Modernising and Harmonising Consumer Contract Law

Geraint Howells
Reiner Schulze (Eds.)

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Foreword

In October 2008 the European Commission published the Proposal for a Consumer Rights Directive; a Proposal that suggests far-reaching changes to the core of consumer contract law. Four current directives shall be replaced by a new, overarching piece of legislation and in doing so full harmonisation should for the most part take the place of the minimum standard presently in force in the European Union. In January 2009, legal experts from universities, practice and the civil service met in Manchester to address the question of the extent to which this Proposal can contribute to the modernisation and harmonisation of European consumer contract law. This event was organised under the auspices of the Consumer Law Academic Network (CLAN) jointly by the Manchester University Law School and Münster's Centre for European Private Law and benefited from support from the UK Department for Business, Enterprise and Regulatory Reform (BERR), Domestic and General and the Acquis Group. The papers presented at this conference analysed, criticised and suggested improvements for the Proposal and are published in this volume.

The editors would like to thank the contributors and the publisher for their efforts in making the publication possible in such an exceptionally short period. The results from this conference are thereby timely for the further discussions on a Consumer Rights Directive.

Further thanks are due to Eric Sitbon, legislative officer at DG SANCO, and Graham Branton of BERR for their important contributions and valued participation at the conference.

The editors would like to particularly thank David Kraft and Jonathon Watson for their conscientiousness and commendable dedication to the organisation of the conference and co-ordination of this publication, as well as Joana Tolle for her assistance.

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Geraint Howells and
Reiner Schulze

Contributors

Hugh Beale
Professor of Law, University of Warwick, United Kingdom.
Visiting Professor at the University of Oxford, United Kingdom, and
Honorary Professor at the University of Amsterdam, The Netherlands

Roger Brownsword
Professor of Law and Director of TELOS at the School of Law,
King's College London and Honorary Professor in Law at the
University of Sheffield, United Kingdom

Geraint Howells
Professor of Commercial Law, University of Manchester, United Kingdom.
Barrister, Gough Square Chambers, United Kingdom

Marco Loos
Professor of Private Law, in particular of European Consumer Law,
University of Amsterdam, The Netherlands; associated with the
Centre for the Study of European Contract Law of that university

Vanessa Mak
Post-doctoral fellow, Tilburg Institute of Comparative and
Transnational Law (TICOM), Tilburg University, The Netherlands

Hans-W. Micklitz
Professor of Economic Law, European University Institute, Florence, Italy

Annette Nordhausen Scholes
Lecturer in law, University of Manchester, United Kingdom

Christine Riefa
Brunel University, United Kingdom. Convenor of the European Masters
in Consumer Affairs (EU funded) and Board Member of the
International Association of Consumer Law

Hans Schulte-Nölke
Professor of Civil Law, European Private and Business Law,
Comparative Law, and European Legal History.
Director of the European Legal Studies Institute, Osnabrück, Germany

Reiner Schulze
Professor of German and European Civil Law at the University of Münster, Germany.
Director of the Centre for European Private Law (CEP), Münster, Germany

Jules Stuyck
Professor of European Law and Consumer Law at the K.U. Leuven and director of the Study Centre for Consumer Law.
Partner Liedekerke, Brussels, Belgium

Christian Twigg-Flesner
Reader in Law and Convenor of the Trade and Commercial Law Centre, University of Hull, United Kingdom

Chris Willett
Professor of Consumer Law, De Montfort University, Leicester, United Kingdom

Fryderyk Zoll
Professor of Law, Jagiellonian University, Cracow, Poland

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Overview of the Proposed Consumer Rights Directive

Geraint Howells & Reiner Schulze

I. Introduction

On the 8 October 2008 the Commission published a Proposal for a Directive on Consumer Rights (hereafter referred to as Proposal or pCRD).[1] First mooted back in 2004,[2] when the project was firmly integrated into the general programme for reforming European contract law, the project began to take shape in 2007 with the Green Paper on the Review of the Consumer Acquis.[3] Originally covering eight consumer directives[4] the final Proposal focuses in on just four that lie at the heart of consumer contract law: Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises;[5] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts;[6] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts;[7] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.[8]

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1 COM(2008) 614 final.

2 See COM(2004) 651 final, OJ 2005 C 14/6.

3 COM(2006) 744 final.

4 The other four were Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ 1990 L 158/59; Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, OJ 1994 L280/83; Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ 1998 L 80/27 and Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ 1998 L 166/51.

5 OJ 1985 L 372/31.

6 OJ 1997 L 144/19.

7 OJ 1993 L 95/29.

8 OJ 1999 L171/12.

The project is now well focused on key areas of consumer contract law and although seeking to be informed by the Common Frame of Reference (hereafter: CFR) the project has been produced in advance of the CFR being available.[9] Indeed one of our broad general observations about the Proposal in the next section concerns the way in which it uses and relates to the CFR. Another central theme addressed in this overview section is full harmonisation. The goal of full harmonisation has been modified in rhetoric to targeted full harmonisation. However, in practice full harmonisation remains at the core of the Directive. Linked to this is the question of whether the Proposal addresses the concerns of the internal market consumer. Building confident internal market consumers is the worthy objective underpinning this Proposal, but the unerring belief in full harmonisation combined with some of the policy choices risks reducing consumer protection in some Member States. Finally the attempts to modernise consumer contract law to take account of changes in technology and market practices will be discussed. After this overview key provisions will be briefly analysed.

II. General policy observations

1. The Consumer Rights Directive and general contract law – the influence of the CFR

The purpose of the CFR is a much debated topic.[10] Indeed within the Commission there have been notable ebbs and flows in emphasis with at times the notion of an optional instrument being more prominent than at others. The notion of the CFR as a toolbox has, however, been a constant (even if recently the term "handbook" is becoming more popular[11]); by which seems to be understood an aid to, amongst others, the European legislator when drafting laws. Under Commissioner *Kyprianou* there was a discernable drawing back of the engagement of DG SANCO so that its interest in the CFR was increasingly focused on its utility for the reform of consumer law – connected with the review

[9] The basis of this project is the Action Plan for a more coherent contract law, COM(2003) 68 final, OJ 2003 C 63/1. For more details see D. Staudenmayer, Weitere Schritte im Europäischen Vertragsrecht, (2005) *Europäische Zeitschrift für Wirtschaftsrecht* 103. For recent developments of the CFR see Council documents 8286/08, (11.4.08) and 15306/08 (07.11.08) and the resolution from the European Parliament B6-0374/2008 (17.07.08).

[10] Cf. H. Eidenmüller, F. Faust, H. Grigoleit, N. Jansen, G. Wagner, R. Zimmermann, Der gemeinsame Referenzrahmen für das Europäische Privatrecht – Wertungsfragen und Kodifikationsprobleme, (2008) 11 *Juristen Zeitung* 529-550.

[11] See, for example, COM(2007) 447 final, at p. 10.

of the Acquis.[12] However, the role of the CFR in simplifying, modernising and improving the Consumer Acquis, nevertheless could be a very tangible beneficial output. The timing of the Proposed Consumer Rights Directive is in that respect unfortunate as this fundamental building block of the future European consumer contract law has been proposed at a time when the CFR is still in preparation. The draft CFR (hereafter: DCFR)[13] does exist and yet we shall see that – in crucial areas where it has sought to address the consumer contract acquis such as information duties and rights of withdrawal – the DCFR does not seem to have left a strong impression on the text. Indeed the Proposal makes no mention of the DCFR; the aforementioned Green Paper only mentioned it in the context of a number of stakeholder meetings that had been arranged.[14] Given the large investment in the CFR one might have expected the draft to have been, if not centre stage in the reform process, at least one of the main players. Of course the DCFR is still only an academic text and it has no political clout or binding authority, but one would have expected at the very least its solutions to have been mentioned and deviations explained.

The Proposal draws back from some of the more ambitious issues floated in the Green Paper. The outcome of the consultation process seems to have been that the Commission was cautioned against including reforms like a general clause of good faith and fair dealing, the extension of the scope of the unfairness test to all contract terms and a general right to damages.[15] This may indeed be sensible if such broader topics are to be incorporated into a coherent CFR. The Proposal could then be seen as a two stage process – dealing with

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12 Cf. H. Schulte-Nölke, Scope and Role of the Horizontal Directive and its Relationship to the CFR, *in this volume*.

13 *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) Interim Outline Edition*, edited by C. von Bar et al., (Munich: Sellier, 2008); also available online at www.law-net.eu. A revised edition is due to be published by Sellier in February 2009. For literature on this subject see e.g. C. von Bar, European Coverage and Structure of the Academic Common Frame of Reference, (2007) 3 *European Review of Contract Law* 350-361; O. Lando, The Structure and the Legal Values of the Common Frame of Reference (CFR) (2007) 3 *European Review of Contract Law* 245-256; R. Schulze/T. Wilhelmsson, From the Draft Common Frame of Reference towards European Contract Law Rules, (2008) 4 *European Review of Contract Law* 154-168; *Common Frame of Reference and Existing EC Contract Law*, edited by R. Schulze, (Munich: Sellier, 2008); H. Beale, The Future of the Common Frame of Reference, (2007) 3 *European Review of Contract Law*. 257-276; T. Pfeiffer, Von den Principles of European Civil Law zum Draft Common Frame of Reference, (2008) 4 *Zeitschrift für Europäisches Privatrecht* 679-707.

14 The documents from the consultation proceedings are available under: http://ec.europa.eu/consumers/rights/cons_acquis_en.htm.

15 Commission Staff Working Document accompanying the proposal for a directive on consumer rights Impact Assessment Report at p. 20: available at http://ec.europa.eu/consumers/rights/docs/impact_assessment_report_en.pdf.

some specific matters in this Proposal and more broad ranging matters once the CFR was in place. However, even this first stage needs to be more clearly linked to the general CFR framework, unless the need for early revision is to be avoided.

2. Targeted full harmonisation

The Proposal clearly sees itself as the successor of the Unfair Commercial Practices Directive[16], which is lauded for its successful adoption of maximal harmonisation.[17] Maximal harmonisation certainly has a role to play in European consumer law.[18] The Commission is clearly motivated by the fact that cross-border sales are not taking off either in distant selling (especially via the Internet) or direct selling (it cites the example of utilities in border areas) and consumers are not therefore feeling the full benefits of the internal market.[19] In which sectors and to what extent the lack of harmonisation of the rules really is a significant inhibitor of cross-border trade needs to be further evaluated.[20] Nevertheless, where consumer law can be harmonised at a maximum level without affecting consumer protection this is surely a worthwhile goal. It may be expected, in particular, to be appreciated by small and medium sized enterprises (SMEs) that lack large in-house legal teams to advise on the differences between laws in Member States and whose cross-border sales may be in small quantities that do not justify modifying products, packaging or contracts for new markets.

However, contract is different from unfair commercial practices. Whereas commercial practice law may constrain what is allowed to be done or require certain things to be done so that, in principle, a full harmonisation may be justified,[21] not all contract rules impose such direct obligations. Some information duties and different rules on withdrawal may produce such barriers to trade and might justify full harmonisation. The same might apply to some aspects of unfair terms if the use of common contract documents across Europe

16 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) no 2006/2004 of the European Parliament and of the Council.

17 COM(2008) 614 final, at p. 7.

18 Cf. H. Micklitz, The Targeted Full Harmonisation Approach: Looking Behind the Curtain, *in this volume*.

19 Recital 5 pCRD.

20 See G. Howells, The Rise of European Consumer Law – Whither National Consumer Law?, (2006) 28 *Sydney Law Review* 63.

21 But even here a safeguard clause may be wise in case the European definition of unfairness is not broad enough to capture all unscrupulous practices.

would otherwise be impeded. However, the impact of some contract law rules is far more indirect; they do not necessarily create barriers to trade and should only be harmonised if they distort competition.[22]

It should be carefully considered whether particular private law rules such as the remedies for breach of contract, limitation periods and notification periods really create barriers to trade or distort competition to the extent that their full harmonisation is necessary.[23] In addition, one also has to consider the effects that the full harmonisation of consumer contracts' provisions can have on the development of contract law within the Member States when these provisions are harmonised beyond their particular scope of application. For example, a full harmonisation of the remedies for consumer contracts can possibly make it difficult for Member States to integrate the respective provisions in their general system of contract law. It is precisely this integration that has led to the situation in a number of Member States that reforms of the national Civil law have been based around concepts of Community law – going beyond the Directive's scope of application.[24] This "extended" transposition of Community law concepts can promote a "Europeanisation" of Civil law in the Member States and thereby voluntarily bring national laws closer together. However, this requires sufficient lee-way to be given to the Member States so they can combine concepts of Community law with national traditions. Too much full harmonisation can thus encumber this "voluntary harmonisation".

As such, with regard to the extent of the harmonisation, one would prefer careful, differentiated solutions. Differentiations of this kind were expected when the preparations for a Consumer Rights Directive first began. After the Green Paper it seemed as if the Commission had appreciated this for in their public speeches[25] they started to use the language of "full targeted harmonisation" and this phrase appeared in the European Parliament Resolution of 16 July 2007[26]. Moreover the Proposal states:

> The majority of respondents to the Green Paper called for the adoption of a horizontal legislative instrument applicable to domestic and cross-border transactions, based on full targeted harmonisation; i.e. targeted at the issues

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22 *Germany v European Parliament and Councils*, C-376/98 [2000] ECR I-8419 and *R v Secretary of State for Health and others, ex parte Imperial Tobacco Ltd. and others*, C-74/99 [2000] ECR I-8599.

23 *Alsthom Atlantique v Sulzer*, C339/89 [1991] ECR I-107.

24 Cf. the contribution by F. Zoll, The Remedies for Non-Performance the Proposed Consumer Rights Directive and the Europeanisation of Private Law, *in this volume*.

25 See, for example, Commissioner Kuneva's speech from the 14 November 2007, "Stakeholders' Conference on the 'Review of the Consumer Acquis'", available at: http://ec.europa.eu/commission_barroso/kuneva/speeches_en.htm at p. 2.

26 Report on the Green Paper on the Review of the Consumer Acquis, OJ 2008 C 187/E231.

raising substantial barriers to trade for business and/or deterring consumers from buying cross-border.[27]

But when one comes to review the Directive it is hard to see that any targeting has gone on other than targeting almost all measures for full harmonisation. Certainly Article 4 pCRD emphatically espouses full harmonisation with no reservations. The further discussion on the Proposal ought to therefore return to the question of which differentiations are preferable in individual parts compared with a schematic, complete full harmonisation.

3. Confident consumers

Uneven, fragmented consumer laws are also suggested to undermine consumer confidence in the market.[28] The EU has been accused of abusing this image of the confident consumer as the legal rules are likely in practice to be far less significant than other factors – such as language and practical possibilities of redress.[29] More fundamentally it is hard to see how a maximal harmonisation approach *per se* can enhance this 'consumer confidence' policy rather than a minimal harmonisation approach. Minimum standards set at a high level of consumer protection might indeed be needed to give consumers the confidence that wherever they buy in the Community the law will respect their legitimate expectations of protection, assuming they have the confidence in the European legislator to produce reasonable rules. It is hard to see how setting this minimum as a maximum will enhance their rights further. Indeed it may cause them some surprise and resentment if they find – due to the influence of Europeanisation – that in their home state some rights and remedies they had come to expect have been removed or new hurdles placed in the way of their access to justice. In the United Kingdom context one might think of the loss of the automatic right to reject goods of unsatisfactory quality and the need to notify such defects within two months. This might then cause Europe to be seen as antithetical to consumer protection; although this is exactly the opposite of what is no doubt intended. Indeed a rule like the two month notification rule might have a negative effect on cross-border trade. Suppose someone from the United Kingdom or Germany sees a bargain in Brussels, yet when they get it home it does not work. The most obvious thing to do if one returns to Brussels regularly is to wait until the next trip and take it back to the shop. The consumer may not even know the name of the shop where the goods were purchased, only where it is; or not know how to contact it or be uncomfortable communicating over the phone in a foreign language. How-

27 OJ 2008 C 187/E231.

28 Recital 7 pCRD.

29 T. Wilhelmsson, The Abuse of the 'Confident Consumer' as a Justification for EC Consumer Law, (2004) 27 *Journal of Consumer Policy* 317-337.

ever, if the visit is quarterly, the two month notification period would have expired and there would be no right to redress under the Proposal. The UK government also opposes the notification period on the practical ground that it will be extremely difficult for traders to know when the consumer became aware of the lack of conformity. Moreover in some instances consumers may not realise there is a defect or believe it will remedy itself.[30]

The Proposal has stopped short of introducing some reforms that would have helped raise consumer confidence. A prime example is direct producer liability for non-conformity,[31] which although generating its own complexities would undoubtedly raise consumer confidence when buying at least well-known branded goods abroad. Giving the consumer the right of redress against the producer who might well be trading in the consumer's home state would be a very tangible measure promoting the consumer's confidence in practical access to justice.

4. New technology and market innovations

Given the desire to see greater use of cross-border distance selling, dealing with market developments linked to new technology was a central aspect of the reforms. However, whereas the question of software and sale of goods law was raised in the Green Paper[32] it is not addressed in the Proposal. The nature of online auctions is taken into account by it being made clear that platforms for online auctions are not to be treated as intermediaries.[33] The definition of durable medium is also updated, although one might question the semantic logic of describing as a durable medium the situation where a message can be downloaded to the hard drive of a computer. That seems more like a message that can be placed into a durable medium by the consumer rather than information actually supplied on a durable medium.[34] Nevertheless the policy is clearly one of promoting e-commerce, which on the whole is to be welcomed, even if in some special situations one might still see a role for paper communication. Article 5(1) of the Distance Selling Directive had for instance seemed to impose a stricter requirement on provision of information on the right to withdrawal by requiring it to be in writing. But this became non-sensical as writing came to be equated with simply textual representation in an e-mail or

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30 Department for Business Enterprise and Regulatory Reform (BERR), Consultation on EU Proposals for a Consumer Rights Directive (November 2008), available under: http://www.berr.gov.uk/consultations/page48780.html.

31 Cf. C. Willett, Direct Producer Liability, *in this volume* .

32 Green Paper on the Review of the Consumer Acquis, COM(2006) 744 final, at p. 6.

33 Recital 20 pCRD. Cf. C. Riefa, A Dangerous Erosion of Consumer Rights: The Absence of a Right to Withdraw from Online Auctions, *in this volume*.

34 Recital 16 pCRD.

on a website (and hence was encompassed within durable medium rather than being a stricter requirement). At least this anomaly is to be removed, even if some might have sympathy for the policy that had originally been intended of retaining a limited role for paper communication. One senses an appreciation of the need to have flexible regulations in this area, but equally one suspects there will be a need to come back in the future to difficult questions relating to e-commerce products.

III. Specific rules

1. Definitions

This is not the place to go into detail on the definitions; although it should be noted that some important policy issues lie within these technical definitions – for example removing the need for an organised sales system for distance contracts (as proposed in Art. 11 pCRD) means that many traders may causally slip into a distance sales contract with the attendant obligations. However, the more general point is the near total lack of influence of the DCFR on the definition. Even basic definitions like that of "consumer" and "sales contract" are different and it even uses a different term "trader" rather than "business".

Many further examples may also be referred to,[35] but only two will be discussed at this point. Article 2(8) pCRD considerably extends the scope of the term of "off-premises contracts" in comparison to that of the current Directive pertaining to the protection of the consumer in respect of contracts negotiated away from business premises (Doorstep Sales Directive)[36]. The new definition contained within the Commission's Proposal encompasses, for example, contracts concluded on the street or on public transport. In this respect the Proposal by the Commission follows the model of Article 5:201(1) Acquis-Principles (hereinafter: ACQP)[37] and Article II.–5:201 DCFR[38], which refer to contracts negotiated away from business premises. However, in both of these aforementioned sets of rules the "contracts negotiated away from busi-

[35] Cf. *in this volume* the points raised, *inter alia*, on sales contracts by C. Twigg-Flesner, in Fit for Purpose? The Proposals on Sales; on professional diligence A. Nordhausen Scholes, in Information Requirements; on durable medium M. Loos, in Rights of Withdrawal; and the comments made by Hugh Beale regarding reference to the DCFR, in The Draft Directive on Consumer Rights and UK Consumer Law – Where Now?.

[36] Art. 1 Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372/31.

[37] Cf. *Principles of the Existing EC Contract Law (Acquis Principles) Contract I – Pre-contractual Obligations, Conclusion of Contract, Unfair Terms*, edited by Acquis Group, (Munich: Sellier, 2007).

[38] See note 11 *supra*.

ness premises" also include such contracts that have been concluded with the aid of a means of distance communication, therefore providing for the integration of the existing scopes of the Doorstep Sales and Distance Selling Directives. Without discussing this alternative approach the Proposal from the Commission extends the scope of the off-premises contract beyond the "doorstep" selling situation, yet still retains the distinction between distance contracts and (other) off-premises contracts.

How one defines "linked contracts" is of central importance for consumer protection (particularly concerning the withdrawal from contracts that are fully or partially financed by a credit agreement). Article 5:106(2) and (3) ACQP has proposed a definition for such contracts, which has been used in Article II.–5:106 DCFR, albeit in a modified form. In contrast, Article 2(20) pCRD makes do with a definition of "ancillary contracts"; a definition that does not include the problems attributed to credit agreements, but rather just refers to maintenance agreements etc. The Proposal seems to assume that the definition of "linked contracts" (in the aforementioned sense) rather belongs in the scope of consumer credit, but it does not draw out a clear distinction between ancillary and linked transactions. It merely states the provisions of Article 18 on withdrawal from ancillary contracts are without prejudice to Article 15 of Directive 2008/48/EC on consumer credit.[39]

Given the minimum use of the CFR was foreseen as being a toolbox for the better, more coherent drafting of EU law and consumer law was clearly understood to be a prime early beneficiary, it seems inexplicable that these definitions and the text in general seem to have been developed in a vacuum apparently unaware of the DCFR. This is all the more difficult to understand given that the Commission has invested so heavily into the DCFR project. Of course the CFR is still only in draft form and the Commission should not be beholden to follow the CFR – yet one would have expected more discussion of the relationship between the two and explanations for any deviations. It might make one question whether this tidying up process is taking place at the right time given the CFR should provide a general framework into which consumer contract law should be embedded. One might certainly counter by arguing that reform now is needed and the CFR may still be a long time in development, but that does not explain the lack of influence of draft texts which have been widely circulated and discussed within the relevant department of the Commission and in the public sphere.

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[39] OJ 2008 L 133/66.

2. Information and formal requirements[40]

a) Structure

According to the Proposal the trader is to provide particular information to the consumer either prior to, or during the conclusion of the contract; the provisions on these information duties, are spread over two chapters. The first of these two chapters, namely Chapter II pCRD, concerns the pre-contractual information duties in all sales and service contracts between a consumer and a trader (B–C Contract). The second chapter, Chapter III, refers particularly to the information that is to be given in either distance or (other) off-premises contracts and moreover contains formal requirements and the respective rights of withdrawal applicable to such contracts; however, there are certain pieces of information to be given in both cases, i.e. there is no distinction between whether the contract is off-premises or distance in nature (Art. 9 pCRD). The remainder of the chapter continues to distinguish between (other) off-premises and distance selling contracts as was the case concerning the existing directives regulating such contracts, for example concerning the formal requirements (Arts. 10 and 11 pCRD) and the exceptions regarding the right of withdrawal (Arts. 19(1) and (2) pCRD), although in these examples the order in which the respective contracts are handled is different in each case.

On the whole the structure is not very clear in its arrangement and in this sense does not convey the coherency of consumer contract law in the field of information duties. Furthermore, the structure only partly consolidates the current significant, individual directives into genuinely integrated and new rules. In doing so the Proposal appears to be content to cut provisions out of the existing directives and paste them together in a new directive, albeit in a new order. In this respect it seems to fall short of the pattern featured by the Acquis-Principles and the DCFR for a coherent consumer contract law with respect to the information duties and the formal requirements. According to the approach adopted by the Acquis-Principles and the DCFR it is possible to summarise on the one hand the information duties, and on the other hand the rights of withdrawal, in two separate chapters based upon the overarching principles instead of the present split across individual directives. Furthermore, generally speaking these overarching principles could be applied to other directives that specify information duties and rights of withdrawal (in particu-

40 Cf. A. Nordhausen Scholes, Information Requirements, *in this volume*.

lar the Timeshare Directive[41], Consumer Credit Directive[42] and the Distance Selling of Financial Services Directive[43]).

Moreover, the new challenges surrounding electronic communication in the conclusion of contract have been taken into consideration in the Acquis-Principles and the DCFR without the respective chapters being longer than the Proposal from the Commission. It could therefore be beneficial to revise the Commission's Proposal by using the applicable parts from the Acquis-Principles and the DCFR (Chapter 2 ACQP; Art. II.–3:101 et seq. DCFR) as a basis.

b) Information duties

The particular problems presented by the concept of full harmonisation are also especially shown with regard to the information duties. According to Article 4 pCRD, the full harmonisation shall also apparently extend to cover the general information duties under Article 5 pCRD. If one interprets this in a strict sense one would come to the conclusion that the Member States would not be able to introduce, or uphold any further information requirements for the trader with regards to a sale or service contract concluded with a consumer. Consequently, the question is to be posed of the effect this has upon the numerous information duties that are not expressly named in Article 5 pCRD, yet are recognised – on different legal bases – in Member States in relationships between sellers and buyers (or service providers and recipients thereof). Examples might include the duty to provide information on dangers associated with goods, or information on how the goods are to be used and maintained. Furthermore, how does this relate to the information duties based on particular professional responsibilities?

These examples are of course not exclusive. In cases of this kind there are information duties for the seller (or service provider) that are provided in numerous Member States that are based upon specific provisions or general principles (e.g. on the principle of good faith, or general duties to take care).

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41 Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, OJ 1994 L 280/83.

42 Directive 98/7/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ 1998 L 101/17.

43 Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ 2002 L 271/16.

Interpreting full harmonisation in a strict manner could lead to the situation in which provisions may no longer be applicable if they do not fall under Article 5 pCRD. In a number of Member States the rather absurd consequence of this would be that, with regard to the general information duties, the level of protection for consumers would actually be lower than that offered to the purchaser or recipient of a service in a business to business contract (B–B contract).

In this respect one has to reconsider the problems and the limitations associated with the concept of full harmonisation. Presumably a different solution may be recommended. A stricter harmonisation is more appropriate for the specific and precisely determinable information duties (for example the name and address of the business[44] (Art. 5(1)(b) pCRD), or the particulars on the right of withdrawal Art. 5(1)(e) pCRD). In contrast, the general information requirements contained in Article 5 pCRD should be suitably integrated into the Member States' own contract law system and their provisions on particular types of contract, without the need for the article on full harmonisation (Art. 4 pCRD) to be applied in the strictest sense.

c) Problems

Beyond this there are still numerous individual questions that have to be reconsidered; for example the differences in the language used in the English and German versions of Article 5(1) pCRD. According to the English version of this article the trader has to give the necessary information "if not already apparent from the context". In contrast the German version extends the trader's duties: he should disclose information that does not "*unmittelbar*" (directly) arise from the circumstances.

Even leaving to one side this additional extension contained within the German version, it appears to be questionable whether the lists of information duties under Articles 5 and 9 pCRD actually represent a convincing response to the risk of "information overkill"[45] that is often spoken of and which may indeed result in a deficit of usable information. If the trader were to list all of the required information in a form in each distance or (other) off-premises contract then it is possible that the most important information, such as on the right of withdrawal (Art. 9(b) pCRD), would end up drowning in this sea of information. With this in mind it would be preferred to either reduce the amount of information to be given, or to emphasise the information that is most important in the circumstances.

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44 Cf. H. Schulte-Nölke, Scope and Role of the Horizontal Directive and its Relationship to the CFR, *in this volume*.

45 S. Grundmann, The Structure of the DCFR – Which Approach for Today's Contract Law? (2008) 3 *European Review of Contract Law* 239.

Furthermore, with respect to the individual stipulations on information duties it is questionable, for example, whether Article 7 pCRD offers a convincing solution: the intermediary in a contract between two consumers is to inform the consumer (usually the buyer) that the contract is to be concluded between two consumers and consequently the contract is not subject to the terms of the (proposed) Directive. However, if the intermediary fails to fulfil this requirement then he concludes the contract in his own name (Art. 7(2) pCRD). In such a situation the affected consumer will often have an interest in seeking that the contract be performed; however the consequence provided by Article 7(2) pCRD will in these cases not be to the consumer's benefit, but rather his detriment if it means the consumer only has contractual rights against the intermediary. As such it would be more appropriate to regulate that the choice remains with the consumer as to whether the intermediary shall become the party to the contract or not.[46] It should at least be made clear that the consumer retains any rights he had against the other party.

As another example one can note that further discussion is also required with regards to the wide-reaching consequences of Article 10(2) pCRD. According to this provision, an off-premises contract shall only be valid if the consumer has signed an order form or has received a copy of the order form on another durable medium. The provision is also applicable even when the right of withdrawal has been excluded under Article 19(2) pCRD. The result of this provision would thereby be that the freedom of form, which exists in many Member States for off-premises contracts, would generally be replaced by the requirement that the contract be in writing. This requirement is indeed not especially practical in many situations. For example can the flower seller selling his wares on the street only keep the money paid if the customer signs an order form? It is furthermore questionable whether a requirement of this kind actually improves the position of the consumer. In contrast to the right of withdrawal, the consumer does not have the possibility to decide whether the contract continues or ceases: a contract that does not fulfil the particular formal requirements is always invalid as per Article 10(2) pCRD. The consumer can not demand delivery of the goods even if he has already paid, with the rules on whether and how the payment can be retrieved being subject to (non-harmonised) provisions of national law. Thus there might be a certain resistance to the introduction of an "automatic" invalidity of the entire contract by means of provisions of Community law.

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[46] For further information on this discussion in German law see BGH Urteil v. 22.11.2006 VIII ZR 72/06, Keine Haltbarkeitsgarantie bei Verkauf eines "fahrbereiten" Gebrauchtwagens – Mängelrechte bei Umgehung der Bestimmungen über den Verbrauchsgüterkauf, (2007) 11 *Neue Juristische Wochenschrift* 759; also commented upon in D. Looschelders, Die Rechtsfolgen der Gesetzesumgehung durch Agentur- und Strohmanngeschäfte beim Verbrauchsgüterkauf, (2008) 2 *Juristische Rundschau* 45-47.

3. Withdrawal

The Proposal by the Commission could lead to a considerable improvement of the coherency of Community law with regards to the aim of general provisions on how the withdrawal is to be exercised and the effects thereof (Art. 12 et seq. pCRD). A point that has often been bemoaned is that the current individual directives featured a multitude of differences in content and terminology concerning the right of withdrawal without any noticeable reasons (e.g. the different terms used to characterise the withdrawal, such as revocation, rescission and cancellation;[47] the duration of the right of withdrawal,[48] and the consequences of the consumer's failure to give notice etc.). This makes the application of the provisions more difficult and partly leads to inconsistencies. In contrast, the Acquis-Principles have developed a model that combines the specific requirements of the respective right in each situation with general rules on the exercise and effects of the withdrawal (Art. 5:101 et seq. ACQP).[49] The academic draft of the CFR has, for the most part, adopted these rules (Art. II.–5:101 et seq. DCFR). The Proposal from the Commission also principally follows this approach and appears to be partly based on the scheme followed by the Acquis-Principles.

However, the Proposal presented by the Commission indeed deviates from this scheme in a number of respects. For example, according to Article 12(2) pCRD the withdrawal period for distance contracts begins once the consumer has acquired the material possession of the goods;[50] yet with respect to (other) off-premises contracts the withdrawal period begins once the consumer has signed the order form or has received a copy thereof on another durable medium. If one looks at the wording of the provision then it appears that it is not required that the trader has to have accepted the consumer's order at this point (i.e. the contract is actually concluded). Following the wording strictly one may conclude that the withdrawal period could lapse before the contract was even concluded and the consumer has a claim to demand delivery.

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47 B. Pozzo, Harmonisation of European Contract Law and the Need of Creating a Common Terminology, (2003) 6 *European Review of Private Law* 754-767; H.-W. Micklitz, N. Reich, P. Rott, *Understanding EU Consumer Law*, (Antwerp: Intersentia, 2008), at p. 170. See also the contribution by M. Loos, Rights of Withdrawal, *in this volume*.

48 H. Schulte-Nölke, Right of Withdrawal, in *EC Consumer Law Compendium – Comparative Analysis*, edited by H. Schulte-Nölke, C. Twigg-Flesner, M. Ebers, (Munich: Sellier, 2008) at p. 98.

49 *Principles of the Existing EC Contract Law (Acquis Principles), Contract I – Pre-contractual Obligations, Conclusion of Contract, Unfair Terms*, edited by Acquis Group, (Munich: Sellier, 2007), at pp. 158-159.

50 The Proposal by the Commission uses the term "material possession" instead of "receipt". It is also to be examined whether the new terminology creates greater clarity.

Furthermore, according to the Proposal put forward by the Commission, the point at which the withdrawal period begins in distance contracts is dependent upon whether the consumer has obtained material possession of the ordered goods. When one compares this to (other) off-premises contracts one will see that here the period begins to run independently of whether the consumer has material possession or not; therefore the situation may arise in which the consumer has concluded an off-premises contract without having seen the goods beforehand and then receives the goods following the withdrawal period.[51] In order to avoid such a situation Article 5:103(1) ACQP and Article II.–5:103(2) DCFR make no distinction between the two different types of contracts and therefore provide that, where the subject-matter of the contract is the delivery of goods, the withdrawal period lapses not earlier than fourteen days after the goods have been received.

Both the Doorstep and Distance Selling Directives provide for a minimum of a seven day right of withdrawal. Article 12(1) of the Proposal favours a full-harmonised fourteen day period, which is also in line with the period adopted in the Timeshare Proposal.[52] The only information provision in the Doorstep Selling Directive had been on the right to cancel[53] and failure to comply with this has been held to leave the right to cancel open indefinitely.[54] Failure to comply with the more extensive information provisions in the Distance Selling Directive extended the withdrawal period by three months. Article 13 of the Proposal favours the three month extension period; whereas the DCFR settles on maximum period of twelve months from the conclusion of the contract.[55] However, the Proposal almost silently makes an important policy choice in only allowing the three month extension for failing to provide details on the right of withdrawal. Of course there is a certain logic in linking the extension of the right of withdrawal to lack of knowledge of such a right, but equally the consumer might not have exercised his right because he had not been informed of an unfavourable term until after his right to withdraw had lapsed. Such an important policy choice needs detailed discussion, but it is not found in the Proposal and was not mentioned in the Green Paper. Surely such a significant change has not been introduced unintentionally? Article 6(2) pCRD does provide that national laws should provide for effective contract law remedies in their national law, but this is a significant change and this policy of course is one of the few instances where the proposed Directive departs from its full harmonisation goal. It is, however, in fact one of the areas

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51 D. O. Effer-Uhe, J. M. Watson, Der Entwurf einer horizontalen Richtlinie über Rechte der Verbraucher, (2009) 1 *Zeitschrift für Gemeinschaftsprivatrecht* 11 (forthcoming).

52 COM(2007) 0303 final.

53 Art.4 of Directive 85/577/EEC.

54 *Georg und Helga Heininger v Bayerische Hypo- und Vereinsbank* AG, C-481/99 [2001] ECR I-9945.

55 See Articles III.–3:107 and III.–5:103(3) DCFR.

in which consumers and businesses could be surprised by national rules and which would possibly justify the full harmonisation approach.

In terms of the exercise of the right of withdrawal it is always required under Article 14(1) pCRD that the consumer informs the trader of his decision to withdraw on a durable medium, either in his own words, or using the standard withdrawal form as set out in Annex I(B) pCRD. In contrast, this requirement was not provided by either the Doorstep Sales Directive or the Distance Selling Directive. Moreover, Article 5(1) sent. 1 of the Doorstep Sales Directive refers to the requirements set out by national law; however many Member States do not actually make any formal requirements with regards as to how the right of withdrawal is to be exercised.[56]

This new requirement in the Commission's Proposal leads to the consumer's position being worsened: it is not possible for the consumer to simply return the goods as a means of exercising his right of withdrawal – this is in contrast with the current situation in some Member States as well as Article 5:102 sent. 3 ACQP and Article II.–5:102 DCFR. An argument for this strict approach under Article 14(1) pCRD may well be that it is not clearly discernable from simply returning the goods to the trader whether the consumer wishes to exercise his right of withdrawal, or instead wants to rescind the contract due to non-conformity of the goods with the contract (according to Art. 3(3) and (5) Consumer Sales Directive and Art. 26(1) pCRD). It does however appear questionable whether it is appropriate to prevent the consumer from choosing one form of withdrawal, which is common in several Member States, in order to be able to better distinguish the two forms of bringing the contract to an end.

4. Sale of goods

With respect to sales contracts with consumers, the Proposal by the Commission can lead to a considerable reduction of the level of consumer protection in a number of Member States by including the provisions on the hierarchy of remedies in the scheme of full harmonisation. Two deviations from existing EU consumer law stand out with regard to sales contracts: the choice between repair or replacement in case of non-conformity and the lack of any provision concerning the seller's right of redress against higher links in the distribution chain. Finally, there is a new additional remedy in the form of a provision on damages in consumer sales contracts, but its import is unclear.[57]

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[56] *EC Consumer Law Compendium – The Consumer Acquis and its Transposition in the Member States*, edited by H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers, (Munich: Sellier, 2008), at pp. 101, 344.

[57] Cf. C. Twigg-Flesner, Fit for purpose? The Proposals on Sales, *in this volume*.

a) The hierarchy of the remedies

Article 26(3) and (4) pCRD provides that the consumer has to first give the seller the chance to remedy a lack of conformity by repair or replacement. The consumer is only entitled to have the price reduced or the contract rescinded where the trader has established repair or replacement is unlawful, impossible or would cause the trader a disproportionate effort; or where the trader refuses or fails within a reasonable time to remedy the non-conformity; or significant inconvenience is caused to the consumer through the trader's attempts to remedy the non-conformity or the defect has reappeared more than once within a short period of time. This entitlement to a second attempt for the seller and the corresponding hierarchy of the remedies is roughly in accordance with, albeit not in every sense, the currently applicable clause of Article 3 of the Consumer Sales Directive. The decisive difference relates, however, to the level of harmonisation: the Consumer Sales Directive provides for minimum harmonisation, whereas the Commission's Proposal strives towards full harmonisation. This change from minimum to full harmonisation would have a clear, considerable negative effect on the legal situation for consumers in a number of Member States. As noted above,[58] these Member States could no longer provide that the consumer can immediately demand the return of purchase price in the event of a lack of conformity ("money-back"-rule, e.g. as in the United Kingdom[59]); i.e. a deviation from the hierarchy of remedies that entitles the consumer to rescind the contract and claim back the purchase price without giving the seller the opportunity to repair or replace the non-conforming good would not be permitted. In addition, the Proposal also stretches full harmonisation to the requirement that the consumer has to inform the seller of a non-conformity within a two month period so as to be entitled to the remedies.[60] In contrast, Article 5(2) Consumer Sales Directive currently only stipulates that the Member States may provide an information requirement of this kind. For those Member States in which there is presently neither a primacy of repair or replacement remedies nor a need to notify defects it is hardly likely that this double blow to the protection for consumers will be accepted. With regard to these Member States, the alternative should be put forward during the amendment procedure either to abstain from a hierarchy of remedies (and the two-month notice period) altogether or at least to exempt these rules from the full harmonisation of this area.

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58 See above section II. 3.

59 Cf. H. Beale, The Draft Directive on Consumer Rights and UK Consumer Law – Where Now?, *in this volume*.

60 Cf. Art. 28(4) pCRD.

b) The consumers' or traders' choice

Furthermore, Articles 3(2) and (3) of the Consumer Sales Directive provided the consumer with the right to choose between repair or replacement with the Member States making respective provisions in the course of transposing the Directive. The Proposal by the Commission will henceforth adopt the inverse approach: according to Article 26(2) pCRD it will be the trader (as the seller) who will have the choice between either repairing or replacing the non-conforming good. In practice the difference between this new approach and the current system may not be so great as one might consider at first glance given that the consumer's choice is, according to Article 3(3) Consumer Sales Directive, restricted by the criterion of disproportionality. This criterion has led in practice to the situation that the consumer was often left with no actual choice. Nevertheless, the Commission's policy decision may prompt some courts to decide in a consumer unfriendly manner. Such a change that burdens the consumer is problematic if the legislation intends to combine full harmonisation with the objective of ensuring a high level of consumer protection (Art. 153 EC Treaty). In doing so the impact on the current standard of consumer protection has to be weighed especially carefully. Furthermore, the present solution with the choice of the cure for the non-conformity being with the consumer is aimed at enhancing consumer protection and that therefore comprises a significant element of European consumer sales law, which can be viewed as an alternative model to that of Articles 46 and 48 CISG[61]. A number of Member States have even used this as a scheme for a corresponding general rule in sales law (e.g. Germany in Section 439(1) BGB[62]). It is questionable whether the discussion[63] to-date has sufficiently demonstrated the necessity to depart from this.

c) Lack of redress for the seller

In terms of the final seller's redress, the lack of any solution (or even references to possible solutions) is a considerable shortcoming in the Proposal put forward by the Commission.[64] In present Community law, Article 4 of the Consumer Sales Directive provides that the final seller shall be entitled to pursue remedies against the person or persons liable in the contractual chain

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61 United Nations Convention on Contracts for the International Sale of Goods, 11 April 1980.

62 Cf. M. Schürholz, *Die Nacherfüllung im neuen Kaufrecht: zugleich ein Beitrag zum Schicksal von Stück- und Gattungskauf*, (Baden-Baden: Nomos, 2005), at pp. 58 et seq.

63 For example, in the Green Paper the proposal to give the trader the choice to either repair or replace is not discussed, see COM(2006) 744 final, at p. 29.

64 Cf. the contribution by C. Willett, Direct Producer Liability, *in this volume*.

where the final seller is liable to the consumer because of a lack of conformity resulting from an act or omission by the producer. Further provisions are to be determined by the national legislation within the individual Member States. Without such a provision the final seller would ultimately have to carry the burden of consumer protection, even if someone else in the distribution chain has caused the non-conformity. As a result the protection of the consumer would then lead to an unreasonable and disproportionate burden for the final seller (often SMEs) in the event that the protection would not be expanded by the possibility of redress for the final seller. A provision on redress would also not become superfluous if the consumer is allowed a direct claim (*action directe*) against the producer (or a seller in the distribution chain) as is the case in some Member States and is a subject of discussion at Community level.[65] An *action directe* for the consumer does not reduce the need for the final seller's claim for redress as the consumer can not be restricted to just using the *action directe* against the producer or responsible party: the consumer has to also have the option to claim against the final seller (e.g. because of the insolvency of the producer or earlier link in the distribution chain, or because of difficulties in ascertaining his identity due to the offices being located abroad etc.). A new Directive on consumer protection must therefore – as is currently the case in Article 4 of the Consumer Sales Directive – contain a provision on the final seller's ability to seek redress or at least be connected with the enactment of an additional legal act on this matter. It would be somewhat irresponsible to enact this planned, new directive in place of the Consumer Sales Directive without first finding a solution to this problem.

d) Damages: the challenges

A shortcoming of the current Consumer Sales Directive is that it has completely excluded the question of damages for non-conformity. In this respect credit is to be given to the Proposal in that Article 27(2) expressly provides that the consumer may claim damages for any loss not remedied in accordance with the previous article on the other remedies. However, the function and content of this provision would have to be stated more precisely when amending the Proposal. In particular, a clear statement is necessary as to whether the provision shall merely ensure that the Member States can allow for damages (despite full harmonisation), or whether the provision compels the Member States to provide for damages. In any case, clear statements (particularly with respect to a complete or targeted full harmonisation) are needed with regard to the meaning and concept of damages that are assumed by the Proposal. It may be possible that a detailed definition of the provisions on damages may lead to the future Directive not being criticised for introducing full harmonisation.

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65 *European Perspectives on Producers' Liability*, edited by M. Ebers, A. Janssen and O. Meyer, expected to be published by Sellier in May 2009.

However, this is a complex and multi-faceted topic that needs careful consideration. As a starting point this specification could use the rules suggested in Articles 8:401 et seq. ACQP that refer to existing EC law.[66]

5. Unfair terms

The most important change in respect of unfair terms is the introduction of a black list (Annex II pCRD). Five terms are listed. The Acquis-Principles and DCFR had only dared to list one – exclusive jurisdiction to the place of the trader's business based on *Oceano Grupo Editorial* SA *v Quintero*.[67] This is perhaps curiously not listed as one of the black list terms in the draft Directive. Annex III pCRD contains a list of terms presumed to be unfair unless the trader proves they are fair, which is a clearer formulation than the indicatively unfair terminology of the existing Unfair Terms in Consumer Contracts Directive. These are undoubted improvements from the consumer protection perspective. Like the Acquis-Principles and DCFR, the Commission's Proposal has resisted extending the unfairness control to all terms and instead has restricted it to terms in standard form contracts which the consumer has agreed to without having the possibility to influence their content.

With respect to the planned full harmonisation it could be extremely problematic in this section that Article 32(3) pCRD excludes the main subject matter of the contract and the adequacy of the remuneration from the control of fairness. In principle this is indeed in accordance with present EC law. However, in the Scandinavian countries Section 36 of the Contracts Act does provide for a control of these matters, therefore there would be significant interference with the legal culture of some Member States if full harmonisation were to result in the discontinuance of these principles of Nordic law. It ought to thus be made clear that the provision on full harmonisation does not affect the provisions of Member States with regard to the control of the main subject matter of the contract or the adequacy of the remuneration foreseen for the trader's main contractual obligation, but rather these lie outside of the scope of the proposed Directive.

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66 Chapter 8 of the Acquis Principles is to be found in R. Schulze (ed.), *Common Frame of Reference and Existing EC Contract Law*, (Munich: Sellier, 2008), at p. 301 et seq.

67 *Oceano Grupo Editorial SA v Quintero* C-240-244/98 [2000] ECR 1-494.

IV. Conclusions

The Commission's Draft for a Consumer Rights Directive is undoubtedly an important piece of proposed legislation. It underlines how developed European consumer contract law has become. Its ambition to rationalise these developments into a coherent set of rules is commendable as are the objectives of promoting enhanced cross-border movements both by businesses and consumers. A future Consumer Rights Directive could serve as a model for how the policies under the EC-Treaty – in this case to guarantee a high level of consumer protection in accordance with Article 153 EC – can be followed by means of coherent Community legislation for the respective sector in cooperation with the legislation from the Member States. Thus all efforts should be made during the legislative process in order to improve the present Proposal so that it reflects this objective entirely. The following aspects will above all have to be considered for the necessary revision:

1. Context: Consumer contract law needs to fit into the broader structure of European contract law and closer attention might be given to aligning its terminology, structure and values to that of a potential CFR. As long as this frame of reference is not present then the materials, which the Commission desired for the preparation of the CFR, should be used as far as is possible (in particular the academic draft for the CFR[68] and the Acquis-Principles[69] that formed the basis for this academic draft). This is also true for the responses by the Community institutions to the preparations for the Common Frame of Reference.[70] As far as terms and provisions of future consumer contract law shall deviate from these suggestions for the CFR, then the explanations of the reasons in the materials or restatements of the future Directive could be useful both for understanding this Consumer Rights Directive and for the elaboration of CFR. Furthermore, the Commission needs to set out an agenda for those consumer contract issues which have been left out of the Proposal. The Commission Impact Assessment Report suggested that the introduction of a right to damages, the extension of the unfairness test and a general clause of good faith and fair dealing both attracted little support and should not be part of the

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68 *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) Interim Outline Edition*, edited by C. von Bar et al., (Munich: Sellier, 2008); also available online at www.law-net.eu. A revised edition is due to be published by Sellier in February 2009.

69 See *Principles of the Existing EC Contract Law (Acquis Principles) Contract I – Pre-contractual Obligations, Conclusion of Contract, Unfair Terms*, edited by Acquis Group, (Munich: Sellier, 2007).

70 Council documents 8286/08, (11.4.08) and 15306/08 (07.11.08) and the resolution from the European Parliament B6-0374/2008 (17.07.08).

review as they are not specific to consumer law rather than contract law.[71] Are these issues therefore off the agenda or postponed to the CFR debate? Is direct producer liability still on the agenda for future consideration?

2. Structure: The coverage and structure of the future Consumer Rights Directive ought to guarantee the coherency of European consumer law as far as possible, in that they overcome the fragmentation of the individual directives and assume overarching principles. It will have to be particularly examined as to whether the pre-contractual duties and rights of withdrawal in the current Proposal do not too much reflect the present split in consumer contract law in the individual directives. Improvements could well be made through an increased use of the suggestions in the Acquis-Principles and DCFR; furthermore, it could also be made easier to include further future directives in the field of consumer contract law in a coherent concept (e.g. the Consumer Credit Directive and the Distance Marketing of Financial Services Directive).

3. Degree of harmonisation: Careful consideration is to be made as to the matters that are best served by full harmonisation and those areas that are rather impeded by full harmonisation. If the hope is to bring Europe closer to its citizens then care should be taken not to alienate consumers by removing rights and remedies that exist for their protection in the Member States, because of a perceived need for full harmonisation. There are some consumer rules that do need to be fully harmonised, but this does not apply to all contract rules.

Full harmonisation is particularly appropriate for several specific information duties (as provided under Art. 6 et seq. pCRD e.g. information on the name and address of the business), however, not for all of the general information duties (as under Art. 5 pCRD). The provisions on withdrawal are also, to a great extent, suitable for full harmonisation as they have mostly developed in the Member States on the basis of Community law, and, in comparison with other areas of law, are relatively independent doctrines in their operation. In contrast, full harmonisation of remedies is questionable as these are embedded in the different national traditions of the Member States; a full harmonisation of the hierarchy of remedies would also lead to a considerable reduction in the level of consumer protection in several Member States. As far as other matters are concerned, the scope of a possible full harmonisation would have to be precisely explained (such as unfair terms in relation to the exclusion of the parties' main contractual duties).

The provision of complete full harmonisation in Article 4 pCRD would therefore have to be replaced by differentiated rules that take into account the diversities of each matter.

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[71] Commission Staff Working Document accompanying the proposal for a directive on consumer rights Impact Assessment Report at p. 20: available at http://ec.europa.eu/consumers/rights/docs/impact_assessment_report_en.pdf.

4. Level of Consumer Protection: The aggregation of provisions from different directives into one piece of legislation and the transfer to (partial) full harmonisation requires a number of policy decisions concerning the level of consumer protection. On the one hand, the level of the current minimum harmonisation cannot be the level of a future full harmonisation: the result would otherwise be – contrary to Article 153 EC – a race to the bottom for consumer protection in the European Union. On the other hand, the Member State that offers the highest level of consumer protection for each matter cannot be the standard for the Community as a whole. In spite of these problems, as long as full harmonisation is still intended there are policy decisions attached to it that will often seek to find a solution between these two extremes. It would, however, be an incorrect approach to neglect the experiences and current status of consumer protection in the Member States, and merely to adopt the minimum solutions from current Community law as full harmonisation; in this respect the provision on the withdrawal period of 14 days in Article 12(1) pCRD (as opposed to the minimum 7 day period in the directives underlying the proposed Directive) is convincing. However, less convincing are numerous provisions for Consumer Sales Contracts that provide for maximum harmonisation at, or even below, the minimum standards in the Consumer Sales Directive (e.g. in Arts. 26 and 28 pCRD).

5. Legal technique: Furthermore, one has to scrutinise the legal techniques used for a number of provisions in the Proposal. In doing so the policy rationale for each of the provisions has to be ascertained and the legal instrument analysed to determine whether it satisfies the intended objectives. For example, this relates to the question of whether the withdrawal periods actually should begin before the conclusion of contract (as appears to be possible according to Art. 12(2) pCRD) or whether the consumer should have to turn to the intermediary as a contract partner should the intermediary have not fulfilled his information duties, which is one possible interpretation of Article 7(2) pCRD.

The way from the Commission's Proposal to a Directive on Consumer Rights therefore presents a number of tasks for the European legislator, which concern both principle questions and details of the draft. The efforts in this respect are worthwhile when one considers the desire to ease the legal environment for consumers and businesses in the internal market through a coherent consumer contract law. The issue also deserves further critical support from legal scholars.

Part II
Scope and Values of the Proposal

Scope and Role of the Horizontal Directive and its Relationship to the CFR

Hans Schulte-Nölke

I. Organisational relation between the Consumer Acquis Review and the CFR

Both the Consumer Acquis Review, which lead to the Draft Horizontal Directive[1], and the project of a Common Frame of Reference (CFR) are genuine political endeavours. They have been on the agenda since 2001 (CFR) and 2004 (Consumer Acquis Review) respectively. The first task given to me is to say something on the relation between the two projects. This is not so easy, because this relation is not entirely clear, which may also be due to the impression that the relation has changed substantially during the recent years. Much easier to grasp are the broad academic preparatory works for the two projects, which have been inspired and in part financed by the European Commission. Therefore it seems useful to have a look at these works first, as the relation between them might help one to better understand how the CFR and the Draft Horizontal Directive interrelate with one another, a subject, which will be dealt with afterwards.

The following table indicates some basic information on the preparatory academic and the political projects:[2]

Common Frame of Reference	Consumer Acquis Review
"Network of Excellence" – Study Group: PEL (since 1998) – Acquis Group: ACQP (since 2002) – Other groups & Stakeholders ("CFR-Net")	Consumer Law Compendium – Acquis Group Members – National Correspondents in 27 Member States
Academic Product: Draft Common Frame of Reference (DCFR = PECL + PEL + ACQP) – 2008/2009	Academic Product: Comparative Analysis and Database (2007); available on SANCO homepage
Possible Political Products – White Paper – 2009? – CFR as "Toolbox" – 2010? – Optional Instrument ("Blue Button") – 2013?	Political Products: – Reports & Green Paper (2006/2007) – Proposal Horizontal Directive (2008) – Enactment Horizontal Directive (2010?)

1 COM(2008) 614 final.

2 The acronyms will be defined later in the text.

1. The Common Frame of Reference (CFR)

The idea to inspire and support academic works which might help the Community legislator to achieve more coherence of EC legislation goes back to the Communication on European Contract Law of 2001[3]. The next step was the Action Plan 2003[4], which expressly brought forward the idea of a Common Frame of Reference (CFR). It is a pity that these documents did not make it very clear as to how the CFR should look. The Commission instead used the metaphor of a "toolbox" for legislation, which allowed for rather different views and caused a lot of discussions that were not especially helpful. It was discernible only for experts that the idea of a CFR was very much inspired by the model of the Principles of European Contract Law (PECL)[5], an academic work, which adapted the American method of elaborating restatements, though for Europe in this case.

In order to motivate further academic work in this field, a "priority" on European Contract Law was included into the Sixth EU Framework Programme for Research.[6] Several academic research groups expressed interest in this project. At the end, a consortium of (mainly) such groups was chosen, which were already heavily engaged in the elaboration of restatements following the model of the PECL. This decision was prepared by an independent evaluation of all proposals according to the rules of the Sixth Framework Programme. The result was the creation of a "Network of Excellence"[7] which was entrusted with the elaboration of a Draft Common Frame of Reference (DCFR) together with a corona of evaluative works. The Network began its work in 2005. Besides the elaboration of individual drafts for the DCFR and their evaluation by other groups of the Network, the Commission organised more than a dozen workshops, where stakeholders organised in a "CFR-Net" met with academics and discussed preliminary drafts of the DCFR.[8]

As readers will know, the core product of the Network of Excellence is the DCFR, of which parts have been published in an Interim Outline Edition at

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3 COM(2001) 398 final.

4 COM(2003) 68 final.

5 O. Lando and H. Beale (eds), *Principles of European Contract Law Parts I and II*. Prepared by the Commission on European Contract Law (The Hague: Kluwer, 1999); O. Lando, E. Clive, A. Prüm and R. Zimmermann (eds), *Principles of European Contract Law Part III* (The Hague, London and Boston: Kluwer, 2003).

6 Cf. the short description of the initial steps J. Karsten/G. Petri, (2005) *Journal of Consumer Policy* 31.

7 Joint Network on European Private Law (CoPECL: Common Principles of European Contract Law), Network of Excellence under the 6th EU Framework Programme for Research and Technological Development, Priority 7 – FP6-2002-CITIZENS-3, Contract N° 513351 (co-ordinator: Prof. *Hans Schulte-Nölke*, Bielefeld (until 2008); now Osnabrück).

8 Cf. the homepage of the Network under www.copecl.org.

the beginning of 2008[9] and in an Outline Edition at the beginning of 2009.[10] Predecessors of the DCFR are, besides the PECL, the series Principles of European Law (PEL)[11] and the Acquis-Principles (ACQP)[12]. A full edition of the DCFR, which also includes a commentary and comprehensive comparative references, will be published in the course of 2009. This academic product, together with evaluative material produced within the network[13] and the first

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9 C. von Bar/E. Clive/H. Schulte-Nölke and H. Beale et al., *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Interim Outline Edition* (Munich: Sellier, 2008).

10 C. von Bar/E. Clive/H. Schulte-Nölke and H. Beale et al., *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Outline Edition* (Munich: Sellier, 2009).

11 *Sales (PEL S)*. Prepared by E. Hondius, V. Heutger, C. Jeloschek, H. Sivesand, A. Wiewiorowska (Munich: Sellier, 2008); *Lease of Goods (PEL LG)*. Prepared by K. Lilleholt, A. Victorin†, A. Fötschl, Berte-Elen R.Konow, A. Meidell, A. Bjøranger Tørum (Munich: Sellier, 2008); *Service Contracts (PEL SC)*. Prepared by M. Barendrecht, C. Jansen, M. Loos, A. Pinna, R. Cascão, S. van Gulijk (Munich: Sellier, 2006); *Commercial Agency, Franchise and Distribution Contracts (PEL CAFDC)*. Prepared by M. W. Hesselink, J. W. Rutgers, O. Bueno Díaz, M. Scotton, M. Veldmann (Munich: Sellier, 2006); *Personal Security (PEL Pers. Sec.)*. Prepared by Ulrich Drobnig (Munich: Sellier, 2007); *Benevolent Intervention in Another's Affairs (PEL Ben.Int.)*. Prepared by C. von Bar (Munich: Sellier, 2006). Further books on the law regarding non-contractual liability arising out of damage caused to another, on unjustified enrichment law, on mandate contracts and contracts of donation, and all the subjects related to property law are in preparation.

12 *Principles of the Existing EC Contract Law (Acquis-Principles). Volume Contract I – Pre-Contractual Obligations, Conclusion of Contract, Unfair Terms*. Prepared by the Research Group on the Existing EC Private Law (Acquis Group) (Munich: Sellier, 2007); in print: *Volume Contract* II (Munich: Sellier, 2009), which includes general provisions, delivery of goods, package travel and payment services; further volumes on specific contracts and extra-contractual matters in preparation.

13 Already published are the valuable works by a French group organised by the Association Henri Capitant des Amis de la Culture Juridique Française et la Société de législation, cf. B. Fauvarque-Cosson/D. Mazeaud and G. Wicker/J.-B. Racine/L. Sautonie-Laguionie/F. Bujoli (eds), *Principes contractuels commun. Projet de cadre commun de référence* (Paris: Société de Législation Comparée, 2008); B. Fauvarque-Cosson/D. Mazeaud and A. Tenenbaum, *Terminologie contractuelle commune. Projet de cadre commun de référence* (Paris: Société de Législation Comparée, 2008). These studies have also been published in English: *European Contract Law. Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules. Produced by Association Henri Capitant des Amis de la Culture Juridique Française and Société de Législation Comparée*. Edited by Fauvarque-Cosson and Mazeaud. Prepared by Racine, Sautonie-Laguionie, Tenenbaum and Wicker, (Munich: Sellier, 2008).

analysis by academia, stakeholders and practitioners, now forms the starting point of the political process towards a so-called political CFR.

What the precise political products of the CFR project could be, is still open. Parliament[14] and Council[15] have formed a position. One now awaits a communication from the Commission which is expected at the end of 2009. Any 'political' CFR, be it a simple Commission document, be it an inter-institutional agreement between Commission, Parliament and Council, is hardly imaginable before 2010. Whether afterwards the Commission will begin works with the aim to reflect further on the need of a so-called optional instrument (as it was originally planned) will have to be seen. In any case, such an 'optional instrument' will not come to light before 2013, if ever.

2. The Consumer Law Compendium

At nearly the same time when the Network of Excellence was entrusted with the elaboration of the DCFR, the Commission contracted – on the basis of an open call for tenders – with a group of consumer lawyers the Consumer Law Compendium project.[16] This project had the aim of analysing the transposition of eight core consumer directives[17] in all (then) twenty-five, later twenty-seven Member States. Results are, firstly, a data base, where the transposition laws and case law from all Member States plus additional bibliographical references can be found. This database has been online since the beginning of 2006 and is updated quarterly.[18] A second element of the output is a broad comparative study on the consumer acquis and its transposition in the Member States.[19] This study draws a relatively clear picture of how the consumer laws in the field of the directives under question looks like in all Member States. In particular, the extent to which the directives have led to commonalities in the Member States and where differences remain, can be seen. Such differences

14 Cf. the resolution of the European Parliament of 17 July 2008, N° B6-0374/2008.

15 Cf. Council documents of 11 April 2008 (N° 8286/08) and of 7 November 2008 (N° 15306/08); on the Council position cf. also H. Schulte-Nölke, (2009) *Zeitschrift für Gemeinschaftsprivatrecht*, 1 (forthcoming).

16 Call for tenders 2003/S 153-138854 (www.ted.europa.eu); Service Contract between the European Commission and the University of Bielefeld (co-ordinator: Prof. *Hans Schulte-Nölke*, Bielefeld (until 2008, now Osnabrück), N°. 17.020100/04/389299.

17 Doorstep Selling Directive 85/577; Package Travel Directive 90/314; Unfair Contract Terms Directive 93/13; Timeshare Directive 94/47; Distance Selling Directive 97/7; Price Indication Directive 98/6; Injunctions Directive 98/27; Consumer Sales Directive 99/44.

18 http://ec.europa.eu/consumers/rights/cons_acquis_en.htm#comp.

19 H. Schulte-Nölke/C. Twigg-Flesner/M. Ebers (eds), *EC Consumer Law Compendium. The Consumer Acquis and its transposition in the Member States* (Munich: Sellier, 2008).

may exist because of the use of minimum harmonisation by the Member States, because of transposition deficiencies or because of gaps and incoherencies in the directives.

3. Relations between the academic projects

Although the two academic projects were formally independent from each other and organised in a very different manner[20], there was nevertheless a rather close interrelation. First of all, the contract partner of the Commission was in both cases the same university, namely the University of Bielefeld. Also the overall co-ordinator of both projects was the same person, who is the author of these lines and who worked, at that time, at this university. Such overlaps may look somewhat surprising, but the reason is very simple: the Consumer Law Compendium, which was organised under a service contract and therefore advanced quicker than the CFR, was awarded to a subgroup of the Research Group on the Existing EC Private Law (Acquis Group), which made the ACQP and therefore had quite a lot of specialisation for the required tasks, i.e. the analysis of the transposition of consumer law directives. At the same time, this Acquis Group became a member of the much broader consortium, which applied for the research grant for the Network of Excellence to be entrusted with the DCFR. Thus, there was simply a partial overlap of the academics involved in both the CFR exercise and the Consumer Law Compendium exercise. This overlap was quite natural, because the tasks partly overlapped also. The DCFR in any case had to include the existing acquis, which is mainly consumer law; furthermore the DCFR aimed anyway at giving broad comparative information on all areas included. The comparative information on consumer law, as far as regulated by directives, was already being collected in the course of the Consumer Law Compendium exercise. Because of such synergies, a close co-operation was a win-win-situation for both projects.

4. Relation and non-relation between the CFR and the Consumer Acquis Review

The foregoing section should have made clear that the preparatory academic works, albeit their very different organisational scheme and responsibilities within the Commission, had broad substantial and personal overlaps. This observation should make it obvious, that also the two political projects – the CFR and the Consumer Acquis Review – must have a close connection.

Rereading the Commission documents issued since 2001 confirms an impression that already came up over the years when talking to the different

[20] DCFR: Research grant under the Sixth Framework Programme (DG Research); Consumer Law Compendium: Service contract (DG SANCO).

Commissioners and Commission officials in charge of the two projects. The relation between the projects is obviously characterised by a rather wide vacillation.[21] In the beginning, when the CFR project came on the agenda (2001), there was no relation, because the Consumer Acquis Review project had not yet been launched. Beginning from the second half of 2004, when the contract negotiation for the Network of Excellence took place and the "Way forward" communication of the Commission[22] was issued, the Consumer Acquis Review project seemed to be firmly integrated into the CFR project. The core idea was that the results of the CFR exercise should undergo a "practicability test"[23] when being used for the elaboration of the legislation for the Consumer Acquis Review.

At the latest when the new Commissioner *Kyprianou* took over the responsible Directorate General Health and Consumer Protection (DG SANCO) in November 2004, the priorities changed dramatically. The Consumer Acquis Review (a medium term project), which until then was just a field of application for the CFR exercise (a longer term project), now became priority. At the first European Consumer Contract Law Forum in London (September 2005) Commissioner *Kyprianou* announced that he had "reprioritised" the Consumer Acquis Review. In the aftermath of this conference, the academics in the Network of Excellence were put under pressure to focus their work on fields which were, according to the Commission officials involved, "directly useful for the Consumer Acquis Review". For example, the series of stakeholder workshops organised in the frame of the so-called CFR-Net, where drafts for the DCFR were discussed together with stakeholders and Commission officials, was stopped and replaced by only some new organised workshops on consumer law issues. These new style consumer law workshops took place at the very end of 2005 and in the first months of 2006. Contrary to earlier announcements, the series of CFR-Net workshops were, apart from a short flame up at the end of 2006, finally buried. It is obvious, that at this time, until the end of 2006, the Consumer Acquis Review prevailed while the CFR exercise was dried out.

Things then again changed when Commissioner *Kuneva* came into position in January 2007. Since then, the political project of a CFR has been revitalised, but was seemingly completely disjoined from the Consumer Acquis Review. It is not yet clear what the current state and result of this new development is, but there are at least some indications. At the Presidency Conference in Paris on European Consumer Law in October 2008, which was a follow-up to earlier such conferences, for the very first time a Commission official from the Directorate General Justice, Freedom and Security (DG JLS) spoke on the CFR project. Rumours say that the responsibility within the Commission has changed from Directorate General Health and Consumer Protection

21 A rather similar impression had G. Howells/R. Schulze, Overview of the Proposed Consumer Rights Directive, *in this volume*.

22 COM(2004) 651 final.

23 COM(2004) 651 final, p. 12.

(SANCO) to Directorate General JLS. The Draft Horizontal Directive, which falls into the responsibility of Directorate General SANCO, does not mention the CFR works at all.

II. Scope of the Draft Horizontal Directive

The core provision on scope is Article 3(1) of the Draft Horizontal Directive (in the following: the Draft), which defines the field of application as sales contracts and service contracts concluded between traders and consumers. Articles 3(2) and (3) clarify that for financial services and for timeshare and package travel contracts the Draft applies only in part, namely for financial services Articles 8 to 20 in case of an off-premises contract and, for all financial services and for timeshare and package travel contracts, also the provisions on unfair terms in Articles 30 to 39. The idea is obviously that the provisions on unfair terms, similar to the current Unfair Terms Directive 93/13, form a common element applicable to all consumer contracts.

A closer look at the individual provisions of the Draft reveals that its scope is partially narrower. The wide scope, as defined in Article 3, is only applicable to the definitions (Art. 2), to the three general pre-contractual information duties (Arts. 5-7), to Chapter V on unfair terms (Arts. 30-39) and to the general provisions at the end in Chapters VI (Arts. 40-46) and VII (Arts. 47-50). Thus, the most substantial extension of scope, in comparison with the existing directives, concerns the three general pre-contractual information duties in Articles 5-7. They would introduce fully harmonised general information duties for practically all consumer contracts, which goes far beyond the existing acquis.

With regard to the definitions in Article 2, one may wonder, why their field of application is limited to the Draft. The list of definitions in Article 2 of the Draft contains several notions, which also have a function in the other consumer directives. In particular, notions such as "consumer", "trader" or "durable medium" should not vary between the directives without very strong reasons. Admittedly, some of these definitions seek coherence with other pieces of legislation (e.g. with the notion of consumer in the Unfair Commercial Practices Directive 2005/29), but the aim of creating overarching definitions of some core notions applicable throughout the acquis will not be reached by the Draft.

The scope of application of the provisions on consumer information and the withdrawal right for distance and off-premises contracts (Arts. 8-20) and on sales (Arts. 21-29) is narrower and is modelled along the lines of the existing directives. However, there are some interesting deviations. The most striking example is the new category of "off-premises contracts" as defined in Article 2(8) of the Draft. This is a real innovation. The new legal term slightly widens the scope of the current Doorstep Selling Directive 85/577. The definition of "off-premises contract" also includes contracts concluded

on the street or in other public spaces, which are currently not covered by the Doorstep Selling Directive 85/577. There is a further characteristic extension with regard to the question, whether the contract must be concluded in the protected situation (e.g. at the consumer's home) or whether it suffices that the contract has only been initiated and prepared at the consumer's home, but been concluded later on business premises (cf. Art. 2 (8)(b)). Whereas the Draft includes such contracts, the existing Doorstep Selling Directive 85/577 is narrower on that point and includes only contracts actually concluded at the consumer's home or in one of the other situations listed in the Directive.

Furthermore, the category of "distance contract" (Art. 2(6)) in the Draft is slightly wider than the corresponding definition in the Distance Selling Directive 97/7. The definition in Article 2(1) of Directive 97/7 qualifies as a distance contract only those contracts concluded "under an organized distance sales or service-provision scheme". This requirement is lacking in the Draft. The consequence is that also traders, who only occasionally agree to a distance contract, are covered. This is, of course, a simplification and therefore to be welcomed. However, a negative effect may be that in particular small-scale traders, who do not have any capability to fulfil the information obligations applicable to distance contracts, refuse to conclude such contracts. This might have some disadvantages in particular for weak consumers, e.g. an elderly person, who has caught the flu and phones the owner of a small shop asking him to bring, by way of exception, some goods along.

It is particularly peculiar that the Draft includes such occasional distance contracts within its scope, but does not provide for a clear-cut solution for the common case of mixed off-premises and distance marketing strategies. The two categories, in which there are specific information duties and a withdrawal right, are the "off-premises contract" and the "distance contract". The Draft defines both categories in a way that they do not overlap. If, for example, the consumer has been visited at home and convinced to conclude a contract but the contract was actually concluded the day after over the phone, it is not an "off-premises contract"[24] and probably also not a "distance contract".[25] This result would be very odd, because it is clearly an "off-premises contract" if the consumer, after having been visited at home, concludes the contract on the following day in a shop (cf. Art. 2(8)(b) of the Draft). The technique of introducing the distinct categories of an "off-premises contract" and a "distance contract" leads to unnecessary ambiguities. It might be much easier to follow the suggestion of the DCFR and the ACQP, which use the "contract

[24] Because the contract is not "concluded away from business premises with the simultaneous physical presence of the trader and the consumer" (cf. Art. 2(8) of the Draft).

[25] Because the trader did not make "exclusive use of one or more means of distance communication" for the conclusion of the contract (cf. Art. 2(6)).

negotiated away from business premises" as a generic term for all contracts not concluded on business premises, including distance contracts.[26]

III. Contents of the Draft Horizontal Directive and its relation to the CFR and the current law

Against the organisational background described above, one can ask to what extent the results of the CFR exercise, i.e. in particular the DCFR and the ACQP, have or should have had influenced the Draft. But this would result in a rather limited picture. In order to get a broader picture of the scope and role of the future Horizontal Directive, there are at least four levels of comparison to be looked at:

1. What is the relation of the Draft to the existing directives in its field?
2. How does the Draft relate to the recommendations made in the Consumer Law Compendium?
3. To what extent does the Draft make use of the DCFR and the other works elaborated in the course of the CFR exercise, in particular the Acquis-Principles (ACQP)?
4. How does the Draft relate to the existing national consumer laws?

1. Relation to the existing directives

As differences of scope already have been sketched out, the following focuses on commonalities and differences with regard to the consumer protection instruments in the existing directives and the Draft. However, it has to be clearly stated from the beginning, that the main differences are not the nitty-gritty innovations with regard to consumer protection instruments in the Draft, but the shift to broad full harmonisation. This is, as readers will know, a radical change with of a lot of political and constitutional implications. Having said this, some other remarkable innovations can be mentioned.

However, with regard to definitions, some absent innovations may be highlighted. The first concerns the definition of consumer, which follows the traditional lines of the existing directives. One of the problems is that the Draft does not clarify the so called mixed-purpose issue. The well-known ECJ case *Gruber*[27] has, for the field of international procedural law, broken with the understanding of the notion of consumer in mixed-purpose contracts, according to which the preponderant purpose prevails. There is a Europe wide discussion on the question of whether this decision is also applicable to the other consumer definitions in the acquis. It is regrettable that the Draft does not try

[26] Cf. Art. II.–5:201 DCFR, Art. 5:201 ACQP.

[27] ECJ, judgment of 20 January 2005, case C-464/01.

to clarify this issue, be it in the one or in the other direction. A model could be the Acquis-Principles and the DCFR, which do so – in a more consumer friendly way than the ECJ in *Gruber*.

In addition, the definition of "trader" is possibly too traditional. One may start wondering, whether "trader" is the most ideal word for the consumer's counterpart. Admittedly, it follows the Unfair Commercial Practices Directive 2005/29. More prominent and linguistically precise are the two other common possibilities, be it "professional" as in the Rome I Regulation, be it "business" as in the ACQP and in the DCFR.[28] It also seems rather unconsidered to take over the last part of the definition of trader, reading "and anyone acting in the name of or on behalf of a "trader" (Art. 2 (2)). Taken literally, this also covers consumers who are acting on behalf of a trader. Such consumers can be found, for example, in the traditional distance selling business, where the one who orders for different other people often gets some discount ("collective orderer" "*Sammelbesteller*"). For obvious reasons, such persons should not be qualified as a trader. But if the intermediary is also a trader, the last part of the definition leaves it unclear as to what the consequences are. In the environment of the Unfair Commercial Practices Directive 2005/29, such extension might have some sense, because it only clarifies that a professional intermediary is also directly bound by the obligations and prohibitions of advertising and marketing law. But for most of the obligations imposed on traders under the Draft, it does not make much sense to impose them on the intermediary also. For instance, the duties of the trader under a consumer sales contract to deliver in conformity with the contract or to replace or to repair are most certainly not meant to also be imposed on the intermediary. Therefore, only for some of the duties imposed on traders in the Draft does it makes sense that intermediaries are also under the same obligation towards consumers. This needs a lot of clarification. In particular, the attempt of including intermediaries mixes rather complicated issues of attribution of acts committed by an agent to the principal. This is a question, which should be regulated, if one so wants so, within the law of agency and commercial distribution.

Besides the general information duties in Article 5, which are insofar new as they are applicable to all consumer contracts for goods and services, Article 7 introduces a new consumer protection instrument. The provision stipulates the specific duty of an intermediary to disclose that his principal is a consumer and therefore the consumer protection laws are not applicable to the contract in question. This certainly points in the right direction. However, the sanction is striking: the intermediary who does not fulfil this duty, shall

[28] In the ACQP and, following this example, also in DCFR, "business" was finally chosen, because "professional" in many languages only means the so-called free professions. "Trader" is odd, as the natural meaning does not fit for service providers. "Business" has also the advantage, to use a more descriptive language, which is used anyway in particular when speaking about consumer law (i.e. in "B2C contract"). Also the Draft frequently uses "business" in its explanatory part.

be deemed to have concluded the contract in his own name. If this means that the intermediary simply replaces the principal (who would then be off the hook), the sanction is certainly dysfunctional in many situations. In a full harmonisation directive this is highly problematic as Member States would be prohibited from stipulating more adequate sanctions, which would have to combine the continuing obligation of the principal under the contract with a liability of the intermediary. That will have to be remedied.

In the field of withdrawal rights we find a rather ambitious attempt to regulate the exercise and the effects of withdrawal (Arts. 12-19). This new approach in the field of withdrawal rights is very much to be welcomed. Until now, the existing directives only have a fragmentary and contradictory set of rules. The Draft would create a general set of rules on withdrawal and thereby very much improve legal certainty in this important field. Characteristic differences to the existing directives are the unified withdrawal period (Arts. 12 and 13) of 14 days and the withdrawal form (cf. Annex I B to the Draft). Contrary to the existing directives, Article 14 of the Draft introduces a general form requirement for the exercise of the right of withdrawal. In principle, the consumer must inform the trader of his decision to withdraw on a durable medium. Moreover, Article 16(2) gives the trader a right to withhold the reimbursement of any payment received until he has received back the goods delivered to the consumer. Read in conjunction with Article 17, it becomes clear that the consumer is to perform his obligation to return the goods received before the trader must reimburse any payment received. It is a political question whether this is a fair rule. In any case, it deviates from the existing situation.

Within the field of consumer sales, the Draft seems less ambitious. Most of the rules are very close to the existing Consumer Sales Directive 1999/44. However, in particular for sales, the full harmonisation approach dramatically changes the impact on national laws. New elements are, e.g., the provisions on delivery (Art. 22) and on passing of risk (Art. 23), the change of the right to choice the method of cure in favour of the trader (Art. 26(2) and the provision on damages (Art. 27). It is also striking, that the Draft does not tackle the issue of redress anymore, as it does not contain a provision similar to Article 4 of the Consumer Sales Directive 1999/44.[29]

Finally, in the field of unfair terms, the Draft is also rather close to the Unfair Terms Directive 93/13. Characteristic is a new provision on the nullity of intransparent clauses stipulating additional payments (Art. 31), the black list, on which some items, which are on the indicative list of the Unfair Terms Directive 93/13, can be found. The remaining items from the indicative list have been promoted to a grey list. The Draft allows both lists to be amended by a comitology procedure.

All in all, the Draft is not a completely new piece of legislation. It widely follows the lines and the style of the existing directives, but nevertheless con-

[29] For more detail see the contribution by C. Twigg-Flesner, Fit for Purpose? The Proposal on Sales, *in this volume*.

tains a substantial number of amendments and innovations. Most of these innovations are really worth considering, but need some improvement in order to become operable.

2. Relation to the Consumer Law Compendium

The Draft refers in its memorandum, *inter alla*, to the Consumer Law Compendium as a basis of knowledge made use of during the preparation. In order to assess the role of the Compendium, it might be interesting to compare the contents of the Draft with the recommendations made in the in the comparative study which forms part of the Consumer Law Compendium. With regard to definitions, the Compendium raised a lot of individual points on the definition of "consumer" or "trader" (the Compendium calls it "business")[30]. None of these recommendations are reflected in the Draft.

On information duties, the Compendium recommended to identify a common core of the existing catalogues of information duties and to regulate this common core separately. The purpose why such generalisation was recommended is twofold. Firstly, such technique avoids incoherencies as there are in the existing directives. Secondly, a kind of general part on information duties might help to disburden the long catalogues of information duties in individual directives and thereby make the directives easier to apply. In principle, the Draft follows this recommendation, but with some rather substantial deviations. One such deviation is that the general information duties (Art. 5) are applicable to all consumer sales and services contracts, which goes far beyond the recommendation in the Consumer Law Compendium. A further difference is, of course, full harmonisation, which was not recommended to such an extent.

As to withdrawal rights, the recommendations by the Consumer Law Compendium seem to be widely reflected. It is worth noting that the Consumer Law Compendium already recommended full harmonisation in this field. An interesting commonality is the idea to slightly broaden the field of application of doorstep contracts to all off-premises contracts, which was suggested by the Compendium.

With regard to sales contracts and to unfair terms, the Consumer Law Compendium was not very ambitious. It was particularly rather reluctant with regard to full harmonisation in this field. The innovations in the Draft are mainly not based on the Compendium, whereas the few recommendations made in the Consumer Law Compendium (e.g. inclusion of software into the scope of consumer sales) are not reflected in the Draft.

Finally, as already said, the Consumer Law Compendium recommended selective full harmonisation on certain areas apt for it, e.g. information on

30 E.g. mixed contracts, legal persons of public law, *animo lucri*, burden of proof.

and the technicalities of withdrawal rights. The Draft goes much beyond this recommendation.

3. Relation of the Draft to the DCFR and the ACQP

This chapter can be rather short. The Draft does not contain any reference to the DCFR or the ACQP. There are also hardly any terminological similarities. There are few similarities with regard to content (e.g. off-premises contracts,[31] passing of risk in sales contracts,[32] transparency requirements for non-negotiated contract terms[33]), but it remains unclear, whether these similarities result from any influence of the DCFR or the ACQP, or whether they came into the Draft via other sources, which inspired both the DCFR/ACQP and the Draft. These sources are, of course, the existing directives and their transposition in the national laws, the Consumer Law Compendium or preliminary Study Group and Acquis Group drafts presented at the CFR-Net Workshops. This finding does of course not imply that the frequently repeated oral statement by Commission officials, according to which the DCFR was very influential, is wrong. But it seems obvious, that the influence of the DCFR must have had the effect that very often the content and wording of the existing directives have been given preference over the DCFR.

