

## Summary

### Formal Requirements in Consumer Contracts

#### 1. The classic vs. the consumer concept of formal requirements.

Formal contractual requirements – such as an obligation to create a written document or a notarial deed – count amongst the most classical and straightforward forms of regulation in the classical contract law. They are founded on the assumption that in particular circumstances (usually identified separately for each legal dealing), parties should be obliged to follow particular procedural steps in expressing their will or consent in establishing, changing, or cancelling agreements. This concept clearly rests on balancing two groups of transaction costs: those that are directly dictated by and therefore stem from observance of the formal requirements (or that may ensue, subsequently, from the sanctions for their breach) and those that may be avoided by compliance with the formal requirements. The typical spheres of such a cost-balancing trade-off may pertain both to the *ex ante*, as well as the *ex post*, stages of contracting. In the first regard, formal requirements are typically imposed in order to support parties' efficient decision-making at the stage of contract formation (e.g. by slowing down the entire process and consequently creating better opportunities for parties to think over and better understand the agreement, along with its legal and economic ramifications). In the latter respect, formalities may serve various additional purposes, especially by facilitating proof in the event of future disputes and by protecting third parties' interests. By achieving these aims, the classical contract law uses an array of formalities, which typically constitute different variations of the basic requirement of contract-writing. It is understood as an obligation to produce and provide a written text, directly legible from a medium, which is signed with a hand-written signature (or with its equivalents, such as the electronic signature in the meaning of the 1999/93/EC directive).

The emergence and growth of consumer protection by means of contract law altered this framework substantially. The change in question has been triggered mostly by the consumer law of the EU, which introduces a growing number of procedural and formal requirements, using them as one of the most universal and omnipresent tools of regulating va-

rious genres of consumer transactions. As a result, formal requirements in consumer contracts emerge in a particular legal and political environment that entails a high degree of conceptual and functional autonomy of these regulatory tools, as superimposed against the background of formalities in the classical contract law.

2. **Renaissance of formalism.** By virtue of its immense reliance upon formal requirements, consumer law reverses in part the trend towards informality in the modern contract law. Since the advent of the idea of consumer protection being provided and assured by means of private law, formal requirements became consumer protection's – and, increasingly and once again, contract law's – part and parcel. With the new elements of consumer regulation, the scope and complexity of formalities has both increased and become much more all-embracing than in the classical law of contracts. For these reasons, an increasing part of the scholarship acknowledges a substantial reawakening of a formalistic approach, triggered mostly by the EU regulatory activity in consumer law.

Notably and especially peculiarly, this „reborn” formalism in contract law focuses predominantly on the entire process of communication between parties, rather than solely on the procedure of concluding a contract as such (which had been both the focus and the focal sphere for most of the historical examples of formalization). In other words, „new” formalism focuses primarily on the pre- and post-contractual communication of parties, not on the contract itself – which from this perspective constitutes only an episode within a much broader set of inter-party interactions that are subject to formalization. Moreover, new formalism is much more vague in terms of its conceptual identity than classic formal requirements in contract law. It blurs the borderline between form on the one hand and substance of legal dealing on the other, applying concepts that mix components from these two spectra. This kind of requirement intermingling is perhaps nowhere better illustrated than with respect to matters relating to transparency, ubiquitous in all spheres of EU contract law. The same tendency is also increasingly observable with respect to electronic contracts, where (even more due to specificity of the communication techniques than solely to purposeful regulatory decision), formal and substantial requirements are intertwined into an inseparable nexus. The particular phenomena that are encompassed by the notion of „new” („reborn”) formalism, will be discussed in more detail below.

3. **Functional specificities (form as a substrate of the consumer disclosure policy).** The crucial difference between the classic and the consumer-oriented approach towards formal requirements rests on the functional framework of formalization. Formalities imposed for consu-

mer contracts are perceived as an element of the „protection through information” strategy, fundamental to the EU regulatory approach towards business-to-consumer agreements. From this perspective, formal requirements play a mostly supplementary role. They are introduced to facilitate and better enable the operation of disclosure duties imposed upon professionals, typically by facilitating cognition of the information that is communicated to consumers. In this regard, formal requirements are intended, in particular, to provide a durable and easily accessible record of information, which eases its understanding by non-professional market participants and allows these participants to access it throughout the entire course of their contract engagement and performance. This general aim of formalities in consumer law also encompasses specific type of procedural (formal) duties which are required for incorporation of boilerplate clauses into the contractual relationship. Also in this respect, consumer law places predominant emphasis on the communicational dimension of standard terms. It aims through various types of formalities, such as the duties both to keep them in writing and to deliver them to a consumer, to enhance the creation of actual – and not merely formal, and accordingly only possibly informed – consent.

