



EUIJ-Kyushu Review

Issues 3 and 4 - 2014

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Print edition: ISSN 2186-8239
Online edition: ISSN 2186-3385

THE (PARTIALLY) REVISED AUSTRIAN PASSING OF RISK REGIME: AN EXAMPLE OF FRAGMENTATION OF DOMESTIC LAW AS A CONSEQUENCE OF EU HARMONISATION

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Keywords: Harmonisation, Distance selling, Fragmentation of law,
Sale by dispatch contracts, Passing of risk

1. Introduction

Harmonisation of national private law via European Union (hereinafter *EU*) directives and regulations undeniably leads to increased legal defragmentation at the pan-EU (or: inter-Member State) level, i.e., to a greater amount of alignment of (content-wise) similar legal rules used by different European Member States (hereinafter *Member States*). Depending on the harmonisation level applied by the respective EU instrument, legal defragmentation can take a stronger (maximum / full harmonisation; hereinafter *full harmonisation*)¹ or weaker (minimum harmonisation)² form.

Supporters of (full) harmonisation of private national law usually argue that it would lead to increased transparency and clarity and—as a consequence—to an enhancement of the Internal Market, because market barriers that are believed

¹ In the case of full harmonisation Member States must apply the same standard as enshrined in the respective EU instrument.

² In the case of minimum harmonisation the Member States still possess a certain legislative leeway to go beyond the EU standard.

to be caused by diverse private law regimes could be removed.³ Those who criticise the increased use of (full) harmonisation of private law *inter alia* argue that—while it is true that harmonisation leads to greater defragmentation at an inter-Member State level—in particular full) harmonisation leads to intra-Member State fragmentation.⁴ I already commented extensively on the full vs. minimum harmonisation debate in previous publications and will not go into too much detail in this present contribution.⁵ Here, the focus is not put on a comparison of different national legal regimes and the rules affected by different levels of EU harmonisation (full vs. minimum harmonisation), but on the issue of legal fragmentation of law at the national level as a result of EU harmonisation (in principle⁶ regardless of the harmonisation level). This will be done by highlighting the (domestic) side-effects of EU harmonisation of private law that result from the (oftentimes) comparably narrow scope of EU instruments. Put differently, the present contribution concentrates on the fate of intra-Member State law in the context of implementing EU standards. More precisely, the article discusses the issue of intra-Member State law fragmentation by using the example of the Austrian sale by dispatch contract (*Versendungskauf*) regime

³ See, e.g., Gerhard Wagner, *The Virtues of Diversity in European Private Law*, in *THE NEED FOR A EUROPEAN CONTRACT LAW* 3, 17 (Jan Smits ed., 2005); Fernando Gómez, *Some Law and Economics of Harmonizing European Private Law*, in *TOWARDS A EUROPEAN CIVIL CODE* 401 (Arthur Hartkamp et al. eds., 2011); Helmut Wagner, *Economic Analysis of Cross-Border Legal Uncertainty: The Example of the European Union*, in *THE NEED FOR A EUROPEAN CONTRACT LAW* 27 (Smits ed.).

⁴ See, e.g., for the discussion in the context of the 2008 Proposal for a Directive on Consumer Rights: Michael Stürner, *Das Konzept der Vollharmonisierung—eine Einführung*, in *VOLLHARMONISIERUNG IM EUROPÄISCHEN VERBRAUCHERRECHT?* 3, 7 (Michael Stürner ed., 2010) with further references.

⁵ See, e.g., Stefan Wrška, *EUROPEAN CONSUMER ACCESS TO JUSTICE REVISITED* 324-328 (2015); Stefan Wrška, *Consumers and the Proposal for an Optional Common European Sales Law—No Roads Lead to Rome?*, *Kyushu University Legal Research Bulletin* 87 (2012); Stefan Wrška, *ヨーロッパ共通売買法規則提案—消費者保護のための正しい方向性か* (1), 146 *Minshoho Zasshi* 367 (2012); Stefan Wrška, *消費者とヨーロッパ共通売買法規則提案—どの道もローマに通じないのか*(1), 40 *Kokusai Shoji Homu* 1317 (2012); Stefan Wrška, *ヨーロッパ共通売買法規則提案—消費者保護のための正しい方向性か* (2), 146 *Minshoho Zasshi* 491 (2012); Stefan Wrška, *消費者とヨーロッパ共通売買法規則提案—どの道もローマに通じないのか*(2), 40 *Kokusai Shoji Homu* 1529 (2012).

and its more recent revision that was due to the transposition of an EU directive—the Directive on Consumer Rights (hereinafter *CRD*)⁷—into national law.⁸ In this context the focus will be put on the likely tension between EU harmonisation and legal transparency and clarity at the intra-Member State level.

The article will start with an overview of the Austrian pre-CRD passing of risk regime (Chapter 2), followed by an outline of Article 20 CRD, which aimed to align national passing of risk rules in business-to-consumer (hereinafter *B2C*) sale by dispatch contracts (Chapter 3). It will commence with an analysis of the Austrian implementation of said provision and remarks on the Austrian re-regulation of the passing of risk regime, going beyond B2C contracts (Chapter 4). The article will be rounded off by comments on the new Austrian regime (Chapter 5) and the (de)fragmenting effects of EU harmonisation in general (Chapter 6).

⁶ It should, however, be stressed that full harmonisation can cause greater fragmentation at the national level than minimum harmonisation, because only in the first case are Member States deprived of their chance to align the rules for the directly affected areas at a higher level with the rules for the non-affected scenarios (that are content-wise similar). But even in cases of minimum harmonisation legal fragmentation can arise. This is true in those cases where minimum harmonisation leads to an increase of the protective level in narrow areas (note: In the case of minimum harmonisation Member States can further raise the protective standard, but not lower it to align it with the non-affected areas at a lower level) or where legal concepts are changed (without changing the protective level *per se*). For examples of intra-Member State fragmentation of legal rules (in the case of full harmonisation) see, e.g., Stürner, *supra* note 4.

⁷ Directive 2011/83/EU of the European Parliament and of the Council 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, 25 October 2011, OJ 2011 No. L 304/260.