4. Relation to national laws

There are two aspects under which the relation of the Draft to the national laws can be looked at. Firstly, a list could be made of which elements of national laws will have to be abrogated because of the full harmonisation approach of the Draft. Secondly, one could ask whether a full harmonisation directive might spill-over to other fields of the national laws, which are not inside the scope of the Draft, but which might indirectly be influenced by it. From such observations one may judge, which are the fields in which full harmonisation would do not much harm to the level of consumer protection and the coherency of the national laws, and in which fields full harmonisation might have rather negative effects. This question can, of course, not be answered here comprehensively, but some examples and trends may nevertheless be sketched out.

With regard to the definition of consumer, the Draft could have clarified, that it does not prohibit the Member States from introducing or maintaining broader consumer definitions than the definition given in the Draft. This

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31 At least the idea is similar, cf. Art. II.–5:201 DCFR, which follows Art. 5:201 ACQP; as said above, the Draft uses a different definition.

32 Cf. Art. 23 of the Draft and Art. IV.A.–5103 DCFR.

33 Cf. Art. 31(2) of the Draft and Art. 6:201 (4) ACQP; II.–9:408 (2) DCFR.

should be clear anyway, as the Draft is only applicable to consumers (in the sense of its definition). If Member States maintain or introduce broader definitions of consumer, they simply protect non-consumers (in the sense of the Draft's definition), which is not prohibited by a full harmonisation directive applicable only to consumer, but not to non-consumers. However, there is a lot of discussion on this point.[34] A clarification in the memorandum or the recitals of the Draft might therefore help very much.

In particular, the general information duties in Article 5 of the Draft might heavily interfere with other fields of the national laws which are not directly regulated by the Draft. This is particularly true for the information to be given on the main characteristics of the product. If the full harmonisation approach of the Draft were to be understood as its Article 4 says, the Member States' laws would be hindered to maintain or introduce other information duties with regard to the product of a consumer contract. Such information duties might in particular be provided for under unfair commercial practices law[35], under criminal law (fraud), but also under many institutions of private law (including tort law) such as misrepresentation, *culpa in contrahendo*, duties to disclose, duties to warn or duties to instruct. It is probably not intended to regulate all these areas with the Draft, but this really needs to be clarified. However, it can be doubted whether such clarification is possible. Therefore one might come to the conclusion that such duty to inform on the general characteristics of the product is not apt for full harmonisation at all. By contrast, information duties on the address of the trader, on the indication of price or the existence of a right of withdrawal could easily be fully harmonised, without interfering too much with other fields of the Member States' laws. Therefore a sectoral full harmonisation for these fields would be preferable.

The Draft also leaves the Member States largely in the dark with regard to the sanctions for breach of information duties. The experience with the transposition of the already existing information duties shows that some clearer guidance could be useful to explain to the Member States which remedies for breach of information duties are necessary in order to comply with the principle of *effet utile*.[36] It is particularly unclear if the Draft means by "penalties" (Art. 42) that the Member States have to impose sanctions under criminal or administrative law against traders who infringe information duties. This would unnecessarily burden those Member States which currently have sanctions mainly regulated under private law (including injunctions by consumer associations).

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[34] Cf. M. Loos, Herziening van het consumentenrecht: een teleurstellend richtlijnvoorstel, (2008) 5 *Tijdschrift voor Consumentenrecht*, 173, 174.

[35] Which is, however, also regulated by a full harmonisation directive, i.e. the Unfair Commercial Practices Directive 2005/29.

[36] As to the variety of sanctions in the Member States' laws cf. H. Schulte-Nölke/C. Twigg-Flesner/M. Ebers (eds), *EC Consumer Law Compendium* (Fn. 19), p. 336 et seq., 492.

The regulation of withdrawal rights suggested by the Draft should, in principle, not cause serious problems to the Member States. Only a few Member States would have to substantially change their withdrawal periods. The many political questions on the level of consumer protection (which is slightly lower in the Draft than in some Member States)[37] can be decided this or that way. In addition, some technical issues might need further consideration[38]. This area of the Draft is one where full harmonisation is feasible and where positive effects on the internal market are to be expected.

The sales chapter of the Draft would have dramatic consequences for several Member States' laws. In particular the full harmonisation with regard to the so-called hierarchy of remedies (Art. 26(4) and (5)) and the claim for damages (Art. 27) would blow breaches into national contract laws. If, in particular, Article 27(2) really stipulates, as it reads, a claim for damages to be interpreted autonomously, the ECJ would have to develop a full set of rules which answer the main questions necessary for the application of such claim, such as monetary or also non-monetary damages, mitigation, calculation of damages, causation, foreseeability, fault, excuse and many others.

As the Draft stands now, full harmonisation would cause enormous trouble to the Member States' laws, because the Draft mainly contains incomplete rules.[39] There are dozens of examples which illustrate this, of which only one further can be brought here: Article 22 is a well-meant, but misconstrued provision on delivery, which entitles the consumer to a refund of any sums paid within 7 days if the trader has failed to fulfil his obligation to deliver within 30 days. In a minimum harmonisation directive such provision may work, but what is its effect under full harmonisation? Does it exclude any other remedy for the consumer in such case? One really wonders whether a consumer should not also have a right to terminate the contract and to claim damages for delay or for non-performance. As the Draft only grants damages in the case of a lack of conformity (cf. Art. 27(2) read in conjunction with Art. 26), full harmonisation, if to be taken as Article 4 of the Draft puts it, would prohibit the Member States to maintain such additional remedies for the consumer. This is probably not meant, but needs to be expressed (e.g. by saying that this is just a minimum harmonisation rule).

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37 Cf. the contribution by M. Loos, Right of Withdrawal, *in this volume*; also idem in Herziening van het consumentenrecht: een teleurstellend richtlijnvoorstel, (2008) 5 *Tijdschrift voor Consumentenrecht* 173 et seq.

38 E.g. with regard to order form, in particular that the withdrawal period begins with the signing of the order form (Art. 12 of the Draft), which may lead to the result that the withdrawal period elapses before the contract is concluded. In cases where the order form is on paper, a duty to hand over a copy to the consumer is lacking.

39 On that cf. also the contribution by F. Zoll, The Remedies for Non-Performance in the Proposed Consumer Rights Directive and the Europeanisation of Private Law, *in this volume*.

There are also some technical shortcomings in the Draft, of which again only one example shall be named: Article 28(1) and (4) regulates an odd two years plus two months (plus national prescription) period. Probably Article 28(1) intends to cut off consumer rights after two years, as it is in the current Consumer Sales Directive 1999/44. However, according to the new wording the consumer can bring forward his claim also after the two years have elapsed, if he simply proves that the lack of conformity had became aware within the two years and that he had notified this to the trader within two month afterwards. Such mistakes can (and should) be removed easily.

In principle, full harmonisation is feasible in the field of sales law, but the content of the Draft is not comprehensive enough in order to reach reasonable results. The Commission was insofar either too brave or not brave enough. If one were to decide which subjects need to be covered in a directive on sales law in order to be comprehensive enough to be effective as a full harmonisation measure, the scope of the CISG could function as an indicator. It is easily imaginable, that a directive which includes all the areas covered in this convention (of course with the necessary adaptations to consumer law) functions properly also under full harmonisation regime.

With regard to unfair terms, full harmonisation of the general clause in Article 32 of the Draft is not a big issue if the ECJ continues its judicature on the basis of the *Freiburger Kommunalbauten*[40] decision. If that is the case, the assessment of whether a term is unfair anyway requires a comparison with the applicable default rules of the national laws. Therefore full harmonisation would not cover the individual contract terms but only the method of assessing whether a term is unfair. This would not exclude, that in exceptional cases, like in *Océano*,[41] the ECJ can find terms which are unfair in all circumstances.

The problem begins where full harmonisation of unfair contract terms law might put all other controls, which are regulated in the Member States' laws, under challenge. This concerns, for example, Section 36 of the Nordic Contract Acts or the control of the content of contracts under Section 242 of the German BGB („*Treu und Glauben*"). In addition, the black list under full harmonisation is problematic if this means, that Member States must not add further items to their national black lists.[42] The, certainly unwanted, consequence would be that Member States could expressly prohibit a certain clause for B2B contracts, but would have to leave the issue for B2C contracts to the general clause in Article 32 of the Draft. Member States could even try to circumvent the prohibition to add items to the black list by simply enacting general mandatory rules which ban certain contract terms. If taken seriously,

40 ECJ, judgment of 1 April 2004, Case C-237/02.

41 ECJ, judgment of 27 June 2000, Case C-240/98.

42 As to the similar problem in the Unfair Commercial Practices Directive 2005/29 cf. the pending ECJ cases VTB-VAB, C-261/07 and C-299/07, where AG *Trstenjak* voted in her opinion of 21 October 2008 that the Member States must not extend the black list. Cf. the contribution by J. Stuyck, Unfair Terms, *in this volume*.

the fully harmonised black list would put all mandatory rules in the laws of the Member States which are applicable (also) to B2C contracts under challenge. This is probably not what the Member States can tolerate.

IV. Conclusions

For the purposes of this paper, only some aspects of the Draft could be discussed. The Draft contains several interesting innovations and would constitute a (not very great, but considerable) progress towards more coherence of EC consumer law, given that its technical shortcomings are removed. Therefore the general direction of the Draft is right; however, many questions do remain. Many of them are simply political and are therefore to be decided by political institutions in this or that way. Such questions concern, in particular, the level of consumer protection. Prominent examples are

- whether the consumer shall have the right to withdraw from a contract by, e.g., a phone call (which is not the case under the Draft);[43]

or, with regard to sales contracts,

- whether the consumer shall generally have a right for immediate rescission, when the good is defective (which is not the case under the Draft)[44];
- whether it is the consumer or the trader who has the right to choose the method of cure;[45] or
- whether the consumer must inform the trader of the lack of conformity within two months from the date on which he detected the lack of conformity.[46]

The very controversial issue of full harmonisation has two aspects, one again is political, even constitutional, and therefore to be decided politically, but the other is technical. The technical aspect is insofar crucial, as full harmonisation, even if politically achievable, would simply not work. This is the case with several fields of the Draft, in particular with regard to some of the general information duties in Article 5, in the Chapter on sales (Arts. 21-29) and to the Chapter on unfair terms (Arts. 30-39). If the Draft, as it stands now, were to be enacted as a full harmonisation directive without any exception, it would, in those fields, just disintegrate the Member States' laws and severely damage them, without achieving substantial progress towards harmonisation or market integration. In other areas, in particular with regard to some of the

43 Cf. Art. 14 of the Draft.

44 Cf. Art. 26(3) and (4) of the Draft.

45 Cf. Art. 26(2) of the Draft.

46 Cf. Art. 28(4) of the Draft.

more specific information duties and withdrawal rights, full harmonisation is feasible and desirable. The EC legislator will have to decide, either to step back and to put only those areas under full harmonisation – where already now progress towards market integration can be made – or to speed up and broaden the EC Consumer Acquis Review to an extent that comprehensive full harmonisation will work. With regard to full harmonisation, the Commission was either too brave or not brave enough. The core problem of the Draft is the awkward combination of incompleteness and full harmonisation. This is not just meant as a criticism. It is the offer to help in order to obtain an operable European consumer law, which really facilitates consumers and businesses to make use of the internal market.

The way forward is probably a combination of minimum harmonisation and selective full harmonisation on the one hand (which could be reached on the basis of this Draft) and an optional instrument like the suggested "Blue Button"[47] on the other hand. It might be questioned whether full harmonisation should be pursued in cases where the same or better results for the policy aims of the Union can be achieved by an optional instrument. The principle of proportionality under Article 5(3) of the EC-Treaty could be a strong argument against this. The envisaged combination of minimum harmonisation, selective full harmonisation, and an optional instrument would give the national laws the necessary lee-way and would therefore be the more gentle way towards more coherence of consumer law and better market integration. Within the CFR exercise, the necessary drafting techniques and model rules have been developed. In particular the ACQP, of which most parts are already integrated into the DCFR,[48] contain many elements which could be useful for bringing coherency to the fragmented consumer acquis more coherent. The DCFR goes further and could be the basis for the formulation of an optional instrument. The "toolbox" is there, it should be used now.

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47 The "Blue Button" was first suggested in hearings of the European Parliament in November 2006 and April 2007, where it was positively discussed, cf. http://www.europarl.europa.eu/comparl/juri/hearings/20061121/schultenolke_de.pdf and http://www.europarl.europa.eu/hearings/20070410/imco/schulte_nolke_de.pdf; a short explanation is to be found, for example, in Schulte-Nölke, "EC Law on the Formation of Contract – from the Common Frame of Reference to the '*Blue Button*'", (2007) 3 *European Review of Contract Law* 332-349.

48 A new volume of the ACQP, forthcoming in 2009, contains a lot of innovations (e.g. on specific information duties, on the language of information) which could not be integrated into the DCFR for time reasons.

The Targeted Full Harmonisation Approach: Looking Behind the Curtain

Hans-W. Micklitz[*]

I. Introduction

On 8 October 2008 the European Commission presented its long awaited Proposal on Consumer Rights. It unites the four Directives 85/577[1] on Doorstep Selling, 97/7[2] on Distance Selling, 93/13[3] on Unfair Terms and 99/44[4] on Consumer Sales in a horizontal approach providing for targeted full harmonisation. In this paper I will not discuss the content of the Proposal.[5] Instead I will deal with five issues which lay in the background of the Proposal and which document the regulatory philosophy: (1) the implications of the policy shift from minimum to full harmonisation; (2) competences, subsidiarity and proportionally principle, (3) the effects of full harmonisation on national consumer law, (4) the legislative procedure designed to justify full harmonisation, (5) the economic efficiency argument in European private law.

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[*] The paper refers to a number of EC documents. Quotations in italics are mine, quotations in bold are taken from the relevant documents.

[1] Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises OJ (1985) L 372/31.

[2] Directive 97/7/EC of the EP and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ (1997) L 144/19.

[3] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ (1993) L 95/29.

[4] Directive 1999/44/EC of the EP and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ (1999) L 171/12.

[5] See for a deeper analysis, Micklitz/Reich, Cronica di un muerte anunciada, The Commission's Proposal for a Directive on Consumer Rights, *Common Market Law Review*, forthcoming.

II. How 'horizontal' is the horizontal approach – a 20th or a 21st century model on full harmonisation of consumer contract law

Minimum harmonisation is at the heart of the *acquis communautaire* in consumer contract law. It has most recently been confirmed in the Rome I Regulation 593/2008.[6] Under Article 6 of the Rome I Regulation targeted consumers may not be deprived of the level of protection where they are domiciled.

So far there are two major exceptions: the Directive 2005/29/EC[7] on Unfair Commercial Practices and the Directive 2008/48/EC[8] on Consumer Credit. Both do not form subject of the revision of the consumer acquis although there are strong overlaps with the current proposed Directive on Consumer Rights. The elaboration of the two Directives has been highly controversial both with regard to full harmonisation and the original intention of the European Commission to combine full harmonisation with the country of origin principle. The subject matter of the two Directives differs from the Proposal in that the rules on unfair commercial practices may be regarded as the missing counterpart to the Articles 81 et seq. EC on competition law. The Directive 2008/48/EC regulates a particular sector. For the good or for the bad, the financial sector always claims special treatment. In so far Directive 2008/48/EC cannot be taken as a precedent. The success rhetoric of the European Commission[9] comes a bit early as the implementation process with regard to both Directives has not yet been concluded. It turns out to be much more difficult than the European Commission assumes.[10] Whether the envisaged level of harmonisation can really be achieved by the two Directives is still an open issue.

The Proposal on Consumer Rights[11] (hereafter: Proposal; pCRD) aims at horizontal harmonisation. It intends to establish fully harmonised standards on the modalities of contract conclusion in the field of goods and services, on the control of unfair terms in all sorts of consumer contracts, and on consumer sales. The core of consumer contract law, that is those areas where consumer

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6 OJ (2008) L 177/6.

7 Directive 2005/29/EC of the EP and the Council of 11 May 2001 on unfair commercial practices, OJ (2005) L 149/22.

8 Directive 2008/48/EC of the EP and the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ (2008) L 122/66.

9 Proposed Consumer Rights Directive at p. 7: "The Commission recognises that the full harmonisation approach successfully pursued with the Unfair Commercial Practices Directive in the field of consumer protection marks a new departure in the area of consumer rights".

10 Riehm/Schreindorfer, Das Harmonisierungsrecht der neuen Verbraucherkreditrichtlinie, (2008) *Zeitschrift für Gemeinschaftsprivatrecht* 2008 244.

11 COM(2008) 614 final.

problems are relatively well known and where great experience over the last fifty years had been gained, shall not be put so easily into the hands of the EC alone. There is a constitutional dimension behind this shift which deserves political attention far beyond the inner circles of academics and politicians in the various national or European fora. It is a matter for the public at large, for the national and the European society. The question is in what society do we want to live? In one where the European Community is determining the level of protection European consumer-citizens are depending on, or where the Member States hold the powers in their hands?

Under the minimum approach the constitutional dimension of harmonising contract law did not really matter. The impact of harmonised contract law on national private law remained limited as the Member States were able to extend the protection beyond the EC minimum level. Minimum protection was the key to convince Member States that EC rules are needed to establish a floor of protection. The standard argument from the European Commission was always along the lines of: 'we are just aiming at laying down minimum standards, a kind of a bottom line protection. You remain entirely free to maintain or to introduce standards which go beyond that minimum level'. The European Commission received 'conditional support', consent was bound to the limited effects of EC harmonisation. In Recital (5) of the Directive 99/44/EC[12] on consumer sales minimum rules were used as an argument to increase consumer confidence.

There is, however, another way to look at the scope of the Proposal. It does not contain rules on consumer services contracts. We are living in a service society and that today's GDP results more than 70% from services.[13] The reach of the Proposal is therefore much more limited as the recital wants us to believe. What is mainly regulated is the early 20th century consumer law. What is left aside, is the whole field of services where consumer problems are playing an increasing role and where the European Community does not offer a horizontal approach. Quite the contrary is true. In services, where consumer protection really matters and where the EC has become the key player, a true policy is missing. The Directive 2006/123 on services is of no help here.[14]

Services are subject to various sector related EC rules which affect, *inter alia*, consumer contracts, but which do not contain a consistent policy, similar to the field of sales contracts. There are the (former) public services on energy and gas, telecommunication and postal services, transport and – the financial services. Services which are not subject to sector related rules are submitted to a horizontal approach. Whilst the whole field of services is highly regulated by the European Community, the consumer dimension remains to say the very

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12 Directive 1999/44/EC of the EP and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ (1999) L 171/12.

13 See COM(2007) 724 final, A single market for the 21st century, at p. 8.

14 Roth/Freier Dienstleistungsverkehr und Verbraucherschutz, (2007) *Verbraucher und Recht* 161.

least underdeveloped and inconsistent. Services meet basic needs of consumers. Where the EC is mostly needed it is the least visible. Here the European Commission has no difficulty to accept the key role of Member States.

1. Energy and gas: Directives 2003/54/EC[15] on electricity and 2003/55/EC[16] on gas provide for minimum harmonisation. Consumer rights are enshrined in a non-binding energy charter.
2. Telecommunications: Directive 2002/22/EC[17] on telecommunications lays down rules on universal services, similar to the Directive 2008/6[18] on postal services.
3. Transport: Regulation 261/2004[19] on air passenger rights, Regulation 1371/2007[20] on railroad passengers, Draft Regulation[21] on the rights of passengers in bus and coach and Draft Regulation[22] concerning the rights of passengers when travelling by sea and inland waterways provide for maximum standards, however, not always at a high level of protection.
4. Financial services: With the exception of Directive 2002/65/EC[23] on distance selling of financial services, most rules do not have a particular consumer focus. The Markets in Financial Instruments Directive 2004/39/EC[24] together with the two pieces of law adopted within the Lamfalussy procedure, Directive 2006/73[25] and Regulation 2006/1287[26], aiming at establishing a fully fledged internal market for investment services. The retail client is certainly not at the heart of the Directive though it is covered. The effects of the neglected final consumer concerns may be studied in the current financial crisis and have been acknowledged by AG Bot in *Apothekerkammer*.[27] None of the EC rules establish EC rights and remedies to the benefit of private investors.

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15 OJ (2003) L 176/37; COM (2007) 528 final.

16 OJ (2003) L 176/57; COM (2007) 529 final.

17 OJ (2002) L 108/51.

18 OJ (2008) L 52/3.

19 OJ (2004) L 46/1.

20 OJ (2007) L 315/14.

21 COM(2008) 817 final.

22 COM(2008) 816 final.

23 Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ (2002) L 271/16.

24 OJ (2004) L 145/1.

25 OJ (2006) L 241/26.

26 OJ (2006) L 241/1.

27 Opinion, 16.12.2008, Case C-171/07 *Apothekerkammer des Saarlandes v. Saarland* at 70 fn. 24: Die Argumente, die die Gegner der deutschen Regelung hierzu zur Stützung ihrer Auffassung vorgetragen haben, sind weitgehend theoretisch und werden im Übrigen durch die Realitäten der jetzigen Finanzkrise widerlegt. So hat die Ex-

5. Horizontal services: Under the Directive 2006/123/EC[28] consumer protection shall be guaranteed mainly by information obligations, the Rome I and the Rome II Regulations as well as by technical standards to be elaborated via CEN and CENELEC and national standard bodies[29].

Services are neither subject to a coherent approach nor are they submitted per se to full harmonisation. Various and even combined forms of harmonisation may be found in the heterogeneous field of services. Even the form oscillates between directives and regulations. Seen this way, the press release in which the European Commission announces its new Proposal sounds rather flatly.

The references to the field of consumer services demonstrates that the 'horizontal approach' of the Proposal is less effective than it seems and it raises even more questions on whether it is possible to cut only a limited area of contracts out of the national private law, mainly those of sales. So far services are subject to the rules on the modalities of contract conclusion and on the control of unfair terms only.

In sum: the scope of the Proposal on Consumer Rights is wide and narrow at the same time. It is wide in that it heavily intervenes with national private law, it is narrow in that it does not explicitly deal with the whole area of services where not only an innovative EC policy is mostly needed, but also where there is space for the development of an EC consumer policy as the Member States' legal systems suffer from inconsistency and heterogeneity. It will have to be demonstrated, however, that the Proposal on Consumer Rights affects service contracts due to its horizontal character in a highly unexpected way.

III. Choice of competence, subsdiarity and proportionality principle

A competence shift in private law matters is not explicitly foreseen in the European Treaty.[30] All that the European Community is empowered to do is to take measures to complete the internal market at a high level of consumer protection, Article 95 EC or to adopt measures which support, supplement

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istenz von Kontrollbehörden und rechtlichen Regelungen über die zivilrechtliche, kommerzielle oder strafrechtliche Haftung im Bankengeschäft in tragischer Weise ihre Grenzen und ihr Unvermögen offenbart, die Auswüchse einer Denkweise zu unterbinden oder zu kontrollieren, die dem Ertrag des eingesetzten Kapitals den Vorrang einräumt.

28 OJ (2006) L 376/36.

29 Ackermann, Das Informationsmodell im Recht der Dienstleistungen, (2009) *Zeitschrift für Europäisches Privaterecht*, forthcoming; Micklitz, The Service Directive – The making of consumer contract law via standardisation, the example of the Service Directive, in *Festschrift für G. Brüggemeier*, 2009 forthcoming.

30 Roth, *Rechtssetzungskompetenzen für das Privatrecht in der EU*, (2008), 401.

and monitor the consumer policy by the Member States, Article 153(2)(b) EC. In the light of the *Tobacco I* judgment[31] the European Commission had argued that Article 95 EC requires full harmonisation. This argument was key in the legislative procedure of the Unfair Commercial Practices Directive.[32] Whist this argument is no longer at the forefront of the political discourse, indeed there are good reasons to argue that such a consequence runs counter to the EC-Treaty not least in the light of *Tobacco* II[33], it seems to be still part of the hidden agenda of the European Commission. Measures to be taken under Article 153(2)(b) EC, provided they cover consumer contract law, are constitutionally bound to minimum harmonisation. Insofar it is obvious that the European Commission relies on Article 95 EC alone to defend the envisaged power shift.

The Proposal on consumer rights does not devote much scrutiny to the competence question. The reference to Article 95 is in no way justified in the explanatory memorandum. Indirectly it follows from the reasons given in Recitals (4) to (8):

(4) In accordance with Article 14(2) of the Treaty, the internal market comprises an area without internal frontiers in which the free movement of goods and services and freedom of establishment are ensured. The harmonisation of certain aspects of consumer contract law is *necessary for the promotion of a real consumer internal market* striking the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring the respect of the *principle of subsidiarity*.

(5) The *cross-border potential* of distance selling which should be one of the main tangible results of the internal market is not fully exploited by consumers. (…)The *cross-border potential* of contracts negotiated away from business premises (direct selling) is constrained by a number of factors including the different national consumer protection rules imposed upon the industry (...) therefore *full harmonization* …

(6) The laws of the Member States on consumer contracts show *marked differences* which can generate appreciable *distortions of competition* and obstacles to the *smooth functioning of the internal market*. (…)

(7) These disparities (…) increase compliance costs to business wishing to engage in cross border sale of goods or provision of services. Fragmentation also undermines *consumer confidence* in the internal market. The negative effect on consumer confidence is strengthened by an uneven level of consumer protection across the Community ...

(8) *Full harmonisation* of some key regulatory aspects will considerably increase legal certainty for both consumers and business …

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31 ECJ Case C-376/98 (2000) ECR I-8419.

32 See with regard to the history, Micklitz, *Münchner Kommentar zum UWG*, E. Lauterkeitsrecht, no. 10 et seq.

33 ECJ Case C-380/03 *Germany vs. Parliament and Council*, (2006) ECR I-11573.

The key words are the following: *promotion of a real consumer internal market; cross-border potential; marked differences; distortions of competition; smooth functioning of the internal market; compliance costs; consumer confidence; legal certainty*. In essence three arguments are put forward to legitimate full harmonisation: the cross-border potential for business and consumers, compliance costs of business and consumer confidence. The first and the third parameter are closely intertwined, the first being the negative side of the third.

Therefore the Proposal is in essence built on two ambitious assumptions: that the fragmented national laws negatively affect the cross-border potential and positively increases consumer confidence and that business is suffering from compliance costs. Unfortunately the Commission document does not provide evidence which could undermine the former assumption. It is more than doubtful whether consumers and business make cross-border contracting dependent on fully harmonised rules. One might very well argue that at least from the consumers' side there are other factors such as language, customs and habits, which refrain consumers from engaging in trans-border business.[34] All these arguments show up only in the 2008 Impact Assessment Report but not in the Proposal.[35] The Eurobarometer 2008 confirms such an interpretation.[36] Evidence is provided on the compliance costs. However, one must look at the Impact Assessment Report.[37]

The European Parliament supported full harmonisation,[38] but did not grant a carte blanche. It asked for *targeted* full harmonisation. It is paradigmatic that neither the explanatory memorandum nor the recitals make any effort to give shape to what *targeted* harmonisation means and how it could be concretised. To my understanding targeted harmonisation requires a justification in each and every case why a particular measure can only be fully harmonised to achieve the parameters spelt out in Recitals (4) to (8). It does not suffice to write the key words into the recitals in order to justify the full harmonisation of four Directives. *Howells/Schulze*[39] are therefore right when they argue that the Proposal is *targeting* at full harmonisation rather than aiming at *targeted* harmonisation.

The Proposal is somewhat more outspoken on its search for compliance with the subsidarity and the proportionality principle. The explanatory memorandum gives the following explanation which reaches beyond Recital (65):[40]

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34 See under VI.

35 See under VI.

36 COM(2008) 614 final p. 7 says: 'The 2008 Eurobarometer survey indicates that this legal fragmentation constitutes an important barrier to cross-border trade'. However, no reference is given.

37 See under VI.

38 COM(2008) 614 final p. 3, see for more details under VI. 2.

39 Cf. Howells/Schulze, Overview of the Proposed Consumer Rights Directive, *in this volume*.

40 pp. 6-7.

> The *legal fragmentation* problem cannot be solved by the Member States individually. (…) Only a coordinated Community intervention can contribute to the completion of the internal market by solving this problem.
>
> Action by Member States alone in an *uncoordinated manner* (…) would also deprive consumers from reaping up the benefits of the internal market with more choice and better prices from cross-border offers.
>
> The proposal would therefore significantly reduce traders' compliance costs while granting consumers a high level of protection.
>
> *The scope of the proposal is limited to consumer protection rules in contracts concluded between traders and consumers. It fully harmonises all the consumer protection aspects which are relevant for cross-border trade, i.e. the aspects which are key for traders when they draft their standard contract terms and design the information materials as well as for the operation of their business (e.g. the management of returns in distance or direct selling).*

The Proposal more or less reiterates the arguments which shall justify full harmonisation. The second argument, however, seems to challenge the use and usefulness of international private law rules. What would have been needed is a much denser analysis of what must be regulated at EU level and what should be left to the Member States. This would be targeted full harmonisation in action! Annex 5 of the Impact Assessment Report does not meet these standards.

Last but not least the European Commission has to overcome the limits set out by the principle of proportionality. Again the background documents are more explicative than the Recital (65). At a closer look the very same arguments are turned around and around:

> The proposal regulates only the key aspects of consumer contract law and does not interfere with more general contract law concepts such as the *capacity to contract or the award of damages*.
>
> The *inclusion of domestic transactions* within the scope is proportionate to the objective of simplification of the Community regulatory framework, since it avoids a dual regime …
>
> The *administrative burden on public authorities would be negligible* since it would merely consist in notifying to the Commission the national case law on unfair contract terms in the context of a comitology procedure.
>
> The Community traders who wish to expand their business cross-border would significantly reduce their *administrative costs* due to full harmonisation.
>
> If the proposal fosters consumer protection and increases competition in the retail market through more cross-border offers, then consumers will win through having *more choice, better quality and lower price*.

In its findings the European Commission goes even further than the ECJ in the few judgments in which it had the opportunity to decide whether Member States' private law rules reaching beyond the minimum harmonised level fall foul of the proportionality principle.[41] The ECJ leaves at lot of discretion to the Member States and corrects only measures which manifestly go beyond what is needed. It might be that full harmonisation is covered by Article 95 EC, it might even be that full harmonisation complies with the subsidiarity principle, but it is simply not clear why the proportionality principle requires full harmonisation of purely internal matters. The European Commission might even get trapped by overstretching the emphasis on the key role of cross-border shopping. Article 65 EC covers exactly these constellations.

Where new arguments are introduced, such as the negligible administrative costs, they are wrong.[42] Member States, which are actively involved in the control of unfair terms, would have to screen all judgments taken by their courts over the last decades and would have to decide on those to be notified to the European Commission within the envisaged comitology procedure.

In sum: the Proposal constantly uses more or the less the same propositions, sometimes without evidence, throughout the explanatory memorandum and the recitals to justify the choice of competence, to document respect of the subsidiarity and of the proportionality principle. In a way the European Commission does not even go far enough. Full harmonisation by sheer force would require at the very end to be realised by way of regulation rather than by a directive. Seen through the eyes of the European Commission, a regulation alone would overcome the problem of fragmentation as a regulation would set directly applicable standards which are the same in 27 Member States. Is a regulation not inevitable to increase consumer confidence and guarantee legal certainty? The European Commission is making more and more use of regulations in private law, the Brussels, the Rome I and Rome II Regulations, now the whole set of Regulations on passenger rights? Why not a Regulation on consumer contract law; however, based on Article 153(3)(b) as N. Reich[43] proposed, which per definitionem could only provide for minimum protection under Article 153(5)?

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41 Even in the Judgment from 16.12.2008 C-205/07 *Gysbrechts*, ECJ 2008 I-nyr the ECJ did not prohibit advanced payments before the withdrawal period elapses.

42 See the Proposal for the Consumer Rights Directive, p. 2.

43 Reich, A European Contract Law or an EU Contract Law Regulation for Consumers? (2005) *Journal of Consumer Policy* 383.

IV. Effects of full harmonisation: pre-emption or protection?

The full harmonisation approach opens up a new legal battle field in which the ECJ and the European Commission will become the key players. Full harmonisation produces a double effect. On the one hand, competences in private law are shifted from national to European level, on the other Member States are barred from taking or maintaining national measures reaching beyond the harmonised EC level. In particular VTB[44], the first case to be decided under the Directive 2005/29/EC on unfair commercial practices, provides ample evidence on the importance of the pre-emption doctrine in fully harmonised secondary Community law. I will now embark on the possible effects of full harmonisation under the Proposal on national private law.

So far pre-emption of Community law (*Sperrwirkung des Gemeinschaftsrechts*) had its firm place in the Common Commercial Policy. Here it was – and still is to some extent – a fight over competences between the European Commission and the Member States. Article 133 EC grants the European Commission exclusive powers. Initially the ECJ had given Article 133 EC a broad understanding, thereby considerably extending the powers of the European Commission to the detriment of the Member States. However, in its landmark opinion 1/94 on the WTO agreement the ECJ took a more cautious stand. Today, most of the newly relevant areas coming under the notion of external relations lie in the hands of the European Commission and the Member States. Such a joint competence is not possible within the adoption of secondary Community law under Article 95 EC. Either the European Commission has the competence then it is for the Community to decide or the issue remains outside the scope of Article 95 and then it remains for the Member States to decide. The maximum-minimum divide is vertical, not a horizontal. Again there is a remarkable difference. Article 133 EC imposes an obligation of the European Commission to take measures in the field of CCP, Article 95 EC does not impose an obligation to fully harmonise all rules which are needed to implement the internal market.

Despite these differences there are also some similarities. Pre-emption will necessarily lead to conflicts over competences. Member States and/or parties might argue that the Proposal does not affect their competence in taking action to protect the consumer beyond outside and beyond the fully harmonised rules. The European Commission must argue the other way round in order to defend its concept of full harmonisation. Its potential effects are better the broader the scope of the Proposal reaches. In the following I will try to set out the potential scenario. The starting point is relatively easy:[45]

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44 Case C-261/07 and C-299/07 *VTB-VAB NV v Sanoma*, opinion of the AG Trstenjark, 21.10.2008.

45 Weatherill, Pre-emption, harmonisation and the distribution of competence, in: Barnard/Scott (eds), *The Law of the Single European Market*, (Oxford: Hart, 2002),

1. A national provision on consumer protection will be examined as to whether it is covered by the fully harmonised rules on consumer rights,
2. A national provision on consumer protection which is not pre-empted by the Proposal will be measured against primary Community law; i.e. against the proportionality principle.

The true problem, however, is how to define the scope of fully harmonised rules? The difficulty in defining the pre-emptive effect of secondary Community law results from the fact that contrary to CCP, there is no single provision in the EC-Treaty to be interpreted, but a whole series of rules and recitals which often lack a clear cut picture. EC secondary consumer law demonstrates that the conflicts where an agreement was difficult to achieve are often hidden in rather cloudy wording of the respective rules, or are transferred into the recitals, sometimes even in a contradictory form. All these uncertainties did not really matter as long as the minimum harmonisation approach applies. Full harmonisation dramatically changes the situation. If the national rule is covered by the Proposal, Member States have to give up their competence and follow the EC rules. The following list of issues is no more than a first attempt to set the scene:

1. National provisions *deviate from clear cut rules* in the Proposal, e.g. the national law sets out more comprehensive information obligations than Article 5 pCRD provides for specific form requirements contrary to Article 10 or 11 pCRD, brings off premises or distance contracts under the scope which are exempted under Article 20 pCRD, provide for a withdrawal period which is longer or shorter than 14 days as defined under the Regulation No. 1182/712 in combination with Article 12(1) pCRD.
2. National provisions *extend the protection beyond the rules* in the Proposal. However, the Proposal neither *explicitly defines* the scope of the respective rules, nor do the recitals nor does the *explanatory memorandum* provide guidance on what is meant by the Proposal; e.g. the notion of the consumer as defined in Article 2(1) pCRD. The Proposal hammers out a rather narrow interpretation as developed by the ECJ in its case law to the Brussels Convention and the Brussels Regulation. Are Member States allowed to extend the personal scope of protection to start-ups or to contractual transactions of the non-professional? What about vulnerable consumers? Can Member States act along the line of the Directive 2005/29/EC on commercial practices and introduce rules on how the most vulnerable consumers can be protected in consumer sales or are they pre-empted from such an attempt?

   A comparable problem arises with regard to the reach of Article 5(1) pCRD, which covers contracts for sales and services. Are only those contracts for services meant here which are explicitly regulated by the Proposal,

52; ECJ Case C-322/01 *Doc Morris* (2003) ECR I-14847 at 68; Judgment 16.12.2008 C-205/07 *Gysbrechts*, ECJ 2008 I-nyr.

in particular off-premises and distance contracts, or is Article 5 applicable to all sorts of contracts for services? If the latter is true, Article 5 would bar Member States from introducing more detailed information obligations with regard to particular services contracts, such as e.g. health care or care of elderly people. Does Article 5 overrule more general concepts in Member States on fraud, misrepresentation, *obligation de renseignement* in French law or *culpa in contrahendo* in German law which might on a case-by-case approach lead to more comprehensive information duties than those provided for under Article 5?[46]

A last example might be taken from the field of standard contract terms. Are Member States barred from maintaining or establishing their proper list of prohibited terms? This would be a most far reaching intervention into the autonomy of national private law. Member States would have to turn the clock back and re-start from scratch. The Proposal remains silent on all these issues and the list of examples could easily be prolonged.

3. National provisions *define a level of protection* where the Proposal provides for a *general clause* or a rather *vague wording* which does neither directly nor indirectly cover the issue. Two examples might illustrate what is meant.

   The Proposal does not deal with language issues. Article 31(1) pCRD states that contract terms shall be expressed in plain, intelligible language and be legible.[47] Article 31(4) pCRD points out that Member States shall refrain from imposing additional presentational requirements as to the way the contract terms are expressed or made available to consumers. Are Member States free to introduce particular language requirements with regard to standard terms?

   Article 27(2) pCRD formulates in rather broad terms that 'the consumer may claim damages for any loss not remedied under the rules of non-conformity. Does this cover the costs of repair?[48] Is the standard of liability a strict one? And if yes are Member States barred from tying liability to fault? The grey and black list of prohibited terms are full of legal terminology which need specification and interpretation. All these questions will have to be decided by the ECJ.

4. National provisions *extend the level of protection* where the Proposal deals with *similar issues* in a narrower way. The new rules on consumer sales do not decide the old question of whether the consumer should be entitled to sue not only the seller but also the producer.[49] However, the only addressee

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46 Cf. Schulte-Nölke, Scope and Role of the Horizontal Directive and its Relationship to the CFR, *in this volume*.

47 Cf. Nordhausen Scholes, Information Requirements, *in this volume*.

48 See reference of the German Federal Court of Justice 14.1.09 raising the question of whether Art. 3(3) 1) and 2) oblige the repairer to cover the costs resulting from the dismounting of floor tiles.

49 See Green Paper COM(2006) 744 final at 15. In preparation of the report due under Directive 99/44 the European Commission had launched a tender which was meant

mentioned in the set of remedies made available is the trader as defined in Article 2(2) pCRD. Full harmonisation would imply that those Member States granting remedies also against the producer would have to abolish their national more protective provisions. This would create distortions in France and in most Scandinavian countries.

5. National provisions *deviate from newly introduced legal concepts* which are not in compliance with the Proposal. Despite all the preparatory work of the acquis group and the study group the European Commission introduces new legal concepts.

   Material possession shows up various times in Recital (26), Articles 12(2), 17, 22, 23, 28, and in Annex I pCRD. However it is not defined. The Proposal obviously means 'receipt'. But does this make a difference?

   The order form is legally defined in Article 2(11) pCRD and reappears in Articles 10 and 12(2). The European Commission obviously goes back to an old idea already enshrined in the first draft on distance-selling. Here the European Commission intended to regard the information to be provided by the trader as the offer, in line with French law, but contrary to German law.[50] The legal classification of the order form is far from being clear.

   Ancillary contracts are defined in Article 2(20) and 18(1) pCRD. Are they different from linked agreements? The definition can be read so not to include credit agreements, which would leave more lee-way to Member States. But is this correct?

6. National provisions *reach beyond contradictory concepts and definitions* in the Proposal. Article 2(6) pCRD does no longer request the presence of an organised distance-selling scheme run by the trader up to the conclusion of the contract, Recital (12). There is some uncertainty as to what extent those contracts are covered where the trader combines the two marketing strategies. Article 2(8) b) pCRD treats as off-premises contracts also those where the contract had only been negotiated but not concluded outside business premises. A similar rule is missing with regard to distance-selling contracts, although Recital (13) might be read so as apply the rules on distance-selling contracts those concluded via a distance communication means even if it has been negotiated outside business premises.[51]

Full harmonisation also entails institutional changes. Member States' courts are no longer autonomous in how to interpret and decide the open issues. They will have to refer all these open issues to the European Court of Justice. If one takes into consideration that the ECJ will become the key player in the

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to initiate investigation on the rules of the Member States with regard to exactly this question. But the study has never been realised.

50 Micklitz, Der Vorschlag für eine Richtlinie des Rates über den Verbraucherschutz bei Vertragsabschlüssen im Fernabsatz, (1993) *Verbraucher und Recht* 1993, 129.

51 See Howells/Schulze, Overview of the Proposed Consumer Rights Directive, *in this volume*.

interpretation of standard terms, the competence shift is indeed outrageous. The ECJ as it stands is certainly not equipped to decide all these issues. That is why a CFI might be needed who specialises in private law matters. The costs of the Directive are therefore much higher than indicated, if we set aside the question, whether the shift is feasible and useful.

But it is not the ECJ alone who is strengthened to the detriment of the Member States' courts. Full harmonisation would enhance the monopoly of the European Commission. Each and every change of a fully harmonised Directive will have to undergo the full legislative procedure. The initiative to take action, however, lies in the hands of the European Commission. One might wonder whether full harmonisation would not call for a change in the legislative procedure. Member States should be equally allowed to set the machinery into motion. The most far reaching changes in form of a bureaucratisation take place in the field of the control of standard contract terms. Article 39 pCRD starts from the premise that standard terms are controlled by competent national authorities. Does this mean that courts are excluded from the control? Be it as it may, the competent authorities will have to notify to the European Commission those terms which they deem relevant for the purpose of amending the Directive. Does this mean that courts, if they remain competent, have to notify their decisions to a newly established competent national authority? The Proposal intends to establish the comitology procedure in private law. Here the European Commission would be put in an ever stronger position, as it will in practice decide over the question whether the two Annexes to the proposed Directive will be amended or not. What is totally overlooked are the possible effects of the Proposal on terms which have been declared void before the envisaged adoption of the Directive and which are not covered by the two Annexes.

Full harmonisation invites business to attack Member States' laws if they reach beyond the fully harmonised level. The diverse explicit prohibitions foreseen in the Draft provide for additional incentives. Full harmonisation turns the existing litigation strategies upside down. In the past, consumer organisations were trying to extend the scope of application of consumer law, if it provided for rules reaching beyond national law. Now consumer organisations have to narrow down the scope of EU consumer law, if national law provides for better protection. All sorts of strategies might be invented to keep national consumers away from fully harmonised EU law. Consumers may argue that they are no longer consumers in the meaning of the Proposal, or that they are particularly weak consumers who are not covered by the Proposal, or they may pretend that the standard terms have been individually negotiated if national control system provide for stricter control standards than the EU system.[52]

In sum: legal certainty as advocated for in Recitals (7) and (8) is an illusion! Full harmonisation concentrates ever stronger powers in the hands

[52] See Zoll, Unfair Terms in the Acquis Principles and Draft Common Frame of Reference: A Study on the Differences between the Two Closest Members of one Family, (2008) *Juridica International* 69.

of the Community institutions, the ECJ and the European Commission. Judicialisation and bureaucratisation work to the benefit of the EU and to the detriment of the Member States institutions.

V. The legislative procedure designed to legitimate the plea for full harmonisation

Since the European Single Act the European Commission has developed a kind of a standard procedure which it follows more or less consistently in law-making. Whilst the chronological order may differ, the substance remains nearly identical:

1. the European Commission seeks a political mandate from the Council, which might be enshrined in policy programmes;
2. this mandate is transformed in a call for tender asking for advice through research studies;
3. the results of the studies provide the ground for a Green Paper in which the European Commission sketches a basic outline of potential options for action;
4. an impact assessment often undertaken by a consultancy firm provides guidance on the possible political and/or economic implications of a European regulatory activity;
5. on the basis of the Green Paper the Commission launches a consultation procedure[53] via the Internet, which is open to everybody, although the Commission sometimes invites particular circles to comment on the initiative;
6. sometimes the consultation procedure concludes with a public hearing in Brussels to which a selected number of stakeholders are invited;
7. the results of the consultation procedure serve as a basis for either presenting a White Paper to the public which contains clearer options for action or directly drafting a first proposal of a directive or regulation.

The process of law-making attracts attention in political and legal science. It is common ground that the new mechanism is meant to increase the output legitimacy[54] of the European Commission's activities. It is equally common ground that the European Commission is trying to organise and to finance a substitute for the absence of a European society by establishing academic networks, by seeking input from European and national lobby groups, from

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[53] Which is again formalised: – Towards a reinforced culture of consultation and dialogue – General Principles and minimum standards of consultation of interested parties by the Commission, Communication of the Commission, COM(2002) 704 final.

[54] See for the distinction between input and output legitimation, Scharpf, *Governance in Europe, Effective and Democratic*, (Oxford: Oxford University Press, 1999).

European and national non-governmental organisations and by consulting governments at an early stage. Most of the activities can be reconstructed via the internet. They go back to selection procedures where in principle everybody and every organisation might apply. The European Commission is not deliberately shaping its proper societal environment which surrounds the law-making process. However, it is nevertheless often hard to understand why particular groups, stakeholders and the like are consulted and others are not. This is exactly the weakness of a societal process which is politically organised and which does not emerge out of civil society.

I will limit my analysis to just one question: the policy shift from minimum to maximum harmonisation. I will leave the question where the policy shift comes from to the next and last point of my analysis. My hypothesis is that the process of law-making, as characterised by the symbolic participation of stakeholders and a cacophony of viewpoints, facilitates to a large extent the European Commission's opportunities to get its original ideas realised. The participatory outlook hides the authoritarian character of the whole procedure. Consultancy firms that tend to accompany the whole law-making process serve as a buffer between the European Commission and the "involved" European society. The original policy decision that maximum harmonisation is feasible and needed and how it went through the organised consultation procedure is a perfect example for such an EU organised legitimacy process. It cannot replace, however, the urgently needed public debate on the impact of full harmonisation of consumer law on the civil society.

1. The test case: the UCP Directive

The issue of full harmonisation showed up, if I am not wrong, for the first time within the legislative procedure of what later became the Directive on unfair commercial practices. In 1999 the European Commission had launched three tenders, where the choice of the appropriate legal technique was one of the key questions the contracting party had to answer. Here, at least in the tender, maximum harmonisation was not yet the guiding policy, it was indeed a true question where the European Commission sought advice. By the time the contracting parties were academic institutions and not yet consultancy firms. Based on the three studies, the European Commission produced a Green Paper[55] in 2001 where the degree of harmonisation played already a key role, although the language was still relatively cautious. The breakthrough came in the 2002 follow-up communication, where the following by the time rather surprising statement can be found:[56]

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[55] Green Paper on European Union Consumer Protection, COM(2001) 531 final.

[56] Follow-up Communication to the Green Paper on EU Consumer Protection COM(2002) 289 final.

> A framework directive should bring about:
> *maximum harmonisation* with a high level of consumer protection. Given the need to achieve a properly functioning internal market, further consultation is needed on the required level of harmonisation in the framework directive.

In the meanwhile the European Commission had set the newly introduced impact assessment into motion. It is worth quoting the relevant statement from the Commission Staff Document in which the findings are summarised. It first puts the project into the broader policy frame:[57]

> The **benefits** of doing this were recognised in increased consumer choice, pressure for efficient pricing and price convergence, effective competition, and macro-economic benefits accruing from functioning internal market. As explained above, this will contribute to the **Lisbon European Council** goal of enhancing the EU's **competitiveness** and creating sustainable economic growth. It takes account of the wishes expressed by the **European Parliament** which has called for common general rules enabling a high level of consumer protection to be adopted as a matter of priority and highlighted the fact that current legislation hinders the implementation of a genuine internal market for consumers. It is also consistent with the Commission's priorities as set out in its **Internal Market Strategy** and **Consumer Policy Strategy**. Finally, action in this area will also have political benefits in enabling **the clearer identification of consumer rights** helps to promote the image of the EU and brings it **closer to the** EU **citizens** in a very practical way. As well as the distortions of the market which arise from unfair commercial practices, they often lead to serious harm to individual consumers' welfare as well as causing them severe anxiety and distress. The EU can thus make a real contribution to the **well-being** of EU citizens.

The European Commission reiterates the Resolution of the European Parliament:[58]

> The European Parliament (…) considers that common general rules enabling a high level of consumer protection should be adopted as a matter of priority, EP Resolution on the implications of the Commission Green Paper on European Union Consumer Protection for the future of EU consumer policy, 13 March 2003, paragraph 1. The European Parliament (…) takes the view that maximum harmonisation may be an effective means of eliminating the fragmentation of business-practice and consumer-protection

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57 Extended Impact Assessment SEC(2003) 724.

58 European Parliament resolution on prospects for legal protection of the consumer in the light of the Commission Green Paper on European Union Consumer Protection, 13 March 2003, paragraphs 6 - 8.

> legislation applicable to the internal market, so as to enable the latter to operate more smoothly and thereby raise consumer confidence; (…)" Insists that maximum harmonisation must aim at a high level of consumer protection (…) Is convinced that the principles of mutual recognition and law of the country of origin can only be fully implemented to all-round satisfaction once a sufficient degree of harmonisation and a high level of protection have been achieved.

And it then sums up what it believes to be the major finding of the impact assessment:[59]

> (…) a clear majority of the respondents to the survey of **national business associations expect a decrease of costs** resulting from the introduction of a general principle of fair commercial practices in a framework directive. Support seems to come from those who estimate the chances arising from the new approach to consumer protection in the long run positive (with *maximum* (author's emphasis) harmonisation bringing more legal certainty, less divergent national transpositions of EU directives and a scope for de-regulation).

2. The new Consumer Policy Strategy

What had happened between 2001 and 2003? We may recognise that a new consumer policy strategy has been developed which is obviously linked to the Lisbon Council and the Lisbon Agenda. This strategy is supported by the European Parliament and is said to require full harmonisation to the benefit of the well-being of the consumers. The solution can be found in the Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on a consumer policy strategy 2002-2006:[60]

> The Green Paper on Consumer Protection[61] set out options for the further harmonisation of rules on commercial practices, either on a case-by-case basis or supplementing this through framework legislation. There is also a need to review and reform existing EU consumer protection directives, to bring them up to date and progressively adapt them from minimum harmonisation to 'full harmonisation' measures. The Green Paper and the Commission's strategy on services (2000 888) make it clear that the simple application of mutual recognition, without harmonisation, is not likely to be appropriate for such consumer protection issues. However, provided a

59 At p. 21.

60 OJ (2002) C 137/2.

61 COM(2001) 531 final.

sufficient degree of harmonisation is achieved, the country of origin approach could be applied to remaining questions.

The Council welcomed in its resolution of 2 February 2002[62] the new consumer strategy, however, without discussing the shift from minimum to maximum harmonisation explicitly. For the European Commission the Council Resolution constituted the decisive step in developing and given shape to its policy shift from minimum to maximum harmonisation. To be abundantly clear on what had happened in 2002: the European Commission got the mandate from the Council to execute its new consumer policy strategy i.e. to bring the so far minimum harmonisation Directives to a full harmonisation level. The European Commission openly announced its policy shift, it presented it to the European Parliament and to the Council. It received support at all levels, sometimes more directly by the European Parliament, sometimes more indirectly by the Member States in the Council. Nobody familiar with the EC consumer policy could therefore be surprised the Proposal and its full harmonisation approach.

True, the Council Resolution is not a carte blanche. Member States and the European Parliament reserve the right to discuss the implications of the full harmonisation approach with regard to each and every minimum directive. The European Commission, however, took a clear stand. Since 2002 full harmonisation ranked on top of its agenda. All the rhetoric which now shows up in the Proposal has been developed in the Lisbon Agenda[63] and the 2002 Consumer Policy Strategy. What matters, however, is the way in which the European Commission organised the legislative process in order to execute its policy. The mechanism which is set into motion in order to prepare the revision of the minimum directives and the way in which the consultation mechanism is organised remains para-democratic. The current Proposal is a paradigmatic example.

3. The implementation of the new consumer strategy in the revision of the consumer acquis

The European Commission draws its legitimacy to foster full harmonisation from the consultation of the 2006 Green Paper, from 2007 public hearings with stakeholders and from the 2007/2008 Impact Assessment.

In December 2006 the European Commission published its Green Paper on the Revision of the Consumer Acquis. As usual the European Commission invited all interested parties to comment on the Green Paper. In response to

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62 OJ (2002) C 11/1.

63 See under V.

its call the European Commission received more than 300 responses.[64] The European Commission did not undertake the evaluation itself, but delegated the screening of the bulk of papers to a consortium of consultancy firms GHK, Civic Consulting and Bureau van Dyck.[65] On the basis of these findings the European Commission prepared in 2007 a *Working Staff Document*, which contains the following executive summary:

> A majority of respondents call for the adoption of a horizontal legislative instrument applicable to domestic and cross-border transactions, based on full targeted harmonisation; i.e. targeted to the issues raising substantial barriers to trade for business and/or deterring consumers from buying cross-border. The horizontal legislative instrument should in the view of most respondents be combined with vertical revisions of the existing sectoral directives (for example revision of the Timeshare and Package Travel Directives).

This does in no way comply with the scrutinised analysis which was undertaken by the consortium. Here the picture is much less clear. All sorts of positions are identified:

> Although overall, the largest group of contributors favoured targeted full harmonisation (33%), it is important to note that full harmonisation was favoured by 29% of the contributors and minimum harmonisation by 24%. Therefore, the majority (i.e. 62%) favoured full or targeted full harmonisation. Minimum harmonisation, targeted full harmonisation and full harmonisation are by far the three favourite options with only 13% of contributors who suggested alternative options. The 28th regime was chosen by only one contributor.
>
> While the largest group within the business sector indicated preferring full harmonisation (42%) (almost 80% of the business sector favoured full or targeted full harmonisation), the largest group within the consumer groups favoured the minimum harmonisation approach (31%). Businesses preferred full harmonisation, especially if the principle of the consumer's country of residence would be applied (acceptance of the draft EU Rome I

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64 See Commission Staff Working Paper, Report on the Outcome of the Public Consultation of the Green Paper. Without number and date (probably 2007), but available on the website of DG SANCO, http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/acquis_working_doc.pdf, at p. 3.

65 Preparatory Work for the Impact Assessment on the Review of the Consumer Acquis DG HEALTH AND CONSUMER PROTECTION Analytical Report on the Green Paper on the Review of the Consumer Acquis submitted by the Consumer Policy Evaluation Consortium Date: 06/11/2007: http://ec.europa.eu/consumers/rights/detailed_analysis_en.pdf. It is analysed by M. Loos, Review of the European Consumer Acquis, 2008.

instrument) – so they will not have to deal with 27 different legal frameworks. Consumers mentioned preferring minimum harmonisation since this approach allows Member States to go beyond the minimum standards. It has to be stated though that for both stakeholder groups the opinions were divided within the group itself. For both consumer groups and the business sector the second largest group of contributors favoured targeted full harmonisation (29% and 37% respectively).

The group of academics, legal practitioners and public authorities favoured minimum harmonisation. However, an equally large proportion of contributors within the group of legal practitioners and public authorities respectively favoured targeted full harmonisation (i.e. 39%) and other options (i.e. 26%). Five out of seven contributors of the "others" group favoured the minimum harmonisation approach.

Regarding Member States contributions, targeted full harmonisation was the option supported by the largest group (12). Five Member States supported option 3 "full harmonisation" whereas four Member States supported option 1 "minimum harmonisation". Four Member States opted for 'other options' and one EFTA/EEA country did not respond.

Harmonisation variant

In addition to the degree of harmonisation, the contributors were requested to express their opinion on some of the suggested variants (these were: no variant, mutual recognition, country of origin principle, other option). It is important to look at the combinations of the degree of harmonisation and variant chosen. With regard to those who favoured minimum harmonisation (24% of total contributions), 35% opted for minimum harmonisation with no variant attached to it. This was closely followed by the group choosing minimum harmonisation and "other option" (30%). A high proportion of the latter explained being in favour of the country of destination principle rather than the country of origin and thus in accordance with Rome I. Minimum harmonisation and mutual recognition or country of origin principle (option 2 in the Green Paper) was favoured by 13%, minimum harmonisation and mutual recognition by 12% and minimum harmonisation and country of origin principle by 10%.

With regard to those who favoured targeted full harmonisation overall (33% and thus the favoured approach across all stakeholder groups and countries), the majority (52%) expressed being in favour of targeted full harmonisation and mutual recognition as a variant (option 1 in the Green Paper). 21% favoured targeted full harmonisation and another option for the variant and this group was closely followed by those who preferred targeted full harmonisation with no variant (20%). Only 7% indicated being in favour of targeted full harmonisation and the country of origin principle.

> Regarding Member States' contributions, five Member States supported mutual recognition (combined with targeted full harmonisation). Only one Member State opted for the country of origin principle.
>
> The majority opted for "other option" (13) or no variant (6). The most frequently cited other option was the country of destination principle. Five Member States supported mutual recognition and only one Member State chose the country of origin principle. One EEA/EFTA country did not reply.

The obvious contradictions are surprising. Whereas the consortium obviously aims at doing justice to the heterogeneity of positions and stays away from drawing conclusions, the Working Staff Document condenses the 300 responses into what is the policy of the European Commission anyway. The analysis by the consortium "does not draw political conclusions from the consultation process",[66] says the European Commission, which is correct, but it is European Commission itself which draws highly doubtful conclusions. The publicly available evaluation of the consultation procedure contributes to the legitimacy of the process, but not in the way the European Commission uses it. [67]

The second legitimacy pillar is the stakeholder conference organised on 11 November 2007 where according to the website of DG SANCO around 200 persons participated. The list of participants – 134 only –[68] and speeches given are available on the website.[69] The question remains of who has been invited under what criteria. No evidence is provided. The European Commission does not summarise the findings of the public hearing. What seems to count is the mere fact that such a hearing has been organised, no matter who was there and what has been discussed.

The third pillar constitutes the Impact Assessment Report (IAR)[70] which must be regarded as the *key document* which lies behind the current draft. The IAR together with the comprehensive annexes[71] illustrates the policy and the strategy behind the Proposal as well as the efforts the Commission has undertaken to meet the self set objectives of the Consumer Policy Strategy aiming at full harmonisation.

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66 See Commission Staff Working Paper, p. 3.

67 One might not exclude that the European Commission influences indirectly by commenting on the evaluation work undertaken by the European Commission, see for similar experiences in the evaluation of the consumer programme, Micklitz, in: *Yearbook of Consumer Law 2008*, Twigg-Flesner/Parry/Howells/Nordhausen (eds), (Aldershot: Ashgate, 2007), p. 35.

68 http://ec.europa.eu/consumers/rights/finallist_conference14112007.pdf.

69 http://ec.europa.eu/consumers/rights/cons_acquis_en.htm.

70 http://ec.europa.eu/consumers/rights/docs/impact_assessment_report_en.pdf.

71 http://ec.europa.eu/consumers/rights/docs/proposal_annex_en.pdf.

Systematically speaking, the Impact Assessment Report which accompanies the Proposal and which was obviously – no date is given – accomplished in 2008, is based on the 'Preparatory Work for the Impact Assessment on the Review of the Consumer Acquis' which was undertaken by a consultancy consortium.[72] The latter reflects the way in which the consortium interprets the more than 300 responses. The final responsibility of the 2008 Impact Assessment Report, however, lay in the hands of the European Commission. The consortium provided 'assistance' in the consultation dialogue and the evidence gathering. The IAR together with the annexes comprises around 300 pages.

I will limit my analysis to present first the work which has been undertaken by the European Commission since the adoption of the Green Paper and the evaluation of the responses and then to try to show how the European Commission 'geared' the consultation and consultation process in the aftermath of Green Paper and its review in order to undermine the 'expected results', i.e. targeted full harmonisation of four directives.

In the aftermath of the evaluation of the responses of the Green Paper the European Commission undertook with the assistance of the consultancy consortium an impressive series of actions, which might be broken down in nine steps[73]:

1. On 20 December 2007, two questionnaires (the first one targeted at businesses, the second targeted at consumers) were sent out to numerous consumer and business stakeholders by the contractor. In addition to the aforementioned questionnaires, the contractor incorporated the results of two Eurobarometer polls commissioned by DG SANCO on consumer and retailer attitudes.
2. More than 20 face-to-face meetings with key business actors were conducted by the contractor under the supervision of the Commission. These interviews were conducted with traders and industry associations in January and February 2008. In addition, the Commission services met with several industry associations in various Member States.
3. An expert panel comprising legal and economic experts and consumer representatives was set up to advise on the policy options and their likely impacts. The expert panel met twice in the course of the impact assessment.
4. A full-day stakeholder workshop targeted at businesses was organised on 6 February 2008 with the purpose of discussing the effects of changes to EU

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[72] Preparatory Work for the Impact Assessment on the Review of the Consumer Acquis DG HEALTH AND CONSUMER PROTECTION Analytical Report on the Green Paper on the Review of the Consumer Acquis submitted by the Consumer Policy Evaluation Consortium *Date: 06/11/2007*, http://ec.europa.eu/consumers/rights/detailed_analysis_en.pdf.

[73] Working Staff Document at p. 5. The numbering is the author's alone.

consumer legislation affecting companies. More than 40 business representatives attended the workshop.

5. A consumer focus group was organised on 13 February 2008 with more than 20 consumers. Participants were identified with the assistance of the Belgian European Consumer Centre. The purpose of the focus group was to assess the impacts of the current consumer protection rules on consumer behaviour and to estimate the effects of the envisaged legislative changes on their confidence in cross-border shopping.
6. A one-day workshop was organised by the contractor on 29 February 2008 within the framework of the European Consumer Consultative Group (ECCG) associating representatives of consumer organisations. The purpose of the workshop was to discuss the effects of changes to EU consumer legislation affecting consumer protection and consumer confidence, particularly in cross-border transactions. The ECCG members from Luxembourg, Italy, the Netherlands, Germany, Sweden, EUROCOOP and BEUC attended.
7. In addition, the Commission services held bilateral meetings with BEUC, the European consumers' organisation and BEUC representatives participated in the consumer focus group, the expert panel and the ECCG subgroup meeting.
8. The Commission held two separate consultations on the Distance Selling and Doorstep Selling Directives to take stock of the effectiveness of these Directives in the current market place. All interested parties were invited to submit replies to the Commission, respectively by 21 November 2006 and 4 December 2007.
9. Finally, other Directorate Generals were associated in the impact assessment process through the Impact Assessment Interservice Steering Group on the review of the acquis. The Steering Group was first convened in July 2006 and met six times in the course of the impact assessment.

Whilst the description seems highly comprehensive, the information provided in the IAR is a limited one. The prime information, the questionnaires, the interviews, meetings, records, minutes are not made available. Annex 6[74] contains at least list of stakeholders and a very valuable summary of their views expressed on the diverse regulatory options, the problems and the suggested solutions. The IAR constantly uses the same key words which reappear in the Proposal: the better functioning of the internal market and the enhancement of consumer confidence.

As a starting point I have chosen the different causes for the low level of consumer confidence. Consumer confidence arose already in the early nineties as a promising forward looking project.[75] However, it changed over time and

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74 At p. 211.

75 Weatherill, The evolution of European Consumer Law and Policy: From Well Informed Consumer to Confident Consumer, in: Micklitz (ed.), *Rechtseinheit oder*

has been blamed to misusing the consumer confidence argument.[76] Today is seems as if consumer confidence has become the wonder weapon to justify EU competence in the field of consumer law.[77] The European Commission is well aware of the problem that rights based knowledge does not suffice. The IAR clearly spells out:[78]

> There are three main causes for this problem (the low level of consumer confidence): reasons of a practical and regulatory nature (e.g. language, geography, tax regimes etc.) which are unrelated to EU consumer law; reasons of a practical and regulatory nature, which are affected by EU consumer law (e.g. delivery and complaint handling problems); other factors that are linked to EU consumer law, such as insufficient knowledge of the law by consumers, difficulties in obtaining redress and poor enforcement.

The problem for the Commission was how to turn down all those arguments which in particular academic writers are bringing forward to challenge the Commission position that consumer confidence would be increased by full harmonisation. The first step is to play down the soft factors such as language, habits and customs and to stress the importance of rights:[79]

> The shortfalls in consumer confidence have a number of causes but according to the best available data (...) *they mainly stem from the fact that consumers are insufficiently aware of their rights*. Many consumers believe that they would be exposed to a lower level of consumer protection when buying abroad. They also believe that there is a higher risk something will go wrong when they buy cross-border (e.g. non-delivery or delivery of defective goods bought over the Internet) and in this case it will be more difficult to seek and obtain redress. This is a problem of perception, which does not necessarily reflect the reality (e.g. the consumer may be better-off under the law of the foreign trader than under his own law), and because of the fragmentation is difficult to solve. Indeed, the legal fragmentation and the related uneven level of consumer protection across the EU make it difficult to conduct pan-European education campaigns on consumer rights, mediation or other alternative-dispute resolution (ADR) mechanisms.

Rechtsvielfalt in Europa? Rolle und Funktion des Verbraucherrechts in der EG und den MOE Staaten, (Baden-Baden: Nomos, 1996), p. 423.

76 Wilhelmsson, The Abuse of the "Confident Consumer" as Justification for EC Consumer Law, (2004) *Journal of Consumer Policy* 317.

77 Weatherill, European Private Law and the Constitutional Dimension in: Cafaggi (ed.), *The Institutional Framework of European Private Law*, (Oxford: Oxford University Press, 2006), 81 at p. 105.

78 At p. 12.

79 At p. 8.

So there are obviously no sufficient data on the other causes. But why has the European Commission not undertaken research to deepen its knowledge and to rank the different causes? However that might be, the second step is to transform all three causes mentioned into a regulatory dimension:[80]

> The regulatory problems which consumers perceive when they shop cross-border are based on the consumer organisations survey, the European Consumer Consultative Group (ECCG) workshop, the ECC survey and the consumer focus group.
>
> The ECCs consider that cross-border factors, which are perceived by consumers as problems of a practical nature, constitute the most important factors inhibiting consumers from engaging in cross-border shopping.
>
> The most important of these factors include the following: use of the after-sales service, complications with regard to delivery: e.g. non-delivery or delay of delivery and damage, application of guarantees/requests for refunds, complaints' handling problems.
>
> Even though the first three factors are perceived by consumers as being of a practical nature, *they all have a regulatory dimension* and are relevant under the Consumer Sales Directive or the Distance Selling Directive. For example, the lack of an EU-wide definition of delivery and diverging national rules on the passing of risk (in the event of loss or deterioration of goods during transport) may affect consumer confidence. Apart from being a source of confusion for consumers, fragmentation makes it more difficult for mediators to settle a dispute out of court. Other complications which consumers may face with delivery (i.e. delivery of a damaged product or partial delivery) are tackled by the legal guarantee for defective goods, which is provided for by the Consumer Sales Directive. Similarly, the application of consumers' rights in respect of defective goods (e.g. refunds in case of defective goods which cannot be repaired or replaced) is covered by national laws transposing this Directive.
>
> The consumer complaints' handling problems as well as problems with the use of the after-sales services, in the majority of cases, are related to the *application of the legal and commercial guarantees* for defective goods or the exercise of the right of withdrawal, which is provided for by the national laws transposing the Distance Selling Directive. The issue of non-delivery of goods in transit and the financial consequences for the consumer are also practical issues which are dealt with by diverging national laws, in the absence of harmonised EU legislation in this field.
>
> From the ECC questionnaire response, it appears that consumers are most concerned about *after-sales services*, as they fear that they would not be able to resolve problems with a trader in a different country. This was further confirmed by the consumer focus group. Consumers are also concerned about delivery problems. Those problems are confirmed by the European

[80] At p. 13.

> Online Marketplace Report on Consumer Complaints, which highlighted the increasing number of complaints in relation to e-commerce, the vast majority of which involved the non-delivery of goods.

In a nutshell: consumers are lacking confidence because they do not know their rights. Fragmentation creates confusion. Once the rights are fully harmonised, the information of consumers may more easily to be improved. The European Commission should then start European-wide information campaigns on consumer rights.[81] The reduction of the different causes to the regulatory dimension is key for the whole concept behind the Proposal. This is the decisive bifurcation. Once it is clear that the low level of consumer confidence is the result of the lacking rights based knowledge the way is free to shape the enquiry so as to guarantee that only regulatory options can be discussed.

The European Commission offers to interviewees and the stakeholders' six regulatory policy options, a set of criteria under which the six options may first be assessed and a second set of criteria under which the six options may then be weighed against each other and finally a set of four criteria – the key parameters which show up in the Proposal to justify and legitimate the competence under Article 95 EC and compliance with the subsidiarity and the proportionality principle. This all sounds very ambitious and it must be a burdensome exercise. However, the methodology is not convincing as the set different sets of criteria provided at the different level are selected and therefore determine the outcome of the whole impact assessment.

Policy options: The IAR offers six policy options, three are based on full harmonisation, the remaining three can be broken down in self-regulatory options, minimum harmonisation and minimum/maximum harmonisation combined to country of origin principle. The last three are discarded right from the beginning as they cannot overcome the fragmentation – information – rights – trilemma.[82]

Weighing parameters: These must be read against the background that three options are discarded due to the starting assumption on the role of knowledge/rights:[83]

> In particular, the participants were asked to assess the following: rate the regulatory burden deriving from the current legal situation; rate the significance and relevance of the changes under consideration; rate the impact of the changes under consideration on the regulatory burden.
>
> A similar approach was adopted during the workshop organised within the context of the European Consumer Consultative Group (ECCG) in

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81 The fragmentation and the related uneven level of consumer protection make it difficult to conduct pan-European education campaigns on consumer rights and to carry out alternative dispute resolution mechanisms, at p. 2.

82 At pp. 17, 21, 26.

83 At pp. 18 and 25.

> February 2008. Representatives of consumer organisations were asked to rank the proposed legislative changes in order to assess the following: whether the legislative changes under consideration would increase or reduce overall EU consumer protection and national consumer protection levels; whether the changes under consideration would increase consumer confidence in general and in cross-border shopping in particular; rank the changes in order of significance.

These parameters do not leave room for questions which do not fit into the agenda such as what about experimentalism in the Member States, what about competition of legal standards, what about the substance of consumer protection etc.

Assessment criteria: These are said to be used in weighing and balancing the six different regulatory options:[84]

The six policy options have been assessed by considering each of the legislative proposals included in terms of:

a) Economic effects, including: compliance/administrative costs of public authorities; increased/reduced costs for businesses such as administrative and compliance costs or costs for handling complaints and returns, legal advice, etc; consumers and other indirect effects for example on prices; consumer and business awareness and confidence; effects on SMEs and, effects on the internal market and competition.
b) Social effects, including the level of consumer protection, consumer empowerment, employment, etc.
c) Legislative effects (i.e. need to change EU legislation, effects as a result of other legislative instruments, and particularly Rome I).
d) Environmental effects, including effects on sustainable development due to transport costs, if relevant.
e) Effects on fundamental rights (this is a required consideration in IA, relevant rights include consumer protection itself (Article 38 of the Charter) and protection of personal data.

The findings are presented in an 'assessment grid' which rates and summarises the six regulatory options with regard to the five different expected effects (a)-(e). A closer look at Annex 5 demonstrates that the assessment grid remains highly superficial. The suggested social effects (see under b) of option 1 (minimum harmonisation) and option 4 (the targeted harmonisation) might serve as an example:[85]

> (Option 1) Little or no effect as the current protection levels would not be changed. Rome I would offer some increased legal certainty to consumers, but problems would persist when consumers make on-premises purchases

84 At p. 25.

85 Annex 5 at 31 and 45.

> when travelling since they will be subject to a foreign law and a different level of protection.
>
> (Option 4) The Policy option includes a number of changes which would increase the level of consumer protection at both EU and national levels. In a few cases, despite its beneficial effect at the EU level, protection levels in some Member States are reduced, such as in the case of common rules on withdrawal modalities, information requirements for distance sales and the obligation of consumers to timely notify a lack of conformity.
>
> By agreeing that the passing of risk occurs with the material possession of the good by the consumer, the latter is given higher legal certainty a better protection in case of damage during transport. The definition of distance and off-premises contracts will close loopholes, thus increasing confidence and reducing consumer detriment where no adequate protection existed before.
>
> (to be followed by a long list of examples evaluated in the same superficial way).

Last but not least the IAR analyses each of the six regulatory policy options under four criteria: (1) contributing to the better functioning of the internal market, (2) minimising the burden of EU legislation for business, (3) enhancing consumer confidence, (4) improving the quality of legislation.[86] From a methodological-analytical point of view the answer to the whole exercise is clear long before. The limited set of criteria per-determines the outcome. Targeted maximum harmonisation, option 4, is the solution in which all four parameters are best balanced out. *Quod erat demonstrandum*!

Epilogue: What is all this for? Is this science-based evidence? Is this economic analysis in action? The whole efforts to produce legitimacy, costs a lot of money, involves human resources and produces results which are easily foreseeable, which could be spelt out with much less effort and much less money, and – which all to perfectly comply with what the European Commission decided already in its Consumer Strategy Paper in 2002.

VI. From protection to efficiency – the new legal paradigm

Modern consumer law is nearly fifty years old. In this long or in terms of legal history short period, it has already changed its outlook three times. I will use four parameters of analysis in order demonstrate the changes: the Leitbild, the nature of the consumer policy, the territorial character and the model of justice enshrined.

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[86] At p. 26 et seq.

Consumer Leitbild	Consumer policy	Territorial character	Model of justice
Weak consumer protection	Independent social policy	National	Social + distributive justice
Circumspect consumer information and withdrawal	Pick-a-pack with market integration	European	Access justice + anti-discrimination
Economically efficient consumer choice	Submitted to industrial policy	EU in the World	Consumer confidence = the new economic approach + Educational training

The origins of consumer law are closely linked to the rise of the social welfare state of the fifties and sixties, first in the United States, then in the Member States of the European Community and beyond. Consumer law formed an integral part of the emerging set of social policies, where the state accepted responsibility to reshape the boundaries of private power and individual autonomy. Consumer policy was regarded as a largely independent policy field.[87] Consumer law was meant to counterbalance overarching market paper and misuse of private autonomy. It was a national project, meant to grant social justice to the weaker parties of the society, of the consumer society, of the contract and in non-contractual relations.[88] Consumer law as a nation state device might therefore be understood as being meant to realising distributive justice. *The Leitbild was the weak consumer*. This first period did not last more than 20 years.

In the eighties and nineties of the last century the European Community took over consumer law – and gradually changed its outlook. It became part of measures which were initiated to complete the internal market. Consumer law and market integration went hand in hand. These were the heydays of European Community consumer policy. The success story is grounded in the pick-a-pack procedure; consumer policy and consumer law was realised in between the overall project of completing the internal market. A whole set of directives were adopted establishing mandatory information requirements and where appropriate the right to withdrawal.[89] The key paradigm was and is the market – no longer social and distributive justice. The consumer must be made fit for the internal market. He or she must be granted rights so as to become an active player in the market. The European consumer law of the eighties

87 Janning, Die Spätgeburt eines Politikfeldes. Verbraucherschutz in Deutschland, (2004) *Zeitschrift für Politik* 401.

88 With regard to Germany, Reich/Tonner/Wegner, (1976) *Verbraucher und Recht*, with regard to the United Kingdom Howells/Weatherill, *Consumer Protection Law*, (Aldershot: Dartmouth Publishing, 2005).

89 Weatherill, European Private Law and the Constitutional Dimension in: Cafaggi (ed.), *The Institutional Framework of European Private Law*, (Oxford: Oxford University Press, 2006) 81 at 87; Rösler, *Europäisches Konsumentenvertragsrecht, Grundkonzeption, Prinzipien und Fortentwicklung*, (Munich: C.H. Beck, 2004); Weatherill, *EU Consumer Law and Policy* (Cheltenham: Elgar, 2005).

and nineties is still consumer law, but it has changed its outlook. The national social welfare state is gradually but steadily replaced by a European legal order which has not state at its centre which could and should take care of the weaker parties of the society. Such a European consumer law must aim at making the consumer fit for the market, access barriers to the market must eliminated and equal treatment in the market must be guaranteed. Social justice is replaced by what I called elsewhere 'access justice' – *Zugangsgerechtigkeit* – and anti-discrimination.[90] *The Leitbild was the well-informed, circumspect consumer*. The second period is now coming to an end – if the plans of the European Commission will come true.

Due to the minimum harmonisation approach this Leitbild could guide European contract law. But it must not guide national contract law. The minimum harmonisation approach allows the Member States of the European Community to maintain the Leitbild of the weak consumer, to understand consumer law as consumer protection law and to defend the concept that consumer law is inherently linked to the social welfare state, to social justice in an ever more globalised world. There is no agreement between the Member States on how consumer law should look like. The varieties of capitalism[91] leave room for many different Leitbilder. Minimum harmonisation does not only create a common platform. It allows and enhances competition of legal orders. This paradigm arose in the eighties and is linked to the White Paper on the Completion of the Internal Market. It also guided more implicitly than explicitly the European consumer policy. The directives of the nineties were the result of a maximisation policy. The European Commission chose the best out of the different national legal orders and condensed it in a European bottom line rule. The bottom line rule then could enhance legal experimentation in the Member States. The consumer law compendium could and should be read as a reach source of national legal experimentalism. Often national legal experimentalism has a clear cut background which results from national or even regional grievances. Maximum harmonisation will and shall set an end to national legal experimentalism. Language is telling. Experimentalism has a positive connotation,[92] fragmentation has a negative one. Experimentalism implies a bottom-up, fragmentation a top-down perspective.

The new Leitbild is the economically efficient consumer. He or she has to make choices. The whole Proposal as well as the background documents which underpin the preparation of the Proposal constantly refer to the consumer who is not able to 'reap up'[93] the benefits from cross-border selling. The consumer

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[90] See Micklitz, From Social Justice to Access Justice in Private Law: the European Challenge, EUI Working Paper, 2009 forthcoming.

[91] See Wilhelmsson, Varieties of Welfarism in European Contract Law, (2004) 10 *European Law Journal* 712.

[92] See for such an understanding, Wilhelmsson, Private Law in the EU: Harmonised or Fragmented Europeanisation, (2002) 1 *European Review of Private Law* 77.

[93] These are the words the Commission uses, see Proposal at p. 2.

the European Commission has in mind is not the one who is sitting at home in his or her fauteuil and goes shopping around the corner if there is need, or the one, who is comparing prices offered on the Internet with those from his local shop. Now, the consumer shall not only be vigilant and circumspect, he or she shall behave economically efficient. He or she shall not only compare prices, he or she shall order the products from everywhere in Europe (not from everywhere in the world!). Best value for money is the slogan. He or she is supposed to know her or his rights, he or she is convinced that language does not matter as the rights are the same in Europe and that the trader will handle his complaints carefully if there are any. It then only one step further to think about legal obligations which may 'sanction' the consumer if he or she does not behave adequately. Local ties, social relations in a community do not matter for such a consumer.[94] He is guided by economic efficiency alone.

What has happened and why may the new Leitbild of the economically efficient consumer be associated with industrial policy? The explanation is enshrined in the new *consumer welfare paradigm* that is brought forward ever stronger in the Proposal as well as in the background documents. In state aids[95] and in competition law[96] the European Commission has wrapped its new policy into the idea of a 'new economic approach'. Empirical economic analysis shall be given much more importance in assessing whether the Articles 81 and 82 EC are infringed.[97] The European Commission has issued guidance on how to apply the new economic approach in EC competition law.[98] Consumer welfare is put at the forefront of the new enforcement strategy. Consumer welfare shall justify the focus of the enforcement activities on those infringements which have the greatest impact on the market. The new strategy has been criticised to (mis-)use consumer welfare as a justification for lowering the threshold of enforcement and to integrate competition alien arguments into

94 Szyszczak, Public Service Provision in Competitive Markets (2001) *Yearbook of European Law* 303; the same author, The Regulation of the State in Competitive Markets, (Portland: Hart, 2007); see Krämer, The European Union, Consumption and Consumer Law, in: *Festschrift Stauder*, 2006, 177.

95 See Kroes, Commissioner for Competition Policy, The refined economic approach in state aid law: a policy perspective, 21 September 2006.

96 Ulrich (ed.), *The Evolution of European Competition Law*, (Cheltenham: Elgar, 2006).

97 See with regard to competition law, Röller, Economic Analysis and Competition Policy, Enforcement in Europe, European Policy Perspectives, (2005), available at: http://ec.europa.eu/competition/speeches/text/sp2005_011_en.pdf at p. 11. These findings cannot as such be transferred to consumer policy making.

