. It also calls the non-professional sellers who sell their own goods in its German version (eBay.de) *privater Verkäufer*. Throughout the different national eBay websites there is no coherence in labelling the different types of sellers. The French version of eBay (eBay.fr) lists three categories: *particulier*, *professionnel* and *inconnu*. Whereas, the UK site of eBay (eBay.uk) only announces the registered business sellers and the others are not mentioned.

Taking into account the European directive, the legal rights a buyer has depends on his or her choice of seller. Depending on whether it is a business seller, or private party selling goods, the buyer can be defined as a consumer or not. According to

¹⁴ Like PayPal.

¹⁵ Lilian EDWARDS – Caroline WILSON: Redress and alternative dispute resolution in cross-border e-commerce transactions. www.era.lib.ed.ac.uk/handle/1842/2382, 19.

the definitions, only business sellers can have a consumer counterpart as a buyer, only sales between Business and Consumer are regulated in the directive. Now the question must arise, is the buyer aware of his different status, depending only on his choice of seller? Do the buyers have a clear expectation of what kind of rights they have, for example in the case of non-performance? Are they proactive and informed?

When we google the keywords: eBay, private seller, you will find the Wikipedia web dictionary, where you will find the following definition:

*“Consumer-to-consumer (or C2C) electronic commerce involves the electronically-facilitated transactions between consumers through some third party. A common example is the online auction, in which a consumer posts an item for sale and other consumers bid to purchase it; the third party generally charges a flat fee or commission. The sites are only intermediaries, just there to match consumers. They do not have to check quality of the products being offered.”*¹⁶

Wikipedia is not a source of law, but it is interesting how parties are named on the World Wide Web. Furthermore, it shows that the notion consumer-to-consumer is a kind of standard. Also in quite many reactions to the European Union Green paper on the review of the consumer *acquis* stakeholders make use of the notion consumer-to-consumer transaction in order to underline that there is no professional or ‘supplier acting in the course of trade’¹⁷ involved in a transaction.

For the case of mothers selling their children’s stuff we found already two different notions on two different websites. One calls them private seller and another names them simply as consumer.

4. Extra Protection?

Do these parties need extra protection? Are there enough rules that protect this group?

When we return to eBay, the ‘slogans’ used by the sellers to inform the buyer that he has other rights as in normal B2C transactions are interesting to analyse. Many German private sellers announce: ‘This is a sale by a private seller, no guarantee, buyer must waive his rights in the Law.’ In the UK, eBay has added to its site extra legal explanations, where it is mentioned that even private sellers cannot waive all the buyers’ rights.

Analysing the existing sales law we see that most legislators had two sets of sales parties in mind. On the one hand the parties of a pure commercial sale with professionals on both sides. In the case that this commercial sale is a cross border transaction then in a good many cases the International Convention on the Sale of goods is applicable. The buyers and sellers in business to business transactions are experienced professionals with negotiating skills and quite often advised by legal professionals.

¹⁶ <http://en.wikipedia.org/wiki/Consumer-to-consumer>

¹⁷ This notion is proposed by the City of London Law Society, Commercial Law Committee, Response to the Green Paper on the Review of the Consumer *Acquis*, Bl.

On the other hand the national legislator provided extra protections rules for the consumer buyer. These rules are interwoven in the national civil code for example in the Netherlands. Germany has inserted consumer protection rules for the sale of goods later in its code. In other countries the consumer protection rules can be found in a consumer protection act, drafted next to the Civil Code as it is in Austria, Italy and France.

5. Specific problems

There are, however, many unsolved problems. The Court of Justice of the European Union is steadily solving more and more disputes arising out of e-commerce transactions. Just some years ago, the Court ruled that transport costs are to be forwarded to the seller, in the case that the buyer exercises his or her right of withdrawal.¹⁸ Many more issues are not identified so far, like the burden of proof, the right to specific performance, price reduction or termination.

5.1. Private-to-private transactions are neglected in drafting legal texts

From a legislative drafting point of view specific attention for rules for private-to-private transactions are neglected. The parties in such a transaction are not labelled like they are in consumer protection. There is a lack in transparency. The parties are only named buyer and seller.