⁸ There are two main reason why I chose an example from Austria. First and as explained later, Austria belongs to the group of Member States that had to change their national sale by dispatch contract regime in the course of the implementation of the CRD. Second, Austria is usually not among those Member States whose legal regimes are critically assessed in Japan. Thus, I wanted to add some information that is not yet commonly known in Japan.

2. The Austrian Passing of Risk Regime Prior to the Implementation of the Consumer Rights Directive

The term ‘passing of risk’ (*Gefahrtragung*) refers to situations in which certain contractual obligations incidentally, i.e., without fault attributable to the contractual parties, cannot be fulfilled. Christian Rabl refers to this as follows: ‘In the context of a contractual relationship the rules on the passing of risk determine which party to the contract bears the economic risk of an incidental hindrance of the contractual fulfilment ... that occurs between the conclusion of the contract and the complete contractual fulfilment’⁹. To put it in easier words: If sellers have to bear the risk, they would either have to deliver again (in cases where a substitute performance is possible, i.e., in cases of obligations to supply an interchangeable good; *Gattungsschuld*) or lose the right to receive payment (in cases where re-delivery would not be possible, i.e., in cases of obligations to supply a non-interchangeable good; *Speziesschuld*). If, however, the risk would have already passed to the buyer, the buyer would have to pay for the good without receiving it (or at least a substitute—in the case of obligations to supply an interchangeable good).¹⁰

In the case of sales contracts the Austrian passing of risk concept has generally (note: exceptions will be highlighted in the course of this article) and traditionally been interlinked with the issues of the transfer of the good (from the seller to the buyer) and the place of performance. The reason for this three-layered discussion is that the relevant general provisions of §§ 905 (on the place of performance) and 1064 (on the passing of risk) Austrian Civil Code (ABGB) and

⁹ Christian Rabl, *DIE GEFAHRTRAGUNG BEIM KAUF 3* (2002) (translation mine).

¹⁰ See, e.g., Peter Bydlinski, *GRUNDZÜGE DES PRIVATRECHTS 166* (9th ed. 2014), where Peter Bydlinski differentiates between the ‘risk of (re)delivery’ (*Leistungsgefahr*) and the ‘price risk’ (*Preisgefahr* or *Gegenleistungsgefahr*). The first term refers to the question whether the seller has to deliver again (Note: The seller would, of course, only be subject to this kind of risk in cases of obligations to supply an interchangeable good). The second term refers to the question of payment in cases where (re)delivery is either not possible or not required.

supplementary provisions, most notably the swap contract provisions of §§ 1048-1051 ABGB¹¹ and the property law provision of § 429 ABGB (on sale by dispatch contracts) include several cross-references with respect to those three issues.

The interplay of the concepts used for regulating the place of performance (*Erfüllungsort*), the transfer of the good (*Übergabe*) and the passing of risk becomes quite evident, when one takes a look at the categorisation of possible places of performance and the consequences for both the transfer of the good and the passing of risk in each of these cases. When it comes to possible places of performance one can distinguish between three different general scenarios. First, the parties could agree that the buyer has to pick the good up from the seller's place ('obligation to be performed at the debtor's place'; *Holschuld*). Second, the parties could agree that the seller has to deliver the good at the buyer's place ('obligation to be performed at the creditor's place'; *Bringschuld*). Third, the parties could agree that the seller has to send the good to the buyer ('obligation to be performed by dispatch'; *Schickschuld*).¹²

The primary transfer of ownership clause of § 426 ABGB states that 'movable objects can, as a general rule,¹³ only be transferred via handing over from hand to hand to another person' (translation mine). Against this background, it becomes obvious that the place of performance and the time of transfer (note: unless the contract includes a reservation of ownership, then this also includes the transfer of ownership and not only the transfer of possession)¹⁴ usually fall

¹¹ See the reference to these provisions in § 1064 ABGB.

¹² If the parties do not agree on a place of performance (and it, i.e., 'the place of performance can neither be determined by the character nor the purpose of the contract'— see § 905(1) ABGB-old (translation mine)), one has to assume that the obligation has to be performed at the debtor's place (§ 905(1) ABGB(-old)). For details see, e.g., Raimund Bollenberger, § 905, in ABGB KURZKOMMENTAR § 905 Recital 4 (Helmut Koziol, Peter Bydlinski and Raimund Bollenberger eds., 4th ed. 2014).

¹³ For exceptions see §§ 427-439 ABGB.

together in the cases of obligations to be performed at the debtor's place and obligations to be performed at the creditor's place. (Because of the involvement of a third person—the carrier—the determination of the place of performance and the time of transfer might look trickier in the case of an obligation to be performed by dispatch. I will come back to this issue shortly.)

The time the good is deemed to be transferred to the buyer is, as a basic rule, considered decisive for determining the passing of risk. § 1064 ABGB stipulates as follows: 'With respect to the passing of risk ... of a bought, but not yet transferred good, the relevant swap contract provisions should apply accordingly' (translation mine). The relevant passing of risk provision with respect of swap contracts can be found in §§ 1048-1051 ABGB, which link the passing of risk to the time of transfer of the good. They, in combination with § 1064, thus clarify that the risk usually¹⁵ passes from the seller to the buyer at the time the good is considered as being transferred to the latter one. This (again) is typically the case in cases of obligations to be performed at the debtor's place and obligations to be performed at the creditor's place.

In cases of sales contracts to be performed by dispatch the interplay between the place of performance, the transfer of the good and the passing of risk has caused some questions. The determination of the place of performance is the

¹⁴ For details on the issue that 'transfer' in the context of the passing of the risk does not necessarily cover the transfer of ownership see, e.g., Peter Apathy, §§ 1048-1049, in ABGB KURZKOMMENTAR, *supra* note 13, at §§ 1048-1049 Recital 1; Rabl, *supra* note 9, at 140-147.