98 COM(2008) 3.12.2008 Guidance on the Commission's Enforcement Priorities in applying of Article 82.

the enforcement.[99] I will show that the same type of thinking, though not the same terminology, may be detected in the Green Paper on the Revision of the Consumer Acquis and now in the Proposal on Consumer Rights. The 'new economic approach' in EC law is not meant as a revival and reinvigoration of the 1985 Internal Market programme. It shifts the focus and puts emphasis on the international competitiveness of the European Community. Consumer policy and consumer law just as any other field of EC law has to be seen in the light of the credo spelt out in the Lisbon Agenda from March 2000. More than ever and with more vigour than ever the European Commission uses the different sectors of economic law to make Europe fit for the globalisation process. This is the key to understanding the new economic approach. Competition law needs policy guidance, just as consumer law. This guidance is taken from an international perspective, from ensuring Europe's place in the globalisation process. So internal market and competition law are instrumentalised for industrial policy purposes:[100]

> ***The Way forward***
> The Union has today set itself a new strategic goal for the next decade: to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable growth with more and better jobs and greater social cohesion.

I will try to underline my argument by demonstrating the deeper links between the Lisbon Agenda and the EC policy on the revision of the consumer acquis. I will use the key parameters of the Lisbon Agenda and contrast them with the policy on the revision of the consumer acquis.

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[99] Eilmannsberger, Vortrag und Diskussion "Dominance – The Lost Child? How Effects-based Rules Could and Should Change Dominance Analysis", in: Marsden/Hutchings/Whelan (eds), *Current Competition Law – Volume V* (British Institute of International and Comparative Law, 2007), 297-316.

[100] COM(2007) 724 final.

	Lisbon Agenda 2000	Revision of the consumer acquis 2006-2008
Economic concept = global information economy	"Preparing the transition to a knowledge-based economy and society by better policies for the information society"[101]	Preliminary Assessment: "*The ... best available data (…) they mainly stem from the fact that consumers are insufficiently aware of their rights.*"[102]
Costs	"Further efforts are required to lower the costs of doing business. … the European institutions, national governments and regional and local authorities must continue to pay particular attention to the impact and compliance costs."[103]	Proposal 2008 under 'General context': "The costs incurred by business to comply with fragmented Consumer Acquis are significant. Such compliance costs constitute an important barrier to trade"[104]
Enhancing the consumer	"An effective framework review and improvement based on the Internal Market Strategy endorsed by the Helsinki Council, is essential if the full benefits of market liberalization are to be reaped. Moreover, fair and uniformly applied competition and state aid rules are essential for ensuring that business can thrive and operative effectively on a level playing field in the internal market."[105]	Proposal "If consumers are precluded access to competitive cross-border offers, they do not fully reap up the benefits of the Internal Market, in terms of more choice and better prices"[106] "The objective of the proposal is to contribute to the better functioning of the business-to-consumer internal market by *enhancing consumer confidence* in the internal market and reducing business reluctance to trade cross-border."[107]
Compensatory measures to avoid social exclusions	"Investing in people and developing an active and dynamic welfare state will be crucial both to Europe's place in the knowledge economy and for ensuring that the emergence of this new economy does not compound the existing problems of unemployment, social exclusion and poverty". [108] With regard to information society: "Different means of access must prevent from info-exclusion. The combat against illiteracy must be reinforced. Special attention must be given to disabled people." [109] Promoting social inclusions: "The new knowledge based society offers tremendous potential for reducing social exclusions. At the same time it brings a risk of an ever widening-gap between those who have access to the new knowledge and those who are excluded" [110]	Proposal is exclusively based on the achievement of the rights/knowledge based consumer, But the EU has adopted compensatory measures Educational training in schools and universities, Master in Consumer Economics Educational training of consumer experts in NGO's and governmental authorities (TRACE)

The coherence in language and policy objectives is indeed striking. Even the substance of the policy seems to be the same, perhaps with one notably exception. The Lisbon Agenda recognises the danger of social exclusion and envisages measures to close the gap. Neither the Proposal nor the various background documents mention the educational dimension, perhaps with the exception that fragmentation is said to hinder European-wide information campaigns to increase the consumer knowledge on rights.[111]

The European Commission has a normative concept in mind which ties the consumer into its new policy objective, i.e. to make Europe the best economic player in the world. Consumer protection rules are then just a means to an end. Consumers have to behave in particular way and they have to be trained in that sense – by the Member States with financial support from the Community. Consumers are there to produce consumer welfare for the benefit of the market and society. Consumers become the equivalent to 'shopper'. Such a perspective does not leave room for fragmented consumer law or for deviating standards which leave room for Member States' social policy objectives. Consumer law has to serve international competitiveness. Consumer law then is nothing more than a homogeneous set of rules which does not stand on its own any more, it has to be submitted to 'higher' purposes. Consumer law shall help to screen the market from the worst distortions and from the biggest consumer problems. More is not needed.[112]

The highly *normative* approach of how consumers should behave – economically efficient – does not fit at all to the research which has been undertaken world wide to get a more realistic view of the *factual* behaviour of consumers. The economic language the European Commission uses is not the one from consumer economics, information economics or behavioural economics. The European Commission, this has to be recalled, is relying on a rights/knowledge based concept which is much nearer to neoclassical rational

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101 At p. 3

102 Preparatory Work for the Impact Assessment on the Review of the Consumer Acquis DG HEALTH AND CONSUMER PROTECTION Analytical Report on the Green Paper on the Review of the Consumer Acquis submitted by the Consumer Policy Evaluation Consortium *Date: 06/11/2007* http://ec.europa.eu/consumers/rights/detailed_analysis_en.pdf, at p. 8.

103 At p. 5.

104 Proposal, at p. 2.

105 At p. 5.

106 Proposal, at p. 2.

107 Proposal, at p. 2.

108 At p. 6.

109 At p. 3.

110 At p. 10.

111 At p. 2.

112 See A single market for 21st century Europe, COM(2007) 724 final at 12.

choice models than to the empirical strand in economic theory.[113] The empirical findings which have been collected over the last thirty to forty years contrast the rights/knowledge based model with much more differentiated patterns of consumer behaviour:[114]

- The Rational Decision Making Consumer – consumption is modelled as a multi-stage process – from cradle to grave. Consumer law is restricted to a very limited part of the whole consumption process. It excludes the production as well as the recycling process.
- The Seduced Consumer – most of the shopping behaviour is routine with a rather low involvement but high stress potential. Whatever the type of information to be provided might be, it is of limited importance for the decision making process.
- The Status-Seeking Consumer – this is the dominant view of American institutionalism. In this perspective real or presumed difference between trade mark products and no-name products are crucial. Information this is useful but only in order to distinct no-name products from famous trade marks.
- The Politically Active Consumer Citizen – who in co-operation with other consumers produces public goods. Since the early beginnings of the consumer society in the young 20th century consumers have, this is the evidence produced in research, always behaved politically active.[115]
- The Responsible Consumer – consumption is regarded as an ethical act based on reflected preferences and in full knowledge of the ecological, social and cultural consumption externalities. It shall not be confounded with the circumspect consumer EC law has in mind. Responsibility here is understood in a much more comprehensive way. There is a normative dimension enshrined which overlaps with the new EC model to achieve that consumers behave economically efficient.

This is not the place to discuss the various models. It suffices to underline that all these findings have one thing in common: consumer behaviour is not – or to a limited extent only – guided by economic efficiency. However, the em-

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113 See for a short overview on information economics in a legal perspective, Grundmann/Kerber/Weatherill, Party Autonomy and the Role of Information in the Internal Market – Overview, in: Grundmann/Kerber/Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market*, (Berlin: de Gruyter, 2001), 12 et seq.

114 I deliberately refer to L. Reisch, The Place of Consumption in Ecological Economics, in: Reisch/Røpke (eds). *The ecological economics of consumption. Edward Elgar Series Current Issues in Ecological Economics*, (Cheltenham: Elgar, 2004), at p. 223; see also Howells, The Potential and the Limits of Consumer Empowerment by Information, (2005) 32 *Journal of Law and Society* 349.

115 Soper/Trentmann (eds), *Citizenship and Consumption*, (Basingstoke: Macmillan, 2008).

pirical economic research has also revealed that the rights/knowledge based rational choice model totally misses to reach those consumers who are really in need – i.e. the most vulnerable consumers who appear in the UCP Directive but do not show up in the Proposal. The empirical findings of a whole branch of economic research which aims at finding more realistic patterns for a competition policy do not comply with the parameters of the Lisbon Agenda. They would have called for a different consumer policy and consumer law. In so far they have been simply set aside.

VII. Conclusions

The new consumer Leitbild requires a European-wide open democratic debate. The shift from minimum to maximum harmonisation is more than just a mere technical step. It would be a pity if the ongoing debate within the European Parliament and within the Council would focus on the pros and cons of this and that article and whether it fits or not with the respective legal order. The outcome might then be a European directive similar to the Directive 2008/48/EC on consumer credit. This piece of EC legislation is based on full harmonisation. Member States prolonged the list of exceptions in Article 3 of the Consumer Credit Directive. The result today is secondary law, full of unclear wordings, long, intransparent and sometimes even contradictory recitals. The broader picture, the question in which society we want to live, in one where the top level decides or one where the Member States have a word to say on the (social) outlook of the society, would simply go lost.

I will not be misunderstood: there is potential on true target full harmonisation in consumer contract law, even under a new economic approach, provided the full range of economic research is taken into account. DG SANCO has now set up a working group where consumer economics, information asymmetries and behavioural economics are discussed. This might be too late for the revision of the consumer acquis and the presented Proposal. The European Commission, if it is not willing to fully reconsider the feasibility of the Lisbon parameter in consumer law, should limit its activities on fully harmonising the modalities of contract conclusion, off-premises, distance selling and e-commerce as well as the technicalities of the right to withdrawal. Neither the envisaged amendments with regard to unfair terms nor with regard to consumer sales justify a reform in the name of the consumer. Both projects should be simply given up. Consumers do not need this reform. If business needs such a Proposal in order to be worldwide competitive, fine. But this then is the end of consumer protection. Consumer protection may then survive at the national level, provided national law can escape the tight grip of EC industrial consumer policy. A different formula would then be needed which might be the old formula and which once in a time constituted the starting point of consumer law – the protection of the weak(er) party.

Part III
Good Faith and Unfair Terms

Regulating Transactions: Good Faith and Fair Dealing

Roger Brownsword

I. Introduction

Should regimes of contract law – whether international, regional (as in a prospective European code of contract law) or purely domestic in their scope, whether focused on consumer transactions (as with the recently proposed Directive on Consumer Rights[1]) or on business-to-business transactions – require parties to observe a standard of good faith and fair dealing? Given my track record of support for the inclusion of such a standard in Common law contract regimes, it might be expected that this paper will serve up another round of arguments in favour of adopting a principle of good faith and fair dealing in contracts.[2] However, the arguments on either side of this debate are now so well rehearsed that, so long as we continue to frame the debate in the way that we do, we are unlikely to say very much that is new or helpful. Accordingly, in this paper, with a view to reframing the question, I intend to follow the lead given by Hugh Collins, in Regulating Contracts.[3] Specifically, I will argue that we should widen our lens so that, instead of focusing narrowly on contract law, we consider more broadly the regulation of transactions and, within that regulatory project, the appropriateness of a legal requirement of good faith and fair dealing.

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1 Proposal for a Directive on Consumer Rights COM(2008) 614 final.

2 Previously, I have addressed this question in (principally) the following: R. Brownsword, "Two Concepts of Good Faith", (1994) 7 *Journal of Contract Law* 197; R. Brownsword, "Bad Faith, Good Reasons, and Termination of Contracts", in: J. Birds, R. Bradgate, and C. Villiers (eds), *Termination of Contracts*, (London: Wiley Chancery, 1995), p. 227; R. Brownsword, "Good Faith in Contracts Revisited", in: J. Holder, C. O'Cinneide (eds), *Current Legal Problems 49 (Part Two)*, (Oxford: Oxford University Press, 1996), p. 111; R. Brownsword, "Contract Law, Co-operation, and Good Faith: the Movement from Static to Dynamic Market-Individualism", in: S. Deakin and J. Michie (eds), *Contracts, Co-operation and Competition*, (Oxford: Oxford University Press, 1997), p. 255; R. Brownsword, N. J. Hird, and G. Howells (eds), *Good Faith in Contract: Concept and Context*, (Aldershot: Ashgate, 1999); and R. Brownsword, *Contract Law: Themes for the Twenty-First Century*, 2nd ed., (Oxford: Oxford University Press, 2006), esp. Ch. 6.

3 H. Collins, *Regulating Contracts*, (Oxford: Oxford University Press, 1999).

I should say, at the outset, that although I am taking my lead from Hugh Collins, I am not at all confident that he would see his work as signposting the radical direction that I will suggest. We certainly agree that the fitness of contract law needs to be assessed relative to its regulatory purposes – which, in itself, is quite a radical starting point because it forces us to be more explicit in identifying the purposes of this body of law and, at the very least, it invites us to place contract scholarship within the broader stream of regulatory theory. However, in this paper, I will add to this mix my ideas concerning consent and the essentially voluntary character of contractual obligation. This cocktail generates, *inter alia*, the view that the regulation of consumer transactions has nothing to do with contract law, from which it follows that the proposed Directive on Consumer Rights is not of special significance to contract lawyers. It is also a corollary of this view that, insofar as the draft Common Frame of Reference (draft CFR) seeks to establish a standard lexicon for the consumer acquis, it is of no particular interest to contract lawyers – this is not to say that the standardisation of this body of law has no regulatory significance,[4] simply that it is not of immediate concern for *contract* lawyers. To the extent that the draft CFR is, properly conceived, a toolbox for *contract* lawyers, it might have some utility for contractors and their advisers (but, probably, not a great deal); and, to the extent that the draft CFR is seen as a stepping stone towards a common code of European contract law, it suffers from a serious loss of regulatory direction.

The paper is in seven principal parts. First (in Part II), I sketch the way in which the imagination of contract lawyers is constrained by the lingering influence of classicism. So long as debates about good faith and fair dealing are framed by the classical view, we will fail to move on. Secondly (in Part III), I suggest that we should reframe the question by thinking about what it takes to create the right kind of regulatory environment for transactions. Contract law might or might not be part of the optimal regulatory mix; and, where it is so, a doctrinal requirement of good faith and fair dealing might or might not be part of that mix. Thirdly (in Part IV), I repeat an argument that I have made elsewhere that we should stop thinking about the regulation of consumer transactions as an application of contract law. The reason for this is not so much that we can no longer tolerate such an exceptional deviation from classical principles of self-reliance but that, for all practical purposes, consumer transactions are regulated, much as the law of tort regulates our interactions. There is nothing voluntary about the assumption of obligation; it is imposed. So far as suppliers, in particular, are concerned this is simply a regime of command and control regulation. Fourthly (in Part V), I review the role that a doctrine of good faith and fair dealing might play in such a regulated sector. Fifthly (in Part VI), I turn to the regulation of commercial transactions. Here, I suggest that we should view the framework as one of co-regulation – the

4 Compare the critique of the proposed Directive in G. Howells and R. Schulze, Overview of the Proposed Consumer Rights Directive, *in this volume*.

State setting some public policy limits to the activities of transactors but otherwise authorising contracting parties to self-regulate (and then sanctioning their activities). Insofar as contractual obligations are distinctively voluntary, this is where we find the modern expression of classical thinking. Sixthly (in Part VII), I consider what role a doctrine of good faith and fair dealing might have in such a revised view of commercial dealing. Seventhly (in Part VIII), I tie up the strands in the analysis by sketching how the driving modern idea of protecting reasonable expectations maps on to this reconfigured view of contract law.

If, in this way, we start thinking afresh about two regulated zones, one largely characterised by a command and control approach, the other by co-regulation, then what does this signify for any proposal to adopt a requirement of good faith and fair dealing? From this two-zone perspective, does the incorporation of such a requirement in harmonised schemes of European law make regulatory sense? In relation to consumer transactions, insofar as command and control is the dominant regulatory approach, the Proposal is hardly inflammatory. If good faith and fair dealing is a bit hazy as a general unspecified requirement, regulators can ease that concern by giving more particular guidance – after all, we get along perfectly well with a tort regime that hinges on a test (for a duty of care) of what would be fair, just and reasonable. As for commercial transactions, where the strategy is one of co-regulation, the Proposal is only inflammatory if regulators are seeking, through a requirement of good faith and fair dealing, to make the market. So long as they are simply trying to follow the shape of the market and let parties contract in or out of good faith as they wish, there should be no great friction. Stated shortly, the adoption of a requirement of good faith and fair dealing does not raise major issues of regulatory legitimacy; and, whether or not it will effectively, efficiently and economically serve regulatory purposes is something that time and monitoring will tell.

II. The classical imagination of contract lawyers

In the opening decade of the Twenty-First Century, how do we view the law of contract and how should we view it? To start with our operative view: although we see the modern law of contract as a progressive development from the classical law, it seems to me that our thinking betrays the persistent influence of our inherited classical imagination. Let me highlight three indicators of that classical influence.

First, we still attach fundamental value to the autonomy of the parties. The classical freedoms – party freedom and term freedom – together with the corollary of sanctity of contract still represent cornerstones in our thinking about the regulation of the marketplace. To be sure, modernists recognise that these freedoms have been heavily qualified and constrained in relation to the

regulation of consumer transactions; but, such qualification and constraint is to be regarded as an exception to the general rule.

Evidently, this is not merely a British or a Common law phenomenon. For example, one of the striking features of the draft CFR is that, although it is concerned with the modernisation of contract law, it discloses precisely this conception of the regulation of transactions. At the core of its scheme of fundamental values is an attachment to a traditional notion of freedom of contract, with restrictions on freedom of contract needing to be specially and carefully justified. In general, we read, "interference with freedom of contract should be the minimum that will solve the problem…"[5] In the same vein, the editors of the draft CFR report that the study groups "concur in the view that consumer law is not a self-standing area of private law. It consists of some deviations from the general principles of private law, but it cannot be developed without them."[6] Similarly, in the recent Proposal for a Directive on Consumer Rights we find an apologia for the Proposal in terms of its proportionality and the fact that it does not unnecessarily interfere with more general contract law concepts.[7]

Secondly, the underlying ethic in the general part of contract law is still assumed to be one of self-reliance. Contractual autonomy implies that this is a domain in which the law should be based on the premise that parties will look after their own interests; and it is to this ethic of self-reliance that much modern thinking tends to default.[8] Again, the regulation of consumer transactions adopts a different default. To some extent, consumer law mimics the classical model by seeking to secure a transactional setting in which consumers can make their own free, informed, and undistorted choices. However, in so far as consumer law is seen as special, it is precisely in its recognition of exceptions to the general rule.

Clearly, so long as the default ethic is one of self-reliance, the justificatory burden lies with those who advocate the adoption of a principle of good faith and fair dealing. To respond to this challenge, advocates of good faith and fair dealing have a limited range of options – for example, arguing that any exceptions to this default are actually consistent with the classical principle of freedom of contract, or that they are strictly defined, or that they are confined to special pockets of consumer law; or, more ambitiously, that a default ethic of co-operation has better economic or ethical credentials.

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5 The Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR)*, (Munich: Sellier, 2008), at para. 28.

6 Ibid., at para. 42.

7 Proposal for a Directive on Consumer Rights COM(2008) 614/3, at 7.

8 Compare O. Lando, "The Structure and the Legal Values of the Common Frame of Reference (CFR)", (2007) 3 *European Review of Contract Law* 245. There seems to be a general view that the draft CFR inclines towards a more market-individualist approach than that reflected in PECL.

Thirdly, we cling to the idea that, even with the special exceptions carved out by the modern law, contractual obligation is characteristically and distinctively based on free choice and consent.

If this fairly captures the way that we view contract law today, then I suggest that we need to make a fresh start – and, I confess that I am as guilty as anyone in taking my time to loosen the grip of the classical imagination.[9] Accordingly, as I indicated in my introductory remarks, the purpose of this paper is to sketch some admittedly radical ideas about how we should reconfigure our thinking about contract law and, with that, our views on the doctrinal principle of good faith and fair dealing.

III. The regulatory environment for transactions

In this part of the paper, I suggest that we should stop thinking about contract law as such and start thinking instead about creating the right kind of regulatory environment for transactions. Contract law is potentially part of that environment, along with the criminal law, competition law, and so on, but it is not necessarily a required element in the mix.

Before we proceed with this, however, it is as well to be clear about the relationship between law and regulation, the variety of regulatory modes (the variety of instruments that are available within the regulatory toolbox), and the idea of the regulatory mix.[10]

1. The relationship between law and regulation

Regulation has become an unwieldy concept.[11] It is unclear who counts as a regulator and what counts as regulation. In Hugh Collins's usage, "regulation" is treated as "a generic term to describe any system of rules intended to govern the behaviour of its subjects."[12] Broadly speaking, this is in line with the main-

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9 The ideological modelling of contract law and contract adjudication that J. Adams and I first elaborated in: *Understanding Contract Law,* (London: Fontana, 1987) shows the strains of relying on a single frame (straddling consumer and business transactions). For revisions to this frame, see R. Brownsword, *Contract Law: Themes for the Twenty-First Century*, 2nd ed., (Oxford: Oxford University Press, 2006), Ch. 7.

10 Here, I am drawing on my analysis in R. Brownsword, *Rights, Regulation and the Technological Revolution,* (Oxford: Oxford University Press, 2008).

11 See, e.g., J. Black, "Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World" in: J. Holder, C. O'Cinneide (eds), *Current Legal Problems 54,* (Oxford: Oxford University Press, 2001), p. 103.

12 H. Collins, *Regulating Contracts,* (Oxford: Oxford University Press, 1999), p. 7.

stream regulatory literature, in which it is generally accepted that regulation signifies something like,

> the sustained and focused attempt to alter the behaviour of others according to standards or goals with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification.[13]

If regulation is primarily about channelling behaviour, then legislation is certainly a species of regulation. However, to the extent that regulators rely on instruments and strategies other than legislation in their sustained and focused attempts to alter the behaviour of others, regulation is broader than law – again, as Collins puts it, "Law provides one type of regulation, but it is only one of many types of social regulation such as custom, convention, and organized bureaucracies."[14] On the other hand, to the extent that regulation does not encompass such tasks as constitution-making and dispute-resolution, then law is broader than regulation.[15] We might infer, therefore, that while law and regulation intersect with one another, they are not co-extensive.

As for the question of who counts as a regulator, we might take a narrow or a broad view. If we understand the concept of a regulator narrowly, we will take it as an agent or agency of government authorised to control and channel conduct in a specified field.[16] If, by contrast, we take a broader view, then we will recognise, too, some non-governmental agents or agencies as regulators. For present purposes, we can adopt the narrower view; but, in adopting this view, we need to allow that private governance by contractors can be treated as sufficiently authorised by government to qualify as a species of self-regulation or co-regulation.

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13 J. Black, "What is Regulatory Innovation?", in: J. Black, M. Lodge, and Mark Thatcher (eds), *Regulatory Innovation*, (Cheltenham: Edward Elgar, 2005), p. 11.

14 Ibid.

15 Here, I am drawing on the standard functional analysis of "law-jobs" theory: see K. N. Llewellyn, "The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method", (1940) 49 *Yale Law Journal* 1355.

16 This stipulation is not so narrow as to exclude regional and supra-national governmental bodies or agents. However, it does exclude, at all levels, local, regional, and international, the channelling strategies of non-governmental organisations, corporations, trade associations, consumer groups, the professions, netizens, and the (non-governmental) rest.

2. Regulatory modes

Seminally, Lawrence Lessig has identified four regulatory modalities (or modes of regulation), that characterise the activities of regulators. These four modalities are: the law, social norms, the market, and architecture (or, code).[17] The wearing of seat belts is one of Lessig's illustrative examples, thus:

> The government may want citizens to wear seatbelts more often. It could pass a law to require the wearing of seatbelts (law regulating behavior directly). Or it could fund public education campaigns to create a stigma against those who do not wear seatbelts (law regulating social norms as a means to regulating behavior). Or it could subsidize insurance companies to offer reduced rates to seatbelt wearers (law regulating the market as a way of regulating behavior). Finally, the law could mandate automatic seatbelts, or ignition-locking systems (changing the code of the automobile as a means of regulating belting behavior). Each action might be said to have some effect on seatbelt use; each has some cost. The question for the government is how to get the most seatbelt use for the least cost.[18]

When a smart regulatory style is adopted, then regulators will consider direct and indirect strategies, choosing and combining strategies in whichever way promises the optimal ratio of regulatory input to desired regulatory output.

In a helpful elaboration of Lessig's analysis, Andrew Murray and Colin Scott, following a cybernetic model, present each regulatory modality as having three components (or dimensions), namely: some goal, standard, rule, or norm to which the system refers; some mechanism for monitoring or feeding back information about performance; and some mechanism for realigning the system when its operation deviates from its intended goal.[19] The importance of this is that it enables us to see precisely where and how a particular ingredient in the regulatory regime is intended to contribute to the total regulatory impact. For example, it is not just that regulators might employ the traditional legal mode in conjunction with, say, social pressure; rather, the strategy might be to use the traditional legal mode to set the standard but then leave it to social pressure (the community) to monitor compliance (performance) and possibly even to respond to non-compliance (deviation).

It should be noted that, if we stick to Collins's usage of "regulation", and if we cannot identify an underlying system of rules in architecture, design, code

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17 L. Lessig, *Code and Other Laws of Cyberspace,* (New York: Basic Books, 1999), Ch 7; and L. Lessig, "The Law of the Horse: What Cyberlaw Might Teach", (1999) 113 *Harvard Law Review* 507, at 509.

18 L. Lessig, *Code and Other Laws of Cyberspace*, pp. 93-94.

19 A. Murray and C. Scott, "Controlling the New Media: Hybrid Responses to New Forms of Power", (2002) 65 *Modern Law Review* 491. See, too, A. Murray, *The Regulation of Cyberspace,* (Abingdon: Routledge-Cavendish, 2007).

or the like, then we might not recognise these tools as instruments of regulation. We need to be careful about this. For, in a world of on-line transacting, these are important instruments and we certainly need to keep them in view as we reflect on the optimal regulatory environment.

3. The regulatory mix

To understand the character of the regulatory position, we need to attend to the regulatory mix. In the absence of a blanket prohibition under the criminal law or an unvarnished permission, the regulatory position is liable to mix elements of public and private law – for example, lawyers who are professionally negligent might be accountable to disappointed beneficiaries of the *White v Jones*[20] type as a matter of private law (whether in contract or tort) but also via a code of complaints overseen by an ombudsperson.

Consider, for example, the early life of eBay. In those embryonic years, there was no role for contract law. So, when Pierre Omidyar introduced the "Feedback Forum" in February 1996, he posted a message applauding the honesty of users, encouraging the eBay community to use the feedback (reputational) system to name and chase out the few dishonest or deceptive dealers, and enjoining users to observe the Golden Rule in their dealings with one another. Of course, with the rapid growth of eBay, it became a site for significant on-line fraud at which juncture it was necessary to draw on the resources of the criminal justice system. As for contract law, it finally entered the regulatory mix to underpin the transactions made between eBay users and to set the terms of the relationship between each user and eBay itself (crucially to restrict eBay's potential liability to users).

What should we make of this? According to Jack Goldsmith and Tim Wu:

> [W]hat would eBay look like in the absence of government-enforced contract law? One might think, based on the Feedback Forum … that eBay could continue to run much of its ordinary business. In the absence of law, though, eBay would need something to make up the difference that the legal threat now provides. It is true that eBay itself might possibly provide greater security for buyers and sellers. And eBay might guarantee that it would make sure that the contracts would be honoured. But … the result wouldn't be eBay as we know it, but rather some very different business – and a much more expensive and less popular business. What has made eBay successful and profitable since day one is its hands-off, self-executing, low-cost nature. That, in turn, depends on a robust system of community

20 *White v Jones* [1995] 2 AC 207.

> norms and, also, underneath that community, the rule of law and government coercion.[21]

Sometimes, then, contract law might be a foreground requirement, at other times it can slip into the background (particularly where self-regulation operates), and it is even conceivable that some regulatory environments might be best without having contract law as any part of the regulatory mix.

IV. Regulating consumer transactions

In this part of the paper, I will start by rehearsing an argument that I have made elsewhere that we should stop thinking about the regulation of consumer transactions as an application of contract law.[22] The reason for this is not so much that we can no longer tolerate such an exceptional deviation from classical principles of self-reliance but that, for all practical purposes, consumer transactions are regulated, much as the law of tort regulates our interactions. There is nothing voluntary about the assumption of obligation; it is imposed. I will then state rather summarily what this signifies, namely that, so far as suppliers, in particular, are concerned this is simply a regime of command and control regulation.

1. Contract, Consumers, and Consent

The claim that contractual obligations are essentially voluntary raises some complex issues concerning consent. Stated shortly, consent functions, first, as a reason for holding a rights-holder to a change of position and, secondly, as a reason for holding a power-holder to the terms of a new relationship (or to the terms of a rule-set that has been engaged).[23] In contractual contexts, the first function is exemplified where a party agrees to a waiver of the strict contractual rights, or where an estoppel or one of its analogues arises. However, it is the second function that is more fundamental; for it is the exercise of power, the parties' originating consent, that engages the law of contract in the first place and that then binds the parties in to the rules so engaged.

If the engagement of the law of contract is an option open to prospective contractors, the law might present the option on either an opt-in or an opt-out basis. Generally speaking, where the benefit of a right is being waived by

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21 J. Goldsmith and T. Wu, *Who Controls the Internet?,* (Oxford: Oxford University Press, 2006), p. 139.

22 R. Brownsword, "Contract, Consent, and Civil Society: Private Governance and Public Imposition", in: P. Odell and C. Willett (eds), *Civil Society,* (Oxford: Hart, 2008), p. 5.

23 D. Beyleveld and R. Brownsword, *Consent in the Law,* (Oxford: Hart, 2007).

consent, opt-in is far more satisfactory than opt-out because it insists upon a reliable signal of consent. So, for example, where individuals give their prior consent to direct marketing approaches, such prior opt-in leaves less doubt that they are authorising the approach and waiving the benefit of a background privacy right.[24] Exactly the same considerations apply where consent functions as an originating consent; opt-in is, quite simply, a far less equivocal signal than the failure to opt-out. Indeed, within regimes of contract law, just such doubts about the reliability of (failure to) opt-out are reflected in the control exercised over inertia selling techniques[25] as in the doctrinal hesitation to recognise imposed silence as an adequate form of acceptance.[26] Ideal-typically, then, the local law of contract should not be applied to a dispute arising out of a transaction unless it is quite clear that the parties have opted-in to that particular body of law – in other words, unless it is clear that the parties have given their originating consent for the engagement of that body of law. It follows that, in such a legal regime, there would be a rule (or rules) relating to the procedure for opting-in to the law of contract. Such rule or rules would not be a part of the law of contract itself; rather it, or they, would be antecedent to the law of contract.

If legal regimes ever operated in this way, this is not the shape of the modern law. Instead, we have the following constellation of rules and principles:

- Various rules declaring that specified transactions or categories of agreement are not susceptible to contractualisation – for example, as where the law declares that a certain class of agreement is not contractually enforceable because it is deemed not to be supported by an intention to create legal relations.
- A default rule that is tilted towards contractualising business agreements (that is both business-to-business agreements and business-to-consumer agreements) by treating the parties as having an intention to create legal relations, coupled with the option of expressly opting out (by declaring that they intend to be bound in honour only).[27]
- A default rule that is tilted against contractualising domestic and social agreements by treating the parties as having no intention to create legal relations,[28] coupled with the option of expressly opting in[29].

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24 Compare Regulations 19-20 and 22 of the Privacy and Electronic Communications Regulations 2003 (SI 2003, No 2426) (opt-in provisions) with Regulation 21 (opt-out only).

25 See Regulation 24 of the Consumer Protection (Distance Selling) Regulations 2000 (SI 2000, No 2334).

26 See, e.g., *Felthouse v Bindley* (1862) 11 CBNS 869.

27 See *Rose and Frank Company v J.R. Crompton and Brothers Ltd.* [1925] AC 445.

28 See *Balfour v Balfour* [1919] 2 KB 571.

29 The logic of recognising that the presumption against contract can be rebutted (by reference to the facts of the context) is that an express opt-in should be recognised.

- A default principle of "freedom of contract" within the law of contract that permits the parties (a) to make their own "choice of law" to govern their transaction or (b) to modify the default rules set by the law of contract – for example, by employing a standard form of contract or by using a modified version of a standard form.

For present purposes, provisions of the first kind, decreeing that the rules of the law of contract are not open to be engaged in some circumstances, are unproblematic. To be sure, questions might be raised with regard to the reasons for excluding the option of engagement; but, in principle, there are a number of policy considerations that might justify such measures. The provisions concerning choice of law, and the like, that flow from the principle of freedom of contract within the rules of contract law are also relatively unproblematic.[30] If the parties have freely engaged the law of contract, which then licenses more specific rule engagement, the consensual basis of contractual obligation is intact. However, the twin default rules tilting towards and against contractualisation are problematic. Most obviously, the effect of these rules is that some persons (probably most consumers) will walk into a contractual relationship without realising it – and this will happen because, in business marketplaces, participants are deemed to have engaged the rules of the law of contract. Granted, the law permits such persons to opt-out; but, if they do not realise that they are being co-opted in, they will hardly seize the opportunity to opt-out. De jure, there might be the option of opt-out; but, de facto, we are dealing with imposition.

Accordingly, once parties are taken into contract by way of their presumed intention to create legal relations or in order to respond to considerations of fair dealing, or the like, the link between contract and consent is attenuated or broken. This happens, first and relatively rarely, where there are good reasons for wanting to hold promisors to account, even though their promises were made in social or domestic contexts;[31] and, secondly and much more routinely, where private dealers, consumers and others who are not aware of the presumed legal consequences of their actions are brought into contract unwittingly. To be sure, it can be said that such "innocents" have the law-in-the-books opportunity to resist contractualisation by opting-out; but it is precisely

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[30] Until choice of law rules permit selection of model codes, such as the PECL or the Unidroit Principles for International Commercial Contracts, there is a slight problem. However, in the longer run, this does not seem to be an insuperable difficulty.

[31] For some hypothetical examples, see J. Gordley (ed.), *The Enforceability of Promises in European Contract Law,* (Cambridge: Cambridge University Press, 2001), Case 4 (the famous musician who breaks a dinner engagement with a conservatory, causing financial loss to the latter) and Case 6 (the friend who fails to perform a promise to deliver a letter). For a well-known actual example, see *Simpkins v Pays* [1955] 1 WLR 975.

the innocence of such parties that makes it a nonsense to treat this option as realistic and that makes a mockery of the idea that the application of the law of contract rests on the parties' consensual engagement of the relevant rules. Where a body of rules is imposed in this way, its scheme of rights and duties might well be defensible by reference to substantive principles of fairness and equity; but consent is no longer the key. It follows that, where a legal regime purports to apply its law of contract in the absence of an originating consent (in the absence of a clear opt-in), and where contract supposedly rests on consent, it is deceiving itself. Instead, the rules being applied (even if they mimic consent in some respects) are more akin to the rules of tort or restitution.

To relate these remarks to the prospects for the harmonisation of European contract law, it seems that there is a strong common starting point in the idea that the rules of contract law should not be applied unless the parties have clearly and consensually intended to engage them. It is once local regimes start imposing their rules in the absence of originating consents that it becomes less clear what they are doing and whether they are doing much the same thing. With the Principles of European Contract Law already available (at least, in principle) for adoption by parties who wish to engage them, it is arguable that the principal task of harmonisation is complete. And, insofar as the draft CFR expands the "toolbox" available to contractors, this is simply more power to the elbow of autonomous contractors. What has not been completed is the harmonisation of the rules that regulate the 27 consumer mini-markets. However, given the analysis in this paper – an analysis that is further supported by the movement towards horizontal regulatory integration in both the Unfair Commercial Practices Directive[32] and the proposed Directive on Consumer Rights – this is less a matter of harmonising contract rules than of harmonising the imposed supplier-to-consumer obligations that masquerade as obligations of contract law.[33]

2. Regulating the consumer marketplace

If we err in continuing to think about the consumer law of contract as an exception to the general law of contract, how should we view the regulation of consumer transactions?

First, there is an important clue in the question: we should view it as regulation, not as a discrete body of law, but as one element in a regulatory reper-

[32] Directive 2005/29/EC.

[33] Given such a characterisation, it is perfectly obvious why the Study Group on Social Justice in European Private Law should insist that a pan-European law of transactions should take full account of questions of distributive justice: see G. Brüggemeier et al (the Study Group on Social Justice in European Private Law), "Social Justice in European Contract Law: a Manifesto", (2004) 10 *European Law Journal* 653.

toire. In this light, consider two of the objections to the proposed Directive on Consumer Rights.

One objection, perhaps the most fundamental objection articulated by the community of consumer lawyers, is that the Proposal is misguided in putting forward a measure of maximum harmonisation. Minimum harmonisation, it is conceded, is fine; if Member States wish to adopt a higher legal standard of consumer protection than that set by Brussels, they are free to do so. However, where measures of maximum harmonisation are adopted, Member States lose this freedom – which might be contrary to the public interest in protecting consumers as well as detrimental to democracy in taking away the power of local communities to make their own public interest judgments.[34] There is no doubt that this is a serious objection. Nevertheless, viewed through a regulatory lens, a measure of maximum harmonization will be seen as merely an adjustment to the legal part of the regulatory environment. In principle, in certain environments, the legal maximum might be treated as the regulatory minimum. While the objectors might well be correct in assuming that, in practice, the setting of such a legal maximum will be antithetical to what is taken to be the legitimate regulatory objective of increasing the level of protection for European consumers, without seeing how regulatees respond, we should not jump too mechanically to this conclusion; for, the setting of a legal ceiling does not preclude the possibility that, within particular sectors or zones, there might be self-regulatory standards that aspire to a higher level of consumer protection, or more demanding requirements of good faith and fair dealing. This is all part of the regulatory environment, even if not underwritten by hard law – and, sometimes, soft law is more effective than hard law in achieving the regulatory objectives.

Another objection to the Proposal, an objection voiced in this volume by Geraint Howells and Reiner Schulze,[35] is that the drafting of the Directive is defective to the extent that it deviates from, or simply ignores, the guidance in the draft CFR. Certainly, this deficit invites the charge of, at minimum, regulatory inefficiency. After all, why invest in the drafting of the CFR only to ignore it? In the larger picture, though, there is no particular reason why the regulation of consumer transactions should adopt the language and conventions of a background document that purports to be about the general law of contract. Indeed, in the larger picture, it is not even obvious that the seemingly haphazard specification of different periods for consumers to have the right to withdraw from certain kinds of transaction is counter-productive. To be sure, such untidiness offends our best instincts as lawyers; but whether such untidiness is counter-productive relative to the regulatory purposes is another question – it probably is, but we should not simply assume that this is so. In other words, when we evaluate the Proposal, we need to think about

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34 For this point about local democracy, I am indebted to H.-W. Micklitz.

35 Cf. G. Howells and R. Schulze, "Overview of the Proposed Consumer Rights Directive", *in this volume*.

the regulatory environment (not merely the hard law segment of that environment) and we need to focus on the particular regulatory purposes that back the Proposal.

Secondly, to the extent that the regulatory purpose is consumer protection, we should view the strategy as one of command and control. Admittedly, from the standpoint of the consumer, the law is designed to promote and protect the making of free and informed choices in the marketplace, the making of undistorted judgments, and so on. However, the desired environment is achieved by treating suppliers as the principal target regulatees upon whom a raft of responsibilities is placed.

Thirdly, whereas in purely domestic contexts, the principal purpose of regulating consumer transactions is to ensure that consumers are treated fairly by suppliers, in a regional European context, the regulatory purposes become more complex, involving the encouragement of cross-border consumption (especially e-commerce) and improving the environment for small businesses who want to increase their cross-border markets. There is, of course, a potential tension in these dual-purpose objectives: the more that the bar is raised for consumer protection, the more difficult it is for small businesses to grow. Conversely, the lower the bar – and some object to the Proposal as a measure that, its rhetoric notwithstanding, is actually designed to lower the bar –the easier it is for small businesses to compete for cross-border consumers (although, if the bar is set too low, consumers will surely deal more defensively, which will tend to operate in favour of local suppliers who are known and trusted). At all events, where the concern is to protect consumers, local and regional regulators alike proceed by imposing responsibilities on suppliers.

Finally, in the light of this, we can say that there is no significant regulatory difference nowadays between a tort claim such as that in *Donoghue v Stevenson*[36] and a contract claim by a disappointed purchaser. Whether I suffer personal injury in the supermarket car-park, or purchase a defective kettle in the store, my remedies are against defendants upon whom certain responsibilities (including compensatory responsibilities) have been imposed. To this extent, contract and tort are simply complementary aspects of the regulated consumer marketplace.

V. Consumer transactions and good faith

Broadly speaking, regulators are liable to be called to account in two fundamental ways. First, the question might be whether the objective or purpose associated with a particular regulatory intervention is appropriate or justifiable – that is to say, the question is whether regulators are trying to do the right kind of thing. Secondly, even if it is conceded that regulators are trying to do the right kind of thing, we might question whether they are setting about secur-

36 *Donoghue v Stevenson* [1932] AC 562.

ing their regulatory objectives in the right kind of way. When we ask whether regulators are proceeding in "the right kind of way", our question might be whether the intervention is likely to achieve its regulatory purposes – our question, in other words, is whether this particular intervention will work, whether it will be effective. Alternatively, our question might be more concerned with the legitimacy of the means adopted by the regulators: here, we do not doubt that the regulatory intervention will work, but we remain to be persuaded that it passes moral muster.[37] It follows that, if regulators are to have a complete answer to their critics, they must show that their regulatory interventions are backed by legitimate regulatory purposes, that the regulatory means employed are legitimate, and that the interventions are actually effective.[38]

Observations of this kind, as Hugh Collins remarks, are "not entirely novel"[39] and it should not be thought that contract law is being singled out for some especially demanding regulatory treatment. It is rudimentary – as, for example, Robert Bork has written – with reference to competition law – that

> policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law – what are its goals? Everything else follows from the answer we give … . Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules.[40]

With the regulatory purposes established, we can proceed to check the legitimacy of those purposes and then to investigate whether the doctrinal expression (and, concomitantly, the chosen institutional array) is effective in articulating and implementing those purposes. This implies a process of regulatory review and renewal. According to Collins (speaking, once again, about the implications for contract law):

> Once legal discourse reorients itself towards the instrumental reasoning of welfarist regulation, it must observe closely the consequences of regulation in order to ascertain whether the objectives are being achieved. The trajectory of legal evolution alters from the private law discourse of seeking

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37 See, in particular, K. Yeung, *Securing Compliance,* (Oxford: Hart, 2004).

38 The reasons for regulatory failure or (relatively speaking) regulatory ineffectiveness are many and varied: see R. Brownsword, op cit, note 10 above Ch. 5. Essentially, there are three loci for the problem, namely: (i) the regulators themselves and their regulatory instrument(s); (ii) the regulatees (particularly their knowledge, attitudes, interests, values, and responses); and (iii) externalities (factors outwith the relationship between regulators and regulatees but which act against the achievement of the regulatory purposes).

39 H. Collins, *Regulating Contracts,* (Oxford: Oxford University Press, 1999), p. 8.

40 R. Bork, *The Antitrust Paradox,* (New York: Free Press, 1993), p. 50. For a sustained commentary on the competing and evolving policies of EC competition law, see G. Monti, EC *Competition Law,* (Cambridge: Cambridge University Press, 2007).

> the better coherence for its scheme of principles to one of learning about the need for fresh regulation by observations of the consequences of present regulation. Information about the world, especially market practices, has to be gathered and reconstituted in a form which enables the legal discourse to adjust its own internal operations and regulatory outcomes. Within this new form of legal reasoning, what the law actually does, its social and economic effects, becomes crucial to the dynamic operations of the legal system.[41]

Indeed, in mainstream regulatory thinking, it is a commonplace that regulation is an ongoing process of standard-setting, monitoring (detection) and correction.

Applying this thinking, what would we make of a proposal to introduce a doctrinal requirement of good faith and fair dealing into the regulation of consumer transactions? Given that the regulatory scheme is intended to serve the regulators' purposes (whether to boost consumer entitlement or confidence, or to open markets to small businesses, or whatever), the essential questions are whether the regulatory purposes (and means) are legitimate and whether the inclusion of a general principle of good faith and fair dealing would be effective in serving those purposes. There is a good deal to say about both these questions. Let me restrict myself to three short remarks.

First, there will be plenty of opinions about the legitimacy of whatever purposes regulators proclaim. If our classical inheritance inclines us towards using utilitarian criteria in judging the legitimacy of regulatory purposes, we should resist it. Europeans are committed politically, legally, and rationally to an ethic of human rights.[42] The critical question, therefore, is whether the regulatory purposes are compatible with human rights. Given that so much of the regulation of the consumer marketplace has been propelled by a consumer rights agenda, it seems plausible to suppose that the regulatory purposes will pass muster.

Secondly, we should not be dragged by our classical inheritance into thinking, at once, about how a doctrine of good faith would play in litigation. To be sure, even in a regulated environment, there will be some provision for dispute resolution but this is very much a marginal consideration; it is the task of the regulatory agency, not individual consumers, to keep suppliers in line. If the

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41 H. Collins, op cit, note 39 above, at 8. I take it that, although H. Collins talks here about "welfarist" regulation, his point is of general application.

42 Politically, the activities of the Council of Europe speak to the commitment to human rights all of which is given a focal legal expression in the European Convention on Human Rights. As for rational commitment to rights, that is a much longer story but, seminally, see A. Gewirth, *Reason and Morality*, (Chicago: University of Chicago Press, 1978).

regulation is ineffective, it will be because of agency capture or agency failure or the like, not because of the limits of private action.[43]

Thirdly, the specified rights and responsibilities give a particular articulation of mandatory good faith and fair dealing. To add good faith and fair dealing as a further general requirement might create some uncertainty which would be counter-productive relative to the regulatory purposes. On the other hand, the existence of the general requirement might make for regulatory economy and contribute to the effectiveness of the overall scheme. Without some practical experience, without the benefit of an impact study, we simply do not know.

VI. Regulating commercial transactions

I turn now to the regulation of commercial transactions. Here, I suggest that we should view the framework as one of co-regulation – the State setting some public policy limits to the activities of transactors but otherwise letting contracting parties self-regulate. Insofar as contractual obligations are distinctively voluntary, this is where we find the modern expression of classical thinking. I start by setting out a distinction between two forms of market-individualism in the light of which we can think about the right way to view the regulation of commercial transactions.

1. Static and dynamic market-individualism

Market-individualism has two expressions, a static version which correlates to classical thinking and a dynamic version which correlates to modernism. To draw the contrast between these two versions, the classical and the modern, we can work first through the market dimension of each version of the ideology and then through their individualistic aspects.

Static market-individualism sees the principal function of contract law as being to establish a clear set of ground rules within which a market can operate. To this extent, contract law is constitutive of the market. Markets, of course, may operate with all sorts of ground rules, customs and practices.[44] In some markets, a nod and a wink may be sufficient to close a deal; in others, the deal is not closed until the sealing wax has dried on the contractual docu-

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[43] In the terms set out in note 38 above, agency capture and agency failure look like type (i) regulatory failures. However, the explanation might be, and almost certainly will be, more complex: in both cases, the real loci of the problem might be with the culture and interests of regulatees.

[44] See e.g., T. Daintith, "Comment on Lewis: Markets, Regulation and Citizenship", in: R. Brownsword (ed.), *Law and the Public Interest*, (Stuttgart: Franz Steiner, 1993), (*Archiv für Rechts- und Sozialphilosophie (ARSP)* Beiheft 55) p. 139.

ments. For the static market-individualist, the distinctive contribution of the English law of contract is to declare the conventions in such a way that all those who deal in the contract-constituted market place know exactly where they stand.

Three of the most important ground rules concern formation (i.e. at what moment the parties are bound), third-party effects, and remedies for breach. Here, static market-individualism develops its rules around two key concepts, exchange and expectation.[45] First, the (formation) rule is that a contract comes into existence when, and only when, the terms of an exchange have been fully specified and freely agreed upon. Secondly, only those who deal as parties to the exchange can take the benefit of the contract (or be burdened by its terms). And, thirdly, the basic remedial rule is that, where there is a breach, the innocent party's expectation of performance (by the contract-breaker) is to be protected – generally speaking, by damages or an action for the agreed price rather than by a decree of specific performance as such. These ground rules have the virtue of drawing bright lines (between situations where a binding contract is in place and where it is not, between those who can sue on a particular contract and those who cannot, and so on). However, the rules do not always generate results that seem entirely reasonable. Examples of such hard cases are legion: for instance, cases where an expected contract does not eventuate and one side incurs significant (anticipatory) reliance costs, cases where an agreed variation of a contract does not qualify as an exchange, cases where an intended third-party beneficiary is unable to enforce a contract, cases where the expectation measure of compensation seems over-generous (or, indeed, inadequate),[46] and so on. Now, although it can be argued in response to such hard cases that the results are simply in line with the constitutive rules, and that these rules are well-known, this does not assist where significant numbers in both the commercial and the legal communities feel uneasy with these outcomes.

Dynamic market-individualism responds to these difficulties by favouring a more flexible approach, guided by the practices and expectations of the contracting community (particularly the commercial community).[47] Accordingly, the paradigms of static market-individualism remain central but they are qualified in significant ways. For example, if the commercial community favours protection in certain situations for pre-contractual reliance, enforcement of agreed variations (even though they might be one-sided), recognition of third-

45 Cf. M. Eisenberg, "The Bargain Principle and its Limits", (1982) 95 *Harvard Law Review*. 741.

46 Cf. *A-G v Blake* [2001] 1 AC 268.

47 Cf. e.g. Lord Devlin, "The Relation between Commercial Law and Commercial Practice", (1951) 14 *Modern Law Review* 249, esp. at p. 266; and The Rt Hon Sir Robert Goff, "Commercial Contracts and the Commercial Court", (1984) *Lloyds Maritime and Commercial Law Quarterly* 382, esp. at p. 391; and Lord Irvine, "The Law: An Engine for Trade", (2001) 64 *Modern Law Review* 333.

party interests, and the like, then dynamic market-individualism argues that the law should run with the grain of business opinion. A textbook statement of such sentiments can be found in Lord Wilberforce's well-known remarks in *The Eurymedon*[48] (where, it will be recalled, the point at issue was whether the stevedore third-parties were entitled to rely on protective provisions in the main carriage contract):

> The whole contract is of a commercial character, involving service on one side, rates of payment on the other, and qualifying stipulations as to both. The relations of all parties to each other are commercial relations entered into for business reasons of ultimate profit. To describe one set of promises in this context as gratuitous, or *nudum pactum*, seems paradoxical and is *prima facie* implausible. It is only the precise analysis of this complex of relations into the classical offer and acceptance, with identifiable consideration, that seems to present difficulty, but this same difficulty exists in many situations of daily life, e.g. sales at auction; supermarket purchases; boarding an omnibus; purchasing a train ticket; tenders for the supply of goods; offers of rewards; acceptance by post; warranties of authority by agents; manufacturers' guarantees; gratuitous bailments; bankers' commercial credits. These are all examples which show that English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.[49]

Similarly, in *G Percy Trentham Ltd v Archital Luxfer Ltd*,[50] which concerned a battle of the forms problem, the Court of Appeal recognised that a contract could come into existence in stages, without there being a particular moment at which a comprehensive offer was definitively accepted and a contract (as classically conceived) materialised. As Steyn LJ (as he then was) put it, the courts "ought not to yield to Victorian times in realism about the practical application of rules of contract formation".[51] In other words, if (in *The Eurymedon*) the understanding of contractors involved in the carriage of goods by sea is that the protection of carriage contracts normally extends to the stevedores who unload the goods, and if (in the *Trentham* case) the understanding of contractors involved in the construction industry is that they have a contractual relationship under which work has actually been carried out (and, in fact, in

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48 *New Zealand Shipping Co Ltd v AM Satterthwaite and Co Ltd, The Eurymedon* [1975] AC 154.

49 Ibid., at 167.

50 [1993] 1 Lloyd's Rep 25.

51 Ibid., at 29.

Trentham itself, completed), then classical contract doctrine must be repositioned to accommodate such commercial expectations.[52]

When we turn to the individualist dimension, for the static market-individualist, the law of contract should set up a stable framework within which contractors can agree to exchanges that promise to maximise their individual utility. Contractors, on this view, are licensed to act as self-interested utility maximisers and, having so acted, they are required by the principle of sanctity of contract to respect the bargains that they have struck. However, the market-individualist view of contract as a freely agreed exchange imposes some constraints on the unbridled pursuit of self-interest. In particular, the law of contract must regulate against fraud and coercion, the former because it undermines the reality of agreement, the latter because it is inconsistent with the notion of a free transaction. For present purposes, the question of whether or not there is ultimately any coherent deep justification for these minimal restrictions on the advancement of self-interest need not trouble us.[53] Rather, what we should note is the importance to static market-individualism that the regulation of fraud and coercion should respect two principles: first, that the lines between fraud and non-fraud, and between coercion and non-coercion, should be drawn clearly so that the ground rules for contracting remain bright and sharp; and, secondly, that the lines should be drawn in such a position that they offer no encouragement to contractors who, having made bad bargains, are looking for excuses for non-performance.

By contrast, in the case of dynamic market-individualism, the paradigms of market-individualism – contracting as self-interested dealing; contract as exchange; contract as free agreement – are qualified by commercial practice and opinion. And, of course, conspicuous examples of such qualification can be seen in the adoption of an overriding requirement of good faith in the performance and enforcement of contracts (a matter to which we will return in part VII) as well as in the modern regulation of unfair terms.

The concept of free agreement, too, may be qualified in a dynamic market-individualist regime. For example, whereas static market-individualism takes a transaction as being freely made in the absence of very obvious forms of coercion, dynamic market-individualism must make provision for those more subtle forms of pressure that commercial opinion regards as improper. Such provision could be made within the terms of a broad-ranging good faith requirement. In the modern English law of contract, however, provision has been made in the

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52 Cf. M. Eisenberg, "Relational Contracts", in: J. Beatson and D. Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford: Oxford University Press, 1995), p. 291; and, for strong dicta to the effect that the courts must work with the grain of contractors' intentions and expectations (classical requirements of certainty notwithstanding), see. Blanchard J, in: *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433, at pp. 446-447.

53 Cf. A. Kronman, "Contract Law and Distributive Justice", (1980) 89 *Yale Law Journal* 472.

form of a doctrine of economic duress. Ever since the landmark decision in *The Atlantic Baron*,[54] when the doctrine was first accepted, there has been a difficult question about how the line is to be drawn between economic duress and legitimate commercial pressure. Naturally, for the static market-individualist, such doctrinal indeterminacy is a cause for concern. However, for the dynamic market-individualist, such indeterminacy is a mark of doctrinal sophistication as the law attempts to be more sensitive to commercial opinion.

For static market-individualists, there are obvious dangers in conferring a judicial discretion to strike out unreasonable terms. However, for dynamic market-individualists such a discretion (as ever guided by commercial opinion) may be justifiable where the terms have not been freely agreed. Generally, it is accepted that standardised transacting is efficient and precludes individually negotiated agreement. Moreover, it is accepted that there are various kinds of standard terms (or arrangements of terms) that would pass as normal. However, where particular terms stand out as abnormal, a question is raised about whether such terms have been freely agreed and the onus passes to the party seeking to rely on such terms to demonstrate that they were freely agreed upon. There are a number of doctrinal expressions of this idea but, in England, the 'reasonableness requirement' of the Unfair Contract Terms Act 1977 is the most significant double-check on whether agreement has been genuinely free.

2. Commercial law as a form of co-regulation

If we organise our thinking about the commercial law of contract in dynamic market-individualist terms, we can soon view this side of contract law as an element in a mix that is co-regulatory in nature. Again, "co-regulation", like "regulation", is not always used in precisely the same sense. However, the gist of a co-regulatory approach is that it is a public/private partnership. While the State sets the broad outlines of a regulatory environment in a way that secures the public interest, the detail is filled in by private regulators. Or, to put this another way, the State sets limits to a sphere of mandated private governance.

Applied to commercial transactions, the public interest side of co-regulation implies that, while some transactions might be subject to criminal prohibition, others might be discouraged or simply not enforced; that, while attempts to introduce or rely on some types of contractual term might be subject to criminal prohibition, others might simply not be enforced, and so on. In the regulatory mix, too, there will be measures that are designed to secure the public interest in competitive markets, respect for human rights, and the like. At all events, once the full set of public interest restrictions and limitations has been taken

[54] *North Ocean Shipping Co v Hyundai Construction Co, The Atlantic Baron* [1979] QB 705.

into account, contractors are left to make their own private arrangements. Essentially, these private arrangements may take one of two forms.

First, the parties may expressly elect to engage a particular set of rules to govern their dealings. When commercial parties engage the English or the New York law of contract as the applicable law for their transaction, they micro-manage their participation as co-regulators. Moreover, this is where we find a coalescence of the classical understanding of contract as voluntary obligation, of contract as being based on consent, and of contract as the expression of the parties' autonomy. In the real world of commerce, practice might deviate very substantially from this idealised view. Nevertheless, there is a background regulatory judgment here that the parties should be left to deal in accordance with their own rules.

Secondly, where the parties make no express choice of applicable law, the law of contract applies as a default setting. Given a dynamic market-individualist approach, this default setting seeks out the regulatory backcloth that the parties have implicitly assumed to be applicable. Where that backcloth is represented by a trade standard form that is routinely used, the parties in effect submit themselves to the self-regulatory standards set by the sector. Where there is no standard form, there might nevertheless be various implicit customs and practices in the sector and, again, where this is the assumed backcloth, the parties submit themselves to the self-regulatory practice.

Provided, then, that we already view the commercial law of contract through the lens of dynamic market-individualism, little adjustment is called for. It is only necessary to take a larger view, placing a dynamic market-individualist commercial law of contract in a larger mix of co-regulation. By contrast, if we persist with the static market-individualist view, we will take a negative view of modern doctrinal developments that aspire to track self-regulatory market practices rather than impose the classical rules of engagement in a command and control manner.

VII. Commercial transactions and good faith

In his seminal paper on the good faith provisions of the Uniform Commercial Code, E. Allan Farnsworth argued that the criterion of good faith should be constituted by reasonable commercial standards of fair dealing in the trade.[55] Similarly, in the Australian case of *Renard Constructions (*ME*) Property Ltd v Minister for Public Works*,[56] Priestley JA said:

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[55] E. A. Farnsworth, "Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code", (1963) 30 *University of Chicago Law Review* 666.

[56] *Renard Constructions v Minister for Public Works* (1992) 26 NSWLR 234.

> [P]eople generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and *anything less is contrary to prevailing community expectations*.[57]

In other words, there is a general expectation that contractors should deal fairly and act in good faith which crystallises into more specific views about how far self-interested opportunism, shirking, manipulation and the like, should be restricted. Of course, the expectations of commercial contractors might fluctuate and, indeed, might reflect underlying economic pressures – for example, we might find that commercial opinion expects quite high levels of co-operation where trading conditions are stable but that its expectation of co-operation is significantly lower where the economy is in recession.[58] At all events, the dynamic market-individualist will judge it appropriate that the law should follow the general drift of commercial expectation whether it be relatively restrictive or relatively permissive in relation to contractors prioritising their self-interest.

How does this dynamic market-individualist reading of good faith and fair dealing apply to the regulation of commercial transactions? This is simply a matter of gathering up and making fully explicit a number of points that have already been made.

First, unless there is a public interest consideration that demands that commercial contractors should transact in accordance with rules that require good faith and fair dealing, there is no reason why they should not be permitted to opt for an applicable law that does not have this requirement (such as classical English law). To this extent, a code of classical English contract law still might have a future. Of course, to avoid any misunderstanding, it should be emphasised that this freedom is purely as between commercial contractors. This is not a licence to avoid mandatory consumer law provisions; but, as I have been at pains to explain, these provisions should be viewed as part of a different and wholly distinct regulatory regime.

Secondly, while every marketplace will have some position on good faith and fair dealing, whether explicit or implicit, it need not have a general clause to this effect and the standards of good faith and fair dealing might vary from one marketplace to another. Provided that the parties have chosen to transact in a particular market, and provided that there are no background public policy issues, the parties' choice should be respected. This is what self-regulation entails.

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[57] *Renard Constructions v Minister for Public Works* (1992) 26 NSWLR 234, at 268, emphasis supplied.

[58] See, e.g., P. Vincent-Jones, "Contract Litigation in England and Wales 1975-91: A Transformation in Business Disputing?", (1993) 12 *Civil Justice Quarterly* 337.

Thirdly, it should be quite clear by now that, unless there are public policy considerations that require the imposition of standards of good faith and fair dealing, there is no question of such standards being foisted upon unwilling contractors.[59] For commercial contractors, freedom of contract means that the terms of trade are their choice. It is also an implication of this approach that, public policy permitting, the more choice that contractors have the better. Accordingly, the State's role should be to facilitate the range of options available to contractors. In this light, while any agreed version of a European code of contract law is fine (albeit a seemingly disproportionate expenditure of public regulatory resources) so long as it is simply presented as a blue button option for contractors, it is seriously retrograde to imagine that such a regime might be imposed as the market place rules for business contractors.

VIII. Contract reconfigured and reasonable expectations

How does the foregoing discussion relate to the idea that, in the modern law, the ideal is to protect and promote the parties' reasonable expectations?

In consumer transactions, the position is that regulators set and impose the standards. Regulators do this in the light of their policy objectives. Consumers' expectations are always reasonable insofar as they are in line with the regulatory scheme; but the terms of the regulatory scheme set limits to what consumers can reasonably expect.

In commercial transactions, the expectations of the contractors are always reasonable provided that they are in line with the rules that they have freely engaged or with the implicit market code (assuming in both cases that this is within the authorised scope of private governance under a co-regulated scheme of control). For those who think that we are pitching our expectations too low, there is always the possibility of tweaking the regulatory environment by self-regulatory or similar strategies.

Where disputes are litigated, the dynamic market-individualist mind-set points decision-makers in the right direction. In this light, consider the recent decision of the House of Lords in *Transfield Shipping Inc v Mercator Shipping Inc*.[60] There, the charterers of a single-deck bulk carrier were in breach of contract by being some nine days late in redelivering the vessel to the owners. As a result of this late redelivery, the owners were put in a difficult position in relation to a new fixture of the vessel that had been agreed with another charterer. In order to retain this fixture, the owners agreed to reduce the daily rate by $8,000. The question was whether the owners were entitled to recover the loss of $8,000 per day for the duration of the new charter (a sum

[59] Whether public policy might demand that there should be an imposed requirement of good faith and fair dealing in relation to the initial engagement of the governing rules is another matter.

[60] *Transfield Shipping Inc v Mercator Shipping Inc* [2008] UKHL 48.

of $1,364,584.37) or merely the difference between the market rate and the charter rate for the nine days late redelivery (a sum of $158,301.17). The majority of the arbitrators and the lower appeal courts held that the owners were entitled to the higher amount: their reasoning was that the charterers must have known that the owners were likely to arrange a new onward charter, that market rates fluctuate, and that late delivery might reduce the profitability of the onward charter (i.e., the forward fixture). However, the House held unanimously (albeit with some hesitation) that the owners were restricted to the lesser sum.

According to Baroness Hale, the issue presented by the appeal "could be an examination question". Moreover, in response to the question,

> [t]here is no obviously right answer: two very experienced commercial judges have reached one answer, your lordships have reached another. There is no obviously just answer: the charterer's default undoubtedly caused the owner's loss, but a loss for which no-one has ever had to pay before. The examiners would surely have given first class marks to all the judges who have answered the question so far.[61]

Reflecting on the answers given by her colleagues, Baroness Hale identified two lines of reasoning in support of the lower sum.

One line of reasoning focuses on whether the particular type of loss was within the reasonable contemplation of the charterers. Following this line of thinking, the charterers

> would expect that the owner would be able to find a use for his ship even if it was returned late. It was only because of the unusual volatility of the market at that particular time that this particular loss was suffered. It is one thing to say…that missing dates for a subsequent fixture was within the parties' contemplation as 'not unlikely'. It is another thing to say that the 'extremely volatile' conditions which brought about this particular loss were 'not unlikely'.[62]

The alternative line of reasoning

> is that one must ask, not only whether the parties must be taken to have had this type of loss within their contemplation when the contract was made, but also whether they must be taken to have had liability for this type of loss within their contemplation then. In other words, is the charterer to be taken to have undertaken legal responsibility for this type of loss?"[63]

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61 Ibid., at para. 89.

62 Ibid., at para. 91.

63 Ibid., at para. 92.

It is Lord Hoffmann who most clearly favours the alternative line of reasoning; but that is only half the story. The more important aspect of Lord Hoffmann's approach is the way in which he proposes that it should be determined whether a contract breaker has assumed responsibility for a particular type of loss. In a key section of his speech, Lord Hoffmann says:

> The case therefore raises a fundamental point of principle in the law of contractual damages: is the rule that a party may recover losses which were foreseeable ("not unlikely") an external rule of law, imposed upon the parties to every contract in default of express provision to the contrary, or is it a prima facie assumption about what the parties may be taken to have intended, no doubt applicable in the great majority of cases but capable of rebuttal in cases in which the context, surrounding circumstances or general understanding in the relevant market shows that a party would not reasonably have been regarded as assuming responsibility for such losses?[64]

Drawing a parallel with his own favoured contextual approach to the interpretation of contracts, Lord Hoffmann prefers the latter view. And, applying such a view, Lord Hoffmann finds that, relative to background market expectations in the shipping sector, "it is clear that [the parties] would have considered losses arising from the loss of the following fixture a type or kind of loss for which the charterer was not assuming responsibility."[65]

Transfield offers an important insight into the role of the modern law of contract. Contextualism is a particular expression of dynamic market-individualism; and dynamic market-individualism is the expression of private governance in a larger co-regulatory regime.

IX. Conclusion

In this paper, I have suggested that we need to reconfigure our conventional thinking about contract law – that, so to speak, we need to shake off the chains of our classical imagination. With a renewal of our thinking, we can consider afresh the arguments for and against the inclusion of requirements of good faith and fair dealing in regimes of contract law.

The renewal that I propose is shaped by two radical elements. The first element is one that follows Hugh Collins's insistence that we should think about contract law as a regulatory instrument, as a body of doctrine that is designed to achieve some purpose. I propose that, as a community of contract lawyers, we take this forward by refocusing on contract law within the larger scheme of the regulation of transactions. The second element is one that draws on my own earlier work in conceiving of contractual obligations as distinctively

64 Ibid., at para. 9.

65 Ibid., at para. 23.

voluntary in the sense that they derive from the free engagement of a particular regime for the governance of transactions.

To say that we should attend to the purposes of contract law and to say that contract is distinctively about the voluntary assumption of obligations does not sound particularly controversial. However, when these elements are elaborated and combined in the way that I propose, when our starting point is to think about setting the right kind of regulatory environment for transactions, there is a fundamental shift in our thought patterns and world view. Given my proposal, we would see the proposed Directive on Consumer Rights as a piece in the regulation of the consumer marketplace; and we would see it as having nothing to do with contractual obligation as such.

What, then, does all this signify for requirements of good faith and fair dealing? On my analysis, we should start thinking afresh about two regulated zones, one regulated largely by command and control, the other by co-regulation. In relation to consumer transactions, where command and control is the principal strategy, it is basically a matter of determining whether a requirement of good faith and fair dealing will assist in serving the regulators' purposes. If we are not clear about those purposes or the impact of a requirement of good faith and fair dealing relative to those purposes, then this probably tells us that we have been asking the wrong question (or framing it in the wrong way). As for commercial transactions, where the strategy is one of co-regulation, the proposal is only inflammatory if regulators are seeking, through a requirement of good faith and fair dealing, to make the market. So long as they are simply trying to follow the shape of the market and let parties contract in or out of good faith as they wish, there should be no great friction.

In this light, we should judge the merits of the proposed Directive on Consumer Rights relative to its regulatory purposes. We should ask whether those purposes are legitimate and, if so, whether the proposed Directive is instrumentally fit to serve those purposes. Classical contract thinking, at any rate in the English version of the Common law, might be resistant to a general doctrine of good faith and fair dealing but this resistance is entirely irrelevant to what we make of the proposed Directive. This does not mean that we should not be critical of the proposed Directive, or the draft CFR, or any other European contract initiative; nor does this imply that we should not have a view about whether a requirement of good faith and fair dealing is or is not appropriate in the context of such proposals or initiatives; but, to conclude with the fundamental point of this paper, it does mean that our view should be informed, not by our classical contract imagination but by a sense of what it takes to set the right environment for the regulation of transactions.

Unfair Terms

Jules Stuyck

I. Introduction

The Directive 93/13/EC on unfair terms in consumer contracts is one of the eight directives of the consumer acquis under review. It is also one of the four directives that the Proposal for a Directive on Consumer Rights (hereafter: Proposal; pCRD) proposes to repeal and to integrate in one directive. The substantive changes proposed in the area of unfair contract terms are important. The central general clause remains substantially unchanged (Article 4 Directive 93/13; Article 32 pCRD – 'General Principles'), including its assessment in concreto (Art. 4(1) Directive 93/13; Art. 4(3) pCRD), the protective rules continue not to apply to 'core terms' (Art. 4(2) Directive 93/13; Art. 32(3) pCRD) and the exclusion of terms reflecting mandatory statutory provisions as well as the rules on effects of unfair terms and enforcement are maintained. Other rules, however, have undergone more significant changes and some new rules are added. First, the scope of application of the protective rules has been changed, although not dramatically, it would seem. While according to Article 3 Directive 93/13 the protection applies to terms that are not individually negotiated, Article 30(1) pCRD refers to terms drafted in advance without the possibility for the consumer to influence their content. On the other hand, the full harmonisation character of the Directive (Art. 4 pCRD) has important consequences for the scope of the protection. While under the minimum harmonisation Directive 93/13 Member States remained free to extend the protection provided by the Directive to individually negotiated terms (or to put it in the words of the Proposal, to terms drafted in advance and to which the consumer agreed without having the possibility of influencing their content), the Proposal withdraws that freedom. Second, and really fundamentally, the indicative list on the annex of Directive 93/13 is to be replaced by two new lists: a "black list" (terms considered unfair in all circumstances) and a "grey list" (terms presumed to be unfair). Finally, the Proposal contains stricter transparency obligations (Art. 31 pCRD as compared to Art. 5 Directive 93/13).

I will first briefly describe the state of the law under Directive 93/13; its main provisions; the way it has been implemented in the Member States and interpreted by the ECJ. Then I will turn to the new provisions on unfair contract terms in the Proposal and examine what changes they would bring to existing

Community law. I will also compare the Proposal with the Draft Common Frame of Reference for a European Contract Law (hereafter: DCFR)[1].

II. Unfair terms under Directive 93/13

1. Overview of the Directive

Before beginning to note the changes put forward in the Proposal it is first wise to consider the provisions that are currently provided by Directive 99/13.

Article 3 contains a 'general clause': a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer (Art. 3(1)).

A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract. The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract. Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him (Art. 3(2)).

The unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent (Art. 4(1).

Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other (so-called 'core terms'), in so far as these terms are in plain intelligible language (Art. 4(2)).

The Annex to the Directive contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.

Article 5 contains the so-called "transparency principle" and an interpretation rule. In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation

[1] C. von Bar et al., *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) Interim Outline Edition*, (Munich: Sellier, 2008).

shall not apply in the context of the procedures laid down in Article 7(2) (injunctions procedure).

Article 6(1) provides that the Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing its existence without the unfair terms. The Directive leaves it to the Member States to determine, under their national law, the nature of the non-binding nature of the unfair term.

Article 6(2) contains a rule of Private International law: Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.

According to Article 7 Member States shall ensure that adequate and effective means exist to prevent the continued use of unfair terms, i.e. by granting recognised consumer organisations the right to seek an injunction against contract terms drawn up for general use.

The Directive is clearly a "minimum harmonisation" directive. Not only is the list of unfair contract terms purely indicative and non-exhaustive, but Article 8 provides that Member States may adopt or retain more stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.

2. Transposition of the Directive in the Member States

In 1999 the Commission drew up a Report on the Integration of the Directive in the law of the Member States. Furthermore the Commission had developed a free CLAB database on the case law concerning unfair terms in consumer contracts in EEA countries. The database ceased to be updated in 2001. No further updates have been provided following this date.

More up to date (and updated until the beginning of 2008) data on the case law concerning unfair terms in consumer contracts can be found in the EU Consumer Law Acquis Database (the "Compendium"), which links the directives under the Review, relevant ECJ jurisprudence, national transposition measures as well as national case law concerning the eight directives subject to the review of the "Consumer Acquis" (including the Unfair Contract Terms Directive).

The team of Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers has not only set up the database, but has also written a Comparative

Study on the basis of national reports drawn up by national experts of the then 25 Member States.[2]

It is interesting to see how many differences there exist in the national laws transposing the Directive. Not all of these differences can be explained by the "minimum" harmonisation character of the Directive, allowing Member States to provide for a stricter protection.

First the Study reveals that not less than 11 Member States have black listed the terms of the indicative list of the Directive. The Comparative Study notes a certain number of shortcomings regarding the implementation of the Directive. The following seem important:

First, in some Member States (esp. the Czech Republic, Latvia and the Netherlands) unfair terms are binding unless the consumer invokes unfairness. The authors note that this is contrary to *Océano*,[3] *Cofidis* [4]and *Mostaza Claro*,[5] in which the ECJ (the "Court") would have stated that unfairness is to be determined on the court's own motion. It is submitted that such a broad duty cannot be implied, at least not with certainty, from the Court's case law. Admittedly the Court ruled in *Mostaza Claro* that:

> The nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists.

This judgment however concerned the possibility for a consumer to invoke the nullity of an arbitration award on the basis that the arbitration agreement contained an unfair contract term. Likewise *Océano* concerned access to justice (jurisdiction clause). In *Cofidis* the Court (merely) ruled that:

> A procedural rule which prohibits the national court, on expiry of a limitation period, from finding of its own motion or following a plea raised by a consumer that a term sought to be enforced by a seller or supplier is unfair is therefore liable, in proceedings in which consumers are defendants, to render application of the protection intended to be conferred on them by the Directive excessively difficult.

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2 H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers, *The EC Consumer Law Compendium. The Consumer Acquis and its transposition in the Member States*, (Munich: Sellier, 2008).

3 Joint cases C-240/98 to C-244/98. [2002] ECR I-4941.

4 Case C-473/00 [2002] ECR I-10875.

5 Case C-168/05 [.2006] ECR I-10421.

It seems difficult to infer from these judgments that the national courts should have the possibility to invoke on their own motion the unfair character of any term in a consumer contract.[6]

Second, according to Article 3 and Recital (15) of Directive 93/13, the Member States are obliged to fix the criteria in a general way for assessing the unfair character of contract terms. Although this requirement also applies to pre-formulated individual contracts for single use, the general clauses in Austria and in the Netherlands only relate to standard terms. Even though in these Member States other legal instruments are available to monitor such types of terms, this legislative technique gives rise to the danger that the requirements of the Directive will go unheeded.

Third, in those Member States which only transposed certain parts of the Annex, it remains unclear whether this legislative technique can be accepted. The authors refer to *Commission v Sweden*.[7] In this case the Commission contended that Sweden had not correctly implemented the Directive by failing to reproduce the indicative list in the Annex to the Directive. The Annex simply appears, with a commentary, in the statement of reasons for the draft of the law. Having regard to the role of preparatory works in the interpretation of laws in Sweden, but also considering: "In so far as it does not limit the discretion of the national authorities to determine the unfairness of a term", the Court held that:

> The list contained in the annex to the Directive does not seek to give consumers rights going beyond those that result from Articles 3 to 7 of the Directive. It in no way alters the result sought by the Directive which, as such, is binding on Member States. It follows that, contrary to the argument put forward by the Commission, the full effect of the Directive can be ensured in a sufficiently precise and clear legal framework without the list contained in the annex to the Directive forming an integral part of the provisions implementing the Directive (point 21 of the Judgment).

It would appear that in the light of this consideration Member States cannot be forced to actually reproduce the list of the annex in their legislation. However a partial preproduction of the list in the law could, as the authors rightly suggest, mislead the consumer about his rights and therefore constitute an incorrect implementation of the Directive.

Fourth, the principle of transparency prescribed in Article 5, first sentence of Directive 93/13 has not been explicitly transposed in the Czech Republic, Estonia, Greece, Hungary, and in Slovakia.

Finally, if one assumes, that the Member States are obliged by Article 7(2) of Directive 93/13, to provide consumer associations with standing to bring collective proceedings against the user of unfair terms, then Lithuania and

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6 See also section II.3. of this chapter.

7 Case 478/99 [2002] ECR I-4147.

Malta have not correctly implemented the Directive since in both countries consumer associations do not have the right to proceed directly against the user of the clause, but merely to proceed against a measure of the relevant public body or to bring an action before a court for an order requiring the public body to make a compliance order.

3. The case law of the ECJ

It took some time before the Directive reached the ECJ. The first judgment *Océano*, a preliminary ruling, dates from 2000. It will be discussed hereafter.

In 2001-2002 the Court handed down three judgments in infringement procedures. In the first of these cases, *Commission v Sweden*,[8] already mentioned, the Court rejected the Commission's contention that Member States have to reproduce the list of unfair terms in the text of the law transposing the Directive. In *Commission v Netherlands*[9] the Court condemned this Member State because it had not transposed the Directive and had been unable to show that its legal system already contained provisions equivalent to Articles 4(2) and 5 of the Directive (exclusion of core terms and transparency requirement). In *Commission v Italy*[10] the Court found that Italy had failed to adopt measures necessary to transpose Article 7(3) in full, i.e. the possibility of injunctive relief against conduct confined to the recommending (by professional bodies) of the use of unfair contract terms.

In three preliminary rulings, starting with *Océano*, the Court interpreted the Directive with regard to clauses which influence the consumer's access to the courts. In *Océano* the Court ruled, *inter alia*, taking into account that the Annex to the Directive mentions as unfair a clause (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, that the inclusion of a jurisdiction clause in a consumer contract, without being individually negotiated, conferring exclusive jurisdiction on a court in the territorial jurisdiction of which the seller or supplier has his principal place of business, must be regarded as unfair within the meaning of the general clause of Article 3 of the Directive *in so far* as it causes, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. It is not absolutely clear whether a jurisdiction clause is in all circumstances unfair. The words "in so far" ("*dans la mesure*", "*en la mededida*") seem somewhat ambiguous. On the one hand they suggest that a jurisdiction clause (inserted in a consumer contract without prior negotiation) conferring exclusive jurisdiction on courts of the supplier's place of business is not unfair as such, but only after it has been established (in the case at hand) that it is contrary to good faith and that it causes

8 See footnote 6.

9 Case C-144/99 [2001] ECR I-3541.

10 Case C-372/99 [2002] ECR I-819.

a significant imbalance between the parties' rights and obligations, while on the other hand the Court's overall reasoning in the judgment amounts to recognising that such an imbalance is created by the very nature of such a clause. I have already defended the view that this formula is the consequence of the fact that the list of unfair terms on which the Court based its assessment of unfairness is a purely indicative list (and that the Court cannot therefore find the unfairness itself), but that the practical effect of the judgment is that non-negotiated jurisdiction clauses like the one at hand are always unfair in B2C contracts.[11]

Océano concerned a purely domestic case and therefore leaves open the relationship between Directive 93/13 and the Brussels Regulation. This relationship is complicated by the fact that the Regulation only provides protection for "passive consumers." (Art. 15(1) (see also here after IV.2. a.).

Finally, in *Océano,* the Court ruled that the protection provided for consumers by the Directive entails the national court being able to determine of its own motion whether a term of a contract before it is unfair when making *its preliminary assessment as to whether a claim should be allowed to proceed* before the national courts. The ECJ came to this conclusion after general considerations it has repeated in several later judgments, namely that

> (…) it should be noted that the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms.

Logically in *Cofidis* the Court said that a procedural rule which prohibits the national court, on expiry of a limitation period, from finding of its own motion or following a plea raised by a consumer that a term sought to be enforced by a seller or supplier is liable, in proceedings in which consumers are defendants, to render application of the protection intended to be conferred on them by the Directive excessively difficult and is therefore unfair.

In *Mostaza Claro*,[12] referring to *Océano* and *Cofidis*, the Court repeats that the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms. Such an imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract, i.e. by requiring Member States to ensure that the judge finds the unfair character of the clause

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11 Case note on this judgment in (2001) 3 *Common Market Law Review* 719.

12 Points 25-27.

of his own motion. In the case at hand a consumer, Ms Mostaza Claro, had not disputed an arbitration clause in a contract with a mobile telecommunications operator. However, subsequently she contested the arbitration decision before the ordinary court. The national court found the arbitration clause to be unfair but wondered whether in these circumstances, i.e. the consumer had not raised the invalidity of the arbitration clause before the arbitrators, Directive 93/13 required him to determine whether the arbitration agreement is void and to annul the award. The Court answered that question in the affirmative.

