

EU Contract Law

Contract law is mainly national law. No provision in the EU Treaties grants the EU unlimited competence in the field of contract law. There are, however, specific provisions, such as Articles 100(2) and 101(1) TFEU.

Article 100 TFEU: “2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport [...].”

Regulation 2004/261/EC establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights

Regulation 1371/2007/EC on rail passengers' rights and obligations

Regulation 1177/2010/EU concerning the rights of passengers when travelling by sea and inland waterway

Regulation 181/2011/EU concerning the rights of passengers in bus and coach transport

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The development of EU-driven contract law has been largely based upon Article 114 TFEU.

Article 114 TFEU: “1. 1. [...] The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.”

As for IP rights, the understanding and use by EU institutions of their power in the contract law field have changed through time, moving from the progressive layering of EU acts (especially directives) to the progressive hardening of such layer, and from a ‘minimal’ to a ‘maximal’ harmonization approach.

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Regulation 2001/44/EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussel I), now replaced by Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussel I bis)

Regulation 593/2008/EC on the law applicable to contractual obligations (Rome I)

Regulation (EU) 524/2013 on online dispute resolution for consumer disputes

Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services

Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector

Regulation (EU) 2022/2065 on a Single Market for Digital Services

Directive 85/577/EEC on consumer contracts negotiated away from business premises + Directive 97/7/EC on the protection of consumers in respect of distance contracts, replaced by Directive 2011/83/EU on consumer rights

Directive 2002/65/EC on the distance marketing of consumer financial services

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Directive 1987/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, now replaced by Directive 2008/48/EC on credit agreements for consumers, and Directive 2002/47/EC on financial collateral arrangements

Directive 90/314/EEC on package travel, package holidays and package tours, now replaced by Directive (EU) 2015/2302 on package travel and linked travel arrangements

Directive 93/13/EEC on unfair terms in consumer contracts. The Directive provides for the judicial review of standard terms in consumer contracts, famously stating that “a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer” (Article 3(1)); such terms are not binding on consumers (Article 6(1)).

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Directive 1994/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, now replaced by Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts

Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, now replaced by the Directive (EU) 771/2019 on certain aspects concerning contracts for the sale of goods

Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, now replaced by the Regulation (EU) 2022/2065 on a Single Market For Digital Services

Directive 2000/35/EC combating late payment in commercial transactions, now replaced by Directive 2011/7/EU on combating late payment in commercial transactions

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Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market unfair commercial practices, prohibiting misleading advertisement (Article 6) and unfair commercial practices

Directive 2013/11/EU on alternative dispute resolution for consumer disputes

Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property

Directive (EU) 770/2019 on certain aspects concerning contracts for the supply of digital content and digital services

Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers

Many of these acts, which originally were qualified as instruments for minimal harmonization, have been later qualified as instruments of maximum harmonization.

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Contract law, however, remains in principle governed by national laws, which provide for its essential vocabulary, rules and remedies.

Article 2 Directive 2011/83/EC: “(1) ‘consumer’ means any natural person who [...] is acting for purposes which are outside his trade, business, craft or profession; (2) ‘trader’ means any natural person or any legal person [...] who is acting [...] for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive; (5) ‘sales contract’ means any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services; (6) ‘service contract’ means any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof.”

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Under EU law, only natural persons can be consumer (*Cape v. Idealservice*, C-541/99 [2001]; *Condominio di Milano, via Meda v. Eurothermo*, C-329/19 [2020]).

The quality of consumer is to be assessed objectively, no matter what the knowledge and experience of a party is (*Costea v. Volksbank Romania*, C-110/14 [2015]).

“Neither the expertise which [a consumer] may acquire in the field covered by those services nor his assurances given for the purposes of representing the rights and interests of the users of those services can deprive him of the status of a ‘consumer’ within the meaning of Article 15 of Regulation (EC) 44/2001 [...] [t]he answer to the first question is that Article 15 of Regulation (EC) 44/2001 must be interpreted as meaning that the activities of publishing books, lecturing, operating websites, fundraising and being assigned the claims of numerous consumers for the purpose of their enforcement do not entail the loss of a private Facebook account user’s status as a ‘consumer’ within the meaning of that article” (*Schrems v. Facebook*, C-498/16 [2018]).