¹⁵ It should be noted that 'transfer' in the context of this article refers to the transfer of possession and not ownership, unless explicitly mentioned otherwise. This does not mean that they do not happen at the same time, but in particular in the case of a reservation of ownership the possession is transferred prior to the ownership. Note further that the passing of risk and the transfer of the good (incl. the transfer of possession) do not necessarily have to happen at the same time – a notable exception are delay issues (on the buyer's side). On these issues see, e.g., Thomas Klicka and Alexander Reidinger, § 429, in ABGB PRAXISKOMMENTAR BAND 2 § 429 Recital 1 (Michael Schwimann and Georg Kodek eds., 4th ed. 2012).

easiest of the three to make. In the context of such contracts, performance by the seller means dispatching the good, i.e., handing it over to the carrier. But does the seller's performance (necessarily) mean that the good is already deemed to be transferred to the buyer with its handing over and that the risk passes already at this point, i.e., with the handing over to the carrier, or do the latter two coincide with the buyer's receipt of the good (and thus happen at a different time than the time of performance)? In other words, is the carrier attributable to the buyer (in this case the good/risk is considered as being transferred/passed to the buyer with the handing over to the carrier) or is the carrier considered as an extension of the seller (in this case the good/risk is considered as being transferred/passed to the buyer with the receipt of the good)? The Austrian legislator answers/answered this question in the transfer of ownership provision of § 429 ABGB(-new/-old)¹⁶ on contracts performed by dispatch.¹⁷ § 429 ABGB-old read as follows: 'In principle, sent goods are deemed to be passed, when the transferee receives them; unless the transferee determines or agrees on the method of sending' (translation mine). Reading said provision, it seems that the generally applicable rule was that the transfer of ownership (and thus, via § 1064, also the passing of risk) should have happened when buyers themselves receive the good and not already at the time the seller handed the good over to the carrier.¹⁸ This understanding rests on linguistic considerations (note: 'unless' being understood as the exception to the rule). Put differently, under what one could have understood as the basic rule, the time of performance (i.e., the handing over of the good to the carrier) was different

¹⁶ Note: To distinguish the pre- and post-CRD versions I will use the terms ABGB-old when referring to the pre-CRD version, and ABGB-new when referring to the post-CRD version, if and where needed.

¹⁷ For details on this issue see, e.g., Rabl, *supra* note 9, at 114 and 232; Helmut Koziol and Rudolf Welsch, *BÜRGERLICHES RECHT BAND II: WELSER 170-171* (13th ed. 2007); Stefan Perner, Martin Spitzer and Georg Kodek, *BÜRGERLICHES RECHT 166* (4th ed. 2014); Bydlinski, *supra* note 10, at 166 and 197; Bernhard Eccher and Olaf Riss, § 429, in *ABGB KURZKOMMENTAR*, *supra* note 13, at § 429 Recital 1; Klicka and Reidinger, *supra* note 15, at § 429 Recital 1 with further references.

¹⁸ For the buyer's default in acceptance exception see already *supra* note 15.

from the place of transfer. Due to §§ 1048-1051 and 1064 ABGB this was also true for the passing of risk. Both—the transfer of good and the passing of risk—happened when the buyer physically received the good. Only in the ‘unless’ case, i.e., what (linguistically-seen) had been the exception to the rule, one arrived at a result similar to the uniform concept used for obligations to be performed at the debtor’s place. Only in that case was the good/risk considered as being transferred/passed to the buyer already with the performance, i.e., the handing over of the good to the carrier.

Case law developed § 429 ABGB-old further and distinguished between common and uncommon methods of sending goods. It arrived at the conclusion that *common* methods of sending goods—sending goods by post arguably is the prime example of a common method¹⁹—have to be considered as having been agreed upon by the parties within the meaning of § 429 ABGB-old (and thus fell under the ‘unless’ rule). In such cases—in reality they might rather be the norm than the exception—one arrived at the just outlined latter of the two consequences, i.e., the moment of transfer of the good and the passing of risk were linked to the passing of the good to the carrier (e.g., the post or any other commonly mandated carrier). This meant that in the vast majority of cases § 429 ABGB-old needed to be ‘re-read’ in the sense that the exception rule (‘unless’) *de facto* became the primary rule. Without sufficient legal knowledge, interpreting said provision undeniably was a difficult task.

This case law developed understanding had (since 2007)²⁰ until very recently been applicable to sale by dispatch contracts *regardless* of their basic nature, i.e., regardless of the question of whether the respective contract had been concluded between two parties of which none was a trader, between a trader and a consumer (in either direction)²¹ or between two traders. Hence, § 429

¹⁹ For this and some further examples of common methods of sending see, e.g., Rabl, *supra* note 9, at 148; Eccher and Riss, *supra* note 17, at § 429 Recital 2. For a comment on uncommon methods of sending see, e.g., Rabl, *supra* note 9, at 137-138.

ABGB-old covered consumer-to-consumer (C2C) and B2C cases as well as consumer-to-business (C2B) and business-to-business (B2B) situations alike. The undeniable advantage of this broad application was the existence of a uniform rule that could be used for sale by dispatch contracts regardless of what kind of party had concluded such contract. The reverse of the medal, however, was that (in particular) consumers did not enjoy a higher standard of protection (that would have been comparable to the standards in some other Member States as discussed in the following chapter). The practical relevance of this fact was not be underestimated—B2C sale by dispatch contracts were (and still are) arguably (together with B2B sale by dispatch contracts) among the most often— if not the most often—found example of sale by dispatch contracts. As we will see in the following, this consideration, i.e., the relevance of B2C contracts in the business world, and the question of a fair allocation of the risk between parties to B2C dispatch of sale contracts eventually was the decisive factor for a more recent development at the EU level (that affected the passing of risk regimes in several Member States including Austria).

3. The EU Influence on the Passing of Risk Regime

On 25 October 2011 the EU legislator adopted the Directive on Consumer Rights (hereinafter *Consumer Rights Directive* or *CRD*)²². Pursuant to Article 28(1) CRD the Member States had to implement the directive by 13 December

²⁰ The 2007 alignment rests on the 2005 Commercial Code Amendment Law (*Handelsrechts-Änderungsgesetz; HaRÄG*), BGBl I Nr 2005/120 that introduced the new Commercial Code *Unternehmensgesetzbuch; UGB* (replacing the old Commercial Code—*Handelsgesetzbuch; HGB*—per 1 January 2007). Prior to the UGB the passing of risk in B2B sale by dispatch contracts was linked (only) to the handing over to the carrier (Article 8/20 of the 4th Introductory Act to the HGB; *Handelsgesetzbuch—Einführungsgesetz Nr. 4—4. EVHGB*), while questions of ownership and possession had to be answered in accordance with § 429 ABGB.