These three judgments concern a clause limiting access to justice (*Océano*, and *Mostaza Claro*) or at least an action in justice (*Cofidis*), which explains why the national court is required to invoke the unfairness *ex officio*. The three judgments have something different in common, namely that the unfairness of the clauses at hand (and this is possibly limited to clauses limiting access to justice and actions in justice) can be established irrespective of the circumstances of the case, while Article 4(1) provides expressly that the unfairness of a contractual term shall be assessed

> (…) by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or another contract on which it is dependent.

Recently, one Spanish and two Hungarian courts made preliminary references to the European Court of Justice. The Spanish case, *Astrucom Telecommunicationes v Cristina Rodriguez Noguiera*[13] relates again to arbitration. In the two Hungarian cases, *VB Pénzügyi Lizing Zrt. v Ferenc Schneider*[14] and *Pannon GSM Zrt. v Erzsébet Sustikne Györfi*[15], the referring judges ask in essence whether there is a general obligation for national courts to assess, of their own motion, the unfair nature of a contractual term. Such a general obligation can indeed not, at least not with certainty, be deduced from *Océano, Cofidis* and *Mostaza Claro*.

In only one, but important, judgment so far did the Court rule on the general clause by stressing its limited role in interpreting it: *Freiburger Kommunalbauten*.[16] In this case Mr and Mrs Hofstetter purchased a parking space in a car park. The contract with the contractor (Freiburger Kommunalbauten) provided that the price was due upon delivery of a security by the contractor. The German Federal Court of Justice (the *Bundesgerichtshof*; BGH) was inclined to consider this clause as unfair, but was unsure whether this was the case under Article 3(1) of the Directive. It referred the matter to the ECJ.

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13 Case C-40/08.

14 Case C-137/08.

15 Case C-243/08.

16 Case C-237/02 (2004) ECR I-3403.

The Court ruled that it is for the national court to decide whether a contractual term such as that at issue in the main proceedings satisfies the requirements for it to be regarded as unfair under Article 3(1) of the Directive.

The Court differentiated this prudent approach from its more active approach in *Océano*, in the following words:

> It is true that in Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraphs 21 to 24, the Court held that a term, drafted in advance by the seller, the purpose of which is to confer jurisdiction in respect of all disputes arising under the contract on the court in the territorial jurisdiction of which the seller has his principal place of business, satisfies all the criteria necessary for it to be judged unfair for the purposes of the Directive. Nevertheless, that assessment was reached in relation to a term which was solely to the benefit of the seller and contained no benefit in return for the consumer. Whatever the nature of the contract, it thereby undermined the effectiveness of the legal protection of the rights which the Directive affords to the consumer. *It was thus possible to hold that the term was unfair without having to consider all the circumstances* in which the contract was concluded and without having to assess the advantages and disadvantages that that term would have under the national law applicable to the contract.[17]

It results from the Court's case law so far that the role of the ECJ in finding a contractual term unfair (by applying the general clause of Art. 3(1) with due account of Art. 4(1)) necessarily remains limited. The ECJ cannot decide whether a substantive cause of a contract is contrary to the requirement of good faith and whether it causes a significant imbalance in the parties' rights and obligations arising under the contract because the unfairness will necessarily depend on the circumstances of the case which is not for the ECJ – rendering a preliminary ruling – to take into account.

4. The fairness test of the Directive and national law

Under Directive 93/13 (and also under the Proposal, see here after) a (non-individually negotiated) contract term in a B2C contract is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

The DCFR refers to "good faith and fair dealing" (see Section III of this Chapter).

Interestingly the majority of Member States have implemented the Directive without the "good faith" criterion. In Belgium (Article 31 Trade

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17 Emphasis added.

Practices Act), France (Art. L132-1 French Code de la Consommation) (see here after) and Luxembourg, Austria, Finland, Greece, and the Netherlands the unfairness test is limited to the imbalance between the parties' rights and obligations. In Sweden there is no reference to imbalance either. Some Member States use other concepts, like honest business practices (Denmark) or proper morals (Slovakia), instead of "good faith".[18] Good faith is only mentioned in thirteen Member States (of the then 25). Nearly all the national laws refer to the imbalance between the parties' rights and obligations to the detriment of the consumer, but in varying ways.[19]

The meaning of good faith in the Directive has given rise to interrogations. Is it procedural good faith or substantive good faith? Procedural good faith relates to the opportunity given to the consumer to influence the terms, to choose between alternatives and to understand them (but other provisions of the Directive take care of that). Substantive good faith involves an overall evaluation of the interests involved.[20]

Brownsword and Howells[21] have rightly observed that if good faith has to do with imbalance or unduly advantageous transactions, it is difficult to understand how it differs from the second part of the test (significant imbalance to the detriment of the consumer). *Nebbia* mentions that Italian courts tend to assimilate the good faith criterion to significant imbalance.[22]

I will not further discuss the notion of good faith here, referring the reader to *Brownsword's* contribution to this book.[23]

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18 H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers, *The EC Consumer Law Compendium. The Consumer Acquis and its transposition in the Member States*, p. 228-232 (who make a comprehensive overview of the laws of the (then) EU 25).

19 Ibid.

20 See H. Beale, "Legislative Control of Fairness: the Directive on Unfair Terms in Consumer Contracts", in J. Beatson & D. Friedman (eds) *Good Faith and Fault in Contract Law*. (Oxford: Clarendon Press, 1995); H. Collins, "Good Faith in European Contract Law" (1994) *Oxford Journal of Legal Studies* 251; P. Nebbia, *Unfair Contract Terms in European Law. A Study in Comparative and EC Law*, (Oxford: Hart, 2007,) p. 149; see also C. Willett, *Fairness in Consumer Contracts. The Case of Unfair Terms*, (Aldershot: Ashgate, 2007), p. 15 et seq.

21 R. Brownsword and G. Howells, "The Implementation of the EC Directive on Unfair Terms in Consumer Contracts – Some Unresolved Questions", (1995) *Journal of Business Law* 255.

22 Nebbia, p. 149.

23 See the contribution by R. Brownsword, "Regulating Transactions: Good Faith and Fair Dealing", *in this volume*.

III. Unfair terms in the DCFR

In 2008 the Study Group on a European Civil Code and the Research Group on Existing EC Private Law (the 'Acquis Group') presented the first academic Draft of a Common Frame of Reference.[24] One purpose of the text is to serve as a draft for drawing up a 'political' Common Frame of Reference which was called for by the European Commission's Action Plan on a More Coherent European Contract Law of January 2003.[25]

The Model Rules are framed (provisionally) in seven books. Book II relates to Contracts and other juridical acts. Chapter 9 concerns contents and effects of contracts, of which Section 4 deals with unfair terms, not only in B2C contracts, but also in B2B contracts and in NonB2NonB (or P2P) contracts. For the three types of contracts the DCFR contains mandatory provisions (Article II.–9:401 DCFR) and a duty of transparency in terms not individually negotiated.

The meaning of "not individually negotiated" is explained in Article II.–9:403 DCFR:

> (1) A term supplied by one party is not individually negotiated if the other party has not been able to influence its content, in particular because it has been drafted in advance, whether or not as part of standard terms.
> (2) If one party supplies a selection of terms to the other party, a term will not be regarded as individually negotiated merely because the other party chooses that term from that selection.
> (3) The party supplying a standard term bears the burden of proving that it has been individually negotiated.
> (4) In a contract between a business and a consumer, the business bears the burden of proving that a term supplied by the business, whether or not as part of standard terms, has been individually negotiated.
> (5) In contracts between a business and a consumer, terms drafted by a third person are considered to have been supplied by the business, unless the consumer introduced them to the contract.

Pursuant to Article II.–9:405 DCFR in a contract between parties neither of whom is a business, a term is unfair only if it is a term forming part of a standard term supplied by one party and *significantly disadvantages* the other party, contrary to good faith and fair dealing. In contracts between businesses a term is unfair only if it is a term forming part of standard terms supplied by one party

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[24] Von Bar et al., *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR), Interim Outline Edition*; for a critical comment, see S. Grundmann, "The Structure of the DCFR – Which Approach for Today's Contract Laws? (2008) *European Review of Contract Law* 226 et seq.

[25] COM(2003) 68 final, OJ (2003) C 63/1.

and of such a nature that its use *grossly deviates* from good commercial practice, contrary to good faith and fair dealing.

Article II.–9:404 DCFR defines the meaning of "unfair" in contracts between a business and a consumer:

> In a contract between a business and a consumer, a term [which has not been individually negotiated][26] is unfair for the purposes of this Section if it is supplied by the business and if it significantly disadvantages the consumer, contrary to good faith and fair dealing.

This provision resembles Article 3(1) of Directive 93/13 (significant disadvantage for the consumer as compared to causing a significant imbalance in the parties' rights and obligations), but for the addition of the concept of fair dealing. Under the Directive a contract term in a consumer contract is unfair if it is contrary to the requirement of good faith. The DCFR refers to good faith *and fair dealing*, following in this respect the Unidroit Principles and the Principles of European Contract Law (PECL).[27] By stating that a contract term is unfair if it is contrary to (both) good faith *and* fair dealing, the DCFR would seem to fix a higher threshold for unfairness and thus be less consumer friendly than the Directive. However, good faith and fair dealing rather seem to be alternatives. In this respect one could compare this with the general clause of the Unfair Commercial Practices Directive (UCPD)[28]: according to Article 5 UCPD a B2C commercial practice is unfair when it is contrary to professional diligence, a notion that is defined in Article 2(h) UCPD as

> *the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity*.[29, 30]

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26 See below for further detail on the meaning of the text in the brackets.

27 M. Mekki and M. Kloepfer-Pelèse, "Good faith and fair dealing in the DCFR", (2008) *European Review of Contract Law* 345, (good faith is a more subjective notion, the will to act honestly and equitably, while fair dealing is closer to the idea of acting objectively with loyalty); on both notions (good faith and fair dealing) see further the contribution by R. Brownsword, "Regulating Transactions: Good Faith and Fair Dealing", *in this volume*; for the role of good faith in the DCFR in general, see M. Hesselink, "Common Frame of Reference & Social Justice, (2008) *European Review of Contract Law* 267-268.

28 Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive'), O.J. 2005 L 149/22.

29 Author's emphasis.

30 An identical definition is given by Article 2(14) pCRD, but it does not seem to play a role with regard to unfair terms.

The words "which has not been individually negotiated" are between brackets. This reflects the differences in views between the Study Group and the Acquis Group. While the Study Group wanted to include the individually negotiated terms in B2C relations, the Acquis Group insisted that the unfairness test be restricted to terms not individually negotiated.[31] Article II.–9:407 DCFR contains exclusions of the unfairness test comparable to those of Articles 1(2) and 4(2) of the Directive, i.e. mandatory provisions and international conventions, respectively 'core terms' which are expressed in plain and intelligible language. The extension of the protection to core terms has been contemplated but found little support outside consumer organisations.[32]

Article II.–9:408 DCFR is comparable with Article 4(1) of the Directive: for the assessment of the unfairness of a contractual term regard is to be had to the nature of the goods or services, the circumstances prevailing during the conclusion of the contract and to other terms of the contract and to the terms of any other contract on which the contract depends. To these elements the DCFR adds the duty of transparency.

With regard to the effects of unfair terms, the DCFR is again comparable to Directive 93/13 (Art. 6(1)): a term which is unfair is not binding on the party who did not supply it (normally the consumer in a B2C situation) and if the contract can reasonably be maintained without the unfair term, the other terms remain binding on the parties.

Article II.–9:410 DCFR ('Exclusive jurisdiction clauses') voices *Océano* by stipulating that a term in a contract between a business and a consumer is unfair if it is supplied by the business and if it confers exclusive jurisdiction for all disputes arising under the contract on the court of the place of residence of the business, unless this is also the place of the consumer's residence. This Article is as if it were a one item black list.[33]

Finally Article II.–9:411 DCFR contains a list of terms which are presumed to be unfair in contracts between a business and a consumer (in other words a "grey list"). The list is nearly identical to the indicative list of Directive 93/13, but phrased in more adequate legal language.[34] Point (i) on the indicative list ("irrevocably binding the consumer to terms which he had no real opportunity of becoming acquainted before the conclusion of the contract") is not on the list of the DCFR.

All in all the major difference between Directive 93/13 and the provisions on unfair terms in consumer contracts of the DCFR is the transformation, in

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31 M. Loos, *Review of the European Consumer Acquis*, (Munich: Sellier, 2008), p. 41.

32 M. Loos, p. 41.

33 See M. Loos, p. 42, who regrets that the list is not longer.

34 The provisions under point 2(a) (b) and (d) of the indicative list of the Directive ("scope of subparagraphs (g), (j) and (l)") have been integrated in the relevant items of the list in Article II.–9:411(1); the equivalent of point 2(c) of the indicative list can be found in Article II.–9:411(2) of the DCFR.

the DCFR, of (all but one item, which is blacklisted) the indicative list of the Directive into a list of terms which are presumed to be unfair ("grey list")

IV. The new approach to unfair terms in the Proposal

1. Introduction

While maintaining the limitation of the applicability of the Directive to standard terms,[35] the general clause of Directive 93/13 and its exclusion of 'core terms', as well as the rules concerning interpretation and the effects of unfair terms and the rules on enforcement, the Proposal abandons the indicative and non-exhaustive list of the terms which may be regarded as unfair and replaces it with two exhaustive lists – a "black list" and a "grey list" – and introduces a (comitology) procedure for amendment of the lists. Last but not least the minimum harmonisation clause of Article 8 of Directive 93/13 is repealed. Like for all other provisions of the Proposal, the full harmonisation clause of Article 4 pCRD applies:

> Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection.

I will first discuss the minor changes with regard to (i) the scope of application, (ii) the non-binding character of unfair terms (iii) the imperative nature of the Directive and Private International Law. Then I will draw attention to two new ancillary provisions (express consent of consumer required for extra charges and exclusion of national presentational requirements). Finally I will turn to the major changes: the black and grey lists, the comitology procedure to change them and the full harmonisation character of the new provisions.

a) Scope of application

First, it should be mentioned that the definition of "consumer" in Article 2(1) of the Proposal is potentially slightly stricter: any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, *craft* or profession. The word craft does not figure in Directive 93/13 (Art. 2(b) pCRD). However "craft" was probably already covered by the notion of "trade".

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[35] As opposed to terms that have been individually negotiated. The notions used both by Directive 93/13 and the Proposal to distinguish these two categories are different (see here after).

Second, the new rules would apply to contract terms *drafted in advance by the trader or a third party, which the consumer agreed to without having the possibility of influencing their content*, in particular where such terms are part of a pre-formulated standard contract. Directive 93/13 applies to terms *that have not been individually negotiated*, it being understood that a term shall *always* be regarded as not individually negotiated where it has been drafted in advance and the consumer has *therefore* not been able to influence the content of the term, particularly in the context of a pre-formulated standard contract. At first sight it would thus seem that under Directive 93/13 a standard term is per se deemed not to be individually negotiated. However this is contradicted by the last subparagraph of Article 3(2), stating that where a professional claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him. In this respect Article 30(1) of the Proposal is more elegant; it does not contain the same contradiction, but defines the scope of application straightforwardly as contract terms drafted in advance and agreed to by the consumer without giving him or her the possibility of influencing their content.

The preamble to the Proposal (Recital 45, second sentence) adds that being afforded the possibility to choose between different contract terms which have been drafted by the trader or a third party on behalf of the trader should not be regarded as a negotiation. It can be regretted that the text of the Proposal does not mention this rule, as the DCFR does.

The professional bears the burden of proof that a standard term has been individually negotiated, that is, it would seem, whether or not as part of standard terms (Art. 33 pCRD; see also Art. II.–9:403 DCFR).

There is also a change with regard to the "severability" of a non standard term. Under Article 3(2), second subparagraph of Directive 93/13 the fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of the unfairness test to the rest of a contract *if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract*. By contrast, according to Article 30(2) of the Proposal, the fact that the consumer had the possibility of influencing the content of certain aspects of a contract term or one specific term, shall not exclude the application of the unfairness test to the contract terms which form part of the contract; there is no condition here that an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

These changes are of course not essential. Under Directive 93/13 the pre-formulated character of a contract term triggers as such the applicability of the unfairness test because the consumer is deemed, or at least presumed (see Art. 3(2), last subparagraph), not to have had the possibility to influence its content. Under the Proposal the pre-formulated standard character of a term does not necessarily mean that the consumer had no possibility to influence its content, a factor which, ultimately like in Directive 93/13, determines whether the unfairness test applies or not. It is believed that the practical consequences of this change will, remain limited. Likewise, the different and

more consumer friendly "severability" test introduced by the Proposal would not seem to change a lot in practice.

By focusing more on the consumer's possibility to influence the content of contract terms than on their pre-formulated character, the Proposal follows the Court in its *Océano* formula quoted above.

Finally Article 30(3) pCRD excludes the applicability of the unfairness test to contract terms reflecting mandatory statutory or regulatory provisions, which comply with Community law and the provisions or principles of international conventions to which the Community or the Member States are party. Article 1(2) Directive 93/13 refers to the same two types of provisions and to the provisions and principles of international law but does not require *expressis verbis* these mandatory statutory or regulatory provisions and principles of international law to be compliant with Community law and international law. On the other hand that Article adds, with regard to international Conventions, particularly those in the transport area.

It can be regretted that the Proposal does not clarify this problematic provision of the Directive.[36] A Study made, in 1997, for the then DG XXIV, by the Institut National de la Consommation (France) about the EU-15, shows that this provision has been implemented in many different ways in the Member States.[37] The exclusion does not mean that contract terms imposed by public sector undertakings escape as such from the application, but where they are part of mandatory regulations it can be argued that they are. There does not seem to be any justification that exists so as to deny consumers protection against unfair contract terms of pubic sector undertakings, on the contrary, unless the regulations containing these terms give the consumer equivalent protection as Directive 93/13, *quod est demonstrandum*.

b) The non-binding nature of unfair terms

Contract terms that are unfair shall not be binding on the consumer. The contract shall continue to bind the parties if it can remain in force without the unfair terms (Art. 37 pCRD). In substance this does not seem to be different from Article 6(1) Directive 93/13.

Article 43 of the Proposal (imperative nature of the Directive) provides that if the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by this Directive. Recital 59 of the Proposal states that:

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36 Cf. H. Beale, "The Draft Directive on Consumer Rights and UK Consumer Law – Where Now?", *in this volume*.

37 AO 2600/96/000237 – Application de la directive 93/13 aux prestations de service public/Rapp. final/1997 (on DG SANCO's website: http://ec.europa.eu/dgs/health_consumer/index_en.htm).

> The consumer should not be deprived of the protection granted by this Directive. Where the law applicable to the contract is that of a third country, Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) should apply, in order to determine whether the consumer retains the protection granted by this Directive.

Article 6(2) of Directive 93/13 provides that Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by the Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.

Under Directive 93/13 Member States can either leave it for the courts to decide on the country with which the contract has the closest connection or adopt a conflict rule determining the closest connection (e.g. Germany).[38]

Regulation 593/2008 on the law applicable to contractual obligations (Rome I),[39] like its predecessor the Rome Convention, contains a special provision on consumer contracts. Article 6 of Rome I, which is based on Article 15 Brussels I,[40]differs from Article 5 of the Rome Convention, but like the Convention, limits the protection to "passive consumers". It reads:

> 1. Without prejudice to Articles 5 and 7 (contracts of carriage and insurance contracts, J.S.), a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:
> (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
> (b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.
> 2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3 (express or clearly demonstrated choice, J.S.). Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by

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38 See A. Lopez-Tarruella Martinez, "International consumer contracts in the new Rome I regulation: how much does the regulation change?" (2007-2008) *European Consumer Law Journal* 376-377.

39 O.J. (2008) L 177/6.

40 Regulation 44/2001 of 20 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. (2001) L 12/1.

> agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.
> 3. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled (i.e. the consumer was 'active', J.S.), the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4.

Article 3 Rome I refers to the freedom of choice of the parties (to be made expressly or clearly demonstrated). Article 4 determines the law applicable in the absence of choice (which will normally be the law of the country of the seller or service provider).

Paragraph 4 of the Article contains a certain number of exclusions, namely for services to be provided in another country than the one in which the consumer has his habitual residence, contracts of carriage other than package travel, contracts relating to a right in rem in immovable property or a tenancy of immovable property other than timeshare and obligations relating to financial instruments.

Article 6 Rome I clarifies the following points, as compared to the Rome Convention: the consumer is not just a person, but only a natural person; P2P contracts (important in electronic commerce) are excluded; all consumer contracts (whether for the sale of goods or the supply of services or anything else, such as software licences, time-sharing etc.) come (as a matter of principle) within the scope of application of the protective rules and finally a consumer contract is one which is concluded for a purpose which can be regarded – rather than "is" – as being outside one of the parties' trade or profession, (meaning that account can be taken of the parties' expectations).[41]

Article 5(2) Rome Convention, especially the hypothesis of Article 5(2) that in the country where the consumer has his habitual residence:

> (…) the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
> – if the other party or his agent received the consumer's order in that country, or
> – if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

led to important interpretation problems in case of Internet sales. Article 6 Rome I, taking the same approach as Brussels I might solve these problems. The words in Article 6(b) Rome I "by any means, directs such activities to that country or to several countries including that country" as interpreted by the

41 A. Lopez-Tarruella Martinez, pp. 351-353.

Joint Declaration by the Council and the Commission to Article 15 Brussels I Regulation allow to distinguish websites that actively promote sales in other Member States and those that do not (depending e.g. on its interactivity, the languages used, the presence of disclaimers as to the territories served…).[42]

2. New ancillary rules

The Proposal contains two ancillary rules which are new compared to Directive 93/13.

First, according to Article 31(3) pCRD the trader shall seek the express consent of the consumer to any payment in addition to the remuneration foreseen for the trader's main contractual obligation. If the trader has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment.

This is an important provision for internet sales, especially in the field of air travel. Complaints about default options in this sector, e.g. travel insurance which is concluded automatically unless the consumer opts out by clicking it away, have led the Community legislature to adopt Article 23(1) of the New Regulation 1008/2008 on common rules for the operation of air services in the Community.[43] This provision reads:

> Air fares and air rates available to the general public shall include the applicable conditions when offered or published in any form, including on the Internet, for air services from an airport located in the territory of a Member State to which the Treaty applies. The final price to be paid shall at all times be indicated and shall include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication. In addition to the indication of the final price, the following shall be specified:
>
> (a) air fare or air rates;
> (b) taxes;
> (c) airport charges; and
> (d) other charges, surcharges or fees, such as those related to security or fuel;
>
> where the items listed under (b), (c) and (d) have been added to the air fare or air rate. Optional price supplements shall be communicated in a clear,

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42 A. Lopez-Tarruella Martinez, p. 355.

43 O.J. (2008) L 293/3.

transparent and unambiguous way at *the start of any booking process and their acceptance by the customer shall be on an 'opt-in' basis*.[44]

After the Denied Boarding Regulation[45] and the Roaming Regulation,[46] this provision is a new example of a – questionable – trend in EC law to provide for consumer rights (in the contractual sphere) by way of directly applicable regulations,

Second, Article 31(4) pCRD stipulates that Member States shall refrain from imposing any presentational requirements as to the way the contract terms are expressed or made available to the consumer. This provision can be seen in the light of the full harmonisation character of the Proposal (See Section IV. 5. of this Chapter). The question can be asked whether this prohibition includes language requirements. It would seem that a requirement to use the language of the consumer is not a (mere) presentational requirement and that it would be a concretisation of the duty of Article 31(1) pCRD that contract terms shall be expressed in plain, intelligible language and be legible.

3. The black and grey list and the comitology procedure

Article 34 of the Proposal relates to terms considered unfair in all circumstances and provides that Member States shall ensure that contract terms, as set out in the list in Annex II, are considered unfair in all circumstances ("black list"). Examples of clauses that are considered unfair in all circumstances are: exoneration of liability for death or personal injury, hindering the exercise of remedies, including compulsory arbitration, and the right for the trader to determine conformity.

Article 35 refers to terms presumed to be unfair. Member States shall ensure that contract terms, as set out in the list in point 1 of Annex III, are considered unfair, unless the trader has proved that such contract terms are fair in accordance with Article 32 pCRD ("grey list"). Examples of contract terms that are presumed to be unfair are: certain clauses on contract renewal, termination and price revision clauses.

Both lists shall apply in all Member States and may only be amended in accordance with Articles 39(2) and 40 pCRD, i.e. according to a comitology procedure.

In combination with Article 4 of the proposed Directive there can be no doubt that the Proposal aims at full harmonisation (or in the words of the

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44 Emphasis added.

45 Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, O.J. (2004) L 46/1.

46 Regulation 717/2007 on roaming on public mobile telephone networks within the Community, O.J. (2007) L 171/32.

Court in *Gysbrechts*[47] "exhaustive harmonisation"). I will come back to this technique of harmonisation and its consequences in the next subsection.

First I would like to discuss the introduction of a black and a grey list and the procedure for amending these lists.

The co-existence of a black list and a grey list seems to be inspired by the DCFR (although, as mentioned above, the black list of the DCFR contains only one item). But such a system already exists, in France. Article L132-1 Code de la Consommation has been amended by Act of 4 August 2008. The new provision has entered into force on 1 January 2009 and reads[48]:

> In contracts between professionals and non-professionals, terms that have as their object or effect to create, a significant imbalance in the parties' rights and obligations arising under the contract are unfair.[49]
>
> A decree, adopted after the opinion of the committee established pursuant to Article 132-2[50]establishes a list of terms which are presumed to be unfair; in case of a dispute concerning such a term, the professional has to adduce evidence of the non unfair character of the term at issue.
>
> A decree, adopted according to the same procedure, establishes the type of clauses which, taking into account the seriousness of the adverse effect they have on the contractual equilibrium, are deemed to be unfair in all circumstances.[51]

Black lists have several disadvantages. First, they do not allow the judge to take account of the circumstances of the case that may otherwise suggest that there is no imbalance between the parties' rights and obligations. Second, a black list is always a bit arbitrary. Why does it contain certain terms and why not others? The co-existence with a grey list has the advantage that the black list can be limited to those terms which are the most likely to be unfair in all circumstances.

Indeed the black list (Annex II) of the Proposal only contains five terms:

(a) excluding or limiting the liability of the trader for death or personal injury caused to the consumer through an act or omission of that trader;
(b) limiting the trader's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular condition which depends exclusively on the trader;

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47 Case C-205/07, Judgment of 16 December 2008, not yet reported, discussed in section VI.5.

48 Translation by author.

49 "Abusives" (abusive).

50 The Commission des clauses abusives.

51 "(...) doivent être regardées, de manière irréfragable, comme abusives au sens du premier alinéa".

(c) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions;
(d) restricting the evidence available to the consumer or imposing on him a burden of proof which, according to the applicable law, should lie with the trader;
(e) giving the trader the right to determine whether the goods or services supplied are in conformity with the contract or giving the trader the exclusive right to interpret any term of the contract.

The grey list (Annex II) is much longer (12 terms) and corresponds (except for the terms which are now black listed) to a large extent to the indicative list of Directive 93/13 and the grey list of the DCFR, although there are quite a number of significant differences which I cannot discuss in the framework of this paper.

The comitology procedure is the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC. If the measure envisaged by the Commission is in conformity with the opinion of the Committee (with representatives of the Member States and a chairman of the Commission and deciding by a qualified majority), the Parliament and the Council can still oppose the measure (if they do not the measure is adopted). If the Committee delivers a negative opinion the Commission has to submit a proposal for approval by the EP and the Council.

4. Full harmonisation

a) General remarks

I have to start with a terminological issue. The terms used to designate the various forms of harmonisation are not well settled. The Proposal refers to 'full harmonisation' and the Explanatory memorandum to 'full targeted harmonisation'. The latter is a species of the former. The term 'total harmonisation' can best be avoided because it suggests that everything is harmonised (with 'full targeted harmonisation' this suggestion is of course not made). *De Agostini*[52] has shown that even 'full' or 'total' harmonisation of e.g. television broadcasting does not exclude the applicability to television broadcasting of general rules of a Member State on trade practices.

'Full harmonisation' is mostly used in opposition to 'minimum harmonisation', denoting the fact that Member States cannot deviate from the harmonised rules (of course within the harmonised field)(as the Audiovisual Media

[52] Joint cases C-34-36/95, *De Agostini*, (1997) ECR I-3843.

Services Directive[53] e.g. has not harmonised everything with regard to television, but only certain aspects: the licensing, advertising, protection of minors …).

In the field of consumer law the question is whether, after harmonisation, Member States can adopt or maintain more protective measures. This is a constitutional principle where the Community has adopted a measure under Article 153(3)(b) EC (measures which support, supplement and monitor consumer policy pursued by the Member States, as opposed to measures adopted pursuant to Art. 95 EC in the context of the completion of the internal market, as referred to by Art. 153(3)(a) EC). Where neither the Treaty nor the relevant instrument of secondary Community law allows Member States to adopt more protective measures, the term 'maximum harmonisation' would seem to be appropriate, in order to distinguish the situation firmly from 'minimum' harmonisation.

However, the term 'maximum' is misleading since in a situation where the harmonisation is not 'minimal', i.e. Member States have not the right to introduce or maintain more stringent measures, the harmonisation is in fact also 'minimum'. Community law sets both a minimum and maximum level of protection, as now expressly stated in Article 4 of the Proposal: Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection.

The term 'full targeted harmonisation' is thus to be preferred. However the Court of Justice now seems consistently to refer to 'exhaustive' harmonisation, when it expresses the well-known rule that a national measure in an area which has been the subject of exhaustive harmonisation at Community level must be assessed in the light of the provisions of that harmonising measure and not those of the Treaty.[54]

For the sake of the following considerations I will assume that 'exhaustive harmonisation' is the same as 'full harmonisation'.

The Proposal claims to have adopted the variant "targeted full harmonisation".

A recent example of full targeted harmonisation is given by Directive 2008/48 on Consumer Credit: full harmonisation limited to key issues so as to remove those disparities which are believed to be real obstacles to cross-border trade. In fact this Directive gives a much more complex picture than one of full targeted harmonisation. The Directive contains many exclusions (forms of

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53 Directive 2007/65/EC, amending Directive 89/552/EEC (the "Television Without Frontiers Directive"), O.J. (2007) L 332/27.

54 Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 64; Case C-205, *Gysbrechts*, Judgment of 16 December 2008, not yet reported in the ECR. In earlier judgments the Court formulated this rule with reference to matters which had been "harmonised" (Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, paragraph 9; Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897, paragraph 32).

credit that are not harmonised) a threshold and a cap (200 and 75,000 Euros respectively), minimum harmonisation provisions (e.g. regarding the consultation of databases) and options for the Member States. In some instances the fields that are fully harmonised are very limited, e.g. the section on advertising only applies to the mentioning of the cost of credit in advertising, advertising in general remaining under the ambit of the UCPD, which for financial services, including credit, is a minimum harmonisation directive.

Whether the Proposal brings 'targeted full harmonisation' or just 'full harmonisation' or another variant thereof can be left open here. One thing is sure: unfair contract terms are targeted by the Proposal.

All recent directives (Distant Marketing of Financial Services[55], Unfair Commercial Practices and Consumer Credit[56]) and proposals (like this Proposal) in the consumer field are based on full harmonisation rather than minimum harmonisation.

In its proposals the Commission justifies this important paradigm shift by referring to the need to raise consumer confidence in the internal market. This justification has been heavily criticised by some authors.[57]

Other arguments have been put forward in favour of minimum harmonisation, instead of full harmonisation, but this is not the place to discuss them here. [58]

In the field of contract law it has also been argued that full harmonisation is at variance with the many cultural, social and legal differences between Member States.[59]

Eventually the scholarly discussion on harmonisation of laws that may affect the internal market gravitates between the merits of (more or less) uniform rules throughout the single market and the merits of competition between law makers (in the creation of a market of rules).[60]

In this respect it is interesting to note that, according to the Report on the Outcome of the Public Consultation on the Green Paper on the Review of the

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55 Directive 2002/65/EC concerning distance marketing of consumer financial services, O.J. (2002) L 271/10.

56 Directive 2008/48/EC on credit agreements for consumers, (2008) L 133/66.

57 See in particular T. Wilhelmsson, "The Abuse of the 'Confident Consumer' as a Justification for EC Consumer Law", (2004) *Journal of Consumer Policy* 328-329.

58 A strong argument is that of leaving room for "regulatory competition" (see e.g. H. Wagner, "Economic Analysis of Cross-Border Legal Uncertainty" in J. Smits (ed.), *The Need for a European Contract Law. Empirical and Legal Perspectives*, (Groningen: European Law Publishers, 2005), pp. 25-54; see also in general E. Terryn, *Bedenktijden in het Consumentenrecht*, (Antwerp: Intersentia, 2008), p. 68 et seq.

59 See e.g. M. Van Hoecke, "The harmonisation of private law in Europe. Some misunderstandings" in M. Van Hoecke & F. Ost (eds), *The Harmonisation of European Private Law*, (Oxford: Hart, 2000), pp. 1-20.

60 G. Kemperink and J. Stuyck, "The Thirteenth Company Law Directive and Competing Bids", (2008) 1 *Common Market Law Review* 93, at 111.

Consumer Acquis of October 2007, 80% of the business associations support full or targeted harmonisation (targeted to issues raising substantial barriers to trade for business and/or deterring consumers from buying cross-borders), while the majority of consumer associations support minimum harmonisation combined with the application of the law of the country of destination. Some consumer associations would be ready to accept full harmonisation provided that the level of protection were high and that it were targeted at very specific issues and not extended to general principles of contract law.

The famous *Tobacco Advertising I*[61] judgment of the ECJ has cast doubt on the constitutionality of minimum harmonisation. This judgment is often mentioned by policymakers favouring full harmonisation.

This is not the place to discuss the consequences of the *Tobacco* judgment.[62] The following observations can be made. First it should be stressed that the ECJ ruled that Article 95 EC does not vest in the Community legislature a general power to regulate the internal market.[63] A measure adopted on the basis of Article 95 EC must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. A mere finding of disparities between national rules, the abstract risk of obstacles to the exercise of fundamental freedoms or distortions of competition that may result from this will not suffice in this regard.[64] In view of the absence of an 'internal market clause', e.g. a provision allowing tobacco advertising conforming to the directive to freely circulate in the internal market, the directive has no sufficient link with the internal market.

Be as it may, the ECJ confirmed in *Tobacco* II[65] that recourse to Article 95 EC as a legal basis does not presuppose the existence of an actual link with free movement between the Member States in every situation covered by the measure founded on that basis. What matters is that the measure adopted on the basis of Article 95 EC must actually be intended to improve the conditions for the establishment and functioning of the internal market.[66] Be that as it

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61 Case C-376/98, [2000] ECR I- 8419.

62 See S. Weatherill, "The Constitutional Competence of the EU to Deliver Social Justice", (2006) *European Review of Contract Law* 136, at 153-156; S. Weatherill, "Constitutional Issues – How Much is Best Left Unsaid?" in *The Harmonisation of European Contract Law*, S. Vogenauer & S. Weatherill (eds), (Oxford: Hart, 2006), pp. 89-103; see also S. Vogenauer & S. Weatherill, "The European Community's Competence to pursue the Harmonisation of Contract Law – an Empirical Contribution to the Debate", in the same volume, pp. 105-148.

63 At paragraph 83 of the judgment.

64 At paragraph 84 of the judgment.

65 Case C-380/03, *Germany v Parliament and Council*, [2006] ECR I-11573.

66 With reference to Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, at paragraphs 41 and 42, and Case C-101/01 *Lindqvist* [2003] ECR I-12971, at paragraphs 40 and 41.

may, as Weatherill rightly points out, it is uncertain (awaiting further case law) whether Article 95 EC is a sufficient legal basis for minimum harmonisation.

Interestingly in *Deutscher Apothekerverband*[67] and *Gysbrechts*, the European Court has not questioned the minimum harmonisation character of the Directive at stake (the Distant Selling Directive). Of course the Court was not asked to rule on the validity of the minimum harmonisation clause, but it may be noted that in *Gysbrechts* the Court firmly refers to it:

> In the present case, it is clear that the harmonisation effected by Directive 97/7 was not exhaustive. In that regard, as is expressly provided by Article 14(1) of that directive, Member States may introduce or maintain, in the area covered by the Directive, more stringent provisions to ensure a higher level of consumer protection, provided that power is exercised with due regard for the Treaty (see *Deutscher Apothekerverband*, paragraph 64).[68]

From this case the Court builds its reasoning to the effect that the national rule going beyond the minimum of the Directive has to comply with the Treaty provisions on free movement of goods (and surprisingly with Article 29 EC on exports).[69]

b) Full harmonisation in the Proposal and the consequences for unfair terms

Article 4 of the Proposal may be reiterated here: Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection. The Directive does aim at full harmonisation, and very much so: Member States may do no more and no less.

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67 Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, at paragraph 64.

68 At paragraph 34.

69 *Gysbrechts* (pronounced by the grand chamber of the Court) actually departs from a well established restrictive interpretation of Article 29 EC since *Groenveld* (Case 15/79 (1979] ECR 3409, paragraph 7). In *Groenveld* the ECJ ruled that Article 29 only relates to measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the State in question, at the expense of the production or of the trade of other Member States. In *Gysbrechts* (at paragraph 42) the test is whether the consequences of the measure are (generally) more significant in cross-border sales made directly to consumers, in particular, in sales made by means of the Internet, than in domestic sales.

The full harmonisation of the Proposal in the field of unfair terms can be compared to the full harmonisation of Directive 2005/29 on Unfair Commercial Practices (UCPD): the first major example of the paradigm shift to full harmonisation. Although another area where the change from minimum harmonisation to full harmonisation is crucial is that of unfair contract terms.

The DCFR builds on the existing Unfair Contract terms Directive 93/13 and the case law of the ECJ interpreting this Directive (see above). The Proposal adopts the multi layer system – a black list, a grey list and a general clause – proposed by the DCFR.

The UCPD is also multi-layered. It applies to all B2C commercial practices, including advertising, it contains a grand general clause ('*Grosse Generalklausel*'), two specific ('small general') clauses, one prohibiting misleading practices and the other aggressive practices (the one on misleading commercial practices is not really a "small general clause", because it enumerates in an exhaustive way the elements on which the consumer shall not be misled; misleading the consumer on other elements can of course be caught by the grand general clause). And finally the Directive contains in an Annex, a black list of 31 commercial practices, practices that are unfair in all circumstances.

Article 5(5) reads:

> Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. The same single list shall apply in all Member States and may only be modified by revision of this Directive.

According to the grand general clause a commercial practice is unfair if:
(a) it is contrary to the requirements of professional diligence, and
(b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

Professional diligence means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity (see also Art. 2(14) pCRD). Member States can thus choose between honest market practices (usages honnêtes en matière commerciale) and good faith, or opt for both. For this and other reasons I cannot elaborate now[70] the UCPD does not really harmonise "fairness" of

[70] See J. Stuyck, E. Terryn & T. Van Dyck, "Confidence through Fairness? The new Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market", (2006) 1 *Common Market Law Review* 107, at 115-117.

commercial practices. It also means that the role of the ECJ will be limited, as is the case with the Unfair Terms Directive.[71]

However, what is fully and totally harmonised is the list of commercial practices that can be prohibited in all circumstances without the need to appraise whether they are misleading, aggressive or otherwise contrary to professional diligence and whether they influence the consumer's economic behaviour. The list in the Annex to the proposed Directive is indeed a real black list and the list can only be modified by revision of the proposed Directive. In relation to financial services, as defined in Directive 2002/65/EC concerning distance marketing of consumer financial services (i.e. broadly speaking banking, credit, insurance, payment and investment services), and immovable property, Member States may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates (Art. 3(9)). For these sectors the UCPD is a mere minimum harmonisation directive.

In her Opinion of 21 October 2008 in joined Cases C-261/07 and C-299/07, VTB-VAB, Advocate General Trstenjak has recognised that the Directive sets a minimum and a maximum. In view of the exhaustive list of practices which are prohibited in all circumstances, Article 54 of the Belgian Trade practices Act prohibiting all joint offers – except those expressly excepted – in all circumstances, while the list of the Directive does not mention this commercial practice, is therefore contrary to the Directive.

It should be mentioned here that in a judgment of July 2008 the German Federal Court of Justice, the *Bundesgerichtshof*, has also referred a preliminary reference to the ECJ[72] about a provision in the German UWG (*Gesetz gegen unlauteren Wettbewerb*; Unfair Competition Act) prohibiting to link the participation in a competition with prizes to the purchase of a good. The BGH acknowledges the full harmonisation character of the Directive.

If the ECJ follows the AG in her Opinion in VTB-VAB,[73] – which I believe may be expected – it means that several Member States (including France, Germany and Belgium) will have to abrogate a certain number of still existing regulations of sales promotions.

An interesting question is what the role of the ECJ will be in interpreting the provisions of the black list and the grey list of contract terms of the Proposal, while, contrary to the Directive 93/13 (with its indicative list), the Proposal does not leave any implementation margin to the Member States, in considering terms per se unfair or to presume that they are.

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71 See above *Freiburger Kommunalbauten*, footnote 15.

72 Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH*.

73 Joined Cases C-261/07, *VTB-VAB v Total Belgium* and C-299/07, *Galatea v Sanoma*, Opinion of Advocate General Trstsenjak of 21 October 2008.

Obviously the 'open texture' of the general clause and of the notion of good faith will lead to divergences in application of national laws implementing even faithfully the new Directive.

Arguably the combination of a general clause with a black list and a grey list is a fair attempt to solve the following conundrum: how to maximise legal certainty, flexibility and legal protection? Uniform and precise rules, for the whole of the EU, on what is unfair in consumer contracts maximises legal certainty, not the least for consumers, and avoids as much as possible obstacles to trade on the one hand, but seriously hamper flexibility of marketing and the possibilities of competition on contract terms and, last but not least, the possibility for Member States to maintain more protective rules on the other. Too general and vague rules have the opposite advantages and disadvantages.

A grey list and a (somewhat) flexible procedure to modify the black and the grey list seem to be an answer to the reproach which can be voiced with regard to a black list like the one of the UCPD, i.e. that it is too rigid.

But one will remain a little bit puzzled with the existence of a grey list, i.e. a list of clauses which are presumed to be unfair unless the trader has proved that such contract terms are fair in accordance with the general clause.

How can one prove that something that is presumed to be unfair is nevertheless fair? Is the evidence to be brought in the abstract or in the particular circumstances of the case? In other words can a trader only try to prove that a term which is in general unfair (as presumed by the grey list) is not unfair in the particular relationship with the individual consumer who is a party to the dispute, or will it suffice that he proves that the clause in general, as applied in all or specific his contracts with consumers, is not unfair in the context of those contracts? A trader should at least be allowed to use the abstract fairness defence against a collective action for injunction.

An important question remains as a result of the 'full harmonisation' character of the Proposal: can Member States extend the protection to unfair terms where the consumer had the possibility to influencing their content? Article 30(1) pCRD defining the scope of the rules refers only to contract terms drafted in advance that the consumer agreed to without having that possibility. It can therefore be argued that only those terms are within the harmonised field. But such an extension would seem to be in conflict with the provision of Article 4 that Member States shall not maintain or introduce provisions "diverging" from those laid down in the Directive. In that sense the ambition of the Proposal seems to be further reaching than 'full' or 'maximum' harmonisation, but really to harmonise 'totally' and horizontally certain fields of consumer contract law, in particular that of unfair terms. This is also evidenced by Article 3(2) pCRD providing that the Directive shall apply to financial services as regards, *inter alia*, unfair terms as provided for by Articles 30 to 39 and Article 3(3) pCRD pursuant to which only Articles 30 to 39 on consumer rights concerning unfair contract terms, read in conjunction with Article 4 pCRD on full harmonisation, shall apply to contracts which fall within the scope of Directive 94/47 (timeshare) and 90/314 (package travel).

V. Concluding remarks

With regard to unfair contract terms the Proposal departs radically from the present Directive 93/13 in one important respect: the indicative list of unfair terms is replaced by two new lists: a black list of terms which are unfair in all circumstances and a grey list of terms presumed to be unfair. In that respect the Proposal follows the system proposed by the DCFR. The hesitations about enlarging the protection to contracts that have been individually negotiated (as expressed in the DCFR) have not led the Commission to propose such an enlargement.

In view of the uncertainties that have accompanied the existence of an indicative list (as notably evidenced by the unsuccessful case brought by the Commission against Sweden that had not integrated the list in its legislation proper but only referred to it in the preparatory works), the introduction of a black and/or grey list is certainly an improvement. The UCPD has shown that an exhaustive black lists has two major disadvantages: (i) it is apodictic and necessarily arbitrary and reflects knowledge and opinions at a given moment in time and (ii) it does not exclude the tendency in Member States to maintain practices or terms that are not on the black list but which they view as to be prohibited in al circumstances. The comitology procedure proposed in the Proposal has the advantage of making the black list less definitive (which obviously it could never be). The introduction of a short black list accompanied by a longer grey list can also be seen as a way to remedy the disadvantages of a black list. While the (fairly long) black list of the UCPD (looking like a compilation of short lists which were presented by various Member States) raises the question why certain black listed practices can reasonably be considered as unfair per se and does actually contain a lot of practices which nevertheless require the judge to examine the circumstances of the case; a short black list like the one in Annex II to the Proposal enshrines widely accepted general principles of consumer contract law, some of which belong to the common law of Europe (partly through case law of the ECJ).

Part IV
Sales and Direct Producer Liability

Fit for Purpose? The Proposals on Sales

Christian Twigg-Flesner

I. Introduction

One of the cornerstones of EU Consumer Law is Directive 99/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees ("Consumer Sales Directive" or "CSD" hereafter).[1] Broadly speaking, it deals with three aspects: (i) the requirement that goods must be in conformity with the contract, i.e., meet a minimum standard of quality; (ii) the remedies available to a consumer where goods are not in conformity; and (iii) guarantees given on consumer goods.[2] This Directive, alongside the Directive on Unfair Terms in Consumer Contracts,[3] has had a significant impact on the consumer laws of the Member States.[4] This has not always been entirely positive; for example, in the UK, the introduction of the new remedies for consumer sales contracts alongside the existing remedy of rejection of the goods and termination of the contract into the Sale of Goods Act 1979 was not successful. The Law Commission has been asked to consider how the various remedies could be combined, and its Consultation Paper was published in November 2008.[5] It offers an interesting alternative to the European remedies scheme; the main proposals will therefore be considered below.

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1 O.J. (1999) L 171/12.

2 The Consumer Sales Directive is not analysed further here. A detailed treatment can be found e.g., in S. Grundmann/M. C. Bianca (eds), *EU Sales Directive – Commentary* (Oxford: Intersentia, 2002) or R.Bradgate/C.Twigg-Flesner, *Blackstone's Guide to Consumer Sales and Associated Guarantees* (Oxford: Oxford University Press, 2003). For shorter discussions, see H.W.Micklitz, "Die Verbrauchsgüterkauf-Richtlinie", (1999) 10 *Europäische Zeitschrift für Wirtschaftsrecht* 485; D. Staudenmeyer "The Directive on the Sale of Consumer Goods and Associated Guarantees – a Milestone in the European Consumer and Private Law", (2000) 4 *European Review of Private Law* 547-564; and C.Twigg-Flesner "The E.C. Directive On Certain Aspects Of The Sale Of Consumer Goods And Associated Guarantees", (1999) 7 *Consumer Law Journal* 177-192.

3 Directive 93/13/EEC O.J. (1993) L95/93.

4 See H. Schulte-Nölke/C. Twigg-Flesner/M. Ebers, *EC Consumer Law Compendium* (Munich: Sellier, 2008), Part 2, Ch. H.

5 Law Commission, *Consumer Remedies for Faulty Goods – Consultation Paper LCCP 188/SLCDP 139* (London: The Stationery Office, 2008).

The "sales" chapter of the proposed Consumer Rights Directive ("proposed Directive" or "pCRD" hereafter)[6] deals with the same areas as the Consumer Sales Directive, but adds important provisions on risk and delivery to these. The purpose of this chapter is to examine the rules that would be introduced if the proposed Consumer Rights Directive were to become law in its current form. However, as it is hoped that there will be considerable debate about improving this Proposal during the legislative process, suggestions for improving the text are made throughout. Were this to be enacted as currently drafted, there would be a significant shift in favour of traders; moreover, it is doubtful whether many of the provisions are workable in a cross-border context.

It may also be noted that several ideas mooted in the *Green Paper*[7] have not been carried through into the proposed Directive at all, most notably the inclusion of contracts for software and digital content as well as the question of direct producer liability.[8]

II. A few general thoughts on the Proposal

Before turning to the specific provisions on sales contracts, a few general thoughts on the Proposal seem appropriate. In particular, there are several aspects of the Proposal which are cause for concern. Inevitably, the decision to introduce this as a "full harmonisation" measure which precludes Member States from adopting more favourable provisions for the protection of consumers[9] is worrying. It will have the effect of fixing consumer protection at the level of the Directive and deprive Member States of the possibility to adopt those rules which work best for its citizens. This is not the place to subject the arguments put forward by the Commission to full scrutiny other than to register the present writer's scepticism about the real significance of variation between the Member States' consumer laws for the operation of the internal market. However, one point must be made: if consumer contract law is to be subject to full harmonisation, then the quality of those rules needs to be good and offer real protection for consumers. Unfortunately, as far as the proposed rules on sales contracts are concerned, the proposed Directive is a real disappointment; in particular, in some respects, it would seem to *reduce* the level of harmonisation already achieved as a minimum standard.

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6 COM(2008) 614 final.

7 *Green Paper on the Review of the Consumer Acquis* COM(2006) 744 final. See C.Twigg-Flesner, "No sense of purpose or direction? The Modernisation of European Consumer Law", (2007) 3 *European Review of Contract Law* 198-213.

8 See R.Bradgate and C.Twigg-Flesner, "Expanding the Boundaries of Liability For Quality Defects", (2002) 25 *Journal of Consumer Policy* 345-377 for a full discussion of the arguments surrounding direct producer liability.

9 Article 4 pCRD.

Major changes to national laws, including the reduction of existing consumer rights which would be the consequence of full harmonisation, should be avoided as far as possible, because irrespective of what the EU might do, the vast majority of consumer transactions will remain national. It seems that the EU's focus on a comparatively small number of transactions could produce an EU-wide legal framework that might easily have the opposite effect of that intended: far from encouraging consumers to take advantage of the internal market, the loss of familiar rights and established protection may create antagonism towards the internal market and the EU. Thus, the potential removal of the right to reject faulty goods for a full refund for a short period after purchase under UK law which would be mandated by the proposed Directive would undoubtedly receive a very frosty reception.[10] The present writer has suggested elsewhere that the case for a cross-border only measure ought to have been considered more seriously,[11] and it is regrettable that this option was not pursued in earnest. Similarly, the use of a directive rather than a regulation seems problematic, because it will continue to rely on full and accurate transposition by the Member States for full its effectiveness, but there are often problems in this regard.

The intention to adopt a new Consumer Rights Directive provides a useful opportunity to improve the quality of the existing legislation and to adopt a generally more comprehensive framework. Whether the present Proposal goes far enough in this regard is debatable; at least with regard to sales contracts, there is still considerable room for improvement.

III. Sales contracts – substance of the Proposal

The provisions dealing with sales contracts are contained in Chapter IV of the proposed Directive. This covers both aspects already dealt with in the Consumer Sales Directive as well as several new areas not previously regulated at the European level. These will now be considered in turn.

1. Scope – contracts covered

The proposed Consumer Rights Directive applies to sales contracts. As was the case in the Consumer Sales Directive, there is no comprehensive definition of "sales contract", although there is a partial definition in Article 2(3) pCRD. According to this, "sales contract" encompasses both "any contract for the sale of goods by the trader to the consumer" and "mixed-purpose contract[s] having as [their] object both goods and services". This could be a useful clarification, because the addition of a service element to a contract involving the sale of

10 This issue is returned to further below.

11 Twigg-Flesner, "No sense of purpose or direction?", pp. 202-3.

goods raises interesting questions of classification at national law. Thus, there may come a point when a transaction which involves what looks like a sale together with a service element, such as the installation or assembly of the goods sold, is treated in national law as something other than a contract of sale. This would have the consequence that different legislation might be applicable.

In the Consumer Sales Directive, this clarification was absent, and whilst that Directive included contracts for the supply of goods to be manufactured or produced (and this is retained in Art. 21(2) pCRD),[12] other instances where there was a service element to the contract were not explicitly included within the definition of "sales contract". This caused interesting questions about the situation where goods had to be installed, for example, because Article 2(5) CSD refers to a non-conformity "resulting from incorrect installation of the consumer goods...if installation forms part of the contract of sale". This suggests that a contract for the supply of goods together with a service element for their installation is still regarded as a contract of sale within the scope of the Consumer Sales Directive, although this is not made explicit anywhere in the text of that directive.[13] In national law, such as English law, a contract involving the supply of goods together with their installation will not inevitably be regarded as a contract of sale, but could be a contract for work and materials.[14]

However, it is not clear if the new definition in the proposed Directive. is intended to cover all contracts involving the supply of goods or services, or whether there is some sort of implicit understanding that the goods element of the contract has to constitute the predominant part of the contract. The definition of "service contract" in Article 2 pCRD does not assist greatly, as this treats a service contract as one "other than a sales contract whereby a service is provided by the trader to the consumer". To raise this issue is to engage in more than terminological hair-splitting: the definition of "sales contract" determines the scope of the Directive, and consequently those contracts in respect of which Member States are precluded from adopting rules which differ from those in the proposed Directive (should they wish to do so). If all contracts involving the transfer of ownership in goods are to be covered by the proposed Directive, including those where a service element might result in the treatment of such a contract as something other than a sales contract at national law, then the definition could be more precise on this point, and some clarification, at least through an additional Recital, might be welcome.

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12 Art. 1(4) CSD.

13 See further R. Bradgate/C. Twigg-Flesner, *Blackstone's Guide to the Sale of Consumer Goods*, (Oxford: Oxford University Press, 2003), pp. 22-26.

14 Compare *Philip Head & Sons Ltd v Showfronts Ltd* [1970] 1 Lloyd's Rep 140 (design, supply and laying of carpet treated as contract of sale) with *Jones v Callagher* [2005] 1 Lloyd's Rep. 377 (supply and installation of kitchen cupboards treated as contract of work and materials). On the latter decision, see Bradgate, "Remedying the unfit fitted kitchen", (2005) 120 *Law Quarterly Review* 558.

Similarly, it might have to be clarified that other supply transactions – such as hire, leasing or hire-purchase – are not intended to be within the scope of the proposed Directive.[15]

This issue is an instance where some kind of reference to – or at least taking account of – the Draft Common Frame of Reference (DCFR)[16] might have been helpful. This contains a helpful definition of "contract for sale" as

> a contract under which one party, the seller, undertakes to another party, the buyer, to transfer the ownership of the goods to the buyer, or to a third person, either immediately on conclusion of the contract or at some future time, and the buyer undertakes to pay the price.[17]

In turn, ownership is defined as

> the most absolute right a person, the owner, can have over property, including the exclusive right, so far as consistent with applicable laws or rights granted by the owner, to use, enjoy, modify, destroy, dispose of and recover the property"

"Property" as "anything which can be owned: it may be movable or immovable, corporeal or incorporeal".[18] The point here is not to engage in any kind of scrutiny of those definitions; rather, they do reflect what constitutes the essence of a contract of sale, i.e., the transfer of outright ownership from seller to buyer.[19] So if the intention in the proposed Directive is to treat all contracts involving the transfer of outright ownership in goods as "sales contracts", irrespective of whether the contract also contains a service element regarding those goods, then a more comprehensive definition of "sale" is necessary. An additional recital could explain that "sale" is generally to be understood along the lines of the DCFR (the relevant provisions could be reproduced rather than including an explicit reference to the DCFR in the recital itself, as this would undoubtedly cause much controversy as the DCFR as an academic project and not a Commission-endorsed document, of course). The definition of "sales

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15 Although this is regrettable, because the consumer protection issues regarding conformity of the goods with the contract and remedies are not that different. One might suspect that many Member States may feel compelled to broaden their national laws to include such contracts, too.

16 Study Group on a European Civil Code/Research Group on the Existing EC Private Law (Acquis Group) (eds.) *Principles, Definitions and Model Rules on European Private Law – Draft Common Frame of Reference*, (Munich: Sellier, 2009).

17 Art. IV.A.–1:202 DCFR (interim).

18 "Ownership" and "Property" are defined in Annex I of the DCFR (interim).

19 Note how the DCFR defines "barter" in Art. IV.A.–1:203: "each party undertakes to transfer ownership of goods ... in return for the transfer of ownership of other goods." The "sales" provisions are then applied accordingly.

contract" in Article 2(3) pCRD could then make it clear that it applies to all contracts involving the transfer of ownership in goods, including contracts for goods yet to be manufactured or produced[20] as well as contracts involving a service element regarding some or all of the goods supplied under the contract. Such an all-encompassing definition would further reduce any potential legal uncertainty with regard to contracts involving both goods and services. To use a standard example, a contract for the supply, assembly and installation of a fitted kitchen could be regarded as a contract for work and materials, and therefore fall outside the scope of sales legislation. It seems that the intention in the proposed Directive is to regard such a contract also as one of sale to ensure that the requirement as to the goods' conformity with the contract and the relevant remedies are applicable. It is submitted that the definition as presently phrased is insufficiently precise and could benefit from clarification along the lines suggested in the foregoing discussion. In short, it needs to be made clear that, as long as goods are supplied, the provisions on sales apply even if the service element is dominant.

It is important to note that nothing in Chapter IV pCRD has the effect of introducing some sort of general standard regarding the quality of *services*: Article 21(1) pCRD states that where a contract is a "mixed-purpose contract", the Chapter will only apply to the goods and not the service element. The one exception is with regard to the "installation" of the goods by the trader or under his responsibility, where inadequate installation can produce a non-conformity in the goods.[21] So making it clear that these provisions will apply to *any* contract under which outright ownership in the contract goods is transferred to the consumer could be a useful clarification and could aid simplification of the legal landscape (especially in the UK, where there is quite a complex and diffuse legal framework applicable).

2. Public auctions

One option from the Consumer Sales Directive has survived in the proposed Directive. Article 1(3) CSD permitted Member States to provide that "second-hand goods sold at public auction where consumers have the opportunity of attending the sale in person" are not within the notion of "consumer goods". In a similar vein, Article 21(4) pCRD states that Member States may choose not to apply Chapter IV of the proposed Directive in the case of second-hand goods sold at public auction. The term "auction" is defined in Article 2(15) pCRD, the essence of which is that an auction is a "method of sale where goods or services are offered by the trader through a competitive bidding procedure

20 Cf. Art. 21(2) pCRD.

21 Art. 24(5) pCRD. This restates Art.2(5) CSD; on the difficulty with the notion of "installation" see R. Bradgate/C. Twigg-Flesner, *Blackstone's Guide to Consumer Sales*, pp. 25-6.

which may include the use of means of distance communication …". Thus, it is no longer necessary that the consumer has to be able to attend the auction in person, and therefore internet-based auctions are also covered.[22] However, where a transaction is "concluded on the basis of a fixed-price offer, despite the option given to the consumer to conclude it through a bidding procedure", then this is not regarded as an auction. Unfortunately, this restriction seems rather vague and it is not clear what sort of circumstances are covered by this. As a minimum, a recital clarifying the kinds of transactions envisaged by this proviso could be added.

3. Delivery and passing of risk

The next two provisions in Chapter IV, Articles 22 and 23, are new, dealing with the time of delivery and the passing of risk respectively.

a) Delivery

Article 22 pCRD provides a basic rule regarding the *time* of delivery. This is a default rule, i.e., it only applies in the absence of an agreement between the parties and requires a trader to deliver within a maximum of thirty days from the date of concluding the contract.[23] Somewhat strangely, there is no definition of "delivery" in the Directive, although Article 22(1) pCRD explains that the seller delivers "by transferring the material possession of the goods", either to the consumer with whom the contract was made or a third party nominated by that consumer.[24] Crucially, that third party cannot be the carrier. Implicit in this provision therefore is a rule that delivery to a carrier does not amount to delivery to the consumer.

Failure to deliver on time entitles the consumer to a refund of any sums paid within seven days from the date on which delivery should have been made. At first sight, this appears to be a sensible provision: a trader should not be able to take pre-payments from a consumer and then delay delivery indefinitely

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22 For the discussion on online auctions see C. Riefa, "A Dangerous Erosion of Consumer Rights: The Absence of a Right to Withdrawal from Online Auctions", *in this volume*.

23 Art. 22(1) pCRD. Note that the word "day" is to be interpreted in accordance with Regulation 1182/71 O.J. (1971) L 124/1, which sets out general rules on the calculation of time periods. Accordingly, "days" should mean "calendar days". If the final day of the period is a public holiday, a Saturday or a Sunday, the period is extended to the end of the next working day: see Art.2(4) of Regulation 1182/71.

24 Note the somewhat convoluted expression in Art. 12(2) pCRD on the starting point of the right of withdrawal. A general definition of "delivery" in Art. 2 pCRD could help to clarify the text of the proposed Directive.

whilst hanging on to the consumer's money. However, it is imprecise and does not offer sufficient legal certainty: as currently drafted, a day's delay beyond the required delivery date (whether contractual or the default date) would mean that Article 22(2) pCRD is engaged and that the consumer is entitled to a refund. Presumably, however, the intention of Article 22(2) is not to impose some sort of penalty on the trader in that he has to refund all prepayments without being entitled to receive the contractual payment for the goods eventually delivered, but rather to ensure that consumers do not remain out of pocket for longer than necessary. So surely there should be no obligation to refund the money if delivery is only marginally late, i.e., within the seven-day window created by Article 22(2). This provision only really makes sense if the trader fails to deliver by the date specified and does not know when (or if) he can deliver – or has no intention of delivering at all. Some clarification of this provision is required.

b) Passing of risk

The second new provision is Article 23 pCRD, which introduces a rule on the passing of risk. Whereas under the Consumer Sales Directive, there was no obligation to change existing national rules regarding the passing of risk,[25] the proposed Directive now introduces a firm rule. According to Article 23(1) pCRD, risk passes to the consumer "when he or a third party, other than the carrier and indicated by the consumer has acquired the material possession of the goods". In short, risk passes on delivery. However, if the consumer or the nominated third party has failed to take reasonable steps to take delivery, risk is deemed to have passed at the time of delivery as agreed by the parties.[26] This seems a bit vague – presumably, if the default provision in Article 22 pCRD applies, the time of delivery "as agreed" would be the last day of the thirty-day period, and where a delivery period has been agreed expressly between consumer and trader, the last day of that period – clarification is needed in this regard. There is limited guidance on this in Recital 38, which suggests that one instance of this could be where the consumer does not collect the goods from the post-office depot within the timescale indicated by the post-office) – and this would support the suggestion that it is the last day of any delivery period that would be the crucial date.

Here, it is possible to note what seems to be an inconsistency between the text of Article 22 (and similarly Art. 23, below): Recital 38 states that a consumer should be protected against the risk of loss of, or damage to, the goods which occurs during their transport "arranged or carried out by the

[25] Note Recital 14 CSD: "The references to the time of delivery do not imply that Member States have to change their rules on the passing of the risk", although some, including the UK, did adopt new rules for consumer contracts.

[26] Art. 23(2) pCRD.

trader". This might suggest that, where the *consumer* specifies the carrier (e.g., by choosing from several different delivery options on a website), risk could pass before delivery. However, the "third party indicated by the consumer" in Articles 22 and 23 is a party "other than the carrier". So even where the consumer specifies ("indicates") the carrier, delivery will not occur, nor risk pass, when that carrier has gained material possession of the goods. This seems to be the right outcome, because otherwise, there would be scope for an avoidance-scheme whereby a trader could give a consumer several delivery options with different carriers; in the words of Recital 38, that could be regarded as neither "arranged by" nor "carried out" by the trader. Perhaps what is needed is a clarification, if only in the Recital, that the term "carrier" refers to a business carrier to whom the trader has handed the goods for transmission to the consumer, and that this carrier is not a "third-party indicated by the consumer" even when the consumer has chosen a particular delivery method from a range of options.

aa) Risk and the non-definition of "delivery"

As already noted, it seems slightly strange that there is no definition of "delivery" in Article 2, and Article 23 pCRD underlines the need for such a general provision. The section reads rather awkwardly, but it could be made much more readable by replacing this rather lengthy phrase with "delivery". That term could then be defined in Article 2 along the lines used in Articles. 22 and 23 (as well as e.g., Art. 12) pCRD as the "transfer/acquisition of material possession of the goods by the consumer or a third party indicated by the consumer", with an additional proviso that transferring material possession to a carrier (in turn defined as suggested above) does not constitute delivery.

bb) Inconsistency between "delivery" and "risk" provision?

A further oddity is that there is provision in Article 23(2) pCRD about the consumer failing to take reasonable steps to acquire material possession of the goods and the consequent impact on the passing of risk, but no equivalent to that in Article 22 pCRD regarding the time of delivery. Surely the trader should not be responsible for late delivery (and the obligation to refund money) if the consumer has not collected the goods from the post-office? This raises the question as to whether delivery should be deemed to have occurred once the trader or the carrier has attempted to delivery on the agreed date at the correct place. Of course, where no delivery date has been specified, it may be sufficient that an attempt to deliver within the requisite time-scale has been made for the trader to have complied with his obligation to deliver by the right time, even though "material possession" of the goods has not yet been transferred to the consumer. Some clarification in this regard may be needed.

4. Conformity with the contract

a) "Conformity with the contract"

aa) The requirement restated

Article 24 pCRD restates the requirement that the goods must be "in conformity with the contract", previously contained in Article 2 CSD. To a large extent, Article 24 pCRD follows the wording of Article 2 CSD, but there are some subtle variations. Thus, Article 24(1) pCRD has been slightly reworded without altering the substance of the core obligation on the trader to deliver goods which are in conformity with the contract. The opening sentence of paragraph (2) also contains linguistic changes, now referring to the "delivered goods", but there is no change to the substance that this paragraph introduces the presumption of conformity. Sub-paragraphs (a)-(d) of Article 24(2) then replicate the criteria for establishing whether the presumption of conformity applies, and these also mirror those contained in Article 2(2)(a)-(d) CSD. One minor adjustment has been the replacement of the phrase "held out" in sub-paragraph (a) regarding a sample or model with the word "presented", but this does not appear to change anything.

However, there is the somewhat strange insertion of the word "or" at the end of sub-paragraph (c), which is not found in the corresponding provision of the Consumer Sales Directive. This may matter because it might suggest that the criteria in Article 24(2) pCRD are alternatives, rather than cumulative, and the presumption could be satisfied as long as one of the criteria is met. This clearly cannot be the intention of the legislator, and it is suggested that the word "or" be deleted. It seems clear that these criteria are cumulative: for example, goods might be fit for the purpose for which they are normally used, and yet might not be fit for the particular purpose for which the consumer requires them, that purpose having been accepted by the seller. Surely this gives rise to a non-conformity and the presumption is rebutted. If the "or" were retained, it would at least create the possibility for a trader to argue that goods are in conformity as long as they are fit for their normal purpose, but that cannot be correct.

bb) No further criteria added

As explained above, Article 24(2) pCRD is essentially a restatement of Article 2(2) CSD, although converted into a fully harmonised presumption of conformity. This might suggest that any additional criteria could not be introduced in national law. However, as this paragraph only introduces a *presumption* of conformity rather than a fixed obligation to comply with the factors in Article 24(2)(a)-(d) pCRD, it seems plausible that in the circumstances of a

particular case, other factors might also be relevant.[27] That was certainly the intention under the Consumer Sales Directive (see Recital 8, in particular), and it would be odd if that position should have changed in what remains essentially the same wording.

Nevertheless, it seems strange that the opportunity was not taken to clarify and improve the criteria which give rise to the presumption of conformity, both in the interest of improving consumer protection and promoting legal certainty. Several Member States expressly added, or retained, additional criteria,[28] such as the availability of spare parts,[29] appearance and finish, the price of the goods, freedom from minor defects, safety, proper packaging,[30] user instructions, and durability. With the shift to full harmonisation, a more comprehensive list would have been helpful, especially because many of these additional factors are of particular relevance in consumer transactions.

b) No lack of conformity if consumer aware

One change can be seen in Article 24(3) pCRD. This provides that there is deemed not to be a lack of conformity if the consumer "was aware and *should reasonably have been* aware"[31] of the non-conformity in question at the time the contract was concluded. The words in italics are different from the corresponding provision in Article 2(3) CSD, where the reference is to non-conformities of which the consumer "could not reasonably be unaware". Substantively, this also appears to alter nothing, although in this instance, it provides a simpler provision. It still leaves open the question when a consumer should reasonably have been aware of a non-conformity. For example, although the proposed Consumer Rights Directive (nor the Consumer Sales Directive) does not contain an express obligation on a consumer to examine the goods (where this would be possible) before concluding a contract, does the fact that the consumer *could* have discovered a non-conformity *had he examined* the goods before purchase mean that the consumer "should reasonably have been aware of" the non-conformity? It is submitted that this criterion needs to be inter-

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27 Cf. R. Bradgate/C. Twigg-Flesner, *Blackstone's Guide to Consumer Sales*, p.41.

28 See H. Schulte-Nölke/C. Twigg-Flesner/M. Ebers, *EC Consumer Law Compendium*, pp. 422-3.

29 This factor would undoubtedly give rise to some controversy if this were to be expressly listed in Art. 24(2) pCRD because of the implicit obligation to stock spare parts this would entail. Nevertheless, concerns over the environment as well as the financial position of consumers might make repair more attractive. See C. Twigg-Flesner, "The Law on Guarantees and Repair Work" in T. Cooper (ed.) *Longer Lasting Solutions* (Aldershot: Gower, forthcoming).

30 A factor which would have particular relevance to the proposed Directive if this is to encourage cross-border transactions via the internet.

31 Emphasis added.

preted restrictively, and that only obvious non-conformities that can be discovered without an examination going beyond a cursory glance should come within its scope. It is to be hoped that this provision will be clarified during the legislative process.

Although one should avoid proposing the adoption of a rule taken from a particular national law, it might nevertheless be valuable to draw inspiration from the corresponding provision of UK law. This excludes non-conformities either where these are specifically drawn to the buyer's attention before the conclusion of the contract, or, where the buyer examines the goods before concluding the contract, which *that* examination should reveal.[32] A provision along these lines would have the advantage of greater legal certainty, and might avoid any argument over what a consumer should reasonably have been aware of. In its current version, the proposed Directive's (and corresponding Consumer Sales Directive's) provision is rather more vague, and this could work to the disadvantage of a consumer when trying to establish that goods are not in conformity with the contract.

Articles 24(4) and (5) pCRD restate the provisions in Article 2(4) and (5) CSD, and deal with the circumstances where a trader will not be bound by public statements, as well as the consequences of incorrect installation by the trader or the consumer. These have not been changed.

5. Liability and remedies

a) Liability falls on the trader

Article 25 pCRD states that the trader is liable for a lack of conformity which exists at the time that risk passes to the consumer. There is one significant change from the corresponding provision in Article 3(1) CSD, which used the time of deliver as the point in time when goods had to be in conformity. The Consumer Sales Directive, of course, did not contain any rules on the passing of risk and therefore had to use the time of delivery as the relevant point for establishing the goods' conformity. Now that the proposed Directive introduces a rule on the passing of risk, it is possible to change the relevant time to the moment when risk passes. As already explored above, the general position is that risk will pass on delivery, and in practical terms, this change will not make any difference in most cases. It will matter where the consumer "has failed to take reasonable steps" to take delivery, because in such circumstances, risk may pass before delivery. Consequently, a trader would not be liable e.g., for any deterioration in the goods where these are perishable.

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[32] See s 14(2C) Sale of Goods Act 1979. That provision applies to consumer and non-consumer provisions, and only applies to the requirement that goods must be of "satisfactory quality". Broadly speaking, this is the English equivalent of Art. 2(2)(c) and (d) CSD (Art. 24(2)(c) and (d) pCRD).

It seems surprising that what was previously a sub-paragraph of another Article[33] has now become a stand-alone provision. This may not have any great significance, although it does leave open the possibility that, should the Commission change its mind about the question of "direct producer liability", it may be easier to amend the proposed Directive

b) The remedies

The remedies for a lack of conformity are contained in Article 26 pCRD Although it continues to maintain the two-stage hierarchy of remedies found in Article 3 CSD, this Article is a complete redraft of the earlier provision. The immediate effect is that the new provision is perhaps less complex and therefore easier to read; however, that benefit is easily outweighed by the substantive changes made to the remedies, several of which would be to the detriment of consumers. In fact, it is in the context of the remedies where consumer protection would be reduced under the proposed Directive's full harmonisation scheme.

aa) Repair and replacement as primary remedies

The starting point remains that a consumer is entitled to the following remedies where there goods are not in conformity with the contract:[34]
a) repair or replacement;[35]
b) price reduction;
c) rescission of the contract.

However, whilst this might suggest that a consumer has the free choice between these remedies, the subsequent paragraphs of Article 26 pCRD soon reveal that this is not at all the case. The first major change is seen in Article 26(2). This reaffirms the position that initially, a consumer is only entitled to repair or replacement. However, the choice as to which remedy to provide is now given to the *trader*. This reverses the position in Article 3(3) CSD, which gave the consumer the choice between repair or replacement, subject to the limitation that the remedy chosen must be possible and not disproportionate. There can be no good reason for this change from the perspective of consumer protection, because it clearly shifts the balance in favour of the trader. It is indicative of the problems associated with pursuing consumer rights within the

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33 Art. 3(1) CSD.

34 Art. 26(1) pCRD.

35 It can be noted in passing that the definition of "repair" in Art. 1(2)(f) as "bringing consumer goods into conformity with the contract of sale" has not been retained in the proposed Directive and "repair" is now undefined.

context of the internal market and using Article 95 EC as the relevant legal basis, because the interests of consumers always have to be balanced against those of traders. However, whilst this might encourage more traders to offer their goods on a cross-border basis, it seems unlikely that consumers will feel greatly inspired to buy goods from another Member State. It is certainly a regrettable development.

bb) Price reduction and rescission

Article 26(3) pCRD deals with price reduction or rescission. It may first be observed that nothing is said about the method of price reduction, in particular whether this should be based on a straightforward "difference in value" assessment or the more complicated "proportionate reduction" approach. Of course, unless the matter is litigated with expert evidence considered, the amount by which the price is reduced will be calculated on a fairly arbitrary basis. Furthermore, rescission is only available for a lack of conformity which is not minor.[36] Whilst this was not a regulatory option in the Consumer Sales Directive, several Member States chose to rely on the minimum harmonisation nature of that Directive in not transposing the corresponding provision (Art. 3(6) CSD).[37] This opportunity would be lost if the proposed Directive remains a maximum harmonisation measure. It seems surprising that this provision was included in the Consumer Sales Directive and retained in the proposed Directive, because it does not seem particularly helpful to consumers, primarily because it serves to reduce legal certainty by creating further scope for argument between consumer and trader as to whether a remedy should be provided.

cc) Criteria for price reduction/rescission

Article 26(3) pCRD sets out when price reduction or rescission are available. The onus is on the trader to prove that providing repair or replacement would be "unlawful, impossible or would cause the trader a disproportionate effort". The latter two criteria are familiar from Article 3 CSD, although, as will be seen shortly, their scope has been altered in the proposed Directive. The third criterion, unlawfulness, is new, but no guidance is offered in the proposed Directive as to when repair or replacement might be "unlawful". In particular, it is not at all clear if this relates only to a general prohibition of repair or replacement sanctioned by legislation or administrative order, or if this could also cover any contractual restrictions which the trader has agreed, e.g., with his immediate supplier. As this criterion constitutes a limitation on consumer

36 Art. 26(3) pCRD, final sentence.

37 See H. Schulte-Nölke/C. Twigg-Flesner/M. Ebers, *EC Consumer Law Compendium*, p. 434.

rights, it is submitted that it should be interpreted restrictively and only deal with prohibitions enshrined in law, although there seems to be no obvious example as to where this may be the case.

dd) Impossibility

"Impossibility" is a criterion familiar from the Consumer Sales Directive, although no attempt is made to clarify its scope. Limited guidance is offered by Recital 40 of the preamble to the proposed Directive, which states that a lack of spare parts is not a valid reason for failing to remedy a lack of conformity within a reasonable time or without a disproportionate effort. Nothing is said about "impossibility" in the Recital, but it would be appropriate to consider whether a lack of spare parts, or indeed the lack of in-house repair facilities on the trader's part, would be sufficient to prove that repair, in particular, would be impossible.

ee) Disproportionate effort

Although also known from the Consumer Sales Directive, the "disproportionality" criterion in Article 3(3) CSD has been redrafted significantly. It was widely accepted that Article 3(3) CSD had not been drafted particularly clearly, and there was some confusion about the application of the "disproportionality" criterion. In particular, it was not clear which remedy should be used as a comparator remedy when considering whether a particular remedy is "disproportionate". Article 3(3) CSD made a "comparison with the alternative remedy", but that left it open whether that alternative would be the opposite of repair or replacement respectively, or whether it could also extend to price reduction or rescission. As it turned out, the vast majority of the Member States, when transposing Article 3(3) CSD into their national laws, adopted the view that the "disproportionality" criterion should only be applied to compare repair with replacement and vice versa.[38] In the overall scheme of Article 3(3) CSD, as well as in view of the underlying policy of consumer protection, that position appears to be the correct one,[39] although the matter was left uncertain.

The proposed Directive is clearer on this point – albeit it in a very surprising way. The criterion – now referred to as a "disproportionate effort" for the trader – uses as comparator remedies for establishing whether repair and/or re-

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38 See H. Schulte-Nölke/C. Twigg-Flesner/M. Ebers, *EC Consumer Law Compendium*, pp. 427-8. The UK explicitly permitted comparison also with price reduction and rescission: see s 48B(3)(c) Sale of Goods Act 1979.

39 For a fuller discussion, see R. Bradgate/C. Twigg-Flesner, *Blackstone's Guide to Consumer Sales*, pp .93-5.

placement are disproportionate the remedies for price reduction and rescission *only*, but *not* the opposite of repair or replacement respectively. Thus, repair or replacement would cause the trader a disproportionate effort if "it imposes costs on him which, in comparison with the price reduction or the rescission of the contract are excessive, taking into account the value of the goods if there was no lack of conformity and the significance of the lack of conformity".[40] This explanation changes the position from Article 3(3) CSD in two respects: first, as discussed, in clarifies which remedies are the comparators, and thereby improves legal certainty in this regard. Secondly, it omits, as a relevant consideration, whether the alternative remedy could be provided "without significant inconvenience to the consumer".[41] This would have been relevant, had repair or replacement remained as the respective comparator remedies, because either of those remedies could cause significant inconvenience. Arguably, price reduction and rescission cause less inconvenience as the consumer can receive a remedy (a partial or full refund of money) fairly quickly.[42]

However, the shift in the proposed Directive is regrettable. The cost of rescission and, more significantly, price reduction will almost certainly be lower than repair or replacement in the vast majority of situations, and often to such an extent that the difference could be regarded as "excessive". Where this is the case, the sole remedy a consumer may be entitled to would, effectively, be price reduction, as this is likely to be the cheapest remedy from the trader's perspective. That would have two consequences: first, the consumer's apparent right to repair or replacement could be undermined very easily, effectively promoting price reduction to the main remedy. Secondly, it appears to conflict with the overall thrust of the remedial scheme, which focuses on ensuring the full performance of the trader's obligation to deliver goods which are in conformity with the contract. Once more, this looks like a provision designed more with trader than consumer interests in mind, something which, in light of the proposed full harmonisation nature of the proposed Directive, is of considerable concern.

c) Circumstances where consumer is given free choice

In contrast to the foregoing, a potentially more positive development is the introduction of Article 26(4) pCRD This sets out the circumstances when the hierarchy of remedies is displaced in favour of giving the consumer the free choice between all of the remedies.

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40 Art. 26(3) pCRD.

41 Cf. Art. 3(3), third indent, CSD.

42 Of course, the fact that a consumer is left with an item of lower value (in the case of price reduction) or with the obligation of having to return, or facilitate the collection, of the non-conforming goods (rescission) might equally be regarded as a significant inconvenience to the consumer.

aa) Refusal to provide a remedy

The first situation is where the trader has explicitly or implicitly refused to provide any remedy,[43] which includes failing to respond to, or ignoring, the consumer's request.[44] This must be a criterion that is relevant in circumstances where the consumer is trying to resolve the problem without the involvement of a court, at least initially. There is a degree of uncertainty as to the kind of actions on the trader's part are covered by this situation. A trader could dispute the existence of a non-conformity, or accept that there is a non-conformity but simply refuse to provide a remedy. In both cases, it could be suggested that the trader has refused to remedy the lack of conformity, although the former situation could prove to be more tricky. Assume that a consumer complains about a non-conformity and the trader denies that there is a problem. If the consumer is right, then the trader has now refused to provide a remedy. What if the trader subsequently agrees that there is a non-conformity and that the consumer is entitled to a remedy? Does the consumer now have the free choice between remedies, or is it still necessary to follow Articles 26(2) and (3) pCRD first? From the consumer's perspective, it might seem preferable to engage Article 26(4) pCRD and permit the free choice, whereas a trader might now claim to be entitled to choose between repair or replacement first.

