

IATL Report: A Practical Study in Comparative Law and European Private Law – Automatically Renewable Contracts

Introduction

The gradual increase of consumerist consumption patterns and the evolution of technology observed over the past decades have exponentially amplified the economic weight attached to the telecommunications sector in Europe. Indeed, since it offers vast opportunities for employment and economic growth, the EU recognized its importance for the development of the internal market and thus regulated the sector with the Telecommunication Framework Directive in 2002 with the objective of establishing ‘a harmonized framework for the regulation of electronic communications networks and services’. A further attempt in 2009 to reform the field was the “EU telecom package”, a novel regulatory approach which sought to increase the reliability and price competitiveness of communication services in a united Europe. The enhancement of competition within the field was not the only predominant motive for this transformation; indeed, the European Commission was equally preoccupied with the protection of the consumer.

An issue which particularly undermines the rights of consumers within the telecommunications field concerns “Automatically Renewable Contracts” (‘ARCs’). These are contracts which are automatically renewed after the original expiry date agreed upon in the contract has passed. Its effect is to continue binding the contractual party for another period of time – for instance, a year – without requiring his or her explicit consent to that renewal. Whilst all potential clients may be negatively affected by such types of clauses, they are most detrimental to consumers who, lacking bargaining power and legal awareness, are often unable to understand or alter the complex legal clauses incorporated in the contractual agreements between them and their telecommunications provider. This subject area is thus faced with the difficult challenge of striving to increase the effective protection of consumers whilst maintaining a high level of competition within the internal market.

The purpose of this study is therefore to undertake a comparative evaluation of the current legal positions in a number of European jurisdictions, namely Germany, France, the United Kingdom, the Netherlands and Poland. This national data will additionally be compared to the existing European framework. The study aims to provide an overview over the main positions adopted on the issue within Europe and to establish which of the jurisdictions has developed the most efficient mechanism of protection of consumers concerning ARCs in the telecommunications sector.

Part 1: Type of Legislation Regulating ARC

In the light of harmonisation of law on certain topics - in this case contract law - the EU has issued a number of directives. In the context of ARCs Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts and Directive 2009/136/EC (as amended by Dir 2009/136) on Universal Service and Users' Rights relating to electronic communications networks and services are particularly interesting. The 1993 Directive contains general provisions with regard to automatic renewal of consumer contracts, whereas the latter Directive establishes rules for automatic renewal of consumer contracts in the specific context of telecommunication services.

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contract refers its readers to the annex, where it provides a list of terms which may be regarded as unfair in consumer contracts. Many member states have followed this format of listing unfair terms in some part of the domestic legal system. In France, Germany, the Netherlands and the UK, a system has been put in place where there exists both a so called 'black list' of terms which are always considered unfair in consumer contracts, and a 'grey list' of terms, which, as in the Directive, may be found to be unfair. If a contract contains a term, which is listed on the black list, the contract in itself can continue to exist, however the particular term which is unfair will no longer be considered a binding part of the contract.

Directive 2009/136/EC (as amended by Dir 2009/136) on Universal Service and Users' Rights relating to Electronic Communications Networks and Services on the other hand does not provide any specific information on the legitimacy of automatic renewal of telecommunication contracts. Instead, article 20(e) establishes quite generally that it is up to the Member States to ensure that consumers have a right to a contract which specifies, amongst other things, the duration and conditions of renewal of the contract.

Contrast this with 1(h) of the annex, referred to in article 3(3) of Council Directive 93/13/EEC, which states that:

“Automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early”

may be regarded as unfair.

The reason why the 2009 directive is so much more generally worded than the 1993 directive, could be simply because the EU saw no need to lay down specifically again in the newer directive that which was already detailed in the older directive. After all, since the 1993 Directive is applicable to consumer contracts in general, it is also applicable to consumer contracts in the context of telecommunication services. Therefore there was no need to repeat in the 2009 Directive what had already been explained in the 1992 directive.