It asks quite a lot of a citizen of the European Union to reveal his or her rights as a private party in, for example, an eBay transaction in some of the national codifications.

Most law books are still have in mind the professional to professional and the professional to consumer sales. Only in the discussion of the last years lawyers detected that there are even consumers to business sales, like a person selling his or her car to a dealer. And that the number of Internet transactions is increasing where private-to-private transactions are concluded.

Turning back to the different civil codes one will find out that in civil codes with a mixed approach of regulating all kinds of sales, commercial as well consumer sales, it is quite a job to determine the applicable law for private-to-private transactions. Even when it is always stated that these integral codifications avoid fragmentation, repetition of rules and cross references and are therefore better accessible, especially for foreign lawyers who consult only one codification. I must state that in my examination of how to determine my rights in a private-to-private transaction, such proclaimed integral approach was not at all easy to access : I needed quite a lot of time to extract the general sales rules for private-to-private transactions in the Dutch Civil Code.¹⁹ I must honestly state that this came as quite a shock for me. I had been

¹⁸ *S. Verbraucherzentrale Nordrhein-Westfalen e.V. v. Heinrich Heine GmbH*, C-511/08.

¹⁹ Articles 7:1 ss BW.

always in favour of regulating all kind of sales in one codification. We followed the approach of the Dutch Civil Code in the draft of a European Law of Sales which is now part of the Common Frame of Reference of European Contract Law.²⁰

Following this, I had a look into the German civil code. There the rules for private-to-private transactions were quite accessible.²¹ But my clear preference had the rules of the Austrian Civil Code. There the rules were formulated in a very clear and simple format with everything being laid down on two pages.²²

Private-to-private transactions are regulated in national law, however because of the special attention drawn to European consumer law they are a little bit lost between the sometimes rather over detailed regulated consumer protections rules and those rules applicable only to national or international commercial sales law.

Furthermore, recent European legislation even leaves out private-to-private transactions in the case that they are negotiated and concluded online. So far, only limited legislative framework is provided. Therefore, some scholars ask for a *lex informatica*, a legislative framework that of international rules of law and trade usages applicable to cross border e-business transactions. It could be a product of private decentralized law-making emerging mainly from the discourses of actors in cross border e-business transactions and information technology networks.²³

5. More and more private-to-private transactions

Within the last decade private-to-private transactions have increased dramatically. The European Commission is aware of this fact. The first question of the green book of 2008 starts with a question on whether consumers need to be protected when acting through an intermediary. Most reactions towards this question have been answered affirmatively. This proves that there was a request for extra consumer protection. However, the result will be a change in daily shopping transactions. Transactions like those via eBay will become consumer to consumer transactions because they are concluded via a professional intermediary. As a consequence the definition of a consumer must be broadened. Even in the case that the seller is acting for purposes which are not related to his trade, business or profession the buyer will be protected like a consumer when the transaction is concluded via an intermediary. Nevertheless, this new approach will only be applicable for face-to-face transactions, where both parties are simultaneously physically present. Already the green paper of 2007²⁴ states that the broader protection will not include trading platforms for sellers nor consumers, e.g. on the Internet, where the platform provider is not involved in the

²⁰ CFR, Sellier 2008.

²¹ Articles 433 ss BGB.

²² Articles 1053 ss ABGB.

²³ S. Antonis PATRIKIOS: Resolutions of Cross-Border E-Business Disputes by Arbitration Tribunals on the Basis of Transnational Substantive Rules of Law and E-Business Usages: The Emergence of the Lex Informatica. *University of Toledo Law Review*, fall 2006, vol. 38, 277.

²⁴ Green paper on the review of the consumer *acquis*, COM (2006) 744 fin, 4.2.

conclusion of the contract, irrespective of whether he gets a fee for each concluded transaction or not.²⁵ To exclude online intermediaries of this general scope is not a wise construction. At least a specific level of detailed information should be accessible to a purchaser to improve his position in order to balance the respective needs of such purchasers.