Of course, the consumer's entitlement to a free choice will almost certainly necessitate that the consumer take legal action to enforce his right to the chosen remedy – if the trader has refused to act once, it seems unlikely that he would respond once the consumer demands a different remedy. So the perceived benefit to the consumer of this provision could turn out to be illusory.

bb) Not within reasonable time or without significant inconvenience

The second and third situations are familiar from the Consumer Sales Directive. This is where the non-conformity has not been remedied within a reasonable time, or, having tried to remedy the lack of conformity, the trader has caused significant inconvenience to the consumer. In this context, a helpful clarification is provided by Article 26(5) pCRD, which states that in considering what would be a reasonable time or a significant inconvenience to the consumer, a particular purpose for which the goods were required – as per Article 24(2)(b) pCRD – can be taken into account. Thus, if the seller has been told, and accepted, that the goods are needed for a particular event (e.g., a wedding dress), then the failure to remedy a non-conformity by that event should be taken into consideration in determining whether the trader has exceeded a reasonable time and/or caused significant inconvenience.

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43 Art. 26(4)(a) pCRD.

44 Recital 42 pCRD.

The wording of the opening sentence of Article 26(4) pCRD ("where one of the following situations exists") together with the tenses used in paragraphs (b) and (c) suggest that this is an *ex post facto* variation in the remedies. As far as remedying within a reasonable time is concerned, the trader must *have failed* to do so – i.e., more than a reasonable period of time must have passed since the consumer requested that a remedy be performed. Thus, it seems that if the circumstances show that the trader is unable to provide a remedy within a reasonable time (e.g., because spare parts are not available, or because the remedy can only be provided once the purpose for which the goods are required is no longer relevant), the consumer is not yet entitled to ask for any of the remedies, but has to wait for the time to have passed. This seems strange, and it would be appropriate to clarify this condition to include the fact that it is clear that the relevant remedy will not, or cannot, be provided by the trader within a reasonable time. Similarly, the trader must *have caused* significant inconvenience, i.e., this must have happened before Article 26(4) is engaged, and it can again be argued that this condition should extend to the situation where it is clear that significant inconvenience will be caused where the trader attempts a particular remedy.

cc) Reappearance of the same "defect"

Finally, the consumer is also given the free choice if "the same defect has reappeared more than once within a short period of time".[45] One can leave aside any discussion regarding the use of the word "defect" – presumably, this means non-conformity. What is less clear is exactly how often the same defect has to occur.[46] The phrase "*re*appeared more than once"[47] would suggest that it is only on the third occurrence of the same defect that this provision is engaged. The first occurrence is the original defect; the second instance is the reappearance of that defect once, and only the third time is where the same defect has reappeared more than once. Similarly, Recital 42 pCRD states that the consumer should have the free choice where the trader "has more than once failed to remedy the lack of conformity", which would also suggest that the second occurrence of the same defect is not enough for Article 26(4)(d) to apply. In this writer's view, once the trader has had one opportunity to remedy a non-conformity, a consumer should have the free choice between the alternative remedies – otherwise, consumers might be given too much of a run-around. This could easily be achieved by deleting the phrase "more than once", and it is submitted that this should be done.

However, there is a further inconsistency: in paragraph (d), there is an additional limitation that the same defect must reappear "within a short period

45 Art. 26(4)(d) pCRD.

46 See also Law Commission, *Consumer Remedies for Faulty Goods*, pp. 102-3.

47 Emphasis added.

of time", but Recital 42 contains no such restriction. It is far from obvious why there should be such a restriction, especially because it opens up further room for argument by introducing yet another time-based limitation. If a washing-machine has a defect which is repaired, and then the machine works fine for three months before the same defect reappears, why should this deprive the consumer of the free choice of remedy, when the reappearance of the same defect within one week would not have this effect? If this provision is really going to be of any benefit, it should mirror much more closely the situation described in Recital 42, and the requirement as to "a short period of time" be deleted.

Finally, it is noteworthy that this provision only covers the reappearance of the same defect. It leaves unanswered the question what would happen if there were several separate non-conformities which appear after the previous one has been remedied. In such circumstances, it does seem appropriate that a consumer should be able to ask for an alternative remedy, too.

dd) Other issues surrounding "free choice" provision

The Law Commission has – rightly – pointed out that what is missing in this list is the possibility that a trader may have behaved "so unreasonably as to undermine the consumer's trust".[48] This may occur e.g., where the trader delays responding to the consumer or refuses to provide information. In such circumstances, it should also be possible for a consumer to be given the choice of rescinding the contract.

A further problem is the uncertainty as to whether the specific restrictions on some of the remedies – impossibility or unlawfulness in the case of repair/replacement, or limiting the right of rescission to non-conformities which are not minor – are applicable here, too. Whilst it seems logical that unlawfulness and impossibility might continue to apply, this is not the case for restrictions on exercising the right of rescission. As the particular restriction regarding rescission is contained in Article 26(3) pCRD but the reference in paragraph (4) is to the remedies as listed in paragraph (1), it might be possible to argue that the proposed Directive already lifts that restriction in this regard, although paragraph (1) is subject to the remaining paragraphs of this Article. However, from a policy perspective, it does seem appropriate to remove the restriction on the right of rescission in the circumstances where Article 26(4) applies.

48 Cf. Law Commission, *Consumer Remedies for Faulty Goods*, p. 106.

d) Workability of remedies?

aa) General

The foregoing analysis of the remedial scheme in the proposed Directive raises the very real question whether these provisions would be workable in the context of a particular consumer transaction, especially a cross-border one. The practicalities of returning goods to a trader for a repair or replacement are challenging enough in the context of a transaction conducted at the local level, but will undoubtedly be exacerbated in the context of a cross-border transaction: surely most consumers will be put off from pursuing seriously the right to have a non-conforming item repaired where the trader is based in another country and a considerable distance away from the consumer's home.[49]

Furthermore, the provisions in Article 26(4) pCRD may look good on paper, but doubts as to their practical workability are even higher. Take sub-paragraph (a) – free choice of remedies where trader has refused to act – as an example: will a trader seriously respond to the consumer's request for an alternative remedy if he has refused to respond to the initial request? Similarly, sub-paragraph (d) requires that the trader must have failed three times to cure a particular defect before the consumer is given the free choice, but is seems very doubtful that this stage will be reached often in the cross-border context: would many consumers seriously go through the trouble of packing-up the non-conforming item and posting it back to the trader for repair (or replacement) more than once (if at all)? It seems more likely that consumers will pay for repair to be carried out locally at their own expense than to engage in the merry-go-round envisaged under the Directive.

So, from the perspective of the internal market, Article 26 might look reasonable, but there are some doubts whether these provisions would really work in practice.

bb) Workability where non-conformity is unfitness for particular purpose

A further question as to the workability of the remedial scheme arises when one considers one particular instance that could give rise to a non-conformity: this is where the consumer has made known to the trader a particular purpose for which the goods are required and the trader has "accepted" this, but the goods are then not fit for that purpose (Art. 24(2)(b) pCRD). Thus, the goods in question may work perfectly fine and yet not be suitable for the consumer's particular purpose. For example, a consumer has bought a heating boiler which works perfectly fine in itself, but which causes unacceptable energy efficiency

[49] Where the trader and the consumer are based in the same border region, this will, of course, be less of a problem.

ratings in the consumer's flat due to factors affecting the particular flat. [50] There is nothing that can be "repaired" to solve this problem, nor would a "replacement" help. One is therefore immediately pushed towards price reduction or rescission as the appropriate remedy, as a cure-based remedy would be nonsensical. However, is it permissible to move to these remedies – i.e., is this a situation where repair and replacement are impossible? Furthermore, is this a situation where there might be some dispute as to whether the non-conformity is to be regarded as minor if the goods could be used for other purposes, thereby precluding rescission? Take the example of a consumer who has bought a music-system to be used in a particular room in his house (assuming the trader is fully aware of the nature of the room), but it transpires that in the particular surroundings, the system produces only very poor sound. If the system could be used elsewhere in the consumer's home, does this render the non-conformity "minor", thereby effectively limiting the consumer to price-reduction?[51] This would appear to be the case, but this would be a rather unsatisfactory outcome from the consumer's point of view. In short, therefore, the rigid remedial scheme in Article 26 pCRD may, in many cases, be difficult to apply.[52]

e) Remedies: an alternative

In light of the foregoing, the question must be asked whether the remedies as currently provided for in Article 26 pCRD are suitable for encouraging consumers and traders to make better use of the internal market. In particular, is the emphasis on repair or replacement as the primary remedies appropriate, bearing in mind the potential practical difficulties associated with this? The costs and inconvenience associated with returning goods can be a deterrent in the local context, and surely the hurdle will be higher still in the cross-border context. Traders, too, would potentially incur significant cost associated with posting or transport of goods in order to effect a particular remedy – although, as discussed above, that could result in price reduction becoming the primary remedy in the European context.

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50 Cf. *Jewson v Boyhan* [2004] 1 Lloyd's Rep. 505, where the English Court of Appeal made a helpful distinction between "intrinsic" and "extrinsic" aspects of the goods; cf. C. Twigg-Flesner, "The relationship between satisfactory quality and fitness for purpose", (2004) 63 *Cambridge Law Journal* 22.

51 It may be that the consumer is able to exercise a right of withdrawal, where available, or benefit from the trader's returns policy, but neither factor should have a bearing on the design of the remedial scheme for non-conformity.

52 This situation would be even more complex still if there was a defect with the item in question that could be repaired in addition to its lack of fitness for the particular purpose required.

Instead, the proposals for reforming the UK consumer remedies for faulty goods could, it is submitted, provide a template for a better EU-wide scheme.[53] Prior to the implementation of the Consumer Sales Directive, the remedies available under the Sale of Goods Act 1979 for a non-conformity[54] were either to reject the goods and terminate the contract ("the right of rejection") in return for a full refund, or to claim damages.[55] Damages could also be claimed at Common law for any consequential losses.[56] However, the right of rejection is lost once the goods are deemed to have been accepted. "Acceptance" occurs in one (or more) of the following circumstances:[57]

1. The buyer intimates to the seller that he has accepted the goods.
2. The goods have been delivered and the buyer does an act in relation to them which is inconsistent with the ownership of the seller.[58]
3. The goods have been retained for a reasonable time without an intimation to the seller that the buyer has rejected them.[59]

In most consumer transactions, it is the third situation that will result in the consumer being deemed to have accepted the goods, and consequently no longer being able to reject them and obtain a full refund. Some difficulty has been caused by the phrase "reasonable time", which is rather vague, and there is only a small number of cases to offer any guidance. One of the proposals made by the Law Commission is to replace this criterion with a specific period of 30 days.[60] However, this could be adjusted downwards e.g., if the goods are perishable, or if the consumer should have discovered a fault before doing something which makes it impossible to return the goods (e.g., altering clothes).[61] Similarly, it could be increased if objective circumstances indicate that a longer period is needed (e.g., Christmas presents bought in October, or a lawn mower bought in December), or where the parties agree to a longer

53 Whilst what follows might seem as if the present writer is defending his own national law, it is hoped that the reader will consider the following purely on its merits and disregard the fact that an English writer is supporting a solution proposed by the (English) Law Commission.

54 I.e., a breach of the terms implied into the contract of sale by s13, 14(2) and/or 14(3) of the Act.

55 These remedies apply to all sales contracts, not merely consumer sales.

56 For a fuller analysis, see R. Bradgate/C. Twigg-Flesner, *Blackstone's Guide to Consumer Sales*, Ch. 4.

57 All are subject to the requirement that the buyer must have had a reasonable opportunity for examining the goods to establish that they are in conformity with the contract: see ss 35(2) and (5). Note that this does not impose a duty on the buyer to examine the goods.

58 S 35(1).

59 S 35(4).

60 Law Commission, *Consumer Remedies for Faulty Goods*, p. 93.

61 *Ibid.*, p. 90.

period.[62] The Law Commission has also suggested that if personal factors make it impossible for the consumer to examine the goods within the 30 days, the period might be extended. On the other hand, it does not favour an extension where the defect is latent and not easily discoverable.

The main task for the Law Commission was not merely to improve the right of rejection, but to consider how that right could be combined more successfully with the Consumer Sales Directive's remedies, particularly repair and replacement. Its proposals in this regard are worthy of serious consideration by the European legislator. The right of rejection comprises two elements: rejection of the goods *and* termination of the contract. Even before the transposition of the Consumer Sales Directive, it was possible for the buyer to reject the goods but to keep the contract alive and thereby afford the seller the opportunity to cure a defect by repair or replacement. Under the Consumer Sales Directive, a consumer who exercises his right to ask for repair or replacement is, in effect, doing two things: (i) rejecting the non-conforming goods; and (ii) requesting repair/replacement. So the Consumer Sales Directive's remedies and the English right of rejection and termination have the common feature that the consumer is rejecting the goods.[63]

Using this as its starting point, the Law Commission proposes a revised two-tier scheme.[64] If there is a non-conformity, then, in the first instance, the consumer has the right to *reject* the goods. This then opens up the choice between (i) termination of the contract and full refund within 30 days, as explained above; or (ii) repair; or (iii) replacement. However, if repair or replacement cannot be provided within a reasonable time or without significant inconvenience to the consumer, then the consumer can move to the second tier remedies of price reduction or rescission (i.e., termination and refund). Also, once repair has been accepted, the primary right of termination would cease, although if the repair is unsuccessful, a consumer might ultimately still be able to terminate and obtain a refund under the Consumer Sales Directive/proposed Directive's scheme. The Law Commission defers to the number of repairs/replacements to be endured by the consumer before moving to price reduction/rescission as determined in the proposed Directive.

It is submitted that this proposal has a lot of merit, not merely because it would provide a better match between existing English law remedies and those provided in the Consumer Sales Directive/proposed Directive, but because it could encourage more consumers to make use of the internal market. Although the Commission – probably correctly – envisages that much cross-border consumer contracting will occur over the internet, consumer can also "shop abroad" whilst they are travelling. Moreover, Recital 5 of the proposed Directive indicates that border regions could be another beneficiary of the revised legal framework. It seems more likely that a consumer might buy goods

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62 *Ibid.*, p. 91.

63 Cf. R. Bradgate/C. Twigg-Flesner, *Blackstone's Guide to Consumer Sales*, pp. 133-4.

64 Law Commission, pp. 113-5.

abroad if he has the opportunity of getting the quick remedy of a full refund if they do not work, rather than being locked into a circle of repair or replacement. Moreover, many shops – especially larger ones – have their own returns policy which allows consumers to return goods within a specified period, so a legal right to a refund within 30 days in cases of non-conformity would have a much more limited impact than may be feared. Furthermore, in the off-premises and distance contract context, there will be a 14-day withdrawal period already. It seems unlikely that the 30-day refund period for faults would cause many additional claims, especially because many problems either occur very soon after purchase, or not for some time if they are latent. Finally, the Law Commission's proposals are based on solid research into consumer and business expectations, and they largely reflect those expectations. The European Commission has not undertaken research of a comparable kind in drafting its proposals.[65]

Therefore, it is submitted that the Law Commission's proposals should be given very serious consideration by the European legislator. Adopting this on an EU-wide basis would provide a set of consumer remedies which would be more favourable and might stand a better chance of encouraging consumers as well as traders to take advantage of the internal market. Incidentally, it would also be more appropriate where the non-conformity is the lack of the goods' fitness for the particular purpose for which the consumer requires them (cf. Art. 24(2)(b) pCRD).

6. Costs and Damages

Article 27 pCRD deals with costs and damages.

a) Costs

Paragraph (1) restates the established rule that a consumer is entitled to have any non-conformity remedied free of any costs. There is no equivalent to Article 3(4) CSD, which specifies that "free of charge" in particular refers to the cost of postage, labour and materials. Instead, Recital 41 of the proposed Directive lists the cost of postage, labour and materials as indicative items which may not be charged to the consumer. In a further departure from the Consumer Sales Directive, Recital 41 explicitly states that the consumer "should not compensate the trader for the use" of the non-conforming item. This reflects the decision by the ECJ in the *Quelle* case,[66] and changes the position stated in Recital 15 of the Consumer Sales Directive which left Member

[65] Two surveys were carried out (Eurobarometers), but these did not consider this particular issue in depth.

[66] C-404/06 *Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände* [2008] ECR I-n.y.r. In this case, a German rule which permitted a seller to

States the freedom to specify that any reimbursement made to a consumer could be reduced to reflect any period of use the consumer may have had of the non-conforming goods. The very clear position now adopted in Article 27 pCRD is to be welcomed.

b) Damages

Article 27(2) pCRD, in a further departure from the Consumer Sales Directive, states that the consumer is entitled to "claim damages for any loss not remedied in accordance with Article 26". However, nothing further is said in the Directive, or the Recitals, about the kinds of losses that may be recoverable. Clearly, economic loss caused by the non-conformity should be covered. However, it is not clear if, for example, loss of earnings whilst waiting for a repairperson to arrive, or the emotional distress caused by the unavailability of an item, can be recovered. In this particular instance, the (D)CFR could have offered assistance once more, if only to help the legislator to identify what the potential categories of recoverable losses might be and the degree to which national laws vary. One would have hoped that the lesson from the *Leitner* case[67] in the context of package travel might have been learned. In that case, the fact that the term "damage" in Article 7 of the Package Travel Directive[68] had not been defined required a preliminary ruling from the ECJ, with the controversial effect that non-economic damage was held to be included within the scope of that term. In view of the fact that one of the objectives of the *Acquis* review is the removal of inconsistencies and to introduce terminological coherence, additional clarification on the notion of "damage" might have been needed here, in particular in order to repeat the experience of the unexpected interpretation of the term adopted in *Leitner* – as well as an similar meaning given to the term in the context of sales.

It may be that the purpose of this provision is merely to confirm that a consumer is entitled to claim damages, but that the questions raised above are to be determined by the relevant applicable law. If that were so, then it would be necessary to amend the wording of Article 27 to make it clear that this is a question for national law. As currently drafted, the provision could be a bit of a time-bomb, waiting to be exploded by means of a suitable reference to the ECJ.

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require the consumer to pay compensation for having used goods which were subsequently replaced was found to be in contravention of the CSD.

67 C-168/00 *Simone Leitner v TUI Deutschland* [2002] ECR I-2631.

68 Directive 90/314/EEC on package travel, package holidays and package tours O.J. (1990) L 158/90.

7. Time limits

a) Two-year liability period

Article 28 pCRD provides that a trader will only be liable for a lack of conformity if this becomes apparent within two years from the time that risk passed. Thus, the liability period already introduced by the Consumer Sales Directive is maintained in the proposed Directive, albeit now combined with the maximum harmonisation principle. This means that in those countries where there is a longer period, the level of consumer protection will be reduced. It needs to be borne in mind that this period is primarily relevant to latent non-conformities, i.e., problems which only manifest after some time of using the goods. Subject to the reversed burden in Article 28(5) pCRD,[69] the consumer will have to establish that the non-conformity existed at the time risk passed. The further one moves away from that point, the more difficult it may become for a consumer to prove that the non-conformity was present at that time and not caused by normal wear and tear or use of the goods, but for some goods, a two-year period seems rather short. For example, one would expect a washing machine to last for longer than that under conditions of normal use, and a failure after 25 months could well be an indication that there was a problem from the start. In English law, for example, there is no separate liability period, and the trader's period of liability is equivalent to the statutory limitation period for taking legal action for breach of contract.[70] This is fixed at six years and may therefore be particularly generous (there are Law Commission proposals to reduce this to three years),[71] but it seems that a two year period is unnecessarily short. One possible effect of such a reduction could be to increase the desire among consumers to take out additional breakdown insurance (known in the UK as "extended warranties"[72]) and thereby pay for extending the period during which they are entitled to a remedy when goods break down – effectively a form of privatising consumer rights.

In those countries where the impact of the proposed Directive is to shorten the manifestation/limitation period, the impact of full harmonisation in this regard is unlikely to be well received by consumers.

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69 See below.

70 Limitation Act 1980, s 5.

71 See Law Commission, *Limitation of Actions – Report* LC 270 (London: The Stationery Office, 2001).

72 See C. Twigg-Flesner, Dissatisfaction Guaranteed? The Legal Issues of Extended Warranties Explored" 2002 *Web Journal of Current Legal Issues* http://webjcli.ncl.ac.uk/2002/issue4/twigg-flesner4.html.

b) Reduced liability period for second-hand goods

Article 28(3) pCRD converts a regulatory option under the Consumer Sales Directive into a firm rule. Article 7(1) CSD permitted the introduction of a rule whereby consumer and trader could agree on a shorter liability period of at least one year in the case of second-hand goods. Eleven Member States chose not to exercise this option at the time of transposing the Consumer Sales Directive.[73] In light of this, it seems surprising that the Commission took the decision to propose this as a general rule, especially in light of Recital 39 pCRD. This explains that, in the context of the conformity-test, the "quality and performance which consumers can reasonably expect will depend *inter alia* on whether the goods are new or second-hand …". Thus, the mere fact that goods are second-hand affects the reasonable expectations of consumers regarding the performance of the goods, and it may be more difficult to establish that a particular defect is sufficient to constitute a lack of conformity, rather than a problem that one should expect from a second-hand item. There does not seem to be any need for a reduced liability period for second-hand goods if the conformity test already allows for their used nature to be taken into consideration in establishing that the goods do not conform to the contract. It is also far from obvious that this rule is really needed to encourage more traders and consumers to utilise the internal market.

c) Impact of replacement (but not repair) on liability period

An important new provision is found in Article 28(2) pCRD. Hitherto, there has been some uncertainty as to what would happen to the liability period if non-conforming goods were replaced: did the period continue to run, or did it restart? This issue is now settled in favour of restarting the period. Thus, where goods are replaced, the trader is once again liable for a full two-year period, starting from the date when the consumer acquired material possession of the goods (i.e., "delivery"). One may note that this was chosen rather than the time when risk passes. Indeed, the question of risk when goods are replaced is not settled by the proposed Directive and therefore seems to be a question which national courts would have to tackle.

The one question is whether the use of the definite article ("*the* lack of conformity") means that the restart only applies where the same lack of conformity occurs again in the replacement. It is submitted that no such restriction should be inferred, and that the trader should be liable for any lack of conformity which arises during the two years from the date of replacement.

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[73] H. Schulte-Nölke/C. Twigg-Flesner/M. Ebers, *EC Consumer Law Compendium*, p. 430.

Also, whilst a replacement effectively starts the period afresh, the position is different where goods are repaired. In fact, nothing is said about whether the liability period is suspended or continues to run whilst the goods are undergoing repair. However, Article 21(3) pCRD states that Chapter IV does not apply to any "spare parts replaced by the trader when he has remedied the lack of conformity of the goods by repair", which means that there is no separate obligation regarding the conformity of the spare parts with the contract. This suggest that, at best, the liability period continues to run whilst the goods are undergoing repair. However, the position may be less uncertain as may seem. If the spare parts used are defective, then it is likely that the repaired item might fail again. If this happens within a short period of time, Article 26(4)(d) pCRD is engaged and the consumer should be able to ask for an alternative remedy. Similarly, if the fault occurs at a later point, it may be possible to argue that the lack of conformity has not been remedied within a reasonable time as per Article 26(4)(b), again allowing the consumer to select a different remedy. However, clarification as to what should happen to the liability period whilst goods are undergoing repair would be welcome.

8. Notification duty

One provision which will be controversial is Article 28(4) pCRD, which imposes on a consumer the duty to notify the trader of a lack of conformity within two months of discovering this. Although not made explicit, it seems that this also entails an indirect obligation – or, perhaps, incentive – on a consumer to examine and try-out goods as soon as possible after delivery, if only to avoid a subsequent dispute as to whether notification was made on time: any non-conformity notified more than two months after delivery would enable the trader to raise the argument that notification was made out-of-time. In this context, it may be noted that the burden of proving compliance with the duty is unclear, in particular with regard to what exactly a consumer would have to do to prove that notification was, indeed, made within the two month period.

This provision had previously been a regulatory option[74] for the Member States,[75] although ten countries chose not to exercise this.[76] Recital 43 somewhat bluntly asserts that the variations between the Member States in this regard have created barriers to trade and that a firm rule is needed in the interest of legal certainty. What is not explained is why the decision was taken to require a notification duty, rather than prohibiting a notification requirement?

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74 Cf. B.van Zelst, *The Politics of European Sales Law* (The Hague: Wolters Kluwer, 2008), pp. 217-220 for a discussion of the political background to this provision.

75 Art. 5(2) CSD.

76 See H. Schulte-Nölke/C. Twigg-Flesner/M. Ebers, *EC Consumer Law Compendium*, p. 432.

Surely from the internal market perspective, the duty to notify the trader within two months can be more difficult.[77] It may also be queried whether a notification period serves a meaningful purpose.[78] It certainly creates an opportunity for a trader to argue that any non-conformity notified after more than two months from the date of sale was not notified on time, thereby adding to the hurdles put in the consumer's way. Of course, consumers could easily claim that they discovered the defect later than they did, but encouraging a degree of dishonesty does not seem appropriate.

9. Burden of proof

Article 28(5) pCRD restates the so-called "reversed burden of proof", i.e., the presumption that any non-conformity which manifests within six months from risk passing to the consumer is presumed to have existed that that time. The consumer still has to establish that there is a non-conformity, but is relieved from the additional burden of showing that it existed when risk passed. However, whether this will be a consolation for the potential impact of the duty to notify the non-conformity within two months remains to be seen.

IV. Evaluation and conclusions

It will be clear from the foregoing that there are some concerns about the sales provisions in the proposed Directive. These relate to both the fundamental balancing of consumer and trader interests (which are more weighted in the trader's favour under the proposed Directive than the Consumer Sales Directive), and the drafting of particular provisions (some of which are imprecise or contain gaps).

The main difficulty stems from the fact that what was a minimum harmonisation standard in the Consumer Sales Directive is converted to a full harmonisation standard in the proposed Directive. At the same time, the minimum level of consumer protection established under the Consumer Sales Directive is *reduced* in several respects in the proposed Directive, without a discernible counter-benefit for consumers. From a constitutional perspective, the justification of full harmonisation at a lower level of consumer protection than the previously established minimum standard seems difficult. Moreover, it seems strange to justify a fully harmonised reduced level of protection in

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77 See G. Howells/R. Schulze, "Overview of the Proposed Consumer Rights Directive", *in this volume*.

78 Although see C. Jeloschek, *Examination and Notification Duties in Consumer Sales Law* (Munich: Sellier, 2006), who argues in favour of a more limited notification duty, having carefully examined the implications of such duties.

view of the imperative in Article 95(3) EC to take as the base a "high level of consumer protection"[79] even in the context of the internal market.[80]

One very real consequence of the proposed Directive is that the level of consumer protection which it would introduce as a mandatory maximum level across the EU would fall below the protection given to a non-consumer buyer under the legislation applicable to (commercial) sales in many Member States. It seems that being a consumer would be a *disadvantage*, which would turn the whole point of consumer-specific legislation on its head. Consumer law is generally adopted where the rules applicable to transactions generally are too imbalanced and likely to cause unacceptable detriment. Worryingly, consumers would not be able to escape the application of the consumer-specific rules in favour of generally applicable rules because consumer law is mandatory and consumers cannot contract out of such rules. Indeed, Article 43 pCRD states that "*consumers* may not waive the rights conferred on them", which seems to be far too protective. Surely it would suffice if the provision precluded *traders* from attempting to exclude consumer rights, but leaving consumers with some level of choice? Although this issue appears to have long been settled, the lowering of consumer protection under the proposed Directive mandates that this issue be revisited.

Wilhelmsson has rightly pointed out the fact that it is non-sensical to push for full harmonisation of consumer contract law because the national default rules of contract law will vary, resulting in a "legal mess".[81] It is to be hoped that sense will ultimately prevail and that the European legislator will abandon its full harmonisation drive, at least with regard to the sales provisions, although the signs are not promising. The resulting mess could take many more years to sort out.

Overall, therefore, whilst there are some positive developments in the proposed chapter on sales, there is some room for improvement, and it is hoped that the opportunity will be taken during the legislative process to deliver a Consumer Rights Directive which is truly fit for its purpose.

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79 Although this need not, of course, be the *highest* level possible. Nevertheless, the proposed Directive has, at best, adopted a medium level of protection which arguably falls short of what is required for Art. 95 EC.

80 A somewhat cynical suggestion might be to say that it would seem wrong to call this a *Consumer* Rights Directive when it really shifts the balance so significantly to the trader's side that a better title would be the *Protection of Traders from Consumers* Directive!

81 T. Wilhelmsson, "Full Harmonisation of Consumer Contract Law?", (2008) 16 *Zeitschrift für Europäisches Privatrecht* 225-229, p. 227.

A Dangerous Erosion of Consumer Rights: The Absence of a Right to Withdraw from Online Auctions

Christine Riefa

I. Auctions – an overview

An auction is a sale technique that finds its origin in 500BC in Babylon, where women were sold to the most generous bidder. Since then, the auction process has grown steadily over the centuries and has taken many varied forms.[1] Whilst for many years the auction has been reserved to a handful of specialist people present in the auction room, the evolution of technology such as telephone, television and more recently the Internet, has brought the auction process within the grasp of the general public.[2]

Whereas traditional auctions epitomised by auctioneers such as Sotheby's or Christie's have remained strong, online auctions for the sale of everyday consumer goods and services have, in recent years, developed exponentially. E-commerce figures for the United Kingdom revealed an increase in spending at online auctions in 2005. The figures show that 14% of the 34 million adults who used the Internet (4.9 million) made their most recent purchase from an auction site that year.[3] There were 79 million transactions over this period, and £2.8 billion was spent. This trend is echoed across Europe in more recent polls. For example, in France the FEDAV (*la fédération du e-commerce et de la vente à distance*) in association with Médiamétrie published e-commerce figures

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1 Some auctions are organised by public officers, others are ordered by courts, others conducted by professional auctioneers or directly by traders. Some are timed by the use of a candle or a pre-set clock, whilst others end with the fall of the auctioneer's hammer. Some allow bidders to make increasing bids whilst others use a mechanism by which the price drops or a combination of both. For a detailed study of the many forms of auctions, see C. Ramberg, *Internet Marketplaces: The law of auctions and exchanges online*, (Oxford: Oxford University Press, 2002).

2 C. Riefa, "To be or not to be an auctioneer? Some thoughts on the legal nature of online 'eBay' auctions and the protection of consumers", *Journal of Consumer Policy* (2008) 31, 167-194, at p. 167.

3 See the figures published by APACS: http://www.apacs.org.uk/media_centre/press/06_31_07.html, last consulted [27/01/2009].

showing eBay and its rival PriceMinister at the top of the rankings for most visited websites, and this for more than three consecutive quarters.[4]

Although the immense success of online auctions cannot be denied, a well-documented series of risks also mars such achievement. An Internet shopping survey by the Office of Fair Trading (OFT) in June 2007 showed that over half of the respondents to the study who had shopped on an online auction site had experienced at least one problem in the last twelve months. This included a wide range of issues ranging from difficulties in contacting the seller, items not being as described to other problems with delivery such as items that were never delivered or arrived broken, damaged, faulty or with parts missing.[5]

When these problems occur, under Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts[6], consumers buying at online auctions face an uncertain fate. Indeed, whilst Article 3(1) excludes contracts concluded at an auction from the scope of this Directive, it does not provide a definition of what an auction is, leading to much legal uncertainty and fragmentation amongst the Member States.[7]

For example, in France and Luxembourg, consumers buying on online auction sites are protected under the distance selling regime and benefit from a right to withdraw, because only public auctions are excluded from the scope of the Directive. The legislator in those countries makes a distinction between traditional public auctions and online auctions akin to brokerage. In Belgium and Greece, eBay auctions are also subject to the distance selling regime, but it is because the exclusion of contracts concluded at an auction was not implemented at all. In Germany, consumers are also adequately protected following a decision of the Federal Court of Justice (*Bundesgerichtshof*)[8], concerning the sale of a diamond bracelet on eBay, which decided that traditional auctions in German law required the "fall of the hammer" in order to conclude an auction sale in accordance with Section 156 of the BGB and that in the absence of such event, no adjudication takes place, therefore subjecting the sale to the distance selling rules and allowing the unsatisfied consumer to return the goods. By contrast, in Estonia, auctions have been included within the scope

4 eBay has topped the rankings since the start of the recording process in January 2007 and Price Minister has also always featured in the top 8 sites since January 2007. See Fédération du e-commerce et de la vente a distance (FEDAV), Baromètre de l'e-commerce 2007 et 2008. The figures are available online: http://www.fevad.com/index.php?option=com_content&task=category&sectionid=5&id=15&Itemid=366, last consulted 27.01.2009.

5 See OFT, *Internet Shopping, an OFT market survey*, June 2007, p. 141. Other issues concerned the sale of counterfeit items as well as practices of shill bidding (where sellers or an accomplice bid on their own items to drive the price up).

6 OJ 1997 L 144/19.

7 See H. Schulte-Nölke and A. Börger, *Consumer Law Compendium, Comparative Analysis, E. Distance Selling Directive (97/7)*, p. 500.

8 Bundesgerichtshof VIII ZR 375/03, 3 November 2004.

of the Distance Selling Directive, but the right of withdrawal does not apply in the case of online auctions.[9] Other countries such as the United Kingdom, Malta or Ireland have also implemented the exclusion but in the absence of any authoritative definition of "auction" or relevant case law, the debate rages as to whether or not eBay auctions are caught by the legislation, creating real uncertainty for consumers buying on such sites.[10] As a result, the discrepancies in the definition of the scope of the Distance Selling Directive with regards to the inclusion or non-inclusion or even partial inclusion of auctions create regrettable differences in the protection of consumers, not mentioning the barriers to competition between businesses in the internal market.

It is to respond to the negative effects of fragmentation, noted in the Green Paper on the Review of the Consumer Acquis[11] that the proposed Directive on Consumer Rights[12] (hereafter: the Proposal; pCRD) opted for full targeted harmonisation. In the area of online auctions, the Proposal recommends amending the distance selling provisions to create a harmonised regime[13] that no longer exclude contracts concluded at an auction from the scope of the Distance Selling Directive, but defines auctions and public auctions respectively in Articles 2(15) and 2(16).[14] For the sales that will fall within the scope of the proposed Directive, traders will have to yield to new informa-

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9 COM(2006) 514 final, p. 7.

10 Some authors consider online auctions outside the scope of the Distance Selling Directive making no distinctions between traditional and online auctions. See for example, S. Atiyah, J. Adams and H. McQueen, *The Sale of Goods*, (London: Longman, 2005), p. 58; G. Howells and S. Weatherill, *Consumer Protection Law*, (Aldershot: Ashgate, 2005), p. 370. B. Harvey and F. Meisel have a more developed view and suggest that eBay can be considered "as acting as auctioneers, albeit to a limited extent" in *Auctions Law and Practice*, (Oxford: Oxford University Press, 2006). Finally, C. Riefa rejects those interpretations arguing that eBay is not a traditional auctioneer and that sales conducted on eBay between a trader and a consumer should be subject to the Distance Selling Directive: see C. Riefa, "To be or not to be an auctioneer? Some thoughts on the legal nature of online 'eBay' auctions and the protection of consumers", (2008) 31 *Journal of Consumer Policy*, 167-194.

11 Green Paper on the Review of the Consumer Acquis, OJ 2007 C 61/01.

12 Proposal for a Directive of the European Parliament and of the Council on Consumer Rights, COM(2008) 614 final.

13 Note that the scope is actually wider as the Proposal will also impose a general obligation information on public auctions in its Article 5.

14 Article 2(16) pCRD defines auctions as "a method of sale where goods are offered by the trader to consumers, who attend or are given the possibility to attend an auction in person, through a competitive bidding procedure run by an auctioneer and where the highest bidder is bound to purchase the goods".

tion requirements[15], in exchange for consumers being barred from the right to withdraw under Article 19(1)(h) pCRD.[16]

The latter appears to constitute a dangerous erosion of the protection of consumers buying on online auction sites. Whereas we support a process of harmonisation and acknowledge that the differences between Member States could be damaging to the protection of consumers in the EU, we do not agree with a system of harmonisation benchmarking itself against the lowest common denominator and the loss of the right to withdraw for all consumers. We identified three main arguments that are used to justify the absence of a right to withdraw being granted to consumers:

1. the enhancement of information requirements;
2. the uniqueness of the sale method; and
3. the potential for consumers abusing the right to withdraw.

II. The enhancement of information requirements as a justification for the absence of a right to withdraw

The first argument used to justify the exclusion from a right to withdraw concerns the corollary enhancement of the information requirements imposed on traders selling at online auctions under Articles 5[17],7 and 9 of the Proposal. Leaving aside the potential risks linked with relinquishing effective remedies for the breach of the general information obligation under Article 5 pCRD, to national contract law[18] and the apparent absence of sanctions for non-compliance with Articles 7 and 9 pCRD, we disagree with this position for at least two reasons.

First, we disagree because enhanced consumer information may not necessarily assist consumers and could have perverse effects. For example, Article 7 pCRD imposes a specific information requirement for intermediaries[19] and states:

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15 Under Article 5 pCRD auctions and public auctions are subject to a general information obligation that is topped up by the obligation in Article 9 pCRD when the auction is conducted at a distance.

16 Article 19 pCRD which lists the exceptions from the right of withdrawal indicates that "in respect of distance contracts, the right of withdrawal shall not apply as regards (...) (h) contracts concluded at an auction".

17 Article 5 pCRD imposes a general information requirement, applicable to all sales. It also appears to be applicable to both public auctions and auctions as defined in Articles 2(15) and (16) pCRD.

18 Which may create further fragmentation as some Member States may be more stringent than others.

19 Note that under Article 7(3) pCRD the obligation to provide specific information does not apply to public auctions.

> prior to the conclusion of the contract, the intermediary shall disclose that he is acting in the name or on behalf of another consumer and that the contract concluded shall not be regarded as a contract between the consumer and the trader, but rather a contract between two consumers and as such falling outside the scope of this Directive.

This Article will be particularly relevant on eBay with regards to what are called drop-off centres, where a professional (not necessarily an auctioneer) will proceed with selling goods on behalf of the consumer who has deposited the item in his care. We fear that this provision will allow many professionals to escape the scope of the proposed Directive, resulting in poor information for consumers and an absence of a right to withdraw, which would currently apply. Such a provision will indeed encourage traders to shift from simply buying items from consumers in order to resell them, to acting as an intermediary in order to avoid any right to withdraw. A surge in consumer information may therefore not necessarily lead to a better protection of consumers buying at online auctions and needs to be complemented by strong public enforcement measures and/or a right to withdraw for consumers.

Second, we disagree that enhanced information will be sufficient to alleviate the risks of an absence of a right to withdraw because some information requirements cannot reasonably be applied on online auction platforms without significant alteration to the way platforms function. Indeed, because online auction sites rely on the anonymity of the parties to preserve their revenue stream, a number of information requirements cannot easily be complied with. For example, under Article 5(1)(b) and Article 9 pCRD, traders need to provide their geographical address and identity. In its current set up, eBay and other online auction providers are not allowing sellers to disclose this information to potential buyers. It is only at the close of an auction, or once a consumer proceeds to buy at a fixed price, that the parties discover their respective true identity. It would be possible to envisage that the information given on the site (i.e. a nickname and a vague geographical location) is sufficient to fulfil this information requirement in its current state. But this could only be so, if online auction platforms were to reinforce their role in checking the true identity of the parties and taking some responsibility in the management of the transaction, since consumers will have to rely more heavily on the intermediary to guarantee the identity and geographical presence of the sellers. The alternative may force online auction platforms to rethink their business model, if they were to allow parties to know their full identities and geographical addresses from the outset. In some cases this could, rather than improve the protection of consumers buying at online auction, erode it further. For example, PriceMinister (eBay's rival in France) does not allow the parties to know their identity but acts as an intermediary and collects payments from buyers. It pays sellers only when buyers have confirmed that the goods have been received and are satisfactory. If the parties were to be able to bypass the

online auction platform by making direct contact and concluding sales outside of its environment, the protection of consumers may be in jeopardy.[20]

Moreover, under Article 9(f) pCRD, the trader shall provide information about the fact that "the contract will be concluded with a trader and as a result that the consumer will benefit from the protection afforded by this Directive."

This requirement causes difficulties because the distinction between consumers and suppliers who use online auction sites is not as clear-cut as one would anticipate. On the one hand,

> online auction sites of the "eBay type" have evolved from a consumer-to-consumer market place, where individuals would exchange or sell collectibles and where consumer protection law is not applicable, to sites where small and medium enterprises as well as big corporations sell their products to consumers using auction processes.[21]

On the other hand, to have a commercial activity on online auction platforms no longer requires important capital or sophisticated infrastructures and many individuals use eBay as a source of second income, selling regularly rather than sporadically on online auction sites. Those individuals may lose their legal classification as consumers to become suppliers "selling in the course of business" or hybrid consumers[22], i.e. consumers who have, many times unknowingly, displayed the characteristics of a business and should be treated as such. Most will not consider themselves to be businesses and are therefore likely to ignore the requirements of Article 9 pCRD causing some detriment to the consumers who buy goods from them.[23] The proposed Directive defines both traders and consumers, but does not provide any definitions for hybrid consum-

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20 See PriceMinister, *Réponse à la consultation publique relative à l'application de la directive 1997/7/CE du Parlement européen et du Conseil du 20 mai 1997 concernant la protection des consommateurs en matière de contrats à distance*, Paris, novembre 2006, p. 6.

21 C. Riefa, "To be or not to be an auctioneer? Some thoughts on the legal nature of online 'eBay' auctions and the protection of consumers", (2008) 31 *Journal of Consumer Policy*, 167-194, at 168.

22 Some authors refer to them as hybrid sellers. See M. Morgan-Taylor and C. Willett, "The Quality Obligation and Online Market Places", (2005) 21 *Journal of Contract Law* 157.

23 It is important to note that one main reason for consumers not always being aware of their change in status is that defining the hybrid consumer is not an easy task. Yet it is important to clarify this point because the findings of the OFT Internet shopping market survey note that 60% of respondents to the survey who bought items from an online auction wanted to know whether they were buying from a business. This, the survey remarked, affected their confidence and their rights. See OFT, *Internet Shopping, an OFT market survey*, June 2007, pp. 144-145.

ers. It is therefore unclear if those para-commercial activities should fall under the scope of the proposed Directive. As a result, a large number of *bona fide* consumers may not receive the general or even specific information that the Commission consider can justify an absence of the right to withdraw.

III. The uniqueness of the sale method as a justification for the absence of the right to withdraw

The second argument put forward to justify the choice of the Commission to exclude auctions from the right to withdraw, rests in the fact that auction sales are unique events because a

> competitive bidding process creates a unique one-off transaction that cannot be repeated or re-created in an identical format because the outcome of the bidding cannot be predicted.[24]

It is therefore the sale method that justifies the exclusion from the right to withdraw. This view is supported by public auctioneers such as Sotheby's. Indeed, it is understandable that a right to withdraw from public auctions, i.e. those run by an auctioneer, would disrupt the whole auction business, because people would make very different decisions if they knew they had the right to withdraw.[25] In the case of public auctions, the absence of a right to withdraw is justified in our view because the intermediary has a broader role than that of the online auction platform. Traditional auctioneers take possession of the goods sold and they have a number of duties to vendor and purchaser as well as third parties. In the United Kingdom for example, this includes a duty to describe the property accurately (which includes a duty not to misrepresent) and a duty of care for the goods whilst they are in the auctioneer's possession.[26] As a result, consumers are provided with a minimum guarantee that the auctioneer will have seen the goods and given them a valuation that reflects their sale potential.

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[24] eBay's response to the Public consultation on the implementation of Directive 1997/7/EC (Distance Selling Directive), p. 8. eBay adds: "(…) The re-listing of an item, or even the listing of an identical item at the same time, is never going to have the same outcome (…). This is very different from direct sales where any buyer can make a purchase at a fixed price and this process can be duplicated".

[25] See Sotheby's position in Commission staff working document accompanying the proposal for a directive of the European Parliament and of the Council on Consumer Rights, Annexes, SEC (2008) 2547, p. 170. The auctioneer explains that it is possible that buyers would outbid others without the intention to actually purchase, ensuring that for instance art pieces stay on the market.

[26] For more on these obligations, see B. W. Harvey and F. Meisel, *Auctions Law and Practice*, 3rd ed., (Oxford: Oxford University Press, 2006).

This is not the case with sales conducted on eBay. Yet, in its response to the public consultation on the implementation of the Directive 1997/7/EC, eBay raises similar arguments. It claimed that if a

> supplier was forced to re-list an item under the cooling-off regime, this would unfairly disadvantage both supplier who may not get the same price as previously and off course have to incur the cost and time of re-listing and the bidders who were outbid by someone who is not really interested in the item.

We do acknowledge some inconvenience in the seller having to add to his costs by re-listing and running the risk of the new auction not resulting in as good a price as previously obtained. We also acknowledge the fact that such added expenses and potential loss on the original price may ultimately find their way back to consumers with sellers setting reserve prices to take this expense into account, potentially driving up the costs of items on eBay and disadvantaging consumers. However, such position is directly influenced by eBay's remuneration system rather than sellers' or consumers' welfare. Indeed, because the site obtains its remuneration from listing fees as well as commissions on the completion of sales, it is in its interest to argue against a right to withdraw so as to avoid having to revert the commission to the seller or delaying the moment the commission can be accrued (after the expiration of the period during which a consumer may withdraw). Furthermore, eBay's position seems to ignore the rationale behind a right to withdraw. The right for consumers to withdraw does not lay with the fact that consumers will or will not have a genuine interest in making a purchase, but rather, with the fact that, because of the sale occurring at a distance, the consumer is not able to see the goods before concluding the contract, and therefore needs a way of ascertaining the nature and functioning of the goods.[27] Since unlike traditional auctioneers, eBay does not verify the goods sold on the platform, the consumer needs to be able to do this for him or herself. The only possible way this can be satisfactorily achieved is to allow consumers to withdraw from the sale.

IV. The potential for consumers abusing the right to withdraw as a justification for its absence

The third argument, which would justify the absence of a right to withdraw, concerns potential abuses of this right by consumers buying on online auction platforms.[28] In the same consultation document cited above, eBay goes further and raises the point that "consumers could abuse the right to withdraw

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[27] Recital 22 pCRD.

[28] The subject of abuse of the right of withdrawal in general is discussed by M. Loos, "Rights of Withdrawal", *in this volume*.

to take unfair advantage of the price building mechanism of auction-style transactions."

If one followed their argument, for want of avoiding some consumers abusing the right to return, we would completely ignore a more pressing issue: businesses choosing to sell via auctions on eBay to circumvent the right to withdraw.

According to Article 2(15) pCRD in fine, a "transaction concluded on the basis of a fixed-price offer, despite the option given to the consumer to conclude it through a bidding procedure is not an auction".

As a result, as it was the case under Directive 97/7/EC, goods sold on eBay using the "buy-it-now" facility are subject to the distance selling provisions and offer consumer a right to withdraw from the purchase. Traders who wish to avoid the distance selling regime can do so by opting to sell items using an auction process rather than a fixed price. By imposing a reserve price on the auction they can mitigate not only the risk that the sale via auctions will not realise a satisfactory price, but also the risk of an item being returned by the buyer. When a trader chooses to offer products up for sale on eBay either via fixed price or auction, he does so because he believes that the use of one of the sales technique or a combination of both will derive some benefits. Unlike a public auction, the eBay auction is not chosen as a method to authenticate and guarantee the goods and reach specialised buyers, in a way that a traditional auctioneer would have been entrusted with a sale. Since the traditional functions of authentication and guarantee are not fulfilled by sellers on eBay, nor by the online auction platforms itself, the only feasible means for consumers to ensure that the goods will be satisfactory is to be able to return them should they fail inspection. To take this right away is to deny consumers the most basic level of protection.

We are not rejecting the claims that the right to withdraw could be abused. But it seems that it could be so in the same way that it can be abused with straight forward distance sales. Yet, for those sales the Commission is committed to offering a strong and efficient right to withdraw and has even increased the period of time during which consumers can withdraw from a distance contract under Article 12 pCRD.

It seems that the dangers of consumers being abused if such right was not in place are greater than the risks encountered by businesses and could lead to a significant increase in the number of online auction sales in order to circumvent the application of the distance selling rules.[29] This would be particularly worrying because the OFT market survey revealed that receiving items that were not as described or receiving broken, damaged, faulty or incomplete items were amongst the most common problems encountered by buyers at online

[29] This may reverse the current trend of auction sales being outperformed by fixed price offers listings.

auctions.[30] Without an opportunity to withdraw from the purchase, in those cases, consumers would have no redress under the current Proposal.

One solution may be to retain the right to withdraw, but mitigate potential abuses on the part of consumers by imposing some limits to the situations in which this right can be exercised. This could strike a balance between the right of the consumers and the needs of the business. The Proposal for a Directive on Consumer Rights already provides a number of safeguards by imposing some obligations on the consumer in case of withdrawal in Article 17. Consumers have an obligation to send back the goods rapidly but can only be charged with the direct cost of returning the item.[31] In addition, the consumer will be liable for any diminished value of the goods. This seems a fair regime under which consumers buying at online auctions could be placed. Further, the Commission may wish to maintain some exclusion to the right to withdraw based on the nature of the product sold, rather than, as it currently proceeds, based on the sales technique employed. As a result, certain goods, such as works of art or antiquities, could be excluded from the right to withdraw in order to account for the fact that a possibility to withdraw for those products could lead to some important distortions. Even second-hand goods may benefit from a derogatory rule if it can be demonstrated that the right to withdraw would have too great an impact. However, for new products sold in mass that could just as easily be sold at a fixed price, it should not be possible to avoid the grip of a right to withdraw.

V. Conclusion

In the name of fragmentation, the Commission proposes to go from a position under Directive 97/7/EC where many consumers could benefit from essential protection such as a right to information and a right to withdraw when buying at online auctions, to a position where consumers will all benefit from a right to information, but none will be entitled to withdraw from a contract concluded on an online auction platform. We have seen that neither the enhancement of information requirements, nor the uniqueness of the sale method or the potential for consumers abusing the possibility to withdraw can justify such strong erosion of consumer rights. We believe that when a good is being sold at auction when it could all the same be sold with a fixed-price, the absence

30 OFT, *Internet Shopping, an OFT market survey*, June 2007, p. 141, chart 10.2.

31 One can imagine that for online auction sales where a listing fee is payable, the cost of returning the item could be augmented by the amount it will cost to re-list the item on the site. Although this would have to be defined carefully, as one would want to avoid allowing traders to charge not simply the nominal fee paid to eBay to list the item, but also staff cost associated with it. Depending on the value of the item the latter may be prohibitive and result in de facto taking away the right to withdraw.

of a right to withdraw gives the business an advantage that is both unjustified and disproportionate. In our view, if the Commission, who purports to want to foster confidence in cross-border sales with this new Proposal for a Directive on Consumer Rights, wants to achieve its goals, it would be better inspired to explore the possibility of providing consumers a right of withdrawal, all be it limited.

Direct Producer Liability

Chris Willett

I. Introduction

The proposed Consumer Rights Directive (the 'proposed Directive') contains various rules as to conformity of goods and remedies for non-conformity;[1] which build on the foundation of the Consumer Sales Directive (the 'Sales Directive'; CSD).[2] The Sales Directive imposes the liability for non-conformity on the party that sold the goods to the consumer;[3] and the same approach is taken in the proposed new Directive.[4] Of course, when the Commission first began the discussions leading to the Sales Directive, it was suggested that the planned regime would (alongside seller liability) impose liability on the producer of the goods. In other words, if the goods ultimately purchased by the consumer did not meet the legally imposed standard, the consumer would be entitled to choose between pursuing the remedies laid down in the regime against either the seller or the producer.[5] Ultimately, direct producer liability did not find its way into the adopted Directive. It was, however, stated in the Directive that the possibility of such direct producer liability would be revisited in the context of the review of the Directive.[6] This review concluded that there was not yet sufficient evidence that the lack of harmonised direct producer liability had a negative impact on consumer confidence in the internal market;[7] and, as indicated, direct producer liability is not a part of the proposed new Directive.

However, the debate as to the merits of direct producer liability has continued and various important contributions have been made in recent years

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1 COM(2008) 614 final, Arts. 24-28 (hereafter: pCRD).

2 Arts. 2 and 3 of the Directive 99/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

3 Art. 2(1) CSD.

4 See Arts. 2 and 24-28 pCRD.

5 Green Paper on Guarantees for Consumer Goods and After-sales Services, COM(1993) 509 final.

6 Art.12 CSD.

7 Communication from the Commission and the European Parliament on the implementation of Directive 99/44/EC, COM(2007) 210 final, at 11-13.

or are forthcoming.[8] This chapter does not seek, as such, to 'make the case' for direct producer liability. It aims, simply, to keep the issue on the agenda by sketching what direct producer liability might actually mean; where we stand, relative to such possible meanings, at present; what some of the arguments are for and against a direct producer liability approach;[9] and what alternatives there might be to a full direct producer liability approach.

Running through all of this are observations as to further questions that perhaps need to be asked if we are to have a fuller picture as to how to proceed. A further running theme is the question as to how a direct producer liability system fits within the existing and proposed fabric of the acquis. So, for example, we shall see in the section immediately following that a direct producer liability system would probably be based around the conformity and remedies concepts already being used in the Sales Directive and carrying forward into the proposed new Directive. In addition, it will be suggested that direct producer liability approaches could be seen as being in congruence with established principles of the acquis such as 'reasonable expectations', 'professional diligence' and 'transparency'.

Another important theme that emerges is whether we should be thinking beyond direct producer liability, to imposing liability, in at least some circumstances, on those importing goods to the EU and on members of the broader distribution network.

II. What does direct producer liability mean?

The first issue is as to what exactly we mean by direct producer liability.[10] Broadly, any system of direct producer liability would certainly involve the producer being legally responsible for defects in the general quality of the goods where these defects derive from the production process. By 'general quality' I mean the type of elements of 'conformity' currently applicable in relation to the seller under the Sales Directive, Articles 2(c) and (d)[11] as to fitness for normal use and quality and performance that is normal and can reasonably be expected.

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8 See, for example, R. Bradgate and C. Twigg-Flesner, "Expanding the boundaries of Liability for Quality Defects", (2002) 25 *Journal of Consumer Policy* at 345-377; M. Ebers, A. Janssen and O. Meyer, *European Perspectives on Producers' Liability*, (Munich: Sellier, forthcoming 2009).

9 There is no scope to be anywhere near comprehensive in this respect; and readers are referred, in particular, to the forthcoming collection by M. Ebers et al., ibid.

10 Whether as a mandatory regime or as a default regime that might be derogated from in some way – see the discussion of this possibility at section 5 below.

11 And which would continue to be used in relation to sellers under the pCRD (see Art. 24(2)(c) and (d)).

Of course, under Article 2(2)(d) CSD, producer statements ('particularly in advertising or labelling') as to the 'specific characteristics of the goods' are to be taken into account in determining what the consumer can reasonably expect in terms of quality and performance; and this would continue to be the case under the proposed Directive.[12] This would surely need to be the case also if there was to be a direct producer liability system; given that consumer expectations as to quality are surely influenced by such statements.

A further possibility, of course, would be for a direct producer liability system to contain a rule imposing 'free standing' liability for producer statements. By this I mean that the statement would be treated as creating an independent obligation or duty and that, if there was a breach, the producer would be liable to provide the relevant remedies. So, for example, if a windscreen was said to be 'shatterproof'[13] and this proved not to be the case, there would be a remedy; even although (taking into account all the other relevant aspects of quality) this would not necessarily be sufficient to put the car in breach of the overall conformity/satisfactory quality standard. Currently (and the proposed Directive would follow this), the seller's liability for producer statements is not of this free standing nature; but is restricted to such statements being a relevant aspect of the conformity standard.[14]

Related issues here are as to whether a direct producer liability system should make producers liable for their statements about the basic description of the goods and statements as to fitness for particular purposes (things that sellers are, and would continue to be, liable for[15]). The case for liability in these cases seems to be particularly strong. While there might be some scope to argue that statements as to the general qualities of the goods should be seen only as part of the overall assessment of quality (and not give rise to free standing liability), there will surely be a particularly high degree of reliance where statements describe the essential nature of the goods and their fitness for particular purposes.

More difficult is whether producers should be liable for quality problems that have their source further down the distribution chain; for expectations as to quality that have been raised by statements made further down the chain; or for descriptions or statements as to fitness for particular purposes that have been provided further down the chain. Obviously, it is more controversial to impose liability where the producer is not the 'cause' of the problem.[16]

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12 Art. 24(2)(d) pCRD.

13 The 'shatterproof' claim is taken from the U.S. case, *Baxter v Ford Motor Co*., 168 Wash 456, 12 P2d 409, 15 P2d 1118, 88 ALR 521.

14 Art. 2(2)(d) CSD (followed by Art. 24(2)(d) pCRD) refers to whether goods show the quality and performance that is normal and can reasonably be expected given their nature 'and *taking into account* any public statements' on their specific characteristics.

15 See Art. 2(2)(a) and (b) CSD and Art. 24(2)(a) and (b) pCRD.

16 For a discussion see R. Bradgate and C. Twigg-Flesner, supra, note 8, at 361-2.

Finally, there is the issue of remedies. Presumably, the remedial regime would involve one or all of the remedies currently available[17] as against sellers, i.e. repair, replacement, price reduction and rescission. A further question, then, would be whether a damages remedy should be available to cover, for example, injury, damage to property and consequential losses such as expenses involved in hiring temporary replacements, correspondence, telephone calls etc. Damages are not currently available against the seller under the Sales Directive; although they are available (but only for injury and property damage) against the producer under the Product Liability Directive. In addition, the proposed Directive provides that 'the consumer may claim damages for any loss not remedied by' the repair, replacement, price reduction and rescission remedies.[18]

One thing that does emerge from the above sketch is that the existing acquis and/or the proposed Directive (while not imposing direct producer liability) do contain the tools that would need to form part of a system of direct producer liability. The core concepts of such a system could be the conformity, public statements and remedy concepts that either already exist and would continue to exist or (in the case of a broader damages claim) would exist under the proposed Directive.

III. The current position on direct producer liability

1. Seller and producer liability in general

Where do we stand at present? Currently, as we have seen, it is the seller that is held responsible under the Sales Directive for the various description, quality and fitness problems that could amount to non-conformity. This follows the approach in many national systems such as the United Kingdom, Germany and the Netherlands.[19] So, for instance, in the United Kingdom implied terms as to description, satisfactory quality and fitness for particular purpose are applicable as between the parties to the contract of sale,[20] i.e. normally the retailer of the goods, not the producer.

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17 See Art. 3 CSD and Art 26 pCRD.

18 Art. 27(2) pCRD.

19 On England see C. Twigg-Flesner, "An English Perspective on Producer Liability", in M. Ebers et al., supra, note 8; for Scots law see C. Willett, "Producers' Liability for Non-Conformity in Scots Law", in M. Ebers et al., supra, note 8; for Germany, see S. Bittner and P. Rott, "Direct Producer Liability and the Final Seller's Right of Redress in Germany", in M. Ebers et al., supra, note 8; and for the Netherlands see B. Duivenvoorde and E. Hondius, "Recourse and Direct Action in the Netherlands: A Dutch Treat?", in M. Ebers et al., supra, note 8.

20 See Sale of Goods Act 1979, ss 2, 13 and 14.

Producers may of course sell directly and will then be liable under the conformity standard in the Sales Directive. Further, it is sometimes possible in national systems to find another form of direct contract between producer and consumer, i.e. to do what is promised in advertising if a particular quality issue arises.[21] But often this will not cover general advertising statements, but only those that are actually promissory in nature.[22]

There are some national systems that do impose some form of direct producer liability; whether for the quality of the goods and/or for producer statements, e.g. Belgium, Finland, France, Latvia, Portugal, Spain and Sweden.[23] In some cases this means being able to request any of the repair, replacement, price reduction or rescission remedies available against sellers.[24] In other cases, various restrictions on full direct producer liability are in evidence. In some cases only repair and replacement are available.[25] In yet other cases, the consumer's claim is based on the contract between the producer and his buyer.[26]

There are also, of course, provisions in EC law that go some way to imposing legal responsibility on producers. What I have in mind here are the Sales Directive rules on guarantees and on seller redress under Article 4 thereof.

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21 For example, in the UK see the case of *Carlill v Carbolic Smoke Ball Co* [1893] 1 Q.B. 256.

22 For example, in the UK see *Lambert v Lewis* [1980] 1 All E.R. 978.

23 See the Communication from the Commission and the European Parliament on the implementation of Directive 99/44EC, supra, note 7, at 11-12. See also S. Rutten, G. Straetmans and D. Wuyts, "Rights of Redress and Direct Producer's Liability in Consumer Sales Law in Belgium: A Critical Appraisal", in M. Ebers et al., supra, note 8; O. Norros, "A Finnish Perspective on Producers' Liability", in M. Ebers et al., supra, note 8; M. Cannarsa and O. Moreteau, "The French 'Action Directe': The Justification for Going Beyond Privity", in M. Ebers et al., supra, note 8; P. Mota Pinto, "Direct Producers' Liability and the Right of Redress in Portugal", in M. Ebers et al., supra, note 8; S. Navas Navarro, "Direct Liability of the Producer and the Seller's Right of Redress in Spain", in Ebers et al., supra, note 8; and E. Lindell Frantz, "Direct Producers' Liability and the Seller's Right of Redress According to Swedish Law", in M. Ebers et al., supra, note 8.

24 This is reported to be the case in Finland, Latvia and Sweden (Communication from the Commission and the European Parliament on the implementation of Directive 99/44EC, supra, note 7, at 11-12). On Finland see O. Norros, ibid and on Sweden, see E. Lindell-Frantz, ibid.

25 This is reported to be the case in Portugal and Spain (Communication from the Commission and the European Parliament on the implementation of Directive 99/44EC, supra, note 7, at 11-12). On Portugal see P. Mota Pinto, supra, note 23 and for Spain see S. Navas Navarro, supra, note 23.

26 This is reported to be the case in Finland and France (Communication from the Commission and the European Parliament on the implementation of Directive 99/44EC, supra, note 7, at 11-12). On Finland see O. Norros, supra, note 23 and on France see M. Cannarsa and O. Moreteau, supra, note 23.

2. Guarantees

Producers are (and, under the Proposal, would continue to be) liable under guarantees that have been provided. Article 6(1) CSD provides that:

> A guarantee shall be legally binding on the offeror under the conditions laid down in the guarantee statement and the associated advertising.[27]

A guarantee is defined in Article 1(2)(e) CSD as:

> any undertaking by a seller or producer to a consumer, given without extra charge, to reimburse the price paid or to replace, repair or handle consumer goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising.[28]

It seems, then, that there must be a promissory statement of some kind (an 'undertaking') to take some form of action (reimburse, refund, repair, replace etc. if the goods do not meet certain standards ('specifications'). Clearly, there is no need for any such promissory statement for the general obligation as to conformity to arise under Sales Directive as against the seller. So, it is very clear that the guarantee rules only impose an obligation on the producer where he has voluntarily given a guarantee. However, most producers will, in practice, give a guarantee. A key question then is how the standards of quality and the available remedies tend to compare with those that apply under the mandatory conformity standards imposed already on sellers. Are remedies triggered in all or most of the cases in which they would be under the mandatory conformity standards? In other words, how close does the typical guarantee come to effectively setting the same standard as would be imposed under a system of direct producer liability? The same goes for remedies. Often, in practice, there will be repair and replacement remedies under guarantees. Price reduction and rescission are likely to be less common and damages even rarer. Of course, another point is that guarantees will often contain other restrictions and exclusions that would not exist under the mandatory standards, e.g. that the guarantee is invalid if work has already been carried out by a non-approved trader.[29]

So it is certainly true that the enforceability of guarantees does not equate with a full system of direct producer liability. However, if we are to fully under-

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27 See now Art. 29(1) pCRD, which contains a different wording, the possible significance of which we shall refer to below.

28 See now Art. 2(18) pCRD The main difference is that the latter provision makes no reference to the guarantee being 'given without extra charge', so that it seems to cover guarantees (including so called 'extended warranties') that are paid for by the consumer. However, this is of limited relevance for present purposes as producer guarantees are normally free of charge.

29 Bittner and Rott, supra, note 19 on this in Germany.

stand the implications of introducing such a system there may need to be an empirical study as to what is, in practice, offered under most guarantees.

Another dimension of the guarantees issue is as to the role of advertising statements. It was suggested above that a system of direct producer liability would take account of such statements in assessing the quality standard to which a producer could be held; and that we might also wish to impose free standing liability for such statements. What are the implications of the rules on guarantees in relation to advertising statements?

It certainly seems that the 'specifications' to which the provisions refer can be standards that are set out either in a formal guarantee or in the 'associated advertising'. In addition, it certainly seems that currently (under the Sales Directive) enforcement is to be subject to any 'conditions' laid down in the formal guarantee or in the associated advertising (the reference being to conditions in the 'guarantee statement and the associated advertising'). It might, then, be the case that the provisions cover cases in which the advertising contains an undertaking to take certain action (reimburse, repair, replace etc.) if the goods do not meet certain standards. In other words, quite apart from any promises in any formal guarantee, the provision would render enforceable a sufficiently precise advertising promise which is independent from the formal guarantee and that undertakes to take specific action if the goods do not meet certain specifications. This conclusion is brought into some question by the wording used in the proposed Directive. There (in Art. 29(1)) it is said that:

> A commercial guarantee shall be binding on the guarantor under the conditions laid down in the guarantee statement. In the absence of the guarantee statement, the commercial guarantee shall be binding under the conditions laid down in the advertising on the commercial guarantee.

This could be read to mean that conditions in advertising are only relevant where there is no guarantee statement at all, i.e. where there is no formal guarantee. After all, it is said that '[i]n the absence of the guarantee statement' the conditions in the advertising coming into play. This would seriously limit the scope to hold producers to advertising, given that most producers offer some form of guarantee. However, it may well be that this is not the intention. It may simply be a case of sloppy drafting; the intention being to say, 'In the absence of the guarantee statement (the formal guarantee) laying down conditions that clearly cover what rights are available in the case of a given defect', any conditions in the advertising will be taken to apply. This would allow the same result as above, i.e. for producers to be held to advertising promises to take certain action where the goods do not meet certain standards (as long as the issue is not provided for in the formal guarantee).

The rules also seem to allow us to interpret the conditions of enforceability in the formal guarantee in the light of the advertising in order to determine what has been promised. As we have already noted, the current rule certainly allows for the 'conditions' to be laid down either in the formal guarantee or

in any associated advertising. Surely, this must mean reading the conditions for enforceability (of the promises contained in the formal guarantee) in the light of what may be said in the advertising. So, for example, the provisions in the formal guarantee may be vague on some question as to time coverage, while the advertising makes a clear statement on this issue and we construe the wording in the formal guarantee in the light of the statement in the advertising. This also seems to be permitted by the proposed provision if my above interpretation of it is correct. The essence of this interpretation is that we can look to advertising where the conditions in the formal guarantee do not cover something. This probably covers cases where there is uncertainty as to the scope of the conditions in the formal guarantee; allowing us to resolve such uncertainty by reference to any conditions in the advertising.

A more radical approach to reading the formal guarantee and the advertising together involves a scenario in which the advertising makes a statement as to the qualities or performance of the goods; but does not actually go on to undertake to do anything (reimburse, repair, replace etc.) if the goods do not meet these promised standards. Here I have in mind the type of statement that is more than simply a sales puff and that is actually a factual statement as to a feature of the goods, for example, a statement to the effect that a towing hitch 'locks absolutely'; that a windscreen is 'shatterproof – will not fly or shatter under the hardest impact'; or that a fabric is 'shrink-proof'.[30] The idea would be to treat these statements in the advertising as to the qualities, performance etc. of the goods as being 'specifications' as to the goods. If these specifications are not met then the most appropriate reimbursement, repair, replacement etc. obligations in the formal guarantee are triggered even though the formal guarantee does not expressly cover failure to meet these particular specifications.

The question as to whether the provisions allow for such an approach seems to depend on how we read the idea of an 'undertaking' in the relevant provisions. Article 6(1) CSD makes guarantors liable for a guarantee promise to reimburse, repair, replace etc. 'under the conditions set out in the guarantee statement and the associated advertising'.[31] Article 1(2)(e) CSD defines a guarantee as an 'undertaking' to repair, replace etc. if the goods 'do not meet the specifications set out in the guarantee statement or in the relevant advertising'. It has to be conceded that the most natural reading of these provision might be to the effect that the failure to meet certain standards or

[30] See, respectively, *Lambert v Lewis*, supra, note 22; *Baxter v Ford Motor Co.*, supra, note 13; and *Randy Knitwear Inc v American Cyanamid Co* 226 NYS 2d 363, 181 NE 2d 399 (NY, 1962).

[31] As we have seen, the proposed new provision is worded differently, but the difference only seems to affect when, precisely, any undertakings and conditions of enforceability contained in advertising are relevant. It does not go to the situation where the only undertakings and conditions of enforceability are actually in the formal guarantee and the issue is whether these undertakings and conditions can be applied to failure to meet standards/specifications in the advertising.

'specifications' (whether these are in the formal guarantee or the associated advertising) only triggers the reimbursement, repair, replacement etc. obligations where the guarantor specifically undertakes that failure to meet these particular specifications triggers the reimbursement, repair, replacement etc. obligations. On this approach, if the formal guarantee only specifically obliges the guarantor to reimburse, repair, replace etc. where particular specifications in the formal guarantee are not met (and makes no reference to specifications in the advertising), then failure to meet the specifications in the advertising would not trigger the obligations as to reimbursement, repair, replacement etc. in the formal guarantee.

However, it also seems reasonably plausible to read the provisions *not* to require the undertaking to reimburse, repair, replace, etc. to make specific reference to the specifications in the advertising. It could be said that failure to meet these specifications are triggers for the reimbursement, repair, replacement etc. obligations *as long as this possibility is not explicitly ruled out by the language used* and, on a reasonable construction of the undertaking, it could be said to extend to cases where the specifications in the advertising are not met. So, for example, this approach might catch a situation in which the undertaking as to reimbursement, repair, replacement etc. makes a general reference to 'defectiveness' or failure to meet a proper standard of quality'. On the approach now under discussion such 'defectiveness' or 'failure to meet a proper standard of quality' could be determined not only by reference to the specifications in the formal guarantee but also by reference to the statements as to quality, performance etc. in the advertising. This approach, then, is effectively one based on the construction of the language used in the formal guarantee; albeit with the language being construed in favour of the consumer, so that where general language is used this will cover the specifications in the advertising unless this is expressly excluded. Such an approach would at least encourage guarantors to be explicit in excluding responsibility for the advertising statements. However, it seems unlikely, in practice, that such explicit exclusions would usually be noticed by consumers who would be unlikely to go through the guarantee sufficiently carefully to pick this point up. Of course, such a term would also be subject to the rules unfair terms.[32] Given that consumer expectations as to the product are likely to be strongly influenced by the advertising and that there is unlikely to be much focus on the guarantee document (and given the vital importance of transparency to fairness[33]), it seems quite possible that such a term might be held not to be binding under these rules. So, it might be that the combined effect of the 'construction' approach to the guarantees rules and the rules on unfair terms would be that the guarantor ends up being liable to carry

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[32] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

[33] Generally, see C. Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms*, (Aldershot: Ashgate, 2007).

out the reimbursement, repair, replacement etc. promises where specifications in the advertising are not met.

Another route to the same conclusion would be to say that Article 6 CSD, itself, requires that the guarantee promises as to reimbursement, repair, replacement etc. are triggered in all cases that the goods do not meet the specifications in the advertising notwithstanding any explicit exclusion of this in the guarantee. However, in order to reach this conclusion we need to read the idea of an 'undertaking' to reimburse, repair, replace etc. partially disjunctively from the question as to the failure of the goods to 'meet the specifications set out in the guarantee statement or in the relevant advertising'. In other words, rather than saying that the undertaking needs to explicitly refer to (or at least – where there is no such explicit reference – be able to be construed as implicitly referring to) failure to meet the specifications in the advertising; we say that there need only be an undertaking to reimburse, repair, replace etc. when specifications of any type are not met and that these specifications are then always taken (whatever the guarantee actually says) to include all specifications in the guarantee or associated advertising.

This is undoubtedly an interpretation that stretches the language of the provisions. However, it does not seem to be wholly impossible, especially given the need to interpret the Sales Directive in the light of its consumer protection and confidence goals;[34] and the point made above to the effect that consumer expectations as to the product are likely to be strongly influenced by the advertising and that there is unlikely to be much focus by the consumer on the guarantee document.

The above discussion shows that there are ways of reading the existing rules to enable producers to often be held liable for advertising statements; and, to the extent that this is possible, we may actually be closer than is generally appreciated to at least one component of a direct producer liability system. Of course, it has been shown that the position is far from clear. So, one fairly modest option for future action might be to amend the above rules to make it clear that the 'remedial' promises in the formal guarantee are triggered in all cases (and without the possibility of exclusion) when there is a failure to meet specifications set out in the advertising (or, at least, where such a failure leads to the overall conclusion that there is a non-conformity[35]). A further step would be to provide for mandatory remedies (such as repair, replacement, price reduction or rescission) where advertising specifications are not met (or, again, where such a failure leads to the overall conclusion that there is a non-conformity), even where there is no formal guarantee.

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34 See Preamble to Consumer Sales Directive, Recitals 1 and 5.

35 The choice here being the one discussed in section 1 above as to whether we impose full free standing liability for statements or only liability as part of a broader evaluation as to quality.

3. The seller's right of redress under Article 4 CSD

Article 4 of the Sales Directive[36] is concerned not with the rights of the consumer (as in the case of the guarantees provisions above); but, rather, with the rights of a seller (that ends up being liable to the consumer) to push liability up the chain towards the producer. In fact, the proposed new Directive does not replicate Article 4. This, in itself, could be said to support the argument for some form of direct producer liability. The point of Article 4 is to give the seller some degree of relief from the legal responsibility he bears to the consumer (by seeking recourse further up the chain). If he can no longer seek such recourse, at least a direct producer liability system would in some way compensate for this by ensuring that (in at least some cases) the seller would escape responsibility in the first place (if it was a system allowing the consumer to choose whether to proceed against the seller or the producer).

But, what does Article 4 actually require? It provides that:

> Where the final seller is liable to the consumer because of a lack of conformity resulting from an act or omission by the producer, the final seller shall be entitled to pursue remedies against the person or persons liable in the contractual chain. The person or persons liable against whom the final seller may pursue remedies, together with the relevant actions and conditions of exercise, shall be determined by national law.

In general, this provision seems to require that when a seller of goods is liable to a consumer based on goods not being in conformity with the contract within the meaning of the Directive (and this results from an action or omission by the producer) then Member States must ensure that at least some right of redress is available to the seller against a party further up the contractual chain. Two initial points can be made. First, it is clear that, it only intends liability to be pushed up towards the producer where the non-conformity actually emanates from the producer. So, this is not a notion of producer liability for defects caused further down the chain.[37] Second, Article 4 does not say that the action of the seller need necessarily be against the producer directly, but only against 'the person or persons liable in the contractual chain'. In other words, this is not even a notion of 'direct' producer liability to the frontline seller.

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[36] Generally on Article 4 see M. Bridge, "Article 4" in: M. C. Bianca and S. Grundmann, *EU Sales Directive Commentary*, (Antwerp: Intersentia, 2002); R. Bradgate and C. Twigg-Flesner, *Blackstone's Guide to Consumer Sales and Associated Guarantees*, (Oxford: Oxford University Press, 2003), para 9.2; H.-W. Micklitz, Die Verbrauchsgüterkauf-Richtlinie, (1999) 10 *Europäische Zeitschrift für Wirtschaftsrecht* 485; and M. Schmidt-Kessel, Der Rückgriff des Letztverkäufers, (2000) 55 *Österreichische Juristen-Zeitung* 688. See also the various national reports in M. Ebers et al, supra, note 8.

[37] See section 1 for the possibility of producers being liable for such defects.

It is fairly clear that Article 4 allows Member States freedom to choose which party in the chain any action should be against; the form of the action (e.g. whether contractual, tortious, restitutionary or based on an independent statutory regime); and any procedural conditions (e.g. as to time limits).

This degree of flexibility obviously has advantages. At the same time, it clearly leaves a considerable degree of uncertainty as to what is acceptable. It seems that a whole host of different problems and questions have arisen in different Member States; these often reflecting the different legal traditions in question. There is no space to consider these in detail here.[38] However, it is useful to draw attention to two broad issues that arise.

The first relates to the issue of public statements made by producers for which sellers are responsible under the conformity obligation in the Sales Directive and the proposed Directive. Suppose that the seller is liable for selling defective goods to the consumer. Suppose, also, that, in the circumstances, it would have been concluded that there was a lack of conformity irrespective of any public statements, e.g. a case where the goods are simply not fit for normal use. If, in such a case, the defect existed at the time when the seller bought the goods, then he will often be able to claim against his own seller on the basis that the goods were defective (and, therefore, in breach of contract or in breach of whatever the relevant legal concept may be in any given member state). If the defect originated at producer level then ultimately some such form of action could be taken until legal responsibility reached the producer (subject, of course, to exemption clauses between parties – to which we shall turn below – and any other procedural or substantive problems with claims).

However, let us suppose that a key reason that the goods are non-conformant is that they do not conform to a public statement made about them by the producer; this being a statement that was made *after* the final seller had contracted to buy the goods from his own seller, but before he sells them to the consumer. To the extent that legal systems determine contractual liability based on the promises and circumstances made before the conclusion of the contract, it might be, at the very least, a challenge to find a way of making the 'seller's seller' contractually responsible to the seller.[39] So, if legal systems have left the issue of seller redress to contract law, problems may arise in pushing liability up to the producer in this sort of case.

The second issue is whether, supposing a seller has a right to claim as against his seller or some other party, exclusion or limitation of this right is allowed. On the one hand (1) the reference to 'pursuing' an action could suggest that such action need not always be successful (e.g. where it is validly excluded or restricted), (2) the reference is to remedies being pursued against

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[38] For a comprehensive overview see the various national reports in M. Ebers et al., supra, note 8.

[39] See the discussion as to the problem and how it might be solved in the UK in C. Willett, "The Role of Contract Law in Product Liability", in: G. Howells (ed.) *The Law of Product Liability*, (London: Butterworths, 2007), at 116-118.

persons in the contractual chain who are 'liable', possibly suggesting that such liability could be validly excluded or restricted, (3) the 'conditions of exercise' that national law is entitled to decide upon might be said to include not only procedural matters, but also whether any liability can be excluded or restricted, and (4) the possibility of exclusion or restriction might be suggested by Recital 9 to the Preamble of the Consumer Sales Directive which, in explaining Article 4, refers to remedies being pursued where the seller has not 'renounced that entitlement' and how the Directive 'does not affect the principle of freedom of contract between the seller, the producer, a previous seller or any other intermediary'.

On the other hand it might be said that there is little point in the provision if some party is not to be viewed as liable (at least up to some definite limit that might be set by Member States) in all cases. Starting from this premise, points (1), (2) and (3) look less plausible; at least to the extent of accepting that there could be outright exclusion of liability. However, point (4) is a little more difficult to deal with; as it is based on what appear to be fairly explicit statements permitting even outright exclusion. However, there are other ways to read what is said in Recital 9. It could be argued that the reference to an entitlement being 'renounced' relates to the time when the seller is liable to the consumer; the idea being to express the notion that sellers should be able to choose not to pass back liability at this stage. In other words, sellers have the right to pass back liability; this is a right that cannot be taken away by an exemption clause in the contract under which the seller bought the goods; but, after the seller has provided recourse to the consumer, he has the right not to pass back this responsibility to his seller. How plausible is such an interpretation? Surely it is so obvious that any party with rights can choose not to exercise them that it does not need to be said and that Recital 9 would be unlikely to be saying this. This is probably true. However, the idea may be more about emphasising that the seller is bound by any express assurances he gives to the party who sold the goods to him to the effect that (notwithstanding the defects that have now emerged and his own liability to the consumer in respect of these) he will not be taking any action. Indeed, Recital 9 may also be saying that the seller could be taken to have 'renounced' his rights by implied assurances, e.g. words or actions suggesting to his own supplier that notwithstanding his liability to the consumer he will not pursue a claim against this supplier. The idea could be something akin to the affirmation, waiver and estoppel concepts that apply to deprive a party of a right to terminate a contract; except that here the party would be being deprived of the right to claim damages to cover his own liabilities to the consumer. A yet broader interpretation would be to say that the seller 'renounces' this right simply based on lapse of a reasonable time, e.g. akin to under s 35 of the Sale of Goods Act in the United Kingdom.

Also, in relation to point (4) the reference to 'freedom of contract' could refer not to the right to contract out of the liability but to the right of the seller

to contract with his seller for *greater* liability than that required under Article 4 and/or to contract with another party for the latter to be liable also.