²¹ For a critical comment on the applicability of this case law-developed rule to B2C contracts see, e.g., Martin Schauer, *Handelsrechtsreform: Die Neuerungen im Vierten und im Fünften Buch*, ÖJZ 64, 78 (2006).

2013 and had to make the new provisions applicable by 13 June 2014. The directive was one of the results of reform discussions with respect to a group of eight EU consumer directives enacted in the 1980s and 1990s.²³ It eventually repealed only two of them, the Doorstep Selling Directive and the Distance Selling Directive, added one article to each the Unfair Contract Terms Directive and the Consumer Sales Directive and introduced some new general provisions for a broader range of business-to-consumer (hereinafter *B2C*) contracts.²⁴ One of the latter provisions, the fully harmonised Article 20 CRD aimed to standardise the passing of risk regime with respect to B2C sales contracts (Article 17(1) CRD), which Article 2(5) CRD defines as ‘any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and

²² Directive 2011/83/EU of the European Parliament and of the Council 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, 25 October 2011, OJ 2011 No. L 304/260.

²³ These eight directives—commonly referred to as ‘the consumer *acquis*’ (in the narrow sense)—are the following: (1) Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, 20 December 1985, OJ 1985 No. L 372/31 (hereinafter *Doorstep Selling Directive*); (2) Council Directive 90/314/EEC on package travel, package holidays and package tours, 13 June 1990, OJ 1990 No. L 158/59 (hereinafter *1990 Package Travel Directive*); (3) Council Directive 93/13/EEC on unfair terms in consumer contracts, 5 April 1993, OJ 1993 No. L95/29 (hereinafter *Unfair Contract Terms Directive*); (4) Directive 94/47/EC of the European Parliament and of the Council on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of a right to use immovable properties on a timeshare basis, 26 October 1994, OJ 1994 No. L280/83 (hereinafter *1994 Timeshare Directive*); (5) Directive 97/7/EC of the European Parliament and of the Council on the protection of consumers in respect of distance contracts, 20 May 1997, OJ 1997 No. L 144/19 (hereinafter *Distance Selling Directive*); (6) Directive 98/6/EC of the European Parliament and of the Council on consumer protection in the indication of the prices of products offered to consumers, 16 February 1998, OJ 1998 No. L 80/27; (7) Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers’ interests, 19 May 1998, OJ 1998 No. L166/51 (hereinafter *1998 Injunctions Directive*); (8) Directive 99/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees, 25 May 1999, OJ 1999 No. L171/12 (hereinafter *Consumer Sales Directive*).

²⁴ For details see, e.g., Wrška, EUROPEAN CONSUMER ACCESS TO JUSTICE REVISITED, *supra* note 5, at 169-189.

the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services’.

Article 20 CRD reads as follows:

In contracts where the trader dispatches the goods to the consumer, the risk of loss of or damage to the goods shall pass to the consumer when he or a third party indicated by the consumer and other than the carrier has acquired the physical possession of the goods. However, the risk shall pass to the consumer upon delivery to the carrier if the carrier was commissioned by the consumer to carry the goods and that choice was not offered by the trader, without prejudice to the rights of the consumer against the carrier.

From this provision we can see that the Member States’ legislators had to make sure that in (B2C) sale by dispatch contracts the risk passes on to the buyers only once the buyers (or a third party attributable to them) receive the good. This provision, in principle, follows the concept on consumer sales contracts introduced by Rule IV.A.-5:103 Draft Common Frame of Reference (hereinafter *DCFR*)²⁵. Said provision reads as follows:

- (1) In a consumer contract for sale, the risk does not pass until the buyer takes over the goods.

²⁵ The DCFR was an extensive research project conducted by the Joint Network on European Private Law (CoPECL) under the lead of the Study Group on a European Civil Code (SGECC) and the European Research Group on Existing EC Private Law (Acquis Group). The CoPECL had been founded under the EU Sixth Framework Programme for Research with funding secured from the European Commission and researched on private law rules primarily (but not only) related to contract law with the main purpose to provide policy-makers with information about the possible necessity to and means of how to further develop EU private law. One of the most important practical results from this was the (not yet adopted) 2011 Proposal for a Regulation Common European Sales Law (CESL). For details on the DCFR and the CESL Proposal see, e.g., Wr̀bka, EUROPEAN CONSUMER ACCESS TO JUSTICE REVISITED, *supra* note 5, at 196-205.

- (2) Paragraph (1) does not apply if the buyer has failed to perform the obligation to take over the goods and the non-performance is not excused under III.– 3:104 (Excuse due to an impediment) in which case IV.A.– 5:201 (Goods placed at buyer’s disposal) applies.
- (3) Except in so far as provided in the preceding paragraph, Section 2 of this Chapter does not apply to a consumer contract for sale.
- (4) The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

As indicated by Rule IV.A.-5:103(3) DCFR the special DCFR rule for the passing of risk in sale by dispatch contracts of Rule IV.A.-5:202 DCFR shall not apply (note: ‘Section 2 of this Chapter’ refers to Rules Rule IV.A.-5:201—IV.A.-5:203 DCFR). Rule IV.A.-5:202 DCFR stipulates that ‘[i]f the seller is not bound to hand over the goods at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract’ and that ‘[i]f the seller is bound to hand over the goods to the carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place’. The fact that B2C contracts are exempted from the application of Section 2 DCFR (including the just cited Rule IV.A.-5:202 DCFR) basically means that (in accordance with Rule IV.A.-5:103(1) DCFR) the risk in non-B2C sale by dispatch contracts passes to the buyer at the moment the seller hands it over to the carrier. As a consequence, one would have had to distinguish between B2C (where the application of Rule IV.A.-5:202 DCFR is excluded) and non-B2C sale by dispatch contracts (that fall under the applicability of Rule IV.A.-5:202 DCFR).