**4. The object of formalization.** As a result, consumer law visibly shifts the focus of formalization from resting upon a declaration of intent to conclude or alter contractual relations to, instead, resting upon various sorts of purely informative content, which do not create (or, at least, would not typically create) rights and duties upon parties to a contract. The main sphere of consumer law formalities is thus constituted by various duties to inform, as imposed for the pre-contractual stage – the stage at which the EU consumer contract law places especially strong emphasis on the efficient transfer of information between parties. Therefore, the EU consumer contract law does not focus on the statements that express will to conclude a binding contract (which are the main focus of formalities in the classic contract law), but instead on a much broader set of communication acts. Many of them simply state particular facts, as is the case for the majority of disclosure duties, without directly creating any consequences for the existence of a contract.

The recent consumer regulations – especially on distance and off-the-business-premises (2011/83/EC directive) – blur this line, however. They state straightforwardly that the information disclosed in the pre-contractual stage constitutes „an integral part of the contract”. This segment of communication (which in the classical contract law sphere is sharply separated from the contract itself) – thereby becomes significantly empowered as a source of the rights and duties that are incorporated into a contract. Such a broad approach towards the notion of contractual content

plays an obviously protective role, safeguarding consumers from being lured by pre-contractual promises that ultimately will not be incorporated into the actual contracts to which they become parties. In adopting this sort of broad and protective approach, EU consumer law builds on the concept of reasonable expectations and embodies it into pre-set and detailed legal frames (by casuistic enumeration of details that should be revealed by a professional). Under this rubric, formal requirements imposed in the pre-contractual stage accordingly become one of the guarantees not only of effective conveyance of information, but also of the proper creation and cognition of the ultimate content of consumer agreement.

**5. The array of formalities.** The other distinctive feature of form in consumer contract law is a specific array of formalities. In most instances, they are imposed on professionals only, obliging them to observe particular technical ways in their communications with consumers. The most typical and widespread example of this phenomenon is the requirement that professionals produce written records of the particular information that they share with consumers in meeting/fulfilling their disclosure duties, which is imposed by consumer law in various shapes and contexts. Apart from this formality, which contains numerous parallels to the classic requirements of contract law, consumer regulations also impose a vast number of more detailed and quite specific obligations. In principle, they are intended to play a supplementary role facilitating proper use of the principal requirement of writing. As a result, EU rules focus strongly not only on producing a durable record, but also on making this record actually accessible to a consumer, both in the formal dimension (through various requirements concerning both the delivery of a document and making that document accessible), as well as regarding consumer comprehension of that document (through the requirement of transparency). A specific dimension of these auxiliary obligations concerns those EU requirements pertaining to the specific language used within professional-consumer communication, focusing on language that is readily understandable by non-professionals within the contracting relationship. The aggregation of the principal (usually a written document) and secondary formalities leads to the creation of compound and multi-level requirements, unusual for the classic contract law landscape.

**6. The new regulatory approach.** The EU consumer regulations not only set forth a new catalogue of formal requirements, but make an even more meaningful alteration to the classic shape of formalities in contract law. In the course of time, they have incrementally shifted in emphasis from the „technical” to the „pragmatic” understanding of this phenomenon. The first of these regulations – in a framework typical of the traditio-

nal approach of private law – defines formal requirements through a set of precise technical obligations that need to be fulfilled in order to observe the requirement as such. In this understanding, form is construed as a mere set of procedural steps that need to be followed mechanically in order to comply with the legally-set obligation. One of the most illustrative examples of this approach are notarial deeds (based in fact on micro-procedures, consisting of multiple incidental requirements), yet the same attitude is also characteristic for the cornerstone notion of „writing” in the classical contract law (composed of the clearly defined concepts of a document and a hand-written signature).