Concluding on Article 4, first of all we can say that it clearly requires Member States to allow liability to be pushed back up to the producer in at least some cases. For this reason, it seems unfortunate to remove it; as this will mean that (even if direct producer liability was introduced) in those cases where the consumer chooses to proceed against the seller, Member States would no longer be required to do at least something to channel the liability back to the producer (although, of course, many if not most, will do something in any case). Secondly, we can say that Article 4 certainly does not produce anything like a guarantee that legal responsibility will end up being passed back to the producer.

IV. Some arguments in relation to direct producer liability

1. General points

Obviously, there is no space here to deal with all of the arguments for and against direct producer liability.[40] However, it is possible to address some key issues. So we might mention the argument that if the producer is the source of the problem, then it seems counter-intuitive that the consumer should not be able to hold him directly responsible – putting this in another way it might be said that direct producer liability is what the consumer would reasonably expect.[41] Then, there is the point that under modern marketing conditions, the primary reliance of the consumer will often be on the producer's brand, rather than the retailer (reliance that is generated in part by the general brand awareness advertising of the producer and often also by more specific claims about the goods in question).[42]

Further, it could be said to be fairer, from the point of view of the retailer, to have direct producer liability; otherwise the retailer is always in the 'firing line' and must take steps to recover his losses by pursuing claims up the chain (such claims, as we have seen in the previous section, may or may not always result in the retailer recovering his losses).[43] More generally, it seems particularly inefficient to have a system that depends on such redress being taken by the retailer (and possibly by other parties, depending on the length of the chain), when this could be 'short circuited' by a direct consumer-producer claim.

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40 Generally, see R. Bradgate and C. Twigg-Flesner, supra, note 8 and M. Ebers et al., supra, note 8.

41 R. Bradgate and C. Twigg-Flesner, supra, note 8, at 352.

42 H. Beale, "Customers, Chains and Networks", in: C. Willett (ed.), *Aspects of Fairness in Contract*, (London: Blackstone, 1996), 137-155, at 142.

43 R. Bradgate and C. Twigg-Flesner, supra, note 8, at 352.

2. The single market

Let us now focus squarely on the internal market element to the debate. To the extent that consumer confidence and a high level of consumer protection are important in terms of justifying harmonisation (and determining its content), the direct producer liability issue seems to come under the spotlight.[44] Reflecting on the above points, first of all, is there a high level of protection and is consumer confidence likely to be enhanced if there are rules that are out of line with consumer expectations and which allow the party relied on by the consumer to escape responsibility when things go wrong?

However, there is more to the consumer confidence and protection arguments than just these preceding points. Direct producer liability provides a means of redress for the consumer in cases where the seller is insolvent.[45] It may provide a better means of redress where the seller is more accessible than the producer (e.g. where the consumer has bought on a trip to another country, but the producer is actually based in his home state[46]); or where, for whatever reason, access to the producer is cheaper or more convenient. It is arguable that a system that does not provide these options is not one that generates consumer confidence in using the single market; nor is it one that sets a high level of protection. It should also be pointed out here that the Commission has reported that the 'majority of the Member States and a number of stakeholders' believed that direct producer liability would provide an important increase in consumer protection by providing a 'safety net' of redress where the seller is either unwilling or unable to bring goods into conformity.[47]

A further point is that direct producer liability might provide a stronger incentive for producers to maintain high quality standards (the connection with consumer confidence and protection being rather self evident).

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44 These are mentioned, respectively, at Recitals 7 and 3 of the Preamble to the proposed Directive; they were justifications for the Sales Directive (Recitals 5 and 1); and they are a recurring theme in relation to harmonisation of consumer laws.

45 See H. Beale, supra, note 42, at 140; and note, of course, that insolvency is a particular risk in the current economic climate.

46 See R. Bradgate and C. Twigg-Flesner, supra, note 8 at 353-5.

47 Communication from the Commission and the European Parliament on the implementation of Directive 99/44/EC, supra, note 7, at 13.

3. The broader values of the acquis

Next, there is the argument that direct producer liability could be seen as being in congruence with established principles of the acquis and of EU consumer policy more generally. One such principle is that of 'reasonable expectations';[48] which we find underpinning the Product Liability Directive,[49] being relevant to the conformity concept in the Sales Directive;[50] and now being a core element of the professional diligence concept in the Unfair Commercial Practices Directive.[51] If we are striving to achieve a more coherent body of EU consumer law, should such a principle not be taken to its logical conclusion where possible? If so, then we return to the point above as to the likelihood that consumers reasonably expect producers to be held responsible for quality problems. Of course, another general goal of EU consumer policy is access to justice; and, again, we have seen that this may be compromised by a lack of direct producer liability.

4. Counter arguments and questions as to the limits of direct producer liability

Of course, there are also problems with direct producer liability. One key point is that it does run contrary to the legal tradition of many Member States.[52] In many Member States (as under the Sales Directive) the liability comes as part of the contract of sale. There might be difficulties for such Member States in conceptualising direct producer liability. For example, should it be based on a contractual or tortiuous or some other theory? What implications would the relevant theory have for the precise nature of the regime? In particular, what implications would it have for the type of remedies that it would be normal

48 See H. Micklitz, "Principles of Social Justice in European Private Law" (1999/2000) *Yearbook of European Law* 167, in particular at 188-196; G. Howells and T. Wilhelmsson, "EC Consumer Law: has it come of age?", (2003) 28 *European Law Review* 370, at 384-5; and A. Naidoo and C. Willett, "The Developing Role of Reasonable Expectations in EC Consumer Law: The case of Producer's Advertising Statements", (2007) 2 *Journal of European Law and Policies* at 70-88.

49 Article 6(1) of Directive 85/374/EEC.

50 Article 2(2)(d) CSD.

51 Article 2(h) of Directive 93/13/EEC defines professional diligence as 'the standard of special skill and care which traders may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity'.

52 In particular, the Commission highlighted the view of some respondents that direct producer liability is problematic in flouting the privity of contract tradition (Communication from the Commission and the European Parliament on the implementation of Directive 99/44/EC, supra, note 7, at 13).

for that system to apply; and, perhaps, especially, for the type of damages that would normally be available?

A further issue is that within those Member States that currently channel liability through the contract of sale, there would inevitably be practical commercial implications, e.g. in relation to the settled customary risk allocations, insurance choices and the like that take place throughout the contractual chain.[53]

Then there is the point (which was made by some respondents in the Commission report[54]) that direct producer liability might encourage sellers to seek to shift the blame for defects onto producers. The risk being referred to here seems to be that sellers may try to avoid their responsibilities by suggesting that it is only producers that are liable. This is certainly a possibility, although it probably happens already; so the question is whether it would get any worse.

Next, there is the issue as to the so called signalling function of guarantees. A long standing argument in relation to commercial guarantees is that they are a means of the producer sending a signal as to the quality of his products;[55] a signal that helps consumers to make informed decisions and which ultimately, therefore, contributes to a competitive and efficient market. If there was s system of direct producer liability which meant that producers no longer made use of commercial guarantees, then obviously these benefits resulting from the signalling effects of guarantees would be lost.

A further point is one that goes to a particular aspect of the desirability of direct producer liability. The point was made above that it may be that a producer is more accessible to the consumer than the seller of the goods. The fact, of course, is that this may not be the case. It will very often be the case that it is the seller that is more accessible. This then prompts the question as to which is the more typical scenario – a matter that obviously requires some form of empirical evidence. This might help to clarify the extent of the problem and whether any form of direct producer liability should be the rule; or only the exception, for cases where the seller (unusually) is not accessible.[56]

Another very important dimension to the whole issue is that there may be many cases in which direct producer liability would simply not provide consumers with an effective remedy because the producer happens to be from

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53 The Commission also reported the view of some respondents that direct producer liability may 'affect the balance between different members of the distribution chain' (Communication from the Commission and the European Parliament on the implementation of Directive 99/44/EC, supra, note 7, at 13).

54 Communication from the Commission and the European Parliament on the implementation of Directive 99/44/EC, supra, note 7, at 13.

55 See D. Standhop and G. Grunwald, "Impacts of Warranty Claims on Consumers' Complaints Behaviour and Producer's Reputation: A Behavioural Psychology Analysis and Empirical Findings", in Ebers et al, supra, note 8.

56 My thanks are due to Hugh Beale for discussions on this point.

outside the EU; and this may be increasingly the case.[57] One question, then, is as to the economic value of the goods that still derive from EU-based producers as compared with non-EU producers. Obviously this is not simply about the percentage of goods and producers, but also about the value of the goods being sold. Once there is an idea on these issues it becomes easier to work out whether the issue of direct producer liability remains significant; although it seems hard to imagine that it would not do so.

Of course, the other point about non-EU producers is that even if direct producer liability remains significant, it may be important to look for some form of alternative where a non-EU producer is concerned. Here, the obvious option is to look to the importer into the EU; this being the option adopted under the Product Liability Directive.[58]

The next point (in common with the last one) is not really a counter-argument to direct producer liability; but more an observation as to its possible limits or, at least, what might be a useful complement to it. The issue is so called 'network liability'; i.e. liability imposed on members of the producer's network of retailers. There is no space to develop the argument here.[59] However, essentially the point is that such parties benefit from membership of this network and it might therefore be argued that they should take a share of the risk of poor quality products. As members of this network they may also, in various ways, be well set up to deal with customer complaints. In addition, it may well be that in some cases members of the network are more accessible than either producer or the actual seller.

5. Reprising the consumer confidence issue

In the Review of the Sales Directive, the Commission concluded that there was not yet sufficient evidence to conclude that the lack of direct producer liability affected consumer confidence in the internal market.[60] This may be true and it may well be that further empirical research is required. This leads us to a final important point about the whole issue of consumer confidence. There are serious questions as to whether the substantive legal obligations owed to consumers are key factors in determining whether consumers are, or are not, confident about making use of the internal market.[61] The Commission report the view of a number of Member States and stakeholders to the effect

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57 My thanks are due to Hans Micklitz for discussions on this point.

58 Article 3(2) of the Directive 85/374/EEC.

59 For a full analysis see R. Bradgate and C. Twigg-Flesner, supra, note 8, at 365-373.

60 Communication from the Commission and the European Parliament on the implementation of Directive 99/44/EC, supra, note 7, at 13.

61 Generally, see T. Wilhelmsson, "The Abuse of the Confident Consumer as a Justification for EC Consumer Law", (2004) 27 *Journal of Consumer Policy* at 317.

that consumer confidence is affected mainly by economic factors.[62] One point that can be made here is that, to the extent that changes to substantive legal obligations have a limited impact, it does seem likely that introducing direct producer liability is at least as likely to have an impact as any other rule. In particular, it should be noted that one factor that seems more likely than most to affect consumer confidence is lack of access to justice;[63] and that a particularly strong case for direct producer liability in general is that it may provide better access to redress or (e.g. in cases of insolvency) the only access to redress.[64]

V. Alternatives

We turn, finally, to some of the alternative direct producer liability models that might be adopted. One issue that arises here is as to whether to allow consumers a free choice as to whether to proceed against the seller or the producer (or importers and/or network members if they were to be included in the scheme). Alternatively, the consumer might be expected to proceed against the seller; and only be allowed to turn to the producer (and/or importers/members of the network) where the seller is insolvent, less accessible, more costly, or where proceeding against the seller would involve some other form of significant inconvenience.[65]

Another possible variant might be that if a producer was to be liable (whether always or under the above conditions as to insolvency etc.), he could be allowed to pass this liability back down by insisting that his buyer indemnify him in cases where he is held responsible by the consumer (of course, this might not be possible where this indemnifying party is insolvent). This approach would retain a greater degree of freedom for producers and might cause less of a disruption to the customary risk allocations and insurance choices as between the producer and his buyer.

Next we turn to possible approaches based on transparency. In general, a case might be able to be made for a transparency based approach on the basis of the importance of transparency as a value in the acquis and in EU consumer policy more generally. Here, my suggested transparency models take as a starting point that the producer is directly liable to the consumer – this is the default position. However, they allow some form of contracting out;[66]

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62 Communication from the Commission and the European Parliament on the implementation of Directive 99/44/EC, supra, note 7, at 13.

63 See T. Wilhelmsson, supra, note 61, at 329-332.

64 See above at subsection (2).

65 For an approach where the producer is only liable on a subsidiary basis see S. Navas Navarro, supra, note 23 (Spain).

66 Thereby preserving producer freedom and the scope for existing risk allocations to be maintained (see the criticism of direct producer liability on these counts above at section IV (4)).

although only in a form that is ultra transparent and that would allow consumers to make genuinely informed choices as between producers; thereby, also, promoting competition over producer offerings.

On one model, producers must either offer full direct producer liability as defined in law or provide a standardised, transparent indication that no guarantee at all is offered. This has the advantage of simplicity. It also has the advantage that it would probably give a strong incentive to offer full direct producer liability. This is because the alternative (no guarantee at all) might signal to consumers that producers had limited confidence in their products.[67]

Of course, such an 'all or nothing' approach might be too inflexible. Most producers could well end up offering full direct producer liability; there would be no scope to offer anything else; and the disadvantage of this would be that there would be little real competition, as producers would be unable to provide distinctive offerings based on their own market research as to consumer preferences. These issues might be addressed by approaches under which, if the producer chooses not to offer full direct producer liability, he has more options. One possibility would be that there is a standardised (less protective) alternative. This broadly reflects the approach under the U.S. Magnusson-Moss legislation.[68]

Alternatively, there are models under which the producer is provided with greater flexibility. So, the producer could be allowed to indicate (through some 'tick box' approach) which aspects of full direct producer liability he chooses not to offer (e.g. 'No Price Reduction', 'No Rescission/Refund'). The producer (to provide further scope for quality signalling[69]) could also be permitted to add to the coverage with his own voluntary offerings. These latter approaches might address the problems said to result under the Magnusson-Moss approach where it seems that producers generally opt for the lower level of protection.[70] On these latter approaches the producer would possibly have a greater incentive not to do this. He is not faced with a straight choice as between exposing himself to full direct producer liability and a single alternative package; a choice that might make the latter seem the safer option. In addition, if the producer must actually itemise the elements of full direct producer liability that he is not offering, this may provide more of an incentive not to deviate too far from full direct producer liability. Further, if producers are entitled to add their own voluntary offerings, there may be a tendency to provide relatively protective packages due to the marketing and competitive advantages that this could bring.

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67 For a discussion of this model in a UK context see C. Willett, "The Unacceptable Face of the Consumer Guarantees Bill", (1991) *Modern Law Review* 552-562.

68 Magnusson-Moss Warranty Act 1975.

69 See the advantages of signalling above at section IV (4).

70 See M.J. Wisdom, "An Empirical Study of the Magnusson-Moss Warranty Act" (1979) 31 *Stanford Law Review* 1117-1146.

VI. Concluding remarks

This chapter has sought, essentially, to provide a focal point for discussion as to direct producer liability. At a time when a further revision of European consumer contract law seems imminent, it seems to be important to review the debates on this issue and to consider some of the possible models. There is no doubt that if direct producer liability were to be introduced it would need to be on the basis of a rigorous case being made that it is needed to remove obstacles to business-consumer contracting in the single market. It is the view of this author that there is a good case for an urgent examination of this question, so that (assuming the case was made out) direct producer liability could be introduced as part of the planned Consumer Rights Directive. It is not obvious why the internal market case is any more difficult to make in the case of direct producer liability than it is where other elements (which are included in the proposed Directive) are concerned.

Part V
Information Requirements, Withdrawal and Remedies

Information Requirements

Annette Nordhausen Scholes

I. Obligations to provide information

Obligations to provide information ("information obligations") have become an ever more important issue in EU consumer law. Most of the existing directives include such obligations. Whenever such directives apply and unless the contract is not explicitly exempted, the supplier has to provide the consumer with prescribed information.[1]

The general Roman law principle *emptor curiosus esse debet* (that each contracting party should be interested enough to make sure he has all relevant information before concluding the contract) – though originally found in all continental European jurisdictions – is not being preserved any more in the recent European law developments.[2] The reasons for this are various. One is the development and integration of consumer protection in the EC-Treaty. Others result from technical developments, which make it generally more difficult for consumers to understand products and their possible impact. Distance and electronic marketing give rise to their own rationales for information provision, given that the consumer is dealing with a remote trader, about whom he may know very little: at the very least, he needs to have contact details for the trader and information about the product or services being supplied. The relevant factors are either the personal circumstances of the consumer, or the circumstances in which the contract is concluded, or the type of contract concluded – or a combination of these factors.

A chronological view shows that the information obligations in the consumer protection directives have become more and more detailed and more

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1 The sanctions for non-fulfilment of this obligation, however vary.

2 H. Fleischer, "Vertragsschlußbezogene Informationspflichten", (2000) 4 *Zeitschrift für Europäisches Privatrecht* 772; S. Grundmann, "Privatautonomie im Binnenmarkt", (2000) *JuristenZeitung* 1133; generally on information duties in EU law: S. Kind, *Die Grenzen des Verbraucherschutzes durch Information – aufgezeigt am Teilzeitwohnrechtegesetz*, (Berlin: Dunker & Humblot, 1997); N. Reich, "Verbraucherpolitik und Verbraucherschutz im Vertrag von Amsterdam", (1993) *Verbraucher und Recht* 3, 5 et seq; P. Rott, "Informationspflichten in Fernabsatzverträgen als Paradigma für die Sprachenproblematik im Vertragsrecht", (1999) 98 *Zeitschrift für vergleichende Rechtswissenschaft* 382; P. Mankowski, "Fernabsatzrecht: Information über das Widerrufsrecht und Widerrufsbelehrung bei Internetauftritten", (2001) *Computer & Recht* 767.

and more demanding as time has gone on.[3] This is not only due to the fact that the products and services the marketing of which is being regulated are increasingly complicated and sophisticated (such as financial services), but also because of a desire on the part of the legislator to learn from practical experience with the earlier directives. This is perfectly understandable. The question arises, nevertheless, of whether this is appropriate to achieve the main aim of improving consumer protection and enhancing free trade within the internal market for the benefit of consumers. If consumers are overloaded with information, the information obligations may achieve the exact opposite of what they are intended to achieve: rather than a consumer basing decisions on rational facts, information overload[4] can result in consumers basing decisions on completely irrational grounds, while possibly even being under the impression that the decision was based on rational grounds (while in other cases, the consumer may realise he is being overwhelmed with information and is unable to process the amount of information properly and may then give up even trying to come to a rational decision).[5]

Another problematic area is the question of when, and in what form, the information has to be provided. The crucial thing is that the consumer should receive the information at a time and in a form that allows him to make appropriate use of it. The directives generally set out rules on when and in what form the required information has to be provided. Unfortunately, however, timing as well as the form of information provision are regulated differently in the different directives. This is unnecessarily complicating and confusing for businesses as well as consumers.

This[6] has led to a European initiative to review the consumer *acquis*[7]. Included in the review are the following directives: sale of goods and associated

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3 For a comprehensive overview see R. Bradgate, C. Twigg-Flesner, A. Nordhausen, *Review of the eight* EU *consumer acquis minimum harmonisation directives and their implementation in the* UK *and analysis of the scope for simplification*, 2005, available under: http://www.berr.gov.uk/files/file27200.pdf.

4 This issue is also raised by G. Howells and R. Schulze, Overview of the Proposed Consumer Rights Directive, in this volume.

5 B. Wendlandt, "EC Directives for Self-Employed Commercial Agents and on Time-Sharing – Apples, Oranges and the Core of the Information Overload Problem", in: G. Howells, A. Janssen, R. Schulze: *Information Rights and Obligations*, (Aldershot: Ashgate, 2005), pp. 67, 74.

6 As well as other factors.

7 Green Paper on the Review of the Consumer *Acquis*, COM(2006) 744 final.

guarantees[8], price indications[9], injunctions[10], distance selling[11], timeshare[12], unfair contract terms[13], package travel[14], and doorstep selling[15]. The proposed Directive[16] on Consumer Rights[17] (hereafter: Proposal; pCRD) only addresses four of the directives under review, those on sales and associated guarantees, unfair contract terms, doorstep selling, and on distance selling.

The Commission had also commissioned a comparative analysis of the existing consumer acquis directives, which resulted in the Consumer Law Compendium[18] and a database[19]. The results of this comprehensive study as well as the results of the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), which have published early in 2008 the Draft Common Frame of Reference[20] not only had no influence on the proposed Directive, they are not acknowledged in the explanatory documents either.[21] Although the DCFR is, of course, an academic study, it could not only have provided alternative ways of regulation, but also would have allowed a more integrated approach than the current proposed directive does. All these studies have been undertaken with a view to a review of the consumer *acquis* and therefore are focussed on the legislative intention. It is therefore, at the very least, surprising that the Commission did not use this

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

9 Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers.

10 Directive 98/27/EC on injunctions for the protection of consumers' interests.

11 Directive 97/7/EC on the protection of consumers in respect of distance contracts.

12 Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis.

13 Directive 93/13/EC on unfair terms in consumer contracts.

14 Directive 90/314/EC on package travel, package holidays and package tours.

15 Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises.

16 COD(2008) 0196 of 8 October 2008.

17 General introduction into the topic see G. Howells and R. Schulze, "Overview of the Proposed Consumer Rights Directive", *in this volume*.

18 A digital version of the Consumer Compendium is available under: http://ec.europa.eu/consumers/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf.

19 The database can be accessed under: http://www.eu-consumer-law.org/index.html.

20 C. von Bar, et al., *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR), Interim Outline Edition*, (Munich: Sellier, 2008).

21 For further information on this subject see H. Schulte-Nölke, "Scope and Role of the Horizontal Directive and its Relation to the CFR", *in this volume*.

valuable source of ideas, to a large degree provided on their own specifications and commission.

II. The proposed Consumer Rights Directive

In following the idea of full targeted harmonisation, the proposed Consumer Rights Directive aims, as noted above, to integrate the four existing directives on doorstep selling[22], unfair terms[23], distance contracts[24], and sales and guarantees[25], merging these into a single horizontal directive. This paper has the relatively modest aim of examining the information obligations in the proposed Directive and of analysing whether the aim of the Commission, as expressed in the explanatory memorandum, to ensure consistency between the various directives and regulate the legal consequences of a failure to comply with such requirements, is achieved. It is beyond the scope of this paper to consider the wider questions of whether the information approach should be the preferred approach and if so, whether the information obligations under the currently existing directives or under the proposed Directive are indeed achieving or are likely to achieve the aim of enhancing (or achieving) consumer confidence in the internal market, nor whether full harmonisation should generally be the way forward.

The proposed Directive relies – unsurprisingly – on the information approach. This approach has been followed for some time for wide areas of consumer protection law and has been followed in all contract-related directives. It is based on the premise that a consumer, who has various information available to him, will make an informed choice. The informed consumer is also thought to be a confident consumer, who is able to exercise choice within the internal market and overcome national borders.

There is actually significant doubt whether this approach is indeed achieving the results aimed for[26]. Statistics (including Eurobarometer) seem to indicate a lack in consumer confidence in cross-border shopping, which the currently existing directives do not seem to have reduced over time. It is therefore questionable whether ever increasing information obligations will cure this

22 Directive 85/577/EEC.

23 Directive 93/13/EEC.

24 Directive 97/7/EC.

25 Directive 1999/44/EC.

26 N. Reich, "Crisis or Future of European Consumer Law?", in: D. Parry, A. Nordhausen, G. Howells and C. Twigg-Flesner (eds), *The Yearbook of Consumer Law 2009* (Aldershot: Ashgate, 2009), 3-67; C. Twigg-Flesner, "No sense of purpose or direction? The modernisation of European Contract Law", (2007) 2 *European Review of Contract Law* 198.

deficit or worsen it[27]. The consumer seems to be confused rather than reassured by the various different information that has to be made available to him and might be less able to make an informed choice with all this information than he would be without it.[28] Other than previous directives, the proposed Directive does not intend to increase the information obligations, but to consolidate and harmonise the existing ones. This is generally a most welcome initiative and can help to achieve the aim of a confident consumer in the internal market. It is, however, questionable, whether this consolidation is first and foremost a consumer protection measure or is, rather, more likely to increase the confidence of businesses to sell throughout the internal market where they may have been hesitant about doing that before[29]. The consumer would, however, benefit from a clearer and consolidated regulation, even if the benefit might only be indirect (through the resulting increase in competition). It will be seen whether this aim can be achieved with the information obligations under the proposed Directive.

Generally, the information obligations can – as in the existing directives – be distinguished as between pre-contractual and contractual information obligations. Pre-contractual information has to be given or provided to the consumer before the conclusion of a contract. Contractual information has to be given to the consumer once the contract has been concluded. These concepts are well-known from the existing *acquis* directives and do not cause much concern in principle. Generally known is also the distinction between general and specific information requirements, such as in the E-Commerce Directive[30]. Other contract-related information can also be seen as a transparency obligation and is not strictly speaking an information obligation, but deriving from the transparency requirement in the Unfair Contract Terms Directive; Article 31(2) pCRD requires the contract terms to be made available to the consumer before the contract is concluded.

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27 S. Grundmann, "The Structure of the DCFR – Which approach for Today's Contract Law?", (2008) 3 *European Review of Contract Law* 239.

28 F. Rischowski, T. Döring, "Consumer Policy in a Market Economy: Considerations from the Perspective of the Economics of Information as well as Behavioural Economics", (2008) 3 *Journal of Consumer Policy* 281.

29 This would however, explain and justify the often criticised legal basis (Art. 95) of the proposed Directive; see H.-W. Micklitz, "The Targeted Full Harmonisation Approach: Looking behind the Curtain", *in this volume*.

30 Directive 2000/31/EC.

III. Overview of the information obligations in the proposed Directive

Chapter II of the Proposal contains a core of information that traders have to provide prior to the conclusion of all consumer contracts[31]. In addition, the Proposal places a pre-contractual information obligation on intermediaries concluding contracts on behalf of consumers.[32] It also deals with the effects of a failure to provide the required information[33].

Chapter III is specific to distance and off-premises contracts[34] and requires specific pre-contractual information for these contracts in addition to the general information required for all consumer contracts[35]. Furthermore, formal requirements[36], the right to withdraw[37] and the effects of non-fulfilment of the information obligation regarding the withdrawal right[38] are regulated in Chapter III.

Article 31 of the proposed Directive contains transparency requirements of contract terms. Although not information obligations in the strictest sense, these interact closely with the information obligations arising from Chapters II and III.

1. Pre-contractual information obligations in the proposed Directive

a) Pre-contractual information obligations

Article 5 pCRD is entitled General Information Requirements, and contains pre-contractual information obligations, which cover largely information required under the existing directives. What is new is not the required information itself, but the horizontal approach: the proposed Directive requires the same set of information for *all* sales or service contracts within its scope of application. The information required[39] includes the main characteristics of the product, the geographical address and identity of the trader, the price (including taxes and other charges), arrangements for payment, delivery and performance, complaint handling policy, right of withdrawal, after-sales service, duration of the contract and termination and deposits. None of this

31 Art. 5 pCRD.
32 Art. 7 pCRD.
33 Art. 6 pCRD.
34 Art. 8 pCRD, exclusions Art. 20 pCRD.
35 Art. 9 pCRD.
36 Arts. 10, 11 pCRD.
37 Arts. 12-19, annex I pCRD.
38 Art. 13, annex I pCRD.
39 Art. 5(1) pCRD.

required information is new, nor are its general relevance and importance for the consumer disputed[40]. There are, however, some remarkable differences from the description of the information in the existing directives.

Article 5(1)(a) pCRD requires the provision of information about the main characteristics of the product. This is undisputedly important information for the consumer to have, and at least in some cases, this may be more information than a "reasonably well informed and reasonably observant and circumspect" consumer (as found in ECJ case law[41]) would look for before entering into the contract. Due to the horizontal approach, the proposed Directive restricts this requirement, however, in that information about the main characteristics of the product only has to be given to an extent appropriate to the medium and the product. The recitals to the proposed Directive only seem to refer to technical constraints in distance contracts, in which case the restriction to the appropriateness of the medium might better be part of the special information obligations for distance and off-premises contracts. Why, in different settings of on-premises transactions, different levels of information might be appropriate, is not obvious[42].

Article 5(1)(b) pCRD requires information about the geographical address and the identity of the trader, including trading names as well as geographical address and identity of any trader on whose behalf a trader may be acting. This may (but will not necessarily be) the address at which a trader can be sued, which would be necessary information for a consumer to effectively enforce his rights. Given that the proposed Directive follows the full harmonisation approach, it may not be permissible anymore to require this information and the inclusion of this information in Article 5 is therefore necessary to guarantee access to justice and enforcement of the consumers' rights.

Furthermore, the consumer has to be told the price inclusive of taxes[43], unless the price cannot be reasonably be calculated in advance, due to the nature of the product. In the latter case, detailing of the way the price is calculated is sufficient. This gives the consumer at least the relevant data for the calculation of the price and with that a basis for comparisons. In addition, all freight, delivery or postal charges have to be stated, unless they cannot reasonably be

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40 Unless the entire concept of the information paradigm of EU consumer law is questioned – on the concept general N. Reich in: H. Micklitz, N. Reich, P. Rott, *Understanding EU Consumer Law*, (Antwerp: Intersentia, 2008), pp 45-46; N. Reich, "Crisis and Future of European Consumer Law", in: D. Parry, A. Nordhausen, G. Howells, C. Twigg-Flesner (eds), *The Yearbook of Consumer Law 2009*, 6-10.

41 Detailed analysis of the ECJ case law in: C. Twigg-Flesner, D. Parry, G. Howells, A. Nordhausen, An Analysis of the Application and Scope of the Unfair Commercial Practices Directive (Report for the Department of Trade and Industry), 2005, p. 15 et seq, http://www.berr.gov.uk/files/file32095.pdf.

42 This can be explained with the different nature of products or services rather than technical constraints.

43 Art. 5(1)(c) pCRD.

calculated in advance, in which case the information that such additional charges may be payable shall be sufficient. It is not clear why in such cases the way the charges are calculated does not have to be stated. These can be a significant cost for the consumer and it is not satisfactory that (rogue) traders should be allowed to include just a clause like: "Additional charges for freight and delivery may be payable." At least, a trader should be required to state the way these charges are calculated, in the same way he has to do for the calculation of the price.

Information about the arrangements for payment, delivery, performance and the complaint handling policy have to be given. Surprisingly however, this is only required "if they depart from professional diligence"[44]. Professional diligence is defined in Article 2(14) pCRD as

> the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity.

Why the trader's professional diligence should have anything to do with his obligation to provide information to consumers is, frankly, impossible to see. How is the consumer, even the reasonably well-informed and circumspect "Euroconsumer", expected to know what would be "professionally diligent" conduct by the trader in each case? Such a provision might make some sense in a business-to-business contract, but in a business-to-consumer contract makes no sense at all. This provision does not become any clearer if read in conjunction with the provision on deposits or other financial guarantees, where the consumer has to be informed about the existence and conditions of such deposits in any event[45] (whether or not they follow or depart from professional diligence). This could mean in an extreme example that a trader would have to inform a consumer that a credit card guarantee will be taken, but not when payment will be due, which could be rather earlier than a consumer might expect, if payment is required before delivery or performance.

This is also a departure from the current structure of the information paradigm, where – whenever there are no explicit rules for special groups of consumers (i.e. vulnerable consumers) – the market or group of consumers, at which the activity of a trader is aimed, is relevant for the detailing of the requirements. The Directive on Unfair Commercial Practices[46] recognises vulnerable consumers as a specific group[47], whose expectations have to be taken into account for the definition of unfair and misleading practices. Furthermore, within the concept of the average consumer standard, whenever the com-

44 Art. 5(1)(d) pCRD.

45 Art. 5(1)(i) pCRD.

46 Directive 2005/29/EC.

47 Art. 5(3) UCPD.

mercial practices are aimed at a specific group of consumers, the standard for defining misleading practices is that of the average member of that specific group of consumers at whom the practice is aimed. Although this does not give a very precise mechanism, it at least tries to take the group of consumers, to which the practice is relevant in practice, as the benchmark. At least in cases where a practice is aimed at a narrowly defined specific group of consumers with common needs or abilities, this allows well-adjusted definitions of what is a misleading practice. In cases where a practice is directed at consumers in general, these mechanisms do not provide any meaningful steer, but in these cases, the interests and expectations of vulnerable consumers at least have to be taken into account[48].

The proposed Directive departs from the focus on the consumer as the benchmark and focuses on the trader instead. Consumer expectations and interests may be in the background, but they are certainly not in the foreground. The proposed Directive does not refer to different groups of consumers or the different needs or abilities of consumers, not does it even refer to the average consumer as a benchmark[49]. This leads to the strange result that the protection for vulnerable consumers or specific groups of consumers against misleading advertising goes much further than the protection in relation to individual contract terms[50] and creates discrepancies as between commercial practices and contract law[51].

All of the required information has to be provided prior to the conclusion of the contract.[52] Although in earlier directives, the wording was slightly different in that information had to be "given" to the consumer, this change in the wording is not a change in meaning. Recital 17 to the proposed Directive states explicitly that the consumer should be entitled to "receive" the information before the conclusion of the contract. The point in time when the conclusion of the contract takes place may not in all cases be too obvious for traders or for consumers, but the provision is clear in requiring the information *before* the conclusion of the contract. This must mean that a provision of the required information with the acceptance would be too late.

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48 Art. 5(3)UCPD; for a general overview H. Micklitz, in: H. Micklitz, N. Reich, P. Rott, *Understanding EU Consumer Law*, pp. 73-89.

49 The DCFR would have provided alternative provisions, taking these issues into account in Art. II.–3:101-103 DCFR.

50 H. Micklitz, N. Reich, "Cronica de una muerte anunciada – The Commission Proposal for a 'Directive on Consumer Rights'" – unpublished research paper, 2009.

51 S. Whittaker, "The Relationship of the Unfair Commercial Practices Directive to European and National Contract Law", in: S. Weatherill, U. Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29 – New Rules and Techniques*, (Oxford: Hart, 2007), p. 139.

52 Art. 5(1) pCRD.

The E-Commerce Directive[53] is going further, in that, due to the medium, general information[54] is to be "directly and permanently accessible", whereas contract-related information has to be given "prior to the order being placed"[55]. As a consequence, E-Commerce traders have to provide the contract-related information required under Article 10 of the E-Commerce Directive prior to the placing of the order, as well as having all general information directly and permanently accessible, whereas in distance sales or off-premises contracts on the other hand, the information only has to be given before the conclusion of the contract.

The E-Commerce Directive also requires that the information has to be provided "clearly, comprehensibly and unambiguously"[56], a requirement which is absent in the proposed Directive. In the proposed Directive, such a requirement only exists for contract terms. Article 31(1) pCRD requires contract terms to be expressed in "plain, intelligible language" and to "be legible". It could be argued that the information is a contract term since it is forming an integral part of the sales contract[57], but given the otherwise noticeable tendency of the proposed Directive to repeat requirements where it would not be necessary in this way[58], this seems to be a rather wide interpretation. In practice, of course, any information can only be of any use for the consumer if these requirements are fulfilled; no matter whether contract terms or information provided to the consumer is concerned, the terms or information need to be expressed in plain, intelligible language and to be legible (where they are written)[59]. Even if a wide interpretation is adopted for this issue, electronic contracts (and in particular the fulfilment of the information obligations) does not get any less complicated for traders or consumers. Recital 25 of the proposed Directive declares the rules of the E-Commerce Directive to be unaffected: the new rules shall be without prejudice to the existing rules on e-commerce. Although Recital 25 only refers to the conclusion of contracts and the placing of the order, the effects will be more far-reaching, and for electronic transactions traders will have to fulfil slightly different requirements arising from the E-Commerce Directive, which follows the minimum harmonisation principle, as well as that of the proposed Directive with its targeted full harmonisation. As a result, electronic contracts will not become any easier for either trader or consumer. This causes some considerable doubt

53 Directive 2000/31/EC.

54 Arising from Art. 5 of the E-Commerce Directive.

55 Art. 10(1) E-Commerce Directive.

56 Art. 10(1) E-Commerce Directive.

57 Art. 5(3) pCRD.

58 As in Art. 9 pCRD, where the inclusion of information as an integral part of the contract is stated separately for the specific information obligation for distance and off-premises contracts.

59 The information can of course be communicated in other forms, i.e. verbal, but it has to be plain and intelligible language in any event.

whether this is coherent with the aims of improving the functioning of the internal market and enhancing the likelihood of the consumer taking full advantage of the potential benefits of the internal market, given that a large proportion, especially of cross-border consumer contracts (and with further growth predicted) are electronic contracts. It is helpful in this context that inconsistencies in the definitions and as to the withdrawal period, as well as generally a harmonisation of information requirements, are addressed with the proposed Directive, but the approach of targeted full harmonisation does not fully reach its aims.

The statement that the information obligations form an integral part of the contract[60] is a welcome clarification (and in some cases widening) of the status of the information. But does this go far enough? The definition of "an integral part of the contract" remains unclear. It is not clear, and will differ in the national laws of the Member States, which status the information will assume in the contract. It can be assumed that generally the information will become part of the contract terms[61]. But what status will the information be given within the contract terms? Is the information *essentialia negotii* and therefore hinders the valid formation of a contract? This would be a possible, albeit rather strict, interpretation. It would mean that a contract may not be validly concluded at all if the information is not given, or not given in the correct way or at the correct time. It is more likely, especially in connection with the requirement of national contract law remedies, that this will mean that they are not *essentialia negotii* (unless they are included in the *essentialia* under national law anyway), so generally the contract will be valid. Otherwise there would be no room for the required contract law remedies there would simply be no contract at all (which may be seen as a contract law remedy as well). The interpretation of the information obligations as *essentialia negotii* (and therefore no valid contract in case of non-fulfilment) could be harsh on the consumer as well, who relied on the contract and may want to affirm the contract regardless of the information deficit. In addition, the proposed Directive states explicitly that the contract law of the Member States shall remain unaffected. It is questionable whether the definition of information obligations as an integral part of the contract is consistent with this limitation. The remedies, however, are not harmonised and can vary significantly between Member States.

The proposed Directive restricts the information obligation to cases where the relevant piece of information is "not already apparent from the context"[62]. In Recital 17, this restriction is explained with very clear examples[63], where the provision of this information would be an unnecessary burden on the trader and not of any benefit to the consumer. If anything, unnecessary in-

60 Art. 5(3) and Art. 9 pCRD.

61 And as such will fall under the control of the provisions on contract terms in Chapter V of the proposed Directive.

62 Art. 5(1) pCRD.

63 Such as the main characteristics of a product in on-premises contracts.

formation may distract the consumer from taking in relevant and important information. The lack of clarity of this provision is, however, problematic. It remains open, how clear the information must be if it is to be taken as "apparent from the context". Would it be sufficient that a consumer could or should have noticed? How well-informed and circumspect has the consumer got to be? From the way the provision is drafted, it seems clear that this is not a general exclusion for on-premises transactions, but it remains unclear, what scenarios are covered by this provision.

Article 7 of the proposed Directive introduces a specific information requirement for intermediaries acting on behalf of a consumer. An intermediary is defined in Article 2(19) pCRD as "a trader who concludes the contract in the name or on behalf of the consumer". Public auctions are excluded from this exemption[64]. At first sight, this might seem like a useful provision, and it is indeed appropriate in a number of cases where a trader sells something for a consumer. The provision is however in danger of being abused to exclude the applicability of the proposed Directive as well as other consumer protection rules. If one consumer sells to another consumer the special requirements of consumer protection rules shall not apply, but in business-to-consumer transactions the protective rules shall apply. This is a largely undisputed premise, but it does not answer the question following from this premise, where the differentiation between a consumer and a trader acting as an intermediary really lies. Is a selling consumer still a consumer if he sells similar goods frequently? With the principle of targeted full harmonisation the answer will have to come from the ECJ. On a slightly different issue, the following could be questioned, namely why does the trader (acting as an intermediary for a consumer) need this level of protection of being completely outside the consumer protection framework? There are various different options available for consumers to sell goods (as consumers) other than selling via an intermediary. If an intermediary is involved, this could be another consumer (in which case it is a consumer-to-consumer transaction in any event): where a trader is involved, there should be some restricting mechanism. The currently proposed provision would allow a trader to act exclusively for consumers and therefore exclude consumer protection rules entirely. This cannot be the aim (and should not be the result) of any consumer protection rule and whereas it may help the internal market, it is not contributing to a high level of consumer protection, as required by Article 153 of the EC-Treaty.

64 Art. 7(3) pCRD.

b) Off-premises and distance contracts

Chapter III of the proposed Directive regulates the specific consumer information and the withdrawal right in the case of distance and off-premises contracts. These two categories are new, but supposedly follow largely the existing definitions of distance contracts and doorstep sales. As will be shown, in relation to these types of contract the proposed Directive goes much further than a consolidation and renaming of the existing rules: it brings significant changes.

A "distance contract" is defined in Article 2(6) pCRD as "any sales or service contract where the trader, for the conclusion of the contract, makes exclusive use of one or more means of distance communication". The phrase "means of distance communication" is defined in the following paragraph as "any means which, without the simultaneous physical presence of the trader and the consumer, may be used for the conclusion of a contract between those parties"[65]. These definitions differ slightly from the corresponding provisions in the Distance Selling Directive[66]. The definition of "means of distance communication" remains the same[67]; the indicative list of means covered by the Distance Selling Directive is abolished in the proposed Directive. The indicative list may have served some explanatory purpose when the Distance Selling Directive was introduced, but since the definition aims to be technologically open and the list only has indicative character, this is a welcome change that will not lead to more difficulties than the existing definition.

The definition of distance contract remains largely the same as in the corresponding definitions in the Distance Selling Directive, but there are some changes widening the scope. The restriction in the definition of the Distance Selling Directive that distance communication methods have to be used "up to and including the moment at which the contract is concluded"[68] would be replaced with the simpler requirement of "for the conclusion of the contract" which probably does not intend to make a substantial difference to the content. More remarkable is the abolition of the limitation that the Distance Selling Directive will only apply where there is "an organised distance sales or service-provision scheme run by the supplier". This is a welcome amendment, and will extend consumer protection, e.g. to cases where a distance contract is concluded at the initiative of the consumer, for example by e-mails sent to the trader who does not normally offer distance transactions on a website. The trader, of course, remains free to refuse a distance sale, but if he agrees and uses "means of distance communication" to conclude the contract over distance,

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65 Art. 2(7) pCRD.

66 Directive 1997/7/EC of 20th May 1997 on the protection of consumers in respect of distance contracts.

67 Apart from the replacement of "supplier" with "trader" which does not make any substantive difference.

68 Art. 2(1) Distance Selling Directive 97/7/EC.

then he will be bound by the proposed Directive and – unless the contract falls under any of the exemptions in Article 20 of the proposed Directive – will have to provide the consumer with all the information requirements arising from the proposed Directive[69]. In case of excluded contracts, only the specific information requirements following from Articles 9 et seq. are waived: the general information obligations of Article 5 et seq. still have to be fulfilled. This is a widening of the scope which in the great majority of cases will not be an undue obligation on the trader, but avoids possible strategies of circumventing the consumer protection rules.

"Off-premises contracts" are defined in Article 2(8) of the proposed Directive as

(a) any sales or service contract concluded away from business premises with the simultaneous physical presence of the trader and the consumer or any sales or service contract for which an offer was made by the consumer in the same circumstances, or

(b) any sales or service contract concluded on business premises but negotiated away from business premises, with the simultaneous physical presence of the trader and the consumer.

Business premises include movable or immovable retail premises, including seasonal premises as well as market stalls or fair stands. Not only is the phrasing of these definitions very different from the Doorstep Selling Directive[70], their substance is also changed. Contracts concluded on the street[71] or on public transport are now explicitly included. The general exemption of "solicited visits" no longer exists in the proposed Directive. The only remaining reference to solicited visits is regarding exemptions from the right of withdrawal[72].

The provision in Article 9 of the proposed Directive states that like the general information obligations, the specific information obligations for distance and off-premises contracts "shall form an integral part of the contract". Whereas this is (in the current version of the Proposal) technically necessary to repeat this effect as the corresponding provision for the general information obligations only refers to these ones and not to the specific information, this repetition could be avoided by a more general rule.

Article 9(a) pCRD requires that for distance and off-premises contracts the general information referred to in Articles 5 and 7 has to be given, but – other than in Article 5(1)(d) – the arrangements for payment, delivery and performance have to be given in all cases. This is in some way a necessary provision

69 This includes the general as well as the specific information obligations.

70 Directive 85/577/EEC of 20th December 1985 to protect the consumer in respect of contracts negotiated away from business premises.

71 This was not included in the wording of the Doorstep Selling Directive, although the ECJ extended the scope of the directive in *Faccini Dori*, ECJ, C-91/92 [1994] I-3325.

72 Art. 19(2)(c) pCRD.

as it will in distance contracts generally be apparent from the context that there have to be specific arrangements for payment, delivery and performance – unlike in a face-to-face sale, payment by cash and simultaneous hand-over of the goods is not possible. It is not clear why this strict requirement is restricted to arrangements for payment, delivery and performance, whereas a distance seller would not necessarily be obliged to provide specific information about price, delivery or postal charges other than required under Article 5(1)(c) pCRD, so possibly just the information that such additional charges may be payable is required.

Regarding the withdrawal right, not only the information about the existence of this right, but also the conditions and procedures for the exercise of the withdrawal right, have to be provided[73]. It is not entirely clear what the reference to "conditions" means, but since the proposed Directive follows the maximum harmonisation approach, this will have to refer to either other requirements arising from other Community provisions[74] or to the specific information as referred to in Annex I of the proposed Directive, which specifies the information to be provided with the withdrawal form and a model withdrawal form.

Article 9(c) pCRD introduces more possible addresses into the picture. The trader can identify (and in that case has to provide this information to the consumer) a specific address for complaints. Whereas this may be a very useful option for the trader and if communicated in a proper way, should not be an obstacle for consumers, it has to be noted, that here for the specific requirements for off-premises and distance contracts in the same way as for the general information obligations, the provision of various (and indeed relevant) addresses is required, but the omission of the address where the trader can be sued is remarkable. This place may be the same as either of the other addresses, but it does not have to be; and even if it is it is not giving the consumer clear information which could result in a restriction or failure of access to justice for the consumer.

Slightly odd is the provision in Article 9(f) pCRD which requires that the trader has to inform the consumer that the contract will be concluded with a trader and, following, the proposed Directive will apply. This means that under the general information obligations of Article 5 pCRD a trader has to inform the consumer only if he is acting as an intermediary for a consumer, but in the specific information obligations under Article 9 pCRD for off-premises and distance contracts he has to state that he is a trader and therefore that the proposed Directive will apply. This may lead to rather confusing information being given to the consumer. It seems at least an unnecessary complication, unless this provision is meaning that for distance and off-premises contracts the derogation as provided in Article 7(1) pCRD shall not be allowed. This would mean that traders acting as intermediaries for consumers in all contracts

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73 Art. 9(b) pCRD.

74 Such as the E-Commerce Directive 2000/31/EC.

other than off-premises or distance contracts would be exempted from the provisions of the proposed Directive, whereas traders acting as intermediaries for consumers in off-premises and distance contracts would have to fulfil the requirements of the directive and correspondingly the consumer would benefit from the protection of the proposed Directive or lose the protection altogether. A reasoning for this would be difficult to imagine.

Articles 10[75] and 11[76] of the proposed Directive introduce formal requirements for the information obligations in off-premises and distance contracts.

Article 10 requires the information to be given in an order form. This is a new category of document, and is defined in Article 2(11) pCRD as "an instrument setting out the contract terms, to be signed by the consumer with a view to concluding an off-premises contract". What status this document acquires in contract law terms remains unclear. Is the consumer bound by this order? Is it an offer in contract law terminology? If this has binding effect, this will have significant effect on the general contract law of Member States where a contractual offer can be withdrawn easily[77]. If it has no binding effect, this will at least confuse consumers and traders in Member States where contractual offers traditionally have a strong binding effect[78]. If the document is not supposed to have any effect on the formation of the contract, as Article 10(2) pCRD might suggest, so that it is just a formal requirement for the validity of the contract[79], the effect of non-performance (invalidity of the contract) seems rather far-reaching. As a formal requirement setting out the contract terms, it seems rather odd that only the information required under Article 9 pCRD and the standard withdrawal form in Annex I (B) has to be given in the order form. The general idea behind this provision, to give the consumer a written confirmation of the information, is very useful. It is not clear, however, why at least all the general information requirements arising from Article 5 (including the ones which are apparent from the context) do not have to be included as well. These are in a similar way defined as an integral part of the contract. It might be preferable (although it would be quite far-reaching in general contract law) to have a requirement of a written contract (in writing or on a durable medium), including all relevant information obligations.

No common legislative aim is visible in the rule in Article 10(2) pCRD that an off-premises contract shall only be valid if the consumer signs an order form, but that in cases where the order form is not on paper, it shall be sufficient if the consumer receives a copy of the order form on another durable medium. Given the development of electronic technologies since the introduction of the Doorstep Selling Directive in 1985, it is an overdue modernisation to abolish the strict reliance on paper for any formal requirements. It is, however, not

75 For off-premises contracts.

76 For distance contracts.

77 Such as in the United Kingdom.

78 Such as Germany for example.

79 As well as the calculation of the withdrawal period, Art. 12(2) pCRD.

clear why the provision of the information on paper requires the signature of the consumer, whereas the provision on another durable medium does not provoke any formal requirement. It would be possible to have a requirement that the consumer has to sign a document confirming that he received a durable medium or on paper. Furthermore, it has to be taken into account that the use of electronic means for consumers to enter into off-premises contracts may not be familiar to or possible for consumers. The consumer should therefore have a right to choose in which format he wishes to receive the information, or the format could be forced to follow the means used in the negotiation and conclusion of the contract[80].

It is not specified in Article 10 pCRD *when* this order form has to be given and signed by the consumer. Since the information is an integral part of the contract and the order form a necessary requirement for the validity of the contract, it has to be before or with the conclusion of the contract (where the rules are determined by national law), but will it be sufficient if the order form is provided (and signed) with delivery (where delivery is acceptance)? Would this be timely information for the consumer if the information has not been provided before? If the order form is in effect a confirmation and has got little to do with an order, it should be renamed to avoid confusion and ambiguity.

Article 11 pCRD is the corresponding provision for distance contracts. Here, the only information with special formal effect is the information required in Article 9(a) pCRD. Conditions and procedure for the right of withdrawal, codes of conduct, dispute settlement mechanisms and the fact that the contract will be concluded with a trader, do not have to be included. The fact whether the consumer protection rules apply or not seems as important in distance contracts than in any other contract. The conditions for the withdrawal right and probably to a lesser extent codes of conduct and dispute settlement mechanisms are relevant information, especially in distance contracts where the consumer does not necessarily know the trader nor the goods or services.

Article 11 requires the information to be given or made available prior to the conclusion of the contract in a way appropriate to the means of distance communication used. Unlike in the case of off-premises contracts, here the time for the provision of the information is specified. Since the means used for distance communication can vary significantly and can include electronic means, the option of giving the information or making the information available is appropriate to the technology in general, and the inclusion of "appropriate to the means of distance communication used" has to be read so as to restrict the means to those means to which the consumer has access. That would avoid a situation, for example, where a consumer who is contracting

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[80] The rules on contract terms in Chapter V of the proposed Directive may be intended to avoid such cases, but it would achieve greater certainty if this was regulated explicitly. Also, the rules on contract terms may result in a stricter regime and not allow the consumer the choice.

over distance via telephone, telefax and letter, might be provided with the information on a CD-Rom, but not have access to a computer.

Article 11(2) and (3) set out special rules for the use of telephone and any other medium with limited space and time. These rules are largely restating the rules as they are currently set out in the Distance Selling Directive.

Article 11(4) requires the trader to provide a confirmation of all information on a durable medium within a reasonable time after the conclusion of the contract, at the latest at the time of delivery of the goods or services[81]. This is a slightly restricted version of the corresponding provision[82] in the existing Distance Selling Directive, where the information could also be provided on a durable medium before the conclusion of the contract unless the information has already been given to the consumer prior to the conclusion of the contract. The information has to be provided on a "durable medium" which is defined in Article 2(10) pCRD as

> any instrument which enables the consumer or the trader to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.

The Distance Selling Directive names paper or a durable medium, but the definition of the term durable medium in the proposed Directive will include paper as well as various electronic means. It is questionable whether a text e-mail would necessarily been seen as sufficient, but an e-mail attachment, which can be saved by the consumer, would fulfil the requirements. It is important, however (and the proposed Directive is surprisingly silent on this) that the document should be available in a format that is accessible to the consumer. This could be seen as implied in the provision, or arising from the requirement, that the information be legible, but it would avoid uncertainty if this was included explicitly.

IV. Plain and intelligible language and legible

Articles 10 and 11 of the proposed Directive both require the confirmation to be given in plain and intelligible language and to be legible.

Whereas the requirement of plain and intelligible language as well as the requirement of being legible is generally a welcome requirement, the regulation in the specific requirements for distance and off-premises contracts causes problematic outcomes. In a literal interpretation this means that plain and intelligible language is only required for distance and off-premises contracts, not for all other contracts, a very odd consequence that cannot have been

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81 Unless performance has begun with the consent of the consumer before that.

82 Art. 8(1) Distance Selling Directive 97/7/EC.

intended! The requirement of legibility is naturally restricted to some sort of written or other visual display of the information, but again, it cannot be the intention to require this only for distance and off-premises contracts, and not for all other contracts. For e-commerce contracts, the specific provisions of the E-Commerce Directive will still apply, so "easily, directly and permanently accessible"[83] for the general information obligations and "clearly, comprehensibly and unambiguously"[84] for the contract-related obligations. This would leave mainly face-to-face contracts outside the requirement of legible information, which does not contribute to the overall aims of the proposed Directive.

Other than the E-Commerce Directive, which requires the provider to inform about the choice of language, the proposed Directive does not include any corresponding provision, and is completely silent about language issues. Since language issues are one of the main issues for consumers in cross-border contracts, this omission is at least surprising. It would certainly go too far to prescribe any particular language for the contract or to make the (or one of the) languages of the consumer's home country mandatory, but some regulation of language seems necessary[85]. The transparency requirements in Article 31 of the proposed Directive require contract terms to be in plain and intelligible language as well as being legible, but again remain silent with regard to the language used. As suggested before, the rules on languages should not be too prescriptive, but at least the consumer ought to have the chance of choosing the language with which he is most familiar. Given that the proposed Directive follows the full harmonisation principle and Article 31(4) requires the Member States explicitly to refrain from "imposing any presentational requirements as to the way the contract terms are expressed or made available to the consumer", the Member States may be prevented from introducing any rules on language requirements.

V. Performance

Another striking omission is the regulation of performance of service contracts. Whereas for sales contracts Article 22(1) of the proposed Directive sets a default time of a maximum of thirty days from the conclusion of the contract, there is no corresponding provision for contracts on the provision of services. Article 5(d) pCRD requires information on (amongst others) performance, but it is not specified whether or in how far the time for performance has

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83 Art. 5(1) E-Commerce Directive 2000/31/EC.

84 Art. 10(1) E-Commerce Directive 2000/31/EC.

85 General on the problem: H. Micklitz, "Zum Recht des Verbrauchers auf die eigene Sprache", (2003) 3 *Zeitschrift für Europäisches Privatrecht* 653; P. Rott, "Informationspflichten in Fernabsatzverträgen als Paradigma für die Sprachenproblematik im Vertragsrecht", (1999) *Zeitschrift für Vergleichende Rechtswissenschaft* 382-409.

to be specified. This could have been done in a way similar to the provision regarding sales (with a default time for performance) or by a clear information obligation to specify the time of performance. Some correction may be found in the rules on contract terms in Chapter V of the proposed Directive, but these can only avoid unfair terms. Trader and consumer should be free to agree a suitable time for performance and this can be determined by various different factors, so unusually long periods for performance should be permissible, but the consumer should been given a clear idea about the time for performance of a service contract.

VI. Remedies for non-fulfilment of information obligations

1. General

Whereas most of the information obligations required in the proposed Directive are not completely new, the same is not true in respect of the proposed obligations as to the quality of this information. The proposed Directive states in Article 5(3) explicitly, that the required information "shall form an integral part of the sales or service contract". This is a positive step forward, since the status of the information within the contract, and therefore possible contractual remedies for non-fulfilment or wrong information, could lead to different results, depending on the applicable law. Even though contractual sanctions will still be different in different Member States, there have to be contract law remedies[86]. Although the proposed Directive does not specify the type of breach of the information obligations, it will have to include any breach, whether intentional or negligent, of the information obligations. Another question is what meaning the term "integral part" will be given within the general contract law of the Member States. Unless the information is seen as contract terms[87], this will have to follow the national laws of the Member States, and therefore the results may differ in different Member States. It is not obvious that more regulation is needed here; the proposed Directive makes it clear that the Member States have to provide for effective contract law remedies for any breach of Article 5[88].

The provision in Article 6(2) of the proposed Directive is different from corresponding provisions in existing directives. The Distance Selling Directive gave a range of various different options (or combinations thereof)[89] to ensure "adequate and effective means"[90] to ensure compliance. The E-Commerce Directive requires in Article 20 sanctions to be "effective, proportionate and

86 Art. 6(2) pCRD.

87 See below under "Transparency requirements".

88 Art. 6(2) pCRD.

89 Art. 11 Distance Selling Directive 97/7/EC.

90 Art. 11(1) Distance Selling Directive 97/7/EC.

dissuasive". Unlike in the earlier directives, the Member States are restricted in the choice of sanction, as the remedies have to be contract law remedies. This emphasises the individual nature of the remedies. Public law enforcement may not be completely ruled out, but cannot be the only sanction. The effect of this is that the individual consumer will have (and has to be given the means for enforcement of) contractual rights, which previously was possible in some Member States, but not in all. At first sight this may seem an improvement for consumer redress, but it does not take into account the differences in the redress systems more generally in the Member States. As a result, enforcement and the consumer interest may be better served by public enforcement in some areas or in some Member States, although the aim of effective redress for the individual consumer may not be fulfilled. However, despite the full harmonisation approach, Member States are not forbidden (and indeed in Arts. 41 and 42 are encouraged or obliged) to introduce or maintain existing public law enforcement.

A special rule is provided in Article 6(1) for the non-fulfilment of information obligations on additional charges in Article 5(1)(c). These refer to freight, delivery or postal charges. If the consumer has not been given the relevant information, the consumer does not have to pay the charges. This is at first sight a very effective and quite far-reaching rule, but the force of this is significantly weakened by the fact that it can be sufficient (as noted earlier) to inform just about the fact that such additional charges may be payable if they cannot be calculated in advance. This gives – especially in the form of this wide exemption – very little room for the application of the strict remedy. Traders will in practice refer to (some possibly rather vague) freight, delivery or postal charges, and will with this provide sufficient information. This provision and the remedy could be given much more effect (and without placing an undue burden on the trader) if at least some basis for the calculation of the charges had to be provided.

If a trader acting as an intermediary for a consumer does not fulfil the requirement of informing the consumer about this fact and the effect of the exclusion of the non-application of the proposed Directive, the trader is treated as if he had concluded the contract in his own name[91]. This is an obvious way of sanctioning the non-fulfilment of this information obligation, but the information required could be clearer in including all consumer protection rules which would not apply.

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[91] Art. 13(2) pCRD.

2. Off-premises and distance contracts

For off-premises contracts, the non-fulfilment of the specific information obligations is linked to the signed order form. If the signed order form is missing or the consumer has not been given a copy of the order form on another durable medium, the contract is not valid. This is certainly an effective and clear remedy, although it may not necessarily always be in the consumers' interest. Further to this, the non-fulfilment (or late fulfilment) of information obligations in off-premises contracts leads to the beginning of the withdrawal period being delayed. The withdrawal period only begins once the consumer signs the order form or receives a copy on a durable medium[92].

For distance contracts, there is no equivalent provision, therefore only the general rules will apply – which means that the Member States must provide some contract law remedy in addition to other enforcement and redress mechanisms[93]. This different treatment of off-premises and distance contracts may be explained with the differences in the preceding directives, but it does not seem appropriate.

Article 13 contains a specific rule for non-fulfilment of the information on the right of withdrawal (both, for off-premises as well as distance contracts). In case of non-fulfilment of this obligation, the withdrawal period expires three months after the trader has fully performed his other contractual obligations. This gives the consumer more time to find out about his rights, but since the withdrawal right is one of the most important information to be provided and is essential for the consumer protection in distance contracts, the non-fulfilment of this obligation should carry more serious consequences.

VII. Transparency requirements

Although transparency requirements are included in Chapter V of the proposed Directive and mainly concern contract terms[94] (which are not examined here), some of the transparency provisions are closely related to the information obligations and shall therefore be briefly discussed here.

Article 31(1) of the proposed Directive requires contract terms to be expressed in "plain, intelligible language and be legible". This in itself is not very spectacular, and the only uncertainty that may arise from this is the question how these terms are to be interpreted in practice. Not so clear is the relationship of this provision with the information obligations. Are the information obligations, which all form an integral part of the contract and in case of the specific information obligations have an effect on the validity of the contract, contract terms? It could be said that all that forms part of a contract will be the

92 Art. 12(2) pCRD.

93 As required in Art. 6(2) pCRD.

94 Which are examined in J. Stuyck, "Unfair Terms", *in this volume*.

terms of the contract, but why would different terminology be used in different parts of the same legislative document? Should the term "integral part" mean something different from "contract terms"? Certainly the specific information obligations in off-premises and distance selling contracts seem to fulfil mainly formal requirements. Also, the explicit requirement to provide this information in plain and intelligible language and to be legible seems to indicate that they do not fall under the contract terms, otherwise the (very specific and possibly incomplete) requirement would be a needless repetition. Even if there is a chance that "contract terms" and "integral part" of the contract could be interpreted as meaning the same, in the interest of avoiding ambiguity and achieving certainty a clarification would be desirable.

If the information obligations are to be seen as contract terms, they would have to fulfil the additional requirement that they would have to be provided in some form of writing or visible display, otherwise they would not be legible. Also, the information would have to be made available to the consumer in "a manner which gives him a real opportunity of becoming acquainted with them before the conclusion of the contract"[95], while taking into account the means of communication used. This poses an additional or slightly expanded requirement than what Article 5 pCRD seems to suggest. The explicit requirement of the real opportunity for the consumer to become acquainted with the contract terms before the conclusion of the contract must include more than just a provision of the terms, like it is required for the information obligations in Articles 5, 7 and 9 pCRD.

VIII. Final remarks

Overall, the proposed Directive addresses a number of issues where the currently existing directives show deficiencies, such as definitions, the differences in the length of the withdrawal period and inconsistencies in the information obligations. Some of these issues were due to differences in the directives, but some only appear due to variations in the implementation of the directives into the national law of different Member States. These differences are not all due to the minimum harmonisation approach taken in these directives and resulting higher standards in some Member States, but are in a number of cases due to a lack of proper implementation. The proposed Directive, however, does not overcome these deficiencies, and in some respects, creates new ones. This is largely linked to the approach of targeted full harmonisation, which results in a lowering of standards in at least some Member States and targets not only narrowly restricted and defined areas, but has got significant influence on contract law in general. It could even lead to a separation of non-consumer contract law and consumer contract law if the result of a full harmonisation of

95 Art. 31(2) pCRD.

consumer contract law would result in too great differences and inconsistencies between these different areas[96].

The information obligations are, however, one of the more suitable areas for being targeted by full harmonisation. The full harmonisation of any vertical issues cannot be seen in isolation and has to carefully examine the effects the full harmonisation will have on other surrounding areas. As shown, the proposed Directive does not take account of a number of surrounding provisions nor of its effects on other national provisions or other European provisions. The effect of this is even greater if the other existing and unaffected directives (like the E-Commerce Directive) follow the minimum harmonisation approach. Furthermore, the E-Commerce Directive is not restricted to business-to-consumer transactions, but includes provisions generally applicable for all contracts including business-to-business contracts.

Another effect of full harmonisation is a shift in jurisdiction. Although technically a directive with the requirement to be implemented into the national law of the Member States, the scope for adaptation to the national legal system is in the case of full harmonisation very limited. Interpretation of the provisions (which will have to be almost word by word identical in the Member States) will regularly have to be referred to the European Court of Justice. This is, on one hand, of course positive with regard to definitions or information obligations, in the sense that the provisions of the directive will be interpreted in a common way and therefore contributes to the functioning of the internal market. On the other hand though, it causes frictions and inconsistencies with the general contract law of the Member States.

Another related problematic issue, which has been shown, is likewise linked to the full harmonisation approach. There is a requirement for clear and unambiguous provisions, which acknowledge the existing terminology and interpretation in the national law of the Member States. The invention of new terminology does not avoid this problem, but causes more confusion for the integration of the provisions of the proposed Directive into the national law of the Member States.

The main aim of the proposed Directive is not quite clear. Regarding a number of areas (such as most prominently the focus on standards of professional diligence), the Proposal seems to be focused on benefitting traders, not on consumers. Since the proposed Directive is entitled as "Directive on Consumer Rights" this focus on the trader, rather than the consumer expectation, is odd and cannot fulfil the requirements arising from Article 153 of the EC-Treaty to contribute to the attainment of a high level of consumer protection. It is hoped that the discussion of the Proposal and the subsequent amendments will finally result in provisions which will set clear rules and achieve the aims of enhancing the internal market, while at the same time achieving a high level of consumer protection.

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96 J. Stuyck, "European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or Beyond the Internal Market?", (2000) 2 *Common Market Law Review* 396.

Rights of Withdrawal

Marco Loos

I. Introduction

On 8 October 2008 the European Commission adopted the Proposal for a Directive on Consumer Rights (hereafter: the 'Proposal'; pCRD).[1] This framework-directive is intended to be the climax of the work on the revision of the consumer acquis. It builds in particular on the Green Paper on the Review of the consumer acquis[2] and on more than 300 reactions the Commission received on the Green Paper. These responses were especially originated from the side of businesses and, to a lesser degree, of consumer groups, government agencies on national and local level, practice lawyers, academicians and others.[3] The most important conclusion the Commission drew from these responses was that a large majority of the respondents preferred a horizontal instrument in which terms were to be regulated in a uniform manner, such as the notions of 'consumer' and 'trader'. That instrument was to apply to both national and cross-border transactions and should be accompanied by amendments to the existing directives for those areas where sector-specific measures were deemed necessary.[4] The responses clearly pointed in the direction of *full* harmonisation. Consumer organisations, however, generally preferred the current approach of minimum harmonisation, which offers Member States the possibility to introduce or maintain rules that are more favourable to consumers.[5] The Commission took up the follow-up energetically: it adopted the

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1 Proposal for a Consumer Rights Directive of the European Parliament and of the Council on Consumer Rights of 8 October 2008, COM(2008) 614 final. The Proposal can be downloaded at http://ec.europa.eu/consumers/rights/cons_acquis_en.htm.

2 Green Paper on the Review of the Consumer Acquis of 8 February 2007, COM(2006) 744 final.

3 Commission Staff Working Document, Report on the Outcome of the Public Consultation on the Green Document on the Review of the Consumer Acquis (hereafter: Review of Consumer Acquis Document). This working document did not receive a COM-number. It can be downloaded at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/index_en.htm.

4 See Review of Consumer Acquis Document, pp. 3-4.

5 See Review of Consumer Acquis Document, p. 4. See on the Green Paper and the responses thereto extensively M. B. M. Loos, *Review of the European Consumer Acquis*, (Munich: Sellier, 2008).

Proposal for a Consumer Rights Directive only one year after the preliminary report on the responses to the Green Paper was published. The Proposal is based on the full harmonisation approach preferred by the majority of respondents to the Green Paper, implying that Member States cannot maintain or adopt provisions diverging from those laid down in the Directive.[6] The full harmonisation of the right of withdrawal in distance and off-premises contracts is thought to contribute to the better functioning of the business to consumer internal market[7], while 'striking the right balance between a high level of consumer protection and the competitiveness of enterprises',[8] as is required by Article 153(1) and (3)(a) EC Treaty. In the eyes of the Commission, that high level is indeed achieved.[9]

In the Green Paper, the European Commission drew the attention to, amongst other things, the regulation of the various rights of withdrawal, which are included in several directives, and the requirements for invoking these rights. The Commission wondered whether the cooling-off periods should be harmonised across the consumer acquis, how the right of withdrawal should be exercised, and which costs should be imposed on consumers in the case of withdrawal.[10] From the responses to the Green Paper, the Commission concluded that there is a strong support for tightening-up and systematising the consumer acquis, amongst others in the area of the regulation of the rights of withdrawal.[11]

In this paper I will examine whether the harmonisation effort undertaken is successful, whether the right choices are made in the Proposal, and whether, as the European Commission indicates, the right balance between a high level of consumer protection and the competitiveness of enterprises is indeed achieved.

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6 Explanatory memorandum to the Proposal for a Consumer Rights Directive, COM(2008) 614 final, p. 3.

7 Cf. Recital 5 of the preamble to the Proposal for a Consumer Rights Directive.

8 Cf. Recital 5 of the preamble to the Proposal for a Consumer Rights Directive. In this sense also the Explanatory memorandum, p. 2.

9 Explanatory memorandum, p. 3.

10 Green Paper, pp. 12, 20-22.

11 See the executive summary in the Review of Consumer Acquis Document, p. 3.

II. Characteristics and development of the right of withdrawal

Rights of withdrawal and the associated cooling-off periods are fairly new concepts in private law. Although traces of a right of withdrawal may already be found in a proposal for a statutory *Reurecht* for buyers in hire-purchase schemes in 1891,[12] it was not until the late 1960s and the early 1970s before a right of withdrawal was first laid down in legislation.[13] The right of withdrawal is usually meant to protect a consumer from making rash decisions: during a relatively short cooling-off period, the consumer may go back on his decision to conclude a contract, sometimes even if that contract has already been performed by the parties. The counterpart to the contract, typically a trader (i.e. a professional seller or service provider), is not given such possibility. When the consumer does exercise his right of withdrawal, all contractual obligations are extinguished.[14]

At European level, the right of withdrawal was introduced by the Doorstep Selling Directive.[15] Since then it has been included in Directives on Life

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12 Cf. the proposal by Heck, published in the proceedings of the 21st German Lawyers day of 1891, 2nd Volume, pp. 180-182.

13 Legislation in Germany and the Netherlands introducing a right of withdrawal date back to 1969 in Germany (*Auslandinvestment-Gesetz*, concerning *inter alia* the sale of foreign investmentshares) and 1973 in the Netherlands (*Colportagewet*, concerning a regulation of doorstep selling contracts).

14 Cf. *Travel Vac SL v Anselm Sanchís*, Case C-423/97, ECR [1999] I-2195, nos. 57-58, ECJ 22 April 1999.

15 Doorstep Selling Directive, i.e. Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372/31.

Assurance,[16] Timeshare,[17] Distance Selling,[18] Distance Marketing of Financial Services,[19] and, recently, Consumer Credit.[20] It should be noted, however, that the directives use different terms to indicate the right of withdrawal.[21] Member States sometimes have additional cooling-off periods in areas that are not or not yet (fully) harmonised.[22] Moreover, occasionally extra-legal (contractual)

16 Second Life Assurance Directive, i.e. Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC, OJ 1990 L 330/50. I will deal with the directive only occasionally.

17 Timeshare Directive, i.e. Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, OJ 1994, L 280/83. A new Timeshare Directive was adopted shortly before this contribution went to print: Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, OJ 2009, L 33/10. In the remainder of the text I will refer to both the existing and the new Directive.

18 Distance Selling Directive, i.e. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ 1997 L 144/19.

19 Distance Marketing of Financial Services Directive, i.e. Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ 2002 L 271/16.

20 Consumer Credit Directive, i.e. Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ 2008 L 133/66.

21 The directives speak of the right to 'renounce' the effects of the contract (Art. 5(1) of the Doorstep Selling Directive), of the right to 'cancel' the contract (Art. 15(1) of the Second Life Assurance Directive) or of the right 'to withdraw' from the contract (Art. 5(1) of the existing Timeshare Directive, Art. 6(1) of the new Timeshare Directive, Art. 6(1) of the Distance Selling Directive and Art. 6(1) of the Distance Marketing of Financial Services Directive). In German, the directives use terms such as 'zurücktreten' and 'widerrufen'; in French, terms such as 'le droit de renoncer', 'le droit de résilier' and 'le droit de rétraction' are used. The diverging terms do not imply a difference in meaning, but are rather the expression of a lack of a unitary *system* of European contract law, cf. J. Büßer, *Das Widerrufsrechts des Verbrauchers. Das verbraucherschützende Vertragslösungsrecht im europäischen Vertragsrechts*, (Frankfurt a. M: Peter Lang, 2001), p. 123.

22 An example is the right of withdrawal for a consumer-buyer of a house in Art. 72 of the Dutch Civil Code. This right of withdrawal is somewhat a-typical, as it applies irrespective whether the seller is a professional or also a consumer. Other

rights of withdrawal have developed in contractual practice. A common example is the commercial practice in retail shops that a good may be returned in exchange for the contract price or a credit note if it does not satisfy the buyer's needs. These national and extra-legal rights of withdrawal will, however, be disregarded in this paper as they are of minor importance only to the debate on the regulation of rights of withdrawal at the European level.

The right of withdrawal gives the consumer the right to unilaterally go back on his decision to conclude a contract. As such, it is a far-reaching instrument, protecting one party from another party by restricting the binding nature of the contract. It is, therefore, at odds with the principle of *pacta sunt servanda*, which is commonly regarded as one of the pillars of contract law. That principle maintains that when parties have concluded a contract, they are bound to uphold their word and are required to perform their part of the contract. The right of withdrawal appears to affect the binding force of a contract in its core. It should be noted, however, that the principle of *pacta sunt servanda* is not without its limitations. For centuries, exceptions have been made to it, in particular when one of the parties was not able to freely determine whether it wishes to be bound by that contract. In the view of Canaris, the right of withdrawal may be seen as just another example of the fact that the formal and material notions of freedom of contract need not always coincide, as already follows from more familiar instruments as fundamental mistake, deceit and fraud. In this view, the right of withdrawal is not really at odds with the principle of *pacta sunt servanda*, as the 'pactum', on which the binding nature of the contract is based, is not really founded on freely determined consent by the consumer.[23] Nevertheless, given its far-reaching nature, the use of such an instrument needs justification.[24] Obviously, whether a right of withdrawal is justified is a matter of legal politics and ethics:[25] justification for such an instrument is normally reflected in the function that the legislator wishes it to fulfil. The function it is to fulfil, however, does of course influence the answers to the questions of how long the cooling-off period should last and how the consumer

peculiarities include the extreme short cooling-off period (3 working days) and the fact that not the dispatch, but the receipt principle applies as regards the timeliness of the notice of withdrawal. See for a critical evaluation of the Dutch regulation Jac. Hijma, 'Bedenktijd in het contractenrecht', in: Jac. Hijma, W.L. Valk, *Wettelijke bedenktijd*, preadviezen Nederlandse Vereniging voor Burgerlijk Recht, (Deventer: Kluwer, 2004), with references.

23 Cf. C.-W. Canaris, Wandlungen des Schuldvertragsrechts, Tendenzen zu seiner 'Materialisierung', (2000) 200 *Archiv für die civilistische Praxis* 344. Cf. also Büßer (2001), pp. 133-134; Th. M. J. Möllers, Europäische Richtlinien zum Bürgerlichen Recht, (2002) *Juristenzeitung* 130; W.L. Valk, 'Wanneer is een bedenktijd gerechtvaardigd?', in: Jac. Hijma, W.L. Valk, *Wettelijke bedenktijd*, preadviezen Nederlandse Vereniging voor Burgerlijk Recht, Deventer: Kluwer, 2004, no. 39.

24 Cf. Canaris (2000), p. 345; Valk (2004).

25 Valk (2004), no. 2.

is to effect his withdrawal in case he decides to make use of his right, as these affect the effectiveness of the right of withdrawal and, therefore, contribute to the answer to whether the use of the instrument of a right of withdrawal as such is actually justified.

III. The duration of the cooling-off period and the need for further harmonisation

1. Diverging lengths of the cooling-off period

The lack of coherence of European consumer law is much debated. One of the most debated examples pertains to unification of the right of withdrawal and the associated cooling-off period.[26] One of the main problems is that the directives that have introduced a right of withdrawal, have very different lengths for the cooling-off period, varying from seven calendar days (doorstep selling), ten calendar days (timeshare),[27] seven working days (distance selling), fourteen working days (distance marketing of financial services; consumer credit) up to even thirty calendar days in the case of life assurance contracts. This may lead to confusion for consumers, entrepreneurs and lawyers as to the length of the applicable cooling-off period. Moreover, it causes legal uncertainty in cases where two or more rights of withdrawal are applicable, e.g. in the case of doorstep or distance selling of a timeshare.[28]

The need for further harmonisation of the rights of withdrawal was confirmed in the responses to the Green Paper, as follows from the staff working document published on the website of the Commission. According to this working document, a clear majority of the respondents showed support for unification of the cooling-off period, including 65% of the consumer organisations, 75% of practitioners, and 20 Member States. According to business stakeholders, the remarkable differences between the national legislation of the Member States impede businesses in cross-border situations in dealing with the right of withdrawal and the duty to properly inform the consumer on the applicable duration of the cooling-off period. Given these comments, it is surprising to note that only 44% of business respondents spoke out in favour of harmonisation of the cooling-off periods.[29]

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[26] See further M. B. M. Loos, *Spontane harmonisatie in het contracten- en consumentenrecht* (inaugural address Amsterdam), (Den Haag: Boom, 2006), pp. 35-36.

[27] Under the new Timeshare Directive the consumer will have a cooling-off period of 14 calendar days, see below.

[28] Cf. *Travel Vac SL v Anselm Sanchís*, Case C-423/97, ECR [1999] I-2195, nos. 22, 23 and 26, ECJ 22 April 1999, where the ECJ confirmed that the Doorstep Selling Directive and the Timeshare Directive may both be applicable to the same contract.

[29] Review of Consumer Acquis Document, p. 8.

In the responses to the Green Paper there is a variation in opinion as to the length of a uniform cooling-off period. In particular, it was suggested from the business side that a uniform period of two weeks would be too long and that too long a period would open the opportunity for consumers to abuse their cooling-off period. Moreover, in such a case the period – during which the consumer would have to ensure that the good would remain as new – would equally be prolonged. Conversely, consumer organisations often argued that the existing cooling-off periods are too short; some argued for even longer periods than two weeks for 'complicated' contracts such as timeshare agreements.[30] Some Member States favoured a distinction between two categories of cooling-off periods. For the first category, consisting of the Distance Selling Directive and the Doorstep Selling Directive, a period of ten calendar days is suggested, whereas for the second category a period of fourteen calendar days is preferred. The second category should include at least timeshare agreements, the reason being that the high financial interest and the often long contractual period for these agreements justify a longer cooling-off period.[31] Why a uniform cooling-off period of fourteen calendar days would not be better – because it is easier to handle and to explain – is not explained. In this respect, one should realise that to one contract both the Doorstep Selling Directive and the Timeshare Directive may apply, as follows from the *Travel Vac* decision of the ECJ.[32] In such a case the question of the actual duration of the cooling-off period pops up again, resulting in the familiar uncertainty which now exists. Moreover, as the difference between ten and fourteen days is not all that great, the added value of a more nuanced system does not seem so great anyway.

One should therefore seriously contemplate introducing a uniform regime for the cooling-off period. A possible disadvantage of such a uniform period could be that it may seem somewhat long for some cases, e.g. where an aggressive sales technique was employed but the undue influence has subsided. Nevertheless, the advantages of having a uniform cooling-off period seem to

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30 Review of Consumer Acquis Document, p. 8. Cf. also Working Document of the Commission, Responses to the consultation on Distance Selling Directive 97/7/EC contained in Communication 2006/514/EC, Summary of responses (hereafter: Distance Selling Document), p. 9, where it is mentioned that consumer organisations were said to prefer a cooling-off period of 14 *working* days, what would amount to about three (calendar) weeks. Business were said to prefer a cooling-off period of 7 (calendar) days. Here, the 'ideal' situation for consumer organisations and businesses apparently differ even more. The Distance Selling Document, again, has not received a COM-number. It may be downloaded at http://ec.europa.eu/consumers/cons_int/safe_shop/dist_sell/sum_responses_consultations_en.pdf.

31 See, for instance, the reaction of the Netherlands, p. 22. The reactions of the individual Member States and other respondents may be downloaded at http://ec.europa.eu/consumers/rights/responses_green_paper_acquis_en.htm.

32 *Travel Vac SL v Anselm Sanchís*, Case C-423/97, ECR [1999] I-2195, no. 23, ECJ 22 April 1999.

outweigh the disadvantages thereof.[33] It would therefore seem that, unless there are pressing reasons *not* to introduce a uniform period for all rights of withdrawal, such a uniform period should be opted for.