For most Member States the two-tiered passing of risk regime (B2C sale by dispatch contracts vs. non-B2C sale by dispatch contracts) recommended by the DCFR (and followed by Article 20 CRD) was innovative, because it led to a reversion of the one-tiered passing of risk concepts that were predominantly used in the EU.²⁶ Only less than a third of the Member States had differentiated

between B2C and non-B2C sale by dispatch contracts prior to the publication of the DCFR and the enactment of the CRD.²⁷ One might ask why the Union legislator decided to follow the example of the minority. The answer is simple: It was hoped that a consumer-friendlier regime would prove beneficial for the stimulation of the distance selling market. From the viewpoint of consumers, the differentiating system, must indeed be considered as a positive move. The ‘Full Edition’ of the DCFR (hereinafter *DCFR Commentary*), for example, explained the rationale behind the buyer-friendly concept in B2C sale by dispatch contracts with *inter alia* three key arguments. First, the DCFR Commentary argued that placing the risk on the seller would lead to the selection of the most trustworthy carriers, since sellers would be forced to choose the most suitable carrier to reduce their financial risk that results from a ‘delayed’ passing of risk to the buyer.²⁸ This would ensure that consumers could enjoy the highest possible standards of transportation.²⁹ Second, it could

²⁶ As the crafters of the DCFR put it, ‘[u]nder most systems the regulation for consumer and non-consumer sales is identical. However, ... under some systems, when goods are transported to the buyer the risk only passes in consumer sales when the goods actually come into the buyer’s possession’—see Christian von Bar and Eric Clive eds., *PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW. DRAFT COMMON FRAME OF REFERENCE (DCFR). FULL EDITION VOLUME 2 1379* (2009).

²⁷ See, for example, §§ 447 and 474 German Civil Code (BGB). § 447 BGB covers non-B2C sale by dispatch contracts. Its first paragraph reads as follows: ‘If the seller, at the request of the buyer, ships the thing sold to another place than the place of performance, the risk passes to the buyer as soon as the seller has handed the thing over to the forwarder, carrier or other person or body specified to carry out the shipment’ (translation taken from <http://www.gesetze-im-internet.de/englisch_bgb/german_civil_code.pdf> – visited December 22, 2014). This general German rule is, in principle, identical with the pre-CRD Austrian understanding with respect to the passing of risk in sale by dispatch contracts. § 474(2) BGB, however, contains an exception applicable to B2C sale by dispatch contracts by excluding the applicability of § 447 BGB. The DCFR Commentary listed the following additional jurisdictions with special consumer-friendly rules for sale by dispatch contracts: England and Scotland, Estonia, Finland, Hungary, the Netherlands, Slovakia and Sweden. Also Norway, a non-EU Member State, is enlisted. For details see von Bar and Clive eds., *supra* note 26, at 1379.

²⁸ The DCFR Commentary puts this as follows: ‘[It] will provide an incentive for the seller to exercise the utmost care in arranging transportation and in choosing a carrier’—see von Bar and Clive eds., *supra* note 26, at 1379.

be expected that it would be easier for sellers to make financial arrangements to cover the possible risk, especially by signing up for a comprehensive insurance system.³⁰ Third, putting/leaving the risk on the consumer would mean that consumers would have to pursue likely claims against the carrier, a fact that was considered as demotivating for consumers to get engaged in sale by dispatch contracts. Taking into consideration that the consumers' willingness to pursue claims is quite low³¹ (if not to say marginal—especially when it comes to claims that I referred to as low and lowest value (*Bagatellschäden*) at a different occasion³²), also this third argument definitely makes sense. Under both, Rule IVA.-5:103 Draft Common Frame of Reference and Article 20 CRD consumers do not face the possible burden of having to sue the carrier for compensation. Instead, under the DCFR/CRD framework it is the sellers' task to take legal action against the carrier in B2C contracts (without losing their own obligations towards the buyer).

²⁹ One should further not forget that professional sellers have more frequent experience with sale by dispatch contracts and thus can more easily identify trustworthy carriers.

³⁰ In the words of the DCFR Commentary this sounds as follows: 'The seller will also be in a better position to calculate the price by integrating the economic cost of the transportation risks in long-term financial arrangement or to obtain a favourable insurance, which may often be blanket cover'—see *ibid.*

³¹ See Wrbka, EUROPEAN CONSUMER ACCESS TO JUSTICE REVISITED, *supra* note 5, at 36 with reference to European Opinion Research Group, *European Union Citizens and Access to Justice*, Special Eurobarometer No. 195 9 (2004), <http://www.medsos.gr/medsos/images/stories/PDF/eurobarometer_11-04_en.pdf> (visited December 22, 2014). The executive summary that accompanied this Eurobarometer survey explains that those consumers who chose to take litigative action did so by either consulting 'a solicitor who brought the matter to court' or by bringing 'the matter to court [by] themselves' (European Opinion Research Group, *European Union Citizens and Access to Justice—Executive Summary*, summary accompanying Special Eurobarometer No. 195 11 (2004) (on file with the author).

³² The group of low and lowest value claims refers to damages that are usually not worth pursuing (either for purely mathematical reasons or as a result of 'psychological barriers'). For more details on this see, e.g., Wrbka, EUROPEAN CONSUMER ACCESS TO JUSTICE REVISITED, *supra* note 5, at 124-126 with further references.

4. The Revised Austrian Passing of Risk Regime

The explanations in the preceding two chapters indicated that the Austrian legislator had to revise its national passing of risk regime to align it with the CRD standard. The Austrian passing of risk regime was not prepared to accommodate B2C cases the way that Article 20 CRD asked Member States to craft their passing of risk rules applicable to B2C sale by dispatch contracts. The main question was how the Austrian legislator would react. Would Austria take a narrow approach limited to B2C contracts only or opt for a broader reform of its passing of risk rules in sale by dispatch contracts?

