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## PART I

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### Consumer protection strategies and mechanisms in the EU

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## 1

## From minimal to full to 'half' harmonisation

NORBERT REICH

This short chapter, based on a longer version in German,<sup>1</sup> discusses the new tendency in EU consumer law towards full harmonisation in contrast to the earlier minimum harmonisation approach. Under the latter, Member States were free to increase the extent and intensity of consumer protection; however, they had to guarantee effective implementation and enforcement of the minimum standards prescribed by EU directives *inter alia* on doorstep and distance selling, unfair terms and consumer sales. The only exception in the case law remained the Product Liability Directive which precluded an extension of the strict liability regime beyond its scope of application, for example to retailers.

Since about 2000, in implementing a more aggressive internal market strategy, the Commission has opted for a full harmonisation approach which would prevent Member States from maintaining or adopting more protective consumer protection provisions in the harmonised field (doctrine of 'preemption'). The Commission justifies its new policy with the argument that consumer confidence requires a uniform set of rules, and with the experience that minimum harmonisation had led to a fragmentation of Member State laws which had created additional impediments to cross-border marketing, especially in e-commerce. The new strategy, which seems to be to some extent supported by recent case law, has been implemented in directives in the area of distance marketing of financial services, unfair commercial practices, consumer credit and timeshare agreements. A recent proposal on a Consumer Rights Directive of 8 October 2008,<sup>2</sup> as a follow-up of a general policy to review the consumer *acquis*, is the most ambitious and at the same time the most controversial step in this

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<sup>1</sup> N. Reich, Von der Minimal- zur Voll- zur Halbharmonisierung (2010) *ZEuP* 7–39.

<sup>2</sup> COM (2008) 614 final. For a critique H. Micklitz and N. Reich, 'Cronica de una muerte anunciada: the Commission Proposal on a Directive of Consumer Rights' (2009) *CMLRev* 471–519; the state of the consumer *acquis* has been analysed in H. Micklitz, N. Reich and P. Rott, *Understanding EU Consumer Law* (Antwerp: Intersentia, 2009).

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direction, and includes a redrafting of the directives on doorstep contracts (to be renamed ‘off-premises contracts’), distance selling, unfair terms and the sale of consumer goods, which is also to contain a fully harmonised general pre-contractual information obligation. This contrasts to some extent with the newly adopted Regulation 593/2008 (Rome I)<sup>3</sup> on conflict-of-law provisions in consumer contracts which seeks to ensure that the consumer who is directed into contracting at his/her habitual residence always enjoys the protection of the home legislation, notwithstanding any considerations relating to party autonomy.

The chapter criticises the Commission’s ‘new approach’ on both empirical and theoretical grounds. The consumer confidence argument cannot simply be turned on its head to require full harmonisation; it has never been corroborated as such. The scope of the full harmonisation principle remains unclear and may lead to negative and unpredictable spill-over effects into the different laws of Member States. There is a general tendency to ‘downgrade’ consumer protection objectives, despite a great deal of Commission rhetoric to the contrary; the chapter gives several examples in this direction. Finally, the chapter questions the authority of the EU to fully harmonise areas which belong to the key competence of Member States, where it must respect the principle of proportionality according to Article 5(3) EC (now Article 5(4) TEU).

As a compromise, the author proposes a theory of ‘half harmonisation’ which would allow uniform standards where justified from an internal market perspective, most notably concerning the marketing, information and quality related to products and services. Yet it would limit legislation to minimum harmonisation, or exclude it altogether, in all areas where there is no such need, and where different constitutional traditions must be respected under the principle of proportionality, for example, by providing for effective (but different!) remedies for breach of pre-contractual information duties, as well as for the enforcement of product and/or service standards, prescriptions on language, lists of unfair clauses in consumer contracts, etc. Preemption of Member State law should not go beyond what is necessary to achieve Treaty objectives, which expressly include consumer protection.

In the meantime there seems to be a widely shared consensus among EU lawyers that the scope of the full harmonisation clause of Article 4 of the above-mentioned proposal is definitely going

<sup>3</sup> [2008] OJ L 176/6.