The European Commission, following the example in Article II.–5:103(3) of the Draft Common Frame of Reference (DCFR)[34], has indeed opted for a uniform duration of fourteen calendar days (Art. 12(1) pCRD). One should recognise that the Proposal only applies to the right of withdrawal in distance contracts and off-premises contracts. However, it is clear that the Commission did take other rights of withdrawal – in particular: timeshare, distance marketing of financial services, life assurance contracts, and consumer credit contracts – into account when drafting the provisions of this Proposal: in almost[35] all of these contracts, the duration of the cooling-off period is or will be fixed at fourteen calendar days.[36]

Is the choice for a uniform period actually a correct decision? Or are there good reasons to opt for a different period, taking into account the interests of both the consumer and the trader? In this respect, one should recognise that the cooling-off period should be sufficiently long for the consumer to be able to actually make use of the right of withdrawal. On the other hand, the cooling-off period should not unreasonably burden the trader with uncertainty as to the finality of the contract concluded. In other words: the interests of both parties need to be balanced in such a manner that the trader is not burdened too much, but the consumer is enabled to make up his mind and then to execute a decision to withdraw. Bearing these considerations in mind, let us now turn to the functions that the rights of withdrawal are meant to serve.

2. Functions of the right of withdrawal

A pressing need to continue the existence of differing lengths of the cooling-off period may, of course, follow from the *function* the right of withdrawal is to fulfil. It has already been remarked that the right of withdrawal is meant to protect a consumer from making rash decisions. Yet, the need for such protection differs.[37] In the cases of doorstep selling and timeshare, the aim was

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33 In this sense also Hijma (2004), no. 50.

34 C. von Bar, E. Clive, H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Interim Outline Edition*, (Munich: Sellier, 2008).

35 The only exception is the case of distance marketing of life insurance contracts, where a cooling-off period of 30 days applies, see Art. 6(1) of the Distance Marketing of Financial Services Directive.

36 Cf. Art. 6(1) of the new Timeshare Directive; Art. 6(1) of the Distance Marketing of Financial Services Directive; Art. 14(1) of the Consumer Credit Directive.

37 Büßer (2001), p. 126, rightly argues that a right of withdrawal often has to fulfil several functions at the same time. For instance, in the case of doorstep selling, the

to protect the consumer from aggressive sales techniques (section III.2.a),[38] whereas in the case of distance selling of goods and services, distance marketing of financial services and consumer credit, it was much more the desire to let consumers and businesses benefit more from the advantages of the internal market by taking away barriers to cross-border trade (section III.2.b).[39] The promotion of the online conclusion of contracts as such could be thought to constitute an independent reason for the introduction or maintenance of a right of withdrawal for distance contracts (section III.2.c). Another ground for the introduction of such a right could be the complex nature of the concluded contract itself and the corresponding need to obtain objective information or advice (section III.2.d).

a) Protecting consumers against aggressive commercial practices

In the case of doorstep selling and timeshare, the seller usually takes the consumer unaware by approaching him at his home or at another locality not perceived as the seller's or service provider's business premises. The seller then may induce the consumer to take a decision he cannot oversee at that moment.[40] In such situations, the consumer is not able to make an informed choice as to whether the goods or services offered to him indeed meet his demands. The right of withdrawal then serves to enable the consumer to rethink his earlier decision, which may or may not have been made under the influence of the actions of the trader. This implies that in such cases, a relatively short cooling-off period would in principle suffice, provided that the consumer can indeed reflect on his decision in peace and quiet, i.e. free from possible duress and therefore outside the company of the trader. From that point of view, the period of seven calendar days mentioned in the current Doorstep Selling Directive seems of sufficient length, provided that such a notice is effective when it is dispatched within the cooling-off period. Obviously, a longer

protection against aggressive sales techniques may have been the main motive for the introduction of the right of withdrawal, but obviously one can also argue that the consumer is deprived from the possibility to assess the qualities of the goods or service offered at the time of the conclusion of the contract. In this respect, any classification cannot be more than indicative in nature.

38 Cf. the Recitals 3 and 4 of the preamble to the Doorstep Selling Directive and Recitals 7 and 11 of the preamble to the existing Timeshare Directive.

39 Cf. Recitals 3 and 4 of the preamble to the Distance Selling Directive, Recitals 3 and 4 of the preamble to the Distance marketing of financial services, and Recitals 6 and 7 of the Consumer Credit Directive.

40 Cf. for Doorstep Selling Canaris (2000), p. 346; G. Reiner, Der verbraucherschützende Widerruf im Recht der Willenserklärungen, (2003) 203 *Archiv für die civilistische Praxis* 9-10; Büßer (2001), pp. 101, 118; Valk (2004), nos. 16-22. Cf. for Timeshare Reiner (2003), p. 10; Valk (2004), no. 24.

cooling-off period would be disadvantageous to traders, but this disadvantage may be outweighed by the advantages of having one uniform duration for the cooling-off period. Where – as is foreseen in the Proposal for a Consumer Rights Directive – the number of form(al) requirements for the conclusion of the contract is much more limited, this may even serve as a counterbalance for a longer cooling-off period.

Where timeshares are concerned, it is much more questionable whether the current cooling-off period of ten or fourteen calendar days is sufficient. In this respect one should realise that timeshare contracts are typically concluded with a consumer who is on holiday and who in practice, often under the influence of the holiday atmosphere (and frequently also of intoxicating substances, such as alcohol and drugs), is not always capable of properly evaluating important decisions. In such cases, to be really effective, the cooling-off period probably should only start to run once the consumer is back home. A rule to that extent, obviously, has the drawback that it causes much uncertainty for the trader as to when the cooling-off period has finally started to run and subsequently when it has elapsed. Moreover, the Unfair Commercial Practices Directive,[41] together with traditional doctrines on absence or vice of consent (in particular: misrepresentation, deceit, fraud and threat) will probably provide sufficient relief for the consumers concerned. In my view, this implies that the possibility that the right of withdrawal will not be effective in all situations cannot justify a different length of the cooling-off period just for timeshare contracts.

b) Taking away barriers to cross-border trade

With regard to distance selling of goods and services it is not so much the need to protect the consumer from existing trade practices, but the (European legislator's) wish to take away barriers that obstruct the development of the internal market.[42] An important psychological barrier in the area of distance selling is the fact that the parties to the contract cannot see each other face-to-face at the moment of conclusion of the contract. Secondly, the consumer

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41 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ 2005 L 149/22.

42 Cf. Recitals 3 and 4 of the preamble to the Distance Selling Directive, Recitals 3 and 4 of the preamble to the Distance marketing of financial services, and Recitals 6 and 7 of the Consumer Credit Directive.

often has problems in picturing the goods or service offered.[43] Furthermore, it will be more difficult for the consumer to better evaluate whether the goods or services offered to him will meet his needs. On the one hand, it is hard to put the necessary questions to the trader. On the other hand, information that is given is often volatile in nature.[44] For these reasons, the consumer is thought to be inclined to purchase the goods or services from the trader operating locally instead of surfing on the Internet and buying it elsewhere – possibly even abroad. It is thought this disadvantage would diminish or be taken away if the consumer were allowed to rethink his decision when he has the good in his hands. He could then examine whether or not the purchased goods meet his expectations, assess their qualities and the reliability of the seller, and reconsider his initial decision.[45] However, the element of ex post quality assessment is not possible in the case of distance selling of services, as the right of withdrawal ceases when the service is rendered.[46] Similarly, in the case of distance marketing of financial services, the right of withdrawal is excluded where the contract has been fully performed by both parties at the express request of the consumer before the cooling-off period has ended.[47]

In any case, for distance contracts the right of withdrawal seems to be aimed at enticing the buyer to engage in cross-border transactions. To my mind, it is doubtful whether that goal justifies the choice for a far-reaching instrument such as the right of withdrawal. An urgent need for protection seems absent here since the consumer will normally not be pressured into concluding a contract. As there is no need to 'cool off', one may wonder whether a cooling-off period should be awarded at all, in any case in the 21st century, where e-commerce has come of age. First of all, it seems unlikely that harmonisation of private law will result in a (substantive) increase in cross-border contracts, as other – arguably more import – barriers such as diverging tax rates and different languages are not taken away.[48] Although harmonisation will certainly take away some barriers for trade within the internal market, the promotion of the internal market is therefore not a convincing argument to introduce or maintain a right of withdrawal. As a consequence, the idea that the right of withdrawal should remove barriers to trade therefore cannot justify a different length of the cooling-off period just for distance contracts.

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43 Cf. H.Chr. Grigoleit, 'Besondere Vertriebsformen im BGB', *Neue Juristische Wochenschrift* 2002, p. 1151; Chr. Wendehorst, in: *Münchener Kommentar*, no. 4 before section 312b BGB; Büßer (2001), pp. 101, 120.

44 Cf. Recitals 11, 13 and 14 of the preamble to the Distance Selling Directive.

45 Cf. Wendehorst, in: *Münchener Kommentar*, no. 4 before section 312b BGB; Valk (2004), no. 26.

46 Cf. Art. 6(3) of the Distance Selling Directive. Cf. also Büßer (2001), pp. 138-139.

47 Cf. Art. 6(2)(c) of the Distance Marketing of Financial Services Directive.

48 See in this respect J.M. Smits, Europa en het Nederlandse privaatrecht, (2004) *Nederlands tijdschrift voor Burgerlijk Recht* 495.

c) Promoting the online conclusion of contracts?

One could argue that a separate argument to introduce and maintain a right of withdrawal is actually the promotion of concluding online contracts as such. In fact, most of the arguments put forward in the previous section are actually based on the idea that if more online contracts are concluded, this will (ultimately?) lead to more cross-border contracts.[49] Looking at it from this angle, one should really focus on taking away barriers for the online conclusion of contracts. In this respect, one should reiterate these barriers:

1. the parties to the contract cannot see each other face-to-face at the moment of conclusion of the contract;
2. the consumer often has problems in picturing the goods or service offered; and
3. it is more difficult for the consumer to evaluate whether the goods or services offered to him will meet his needs.

All of these barriers are, to some extent, valid and true. Yet, this does not seem to be sufficient justification to introduce or maintain a right of withdrawal in distance contracts, as most of the time[50] it is the consumer himself who decides to make use of this method for concluding contracts: he switches on the computer, directs his browser to the website of a trader, and subsequently orders a specific good or service. This objection applies in particular to goods (and to a lesser extent also to services) that the consumer may also purchase in a regular retail shop, where e-commerce has come of age and has developed into just another sales method. Sometimes, another argument is implicitly brought forward: the introduction or maintenance of a right of withdrawal means that the consumer need not engage in difficulties whether or not the goods delivered or the services rendered are in conformity with the contract. However, that argument would equally apply to contracts concluded in a regular retail shop. If this is not perceived as a justification to introduce a right of withdrawal also for such 'normal' contracts, there is no reason to accept it as a justification to maintain a right of withdrawal for distance contracts.

The conclusion, therefore, must be that the right of withdrawal is hardly justified in the case of distance contracts. I take it as a fact that there does not seem to be support for abolishing that right. Yet, one should conclude from the above that there is in any case no reason to have a *different* duration of the cooling-off period for just distance contracts.

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49 Promoting the conclusion of contracts through the Internet would therefore *indirectly* enhance the use consumers and businesses make of the internal market.

50 It may be different in the situation where a consumer is approached directly by the seller or service provider, e.g. in the case of cold calling. One could argue, however, that the problem here is that this situation is not covered by the Doorstep Selling Directive, which would be much more appropriate as similar problems as with 'regular' doorstep selling contracts apply.

d) Complex contracts

Another ground for the introduction of such a right could be the complex nature of the concluded contract itself. In particular contracts pertaining or relating to financial services (including consumer credit contracts and contracts where the purchase of a good or service is combined with the conclusion of a credit contract) are often of such complexity that even a well-educated and well-informed consumer can not easily ascertain whether the service provider's offer meets his demands. In such a case, the consumer might need to obtain objective information or advice. Ideally, he would have done so before the contract was concluded, but it may in fact be difficult for an independent adviser to inform or advise a client if the contract itself has not already been concluded and, therefore, it is not yet clear what exactly the content of the consumer's rights and obligations would be. The mere provision of information – e.g. by imposing obligations on the service provider to inform the consumer – would in such a situation not take away the information asymmetry between the parties: the only thing a consumer could do in such a case, is to obtain independent advice elsewhere afterwards and thus to be able to assess the quality of the service offered, and to determine whether that service meets his subjective needs and specific circumstances. In order to be effectively able to do so, the consumer would have to have the possibility to withdraw from the contract if the advice given to him prompts him to do so.

The complex nature of the product offered by the trader could therefore justify the introduction of a right of withdrawal, in particular in the area of financial services. Moreover, such a right would be useful both in case of distance contracts – as is currently provided by the Distance Marketing of Financial Services Directive – *and* in the case of contracts concluded in the offices of such a service provider. In this respect, it is to be noted that in the case of life assurance contracts, the right of withdrawal already applies irrespective of the manner in which the contract is concluded.

As the consumer needs to seek independent advice and advisers knowledgeable in the field may not be found all that easily – and may not be available immediately – the cooling-off period should be sufficiently long in order to be effective. The periods of fourteen calendar days opted for in the Distance Marketing of Financial Services Directive and in the Consumer Credit Directive seem sufficiently long to at least receive timely preliminary advice, provided that the consumer undertakes to obtain advice without too much hesitation.[51] The period of thirty calendar days accepted for life assurance contracts, on the other hand, seems unreasonably long.

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[51] The service provider should, of course, not be burdened with the fact that a hesitant consumer may not be able to obtain independent advice in time.

3. Conclusion as to the optimal duration of the cooling-off period

It is not easy to establish what an optimal duration for the cooling-off period would be. In deciding on the duration, the differing interests of the consumer and the trader need to be reconciled as much as possible. Moreover, as was argued in section III.1., unless there are pressing reasons *not* to introduce a uniform period for all rights of withdrawal, such a uniform period should be opted for. In the previous section we have identified the reasons for introducing and maintaining the right of withdrawal. In the case of distance selling, it is debatable whether there (still) is sufficient justification to maintain the right of withdrawal. This implies that the optimal duration for the cooling-off period should not take too much account of the distance selling situation in this respect. In the case of doorstep selling, timeshare and complex contracts, a right of withdrawal seems indeed to be justified. The optimal duration for the cooling-off period should therefore respect the needs that follow from the conclusion of such contracts. From this it follows that a cooling-off period of fourteen calendar days is needed but sufficient in the case of complex contracts. Such a period would in most cases also be sufficient for timeshare contracts and certainly for doorstep selling contracts (where a shorter period would probably also have been acceptable). The fourteen calendar days period opted for in Article 12(1) of the Proposal for a Consumer Rights Directive therefore seems to be optimal indeed.[52]

IV. Start and end of the cooling-off period

1. The start of the cooling-off period

In order for the right of withdrawal to be effective, the consumer needs to be informed thereof. With the exception of the Second Life Assurance Directive, all directives that have introduced a right of withdrawal include such an obligation for the trader to inform the consumer of his right of withdrawal, albeit that the details differ – especially as regards the consequences of a failure to properly inform. In the Doorstep Selling Directive, the cooling-off period starts when the contract is concluded and the consumer has received written notice from the trader of his right of withdrawal.[53] Therefore, as the ECJ confirmed in the *Heininger*-case, the cooling-off period does not start before the consumer is informed of his right of withdrawal.[54] Failure to inform the consumer of his

[52] In this sense already M. B. M. Loos, The case for a uniformed and efficient right of withdrawal from consumer contracts in European Contract Law, (2007) 1 *Zeitschrift für Europäisches Privatrecht* 32.

[53] Cf. Art. 5(1) and Art. 4 of the Doorstep Selling Directive.

[54] Cf. *Heininger v Bayerische Hypo- und Vereinsbank*, Case C-481/00, ECR [2001] I-09945, nos. 44-48, AG ECJ 13 December 2001.

right of withdrawal thus implies that the cooling-off period never starts to run and therefore does not end. As a consequence, the consumer may withdraw from the contract, if need be, even years after the contract was concluded.[55] National law may, however, provide that the cooling-off period does end when a month has passed after both parties have fully performed their obligations under the contract.[56] Similarly, in the case of a distance contract pertaining to financial services and in the case of a consumer credit contract, the cooling-off period only starts when the contract is concluded *and* the trader has fulfilled his information duties.[57] Again, if the information has not been provided, the cooling-off period does not start to run. Under the existing Timeshare Directive the cooling-off period starts when both parties have signed the timeshare contract or a binding preliminary contract, whether or not the consumer was informed of his right of withdrawal or other rights and obligations. A failure to provide the information only leads to a (limited) extension of the cooling-off period.[58] Under the new Timeshare Directive, however, the cooling-off period only starts to run when the information has been provided.[59] In the case of distance selling, a division must be made between the sale of goods and the supply of services. In the former case, the cooling-off period starts when the goods are delivered, whereas in the latter case, the cooling-off period already starts when the contract is concluded (and even ends when the contract, with the agreement of the consumer, is performed during the cooling-off period). In both cases, again, the trader's failure to live up to his information duties does not delay the start of the cooling-off period, but does lead to a limited extension of the cooling-off period.[60]

This means that there are at least four possible moments in which the cooling-off period may start:

1. when the contract (or a binding pre-contract) is concluded (existing rule on timeshare; distance selling of services);
2. when the trader has performed his main obligation under the contract (distance selling of goods);
3. when the trader has performed his information obligation pertaining to the existence of a right of withdrawal (doorstep selling);

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55 In the case *Hamilton v Volksbank Filder*, the consumers withdrew from the contract almost 8 years after the contract was concluded

56 Cf. *Hamilton v Volksbank Filder*, Case C-412/06, ECR [2008] n.y.r., ECJ 10 April 2008.

57 Cf. Art. 6(1) of the Distance Marketing of Financial Services Directive and Art. 14(1) of the Consumer Credit Directive.

58 Cf. Art. 5(1) of the existing Timeshare Directive. The obligation to inform the consumer of his right of withdrawal follows from Art. 4 of the directive in conjunction with the Annex sub l of the Proposal for a Consumer Rights Directive.

59 Cf. Art. 6(2) of the new Timeshare Directive.

60 Cf. Art. 6(1) of the Distance Selling Directive.

4. when the trader has performed all of his information obligations (distance marketing of financial services; consumer credit; new timeshare rule).

The issue of the starting point of the cooling-off period was not addressed in the responses to the Green Paper. In the reactions to the consultation on distance selling, it was established that the starting point of the cooling-off period was not unambiguous in the case of distance selling. For instance, in the case of distance selling of prepaid mobile phones the consumer purchases both a good (the mobile phone) and a service (the possibility to make use of the phone during a certain period). When does the cooling-off period start: when the phone is delivered or when the contract is concluded? The starting point of the cooling-off period is also unclear when goods are delivered in batches: does the consumer have a right of withdrawal after every individual delivery, or is the delivery of the first or the last good decisive for the cooling-off period to start running?[61]

These questions originate from the fact that the starting point of the cooling-off period differs whether the distance selling contract pertains to the delivery of goods or the supply of services: were the starting point harmonised, these problems could simply cease to exist. As will be explained below, there is no objective justification for a distinction between the starting moments for the delivery of goods and the supply of services on the basis of a distance contract: why should the buyer of goods be allowed to evaluate the purchased goods after having received them, whereas the purchaser of an online service may only do that prior to the performance of the service? In so far as there should be a right of withdrawal for distance contracts, at least the starting moments should be the same. This implies that option 2 (cooling-off period starts when the trader has performed his main obligation under the contract) should be rejected.

All other options have advantages and disadvantages. Option 1, which implies that the cooling-off period would start upon conclusion of the contract, has the clear advantage of a large degree of certainty as to the start and end of the cooling-off period. Whether or not the consumer is informed of his right of withdrawal is of no relevance as to the starting point; failure to inform the consumer thereof does lead to an extension of the cooling-off period, but that extension is limited by the introduction of a cut-off period. Both measures contribute to legal certainty, which is in the interest of both parties. The drawback of this scenario, however, is that there is a disincentive for the trader to perform his information obligations, as in doing so he may alert the consumer to his right of withdrawal and therefore runs the risk of losing the contract. Options 3 and 4 take away these drawbacks, as the non-observance of the relevant information obligation(s) is effectively sanctioned by delaying the start of the cooling-off period. The disadvantage, obviously, is that a contract could be withdrawn from sometimes long after the parties

61 Distance Selling Document, p. 10.

have started to perform it, as is indicated by the *Heininger*-case. However, one could limit the detrimental consequences thereof by providing, as was done in the *Hamilton*-case, that the right of withdrawal elapses when the contract has been fully performed by both parties and subsequently a relatively short period has elapsed. In such a way, options 3 and 4 serve legal certainty in the same way as does option 1: they provide a clear starting point for the cooling-off period, i.e. when both the contract is concluded and either all information obligations (option 4) or at least the obligation to inform the consumer of his right of withdrawal (option 3) have been performed. Furthermore, they have the advantage that the minimum requirement for a proper functioning of the withdrawal is met: in order for a right of withdrawal to be effective, the consumer needs to be informed thereof.[62]

When determining the optimal rule for the Proposal for a Consumer Rights Directive, one should consider that the Proposal starts from the perspective of full harmonisation, implying that any national rule protecting the consumer better than the existing minimum rules will have to be abolished. This in itself could be considered an argument against option 1, which should be seen as the absolute minimum of consumer protection in the current European directives. Accepting option 1 would amount to lowering consumer protection for most cases. Secondly, one should consider that option 4 has been adopted in the area of the 2002 Distance Marketing of Financial Services Directive and, even more recently, the 2008 Consumer Credit Directive and the 2008 Timeshare Directive. In this respect, it would seem odd to adopt a different rule for other contracts without a convincing argument – which is lacking.

In this respect, the Proposal for a Consumer Rights Directive is simply disappointing: Article 12(2) of the Proposal largely maintains the status quo.[63] As we saw above, apart from the complications as regards information obligations, this means that the starting point of the cooling-off period is normally at or around the moment the contract is concluded.[64] Yet, in the case of distance selling of *goods*, the cooling-off period only starts when the goods are delivered, i.e. when the seller has already performed his main obligations under the contract.[65] At first glance, this later moment for the start of the

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62 Cf. Loos (2007), pp. 20-21.

63 Cf. Art. 12(2) of the Proposal for a Consumer Rights Directive.

64 Under the provisions of the Proposal for a Consumer Rights Directive: in the case of distance selling of services at the moment when the contract is concluded (Art. 12(2), 3rd sentence), in the case of doorstep selling the signing of the order form or, if the contract is not signed on paper, the moment the consumer receives a copy thereof (Art. 12(2) 1st sentence). Similarly, in the case of timeshare, distance marketing of financial services and consumer credit, the signing of the contract or a binding pre-contract (Art. 6 (2) of the new Timeshare Directive, Art. 6(1) Distance Marketing of Financial Services Directive, and Art. 14 (1)(a) Consumer Credit Directive).

65 Art. 12(2) 2nd sentence, pCRD.

cooling-off period seems logical, as the cooling-off period is (also) meant to serve the interests of the consumer to ascertain the nature and the functioning of the goods, which he could not do at the moment of the conclusion of the contract.[66] However, in the case of other consumer contracts where a right of withdrawal is awarded, the cooling-off period always starts to run around the time of conclusion of the contract. In many of these cases, the consumer will not have received the goods or services within the cooling-off period – so he will not be able to ascertain their nature and whether they function properly – and if he does receive them, he may already have lost his right of withdrawal altogether, as is the case with distance selling of services.[67] In particular, it is not clear why this argumentation would be valid for distance selling of goods and doorstep ('off-premises') selling of the same goods, where the consumer is not always able to examine the goods prior to the conclusion either. In doorstep selling practices, the consumer is often only shown one or a few samples but is required to order from a catalogue, where products are also offered that were not shown to the consumer in the form of a sample. So what is so special about distance selling of goods that a fundamentally different starting point is chosen here? Is this just reminiscent of a tradition developed at a time when e-commerce was a novelty and needed to be supported by unorthodox instruments in order for consumers to trust in this manner for concluding contracts? We do not know, as the Commission does not substantiate why a difference needs to be made – or continued, to be more precise, as the existing Distance Selling Directive contains the same distinction.[68] It seems to me, however, that the Commission has failed to seize the moment here to really harmonise the rules on the cooling-off periods.[69]

In the case of doorstep selling, the Proposal does at first glance seem to lead to a new starting point for the cooling-off period. Under the present Directive, the cooling-off period only starts when the consumer is informed of his right of withdrawal.[70] Under the Proposal, the normal starting point will be when the consumer signs the order form.[71] The order form is described as an instrument setting out the contract terms, to be signed by the consumer[72] and is

66 See explicitly Recital (22) pCRD.

67 Cf. Art. 19(1)(a) pCRD.

68 Cf. Art. 6(3) pCRD.

69 Obviously, there are good reasons why the cooling-off period in contracts for the supply of services should not start to run after reception of the service, as in most cases the service cannot be returned or, in the case of software distributed through the internet, the consumer too easily could have made a (then free) copy of the service. But this does not explain why a different rule should apply as regards the supply of goods.

70 Cf. Art. 5(1) in conjunction with Art. 4 of the Doorstep Selling Directive.

71 Cf. Art. 12(2) 1st sentence pCRD.

72 Cf. Art. 2(11) pCRD.

to contain the standard withdrawal form.[73] This implies that at the moment when the contract is concluded, the consumer normally will be informed of the existence of the right of withdrawal and the way in which he can exercise this right. If, however, the contract is not concluded on paper, the cooling-off period only starts when the consumer receives a copy of the order form on another durable medium.[74] In fact, this means that in reality, the cooling-off period will start for doorstep selling contracts when the trader has performed all of his information obligations. In this respect, the European Commission has therefore opted for option 4.

However, the wording of Articles 10 and 12 pCRD raises the question of what is to happen if the order form is on paper, but the consumer is not given a copy thereof. Although the ideas underlying the proposed Directive undoubtedly imply that the consumer is given such a copy, no provision actually requires the trader to do so: the Proposal merely requires the order form to contain the required information in plain and intelligible language and in a legible manner, and that the contract is signed.[75] Moreover, under the present draft, the cooling-off period may even start before the contract is concluded, i.e. in the case where the consumer signs the order form before the trader is legally bound to the contract. In theory, it may even be that the consumer has already lost his right of withdrawal before the contract is ultimately concluded. I assume the European Commission has not intended this. However, as the Proposal explicitly forbids the Member States to impose further formal requirements on the trader,[76] or – given the full harmonisation purpose of the proposed Directive – to provide that the cooling-off period does not start to run before the contract is concluded, these situations cannot be remedied by the Member States arguing that such measure is necessary for the *effet utile* of the proposed Directive. This implies that if the differing starting points are not harmonised, at least these problems should be remedied by the European Commission.

By largely maintaining the status quo, the Commission has probably chosen the worst option available. The unjustified distinction between the sale of goods and the supply of services on the basis of a distance contract is not taken away. There still is no telling when the cooling-off period starts in the case of the sale of a prepaid phone or the delivery of goods in batches. In addition, the different approach between distance contracts and other 'off-premises' contracts is maintained. In other words: in this respect, the review has simply failed.

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73 Cf. Art. 10(2) pCRD.

74 Cf. Art. 12(2) 1st sentence pCRD.

75 Cf. Art. 10 1st and 2nd sentence pCRD.

76 Cf. Art. 10(3) pCRD.

2. The trader's breach of information obligations and the end of the cooling-off period

The situation is different where it concerns the end of the cooling-off period; here large differences also exist in the case where the trader has not informed the consumer of his rights. Under the Distance Marketing of Financial Services Directive and the Consumer Credit Directive, as the cooling-off period does not start to run before the information obligations have been met, the consumer might be able to withdraw from the contract long after it has been fully performed by both parties. The same holds true for doorstep selling in so far as the consumer was not informed of his right of withdrawal, albeit that under the *Hamilton*-case a Member State may provide that the right to withdraw ends after a relatively short period has elapsed once both parties have fully performed the contract.[77] Under the Distance Selling Directive and the existing Timeshare Directive, however, a breach of (any of) the information obligations only implies that the cooling-off period is extended to a maximum of three months (in the case of distance selling)[78] or to a maximum of three months plus ten days (in the case of timeshare).[79] Under the new Timeshare Directive, however, the extension will be much longer. If the information on the right of withdrawal has not been provided then the cooling-off period ends when one year and fourteen calendar days have passed after the conclusion of the contract; if other information obligations have not been met then the cooling-off period ends three months and fourteen calendar days after the conclusion of the contract.[80] The new Timeshare Directive seems to have struck the right balance between the interests of both parties: on the one hand, the extension of the cooling-off period by three months in case of breach of 'normal' information obligation seems to provide a proper incentive for the trader to meet these information obligations. Where the consumer is simply left unaware of the existence of his right of withdrawal, a much longer period is offered. An indefinite extension, allowing the consumer to withdraw even years after the contract has otherwise been performed, would not be in the interest of legal certainty and not serve any justified interest on the part of the consumer.

In the Proposal for a Consumer Rights Directive, however, the Commission did not follow the solution introduced in the new Timeshare Directive, nor did it follow the solution adopted under the 2002 Distance Marketing of Financial

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77 See above.

78 Art. 6(1) of the Distance Selling Directive.

79 Art. 5(1) of the Timeshare Directive.

80 Cf. Art. 6(3) of the new Timeshare Directive. In fact, paragraph (3) refers to paragraph (2) as a whole, thus including also limb (b). This would mean that the cooling-off period does not end at the intended date, as it would not have started according to limb (b). Obviously, the reference must be intended to refer to paragraph (1)(a) only, as paragraphs (2) and (3) would otherwise virtually have no meaning.

Services Directive and the 2008 Consumer Credit Directive. Instead, it basically combined the rules in the Doorstep Selling Directive as interpreted by the European Court of Justice in the *Hamilton*-case with the provisions of the Distance Selling Directive: Article 13 pCRD provides that the cooling-off period is extended only in the case of a breach of the obligation to inform the consumer of his right of withdrawal. The extension is restricted to three months after the trader has fully performed his other obligations under the contract. Any other breach of the information obligations is not sanctioned by the proposed Directive itself, but – in accordance with the general provision of Article 6(2) pCRD – left to the Member States. However, it is unclear whether the restriction of the extension of the cooling-off period to three months also applies if the trader has not only breached his obligation to inform the consumer of his right of withdrawal but also other information obligations. As Article 5(3) pCRD explicitly provided that the information to be given under Article 5(1) including that on the existence of a cooling-off period[81] – forms an integral part of the contract, the non-performance of the obligation to inform could prevent the operation of the provision on the ending of the cooling-off period.

However, in most cases the Proposal will be less favourable to consumers than is currently the case for both distance selling and doorstep selling contracts. Under the present Distance Selling Directive, any breach of the information obligations leads to an extension of the cooling-off period.[82] Under the Proposal for a Consumer Rights Directive, however, the cooling-off period is extended only if the trader has not informed the consumer of his right of withdrawal.[83] A breach of any other information obligation is not sanctioned by an extension of the cooling-off period. Instead, and in line with the general provision of Article 6(2) pCRD, the sanction for such a breach of an information obligation is left to the Member States. In the case of doorstep selling contracts, consumers will be worse off under the Proposal as it limits the extension of the cooling-off period to three months after the trader has performed his other contractual obligations, whereas currently the cooling-off period would not start to run before the consumer is informed of his right of withdrawal.

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81 Cf. Art. 5(1)(e) pCRD.

82 Cf. Art. 6(1) of the Distance Selling Directive.

83 Cf. Art. 13 pCRD.

V. Abuse of the Right of Withdrawal

The more recent directives have all explicitly provided that the consumer need not state reasons for his withdrawal.[84] Article 12(1) pCRD merely follows this approach. As a consequence, it is not considered relevant why the consumer wishes to withdraw from the contract. This implies that the consumer may even withdraw from the contract if he could get a better price elsewhere or, after reconsideration, does not like the colour of the goods purchased by way of a distance selling contract. The mere fact that the consumer – for whatever reason – has changed his mind suffices for his withdrawal, provided of course that the right of withdrawal was exercised in good time.[85] Moreover, where the consumer does state reasons, these need not be taken into account, even if they wrongfully resemble an argument for avoidance based on fundamental mistake or termination for non-performance, as long as it can be assumed that the consumer wants to come back on his decision to conclude the contract.[86]

As we saw earlier, under the Doorstep Selling Directive, the Distance Marketing of Financial Services Directive and the Consumer Credit Directive – as well as the suggested option for the Consumer Rights Directive[87] – the trader's failure to inform the consumer of his right of withdrawal implies that the cooling-off period has not started to run, implying that the consumer would still be able to withdraw from the contract years later, provided only that the right of withdrawal has not ceased for another reason.[88] Whether or not the consumer has a valid reason to withdraw, would not be considered relevant, as he need not state any reasons in the first place. This may be problematic. Imagine, for instance, the situation in which a consumer lawyer buys – on the basis of a distance selling contract – a white refrigerator for the kitchen in his new house. The consumer is not informed of his right of withdrawal, but obviously is aware that he has such a right. Two months after the delivery of the refrigerator he realises that a metallic refrigerator would actually look better in his new kitchen. For that reason, he then wishes to invoke his right of withdrawal. The only reason why he would still be able to do so is the fact that the trader had not properly informed him of the right of withdrawal, even though

84 Cf. Art. 5(1) of the existing Timeshare Directive, Art. 6(1) of the new Timeshare Directive, Art. 6(1) of the Distance Selling Directive, Art. 6(1) of the Distance Marketing of Financial Services Directive and Art. 14(1) of the Consumer Credit Directive. The Doorstep Selling Directive keeps silent about the matter.

85 Cf. Canaris (2000), pp. 346-347, who is of the opinion that this price is not too high, given the advantages from the point of view of legal certainty and result. Valk (2004), nos. 3 and 41, considers this 'overkill', but a logical consequence of the notion of a right of withdrawal as such.

86 Cf. Hijma (2004), nos. 43, 59.

87 See above, section 4.

88 Most importantly: the case where apart from the information obligations both parties have performed the contract fully, see above, section 4.

this particular consumer was well aware he had such a right. In such a case,[89] one could argue that a court should apply the doctrine of abuse of right or a similar doctrine[90] in order to prevent the consumer from successfully invoking the right of withdrawal at will.[91] Community law currently would not stand in the way of the application by a national court of such a doctrine in the case of deceit or abuse of a right originating from a European directive.[92] However, one could argue that in the case of rights of withdrawal, which can be invoked by the consumer at will, the European legislator has taken the possibility of abuse of right for granted. In this view, there would not be any room for the application of such a doctrine.[93] In my view, in the interest of legal certainty a hard and fast rule allowing consumers to withdraw if the set requirements are met is preferable over a rule that takes individual circumstances pertaining to this particular consumer into account – thus leaving room for litigation over the question whether or not these individual circumstances justify a restriction of the right of withdrawal in this particular case. In this situation, the costs of (possibly) achieving justice in the individual case are too high in view of the benefits thereof, taking into account that the trader has it under his own control to prevent the prolongation of the cooling-off period by performing his obligation to inform. In my view, the doctrine of abuse of right should therefore not be applied in these cases.

VI. Form Requirements for Withdrawal

Another important matter is how the consumer must express his decision to withdraw from the contract. The current European directives do not provide one uniform answer as to how the consumer is to withdraw from the contract. The Distance Selling Directive and the existing Timeshare Directive only

89 Whether this situation would constitute an exceptional case justifying the disapplication of the right of withdrawal may of course be questioned, but that is beside the point I wish to make here.

90 Depending on the national law of the court; one may think of doctrines such as estoppel, *Rechtsverwirkung* and good faith and fair dealing.

91 Cf. Ulmer, in: *Münchener Kommentar*, no 65 before Section 355 BGB; Reiner (2003), p. 27; Hijma (2004), nos. 67-68, who argue that in exceptional cases such doctrines could be applied. In this sense also BGH 19 February 1986, VIII ZR 113/85, *Entscheidungen des Bundesgerichtshofs in Zivilsachen* (BGHZ) 97/127 under II. 4, where the *Bundesgerichtshof* ruled that a court may only in the case of very limited exceptions ('*nur in eng begrenzten Ausnahmefällen*') accept that the consumer abuses his right of withdrawal.

92 Cf. *Kefalas v Greece*, Case C-367/96, ECR [1998] I-2843, ECJ 12 May 1998.

93 Cf. Büßer (2001), pp. 137-138, who, however, makes an exception for the situation, described here, where the consumer actually knew of the existence of his right of withdrawal (pp. 178-179).

require notification of the withdrawal, but allow the notification to take place by any means as no mention is made of any form requirement, implying that such requirement is not allowed. However, under the Timeshare Directive, where the consumer notifies his withdrawal in writing, the right of withdrawal is considered to have been exercised in good time if the notification is dispatched before the cooling-off period expires.[94] From this one may deduce that a notice need not be in writing in order to be effective. The new Timeshare Directive, however, requires a notification on paper or on another durable medium.[95] Under the Distance Marketing of Financial Services Directive and the Consumer Credit Directive, notification of withdrawal is required by any means that can be proven *in accordance with national law*.[96] Where national law, as a matter of proof, requires a statement or a statement on a durable medium, the consumer's notice will have to abide with that requirement. At first glance the most restrictive approach is taken by the Doorstep Selling Directive, which provides that the consumer may withdraw from the contract 'by sending notice'.[97] This does suggest that a written statement is required. However, the ECJ has explicitly ruled that the Directive 'does not preclude a Member State from adopting rules providing that the notice of renunciation provided for by Article 5(1) of the [Doorstep Selling] Directive is *not* subject to any condition as to form'.[98] The Doorstep Selling Directive dates back from before the emergence of electronic commerce; it is clear that any rule based on this provision should take account of the current possibilities for concluding and ending contracts by electronic means. This implies that a similar rule as adopted in the new Timeshare Directive would then be opted for.

In short, three different rules apply as regards the requirements that may be posed on the notification of the withdrawal:

1. notification of withdrawal is possible by any means (existing timeshare rule; distance selling);
2. notification of withdrawal is possible by any means that can be proven in accordance with national law (distance marketing of financial services; consumer credit);
3. notification of withdrawal should be in writing or on a durable medium (doorstep selling, as amended for the electronic age; new timeshare rule).

The second option implies that the applicable national law is to decide upon the validity of the notification. Such a rule is problematic in cases where the consumer has concluded an international contract without being aware

94 Art. 5(2) 2nd sentence of the existing Timeshare Directive.

95 Art. 7 1st sentence of the new Timeshare Directive.

96 Cf. Art. 6(6) of the Distance Marketing of Financial Services Directive and Art. 14(3)(a) of the Consumer Credit Directive.

97 Cf. Art. 5(1) of the Doorstep Selling Directive.

98 Cf. *Travel Vac SL v Anselm Sanchís*, Case C-423/97, ECR [1999] I-2195, nos. 50-52, ECJ 22 April 1999, (emphasis added by author).

thereof; this may occur in particular in the case of distance contracts. In many cases, such a contract would be governed by the law of the trader, which may impose requirements unfamiliar to the consumer as to the proof of his withdrawal. Even though this is the option chosen in the two most recent directives awarding the consumer a right of withdrawal, it should be rejected as the possible rule for a Consumer Rights Directive. This leaves us with the 'liberal' rule of option 1, and the more stringent option 3.

It is clear from the responses to the Green Paper that there is a need for harmonisation of the manner in which the right of withdrawal is to be exercised. Such a uniform regulation would lead to simplification and legal certainty. Consumer organisations generally prefer not to introduce form requirements as to the notification of withdrawal (the simpler, the cheaper and more effective the right of withdrawal is), implying a preference for option 1. From the business side, and even some consumer organisations, a form that allows for proof of the withdrawal – a registered letter, an e-mail or a fax message – is sometimes preferred (option 3). The European Parliament advocates the introduction of a standard form, drafted in all the official languages of the Community. Such a standard form should serve to meet several concerns of the Parliament: simplifying procedures, saving costs, increasing transparency and improving consumer confidence.[99] Such a standard form is also suggested in the reactions from consumer organisations to the distance selling consultation.[100] The Member States are divided on the matter of form requirements.

The manner in which the consumer may withdraw from the contract has been explicitly regulated in the Draft Common Frame of Reference.[101] Under Article II.–5:102 DCFR, the consumer need only give notice of his wish to withdraw from the contract, without having to specify the reasons for doing so. From Article II.–1:106 DCFR it follows that the notice may be given by any means appropriate to the circumstances and that it becomes effective when it reaches the trader. That is considered to always be the case if the notice is delivered to the trader in person or when it is delivered to the trader's place of business. The drafters of the DCFR thus have chosen in favour of option 1. In the comments to the Acquis-Principles, which have formed the underlying data upon which the DCFR is based in this area, this choice is explained by pointing out that it is at least questionable as to whether the introduction of any form requirement could be regarded as an improvement of the *acquis communautaire*. It is acknowledged that the observance of a specific form may help to verify the actual events – which is in the interests of both parties – and as such could help the consumer to prove he has indeed exercised his right of withdrawal. However, such formal requirements make it more complicated for the consumer to withdraw at all. Moreover, the argument that a requirement as to textual form in writing on a durable medium could serve as proof of the

[99] Review of Consumer Acquis Document, p. 9.

[100] Distance Selling Document, p. 9.

[101] On the DCFR, see Loos (2008), pp. 2-5, with references.

withdrawal is required as false: in fact, 'anything short of a registered letter could fall short of this function' of the form requirement.[102] In the view of the drafters of the DCFR and the Acquis-Principles, the notice should only serve to inform the trader of the withdrawal. The form of the notice, therefore, should not matter. For that reason, a notice by text message (SMS) sent to a mobile phone number indicated on the trader's business card should suffice for a valid withdrawal.[103] Moreover, returning the subject matter of the contract (e.g. the goods delivered) equally shows the trader that the consumer no longer wishes to be bound by the contract. As a consequence, it should also be considered to be a withdrawal. Therefore, following the example set by Germany,[104] Article II.–5:102, third sentence, of the DCFR explicitly provides that returning the subject matter of the contract is considered a tacit withdrawal.[105]

Given this – in my view: convincing – choice in favour of option 1, it is at least surprising that the Proposal for a Consumer Rights Directive and the new Timeshare Directive opt in favour of option 3.[106] Moreover, the way in which the Commission has worded the form requirement raises serious problems. According to Article 14(1) pCRD, the consumer may choose to express his withdrawal in his own words or on a standard withdrawal form to be supplied by the trader, with such order form to meet the requirements of Annex I to the Proposal for a Consumer Rights Directive. Moreover, but apparently only in the case of a distance contract concluded over the Internet, the consumer may also make use of an electronic standard withdrawal form on the trader's website if the trader decides to provide for such an additional possibility.[107] Apart from this additional possibility, however, the notification must be given on a durable medium.[108] This notion is defined in Article 2(10) pCRD as:

> any instrument which enables the consumer or the trader to store information addressed personally to him in a way accessible for future reference for

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102 Cf. P. Møgelvang-Hansen, E. Terryn and R. Schulze, Comments to Article 5:102 Acquis Principles under no. 5, in: Research Group on the Existing EC Private Law (Acquis Group), *Principles of the Existing EC Private Law (Acquis Principles), Contract I, Pre-contractual Obligations, Conclusion of Contract, Unfair Terms*, (Munich: Sellier, 2007), p. 163.

103 Cf. S. Leible, J. Pisulinski and F. Zoll, Provisional Comments to Art. 1:301 Acquis-Principles under no. 3, in *Acquis Group* (2007), p. 39.

104 Cf. Section 355(1) BGB.

105 In this sense also Art. 5:102, 3rd sentence, Acquis-Principles.

106 As indicated above, in the 2008 Consumer Credit Directive a choice in favour of option 2 was made. However, this option should be rejected for the reasons explained above.

107 Art. 14(2) pCRD.

108 Art. 14(1) pCRD.

> a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.[109]

Obviously, this rules out an oral notification. However, much more problematic is that under the current draft of Articles 2 and 14 pCRD (and under Arts. 2 and 7 of the new Timeshare Directive), a withdrawal may not be notified to the trader by sending an e-mail. It is clear that the e-mail itself is not an instrument, which satisfies the requirements of Article 2 pCRD. The preamble to the Proposal (Recital 16) further clarifies that:

> The definition of durable medium should include in particular documents on paper, USB sticks, CD-ROMs, DVDs, memory cards and the hard drive of the computer on which the electronic mail or a PDF-file is stored.

From this it unequivocally follows that it is not the e-mail itself, but the hard drive of the computer on which the e-mail is stored, that would qualify as 'durable medium'. This, clearly, cannot have been the intention of the European Commission, as even in cases where the contract was concluded electronically, a written statement of a statement on a USB-stick or another medium would be required. If the Commission were to stick with its choice for option 1, it should at least reconsider the wording of Articles 2 and 14 pCRD (and Arts. 2 and 14 of the new Timeshare Directive), in any case for those contracts that were concluded electronically or where the trader advertises or otherwise has informed the consumer of an address for electronic mail or communication through a website. However, it would be much simpler if the Commission would simply indicate that notice could be given by any means.

If the Commission would not ultimately change its course and choose option 1, the question arises of how to deal with the situation in which the consumer has not met the form requirement but the trader has nevertheless become aware of the consumer's intention to withdraw from the contract within the cooling-off period. This situation may arise, in particular, where the consumer has returned the goods during the cooling-off period to the trader without explicitly withdrawing from the contract. Should such a de facto withdrawal be considered valid even though the form requirement has not been met? In my opinion, this should be the case. The purpose of the form requirement is primarily of an evidentiary nature. The form requirement is not based on the need for protection of a fundamental interest of the trader as such, but only seeks to safeguard the trader's need for a clear, unequivocal statement by the consumer, whereas that objective has apparently been achieved in the particular case at hand. Moreover, maintaining the form requirement rigorously would contradict the purpose of the relevant directive, i.e. the protection of the consumer, who may very well be ignorant of the importance or the meaning of the form requirement. Requiring and maintaining a specific

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[109] Art. 2(10) pCRD. In this sense also Art. 2(h) of the new Timeshare Directive.

form for the notice of withdrawal would then turn against the consumer, as the trader could invoke the absence of a valid notice – and therefore the fact that the contract remained in force – even in cases where it was undisputed or proven that the consumer had withdrawn from the contract in good time.[110] This is even more pressing in the situation in which the trader had not properly informed the consumer of his right of withdrawal or had not provided the required standard withdrawal form.

VII. Receipt or dispatch principle in case of written notice

Even when the declaration of withdrawal need not be in written form, in order to be able to prove the (timely) delivery of the notice it will nevertheless often be in the consumer's interest to dispatch his notice of withdrawal in writing.[111] However, sending a written notice may lead to difficulties as regards the timeliness of the withdrawal. In many legal systems, a notice becomes effective (only) when it reaches the addressee (receipt principle).[112] This is usually understood as implying that if a time limit applies as regards the giving of notice, the notice must have become effective before the time limit has elapsed. For the right of withdrawal, this would mean that the notice of withdrawal is only then effective if it is received by the trader within the cooling-off period. This is problematic, in particular, if the cooling-off period is short. It may also be problematic if the period is longer, but the postal services are reputedly slow. This is notoriously the case in cross-border situations, where letters sometimes first are shipped to the capital of the country where the consumer lives, from there to the capital of the country where the trader resides, and from there to the trader himself. Finally, no matter how long the cooling-off period is, the receipt principle will always be problematic if the consumer only decides to make use of his right of withdrawal shortly before the end of the cooling-off period.

Therefore, if the receipt principle were to apply in the case of a right of withdrawal, the period available for timely withdrawal would in practice often be considerably shorter than would appear from the black letter text of the applicable law. Especially in cross-border cases, the receipt principle would endanger the effectiveness of the right of withdrawal. This clearly plays a

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110 For this reason, the Dutch government did not introduce a form requirement as regards the notice of withdrawal for the sale of a house to a consumer. Cf. *Bijlage Handelingen Tweede Kamer* 1995/96, 23 095, no. 8, p. 6.

111 Cf. *Bijlage Handelingen Tweede Kamer* 2001/02, 23 095, no. 14, p. 20 as regards the Dutch withdrawal by a consumer from the sale of a house.

112 Cf. the notes to Art. 1:303 of the Principles of European Contract Law (PECL). Art. 1:303 PECL also accepts the receipt principle as the main rule, but recognises an exception in the case of non-performance, where the dispatch principle is accepted.

role in the case of timeshare, where the buyer often lives in a country other then where the contract is concluded, where the seller resides and where the immovable property is located. Not surprisingly, in the original Timeshare Directive, the European legislator set aside the receipt principle and accepted the dispatch principle. Under this principle, the notice is effective when it is dispatched during the cooling-off period,[113] provided of course that it eventually reaches the addressee. The same solution had been adopted earlier in the Doorstep Selling Directive[114] and was accepted in the case of distance marketing of financial services,[115] and, recently, in the Consumer Credit Directive.[116] Unfortunately, in the case of distance selling – where the promotion of the internal market by removing barriers for cross-border transactions is said to be the reason for introducing a cooling-off period – and the case of life assurance,[117] the Directives are silent about the applicability of either the receipt or the dispatch principle. Whereas the Second Life Assurance Directive explicitly leaves both the consequences of a successful withdrawal and the conditions under which the withdrawal is to take place to the national legal systems,[118] the Distance Selling Directive simply ignores the matter. As explained above, in many legal systems this could be understood as tacit acceptance by the European legislator of the *receipt* principle for these rights of withdrawal.[119] However, if the Consumer Rights Directive were enacted as is now proposed, this possible misunderstanding would be clarified, as Article 12(3) pCRD explicitly indicates that the deadline set for the end of the cooling-off period is met 'if the communication concerning the exercise of the right of withdrawal is sent by the consumer before the end of that deadline'.

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113 Cf. Art. 5(2) of the existing Timeshare Directive and Art. 7 3rd sentence of the new Timeshare Directive.

114 Cf. Art. 5(1) of the Doorstep Selling Directive; cf. Bartels/Sander (1998), pp. 93-94.

115 Cf. Art. 6(6) of the Distance Marketing of Financial Services Directive.

116 Cf. Art. 14(3)(a) of the Consumer Credit Directive.

117 Unless the Distance Marketing of Financial Services Directive applies, as it follows from Art. 6 of that directive that in that case the dispatch principle would apply.

118 Cf. Art. 15(1) 3rd sentence of the Second Life Assurance Directive.

119 Indeed, the Dutch government explicitly rejected the dispatch principle for distance contracts. During the parliamentary proceedings of the implementation act, the Dutch government explicitly argued that the receipt principle applies, in accordance with the main rule of national law in Art. 3:37(3) BW, cf. *Bijlage Handelingen Tweede Kamer* 1999/2000, 26861, no. 5, pp. 23-24; in this sense also Büßer (2001), pp. 188-189.

VIII. Consequences of withdrawal

Once the consumer has successfully withdrawn from the contract, performances rendered under the contract must be returned. Even though this principle is recognised in almost all directives, until now the way it is to be realised is largely left to national law.[120] The fact that the performance must be returned entails a risk particularly for the seller of goods, both in the case of distance selling and doorstep selling: the seller is required to reimburse the consumer within thirty days after having received the notification of withdrawal[121] without being certain whether the consumer returns the goods properly and in good time.[122] Withholding performance of the obligation to pay back the contract price and additional charges until the consumer has returned the goods is not dealt with under the current directives, and it is unclear whether the directives would allow the seller to do so as neither the Doorstep Selling Directive nor the Distance Selling Directive sets a period for performance of the consumer's obligation to return the goods. The Doorstep Selling Directive also is silent on the period within which the trader is to return any payment received from the consumer. The Distance Selling Directive, however, does require the seller to reimburse the consumer within thirty days.[123] Under the Proposal for a Consumer Rights Directive, the imbalance is restored in two ways. Firstly, the consumer is required to return the goods within fourteen days from the date that he communicates his withdrawal to the seller (Art. 17(1) pCRD). The seller therefore no longer will need to set a period for performance of the obligation to return the goods before the consumer is put in default. Secondly, until

120 Cf. Art. 7 of the Doorstep Selling Directive, Art. 6 of the existing Timeshare Directive, Art. 6(2) of the Distance Selling Directive, and Art. 15 of the Second Life Assurance Directive. Only the Distance Marketing of Financial Services Directive contains an extensive Article on the consequences of the withdrawal, cf. Art. 7 of that directive. Art. 14(3)(b) of the Consumer Credit Directive indicates that where the consumer withdraws from a consumer credit contract, he must pay back any sums received under the contract with the interest accrued thereon without any undue delay and in any case within 30 days he sent his notice of withdrawal to the creditor. Art. 8(1) of the new Timeshare Directive only indicates that the withdrawal terminates the obligation of the parties to perform the contract.

121 See Art. 6(2) of the Distance Selling Directive. Similarly also Art. 16(1) of the Proposal for a Consumer Rights Directive.

122 In the responses to the Green Paper, businesses argued that a seller should only be required to return the payment of the price when the good is returned in its original packaging and with the associated parts, cf. Distance Selling Document, p. 9. Where it is not possible to test the goods without damaging the original packaging, such a requirement would effectively exclude the right of withdrawal, which implies that this requirement should not be accepted. However, apart from that the demand from the business side is of course justified.

123 See Art. 6(2) of the Distance Selling Directive.

the moment the consumer has returned the goods or has supplied evidence of having sent back the goods,[124] the seller may withhold performance of the obligation to reimburse the consumer (Art. 16(2) pCRD). These provisions are certainly an improvement to the current situation. Article 17(1) pCRD does, however, not answer the question of whether the seller must have obtained possession of the goods within that period. In other words: should the goods have been received by the seller within the fourteen day period, or may the consumer hand over the goods to the postal services or a carrier on the last day of the fourteen day period in order to properly perform his obligations under this paragraph? In order to prevent litigation on this question, a specific provision should be added indicating that the consumer need only hand over the goods to the postal services or a carrier within the fourteen day period.

In the responses to the Green Paper, opinions varied as regards the question of who is to carry the burden of returning goods purchased at a distance. Consumer organisations alleged that withdrawing from a contract should not lead to any costs for the consumer and that it would be efficient if the costs of returning goods bought at a distance were to be borne by the seller. Conversely, some business stakeholders and Member States expressed the view that consumers, regardless of the nature of the contract, should bear the costs of withdrawing from the contract in order to prevent abuse and excesses.[125] The business world argued that when a consumer buys a good in the brick and mortar-world and wishes to return it, he also must bear the costs of transportation.[126] Another part of the respondents simply supported the status quo and do not wish to harmonise the matter. These respondents argued that the different sales techniques have different consequences and that sector-specific regulation remains necessary for that reason. Moreover, both groups of respondents argue that if the withdrawal would not cost the consumer anything, this would ultimately lead to a general increase of prices for all consumers, as the costs are ultimately redistributed over all consumers. It should be noted, however, that the Member States that argue in favour of having the consumers pay for returning the goods in case of withdrawal do make an exception for the case where a consumer withdraws from the contract because the goods or services delivered do not conform to the contract.[127] In my opinion this exception is justified: although it is true that a consumer in the case of a non-conforming good does not immediately have the right to terminate the contract due to the hierarchy of remedies for non-conformity,[128] it would be rather odd to use this argument to have the consumer cover the costs of returning that non-conforming good if the consumer wants to withdraw from the contract precisely because the good is defective. In this respect, one should bear in mind that the costs of

[124] E.g. a photocopy of a shipping or postal order.

[125] Review of Consumer Acquis Document, pp. 9-10.

[126] Distance Selling Document, p. 11.

[127] Distance Selling Document, p. 11.

[128] Cf. no. 4.3.

returning the good would burden the seller anyway if the consumer would opt for repair or replacement, as he is entitled to under the Consumer Sales Directive. However, the problem with such a rule is that it would lead to questions of proof whether the good delivered was in conformity with the contract, a question which the consumer in this case exactly tried to escape from. For this reason, a clear rule burdening the consumer with the costs of return of the goods if he chooses to withdraw from the contract seems preferable over a more detailed but in practice mostly unenforceable rule. For this reason, I agree with the choice made in the Proposal for a Consumer Rights Directive.[129] Of course, where the consumer wishes to avoid these costs, he would of course still be entitled to invoke the remedies for non-conformity.

IX. Use of goods during cooling-off period

Harmonising the starting point for the right of withdrawal would have had the additional advantage of not having to deal with the consequences of use of the goods during the cooling-off period, as this use would in most cases have been for a very short period anyway. This would apply as well if option 3 or – preferably – option 4, as set out in section IV were chosen, provided that once both parties have fully performed their other obligations under the contract, the right of withdrawal ends when a relatively short period has elapsed – as was the case in the *Hamilton*-case. However, as the European Commission has chosen to maintain the status quo, in the case of distance selling of goods the cooling-off period only starts to run once the goods have been delivered. As a consequence, the problem of use of the goods during the cooling-off period becomes more pressing.

At present, it is unclear to what extent the consumer may use the goods during the cooling-off period. In this respect, it should be noted that in many cases, such use would render the good to become second-hand, whereas in some cases – e.g. in the case of software installed on a computer – it is not even possible to prevent the consumer from using the good after withdrawing from the contract and returning the CD-ROM on which the software was located. Nevertheless, as the right of withdrawal – at least also – is meant to enable the consumer to assess the qualities of the goods offered, the consumer must be allowed to test the goods to a certain extent. Obviously, this implies that the consumer may open the packaging, even if this would mean that the goods can no longer be sold to another consumer in the event that this particular consumer makes use of his right to withdraw.[130] However, where 'testing' evolves into simply using the good, the right of withdrawal should lapse.

Given the problems for sellers to resell the goods returned to them after withdrawal from the contract by a consumer, it is understandable that sellers

[129] Cf. Art. 17(1) 2nd sentence of the Proposal for a Consumer Rights Directive.

[130] Cf. Büßer (2001), pp. 238-239.

try to minimise the use of delivered goods, which are still susceptible to a right of withdrawal, as much as possible. One way of doing so is by trying to invoke exceptions to the right of withdrawal. Where these exceptions cannot be relied upon by the seller, other evasive techniques are invoked. To defend their interests, some sellers stipulate in their standard contract terms that 'in the case of return of the goods' the goods must be returned undamaged and in their original packaging. In any case when the goods were vacuum-packed, this is impossible in practice. Clearly, this practice is at odds with the idea that the cooling-off period, expressed in Recital 22 of the preamble to the proposed Directive, is (also) meant to enable the consumer to ascertain the nature and the functioning of the goods. In such standard contract terms, the notion of 'withdrawal' is explicitly avoided, as in that case the breach of the Directive would have been too obvious, thus leaving room for the interpretation that the clause only pertains to contractual rights of withdrawal or possibly claims for non-conformity. Nevertheless, there is a serious risk that, when confronted with the term, the consumer will simply take it that he is not entitled to withdraw from the contract. For this reason, I think such clauses should be seen as unfair contract terms.

Other techniques primarily centre on the borderline between 'testing' and 'using' the goods delivered. Clearly, there is a risk here that sellers or service providers will try to uniformly define what constitutes 'use' by determining (in standard contract terms) that opening the packaging of the goods amounts to a waiver of the right of withdrawal.[131] If such a clause were to be accepted, it would in fact become virtually impossible to assess the qualities of the good without causing the right of withdrawal to lapse. Such a provision therefore undermines the consumer's rights under the Distance Selling Directive or the future Consumer Rights Directive and should not be given effect. What is to be considered in this respect is that '(continued) use' cannot be left to the parties, but needs to be determined objectively by a court of law. However, when the seller proves that the consumer has indeed *used* the good (and not only tested it), in my view the consumer should no longer be able to withdraw from the contract, even if he had not been informed of his right of withdrawal.[132] Of course, if the good does not have the qualities the consumer could have expected it to have then the consumer should be able to claim the remedies for non-conformity. However, I fail to understand why he should be able to surpass the requirements for such remedies by invoking the right of withdrawal.

The current practice may, to some extent, have been caused by an omission in the current directives. At present, the Distance Selling Directive and the Doorstep Selling Directive do not indicate what is to happen if the goods are damaged during the cooling-off period. Not surprisingly, in their reactions

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131 Such clauses are in fact common practice, as is demonstrated by S.E. Bartels, Ik doe het toch maar niet, (2004) *Nederlands tijdschrift voor Burgerlijk Recht* 165.

132 In this sense also Art. 7(1) of the Italian Doorstep Selling Act, as quoted by Büßer (2001), pp. 150-151, who disagrees on this point, cf. Büßer (2001), pp. 150-152.

to the Green Paper businesses insisted on clarifying what claims a seller has when the goods are used.[133] Business also argued that a consumer should be explicitly required to take proper care of the good as long as it is in his possession.[134] There is no reason to object to this particular rule. Such an obligation already exists in many Member States, either as an explicit obligation or as a consequence from general rules of contract law, in particular from the principle of good faith.

In this respect, the DCFR answers to the demands made by the business side, but probably not entirely to its liking. Article II.–5:105(3) DCFR provides that the consumer need not pay for any diminution in the value to the good delivered under the contract caused by inspection and testing and for any damage, destruction or loss to that good, provided that the consumer used reasonable care to prevent such damage. On the other hand, paragraph 4 of this provision adds that the consumer is required to compensate for any diminution in value caused by normal use, unless the consumer was not properly informed of his right of withdrawal. From this it follows that the consumer may test the good and need not compensate the seller for any loss in value or damage caused by doing so. If the testing of the good implies that he must take the good out of its original packaging without being able to put it back in after testing, he is entitled to do so, provided that he exercises reasonable care in order to prevent unnecessary damage to the good. After all, the fact that he may wish to return the good, requires the consumer to take the justified interests of the seller into account. Moreover, if he *continues* to use the good and later on decides to withdraw from the contract, he is liable for further diminution of the value. Given the fact that the consumer is not liable for the diminution of the value or – provided that he has taken reasonable measures to prevent damage – destruction or loss of or damage to the good during the testing phase, it is up to the seller to prove that the consumer did not exercise proper care or that the diminution of the value was caused by normal use of the good after the testing phase had ended.

The Proposal for a Consumer Rights Directive follows the suggestion in the DCFR by stipulating, in Article 17(2), that in the case of withdrawal, the consumer is not responsible for damage which arises by the inspection and testing the goods, but that he is liable to pay damages if he continues to use the goods after the nature and the functioning of the goods have been ascertained and as a result of the continued use, the goods diminish in value. Moreover, if the consumer had not been properly informed of his right of withdrawal, he may not be held liable for the diminished value, the article provides.[135] The wording of Article 17(2) pCRD is, however, not easy to read. Perhaps it would be better if the text were replaced by that of Article II.–5:105(3) and (4) DCFR,

[133] Review of Consumer Acquis Document, pp. 9-10.

[134] Distance Selling Document, p. 9.

[135] Art. 8(2) of the new Timeshare Directive is to the same extent.

which substantively contain the same rules but are written in language that is easier to understand.

X. Exceptions to the right of withdrawal

All directives awarding the consumer a right of withdrawal also list extensive exceptions to that right. Most of the exceptions listed in the Proposal for a Consumer Rights Directive already feature in the existing Distance Selling and Doorstep Selling Directives, with the notable and somewhat surprising exception of *vins de primeur* ('early wines') in the case of distance selling,[136] insisted on by businesses who were afraid of speculating consumers, and by the United Kingdom, which is all the more surprising given the fact that this country most likely imports more of these wines then it exports.[137] Apart from the exception to the right of withdrawal in the case of a distance contract for the supply of services,[138] which was touched upon in section IV.2, I will not deal with these exceptions themselves. The exceptions appear to have been deemed specific for the different modes for contracting and are not harmonised: Article 19(1) pCRD lists the exceptions in the case of distance contracts, with paragraph 2 of the article listing those for doorstep selling contracts.[139]

Article 19(3) pCRD makes clear that the parties are free to agree not to apply the exceptions to the right of withdrawal that are listed in the previous two paragraphs. Article 19(3) thereby reaffirms the principle of party autonomy. Where the parties have chosen to not apply the exceptions listed in Article 19(1) or (2), the other provisions regarding the right of withdrawal will probably apply as well, including the dispatch principle (Art. 12(3) pCRD) as regards the timeliness of the withdrawal and the provisions of Articles 16 and 17 pCRD as regards the mutual obligations of the parties to return the performances rendered. On the basis of the wording of Article 19(3), it seems clear that the same does not apply for mere *contractual* rights of withdrawal.

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136 Art. 19(1)(d) pCRD.

137 See, for references to the responses on the consultation pertaining to the revision of the Distance Selling Directive, M.B.M. Loos, *Review of the European Consumer Acquis*, (Munich: Sellier, 2008), pp. 45-46.

138 Art. 19(1)(a) pCRD.

139 Some changes are made, though. For instance, the exception of the right of withdrawal for goods that 'by reason of their nature, cannot be returned' (Art. 6(3), 3rd indent of the Distant Selling Directive) is not reproduced in the Proposal for a Consumer Rights Directive. R. Becker and C. Föhlisch, Von Dessous, Deorollern und Diabetes-Streifen. Ausschluss des Widerrufsrechts im Fernabsatz, (2008) *Neue Juristische Wochenschrift* 3751-3756, however, argue that the current exception should actually be enlarged as to also cover, for instance, underwear, deodorant sticks and medicines.

XI. Concluding remarks

In this concluding section I will address the question of whether, with regard to the rights of withdrawal and the associated cooling-off periods, the Commission has succeeded in reaching the goals it has set in the process of the review of the consumer acquis. First, did the Proposal lead to the desired harmonisation of the cooling-off periods and the exercise of the rights of withdrawal? And second, has the European Commission indeed struck the right balance between a high level of consumer protection and the competitiveness of enterprises?

As the following subsections will demonstrate, the answer to the first question is clearly negative; whereas the answer to the second question is not unambiguous. On the basis of the findings in subsections 1-7 I will substantiate these statements in subsections 8 (harmonisation) and 9 (balance of interests).

1. Uniform duration of cooling-off period despite limited scope of harmonisation

The first problem, obviously, is the limited scope of the review as such. While the European Commission originally envisaged a full review of the acquis, in 2004[140] it already restricted its efforts to the review of only eight consumer law directives.[141] However, the Proposal only deals with the content of four consumer law directives. In the area of the right of withdrawal, this implies that the Proposal only pertains to doorstep selling and distance selling of goods and services: in particular the Timeshare Directive, the Distance Marketing of Financial Services Directive and the Consumer Credit Directive are not included in the harmonisation process. It is true that these Directives – including the new Timeshare Directive – appear to have been taken into account when determining the duration of the cooling-off period, but apart from that they largely seem to have been neglected. Where they have been taken into account, harmonisation has indeed largely been achieved: with the exception of the atypical case of life assurance contracts, for all cooling-off periods the

[140] Cf. European contract law and the revision of the *acquis*: the way forward, Communication by the Commission to the European Parliament and the Council of 11 October 2004, COM(2004) 651 final, p. 4.

[141] The directives that were mentioned are the Doorstep Selling Directive, the Timeshare Directive, the Distance Selling Directive, the Package Travel Directive (Directive 90/314/EEC, OJ 1990 L 158/59), the Unfair Contract Terms Directive (Directive 93/13/EEC, OJ 1993 L 95/29), the Price Indication Directive (Directive 98/6/EC, OJ 1998 L 80/27, the Injunctions Directive (Directive 98/27/EC, OJ 1998 L 166/51), and the Consumer Sales Directive (Directive 99/44/EC, OJ 1999 L 171/12).

duration will be fourteen calendar days. Moreover, in doing so the Proposal seems to strike an optimal balance between the interests of consumers and businesses.

2. No uniform starting point

However, in many more respects the harmonisation seems to have failed. Firstly, and most importantly, the European Commission failed to establish a uniform starting point for the cooling-off period to run. It has ignored the option chosen in the three most recent directives that award a cooling-off period (the 2002 Distance Marketing of Financial Services Directive, the 2008 Consumer Credit Directive, and the 2008 Timeshare Directive) to let the cooling-off period start only when all information requirements have been met. It failed to do away with the unjustified distinction between distance selling of goods and distance selling of services. Moreover, in making the choice between the more consumer-friendly rule in the three most recent directives that award a cooling-off period and the more business-friendly rule in the Distance Selling Directive, it has chosen the latter option.

3. Trader's breach of information obligations and consequences for cooling-off period

Harmonisation has also not been achieved as regards the consequences of a failure by the trader to meet his information obligations. Again, the – consumer-friendly – situation under the Distance Marketing of Financial Services Directive and that under the Consumer Credit Directive seem to have been ignored. The new Timeshare Directive seems to strike a good balance between the interests of both parties by awarding a relatively long cooling-off period in the event that the consumer was not informed of his right of withdrawal and a more limited extension if other information obligations were breached. However, that solution has also been ignored. Instead, the Proposal for a Consumer Rights Directive introduces yet another way to calculate the ending of the cooling-off period, awarding the consumer only then an extension of the cooling-off period if the trader had breached his obligation to inform the consumer of his right of withdrawal. This is clearly a step back in the protection of consumers for both doorstep selling contracts and distance selling contracts. Under the present Distance Selling Directive, any breach of the information obligations leads to an extension of the cooling-off period, whereas under the Proposal for a Consumer Rights Directive the cooling-off period is extended only if the trader has not informed the consumer of his right of withdrawal. In the case of doorstep selling contracts, consumers will be worse off under the Proposal as it limits the extension of the cooling-off period to three months after the trader has performed his other contractual obligations, whereas cur-

rently the cooling-off period would not start to run before the consumer is informed of his right of withdrawal.

4. Form requirement

That there is a need for harmonisation of the manner in which the right of withdrawal is to be exercised is clear from the responses to the Green Paper. However, the Proposal for a Consumer Rights Directive does not bring the necessary uniformity. The solution accepted in the distance marketing of financial services directive and the recent consumer credit directive – notification by any means that can be proven in accordance with national law – is not the right way forward as it burdens consumers (and occasionally businesses) with problems of private international law: it should not differ from country to the next as to whether an oral or electronic withdrawal is possible. In practice, the choice to be made is to allow a notification by any means or only in writing or on a durable medium. The main argument in favour of the latter option – it would be easier to prove whether or not the consumer has withdrawn on time – was already falsified by the drafters of the Acquis-Principles. For that reason, the drafters of the Acquis-Principles and the DCFR have suggested not to pose any form requirements. This rule may be seen as consumer-friendly, as it will be easier to withdraw from the contract than when a form requirement would apply. The choice in Article 14(1) pCRD, and the choice in Article 7 of the new Timeshare Directive to require a notification on a durable medium, therefore, is less favourable to consumers. Moreover, under the 2002 Distance Marketing of Financial Services Directive and the 2008 Consumer Credit Directive a different rule applies than under the current Proposal and the 2008 Timeshare Directive. This implies that in this respect, harmonisation has failed. Moreover, given the present wording of Article 14 pCRD and the definition of a 'durable medium' in Article 2 pCRD[142] it is doubtful whether a notification could be sent by e-mail.

5. Dispatch principle

In one area it was not very difficult to achieve harmonisation. Most directives already indicated that if the notice of withdrawal was sent during the cooling-off period then the withdrawal is effective. Only the Distance Selling Directive was silent on this matter. Nevertheless, the current Proposal removes any doubt there may have been in this area and, furthermore, makes clear that the dispatch principle also applies if the notice of withdrawal is not in writing, but on another durable medium. Even though this seems self-evident, it is a

[142] The same problem arises under the new Timeshare Directive, cf. Arts. 7 and 2 (h) of that Directive.

good thing this is now explicitly laid down in the Proposal for a Consumer Rights Directive.

6. Consequences of withdrawal

Unlike most of the current directives, the Proposal for a Consumer Rights Directive provides clear rules for the unwinding of the contract from which the consumer has withdrawn. Moreover, it contains a clear timeframe within which both parties – i.e. also the consumer – are required to return the performance they received under the contract. This certainly is an improvement of the current situation in which the position of the trader was rather underdeveloped: whereas he was required to return any payments received within a short period, he could only hope that the consumer would do the same. It would, however, be good if a specific provision were to be added indicating that the consumer need only hand over the goods to the postal services or a carrier within the fourteen day period set under Article 17(1) pCRD.

That paragraph also sets out that the consumer bears the costs of returning the goods under the contract. That provision seems fair, even in the case where the consumer actually withdraws from the contract because the good delivered is not in conformity with the contract. The consumer may of course avoid these costs by simply invoking his rights for non-conformity but is then subjected to the requirements of the sales provisions in the Proposal for a Consumer Rights Directive.

7. Use of goods during cooling-off period

Whereas the current directives do not deal with the question of whether the consumer is liable for any loss in value as a result from the use of the good during the cooling-off period, the Proposal for a Consumer Rights Directive introduces a means for distinguishing the loss in value, which is caused by the mere testing of the goods from that caused by actual using of these goods after the testing phase has ended. Article 17(2) pCRD indicates that the consumer is not responsible for the former loss, but that he is liable to pay damages if he continues to use the goods after he has inspected and tested the goods. In substance, this provision seems to strike the right balance between the parties' interests. The wording of the provision could be improved upon, however, as the current text does not seem to meet the requirement of 'plain and intelligible language'. It would be worthwhile to simply copy the corresponding text in the DCFR.

8. Evaluation of the success of the undertaken harmonisation

The aim of harmonisation underlying the whole review of the consumer acquis has certainly not been achieved across the board. Firstly, only a few directives are actually included in the Proposal itself. This implies that in a *formal* sense the harmonisation could not really have succeeded. However, if the European Commission would simply have chosen the same solutions as those accepted in directives not included in the review or suggested changes to these directives where appropriate, harmonisation could still have been achieved *substantively*. Changes to the directives not included in the review – with regard to rights of withdrawal in particular the Timeshare Directive, the Distance Marketing of Financial Services Directive and the Consumer Credit Directive – are not suggested. In this sense, true harmonisation would only be possible if the Proposal for a Consumer Rights Directive would simply follow the solutions accepted in these other directives (and these would not diverge amongst each other). This, however, is only occasionally the case: the acceptance of a uniform cooling-off period of fourteen days and the introduction of the dispatch principle for distance selling contracts – the only directive where that principle was not yet codified. In certain areas, e.g. the provisions on use of goods during the cooling-off periods, the problems are rather sector-specific and therefore constricted to distance selling and doorstep selling contracts. For these situations the law therefore has also successfully been harmonised.

However, in some of the more important areas, harmonisation has not been achieved at all. First and foremost, this is the case with the starting point for the calculation of the cooling-off period. Secondly, a uniform approach is also missing in the case of the rules for the end of the cooling-off period in the event that the trader had not properly informed the consumer. Finally, the European Commission has failed to unify the rules on the form in which the notice of withdrawal is to be expressed.

In sum, one can only conclude that the harmonisation of rights of withdrawal has failed.

9. Evaluation of the balance between business and consumer interests

The failure of the harmonisation as such does not, of course, mean that the choices made in the Proposal are wrong. Has the European Commission at least struck a good balance between the interests of both consumers and businesses while maintaining a high level of consumer protection? In certain areas this is indeed the case. The uniform duration of the cooling-off periods can be deemed successful in this respect as well. The same applies as regards the rules on the use of goods during the cooling-off period and those pertaining to other consequences of the withdrawal.

However, without stating any reasons for doing so, it has opted for the least consumer-friendly rule as regards the starting point for the calculation of the cooling-off period, largely setting aside the more consumer-friendly rule in the Doorstep Selling Directive *and* ignoring the choice made in the most recent directives in this area (the Distance Marketing of Financial Services Directive, the Consumer Credit Directive, and the Timeshare Directive). Secondly, the consequences of a breach of the trader's information obligations are much less severe than is currently the case under the Doorstep Selling Directive and the Distance Selling Directive, and also much less severe than is the case under the other existing consumer directives. The most remarkable reduction of consumer protection applies in the case of the breach of another obligation to inform than that pertaining to the right of withdrawal: whereas this would lead to an extension of the cooling-off period under the existing Distance Selling Directive, this is not the case under the Consumer Rights Directive. In the case of doorstep selling, the consumer already was only then entitled to an extension if he was not informed of his right of withdrawal, but in that case the cooling-off period did not start (and did not end) before the consumer was informed of that right. Given the fact that under the proposed Directive the consumer may no longer invoke his right if three months have passed after the trader has performed his other obligations under the contract, consumer protection is also reduced here. This is all the more surprising given the consumer-friendly, yet balanced rule in the new Timeshare Directive. Thirdly and finally, the introduction of a form requirement is clearly not in the interest of consumers and is surprising given the choices made in both the recent Distance Marketing of Financial Services Directive and the Consumer Credit Directive, and in the DCFR.

One is therefore left with an ambiguous feeling as to the answer whether the Proposal has struck a good balance between the interests of businesses and consumers. In some areas this indeed seems to be the case, whereas in other areas the interests of businesses clearly seem to have had the overhand. Examples where the interests of *consumers* have had the overhand, however, have not been found. In the end, therefore, the balance seems to be a bit off to the advantage of businesses.

The Remedies for Non-Performance in the Proposed Consumer Rights Directive and the Europeanisation of Private Law

Fryderyk Zoll

I. Introduction

The long awaited Proposal for the "Horizontal Directive" (hereafter: pCRD) has already been published.[1] It is coming in a very particular time for the process of the European harmonisation of the law: the second volume of the Acquis-Principles is about to be published;[2] the second edition of the Draft Common Frame of Reference (hereafter: DCFR) is coming soon on to the market.[3] There were (and still are) great expectations concerning the proposed Horizontal Directive.[4] The Consumer Sales Directive[5] from 1999 has proposed a system of remedies, which seemed to be a reflection of the much broader concept of the non-performance, going beyond the boundaries of the "contract of sales".[6] The Consumer Sales Directive was drafted in such as a way so as to ensure that the national legislator was able to remodel the national legal system of remedies in line with the concept of non-performance emerging from the Consumer Sales Directive. It is often said, that the Sales Directive has been

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1 Proposal for a Directive of the European Parliament and the Council on consumer rights, 2008/0196 (COD)

2 For the first volume see: Research Group on the Existing EC Private Law: *Contract I, Pre-contractual Obligations. Conclusion of Contract. Unfair Terms*, (Sellier, 2007).

3 For the first Interim Outline Edition of the Draft Common Frame of Reference see: C. v. Bar/E. Clive/H. Schulte-Nölke and Others, *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, (Sellier, 2008).

4 M. Loos, *Review of the European Consumer Acquis*, (Sellier, 2008), p. 9.

5 Directive of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees 1999/44/EC, OJ L 171/12.

6 See: J. Pisuliński/F. Zoll/M. Szpunar, Acquis Principles, Chapter 8 – Preliminary Comments, Art. 8:301, in: R. Schulze, *Common Frame of Reference and Existing EC Contract Law*, (Sellier, 2008), pp. 314-316.

based on the system of the Vienna Sales Convention[7] (the "CISG").[8] This connection to the CISG is not only a technical one. The peculiarity of the Consumer Sales Directive is its very different legislative context in comparison to all other consumer law directives. The other directives in this field have usually provided more or less complete mini-systems, which could be added to every existing legal order without the necessity of far-reaching modification. In this sense the other directives (probably with the exception of another significant directive for the system of remedies – namely the Package Travel Directive[9]) are context-neutral. They may function almost in every system, in spite of the underpinning concepts and values within the national legal order. The correct implementation of the Consumer Sales Directive often required a change to the context. There were, however, a lot of possibilities to satisfy the requirements of the Community law in implementing this Directive without trying to rebuild the national systems of remedies, but in many cases it seemed to be only a temporary solution, bringing a disintegration of the national law. Generally the Consumer Sales Directive has pushed the discussion on European private law immensely forward, building a sort of "frame of reference" for the national reforms.[10] It has been also used in the Acquis-Principles as the source of building a model for more general, but acquis-based European contract law.[11] The system of non-performance adopted in Principles of European Contract Law[12] (PECL) and also in Draft Common Frame of Reference shares at least these same general basic principles and concepts of remedies.[13] Of course the PECL are older than the Consumer Sales Directive, and they were probably one of the possible sources of inspiration for the Consumer Sales Directive itself.[14] The Consumer Sales Directive and PECL also use the

7 United Nations Convention on Contracts for the International Sale of Goods from 11th April 1980 (Vienna Sales Convention – CISG).

8 S. Grundmann, in: S. Grundmann/M.C. Bianca, *EU – Kaufrechts-Richtlinie. Kommentar*, (Verlag Dr. Otto Schmidt, 2002), pp. 19-23; H.-W. Micklitz, in: H.-W. Micklitz/N. Reich/P. Rott, *Understanding EU – Consumer Law*, (Intersentia, 2009), pp. 155-156.

9 Directive 1990/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L 158/59.

10 H.-W. Micklitz, in: H.-W. Micklitz/N. Reich/P. Rott, *Understanding EU – Consumer Law*, p. 156.

11 P. Machnikowski/A. Szpunar, Acquis Principles, Chapter 8 – Preliminary Comments, Art. 8:101, in: R. Schulze, *Common Frame of Reference and Existing EC Contract Law*, (Sellier, 2008), p. 303.

12 Principles of European Contract Law, prepared by the Commission on European Contract Law, edited by O. Lando/H. Beale, vol. 1-2, (Kluwer, 2000).

13 M. Schmidt-Kessel, Remedies for Breach of Contract in European Private Law, in: R. Schulze, *New Features in Contract Law*, (Sellier, 2007), p. 186.

14 See S. Grundmann, in: S. Grundmann/M.C. Bianca, *EU – Kaufrechts-Richtlinie. Kommentar*, p. 24.

solutions contained within the CISG. In the text of the DCFR, the PECL and Consumer Sales Directive influenced the formation of the general rules on non -performance and also the respective provisions on sale.[15]

In this paper I would like to examine, whether the presented Proposal of the Directive on Consumer Rights is able to strengthen the process of the Europeanisation of contract law, in this case in the part concerning remedies, or is neutral to this process, or may create additional obstacles and result in a step backward. I would like to prove that unfortunately the last option may become reality should the Proposal of the Directive on Consumer Rights be turned to be a source of Community law.