When it comes to the transposition of the CRD it can be noted that Austria was among those Member States that implemented the CRD relatively late. The bill for the implementation act, the Consumer Rights Directive Implementation Act (*Verbraucherrechte-Richtlinie-Umsetzungsgesetz*; hereinafter *VRUG*)³³, passed the National Council (*Nationalrat*) in late April 2014 and the Federal Council (*Bundesrat*) in mid-May 2014. It was promulgated on 26 May 2014. Although the Austrian legislator missed the implementation date envisaged by Article 28(1) CRD (13 December 2013) the VRUG was enacted soon enough to make its provision applicable by the due date of 13 June 2014, i.e., the date by which the Member States were obliged to make the relevant provisions applicable (Article 28(2) CRD).³⁴

³³ *Bundesgesetz, mit dem das allgemeine bürgerliche Gesetzbuch, das Konsumentenschutzgesetz und das Verbraucherbehörden-Kooperationsgesetz geändert werden und ein Bundesgesetz über Fernabsatz- und außerhalb von Geschäftsräumen geschlossene Verträge (Fern- und Auswärtsgeschäfte-Gesetz—FAGG) erlassen wird (Verbraucherrechte-Richtlinie-Umsetzungsgesetz—VRUG); BGBl I No. 33/2014.*

³⁴ For a general discussion of the Austrian implementation of the CRD see, e.g., Stefan Wrška, *The Austrian Implementation of the Consumer Rights Directive—an Overview*, 81 *Hosei Kenkyu* 110 (2014). For a comparative analysis of the national implementation of the CRD in selected EU jurisdictions (including Austria) see Stefan Wrška, *Die Verbraucherrechte-Richtlinie—ihre Entstehungsgeschichte und Umsetzung in Großbritannien, Deutschland und Österreich*, in *AUSGEWÄHLTE FRAGEN DES ÖSTERREICHISCHEN UND EUROPÄISCHEN VERBRAUCHERRECHTS* (Alexander Göd, Thomas Ratka and Olaf Riss eds., forthcoming 2015).

Most provisions of the CRD were either incorporated into the central piece of national consumer legislation, the Austrian Consumer Protection Act (*Konsumentenschutzgesetz*; hereinafter *KSchG*) or the Distance- and Off-Premises-Contract Act (*Fern- und Auswärtsgeschäfte-Gesetz*; *FAGG*)³⁵, which was established by the VRUG. Article 20 CRD was among those provisions that were directly implemented in the *KSchG*. This happened via the newly inserted § 7b *KSchG*. Although the wording slightly differs from Article 20 CRD, § 7b *KSchG* strictly follows the concept introduced by Article 20 CRD. This comes as a natural consequence from the fully harmonised character of Article 20 CRD. § 7b *KSchG* reads as follows:

In contracts where the trader dispatches the good to the consumer, the risk of loss of or damage to the good shall pass to the consumer only if and at the moment that he or a third party indicated by him and other than the carrier has received the good. If, however, the consumer concluded the transportation contract by himself, without having been offered this transportation method as an option by the trader, the risk shall pass to the consumer already upon delivery to the carrier if the carrier was commissioned by the consumer to carry the goods (translation mine).

Unlike its model provision (Article 20 CRD), § 7b *KSchG* adds one more sentence—a rule that relates to the transfer of ownership. This sentence (that follows the just cited part) stipulates as follows: ‘Unless agreed otherwise, the consumer acquires ownership over the good at the moment the risk passes to him’. This part is—unlike the part on the passing of risk—not mandatory, i.e., even the parties to a B2C sale by dispatch contract could agree that the ownership is transferred earlier or—more likely, e.g., in the case of a reservation of ownership—later (in the case of a reservation of ownership most likely at the

³⁵ Article 4 VRUG titled ‘*Bundesgesetz über Fernabsatz- und außerhalb von Geschäftsräumen geschlossene Verträge*’.

time of full payment by the consumer). From an EU law perspective the addition of this last sentence is unproblematic, because it deals with an issue neither regulated by Article 20 CRD nor by any other mandatory EU standard, and thus does not contradict EU law.

The Austrian legislator did not stop here. One took the opportunity to clarify the passing of risk concept applicable to non-B2C sale by dispatch contracts by revising the general sale by dispatch contract related provisions of the ABGB. This affected §§ 429 and 905 ABGB-old.³⁶ § 429 and (the relevant part of) § 905 ABGB-new read as follows:

§ 429 ABGB-new: If the good—with the transferee's [note: i.e., the creditor's] consent—is dispatched to a different place than the place of performance, then the good is deemed to be transferred [to the transferee] the moment it is transferred to the person who is mandated with the transfer [note, i.e., the carrier], if the method of transfer corresponds the agreed—or in its absence: a commonly accepted—method of transportation (translation mine).

§ 905(3) ABGB-new: The risk with respect to goods that are—with the transferee's [note: i.e., the creditor's] consent—dispatched to a different place than the place of performance is passed to the creditor at the moment of transfer (§ 429) (translation mine).

§ 429 now explicitly makes the (old) case-law developed rule the standard (unless the contract is a B2C contract and § 7b KSchG applies). To round the systematic interplay between the place of performance, the transfer of the good and the passing of risk off, the law of obligations clause of § 905(3) ABGB-new

³⁶ For details on these two see Chapter 2 'The Pre-CRD Passing of Risk Regime in Austria' above.

now includes a direct reference to § 429 ABGB-new. It stresses the primarily applicable (general)³⁷ concept that the passing of risk regime in sale by dispatch contracts follows the law of property provision of § 429 with respect to such contracts. Put differently, for non-B2C sale by dispatch contracts §§ 429 and 905(3) ABGB-new confirm the (case law developed) passing of risk regime discussed in Chapter 2 of this article.³⁸ This—in combination with the enactment of § 7b KSchG—led to the introduction of a two-track sale by dispatch contract regime that rests on a differentiation between B2C and non-B2C contracts. From a comparative law perspective this means that Austria followed the example of the group of EU Member States that already differentiated between B2C and non-B2C sale by dispatch contracts prior to the adoption of the CRD.