Interestingly, some member states, for instance Germany and France, followed this approach and did not create a special provision for automatic renewal in consumer contracts for telecommunication services. The German system practically copied the approach of the Directives. There is a general provision in paragraph 309(9) which forbids automatic renewal for a period of longer than a year by placing terms to that effect on the black list. Then there is a specific law for

telecommunication services, the Telekommunikationsgesetz (TKG). This law only states that information must be provided in a plain, comprehensive and readily form in the contract. Furthermore article 43a allows the Federal Network Agency (FNA) to create more detailed regulations on a number of topics. Through creating such regulations the FNA could effectively create binding rules for providers concerning the legitimacy of automatic renewal of consumer contracts. However, so far the FNA has not done this.

The German system has therefore stayed close to the original format of the directives and therefore has a detailed provision for general consumer contracts, and applies broad terminology with regard to consumer contracts in the context of telecommunication services.

The French system equally appears to follow the logic that there is no need for detailed provisions of consumer contracts for telecommunication services. However, it takes this line of thought a step further than the directives and the German legal system, as it only knows a general provision. According to French law, two types of automatic renewal are possible.

First of all, it is possible for the consumer and the professional to agree to include a clause which allows for *tacit renewal* in their contract. *Tacit renewal*, however is limited by L. 136-1 which makes it compulsory for a provider, who has included a tacit renewal clause, to inform the consumer in writing, no earlier than three months in advance of the renewal and to later than one month before the renewal, of the option to refrain from renewing the contract.

The second option is that of *tacit roll-over*. Tacit roll-over occurs when the contract is renewed tacitly by the 'elaborated silence' or the conduct of the parties. This occurs for instance where both parties silently agree to renew the contract by remaining in possession of certain goods, or by continuing to receive and use the provided services. Since L. 136-1 only applies to contracts with a *tacit renewal* clause, its restrictions do not apply to *tacit roll-over* and the provider does not have to remind the consumer of the renewal. The reason behind this is that through the elaborated silence or conduct, the consumer has so to say agreed to the renewal of the contract.

Aside from these detailed provisions for consumer contracts in general, France does not have a specific law for contracts for telecommunication services. This does not mean, however, that it has not implemented the 2009 directive. The general provision is so detailed that it covers the requirements of article 20(e) that consumers have a right to a contract, which specifies, amongst other things, the duration and conditions of renewal of the contract.

Other Member States, such as the Netherlands and the United Kingdom, have taken a different approach in their implementation of the two directives.

The Netherlands has, just like Germany, a separate law regulating consumer contracts in general and contracts for the provision of telecommunication services. The former can be found in article 6:236 j BW and states that contracts for the regular delivery of goods or services can only be tacitly renewed if the consumer can cancel the renewed contract at any time with a cancellation period not exceeding one month. Additionally, there is the Telecommunicatiewet (TCW) which states in article 7.2a that tacit renewal is possible but once it has taken place the consumer must be allowed to cancel the contract at any time, free of charge, with a cancellation period not exceeding one month.

In the United Kingdom, on the other hand, an independent regulatory competition authority for the communications sectors named OFCOM was created by the Communications Act 2003 in order to 'further the interests of consumers in relevant markets, where appropriate by promoting competition.' (s.3(1)(b)) The main provision relating to ARCs in the UK has been created by OFCOM in its General Condition 9 which aims to prohibit the use of ARCs in telecommunications contracts (more particularly concerning fixed-line and broadband services) when dealing with consumers. According to General Condition 9.3(a)(i), providers are unable to extend the commitment period unless they have obtained the express consent of their customers. The General Condition therefore makes tacit roll-over unlawful for a Communications Provider without gaining their customers' express permission beforehand.

A further limitation is imposed by Schedule 2 of the Unfair Terms in Consumer Contracts Regulations 1999 which stipulates that a contractual term is unfair if the delay given to a consumer to cancel a contract or not to extend it further is 'unreasonably early'. The Office of Fair Trading has considered that a one-month delay seems reasonable to allow a consumer to decide whether or not to extend a contractual agreement. This implies that a contract could potentially be tacitly renewed if the consumer was given a one month cancellation period before the renewal.