6. Self-regulation

Having regard to the amount of transactions carried out each day via the Internet by private-to-private parties, and taking into account the level of detail of the information provided by the intermediary, one must state that on the World Wide Web self-regulation is present. Sites like eBay build their success on regular evaluation through their users and offer feedback possibilities and trust metrics via their websites. The buyers can judge the seller and provide him with stars for a trust ranking. Negative feedback is reported to potential subsequent consumers. Together with feedback provided by others the seller-quality is peer reviewed.²⁶ The possibility to leave feedback builds a strong customer relationship. Awards for the best 'eBayer' add extra recognition and corporate feeling of 'eBayers.'

7. Online Dispute Resolution

We are living in a time where more and more legal problems are often solved outside domestic courts. Also in e-commerce there is a request for alternative dispute resolutions. So far, online dispute resolutions are not on an equal footing with court decisions. But the idea to have an online dispute settlement is evolving more and more. Methods must be found to ensure a due and fair process and the enforceability of the outcome. A specific problem in online transactions is the fact that these transactions are much more anonymous than traditional face-to-face transactions.

A form of ODR is also the possibility for the disappointed participant in an online transaction to rate the seller and to place a negative feedback. This information is provided to consequent consumers and additionally, the collected feedback form a kind of peer reviewed quality seal.

The legal surrounding of online transactions needs some more certainty. Scholars already asked for short term actions at EU level.

They propose that the EU could undertake the following short term actions: Resolve the legal uncertainty as to enforcement of Alternative or online dispute resolution awards, in both arbitration and mediation, and; Provide guidance, model clauses in standard term consumer contracts.²⁷ Some scholars even ask for

²⁵ Some aspects of e-commerce are regulated by Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

²⁶ EDWARDS-WILSON op. cit. 3.

²⁷ EDWARDS-WILSON op. cit. 9.

an accreditation of ODR measures in order to ensure that providers meet certain minimum standards of due process.²⁸

8. Findings

8.1. No real acceptance of self-regulation:

Some years ago the European Commission asked in its Communication if European Contract law could not be regulated by leaving it to the internal market. Nearly no reaction was in favour of this option.

Later on the Commission repeated the wish to leave some aspects to self-regulation and wanted to create a big database with general contract terms. Also that approach failed. In the proposal for a directive on consumer rights the commission states again that self-regulation or co-regulation would not solve the problem of fragmentation due to regulating specific aspects of consumer protection in different directives.²⁹

8.2. The consumer is not always a buyer:

Although in all the documents so far the European Commission still has in mind the weak consumer acting with a professional counterpart, it must be stated that the Commission sees the consumer always in the role of a buyer. Daily life is, however, quite different as more and more private people interact in the Internal market without being buyers, but still being the weaker party.

8.3. We do have a proactive consumer

On the other hand the Commission has asked several times for a more proactive and informed consumer.

The company eBay has shown that seller and buyer, even with a consumer background want to be informed and will inform each other. This is an example of proactive behaviour and informed consent on both sides.

Better co-regulation Legal regulation as it is now is not in line with reality and seems to be old-fashioned. New systematics for national codifications or a European one is needed when taking into account private-to-private transactions.

It is a perfect example of co-regulation.³⁰ Specific information is provided next to existing legal rights. So in some cases even the waiver of rights of some sellers is set aside by a hint of eBay that the legal rights cannot be waived.

²⁸ EDWARDS–WILSON.op. cit. 10.

²⁹ For a critical review see Marco LOOS: Consumer Sales Law in the Proposal for a Consumer Rights Directive 2010/18, *European Review of Private Law*, 15–55.

³⁰ For the discussion on co-regulation see Viola HEUTGER: Alternative Rechtsdurchsetzungsmechanismen im europäischen Privatrecht – Gesellschaftliche Selbstregulierung. In: *Europäisches Privatrecht im wissenschaftlichen Diskurs*, A. Furrer Ed., Stämpfli, Bern, 2006. 359–370.

9. Conclusion

In order to protect the legal system, and aiming for not over-regulating the national private law I strongly advise not to introduce new arranged legislation on private-to-private transactions, but to include these transactions in the considerations when revising existing legislation. The fragmentation of law must be avoided. In the European Union we need more coherence in law making. Private-to-private transactions can perfectly be solved by existing sales law and general rules of European Contract law. However, it is time to reconsider new dispute resolution methods for the growing number of e-commerce participants.