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too far.<sup>4</sup> This overwhelmingly critical consensus has been subscribed to and elaborated in Opinions by the ECOSOC,<sup>5</sup> the Committee of Regions,<sup>6</sup> and, more recently, by the rapporteur of the European Parliament, Mr Schwarz.<sup>7</sup> In her speech before the Madrid Consumer Day Conference on 15 March 2010, the competent Commissioner, Viviane Reding, proposed a new approach toward harmonisation which would distinguish between online and offline transactions; only the first should be caught by full harmonisation. This author has criticised a demarcation which cannot reasonably be maintained in practice. On the other hand, an optional instrument (blue button) could be developed for cross-border transactions based on the Draft Common Frame of Reference.<sup>8</sup>

<sup>4</sup> P. Rott and E. Terryn, 'The Proposal for a Directive on Consumer Rights – No Single Set of Rules' (2009) *ZEuP* 456; B. Gsell and C. Herresthal (eds.), *Vollharmonisierung im Privatrecht* (Tübingen: Verlag Mohr, 2009); H. Micklitz, 'The Targeted Full Harmonisation Approach: Looking Behind the Curtain', in G. Howells and E. Schulze (eds.), *Modernising and Harmonising Consumer Contract Law* (Munich: Sellier, 2009), 47ff.; see also G. Howells and E. Schulze, 'Overview of the proposed Consumer Rights Directive', in the same volume, 6–8; C. Huguenin, M. Hermann and Y. Benhamou, 'Konsumenten-vertragsrecht in der Gesetzgebung' (2009) *GPR* 159; M. Artz, 'Die "vollständige Harmonisierung" des Europäischen Verbraucherprivatrechts' (2009) *GPR* 171; Jud and C. Wendehorst (eds.), *Neuordnung des Verbraucherprivatrechts in Europa* vitna: MANZ'sche Verlag, 2009; C. Twigg-Flesner and D. Metcalf, 'The Proposed Consumer Rights Directive: Less Haste, More Thought?' (2009) *European Review of Contract Law* 368; Martiin W. Hesselink, 'The Consumer Rights Directive and the CFR: Two Worlds Apart?' (2009) *European Review of Contract Law* 290; Martiin W. Hesselink, 'Towards a Sharp Distinction between B2B and B2C?' (2010) *ERPL* 57; S. Whittaker, 'Unfair Terms and Consumer Guarantees: the Proposal for a Directive on Consumer Rights and the Significance of "Full Harmonisation"' (2009) *European Review of Contract Law* 223; J. Smits, 'Full Harmonisation of Consumer Law? A Critique of the Draft Directive on Consumer Rights', in *Festskript till Thomas Wilhelmsson* (Helsinki: JFT 2009) and (2010) *ERPL* 5; more positive (with the exception of unfair terms): E. Hondius, 'The Proposal for a European Directive on Consumer Rights: a Step Forward' (2010) *ERPL* 103.

<sup>5</sup> [2009] OJ C 317/54. <sup>6</sup> [2009] OJ L 200/76.

<sup>7</sup> European Parliament Working Document of 3 March 2010 (PE 439.177v02–00).

<sup>8</sup> Outline edition Sellier 2009; *re* blue button-proposal: H. Schulte-Nölke, 'EC Law on the Formation of Contract – from the CFR to the "Blue Button"' (2007) *European Review of Contract Law* 332 at 348; H. Beale, 'Pre-contractual Obligations: the General Contract Law Background' (2008) *Juridica Int.* 42; St Grundmann, 'The Optional European Code on the Basis of the Acquis' (2004) *ELR* 698; J. Basedow, 'Ein optimales Europäisches Vertragsgesetz – Opt-in, Opt-out, wozu überhaupt' (2004) *ZEuP* 12; N. Reich, 'Der CFR und Sonderprivatrechte im Europäischen Privatrecht' (2007) *ZEuP* 161 at 175.