In conclusion, there are strong similarities between the different positions adopted by the jurisdictions examined by the study. Whilst some have preferred to adopt an entirely separate and explicit consumer protection code, others retained their previous legislation by adding clauses as appropriate. The consensus concerning tacit renewal seems to be that express clauses included in the contract to that effect should be entirely prohibited. A few variations, observed in the Netherlands and in the UK in particular, are the possibility of tacit renewal if a strict period of cancellation has been granted.

Part 2: ARCs – A classification

ARCs are first of all matter of duration: if the original contract is open-ended, then it cannot be renewed, there is no need to consider ARCs; if the original contract is fixed-term, then it can be renewed. Consequently the question concerns the type of the renewed contract: fixed-term or open-ended. A renewed contract which is open-ended is still a renewed contract, we can speak of ARCs, and nonetheless the consequences for the consumer are minimal since he can terminate the contract when he wants. The principal issue, for the consumer because he may be stuck in a relationship, is when the renewed contract is a fixed term contract, the consumer will have no other choice than waiting for the end of the term. At last, the question concerns the mechanism itself of the renewal, is there a reminder, a possibility of cancellation, etc. In other words, how can the consumer not be stuck longer?

Duration of the original contract

For a consumer the best is an open-ended contract since he has the possibility to terminate the contract at any time. But as we have considered it in the introduction, it is also important to help businesses. An open-ended contract offers no guarantee to the business regarding the stay of the consumer, this is an issue for business perspective in short and medium term.

In Holland, in general a fixed term consumer contract cannot last more than one year. But the contract can be open-ended (art 6:237k BW: grey list). For a telecommunications contracts, the telecommunication code states that a contract should be for 12 months, and cannot exceed 24 months. Telecommunication Code (7.2.a introduced the 11/11/08) seems more flexible than grey list since 24 months is allowed. Telecommunication code accepts open-ended contract 7.2a (1).

In Poland, it seems that there is no limit, but the provision can be challenged by art 385 of the civil code which deals with the unfair terms. In case of dispute the court will decide whether the duration is unfair or not. In practice a contract does not last more than 36 months.

In Germany, §309 Nr. 9 BGB : black list, prohibited clauses without possibility of evaluation : 24 months is the maximum (fixed term contract) but we find in the telecommunication code a limit of 24 months for the initial commitment period (§43b TKG). Introduced by a law (Gesetz zur Änderung telekommunikationsrechtlicher Regelungen) transposing the EU directive.

In France, as in England, the law does not regulate the duration of the contract through the unfair terms, but as in Germany they focus on the initial commitment period. The Consumer code expresses that the commitment period cannot be longer than 24 months. Article L121-84-6 with loi n°2008-3 3/01/2008 « pour le développement de la concurrence au service des consommateurs ». In England, GC 9.4 states the initial commitment cannot be longer than 24 months as-well. (General Conditions and Universal Service Conditions (Implementing the revised EU Framework), Statement and Notification, 25 May 2011)

The 25 November 2009 the Council and the European Parliament have issued a directive (dir. 2009/136/EC), which had to be implemented for the 25 May 2011 (Article 4). It states that the article 30 (5) Dir. 2002/22 should include a limit concerning the initial commitment period. They should not last longer than 24 months. This explains the uniformity in the different laws. None the

less all of them do not refer to the initial commitment period. This period is included in an open-ended contract. During this period, the consumer has the obligation to perform and cannot terminate it. It is a fixed-term contract in an open-ended contract. The contract has not to be renewed, and then the provider has not to respect the legal mechanism we will consider later. We should interpret the initial commitment period as including the fixed-term contract. Indeed the purpose of the text is to prevent the consumer to be stuck into a contractual relationship more than 24 months. The EU directive which creates this notion has as aim to protect the consumer and to prevent him being stuck into a contractual relationship. Therefore it has been decided to restrict the duration of an ICP. This should also apply to a fixed-term contract. Moreover the OFCOM in a report defines the ICP as being the period during which a consumer cannot terminate the contract without paying compensation. This definition includes the fixed-term contract as well. On the other hand literally an initial commitment period is not a fixed-term contract.