5. Remarks on the Revised Austrian Passing of Risk Regime

In terms of consistency and from a pan-EU harmonisation perspective the decision of the Austrian legislator to opt for a two-tiered approach (with different rules for B2C and non-B2C sale by dispatch contracts) did not come as a surprise. One clearly wanted to maintain the existing regime for those scenarios that were not covered by the CRD. Furthermore, opting against the trend at the EU level would have been a too courageous step to say the least. Nevertheless, it is justified to argue that the Austrian legislator missed an opportunity to introduce innovative, buyer-friendly rules at a more general level and to avoid a friction between different types of sale by dispatch contracts.

Two examples shall illustrate that a more progressive approach could have been desirable to avoid legal uncertainty. First, determining whether a concrete

³⁷ The mandatory rule of § 7b KSchG, applicable to B2C sale by dispatch contracts is the big exception.

³⁸ Hence, under ‘normal’ circumstances, i.e. unless the good is sent by different means than the contractually agreed method or (in absence of a contractually agreed method) is sent by a not commonly used method, the risk will continue to be passed to the buyer already at the moment the good is handed over to the carrier.

contract is a B2C or a B2B contract is not always an easy task for legally less experienced parties. For example, it might—despite existing case law³⁹—be difficult to determine whether so-called mixed-purpose contracts, i.e., contracts regarding goods that are partially used for professional purposes, partially for private purposes, qualify as B2C contracts (leading to the applicability of the delayed passing of risk regime of § 7b KSchG) or as B2B contracts (and thus fall under the applicability of the general norm of §§ 429 and 905(3) ABGB-new). Second (and although it is understandable that some kind of power/knowledge/experience imbalance is more likely to occur in B2C contracts)⁴⁰, legal uncertainty problems comparable to the mixed-purpose contract example can further arise in (likely) C2C cases. Deciding whether the seller is or is not a professional seller (in the first case this would create a B2C contract if the buyer were a non-professional buyer, in the second case a C2C contract if also the buyer were a non-professional) might again be difficult. How can a non-professional buyer who purchases a good via an online portal know whether the seller is really a non-professional? Even for the legally more experienced buyer it might be difficult to determine the seller's status correctly, because bullet-proof evidence to determine the true status of the seller is not easily available.⁴¹ The discussed cases could of course be solved by courts. However, from the viewpoint of predictability and legal certainty and to avoid the need to go to court one could have asked for a harmonised concept at the domestic level. The Austrian legislator could have opted for a uniform regime (i.e., a passing of risk regime applicable to any form of sale by dispatch contracts) that would have been aligned with the B2C standard introduced by Article 20 CRD.

One more issue complicates the Austrian situation in general. Unlike the laws

³⁹ For details see, e.g., Jules Stuyck, *Setting the Scene, in* CASES, MATERIALS AND TEXT ON CONSUMER LAW 50-54 (Hans-W. Micklitz et al. eds., 2010).

⁴⁰ Note: The imbalance issue was—as explained further above—one of the key arguments for the introduction of Article 20 CRD and its DCFR model.

⁴¹ The self-declaration of the seller as 'professional' or 'non-professional' or any other way of declaration might not always reflect the actual truth.

of several other Member States, Austrian law does not explicitly put the seller under the obligation to choose a carrier that meets certain minimum quality standards (in cases where the seller may choose the carrier).⁴² This is in particular worrisome in cases in which the carrier is determined by the seller. To some extent the absence is remedied by the fact that pursuant to §§ 429 and 905(3) ABGB(-new) the risk in non-B2C contracts does not pass before the buyer receives the good in those cases where the seller does not choose a ‘commonly accepted’ carrier (note: in B2C cases § 7b KSchG would safeguard the buyer’s interest anyway). However, the number of cases where such ‘uncommon’ carriers are picked by the seller arguably are negligible. This means that in the vast majority of cases the risk already passes with the handing over to the carrier without a legal quality safeguard comparable to the quality provisions found in several other Member States. Admittedly, this does not mean that buyers would be totally deprived of their means to pursue possible claims against the seller (in addition to possible claims against the carrier who they could sue anyway). In particular, one can think of claims based on *culpa in eligendo*, i.e., claims based on the seller’s fault in selecting a suitable carrier (*Auswahlverschulden*). Nevertheless, for the time being it—in absence of significant case-law—remains unclear to which extent Austrian courts would be willing to accept such an argument. Especially the question of whether there is any fault (in selecting) that would be attributable to the seller might not always be easy to answer.⁴³

There are, however, undeniably also strong arguments to back up the legislator’s decision to opt for a two-tiered regime. Two should be pointed out. First, Austria would have opted against the mainstream trend at the EU level that is going for a two-track system of sale by dispatch contracts. From the viewpoint of achieving a level playing field of legal provisions for non-B2C sale by dispatch

⁴² Examples include the Scandinavian Member States as well as the Baltic Member States of Estonia and Lithuania—for more detail see von Bar and Clive eds., *supra* note 26, at 1272 and 1387.

contracts, choosing a solution that is different from the solutions chosen by the other Member States would not have been the best move. Second, one would have had to justify the solution from a necessity perspective. Leaving the above-mentioned determination issues aside, it would have been questionable whether a delay in the shift of the passing of risk would have facilitated the B2B and C2C market or (at least) would have been to be welcome. The ‘imbalance’ factor in B2B and C2C usually plays a smaller role than in B2C cases, which might lead to the argument that putting the burden on the seller would not be necessary—or even more than that: that it would be counter-productive.⁴⁴

6. Concluding Remarks or: EU Harmonisation of Private Law Beyond the Passing of Risk Regime

The explanations in the preceding chapters illustrated the tension between pan-EU harmonisation and national lawmaking when it comes to the issue of legal defragmentation. Harmonising national laws leads to defragmentation of different legal regimes at the inter-Member State level, as it uniformes the legal standards (in the case of full harmonisation) or aligns them at a minimum level

⁴³ Although it is not directly attributable to the CRD and its implementation (but rather to the reaction by the business world) one more issue deserves attention. A recent, random view at terms and conditions of seven online shops roughly six months after the two-track passing of risk regime for sale by dispatch contracts had been introduced in Austria, showed that a considerable number of related clauses have not yet been revised to suit the new, differentiating system. In six out of seven cases the online sellers’ terms and conditions did not differentiate between B2C and B2B contracts and—regardless of the contract—stipulated that the risk would pass to the buyer already with the handing over of the good to the transporting company (terms and conditions accessed on December 22, 2014; files with the author). Although it must be said that these provisions would not pass a check by courts it should also be noted that many consumers would—as shown earlier—refrain from taking any further action beyond initial complaints to the seller.