The final version of the Consumer Rights Directive 2011/83/EU of 25 October 2011 ([2011] OJ L 304/64) has come up with implementing the 'half harmonisation' concept in its Article 4: 'Full harmonisation' is limited to consumer information and withdrawal rights for distance and off-premises contracts, while consumer information other than distance or off-premises contracts (Article 5 (4)), unfair terms (Article 32) and consumer sales (Article 33) – with some exceptions concerning delivery (Article 18), fees for the use of means of payment (Article 19), passing of risk (Article 20), and additional payments (Article 22) – remain under the minimum harmonisation principle.

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## 2

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## Comment: the future of EU consumer law – the end of harmonisation?

CHRISTIAN TWIGG-FLESNER

The development of EU consumer law has reached an important watershed. After decades of piecemeal harmonisation of selected aspects, it seems the moment has been reached where the future of EU consumer law may lie somewhere other than in further harmonisation of national law. The trigger has been the shift in responsibility for much of EU consumer law from DG SANCO to DG Justice following the appointment of a new Commission in 2009, and Commissioner Reding's willingness to open a debate as to where the priorities for EU consumer law should lie.<sup>1</sup> Furthermore, after a period of uncertainty, it now seems that the work on the Common Frame of Reference (CFR) on European contract law has resumed in earnest, and, more importantly, that this has once again been linked with the future development of EU consumer law. The Commission opened a broad debate about this in a Green Paper on policy options for progress towards a European Contract Law for consumers and businesses in July 2010.<sup>2</sup> This contribution will first take stock of the current situation regarding EU consumer law before moving on to examine the various policy choices put forward in the Green Paper. It will be suggested that the overall focus for the future development of EU consumer law should be on cross-border transactions, and that further harmonisation of national consumer laws should be stopped.

Professor of Commercial Law, University of Hull (UK).

<sup>1</sup> V. Reding, *An Ambitious Consumer Rights Directive: Boosting Consumers' Protection and Helping Businesses*, 15 March 2010, SPEECH/10/91.

<sup>2</sup> COM (2010) 348 final, 1 July 2010.

### A brief history of EU consumer law

Before turning to the potential future direction of EU consumer law, a brief account of its evolution is necessary.<sup>3</sup> EU consumer law is largely the result of harmonisation of national laws. There have been two dominant arguments for this approach:

1. Each transaction – whether domestic or cross-border – is subject to one national law, but in the cross-border context, two national laws (those of the consumer and the trader) collide. One law has to govern that transaction. The complication in identifying which law this might be is that consumer law is usually regarded as ‘mandatory law’, i.e. it will apply irrespective of the terms of the specific contract, and it cannot be displaced by choosing a law from another jurisdiction as applicable to the transaction. Differences between consumer laws of the various Member States could deter traders and consumers from dealing across borders, because traders, in particular, may not be aware of the different levels of protection their customers might enjoy. In order to promote the development of the border-free internal market, it was thought necessary to harmonise the key areas of consumer law so as to remove, or at least reduce, this perceived obstacle to cross-border consumer transactions within the EU.
2. It is argued that consumers do not engage in cross-border shopping because the differences in consumer law mean that consumers are not confident enough that they will be adequately protected when buying goods or services abroad (the ‘consumer confidence’ argument). The strength of this argument is in some doubt,<sup>4</sup> because other factors, such as linguistic difficulties or practical difficulties (e.g. transport) could be more significant obstacles to cross-border shopping – although these are not (as) susceptible to legislative intervention.

Much of EU consumer law is therefore tied to the internal market, not least because the EC Treaty (now the Treaty on the Functioning of the European Union (TFEU)) did not provide a formal legal basis for consumer protection measures until the Maastricht Treaty 1992 became law. Initially, the then Article 100 (subsequently Article 94 EC, now Article 115 TFEU) was utilised, but once the Single European Act

<sup>3</sup> For a fuller account see e.g. H. Micklitz, N. Reich and P. Rott, *Understanding European Consumer Law* (Antwerp: Intersentia, 2009).

<sup>4</sup> Seminally, T. Wilhelmsson, ‘The Abuse of the “Confident Consumer” as a Justification for EC Consumer Law’ (2004) 27 *Journal of Consumer Policy* 317–37.