To conclude there has been a European harmonisation focus on the telecommunication contract. Some countries have foreseen the harmonisation, and others have implemented the directive. Even if in Holland the terminology of ICP is not used, and in Poland no implementation seems to exist, overall the harmonisation has been done. At last, an open ended contract is accepted with an initial commitment period of 24 months, and a fixed term contract is limited to 24 months. A telecommunication contract consequently can last indefinitely, there no question concerning ARCs. But it can last also 12 or 24 months, and there ARCs issues arise.

ARCs

We can classify the legislation regulating ARCs in two main categories: the regulation of the renewed contract, and the regulation of the mechanism

The first classification draws a classification of the legislation regarding the renewed contract. These are the legislations which restrict the duration of the renewed contract. In this case the consumer faces a new fixed-term contract. There are the legislations which do not impose a maximal duration. And there are legislations which ban fixed term contract.

We have to keep in mind that where the law does not impose a particular duration of the renewed contract, the period during which the consumer cannot cancel without compensation cannot last longer than 24 months.

In the first category we find alone the German regulation with imposes a fixed term renewed contract. Paragraph 308(9) (b) BGB states that a clause by which a contract is renewed or extended for more than one year is absolutely forbidden (no possibility of evaluation). This restriction represents the worst harm for the consumer because if he does not give notice in time, he will be forced to spend another year with the provider. Moreover (c) seems to allow the renewed contract to be renewed again and again §308(9)(b) BGB « *prior to the expiry of the duration of the contract as originally agreed or tacitly extended at the expense of the other party to the contract* » + LG Dortmund, 16.10.2010 – 8 O 112/10). Thus the consumer is in peril.

In the second we find the French and English laws which impose a fixed-term or an open-ended renewed contract. French law, according to the article of the consumer code which regulates ARCs does not impose any duration. Indeed the reading of L136-1(2) shows that the renewed contract can be a fixed-term contract, or an open-ended contract: « *In such circumstances, any advances made*

after the last renewal date or, in the case of open-ended contracts, after the date on which the initial fixed-term contract was converted". The English law section 9.3 of the General conditions states that the provider must not renew at the end of the ICP for a further ICP without an express consent. If we consider that the ICP is a part of an open-ended contract, then at this end of the ICP the contract should not be renewed but continue as open-ended contract. In that case there is not an ARC, but the effects are the same as ARCs in Polish and Dutch law where the renewed contract is open-ended.

In the third we find the Dutch and Polish laws which impose that the renewed contract shall be open-ended. Dutch law, according to section 7.2a (2) Telecommunication Code, a fixed term contract can be renewed or extended tacitly only if it is possible for the consumer to cancel the contract at any time after the renewal. In Poland the issue is more complicated. The widespread practice is that the contracts are renewed for an indefinite period on the same terms and thus can be terminated by the client at any time. However, telecom providers have made attempts to renew contracts for a fixed time, usually another 24 months. These practices were held to be illegal by the Warsaw District Court - Court for the Competition and Consumer Protection (the **Competition Court**) which examines, upon filing a lawsuit by a consumer, standard terms' (non-negotiated) contract provisions which might be in contravention of Article 385¹ of the Civil Code 1964. Article 385¹ provides that a non-negotiated term does not bind a consumer (it shall be regarded as unfair/prohibited) if it renders the parties' rights and obligations contrary to good custom (good faith), to the gross detriment of the consumer's interests. The Competition Court provides, under the authority given by Art. 479³⁶ of the Civil Procedure Code 1964, the assessment of the contentious term and if he finds it to be unfair or prohibited the President of the Office for Competition and Consumer Protection (the **Competition Authority**) enters this term into, so called, the register of prohibited terms. The Competition Authority is authorised to do so on the basis of the Art. 479⁴⁵ of the Civil Procedure Code 1964. The terms on the register are prohibited and do not bind the consumers. If any undertaking uses the prohibited term he may be subjected to a fine by the Competition Authority under Art. 24(2) of the Competition and Consumer Protection Act 2007. In conclusion, if the renewed contract is not fixed term, it is a renewal, but not an issue for the consumer. Some could say the law does not allow ARCs.