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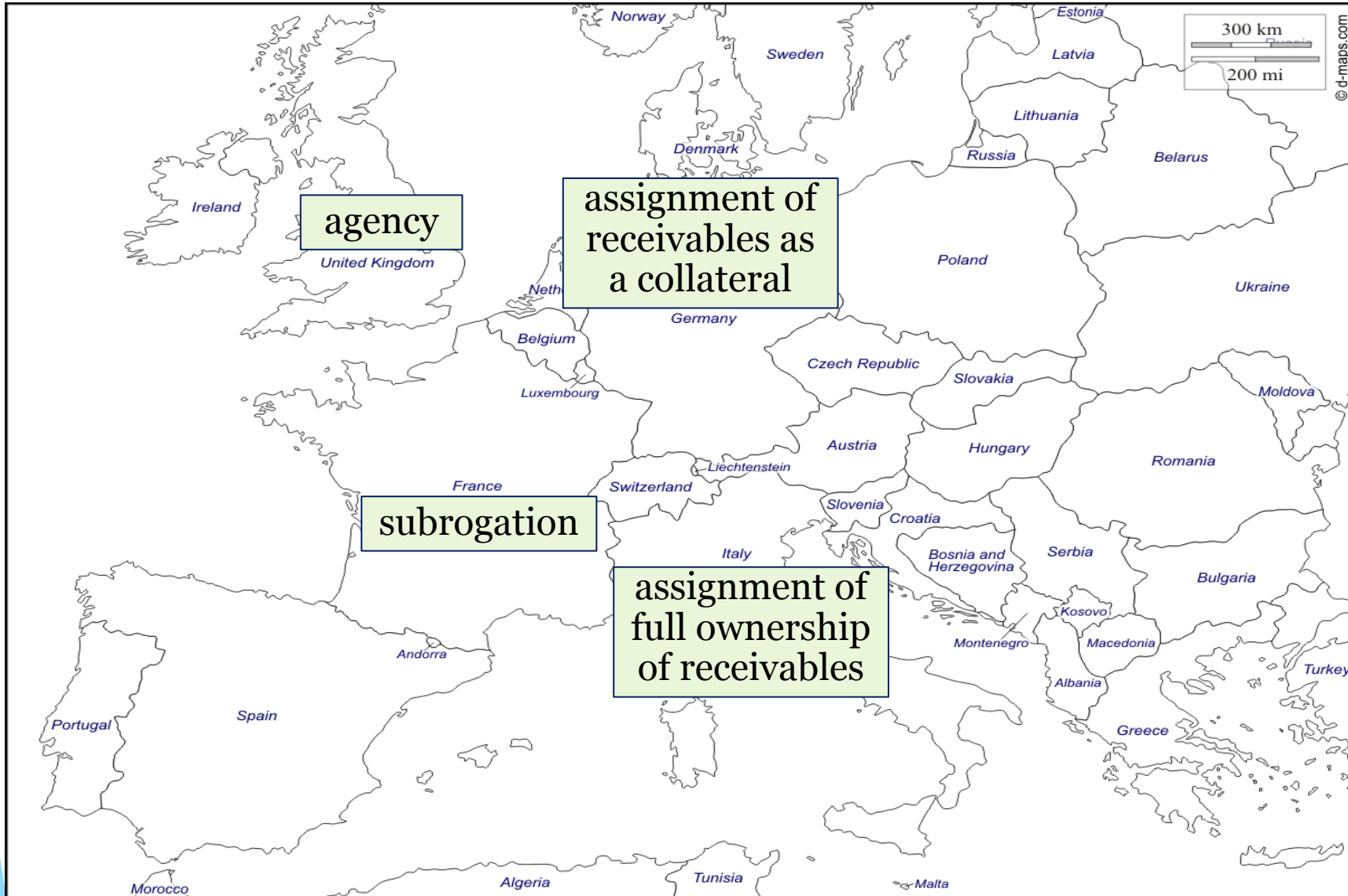
EU acts avoid employing technical expressions and notions.

Article 2 Directive 2011/83/EC: “(5) ‘sales contract’ means any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof [...].”