The pragmatic approach, adopted increasingly in the EU consumer law, converses the traditional picture in a substantial way – focusing on the final functional outcome of formal requirements and considering technical guidelines as a secondary issue. The most vivid instance of this shift is the concept of a „durable medium”, contemporarily the most proliferated requirement in the EU consumer law. It encompasses only two general standards that have to be met by the medium of communication: information must be stored for a duration of time adequate to the particular situation; and this information must be accessible and both producible and reproducible in an unchanged form. In doing so, consumer law shifts the balance from an *ex ante* definition through technical rules to an *ex post* decision of the parties, who are left with a broad margin of freedom in choosing between various technical means that will meet the general criteria set forth by the „durable medium” requirement.

In the reality of uneven bargaining power in consumer contracts, however, this means of „sharing” the creation of formal obligations between the lawmaker and parties may skew the final regulatory outcomes. In fact, it may result in vesting professional contractors with the competence to determine unilaterally the content of a particular formal obligation and to then impose this particular understanding upon a consumer. For these reasons, opening the notions of formal requirements through pragmatic criteria should be accompanied with more intensive control and standard-setting by the judiciary and the consumer protection authorities.

**7. The division of regulatory responsibilities.** Formal requirements in consumer contract law emerge in a multi-dimensional way. Almost without exception, they are created in the EU consumer directives and, subsequently, transposed into domestic legal orders. Further, they are subjected to *ex post* interpretation in the domestic case-law and in the discourse between domestic practice and the Court of Justice of the EU. All of these spheres of interaction apply, without saying, to all the types of EU-rooted rules that function in domestic legal orders. In the case of formal requ-

irements, the impact of European *acquis* is, however, much stronger and more prevalent. The classic structure of contract law formalities has been formed throughout a long period of historical development, becoming in the course of time a deeply-ingrained and particularly persistent element of the legal system, on average much more stable than many other components of contract law. EU consumer law plays in this respect a subversive role, introducing new elements that substantially undermine the existing conceptual and regulatory framework. This embraces not only the direct introduction of new rules and concepts (such as the requirement of a „durable medium”), but also the insemination of domestic orders with new functional considerations and axiology. The tensions that may arise in this regard are clearly evidenced in the growing volume of CJEU decisions regarding formal requirements. They either directly reconcile overlaps between the classic and the EU-based formalities (C-42/15, *Home Credit Slovakia* case) or set guidelines for domestic courts to understand the consumer dimension of particular concepts, which may differ from the general framework of contract law (C-49/11, *Content Services* and C-375/15, *BAWAG* cases).

**8. The perspectives.** The concept of formal requirements as a regulatory tool in consumer law remains in a constant process of evolution and redefinition. This results mostly from the changing policy aims and growing awareness of more specific advantages and perils of steering the consumer market through disclosure duties (which are inherently interconnected with the concept of formal requirements in consumer law). As a result, the EU consumer law seems to move the emphasis, slowly, onto more precisely framing the amount of information that is conveyed by professionals to consumers (e.g. through the use of standardized information forms), and to increase the adjustability of formalities to newly-arising communication techniques (which have been vividly reflected by the „pragmatic” approach towards formal requirements, as mentioned above).

Despite these ongoing adaptations, in the longer perspective, the utilization of formal requirements as a regulatory tool in consumer contacts seems to face a much more material crisis. Firstly, a growing fraction of business-to-consumer agreements is concluded nowadays without making declarations of intent in the classic sense – but mostly through various sorts of automatized IT schemes. This is the case both for smart contracts (including blockchain agreements), as well as for numerous semi-smart ways of contracting, based e.g. on partial governance of contacts by AI algorithms. As a result, the way of expressing contractual content is increasingly shifting from words to an IT code. This fact should be acknowledged in designing formal interventions into consumer trans-

actions – which (in order to maintain real regulatory impact) should also encompass procedural rules for codes created to command and control consumer agreements. Secondly, classic formal requirements are increasingly losing their governing power due to the ongoing fragmentation of consumer markets, which (mostly due to the rapid development of online contracting) turn increasingly into a federation of fractioned communities of contractors, typically gathered around a particular „marketplace” (such as an online auction platform or renting service). The communities in question are typically subjected to their own sets of contract law rules (in many instances „enacted” by a private entity that establishes and governs a particular sphere of the market), which emerge independently from the classic state-based contract law. Most of these micro-systems also contain idiosyncratic formal requirements, which may effectively supersede the classic regulatory approaches. This seems in turn to create a need for the partial reorienting of regulatory efforts from formalization as such to, instead, steering the private regulatory phenomena as it exists in today’s consumer market.