The second classification concerns a distinction between the legislations regarding the mechanism. There are some legislations which require action neither from the provider nor from the consumer. There are also legislations which require action only from the provider. Additionally, there are types of legislation which require an action from the provider and from the consumer.

In the first category there are Dutch, German, and Polish laws in which no action is required in order to renew. But the renewal will be forbidden if the consumer has not right to terminate. In Germany, the only provision concerning the ARCs states, partly, that the notice period cannot be longer than three months. We should note that this is a long time, longer than anywhere else. In Poland, the general rule is that the automatically renewable contracts are permitted where a specific provision had been incorporated into the contract and the consumer is given reasonable time to give notice of termination before the end of the contract. Article 385(18) of the Civil Code stipulates that a non-negotiated contract term in a fixed-time consumer contract which provides for an automatic renewal and do not give the consumer the right to give notice of termination within a

reasonable period of time will be deemed to be unfair and thus prohibited: 30 days to give notice of termination is commonly deemed to be sufficient.

In Holland, there is no need to offer a right to terminate since the renewed contract is open-ended. Then right to terminate at any time, but section 7.2a (3) states that the cancellation period for the consumer is never allowed to exceed one month. We find the same for contracts for the regular delivery of goods or services (art. 6:236 j BW).

In the second category there is only French law which requires that the provider sends a reminder. L136-1 of the Consumer code states that the service provider shall inform the consumer in writing; three months at the earliest, and one month at the latest, before expiry of the period during which renewal can be declined, of the option to refrain from renewing. The mechanism is regarded by the French lawyer as being the best protection. Nonetheless some issues arise. First of all the modalities of sending the reminder does not specify that it must be sent with a registered letter. There are two reasons, it would cost too much for the providers, and the consumer would have to go to the post office each time he is not at home to receive the letter. Then the issue concerns the proof that it has been sent. According to consumer law, the business will have to prove he has sent it on time, which will not be easy. The other issues concern unfair behaviour. Indeed the law points to a no-come back period: there is no definition of it, and it can be early in the contractual period. That means the consumer could receive the reminder at the start of the contract. We all agree it would have been better to specify a period from the end of the original contract. But at last it is possible to regard no-come back period which is designed too early as unfair. Another issue is where the business sends the reminder with a lot of adverts. In that case the consumer would put it in the trash without having knowledge of it. Again the judges could consider it is in bad faith. At last it is well regarded that the law does not go into too many accurate details. The particularity of the provision is that there would be sanctions. If the provider does not send a reminder in time, the termination is possible at any time, and all sums shall be reimbursed within 30 days after the cancellation (minus sum corresponding to the performance until the cancellation). It offers good protection to specify the delay of reimbursement because it can be a way of pressure for the provider to say the consumer won't be reimbursed before a long time.

In the third category is English law. The provider must obtain express consent. And consequently consumer must give express consent (GC 9.3). Ofcom's Guidance on Compliance puts an emphasis on the timing of the consent provided by the consumer. Indeed, the Communications Provider is required to allow the consumers 'sufficient time to properly consider the deal they are being offered (...) before setting deadlines requiring them to opt in to a further initial commitment period.' The guidance paper stipulates that the Communications Providers are required to contact the consumers before the expiry of the contract in order to renew the initial commitment period. However, they should not contact the customers very shortly before or on the day of the expiry or alternatively very far in advance as this will not give them the opportunity to adequately consider the options available to them. Ofcom therefore considers it 'reasonable for Express consent to be obtained by [Communication Providers] no sooner than six months before the end of each initial commitment period.'