Regulation 575/2013/EU on prudential requirements for credit institutions and investment firms and Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, provide that only banks and financial institutions can sell ‘financial instruments’ (that is, “contract[s] that give[s] rise to both a financial asset of one party and a financial liability or equity instrument of another party”: Article 4(1), no. 50, Regulation (EU) 575/2013).

2. Lending including, inter alia: consumer credit, credit agreements relating to immovable property, factoring, with or without recourse, financing of commercial transactions (including forfeiting).

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Another illustration of persisting national variances stems from the saga of foreign-indexed loans to Swiss francs.

Since the 2000s, several European banks, especially in Central and Eastern Europe, started offering loans with mortgages indexed to Swiss francs. After the 2008 financial crisis, these loans became a trap for many households.

Very slowly the Court of Justice elaborated in its case-law the principle that such clauses might be unfair under Directive 93/13/EEC and required banks to appropriate information and disclosure (*Árpad Kásler v. OTP Jelzálogbank Zrt*, C-26/13; *Banif Plus Bank Zrt. v. Márton Lantos*, C-312/14; *OTP Bank Nyrt. v. Teréz Ilyés*, C-51/17; *Dunai v. ERSTE Bank Hungary Zrt.*, C-118/17; *Marc Gómez del Moral Guasch v. Bankia SA*, C-125/18; *NG and OH v SC Banca Transilvania SA*, C-81/19; *Lombard Pénzügyi és Lízing Zrt. v. PN*, C-472/20).

Several countries, however, have taken different routes.

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If one looks at the entire EU legislation on contracts, one perceives that there are some common lines.

EU legislation on contract law has the main objective of establishing a common European market and of reducing information asymmetries between its participants.

This objective informs the way in which EU institutions look and regulate contracts and their requirements (parties' agreement, an object and, if required, form).

As to the agreement, EU legislation, in the entire area of B2C contracts, has introduced rules about the consumers' right to withdraw from the contracts they entered in within a given cooling-off period, thus making their positions asymmetric: while consumers can freely exit from the agreements, traders are bound by them.

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As to the object of contracts, EU law recognizes that in principle parties are free to exchange goods and services at the terms and for the price they wish.

Article 4 Directive 93/13/EEC: “2. Assessment of the unfair nature of the terms shall relate neither to 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 supplies in exchange, on the other, in so far as these terms are in plain intelligible language”.

Yet, in B2C transactions, EU legislation indirectly intervenes on the object of contracts by regulating the terms that only can enter into the contracts.

Article 3 Directive 93/13/EEC: “1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”

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As to the form, EU contract law relies on a number of formalities that pursue objectives other from those pursued by the request of written forms under national laws.

Formalities include, besides written documents, the display of contractual terms on websites and on physical premises, labels, pictures and warnings attached to physical goods, oral announcements, flyers and advertisements about contractual terms, the handing over of copies of contractual documents, etc.

These formality requirements aim to improve the transparency of contractual negotiations and to reduce the information asymmetry in B2C contracts, to protect consumers' freedom of choice, to promote fair competition, to ensure the respect of minimal diligence standards by merchants and to speed up the work of the administrative agencies charged with supervising specific market sectors.

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Rather than adopting the view that all parties are equal and providing them with the autonomy to exercise their freedom, EU contract legislation moves from the assumption that traders and consumers are different and that they deserve to be subject to an unequal treatment.

. Before XIX-century civil codifications, contract law was heavily influenced by the parties' social status.

The revolutionary idea underlying XIX- and XX-century civil codifications was to recognize that all parties were equal before the law.

But, with the advent of global capitalism and mass consumer society, it became clear that the principle of contractual freedom is utopistic, because traders always have better access to information and more choice than consumers

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Article 1341 Italian Civil Code: “General terms and conditions, drafted by one party, are binding on the other party if he was aware of them or might have been aware of them by using reasonable diligence when he entered into the contract. Nevertheless, the following conditions have no effect, unless specifically approved in writing: conditions limiting the liability of the party who has prepared the general conditions, or giving said party a power to withdraw from the contract or to suspend the execution thereof; conditions burdening the other party with time limits for the exercise of the right or limitations to such party’s power to raise defenses, or with restrictions on freedom of contract with third parties, or with tacit extension or renewal of the contract; clauses providing for arbitration or derogation from the normal venue or jurisdiction of the courts.”

EU contract legislation takes back the status into contract law.