II. Approach of the Community legislator to non-performance: is it possible already to reconstruct the main features of the Community law on non-performance of obligations?

Due to the limited scope of applications of the existing directives related to contract law, the system of the remedies for non-performance is necessarily not completed.[16] Many of the directives contain only certain rules on damages, interest or some failures in performance.[17] Two of the contract law directives, even despite the limited boundaries of their scope of application, provide more elaborated and developed set of remedies. These are the Package Travel Directive and Consumer Sales Directive.[18] The Package Travel Directive provides a specific set of rules in case of non-performance tailored to its context, although if one looks closely at these rule one can find the remedies of termination[19], price reduction[20] and finally of damages, hidden within.[21] The last issue has been analysed in the ECJ decision in the case of *Leitner*.[22] This case has emerged to become one of the important incentives for the acceleration of the process

15 See Articles III. – 3:101 – 3:711 and Part A of the Book IV DCFR.

16 L. Usunier/I. Veillart, in: C. Aubert de Vincelles/J. Rochfeld, *L'acquis communautaire. Les sanctions de l'inexécution du contrat*, (Economica, 2006), p. 117.

17 See F. Zoll, The Remedies for Non-Performance in the System of the Acquis Group, in: R. Schulze, *Common Frame of Reference and Existing EC Contract Law*, (Sellier, 2008), p. 190.

18 F. Zoll, The Remedies, p. 191.

19 See Art. 4(7) Package Travel Directive. J. Pisuliński/F. Zoll/M. Szpunar, Acquis Principles, Chapter 8 – Preliminary Comments, Art. 8:301, p. 312.

20 Art. 4(6)(a) and Art. 4(7) subpara 1 Package Travel Directive. J. Pisuliński/ F. Zoll/M. Szpunar, Acquis Principles, Chapter 8 – Preliminary Comments, Art. 8:301, p. 313.

21 Art. 5(2) Package Travel Directive. See U. Magnus, in Chapter 8 – Preliminary Comments, Art. 8:401, in: R. Schulze, *Common Frame of Reference and Existing EC Contract Law*, (Sellier, 2008), p. 330.

22 ECJ C-168/00, *Simone Leitner v. TUI Deutschland*, [2002] ECR I – 2631.

of Europeanising the contract law.[23] To some extent the system of the Package Travel Directive is "self-supportive": it may be regarded as a mini-system of non-performance which may be applied as it stands.[24] It can be imagined that this mini-system also works separately from the whole body of the Civil law. Even despite this, the Package Travel Directive has already influenced the systems of non-performance in the national legal orders by inspiring national legislators to rethink their own regulations on damages.[25]

The Consumer Sales Directive transposed the ideas within the CISG into European consumer law; for example, the concept of the lack of conformity of the consumer goods with the contract is one of the aspects of the broad concept of the breach of contract in the sense of CISG.[26] The consumer is entitled to the similar remedies: termination (although in the terminology of the Consumer Sales Directive this is known as rescission) and price reduction.[27] The Consumer Sales Directive also contains rules on repair or replacement of the goods.[28] A consumer willing to resort to the remedy of right of repair or replacement needs first to demand that the seller of the goods brings the non-conforming goods into conformity with the contract in the way indicated by the consumer. It is not clear if the consumer is entitled – according to the Directive – to claim for repair or replacement, or if he must demand it before he terminates the contract or asks for price reduction. Does the consumer have a right of specific performance of repair or replacement or is it a right to cure of the seller and the consumer only has a choice between different types of cure?[29] Since the Consumer Sales Directive required only a minimum harmonisation of the provisions contained therein, the national legislator remained quite free when regulating this issue for his Member State.

By this means the Consumer Sales Directive fulfils the idea of the right to cure of the consumer, which protects the sustainability of the contractual relationship. The right to damages is not regulated by the Consumer Sales Directive, in spite of the reference to the national legal systems.[30]

The Consumer Sales Directive also contains a set of remedies, which also may be generalised to the other kinds of non-performance. It is quite easy

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23 See: A more coherent contract law. An action plan. Communication of the Commission to the European Parliament and Council of 12 February 2003, COM(2003) final, No. 21. See also U. Magnus, The damages rules in the acquis communautaire, in the Acquis-Principles and in the DCFR, in: R. Schulze, *Common Frame of Reference and Existing EC Contract Law*, (Sellier, 2008), pp. 216-217.

24 See: F. Zoll, *The Remedies for Non-Performance*, p. 191.

25 See however: M. Loos, *Review of the European Consumer Acquis*, pp. 19-20.

26 See M.C. Bianca, in: S. Grundmann/M.C. Bianca, *Kaufrechts-Richtlinie*, p. 169.

27 Art. 3(3) of the Consumer Sales Directive (hereafter: CSD).

28 Art. 3(2) CSD.

29 See: F. Zoll, The Remedies, p. 196.

30 Art. 8(1) CSD. S. Grundmann, in S. Grundmann/M.C. Bianca, *EU – Kaufrechts-Richtlinie*, p. 294.

to imagine, that not only a lack of conformity may be remedied by termination or even by the price reduction, but also that the idea of the cure of the contract may be adjusted to other forms of the failure in performing the obligation.[31] There is, however, an essential difference between the Package Travel Directive and the Consumer Sales Directive. While the Package Travel Directive forms a quasi-autonomous system of the non-performance of obligations, which is constructed beyond the broader context of the general law on non-performance, the Consumer Sales Directive is built as a part of the broader system. The coherent implementation of this Directive, at least in the case of the codified systems, has often required an "overshooting implementation" (*überschiessende Umsetzung*), namely an implementation rebuilding the whole system and not only the part confined to the narrow scope of application of the Directive.[32] The legislator who cares about the consistency of his system of law of obligations should probably provide the "missing context" to the Directive. But he does not have a freedom in choosing such a system. The Polish legislator has ignored this situation and has implemented a directive in a separate body of law without trying to integrate the implementation into the existing system. The results are annoying: in many circumstances the consumer is less protected than the "buyer" under the general system of the Civil Code.[33] It may be sometimes considered whether the consumer should be entitled to wave his or her consumer's status. The Polish system has been disintegrated, because the broader context of the Polish Civil Code does not interact with the Polish consumer law on sales, which requires a different context.

The minimum harmonisation clause of the Consumer Sales Directive has, however, in many cases facilitated an integration of this Directive into national legal systems. Such integration often requires a deviation from the text of the Directive in order to adjust it into more general rules. The Directive requires a quite general law on non-performance, based on a "remedy approach" and not the "case approach".[34] In this respect the "remedy approach" is an attempt to regulate the different remedies where the regulation of the non-performance is general in nature (i.e. no specification of the particular forms of non performance); on the other hand the "case approach" tries to make a distinction between the different forms of non-performance, such as delay or impossibility.

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31 F. Zoll, The Remedies, p. 200.

32 See: S. Grundmann, in S. Grundmann/M.C. Bianca, *EU – Kaufrechts-Richtlinie*, pp. 30-33.

33 F. Zoll, Das dubiose Ergebnis der Umsetzung der Richtlinie über Verbrauchsgüterkauf in die polnische Rechtsordnung, in: J. Stelmach/R. Schmidt, *Krakauer – Augsburger Rechtsstudien. Probleme der Angleichung des Europäischen Rechts*, (Wolters Kluwer, 2004), pp. 243-249.

34 C. Düchs, *Die Behandlung von Leistungsstörungen im Europäischen Vertragsrecht*, (Duncker & Humboldt, 2006), pp. 51-54.

In order to follow this path, the national legislator should retain a degree of flexibility.

III. The system of sales' remedies in the Proposal – changing the context?

Apparently the drafters of the proposed Horizontal Directive did not intend to abandon the system of the Consumer Sales Directive. Their intention was to respect some criticism concerning the current Directive and to introduce some innovations. These interventions are not minor. The full harmonisation clause of the new proposed Directive modifies the content and meaning even of those provisions that maintain the language of their predecessors.

The new Proposal extends the scope of regulation of the law of non-performance. The Consumer Sales Directive deals only with the questions of the lack of conformity[35] but it also concerns the question of late delivery[36] and also of the passing of risk[37], which also goes beyond the simple lack of conformity issue. The Proposal also contains its own right to damages.[38] The existence of these rules combined with the idea of full harmonisation entirely changes the political ambition, which has been linked to the Consumer Sales Directive. The Proposal for the Directive on Consumer Rights tries to deliver a system that is supposed to be more complete than that of the Consumer Sales Directive. It tries to develop its own "mini- system" of remedies, which can be self-supportive and has less need for the backing of the general law on non-performance. To some extent it is necessary that, if somebody wants to provide full harmonisation of a certain field of law, thereby depriving the national legislator of the possibility to deviate from the provisions of the Directive, one must assume that such a Directive cannot be integrated into the general body of the national Civil law. It is condemned to exist on the edge of a national legal system as an exotic, isolated body of law. Such isolation needs a system of remedies, which may be applicable as it stands, despite the lack of integration into the coherent system of the codified law. This new approach, if it were to be successfully implemented and enforced, would mean a changing point in the process of the European harmonisation of law. The Communications from the European Commission, announcing the Action Plan and indicating the way forward, calling for an European Common Frame of Reference were underpinned with the idea of the process of the dissemination of the European law through the national systems in order to get them closer even

35 Conformity with the contract is defined in Art. 24 pCRD.

36 Art. 22(2) pCRD.

37 Art. 23 pCRD.

38 Art. 27(2) pCRD.

in the areas that has not been officially harmonised.[39] The new Proposal may paradoxically reverse this process. Apparent similarity to the Consumer Sales Directive actually hides an unexpected effect – the sales law of the proposed Horizontal Directive may emerge to become the political "anti-Consumer Sales Directive", not because it may lower the standard of consumer protection (which also may happen) but because it would not have the intended effect of enabling the accommodation of the *acquis communautaire* in the coherent body of the national law. Such process of marginalisation of the Community law may be achieved by the technique of the full harmonisation,[40] because it does not leave enough flexibility, which is necessary in order to build the rules into the existing structure. It enforces a separation of the acts implementing the directives requiring full harmonisation from the remaining system and prevents the Europeanisation of these systems.

IV. The full harmonisation of the uncompleted rules: late delivery and damages

Although the new proposal on sales tries to encompass the broader areas of the non-performance law, it causes further difficulties. The drafters have extended a scope of regulation beyond the lack of conformity into the field of late delivery and they have added the remedy of damages as governed by the rules of the proposed Directive. In both cases the full harmonisation clause under Article. 4 pCRD applies. The rules may be regarded as somehow complete, but then they lead to strange consequences.

The consequences of the late delivery are governed by Article 22(2) pCRD. According to this provision if the trader has failed to fulfil his obligation to deliver, the consumer shall be entitled to a refund of any sums paid within seven days from the date of delivery. By adding this provision the legislator is changing the initial concept of the Consumer Sales Directive. Instead of the "remedy approach" the conservative "case approach" has been, albeit only partially, reintroduced. By this step the original link to the CISG is relaxed. It becomes more difficult to reconstruct the system of non- performance, which the provider of the draft had in mind. The completeness of the "fully harmonised" rule on late delivery raises the question of the lack of specificity as to the consequences. What exactly does the obligation to refund the sums paid already by the consumer really mean? Is it a termination of contract or does the

[39] Action plan (See footnote 21); European contract law and the revision of the *acquis*: the way forward. Communication by the Commission to the European Parliament and the Council of 11 October 2004, COM(2004) 651 final. See M. Loos, *Review of the European Consumer Acquis*, pp. 2-5.

[40] Business has opposed the full harmonisation idea because of the fear of the European Civil Code – see: M. Loos, *Review of the European Consumer Acquis*, p. 9. This kind of full harmonisation makes this kind of fear rather grotesque.

contract remain unaffected? Does it concern only a situation of the duty of the consumer to pay in advance? Does the delay discharge the consumer only from this duty? According to my understanding of this provision, it does not lead to termination, but only discharges the consumer from the duty (if it has existed by contract or law) to pay before the delivery occurs and if the payment already has been made by the consumer, to claim it back. The other contractual obligations should remain unaffected. The effects of the late delivery are therefore not overwhelming. Does it mean, however, that these effects are governed by a rule subjected to the full harmonisation? Will a national provision concerning contract of consumer sale, which provides in case of delayed delivery other remedies like damages or termination, be an infringement of the maximum harmonisation requirement? Such a rule, like Article 22(2) pCRD may be only regarded seriously, if the Member States retain their authority to regulate such additional matters. Otherwise such formally complete, but substantively fragmentary rules, cannot be integrated in any serious legal system.

Similar considerations and doubts arise concerning the right to damages as it stands in Article 27(2) pCRD. This provision states: "Without prejudice to the provisions of this Chapter the consumer may claim damages for any loss not remedied in accordance with Article 26". Article 26 pCRD regulates right to repair or replacement, termination and price reduction. What does it mean – that Article 27(2) is covered by the full harmonisation clause? Does it mean, that the consumer may claim damages only if he or she has made use of the other remedy? Are the damages only a subsidiary remedy? Is the liability for damages accordingly to this provision absolute or are any defences (such as force majeure, or even lack of negligence etc.) allowed or is it a matter for the national legislator? Due to the full harmonisation clause of Article 4 pCRD the Member States cannot diverge from the provisions laid down in the proposed Directive. So – is it a complete rule?

V. Conclusion

Full harmonisation of rules which are not a complete set of norms is not possible. If the full harmonisation of the contract of sale is to be seriously considered it cannot be confined to small pieces of the system. The paradox of the Horizontal Directive is that it provides an apparently complete (or almost complete) system of remedies, which is built on the rules drafted as completely closed and exhaustive, but in reality excavated from their context. The context in this case is however unknown. It is not the CISG anymore. The part of the Horizontal Directive devoted to the consumer sale would stop the process of the Europeanisation of the private law, condemning the European based law into exotic peculiarities on the edge of the national systems.

Part VI
The UK Context

The Draft Directive on Consumer Rights and UK Consumer Law – Where now?

Hugh Beale

I. Overview

In this paper I address three questions:

1. What should be the UK's response to the draft Directive on Consumer Rights? I try to summarise the main points that struck me after the discussion at the conference at which the papers in this volume were presented.
2. How should we implement the Directive if it is adopted, and how should the implementation relate to the work being done as part of BERR's Review of Consumer Law?
3. How can UK consumer law be simplified and made more accessible?

II. The response to the Directive

My view is that the draft Directive should be welcomed, but the welcome must be guarded. It seems clear that the emphasis of the Proposal is rather different to that of the existing directives that it is to replace.[1] This draft is less about creating confident consumers who will be prepared to shop across borders and thus contribute to the development of the internal market than it is about making it easier for businesses to supply consumers. However, even though there are aspects of the draft which give cause for serious concern, were it to be implemented, consumers would remain fairly well protected. And even if the proposed Directive would do little to increase consumer confidence, it might increase consumer welfare if it encourages businesses to enter cross-border consumer contracts. As Eric Sitbon of the European Commission pointed out

[1] Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372/31; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ 1997 L 144/19; Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171/12.

in his oral presentation to the conference, consumers would then benefit from greater choice and competition.

1. Improvements

First, the idea of bringing the different directives into a single more coherent instrument is a good one. Whether it is really a more "horizontal" instrument as was originally proposed is questionable – the Directive on Unfair Terms in Consumer Contracts was already horizontal in the sense of applying to all types of contract, so the only truly more horizontal element is the general information duty in Article 5. The sales articles are still purely vertical.

The draft Directive contains a number of distinct improvements. I welcome, for example, the general information duty in Article 5. I think that the proposed rules on distance and off-premises contracts are a good basis on which to work, and the harmonisation of the withdrawal rights is a considerable improvement even if it does not go so far as some would like.[2] I also welcome an attempt to deal with late delivery[3] and the provisions on the passing of risk.[4] The addition of legibility to the transparency requirements for contract terms is valuable.[5]

Unfortunately even these articles cannot all be accepted without question. I explore the problem of the sanctions for breach of Article 5 later. The provisions on late delivery are either unclear or feeble (or both). Is it really the intention that after waiting 30 days for delivery the consumer's only right is to be paid back any sum he has paid – but the consumer will remain bound by the contract? That is what a literal reading suggests. I suspect that most consumers will think that claiming back a payment that they will have to make all over again when the goods finally come is a pretty pointless exercise. Or is it intended that the consumer has the right to withdraw and this is why the ground on which the money is to be paid back? I would rather have a provision that, unless agreed otherwise, the business has 30 days in which to deliver and that if it fails to do so, the consumer may terminate the contract and claim damages. In many laws this would be the normal remedy for late delivery if the date for delivery had been fixed.[6] My proposal would simply apply a similar

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2 See M. Loos, Rights of Withdrawal, *in this volume*.

3 Art. 22 of the proposed Consumer Rights Directive (hereafter pCRD).

4 Art. 23 pCRD.

5 See Art. 31(1) pCRD.

6 Thus in English law it is usually thought that the time for delivery of goods is of the essence, at least for commercial contracts: *Hartley v Hymans* [1920] 3 KB 475, 484. This would give the consumer the right to terminate the contract when the date has passed. In German law the consumer may terminate under Section 323(2) BGB without serving a warning when there is a *Fixgeschäft*.

rule to every case in which the goods have not been delivered within 30 days unless the parties have agreed otherwise.

2. Disappointments

The draft Directive is disappointing in a number of respects. For example, I had hoped that the Sales articles would have been made at least somewhat horizontal by applying them to other types of contract under which the ownership or possession of goods is transferred, i.e. hire-purchase and hire (or leasing). But at least it seems that as the result of the provision for contracts involving supply of both goods and services, such as a building contract or a contract for repair of a car, the sales rules on non-conformity will apply to the "goods" element of the contract.[7] I would also have liked to see the controls over unfair terms extended to terms that have been individually negotiated (other than core terms), for the reasons given by the Law Commissions in their joint report on Unfair Contract Terms.[8] (It is good to learn that the Commission regards negotiated terms as outside the scope of the Directive, so it would at least be possible for Member States to maintain controls over such terms.[9]). I would also like the consumer buyer to be given a right to reject non-conforming goods immediately, rather than have to go through the "hierarchy" of first having to try to obtain repair or replacement.[10] I think that often a consumer who has received non-conforming goods will find it much easier simply to go to another shop – or to abandon the idea of the purchase for the time being – than to have to wait even a day or two while the seller obtains a replacement or gets the original item repaired. This is particularly so when the consumer makes their purchase while they are on holiday.[11]

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7 Art. 21(1) pCRD.

8 *Unfair Terms in Contracts* (Law Com no 292, Scot Law Com no 199, 2005), paras 3.50-3.55.

9 E.g. Unfair Contract Terms Act 1977 s 7(2) (liability for non-conformity in consumer contracts other than sale or hire-purchase under which ownership or possession of goods is transferred. Section 6(2), dealing with the equivalent liability of a seller, remains consistent with the draft Directive, since Art. 43 prevents consumers waiving their rights under the Directive, which will include the rights under the Sales articles. (Compare Art. 7(1) of Directive 1999/44/EC).

10 Cf. G. Howells and R. Schulze, Overview of the Proposed Consumer Rights Directive, *in this volume*.

11 For a full discussion see the Law Commissions' excellent Joint Consultation Paper, *Consumer Remedies for Faulty Goods* (LCCP 188, SLCDP 139, 2008).

3. Continued lack of clarity

Another disappointment is that at many points the Commission has not taken the opportunity to clarify the texts they have taken from the existing directives. For example, it is still unclear whether goods that do not conform to some express promise by the seller fall within the definition of non-conformity, so that the hierarchy of remedies and the other rules of the draft Directive will apply. Article 24 of the proposed Directive repeats the existing formula that goods shall be presumed to be in conformity with the contract if they satisfy the various "implied obligations" set out.[12] In the unfair terms chapter, the article on terms that are exempted as "reflecting mandatory, statutory or regulatory provisions" (Art. 30(3)) is as unclear as ever.[13] I also wish that the European Commission had acted on the proposal of the English and Scottish Law Commissions to make it clear that a term cannot be part of the definition of the main subject matter of the contract if, given the way the contract was presented, it was different to what the consumer should reasonably have expected.[14] This seems to be implicit in the existing Unfair Terms Directive and it would be helpful to businesses to make it explicit.[15] It should also be made clear that the unfair terms chapter applies to tenancy agreements and the like. Article 3(1) says the draft Directive applies only to the supply of goods and services and in some systems tenancy agreements would fall outside this.[16]

4. Backward steps

Sadly, from the point of view of the United Kingdom, the draft Directive would involve a number of backward steps. First, I am not convinced that when a consumer has received non-conforming goods it is right to give the business the choice whether to repair or replace.[17] I think it is better to give

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12 Art. 24(2) pCRD.

13 See the Law Commissions' Joint Consultation Paper Unfair Terms in Contracts (LCCP no 166, SCLDP no 119, 20029, paras 3.35-3.40 and the recommendations in the final report (Law Com no 292, Scot Law Com no 199, 2005), paras 3.16-3.18 and Draft Bill cl 4(4).

14 The Law Commissions' draft Bill (see previous note) says that to be exempt, the term must be not only transparent but "substantially the same as the definition the consumer reasonably expected": Draft Bill cl 4(2), (3).

15 See *Unfair Terms in Contracts* (Law Com no 292, Scot Law Com no 199, 2005), paras 3.56-3.66.

16 See the discussion and cases cited in *Chitty on Contracts* (30th ed., Sweet & Maxwell, 2008), para 15-019.

17 See Art. 26(2) pCRD.

the choice to the consumer, subject to the safeguard that the remedy chosen by the consumer must not be disproportionate.[18]

The other steps backward for the UK are caused by the move from minimum to full harmonisation.[19] Below I discuss some of the general arguments against full harmonisation. Here I merely point out that it would at least mean the loss of the UK consumer's right to reject non-conforming goods without first going through the "hierarchy" of remedies; the restriction of the implied terms to defects which appear within the first two years;[20] and the imposition of a requirement to notify the seller within a two-month period.[21]

I have already mentioned the practical advantages to the consumer of the immediate right to reject. I will add here that I see no reason to prevent Member States from keeping or adopting this rule if they wish to do so, because it is very unlikely to hinder the cross-border trade that the Commission is keen to encourage. We have to ask, which type of traders are likely to be affected by differences in legal regime between their home country and the country into which they are selling. I would guess that large retail organisations are likely to "sell across borders" not as such but to set up subsidiaries in the different Member States. I think the subsidiary can be expected to adapt to the "local law". Likewise, traders who cross frontiers to sell at markets, etc. in another Member State can be expected to adapt to the laws of those Member States they choose to visit. The real aim of the Directive is, as the Recitals indicate,[22] to make it easier to conduct direct distance sales across borders, especially via the Internet. But to a distance seller giving the consumer an immediate right of rejection when the goods do not conform to the contract will make almost no difference, since the consumer already has a right to withdraw from the contract within 14 days of receipt of the goods.[23] The effect of full harmonisation on the immediate right to reject will affect only face-to-face, on-premises contracts, and they are simply not a legitimate concern of measures trying to encourage cross-border sales.

As to the two-year cut-off, I simply do not believe that all non-conformities will necessarily appear within the first two years, nor that the trader needs to be protected from all liability after that period. I could understand that it might be hard to insist that sellers should have to repair or replace goods that were supplied over two years ago, when it may be difficult to get parts and impossible to obtain a direct replacement. However, if a defect in a car or in some other complicated item appears only after more than two years, and renders the item useless or less valuable, and if the consumer can show that the non-conformity was present when the goods were delivered (for example, a design defect), I

18 Cf. Sale of Goods Act 1979, s 48B.

19 Art. 4 pCRD; compare Art. 8(2) of Directive 1999/44/EC.

20 Art. 28(4) pCRD.

21 Art. 28(1) pCRD.

22 Recital 5 pCRD.

23 Art. 12 pCRD.

see no reason why the seller should be protected against reduction of the price or a claim for damages.[24]

As to the two-month notification period, Howells and Schulze have already pointed out how it may operate as a positive discouragement to consumers buying goods while they are travelling abroad.[25]

5. Drawbacks of full harmonisation

It seems to me that the proposal for full harmonisation is going to cause very considerable uncertainty. I am particularly worried about the effect the unfair terms provisions would have under a full harmonisation regime. Member States will not be able to maintain rules that invalidate certain types of clause in all circumstances ("blacklisted terms") unless the term is on the Directive's blacklist – which is limited – or the term is outside the scope of application of the Directive. English law contains a number of rules that render certain types of clause of no effect: for example, penalty clauses[26] and terms that would exclude or limit liability for the party's own fraud.[27] Other legal systems have similar rules, for example in French law it is not possible to exclude liability for *dol* or *faute lourde*. Are these controls over unfair terms, and so within the scope of the draft Directive, or rules of public policy that are outside it? It may be the final version of the proposed Directive will be able to give some guidance, but even then there will be considerable uncertainty. Penalty clauses, for example, are certainly within the scope of the existing Directive[28] and it is hard to see why they should be outside the new one.

I also think that the advantages of full harmonisation to businesses trying to sell across border are far smaller than they appear. This is also related to the scope of application of the draft Directive. There will be no harmonisation of issues outside its scope. There are many important issues, issues that will come up quite frequently, that are left outside – to mention just a few, the position with negotiated terms; controls over prices (since controls over "core terms" are apparently also regarded as outside its scope); general rules on validity and associated duties of disclosure; and the many rules governing the recovery of damages. Many of these rules are likely to be regarded by the law of the con-

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24 Subject of course to the normal limitation periods. If the defect has caused personal injury or serious damage to other property, the producer will be liable under Directive 85/374/EEC, but liability does not extend to defects in the thing itself, see Art. 9(b) of that Directive.

25 Cf. G. Howells and R. Schulze, Overview of the Proposed Consumer Rights Directive, *in this volume*.

26 See *Chitty on Contracts*, 30th ed, (Sweet & Maxwell, 2008,), para 26-125 et seq.

27 *S. Pearson & Son Ltd v Dublin Corp* [1907] AC 351; see *Chitty on Contracts*, 30th ed., (Sweet & Maxwell, 2008), para 6-134.

28 Directive 1993/13/EEC, Annex 1(e).

sumer's habitual residence as ones from which there may be no derogation, and thus as rules from which there can be no derogation of the consumer's rights under Article 6 of the Rome Regulation.[29] This will mean that internet and other cross-border sellers will still have to familiarise themselves with the mandatory rules of each Member State to which they "direct their activity".[30]

I still think that businesses that are faced with dealing with many different laws would do better to press not for full harmonisation but for an optional instrument that can be used for consumer transactions in place of a national law, the "Blue Button" so persuasively advocated by Schulte-Nölke.[31] There is not space here to explore this fully but, in brief, the Internet or other distance seller who is contacted by a consumer living in a jurisdiction whose law the seller is unwilling to accept would offer the consumer a choice: if you wish to proceed with this transaction you must opt to have the transaction governed by the Optional Instrument. To do this, you press the Blue Button on your screen. The Optional Instrument would give the consumer all the rights that are required by EC law but would also contain general principles of European contract law as adopted by the EU. Local consumer organisations could arrange for automatic on-line advice (a pop-up, for instance) as to the risks, if any, the consumer would be taking by pressing the Blue Button.

6. Clarification needed

The question of the scope of application is not the only matter which urgently needs clarification. So do some of the provisions themselves. Two stand out.

The first is Article 6, which deals with the effect of failure to provide the information required by Article 5. The first paragraph, which provides that if the trader has failed to provide the information on additional charges, the consumer will not have to pay them, is entirely sensible.[32] In contrast, for other breaches, the second paragraph provides that

> the consequences of other breaches of Article 5 shall be determined in accordance with the applicable national law. Member States shall provide

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29 No. 593/2008 on the law applicable to contractual obligations.

30 Art. 6(1)(b) pCRD.

31 See H. Schulte-Nölke, "EC Law on the Formation of Contract – from the Common Frame of Reference to the 'Blue Button'", (2007) 3 *European Review of Contract Law* 332, 348-349; also http://ec.europa.eu/consumers/rights/docs/speech_schulte-nolke.pdf and H. Beale, "The Future of the Common Frame of Reference", (2007) 3 *European Review of Contract Law* 257, 269-272.

32 Cf. Art. III-3:107(3) of the Draft Common Frame of Reference (Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law, Interim Outline Edition* (Sellier, 2008).

in their national laws for effective contract law remedies for breach of Article 5.

It is very unclear what remedies Member States will have to provide for their response to be regarded as effective. This is particularly the case for Member States that have no, or only limited duties of disclosure.[33] Is it enough that the consumer be given a right to avoid the contract? Or should the contract be treated as containing the obligations that the consumer might reasonably have assumed given the lack of information, as with the case of information about additional charges dealt with in the first paragraph? Or must the consumer be given a right to damages? It seems that in some of the instances – for example, when the trader has failed to provide his geographical address or identity,[34] really only damages will be adequate compensation. But would these be a "contract law" remedy? In many Member States damages for giving incorrect information – for example, damages for misrepresentation or for *culpa in contrahendo* – are not regarded as contractual but tortuous or possibly sui generis.[35]

No doubt what is required of each Member State could ultimately be worked out, but it is likely to take a good deal of time and trouble and possibly several trips to the ECJ. It would be much better to remove the reference to national law. Instead, the proposed Directive should spell out what is required in detail – the provisions on this in the Draft Common Frame of Reference might provide "model rules", just as the European Commission's *Action Plan on Contract Law*[36] contemplates. Alternatively, the proposed Directive could use the Common Frame of Reference in the other way the Action Plan contemplates, namely to provide definitions. In other words, the Directive might say that the consumer shall have "remedies for breach of information duties", giving that phrase an autonomous European legal meaning, and then refer to the Common Frame of Reference for definitions of what is required. The net effect is much the same as building the rules into the Directive, but saves words.

The other provision of the draft that urgently requires clarification is Article 27. Paragraph 2 states that:

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33 For a discussion of the difficulties of almost exactly this approach to duties of disclosure, see H. Beale, "The DCFR: Mistake and Duties of Disclosure" (2008) 4 *European Review of Contract Law* 317.

34 Art. 5(1)(b) pCRD.

35 See the discussion by M. Hesselink in: H. Beale, A. Hartkamp, H. Kötz and D. Tallon (eds), *Casebooks on the Common Law of Europe: Contract Law* (Hart, 2002), pp. 254-255; and Case C-334/00, ECJ, 17 September 2002, [2002] ECR I-7357. It is very unclear what is intended by Art. 5(3) of the draft Directive, that the information is to form part of the contract.

36 See *Action Plan on A More Coherent European Contract Law* COM(2003) 68 final (OJ 1993 C 63, pp. 1-44) and *European Contract Law and the revision of the acquis: the way forward* COM(2004) 651 final.

> Without prejudice to the provisions of this Chapter, the consumer may claim damages for any loss not remedied in accordance with Article 26.

Is this – as I have been told Commission officials intend – a reference to national law also? On the face of it, no. Comparing this problem to the *Simone Leitner* case,[37] it seems more likely to be treated as requiring an autonomous European legal concept of damages. This will create considerable uncertainty unless, again there were to be a reference to the definition – a rather lengthy but thorough definition – of damages for non-performance contained in the Draft Common Frame of Reference.[38] The same may be said of rescission, which seems to imply very different things in different jurisdictions, though of course that term is used in the existing Directive.[39]

7. Conclusion

Thus on my first point, I conclude that we should not reject the draft Directive out of hand. However, we should press hard for at least clarification of the articles I have mentioned and for restricting full harmonisation to topics where it is really needed and workable.

III. Implementation and the Consumer Protection Review

At least one commentator at the conference questioned the difference between a full harmonisation directive and a regulation. One can see his point: within the scope of the proposed Directive, every Member State has to have the same law. But there remains an important difference between the two. With a directive, even a full harmonisation directive, Member States have freedom as to the form and place of implementation. A regulation has set words and will always constitute a free-standing instrument. A directive may be of course be implemented by a "copy out", which may be completely free-standing[40] or inserted as a separate addition to existing legislation.[41] But it can also be implemented by (where necessary) amending existing law and it can be wholly integrated into consumer legislation. I was very happy to read in the Explanatory Memorandum that the Commission thinks Member States

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37 Case C-168/00 *Simone Leitner v TUI Deutschland* [2002] ECR I-2631.

38 Arts. III.–3:701-3:711 DCFR.

39 Directive 1994/44/EC.

40 As with the Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159) and 1999 (SI 1999/2083).

41 As with Sale of Goods Act 1979, ss 48A-48F, inserted to implement the remedy provisions of Directive 1999/44/EC.

will have a "margin of appreciation" when implementing the Directive.[42] That will make the job easier.

IV. How can UK consumer law be simplified and made more accessible?

I do not need to rehearse the difficulties that copy-out causes for both consumers and businesses in understanding their rights and obligations.[43] I have argued elsewhere that the implementation of these directives represent an institutional failure.[44] But it is not just the implementation of directives that seems to create unnecessary difficulty and confusion. It is also the way in which our domestic law is fragmented. For example we have three separate pieces of legislation all dealing with non-conformity of goods supplied to consumers – one for sale,[45] one for hire-purchase[46] and one for other types of contract.[47] Each was at the time a valuable step forward but why do we have to have separate instruments when the words used are almost identical? A review of our consumer law carried out for the Department for Business, Enterprise and Regulatory Reform (BERR) concluded:

> In terms of the extent and content of rights, the UK appears to be on a par with the best, with the caveat that the amount and complexity of the legislation conferring these rights may be higher than desirable and may potentially render the rights inaccessible to consumers.[48]

I am delighted that BERR has begun a review of consumer law[49] to see if some simplification can be achieved. One of the measures contemplated is

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42 Explanatory Memorandum, p. 8.

43 See the report of the Law Commissions on *Unfair Terms in Contracts* and their Consultation Paper on *Consumer Remedies for Faulty Goods*, both cited above.

44 H. Beale, "English Law Reform and the Impact of European Private Law", in: S. Vogenauer and S. Weatherill (eds), *The Harmonisation of European Contract Law* (Hart, 2006), pp. 31-38.

45 Sale of Goods Act 1979, ss 13-15.

46 Supply of Goods (Implied Terms) Act 1973, ss 9-11.

47 Supply of Goods and Services Act 1982, ss 3-5, with separate provision for hire in ss 8-10.

48 *Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries*, a report prepared for BERR by the ESRC Centre for Competition Policy, University of East Anglia (August 2008), para 2.1. The report is available at http://www.berr.gov.uk/files/file47653.pdf.

49 See their website, http://www.berr.gov.uk/whatwedo/bre/reviewing-regulation/protecting-consumers/page44093.html.

to replace the statutory sections I have referred to with a more "horizontal" instrument that would combine the provisions dealing with supply of goods into a single statement, and probably deal also with failure to perform services contracts properly.[50] I think this would be a valuable first step. It is also one which should be easy to get through Parliament. There is a special procedure for consolidation bills. But the procedure cannot be used to deal with statutory instruments, whereas I would like to put all our major pieces of primary and secondary legislation dealing with consumer rights – including at least the provisions on unfair terms (preferably, of course, in a version derived from the Law Commission's Draft Bill[51]) and distance and door step selling – into a single instrument on consumer rights. That would either have to be primary legislation, or an Act would have to be passed enabling Ministers to make secondary legislation to cover what is wanted.

1. Simplifying the structure and language of legislation

However, I would like not simply to bring the existing provisions together in one place and to eliminate unnecessary repetitions. We should also try to simplify consumer law, in order to make it more accessible to those who are affected by it. I do not believe it is realistic to expect that we can ever draft provisions that will be readily understandable to even the majority of consumers themselves. I think it would be realistic to aim at making it understandable to consumer advisors, many of whom are not legally qualified, and business people with some knowledge of contracting.[52]

That is not an easy task, and there are distinct limits as to what can be achieved. Legislation on contracts necessarily has to deal with complex issues, not all of which can be explained in the relevant text. Think for example, of the legislative controls over terms that exclude or restrict liability for negligence in contract or tort. It would be impossible to explain fully when this would apply without setting out the whole of the law of negligence – which would take pages of text and render the whole exercise pointless, quite apart from possibly arresting development of the law of negligence at the moment at which the statute defined it.

What can be achieved, however, is a simplification in terms of structure and presentation, both of the individual sentences and of the overall organisation of the legislation. For example, the Unfair Contract Terms Act 1977 is a worthy piece of legislation, but anyone who has had to lecture on it to students will agree that it is not easy to explain. One of the main reasons is the economical style in which it is drafted. Single sections apply to a wide variety of differ-

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50 See BERR, *Consumer Law Review: Call for Evidence* (May 2008), paras 2.14-2.17. The paper is available at http://www.berr.gov.uk/files/file45196.pdf.

51 See the Law Commissions' report on *Unfair Terms in Contracts*, above, para 2.45.

52 See the Law Commissions' report on *Unfair Terms in Contracts*, above, para 2.45.

ent cases: a single section may apply to consumer, business-to-business and "private" contracts, with different effects for each one. The Act is a miracle of compression but not of easy reading. The Law Commissions, assisted as always by skilled Parliamentary Counsel, were able to come up with a draft that not only combined the Act with the Unfair Terms in Consumer Regulations into a single instrument but which broke the legislation up into parts that applied, for the most part, only to the particular kind of contract. Thus the consumer advisor or business would not have to bother with the parts dealing with only with business-to-business or employment contracts. I would urge readers to look at the draft Bill;[53] it will give them a good idea of what can be achieved – and also of the limits, since there are still references to complicated legal concepts such as negligence. I would urge that when a project of law reform is taken on, the terms of reference should include something similar to the third paragraph in the terms of reference for that project:

> [To make] any replacement legislation clearer and more accessible to the reader, so far as is possible without making the law significantly less certain, by using language which is non-technical with simple sentences, by setting out the law in a simple structure following a clear logic and by using presentation which is easy to follow.

2. Hyperlinks and comments

There are further steps which can be taken to reduce the problems caused by references to legal notions which cannot be explained in the text. One is to create a digital text of the Act with hyperlinks to other legislation that is referred to, and to explanations (for example, in text books that are available on-line) of Common law concepts. That is of course widely done by private providers of legal information; and I do not see why it should not be done also on the commendable (but not always wholly up-to-date) and free Statute Law Database.[54]

Another, more radical solution would be to create an official commentary to the legislation, which would explain how it is intended to work and how it fits with other law. In the United States, there has been an official commentary to the Uniform Commercial Code since its beginning in the 1950s and I believe that in some states the comments were enacted along with the sections. In Europe we have the same at least in "soft law" in the Principles of European Contract Law.[55] In the UK we have only the explanatory notes that accompany most Bills in Parliament. These are valuable but they tend to be

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[53] See www.lawcom.gov.uk/docs/lc292bill.pdf.

[54] See http://www.statutelaw.gov.uk.

[55] See *Principles of European Contract Law, Parts I and II* (edited by O. Lando and H. Beale) (Kluwer, 2000); *Part III* (edited by O. Lando, E. Clive, A. Prüm and

short and their status is uncertain – I have been told, deliberately so. Would it be too difficult or radical to include "official comments" in secondary legislation on consumer rights? I do not see why.

We lecturers all know the value of examples. I would use the comments for which I am arguing not just for an explanation but also for examples, to show how the text of the legislation applies. The Law Commissions considered including worked examples in the draft Bill on Unfair Terms, but past experience of statutory examples has not been entirely happy: examples were included in Consumer Credit Act 1974 and, I am told, some of them are at least arguably wrong. But examples were included in the explanatory notes and I think they could go into an official commentary to secondary legislation. The great advantage of secondary legislation is that it can be amended fairly easily.

3. "Principles-based legislation"

The BERR consultation document issued as part of its review of consumer law also speaks of simplifying the law by making "greater use of general principles". The Unfair Commercial Practices Directive[56] provides a model, as it replaces a mass of particular controls with more general prohibitions on unfair conduct. It is possible that the same approach might be used for consumer rights. The Law Commission has published on its website preliminary advice to BERR on whether consumers who have been the victim of an unfair commercial practice should have a remedy, for example to avoid the contract or to claim damages.[57] This is an interesting and difficult question. In some cases the consumer will already have a remedy, for example for misrepresentation or on the ground of unconscionability. To add a new remedy might make the law even more complex than it is at the moment without much gain. However, I am not sure this would be the result. If consumers could normally get an adequate remedy under the new provision, it might be that the existing law will fall into disuse in consumer contracts. It would be important to study the experience of the Australian Federal Trade Practice Act 1974, which contains somewhat similar provisions.[58] Alternatively, the new provisions might replace the existing law. However, I have reservations about that. I have not studied the topic in detail, but I suspect that the law of misrepresentation may cover situations that the Directive does not cover. If so, to abolish the existing remedies would be harmful. To abolish them only so far as there would be a remedy under the

R. Zimmermann) (Kluwer, 2003). Similarly the Unidroit Principles of International Commercial Contracts, 2nd ed., (2004).

56 Directive 2005/28/EC, implemented by Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277).

57 See http://www.lawcom.gov.uk/docs/rights_of_redress_advice.pdf.

58 Australian Federal Trade Practice Act 1974, ss 80, 82, 87.

draft Directive would achieve little except more disputes about the scope of its application.

Even if that broad-brush approach is feasible with unfair commercial practices, I doubt whether it can be applied to consumer rights more generally. I suspect few people would wish to see the detailed provisions on non-conformity of goods[59] replaced by a broad-brush provision such as the consumer shall be given what he or she reasonably expects. It would be too vague to help businesses determine what their obligations are, or consumers their rights.

4. Codifying the Common law rules

It is not just the statute book which is hard for consumer advisors and business people to access and understand. Large areas of our consumer contract law still rest on Common law. There are of course many excellent accounts of Common law in textbooks and guides, but none of them is technically authoritative and they do not always say the same thing. I have often wondered whether it would help consumer advisors and business people if we could produce an official, or at least semi-official code of consumer law that would include not only the legislative provisions but also a restatement of the common law rules, using, needless to say, simple language and structures. This would not necessarily have to be in the form of legislation. I suspect that a semi-official restatement vetted by say, a group of judges or by the Law Commission, would be accepted as "the law" in almost all cases. Nor would it have to be enormously detailed. I have in mind something resembling the draft code of contract law written years ago for the Law Commissions by McGregor,[60] or the Principles of European Contract Law. I believe it is something that BERR should at least explore.

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59 E.g. Sale of Goods Act 1979, ss 13-15.

60 See H. McGregor, *Contract Code* (Giuffré, 1993).

Part VII
Discussion Paper

This paper was presented for discussion during the conference

The Degree of Harmonisation in the Proposed Consumer Rights Directive: A Review in Light of Liability for Products

Vanessa Mak

I. Introduction

With the publication of a Proposal for a Consumer Rights Directive,[1] fundamental questions on the review of consumer law in Europe have again come to the fore. A critical point is the degree of harmonisation envisaged by the Directive, with regard to which Article 4 provides:

> Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection.

In brief: the Directive envisages full, or maximum harmonisation.[2] It is with this issue in particular that I take stance in this paper, as I believe it to be essential not only to the debate about the pros and cons of the current Proposal, but also to the future development of consumer law in Europe. What can be seen is that European consumer law, and the same goes for private law in general, has become part of a multi-level system with input from national, European and international laws. The degree of harmonisation, in this respect, determines how national laws relate, or should relate,[3] to legislation of European origin and in particular what bandwidth is left for regulation at national level. As such, it is a key pivot point between the two levels, and therefore an element that requires scrutiny in fine-tuning the interaction between them.

Three factors in particular, in my view, define the debate: scope, coherence and (the standard of) consumer protection. Scope refers to the content, or more precisely the width of the provisions contained in the Directive

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1 COM(2008) 614 final.

2 The terms 'full' and 'maximum' harmonisation are used as synonyms here; neither gives a completely accurate description of the issue but further discussion is not required in the context of this paper. For a discussion of the scope of the term, see further below, p. 3.

3 In case of incorrect implementation of Directives, Member States may be held liable under EC law.

and – related to that – its field of impact. The 'targeted' approach followed by the Commission, in which harmonisation measures are limited to specific issues that raise substantial barriers to trade and/or deter consumers from buying cross-border,[4] results in narrowly defined sets of rules that mostly do not cover more than a slice of the wider legal framework operating at national level. 'Maximum' (in maximum harmonisation) thereby becomes a relative notion. On this ground alone, the proposed regime of the Consumer Rights Directive may be criticised for adopting a full harmonisation approach without taking sufficient account of its limitations. Part II will discuss this problem, as well as the related question of which issues in consumer law actually lend themselves to maximum harmonisation.

The other points are logical follow-ups to the problem of scope. Coherence, or rather the lack of it, proves problematic at the level of European legislation (that is, between consumer law directives) as well as at the national level (the integration of European rules into domestic systems). The targeted, full harmonisation approach adopted by the Commission appears to aggravate rather than alleviate such problems and on this ground also deserves reconsideration. Part III will deal with this and will propose a widening of the scope of the current review to take account of, for example, the Draft Common Frame of Reference (DCFR) and of those consumer law Directives outside the current Proposal.[5]

The standard of consumer protection, the final point to be discussed, proves problematic in relation to the proposed maximum harmonisation approach for two reasons. First, it is debatable whether the level of consumer protection provided by the rules of the proposed Consumer Rights Directive is satisfactory; and secondly, even if it is not, the Directive – through Article 4 – precludes Member States to diverge from that standard, whether upwards or downwards. Saving this point of discussion for last, some suggestions on how to ensure a satisfactory standard of consumer protection may be derived from the foregoing discussions of scope and coherence. Though it is difficult to come up with con-

4 COM(2007) 99 final, p 7. These goals find their origin in Arts. 95 and 153 EC, which define the competence of the EU in matters of consumer law.

5 Directives included in the Green Paper on the Review of the Consumer Acquis COM(2006) 744 final, but not in the Consumer Rights Directive are: Council Directive 90/314/EEC on package travel, package holidays and package tours, OJ (1990) L 158/59; 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, OJ (1994) L 280/83; 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, OJ (1998) L80/27; Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests, OJ (1998) L 166/51. Other relevant Directives are listed in Annex II to the 2001 Communication from the Commission to the Council and the European Parliament on European Contract Law, COM(2001) 398 final.

crete guidelines, as the level of consumer protection is itself a relative notion, a brief inventory will be made of considerations that should in any case be taken into account to prevent a devaluation of consumer rights (Part III).

A final introductory point: arguably, each of these factors can be linked to one important omission from the Commission's review of consumer law, both in the Green Paper[6] and in the current Proposal: the Product Liability Directive.[7] In particular the potential overlap with certain issues covered by the sales part of the Proposal – after all, defective goods often also fulfil the requirements of non-conformity – would have justified the inclusion of this Directive in the review. The relationship between the Product Liability Directive and the sales part of the current Proposal will therefore be a particular point of focus in the discussion below.

II. The Scope of maximum harmonisation

Question one for the Commission to reconsider then is this: should maximum, or full harmonisation become the common standard for current and future reviews of European consumer law? In my view, extreme care should be taken before such a policy is adopted.

First of all, other than its name suggests, maximum harmonisation is not the absolute opposite of the standard of minimum harmonisation prevailing in the majority of existing directives[8] – and may therefore not be a solution to persisting differences between national laws that remained possible under that approach.[9] Previous experiences with maximum harmonisation, for example in relation to the Unfair Commercial Practices Directive[10] and the

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6 Green Paper (n. 5).

7 Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products OJ (1985) L 210/29. The Directive appears to have been left out for political reasons rather than substantive ones, namely that – at least at the time that the review was instigated – it fell outside the competence of DG SANCO.

8 See for example Council Directive 93/13/EEC on unfair terms in consumer contracts, OJ (1993) L 95/29, Recital 8 and Art. 12; Directive 99/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees, OJ (1999) L 171/12, Recitals 2 and 5 and Art. 8(2); Directive 97/7/EC of the European Parliament and of the Council on the protection of consumers in respect of distance contracts, OJ (1997) L 144/19, Recital 4 and Art. 14.

9 Cf. V. Mak, 'Review of the Consumer Acquis: Towards Maximum Harmonisation?', (2009) 17 *European Review of Private Law* 55, 58 et seq.

10 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market OJ (2005) L 149/22.

Product Liability Directive, illustrate this and show that it is a policy with significant limitations. The two major ones are (i) that maximum harmonisation is limited to *the scope of regulation* set by the Directive or other legislative instrument that prescribes it; and (ii) as a result of this, that it may allow for Member States to enact or to keep in place rules which, though dealing with similar issues, have a different legal basis than the rules prescribed by the European legislature, thus circumventing the purpose of that legislation.

In practice, this means for example that the Product Liability Directive lays down a general European regime regulating the strict liability of producers for damage caused by death and personal injury and (limited) property damage.[11] At the same time, however, the fact that in this area, liability in tort may coincide with liability in contract makes it possible for Member States practically to circumvent the general regime of liability laid down by the Directive. The only area out-of-bounds for national legislation is where it lays down rules for product liability that coincide with the strict liability regime imposed by the rules of the Directive – besides this, it is possible for Member States to enact or to keep in place legislation that prescribes the rights of injured parties harmed by products on other legal bases, such as fault or contractual liability.[12] As a practical result, the alternative legal bases may allow Member States to give similar rights of compensation to consumers and so to diminish the impact of the Directive's regime of strict liability. The implication is that, while the Directive in form is regarded to be aimed at maximum harmonisation, in substance it does not achieve this degree of approximation.[13]

This problem is highlighted in more recent case law of the ECJ relating to suppliers' liability. In a Danish case, *Skov*, two questions were put before the Court on the possibility (i) of extending the producer's strict liability to suppliers, and (ii) of extending the producer's fault-based liability to suppliers.[14] Not surprisingly, with regard to the first question the ECJ followed its earlier decision in *Commission v France*, holding that Member States are not permitted to go outside the regime of 'complete harmonisation' laid down by the

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11 That this is a regime aimed at maximum harmonisation was confirmed by the European Court of Justice in a series of cases; see ECJ 25 April 2002, Case 52/00 *Commission* v. *France*, [2002] ECR I-3827 at [22]; ECJ 25 April 2002, Case 154/00 *Commission* v. *Greece*, [2002] ECR I-3879 at [18]; ECJ 25 April 2002, Case 183/00 *Gonzàlez Sanchez* v. *Medicina Asturiana SA*, [2002] ECR I-3901 at [31].

12 Product Liability Directive, Art. 13. See also the cases cited in the previous footnote.

13 Cf. S. Whittaker, 'Form and Substance in the Harmonisation of Product Liability in Europe', (2007) 15 *Zeitschrift für Europäisches Privatrecht* 858, 868.

14 See Case C-402/03 *Skov Æg/Bilka Lavprisvarehus* A/S, [2006] ECR I-199. For a commentary of the case, see Whittaker (n. 13); also, M. Sengayen, 'Recent judgements of the European Court of Justice and the elusive goal of harmonisation of product liability law in Europe' in C. Twigg-Flesner, D. Parry et al. (eds), *Yearbook of Consumer Law 2008* (Aldershot: Ashgate, 2007) 447, 452-53.

Directive. Consequently, a Member State may not impose a more extensive liability on suppliers in respect of damage caused by their defective products than is envisaged in Article 3(3) of the Product Liability Directive, which stipulates limited situations in which a supplier may be held liable for the producer's liability. From this it follows that the Danish court should interpret the Directive 'as precluding a national rule under which the supplier is answerable, beyond the cases listed exhaustively in Article 3(3) of the Product Liability Directive, for the no-fault liability which the Directive establishes and imposes on the producer'.[15] This of course leaves open the possibility of overlapping rules with a different legal basis to circumvent the regime of the Directive at national level as in the second preliminary question posed to the Court. In this respect it is of relevance that, under Danish law, product liability fault can often be established merely by proving that the product was defective.[16] A regime formally based on fault, therefore, may in practice come very close to a regime of strict liability. In light of the objective of maximum harmonisation, the question then arises of whether the Danish courts should abandon their earlier case law, and amend the requirements for establishing fault, in order to avert the risk of undermining the ECJ's view that a supplier should not be liable where the producer is liable under the regime of the Directive.[17]

With these observations on the Product Liability Directive in mind, it can then be said that maximum harmonisation will, in many cases, not be absolute. Even if Member States are not entitled to diverge from the rules laid down in a Directive, such as prescribed by Article 4 of the proposed Consumer Rights Directive, means of circumvention may exist in domestic laws. This has advantages and disadvantages. Ultimately, it means that maximum harmonisation, like minimum harmonisation, leaves room for differences between national laws which may act as barriers to trade in the internal market. It may therefore seem to have failed its purpose.[18]

Positive points may, nevertheless, also be discerned, giving rise to the conclusion that maximum harmonisation may not be an altogether pointless policy but may still be useful to pursue in relation to certain well-defined areas (though in much more restrictive aspects than envisaged by the Commission at this stage of the review). It appears of particular use in relation to the more technical aspects of consumer law that arise in various Directives, such as information requirements and the length of withdrawal periods. These are issues which national laws are able to absorb with relative ease as they do not touch

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15 *Skov* (n. 14) at [45].

16 G. Howells (ed.), *The Law of Product Liability* (London: LexisNexis Butterworths, 2007), [4.24].

17 Cf. Whittaker (n. 13) 869, with references in fn. 34. See also below, p. 17.

18 Cf. the goals set out in the Report on the Outcome of the Public Consultation on the Green Paper on the Review of the Consumer Acquis, p. 3. The document is available at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/acquis_working_doc.pdf.

upon core principles of private law, but rather relate to more practical decisions as to which information should generally be provided to consumers at the time of conclusion of the contract and how much time the consumer should have to make up his mind about a spontaneous (e.g. doorstep selling) or distance contract. Though discussion remains possible on the specifics of these rules,[19] maximum harmonisation in this area, as envisaged by the Proposal, seems a real possibility that would thereby stimulate market integration and secure a high level of consumer protection.[20]

Caution is called for in other areas, however. Though little empirical evidence is available on the numbers of distance contracts and other types of transactions, everyday experience suggests that domestic contracts are still the most common type of transaction occurring within Europe. One may wonder, therefore, whether it is a good idea to impose rules of maximum harmonisation in areas such as sale. If these rules apply in the majority of cases to contracts that have no cross-border element, domestic laws would seem better suited to regulate them. These rules can be specific to the domestic market (such as, for example, the right to reject defective goods in English law), without having a negative impact on the internal market or consumer confidence. In those instances, it would therefore seem advisable to stick with the current policy of minimum harmonisation, which gives leeway to Member States to tailor to their domestic markets. At a later time then, perhaps when cross-border trade in Europe does increase, legislative revisions may be made either at European or at national level.

III. Coherence: a wider perspective on consumer rights

The limited scope of targeted, maximum harmonisation has ramifications at another level: it has a negative effect on the coherence of consumer law in Europe. National laws, because of the inability to diverge from European legislation, are likely to have a hard time grappling with the introduction of these rules into their systems and, as seen above,[21] may even seek to circumvent European legislation by regulating similar issues on different legal bases. In any case, the coherence of national private laws is challenged by the introduction of European rules. While this was already the case with legislation aimed at minimum harmonisation, the effects are likely to be felt even stronger with legislation that allows no divergence, i.e. that aims at maximum harmonisation.

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19 Cf. for example, M. Loos, 'The case for a uniformed and efficient right of withdrawal from consumer contracts in European Contract Law', (2007) 15 *Zeitschrift für Europäisches Privatrecht* 5.

20 See also Recital 4 of the Proposal for a Consumer Rights Directive.

21 See p. 4.

Even more relevant for the current Proposal is that lack of coherence is also problematic at European level, that is, between European directives relating to consumer law. One of the aims of the review of the consumer acquis was to create greater consistency between concepts and rules featuring in different directives, such as the 'consumer' definition and the length of cooling-off periods.[22] However, with the review being limited to eight directives, and this number now being lowered to four in the Proposal, coherence between directives is becoming a somewhat elusive goal. Time constraints and other, mainly pragmatic reasons may have led to this limitation, but do not justify the fact that the Commission gives so little consideration to the wider field of European consumer law and its coherence. Two omissions stand out in particular.

First, the Draft Common Frame of Reference (DCFR), developed by the CoPECL network.[23] I strongly believe that the review of the consumer acquis should be considered in light of the harmonisation of European contract law in general.[24] Consumer law does not exist in a vacuum but is part of the general rules of private law and should be conceptualised in this way. While mandatory rules may be imposed in order to safeguard consumer interests, the framework for such rules is set by the general law of contract (or partly also tort, as seen in the case of product liability law). In this context, the principle of freedom of contract forms the main guideline, as long as it is ensured that both parties' rights of self-determination are reflected in their contract.[25] In the development of legislation on consumer law, regard should therefore be had to the wider legal framework within which these rules operate. It seems that such an approach is in line with the original plans envisaged by the Commission, where the review of the consumer acquis was presented as part of the project of developing a Common Frame of Reference (CFR).[26] With the first draft of a possible CFR now published in the form of the DCFR, it is important to determine how the review of consumer law fits in with the proposed rules. Whilst the DCFR is not a binding instrument, the directives which are part of the review are, and through maximum harmonisation may become of even greater significance for the approximation of European private law than they have been up until now. As such, the review of the consumer acquis could be a foundation on which to build future rules of harmonisation – a function that

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22 Report on the Green Paper (n. 18), pp. 5, 8-9.

23 Study Group on a European Civil Code/Research Group on EC Private Law (Acquis Group) (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Interim Outline Edition* (Munich: Sellier, 2008). See also Mak (n. 9) 62.

24 See also European Parliament resolution of 12 December on European contract law, [8].

25 Cf. R. Zimmermann, 'European Contract Law: General Report', (2007) 18 *Europäische Zeitschrift für Wirtschaftsrecht* 455, 462; also R. Zimmermann, *The New German Law of Obligations*, (Oxford: Oxford University Press, 2005), 224-25.

26 Cf. COM(2004) 651 final pp. 3-4.

will be best performed if current reforms of consumer law are made with the bigger picture of contract law, or even the wider field of private law, in mind.

Secondly, it is striking that the Product Liability Directive was not included in the debate at any point during the review process. Arguably, the Directive could be left out of the review because it is not part of consumer *contract* law. This, however, is an unconvincing argument, as there are many instances in which contractual and tortious liability (whether on the basis of negligence, or strict liability) overlap. Especially in relation to the Consumer Sales Directive[27] – which in a modified version appears in the Proposal for a Consumer Rights Directive – various issues have links with product liability regulation. It is useful to look at a few in greater detail in order to emphasise the point and to give direction as to which issues require further consideration by the Commission.

The obvious starting point is a comparison between the access points to each of the two routes: the concepts of 'defect' and 'non-conformity' (part III.1). Further overlaps then exist between the available remedies (for damages, see part III.2) and the potential parties that may be held liable (see in more detail below, part III.3 and III.4).

1. 'Defect' and 'non-conformity'

Arguably, the distinction between goods that are defective and goods that are non-conforming appears to be losing its practical relevance in national legal systems.[28] As to the starting point for liability, it can indeed be seen that there are significant overlaps between the notions of defect and non-conformity. Defectiveness under the Product Liability Directive is based on the safety of the product not being such as persons generally are entitled to expect, taking into account the presentation of the product, the use for which it could reasonably be expected that the product would be put, and the time when the product was put into circulation.[29] By comparison, non-conformity under the Consumer Sales Directive covers, *inter alia*, situations where goods are not fit for purpose, as well as where goods do not live up to 'the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertis-

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27 Consumer Sales Directive (n. 8).

28 M. Bridge, in: M. C. Bianca and S. Grundmann, *Commentary on the EU Sales Directive*, (Antwerp: Intersentia, 2002), 187.

29 Product Liability Directive, Art. 6. For commentaries, see S. Whittaker, *Liability for Products: English Law, French Law and European Harmonization*, (Oxford: Oxford University Press, 2005); J. Stapleton, *Product Liability*, (London: Butterworths, 1994).

ing or on labelling'.[30] Use and expectations, as can be seen, feature heavily in both definitions and create a significant field of coincidence between them. The overlap is therefore reflected at the initial stages of liability: defective goods will almost always fulfill the requirements for non-conformity, as a defect influences the quality and fitness for purpose of goods.[31]

Perhaps the most significant difference between the two lies in the standard of proof required to establish a defect or the non-conformity of a product, and hence liability. In order to prove defectiveness under the Product Liability Directive, no finding of fault is required – liability is strict.[32] To establish non-conformity, on the other hand, many Civil law legal systems do require proof of fault.[33] This is a significant difference, in particular as the fault requirement can put a heavy burden on consumers and thus decrease the likelihood of the success of their claim. However, the distinction appears to be less stark in practice. With regard to non-conformity in German or in Dutch law, for example, a reversal of the burden of proof (so that the debtor has to prove that he was *not* at fault) in practice means that liability comes close to being strict.[34] Moreover, it should be noted that Common law systems adopt a notion of strict liability in sales anyway.[35] The Consumer Sales Directive also alleviates the burden for the consumer, in this case by providing for a reversal of the burden of proof for a six-month period after delivery of the goods.[36] The practical effect, therefore, is that consumers have almost equally straightforward access to the contractual as to the product liability route.

With this overlap in concepts in mind, it makes sense for a review of European consumer law to make explicit links between liability based on non-conformity in sales, and liability based on defectiveness in product liability law. In other words, to take account both of the Consumer Sales Directive and of the Product Liability Directive. With regard to the latter, a review would

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30 Consumer Sales Directive, Art. 2(2).

31 For the conformity requirements, see Art. 2 of the Consumer Sales Directive, which provides an accurate reflection of norms found in most national systems in Europe. It is copied with some changes in Art. 24 of the proposed Consumer Rights Directive.

32 See Product Liability Directive, Recital 2: '[w]hereas liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production'.

33 Such is the case, for example, in German and Dutch law. Cf. B. Markesinis, H. Unberath and A. Johnston, *The German Law of Contract*, 2nd ed., (Oxford: Hart Publishing, 2006) 445-6; A.S. Hartkamp, *Asser* IV*(I) Verbintenissenrecht. De verbintenis in het algemeen*, 12th ed. (Deventer: WEJ Tjeenk Willink, 2004), [314]-[317].

34 *ibid.*

35 A.G. Guest (ed.), *Benjamin's Sale of Goods*, 7th ed., (London: Sweet & Maxwell, 2006), [12-017].

36 Consumer Sales Directive, Art. 5(3).

moreover be desirable since the regime laid down by the Directive – which has been in force now for well over twenty years – contains uncertainties and also appears to lag behind in comparison with national systems – where signs of divergent trends are beginning to emerge.[37] That is especially the case with the notion of 'defect', which remains a concept open to various modes of interpretation and hence to different application in different Member States.[38]

2. Damages

Another point where liability in sales law and product liability coincide is with regard to damages. The Product Liability Directive enables the aggrieved party to obtain damages under three headings: death, personal injury, and damage to, or destruction of, any item of property other than the defective product itself.[39] These types of damage will normally also be recoverable through the contractual route, under the heading of consequential loss.[40] Of course, the concept of damages in that case is wider and also includes compensation for the defective product itself (reflecting the performance interest in contract law, and making up for the seller's breach), and potentially the reliance or the restitutionary interests of the aggrieved buyer.[41]

Naturally, a consumer may prefer one route over the other depending on the type of damages that he seeks to recover, the proximity and solvency of the party whom he seeks to hold liable, and the division of the burden of proof discussed above under III.1. The fact remains, however, that an overlap exists between the actions where a consumer seeks to obtain damages under one or more of the product liability headings, which he can also obtain through the contractual route.[42] In this respect, a review of the Product Liability Directive

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37 Cf. D. Fairgrieve and G. Howells, 'Rethinking Product Liability: A Missing Element in the European Commission's Third Review of the European Product Liability Directive' (2007) 70 *Modern Law Review* 962, 968-70, 978.

38 *ibid*, 969-70.

39 See Product Liability Directive, Art. 9. With regard to property damage, the Directive prescribes a threshold of 500 Euro, plus that liability is restricted to products used for private use or consumption.

40 *Benjamin's Sale of Goods* (n. 35), [16-047]. German law has forfeited an earlier restriction on damages for pain and suffering, now also allowing for this type of compensation; compare Section 253 II BGB; Markesinis, Unberath & Johnston (n. 33), 482-3.

41 ibid. See also generally E. Peel, *Treitel on the Law of Contract*, 12th ed., (London: Sweet & Maxwell, 2007), [20-017] et seq., [20-034]. Note that contractual liability, in the first instance, focuses on the relationship between buyer and seller, rather than (as in product liability) the producer. For further discussion, see below.

42 Eventually, the contractual route may also lead to the producer; see below part II.3 and 4.

and the Consumer Sales Directive alongside each other would be desirable to fine-tune their interaction and see to what extent the sales rules circumvent the strict liability regime of the Product Liability Directive.

The point has become more stringent in light of the proposed Consumer Rights Directive, which – unlike the original Consumer Sales Directive – appears to make provision for damages in its sales part, instead of leaving it a matter for national law. Article 27(2) of the proposed Directive provides that 'the consumer may claim damages for any loss not remedied in accordance with Article 26', which refers to loss not remedied through repair, replacement, price reduction or rescission.[43] It is yet unclear whether the Commission indeed seeks to regulate damages or whether the provision is meant as a direction to national legislators to ensure that effective remedies are in place. Nevertheless, clarification of the concept would be called for if the final version of the Consumer Rights Directive does include a provision on damages. It would be helpful to know how it relates not only to the damages rules of the Product Liability Directive, but also which other types of loss it covers. For example, would damages for non-material loss be covered? If the Commission's Proposal does not make that clear, the likelihood will be that the European Court of Justice will at some point have to rule on that question, as happened before in relation to the Package Travel Directive.[44]

3. (Direct) producers' liability

Where starting point and remedy (in damages) overlap, the next point to consider is against whom liability may be sought. The distinction appears quite clear: the Product Liability Directive directs liability to producers,[45] whereas the Consumer Sales Directive operates in contract law and thus seeks to regulate the conditions for liability of the contracting party of the consumer: the final seller.[46] However, several points of overlap exist between the Directives that would merit further exploration. In particular, the following may cause the categories of potentially liable parties under the two regimes to coincide:

i) Article 3(3) of the Product Liability Directive, which provides: 'Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is

43 Consumer Rights Directive (Proposal), Art. 26(1).

44 Case C-168/00 *Simone Leitner v TUI Deutschland GmbH & Co* KG [2002] ECR I-2631.

45 Who qualifies as 'producer' is set out in Art. 3 of the Product Liability Directive.

46 Cf. Consumer Sales Directive, Arts. 1(2)(c), 2(1) and 3(1).

indicated'. In other words, where the producer cannot be identified, the aggrieved party may have recourse against the final seller. Though situations in which no producer or even importer can be identified will be rare, the potential for overlap with sales liability exists.[47]

ii) Article 4 of the Consumer Sales Directive, which provides for a right of redress for the final seller: 'Where the final seller is liable to the consumer because of a lack of conformity resulting from an act or omission by the producer, a previous seller in the same chain of contracts or any other intermediary, the final seller shall be entitled to pursue remedies against the person or persons liable in the contractual chain. The person or persons liable against whom the final seller may pursue remedies, together with the relevant actions and conditions of exercise, shall be determined by national law'. The final seller may therefore, through the contractual route, be able to obtain compensation from an earlier supplier in the chain, who may seek compensation from his supplier etc., with the potential to lead liability back all the way to the producer. With what we have seen above, this confirms the statement that liability on the ground of defectiveness and liability on the ground of non-conformity are increasingly coming to amount to the same thing.[48]

Besides these overlaps between the existing directives, an important point for consideration is the possibility of direct producers' liability in the sales context. A suggestion as to the introduction of such a direct route was made consultation by the Commission in 2007, but the idea has since been dropped.[49] However, interest in it appears to have rekindled[50] and the introduction of such an additional route of liability would indeed have certain benefits. Most importantly, it would ensure that consumers always have a port of call in cases of non-conformity and are thus not left without a remedy. As a practical example, it would for example be helpful for consumers to be able to approach a producer based in the Member State in which they reside, if the seller is based in a different Member State. This way, significant costs could be saved, and the consumers would have easier access to a remedy than if they were restricted to approaching the seller in the other Member State.

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47 The final seller may have the possibility for redress against the producer; for the relation between sales law and product liability in that case, see below part II.4.

48 Cf. above, p. 9. What to make of the provision's reference to national laws for the regulation of redress, and the relation between this provision and the proposed Consumer Rights Directive, will be further discussed below under II.4.

49 Communication from the Commission to the Council and the European Parliament on the implementation of Directive 99/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees including analysis of the case for introducing direct producers' liability, COM(2007) 210 final.

50 Cf. C. Willett, 'Direct Producer Liability', *in this volume*.

Again, the potential overlaps between contractual liability in sales law and the regime of the Product Liability Directive appeal for a review in which both systems are included. If not, maximum harmonisation in product liability becomes even more elusive a goal than it currently is. Moreover, the lack of coordination within the European *acquis* may seep through into national laws and have an adverse effect on the coherence of national private law systems.

4. Seller redress

Related to the previous point of producers' liability is the possibility for the seller to seek redress on earlier suppliers in the chain. Article 4 of the Consumer Sales Directive, briefly mentioned above,[51] provides for this option. The details, including which person or persons may be held liable and on which legal basis, however are left to national laws to work out. The proposed Consumer Rights Directive, it should be noted, did not copy this provision nor one of similar effect, as its concern is only with contracts between businesses and consumers and not with those between two professional parties, even if related to the consumer contract.[52]

There is something to be said for leaving this issue outside the current Proposal. The issue is relatively complicated and, since it was previously left to national laws, lacking guidance from the European *acquis*.[53] Nevertheless, consideration of the seller's rights of redress would be helpful in light of the possibility that it creates to direct liability all the way back to the producer. As set out in the previous paragraphs, this leads to a certain overlap of this contractual regime of liability with the strict regime of the Product Liability Directive. In order to ensure coherence between the different regimes, the Commission may consider a review on this issue after all.

In sum, it can be seen that there are numerous overlaps between the areas regulated by the Consumer Sales Directive and the Product Liability Directive that warrant a comprehensive review in which both are included. From the viewpoint of ensuring a coherent regulation of European consumer law, it would make sense to at least consider the relation between these two Directives, and where relevant, to also take account of other Directives or wider developments in European private law.

Another question is whether a review of the Product Liability Directive should stick to the current approach in which maximum harmonisation has

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51 See p. 13.

52 Consumer Rights Directive (Proposal), Art. 1.

53 Moreover, complications may arise where parties in the chain reside in different countries; cf. A. Dutta, 'Der europäische Letztverkäuferregress bei grenzüberschreitenden Absatzketten im Binnenmarkt', (2007) 171 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 79.

become the standard.[54] Or indeed, whether maximum harmonisation should become a common standard for future measures aimed at the approximation of European consumer laws. The answer to that depends for a large part on the final issue to be discussed in this paper: the level of consumer protection.

IV. Defining the level of consumer protection

Problems relating to the scope of maximum harmonisation and the coherence of consumer law in Europe, as discussed in the previous sections of the paper, may have a negative effect on the aim of approximation of the private laws of the Member States. Because of the incomplete level of harmonisation achieved, differences remain between national laws and may keep in place barriers to trade or even create new ones. In that respect, the outcome may not even be so different from cases where minimum harmonisation is set as the standard. On a positive note, laying down a common set of rules applicable throughout the EU – with either degree of harmonisation – may at least be a starting point for further approximation and in that way contribute to the integration of the internal market.

An additional factor of maximum harmonisation is that it may also create problems with regard to the consumer protection policy that has become the corollary to the EU's internal market strategy.[55] Article 95(3) EC provides: '[t]he Commission, in its proposals envisaged in paragraph 1 [of Article 95 EC] concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection'. Seeing that measures under Article 95 EC can be adopted by qualified majority vote, it remains the main basis of competence for consumer legislation in Europe. The alternative, Article 153 EC, which aims specifically at consumer protection, gives the EU shared competence with the Member States. The requirement of unanimity applying under that provision sets a high threshold and thereby makes it an unlikely basis for further development of European consumer law.[56] With the emphasis therefore on Article 95 EC as a legislative basis, the risk is that factors relating to the internal market policy – such as economic efficiency or the facilitation of cross-border trade – will outweigh considerations of consumer protection. And if the degree of harmonisation aimed for is maximum harmonisation, Member States will be unable to adapt their laws to make corrections for this approach.

In those instances where maximum harmonisation is chosen as the standard, it is therefore important to decide whether or not the proposed rules give sufficient weight to consumer protection. Though it is difficult to formulate a precise standard for what is sufficient – Article 95 EC speaks of a 'high level'

54 See above, p. 4.

55 Cf. Art. 95 and Art. 153(1), (3) EC. See also above, p. 2.

56 See also Mak (n. 9), 63-4.

of consumer protection, however without further clarification – some direction may be given by a comparison with relevant provisions in national laws, where a certain standard will generally have developed over time. Because of the relative nature of the level of consumer protection – which is not a set value but, it seems, can only be defined by relating it to specific instances – the guidelines here suggested will have to be limited to some specific examples. These may nevertheless illustrate which considerations come into play in defining the standard of consumer protection adopted in European legislation.

Applied to the proposed Consumer Rights Directive, some observations may be made. A general point of objection is, of course, that the Directive elevates four directives that were originally aimed at *minimum* harmonisation to a standard of maximum harmonisation. As a consequence, its introduction is likely to lead to a decrease in the level of consumer protection in many Member States, including the Netherlands. An example is the limitation period for claims in non-conformity.[57] According to the proposed Directive, that limit would be set at two years from the time the risk passed to the consumer.[58] If adopted, this would significantly curtail the rights of consumers in comparison to current Dutch law: Article 7:17(2) of the Civil Code enables claims for non-conformity for the entire economic lifespan of a good. Especially with durable goods, such as washing machines or other types of household goods, a limitation to two years would thus lead to a lowering of consumer protection standards.

Other provisions found in the proposed Directive may also have a negative impact on consumer protection. To stay with the liability for products/sales law theme of the current paper, another example can be taken from the latter part of the Proposal, which incorporates (in a modified form) the Consumer Sales Directive. Apart from the point made about limitation periods, a rule that catches the eye is Article 26(2) of the proposed Directive on the choice of remedy. It provides: 'The trader shall remedy the lack of conformity by either repair or replacement according to his choice'. In other words, the choice between repair and replacement is attributed to the seller of the non-conforming product. This is a clear divergence from earlier practice under the Consumer Sales Directive, where the choice was given to the buyer.[59] From the viewpoint of consumer protection it would indeed be the better option to leave the choice between the two remedies to the buyer, as he is in the best position to judge which would give him the most satisfactory remedy. The seller, judging from his own perspective, will most likely decide on the basis of which remedy

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57 M. Loos, 'Herziening van het consumentenrecht: een teleurstellend richtlijnvoorstel', (2008) *Tijdschrift voor Consumentenrecht* 173, 176.

58 Consumer Rights Directive (Proposal), Art. 28(1).

59 Cf. Consumer Sales Directive, Art. 3(3). More explicit provisions to this effect are found in the implementing legislation in, for example, Germany and the Netherlands; see Section 439 I *Bürgerliches Gesetzbuch (BGB)* and Art. 7:21 *Burgerlijk Wetboek (BW)*.

is least expensive. The fact that in practice many sellers will try and set up the buyer with a remedy of their choice – for which the proportionality test for repair and replacement leaves room[60] – does not seem sufficient justification for a change of tactics in European consumer legislation. After all, having the back-up of an explicit right laid down in (mandatory) legislation strengthens the bargaining position of the consumer.[61]

Lessons may also be learnt from the experience with maximum harmonisation in relation to the Product Liability Directive. Related to the problems of scope discussed above,[62] an issue that remains unsettled is how the notion of maximum harmonisation through European legislation affects *pre-existing* legislation of the Member States which amounts to more than overlapping rules grounded on other legal bases. For example, does Article 13 of the Product Liability Directive preclude Member States from keeping in a place a general system of product liability different from that provided for in the Directive? The judgment of the European Court of Justice (ECJ) in *Commission v France*[63] prescribes maximum harmonisation, thereby prohibiting Member States from enacting legislation contrary to the Directive after the time of its notification. Apart from adopting the notion that the Directive is aimed at 'complete harmonisation', however, the judgment may be read as to suggest that Member States are under an obligation to ensure compliance with the Directive's regime not just for future legislation but also with regard to pre-existing legislation, at least where a general regime of product liability is concerned. The Court states that 'Article 13 of the Directive cannot be interpreted as giving the Member States the possibility of *maintaining* a general system of product liability different from that provided for in the Directive' (emphasis added).[64] Maximum harmonisation would thus apply also to pre-existing legislation, precluding national laws from diverting from the Directive's regime. Such a restriction, however, is problematic for French law – though the system is generally recognised as a special liability system, it is in fact nothing more than an accumulation of contractual and non-contractual rules, which would seem to be valid under Article 13 of the Product Liability Directive.[65] If the suggestion to reinterpret the rules in light of the Directive is followed through, however, there is a real likelihood that the level of consumer protection in French law will be adjusted to a lower standard, as it is commonly accepted

60 Consumer Sales Directive, Art. 3(3).

61 Of course, that position also depends on the possibilities for enforcement, for example through the courts, small claims tribunals or through alternative dispute resolution.

62 See p. 4.

63 *Commission* v. *France* (n. 11).

64 *Commission* v. *France* (n. 11), at [21].

65 Howells (n. 16), [4.19].

that the French system of tortious and contractual liability surpasses the level of protection provided by the Directive.[66]

Against this could be said that evidence that the Directive provides an inadequate level of consumer protection is lacking. In fact, reports show that according to the predominant view the Directive, and the product liability system to which it belongs, strike an appropriate balance on the whole between the interests of producers/suppliers and those of consumers.[67] There is no uniform call for major reform of the Directive, nor have particular deficiencies been pointed out which show that the regime is fundamentally flawed.[68] This may, at least to some extent, set at ease the minds of those who fear for a fall in consumer protection standards should maximum harmonisation be pursued more vigorously. Of course, as argued above, a case remains for revision of the Directive in relation to the Consumer Sales Directive, in order to fine-tune the interaction between those two regimes.[69]

All in all, these examples show that defining an appropriate level of consumer protection remains an issue that is best worked out from the interaction between European rules with national laws. In case of minimum harmonisation, this is generally not a problem, as it allows Member States to ensure greater protection than laid down in the European rules. With maximum harmonisation, however, circumspection is called for. European legislation would do badly in lowering the level of consumer protection in national laws without sufficiently considering the consequences. The Proposal for a Consumer Rights Directive, as it stands, requires reconsideration on this point in particular in relation to its sales provisions.

V. Conclusion

In conclusion, several recommendations can be made for the further review of European consumer law. One of the main points for the Commission to decide remains the degree of harmonisation that is aimed at. To what extent should European law seek to lay down a fixed set of rules for consumer law to which the Member States are unable to make modifications to fit their own systems? And, an important preliminary point, to what extent can it fix such a standard?

The main conclusion to be drawn from previous experience with maximum harmonisation is that it contains inherent limitations that restrict its field of influence and, moreover, that in many instances it sets a far from absolute standard. It is limited because it relates only to the particular scope set by the instrument to which it applies – for example, the Product Liability Directive

66 *ibid.* Also Fairgrieve and Howells (n. 37), 966.

67 COM(2006) 496 final, p. 6.

68 *ibid.*

69 Above, p. 8 et seq.

is restricted in *scope*, relating to strict liability of producers for death, personal injury, and to a limited extent property damage, but leaving out fault-based liability. As to the second point, the standard set by rules of maximum harmonisation may be circumvented by national legislators, for example by adopting legislation dealing with similar issues but on a different legal basis. Again product liability law can serve as an example.

Two points for consideration. First, it seems appropriate to restrict maximum harmonisation to technical issues of consumer law, such as withdrawal rights featuring in several Directives. Such issues will generally be more easily absorbed by national laws, and may so contribute to the integration of the internal market and the strengthening of consumer rights. With minimum harmonisation as the standard in other areas, a certain level of consumer protection is secured whilst room is left for Member States to make adaptations according to the needs of their systems. Secondly, a widening of the review to take account of the four Directives now selected in the context of other Directives, as well as the general field of European private law, would lead to a more coherent development of European consumer law in a way that, it is thought, would in the long term make it much easier to integrate European rules with national laws. Consumer law does not exist in a vacuum but is part of the general rules of private law, and it should be conceptualised in this way.[70] In the long run, maximum harmonisation may then also become a viable option. A particularly interesting field for further research is the overlap between regimes dealing with liability for products: either through sales law under the Consumer Sales Directive or through a regime of strict liability under the Product Liability Directive.

Finally, a difficult point remains the standard of consumer protection. It is very hard for European legislation to come up with a standard that fits national systems across the board, especially if the rules are aimed at maximum harmonisation, preventing Member States to diverge from them. This problem, it is proposed, is best tackled by referring to solutions adopted by national laws and the standard opted for there. In cases where maximum harmonisation is chosen, careful consideration should be made of the level of consumer protection secured by the rules. In this respect, lessons may again be learnt from previous experiences with product liability law.

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[70] Cf. Zimmermann (n. 25), 462.