To conclude, we have seen that the legal framework has restricted the use of ARCs by limiting the duration of the period during which a party cannot leave without compensation (fixed-term, initial

commitment period). Nowadays, the renewed contract cannot last more than 24 months or it must be open-ended. To go further into an ARCs limitation the current laws shows that there are two main levers. The first one, in the continuity of what we said previously, is the duration. The law can impose to the renewed contract to be open-ended. Theoretically the ARCs would be still allowed but would lose its utility for the business. Consequently it would not be used anymore. Or at last it will not stick the consumer. The second lever is the action. The law can impose one or two actions, the reminder, or the necessity to obtain an express consent. The reminder does not remove the ARCs, since the renewal is still automatic, at the opposite, by requiring an express consent; a sort of offer is made. Then the renewal is not automatic or tacit. It is the creation of a new contract. In term of protection of the consumer, in order to determine what kind of regulation does protect the consumer the best, we can use a grid.

Duration\Action	No action required to renew the contract	Business must send a reminder	Business must ask the consent, consumer must give his consent
Unrestricted fixed-term	0	1	2
Restricted fixed-term	1	2	3
Open-ended	2	3	4

Countries	Duration	Actions	Degree of Protection
Germany	1	0	1
England ResFixed-Term	1	2	3
England Open-ended	2	0	2
France ResFixed-Term	1	1	2
France Open-ended	2	1	3
Holland	2	0	2
Poland	2	0	2

With these grids, we see that the worst degree of protection is 0. It is the consequence of the total absence of maximal duration of the fixed-term contract and of action to renew. That means the contract at the end of its term will automatically be renewed for a long fixed-term, with any information provided to the consumer. This situation cannot exist anymore since the fixed-term contract is limited to 24 months. The degree of protection 1 happens when the contract is renewed for a fixed-term during which the consumer will be stuck, without requiring anything from the business or the consumer. This latter will be in a new contract without knowing it. The degree of protection 2 is as we see the most common. It is the consequence of a mix between the actions or

the duration. The degree of protection 3 results from the use of 1 action and open-ended contract (as in France) or 2 actions and restricted fixed term contract (as in England). In one situation the ARCs is not ban, in the other it is ban. The degree of protection 4 does not exist in the countries compared. But the English law could have done it by imposing the same conditions (actions) for the fixed-term and the open-ended contract either. Results from such degree of protection the ban of ARCs, and fixed-term renewed contract. In this situation the consumer would start a contractual relationship within a fixed-term contract, and will continue it, after acceptance, in an open-ended contract. At last we have also to consider the sanction, and it could be added in the grid. French law offers with the mechanism a particular sanction: the consumer can terminate the contract at any time and getting the reimbursement of the sum spent within 30 days. The limitation of time ensures the consumer will not be preventing from terminating by fear to lose money. On the other side, by using unfair terms, it seems that the sanction can only be to void the term. The consequences are to take into account. Does it mean that the renewal will be considered as having never existed? If the clause is void, it has never existed, and the renewal resulting from the clause neither. What happens to the renewed contract? Does the service stop abruptly? Is that a good protection of the consumer interests? Cutting internet connection, mobile, etc.?

Part 3: Comparison with unilateral change of terms

Since an unrestricted ability to have ARCs as standard contracts is in favour of the provider and troublesome for the consumer, it is the role of the law to create a balance between the interests of the provider and those of the consumer. This part will compare the position of the provider and the consumer with regard to ARC and unilateral changes to the contract.

There are several possibilities :

1. The provider is better off concerning ARC and unilateral changes of terms.
2. The provider is better off concerning ARC but not concerning unilateral changes of terms.
3. The provider is not better off concerning ARC, but he is better off concerning unilateral change of terms.
4. The provider is not better off neither concerning ARC nor unilateral change of terms.