⁴⁴ In response to this possible concern, one could, however, argue that in non-B2C cases the aligned passing of risk regime (that is shifted from the buyer to the seller) would not be a mandatory regime. The parties could still agree on a shift back to the currently applicable seller-friendly regime. In non-B2C cases that involve a professional seller, this could, e.g., be achieved via the inclusion of an according rule in the seller’s terms and conditions.

with the EU standard (in the case of minimum harmonisation). This can in particular be helpful for those who—with regularity—engage in cross-border transactions.⁴⁵ On the downside, however, the fragmentation of legal rules at the national level might increase the complexity of legal regulation with respect to cases that, in principle, are quite similar (but not directly affected by the respective EU instrument) and eventually could create confusion among the citizens. Admittedly, the risk of confusion is not an issue attributable solely to EU harmonisation. Rather, it is eventually (also) a question of how national legislators respond to the need to implement EU law (in cases of directives) / the directly applicable, overriding rules (in cases of regulations). Do Member States take a narrow approach that strictly follows the scope determined by EU law or are they going to align parallel scenarios (that are not directly covered by the respective EU instrument) with cases harmonised at the EU level?⁴⁶ Put differently, unless the national legislator decides to follow the standard enshrined in the respective EU instrument also in areas not directly covered by it (e.g., if the legislator would apply the here discussed B2C sale by dispatch contract standard of Article 20 CRD also to non-B2C cases), this could mean that different rules would apply at the domestic level in cases that—prior to harmonisation—were treated similarly under national law. This rests on the fact that Member States are—as a basic rule—free to maintain their traditional regimes for those cases that are not covered by EU instruments, but which were dealt with under a standardised set of domestic rules (together with the cases affected by EU harmonisation) before the implementation or (in case of a EU regulation) the application start of said European rules. Hence, the fact that harmonisation—in

⁴⁵ In the concrete case of the consumer-friendly regime of Article 20 CRD (as implemented by the respective Member State), for example, it can be hoped that it will show positive effects on the consumers' trust in sale by dispatch contracts. In the vast majority of cases (i.e., unless the exception of Article 20 CRD for cases where 'the carrier was commissioned by the consumer to carry the goods and that choice was not offered by the trader' applies), the goods purchased by consumers will be transported at the seller's risk.

⁴⁶ It should once again be stressed that the risk of intra-Member State fragmentation of law is higher in the case of full harmonisation. For details see already *supra* note 6.

the present context mainly due to legislative competence and subsidiarity considerations—in principle affects only a comparatively small number of scenarios might create difficult policy decisions that need to be made at the domestic level. In the article at hand this was evidenced with the example of the revised Austrian passing of risk regime in sale by dispatch contracts, where the national legislator favoured legal continuity (for sale by dispatch contract categories not directly covered by Article 20 CRD) over uniformity of domestic provisions and decided to keep the traditional regime (that is different from the new B2C regime) for non-B2C sale by dispatch contracts.

That legal harmonisation can have an even higher (negative) impact on legal certainty than in the highlighted passing of risk case, can be shown at the example of the planned Common European Sales Law (CESL) that would introduce a parallel regime for certain (cross-border) B2C and B2B contracts. I commented on the plan of the Commission to introduce the CESL in detail at different occasions.⁴⁷ What should be stressed again at this point is that the CESL would—for the covered B2C transactions—introduce a (more or less)⁴⁸ independent sales law regime which the parties can choose over the traditional sales law regimes. This would—unless national legislators align their general sales law regimes accordingly—not only lead to a greater fragmentation of applicable rules depending on the nature of the concrete transaction (B2C and covered B2B contracts on the one hand and sales contracts not covered by the CESL on the other), but also within the group of CESL covered contracts. This is due to the fact that if the CESL were applicable⁴⁹, different rules would apply than in the case where parties do not agree on the CESL. Especially for consumers this poses problems, as their transactions with traders from the

⁴⁷ See, in detail, the literature in *supra* note 5.

⁴⁸ It must be noted that the CESL does not cover every single legal aspect of a sales contract. For certain questions one still has to apply the rules of the traditional regimes – for details see *ibid.* and Recital 27 CESL.

⁴⁹ For details on this issue see Wrška, EUROPEAN CONSUMER ACCESS TO JUSTICE REVISITED, *supra* note 5, at 237-252.

same foreign country might sometimes be governed by the CESL and sometimes by the traditional sales law.⁵⁰ More than that, since the CESL would, in principle,⁵¹ not be applicable in purely domestic cases, consumers might face a hard time when trying to understand the legal framework that governs the transaction at hand. The only way to minimise the risk of confusion would be to revise their existing sales law regimes in accordance with the model standard as introduced by the CESL. It can, however, be expected that the vast majority of Member States would not be willing to give up their time-tested, traditional sales law regimes.

The article hopefully showed that the harmonisation debate has to go beyond the prevalent discussion of the merits and demerits of full harmonisation on the one hand and minimum harmonisation on the other. To achieve a win-win situation for legal regulation both at the domestic and the cross-border level, it should integrate the question of possible implications of harmonisation for domestic lawmaking. At least—and despite the fact that (as shown at the example of an increase in the protective level via Article 20 CRD) harmonisation can have positive effects at both levels—law- and policy-makers should be aware of the possible risks of increased complexity of legal rules at the national level that can result from a tension between EU and national policy-making.

Received on 24 December 2014

Approved for publication on 19 January 2015

⁵⁰ For details on this issue see *ibid.*, at 221-224.

⁵¹ See *ibid.*, at 210.