This comparison will look at the national laws regulating ARC and consumer contracts in general in Germany, Poland, France, United Kingdom and the Netherlands, to see which of the abovementioned categories each country belongs to.

In order to discover whether the provider or the consumer is better off concerning ARCs and unilateral changes in contracts, it is necessary to evaluate their respective positions in these situations. For ARCs the positions of the provider and the consumer has been explained in part 2 already.

Regarding unilateral change of terms, it will be necessary to look at the specific national laws which will then be contrasted with the EU directive in order to analyse whether or not it has been successfully implemented by the abovementioned member states.

Regarding the possibility of unilateral change of terms, there are three categories:

1. Unilateral change of terms not allowed
2. Unilateral change of terms only allowed if...
3. Unilateral change of terms always allowed

The English system has two laws on the topic of unilateral change of terms, the General Conditions and the Unfair Terms in Consumer Contract Regulations. . The general conditions are specifically aimed at telecommunication contracts whereas the UTCCR is aimed at consumer contracts in general.

“General Condition 9.6 (of the consolidated version of the General Conditions of entitlement as at 22 November 2012) is pursuant to section 51(1)(a) of the Communications Act and is intended to give effect to Article 20(2) of the Universal Services Directive (2009/136/EC which amended Directive 2002/22/EC).”

GC 9.6 applies to consumers as well as businesses.

It says that:

“The Communications Provider shall:

1. Give its Subscribers adequate notice not shorter than one month of any modifications likely to be of material detriment to that Subscriber;
2. Allow its Subscribers to withdraw from their contract without penalty upon such notice
3. At the same time as giving the notice in condition 9.6(a), above, shall inform the Subscriber of its ability to terminate the contract if the proposed modification is not acceptable to the Subscriber”

GC 9.6 is extremely similar to the text of the European Directive. However, it has added the necessity of the modification being of ‘material detriment’ to the consumer. According to Ofcom this addition highlights the fact that intervention by the law through GC 9.6 with a contract is only justified if this is necessary to correct an imbalance of rights and obligations between the parties.

The Unfair Terms in Consumer Contract Regulations lists a number of terms that may be unfair in Schedule 2 of the Act.

This list includes the following terms:

(j) Enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;

(l) Providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;

This suggests that unless the provider has a good reason to unilaterally change the terms of the contract, including the price, then it is not allowed. No further explanation is given of what might constitute a ‘good reason’.

The general conditions and the UTCCR are supposed to provide protection for consumers. However, according to a consultation by Ofcom[#] consumers are currently being negatively impacted by price rises in fixed term contracts.

According to the abovementioned consultation, the main problem is the provider’s “ability to unilaterally raise prices in fixed term contracts in the absence of an automatic right to terminate without penalty on the part of consumers.” This, combined with other sources of consumer harm Ofcom identifies in its report, has led Ofcom to review this area of law. The review is currently still in process.

The French system has two laws on the topic of unilateral change of terms, s L121-84 and S. R132-1 plus S. R132-2. s L121-84 of the consumer code is specifically aimed at telecommunication contracts whereas S. R132-1 plus S. R132-2 are aimed at consumer contracts in general. S. R132-1 constitutes a black list of terms which are always considered unfair and therefore cannot be enforced. S. R132-2 is the gray list. Terms mentioned on this list are presumed to be unfair, however can be enforced if properly justified.

The rule for telecommunication contracts has been a part of the consumer code since 26 July 1993. s L121-84 states that any modification of the terms of the contract must be communicated by the provider, one month before it takes place, in writing or some other 'durable' form, to the consumer. Furthermore, the latter must be informed in writing that he can terminate the contract up to four months after the change has been made, unless the change has been expressly accepted by him.

This rule only applies to contracts with a modification clause in the terms of the contract. In a fixed term contract without a modification clause unilateral amendment of the terms (including the price) are not allowed and a consumer can enforce execution of the initial contract.

The consumer code also has a general system of consumer protection, made up of a black list and a grey list. Terms on the black list are irrefutably presumed to be unfair and can therefore never be enforced. This list can be found in S. R132-1. It includes the prohibition of clauses allowing the professional to change the price, length or feature of the service or the good.

The gray list can be found in S. R132-2. Terms listed here are presumed to be unfair, but can be found justified upon evaluation. Among other things, this list mentions as presumably unfair terms which allow the professional to unilaterally modify terms of the contract, other than those relating to the price, feature or length of the service or good contracted for. This shows that the French consumer code is generally wary of allowing the professional to unilaterally amend terms of the contract, not just where price, feature and length are concerned.

It seems then that French law in general is very protective of consumers, and does not allow professionals to unilaterally change the terms of the contract. Terms relating to time, price and length can never be amended unilaterally according to S. R132-1, and changes to any other terms will be presumed to be unfair as well.

In the light of this generally strict approach to unilateral changes of the terms, the fact that there is a different provision for telecommunication contracts is very remarkable. After all, s L121-84 allows unilateral amendment of the terms, but only within limits. The change must be communicated in writing or other durable form to the consumer, who then is able to cancel the contract if he doesn't wish to accept the modification.

In the Netherlands, it is art. 236 i BW which regulates this field. It states that in an agreement between a user of standard terms and a consumer, a term will be regarded unreasonably onerous if it allows the user of the standard terms to increase the price, which he had suggested within three months of concluding the contract, unless the consumer is given the opportunity to discharge the contract when this happens. In conclusion, if the user of standard terms wants to increase the price

within the first three months of the agreement the consumer must be given the choice to discharge the contract.

In Germany, the TKG is silent on the topic of whether providers can unilaterally change the terms of a contract. It does list the information which must be provided to the consumer in the contract in section 43a TKG. Furthermore, according to the text of 43a TKG the Federal Network Agency (Bundesnetzagentur) can specify the items on this list and thus regulate what information has to be given to the consumer with regard to his rights of cancellation. The Federal Network Agency could therefore define what type of unilateral amendments of the contracts would provide the consumer an early exit right. However, so far the Federal Network Agency has not done this. Since the TKG does not mention any effects of unilaterally changing the terms of the contract, and the FNA has not yet implemented any regulations on the topic either, one must apply the general law of the BGB.

The BGB does not mention unilateral changes to the contract terms in great detail either. §309 no.1 places price increases on the black list, but only for goods or services to be provided within four months. This is therefore not applicable to telecommunication contracts, as those contracts are generally entered into for a longer period of time.

§307 BGB renders ineffective any clause in a set of standard terms which puts the other party at an unreasonable disadvantage. This broad regulation has been interpreted by the court as follows: where the standard terms in a consumer contract include a price variation clause, then the consumer can terminate the agreement when the price increases not insignificantly in comparison to the increase of the general cost of living.

Furthermore, the court has laid down strict requirements for the inclusion of price escalation clauses. These must be of a high level of transparency and the calculation of the increased price must be linked to increased costs.

The conclusion therefore is that in Germany, there is no specific protection against unilateral changes to the terms of the contract in case of telecommunication contracts. In general consumer contracts (therefore also telecommunication contracts with consumer) it is possible to include a price escalation clause, however this possibility is restricted by §307 BGB which has been interpreted by the court as meaning that price increases must be linked to the increase of the general cost of living and the calculation of the price increase must be clear and transparent.

Conclusion

This comparative evaluation has enabled us to assess the respective advantages and disadvantages of the different national legislations. It can be observed that the protection offered to consumers concerning automatically renewable contracts is far from being uniform in Europe. The fundamental question concerns whether or not European harmonisation should take place and if so, what model of law it should follow. A high degree of consumer protection has been developed by European Union law which considers that the consumer should be protected since he is the weaker party. The existence of a common market presupposes a similarity in levels of consumer protection across Europe, both in the interests of individual consumers and growing competition. It can therefore be foreseen that the harmonisation projects across the EU will target high degrees of protection which, according to the undertaken research, should preferably use either English or French law.