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entered into effect, the then Article 100a (subsequently Article 95 EC, now Article 114 TFEU) became the legal basis for all subsequent consumer law directives. Article 114 TFEU is used for the adoption of measures approximating national rules which have the object of the establishment and functioning of the internal market. Any harmonisation measure has to have a link to the operation of the internal market,<sup>5</sup> although once the provision is engaged, action is not limited to harmonisation at a low level; rather, in the context of consumer protection (among other things), a high level of protection should be pursued.<sup>6</sup> By developing EU consumer law on the basis of this article, it became inevitable that the approach would be one of harmonising *national* laws, rather than creating free-standing EU rules. No distinction was made between cross-border and domestic consumer transactions, and the harmonised rules apply to all types of consumer transaction.

Most EU consumer law is based on directives, which require that the national laws of the Member States ensure that the outcomes stated by a particular directive are achieved in national law. A string of directives was adopted between 1985 and 2002, dealing with doorstep selling (85/577/EEC), package travel (90/314/EEC), unfair terms (93/13/EEC), timeshare (94/47/EC, since replaced), distance selling (97/7/EC), sale of consumer goods and guarantees (99/44/EC) and the distance marketing of financial services (2002/65/EC). All but the last of these directives adopted a minimum harmonisation standard, which permitted Member States to adopt or retain rules which were more favourable to consumers. Directives are not free-standing measures, but will only take effect once transposed into national law. The burden is on each Member State to ensure the effective transposition of a directive. This does not require a verbatim, or ‘copy-out’, transposition,<sup>7</sup> and Member States have some choice in deciding how to achieve the outcomes required by a directive, using suitable legal concepts and terminology.<sup>8</sup> Furthermore, directives only address selected aspects of the law – directive-based rules slot into existing national law. And in the case of minimum harmonisation directives, corresponding national legislation (either pre-existing or adopted to transpose a directive) may go further than the directive; indeed, minimum harmonisation has allowed Member States to implement a directive by

<sup>5</sup> C-376/98, *Germany v. Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419.

<sup>6</sup> Art. 95(3) EC; Art. 114(3) TFEU.

<sup>7</sup> E.g. Case C-59/89, *Commission v. Germany* [1991] ECR I-2607, para. 18.

<sup>8</sup> E.g. Case 363/85, *Commission v. Italy* [1987] ECR 1733.



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retaining existing national law without major change if that already matched, or exceeded, the minimum standard demanded by a directive.

The upshot of this approach is that there is not one consistent body of consumer law which is truly European; rather, there are now twenty-seven national rules on doorstep selling, distance selling and so on. National consumer laws have become a mix of pointillist<sup>9</sup> EU measures and existing national law (some of which is specifically concerned with consumer protection, the remainder the general law applicable to all transactions alike). While action so far has resulted in greater approximation of national laws and a reduction of differences, in reality, it has only adjusted the degree of diversity between the national laws of the Member States, making the overall picture more rather than less complex.

In order to get a better understanding of the state of EU consumer law, the Commission undertook an exercise which has become known as the *Acquis* review. This included the so-called EC Consumer Law Compendium and Database (the Compendium project), which analysed the transposition of eight consumer law directives<sup>10</sup> into the national laws of the twenty-seven EU Member States. This project comprised a database which detailed how each provision from a directive had been transposed into the laws of each of the twenty-seven Member States,<sup>11</sup> and a comparative analysis<sup>12</sup> which identified continuing discrepancies in areas already harmonised. There were three key reasons for these: (1) incoherence and ambiguity within the existing *acquis*, including inconsistencies between the different language versions of particular directives; (2) regulatory gaps in the directives tackled in differently by the Member States; and (3) reliance on minimum harmonisation clauses by the Member States.<sup>13</sup>

A Green Paper on the review of the consumer *acquis* was published in 2007.<sup>14</sup> This put forward a range of policy options regarding the future development of EU consumer law. Although it seemingly invited comments on a change of approach, such as limiting future legislation to cross-border transactions or even distance contracts only, or shifting

<sup>9</sup> W. H. Roth, 'Transposing "Pointillist" EC Guidelines into Systematic National Codes: Problems and Consequences' (2002) 6 *Eur. Rev Priv L* 761–76.

<sup>10</sup> Those on doorstep selling (85/577/EEC), distance selling (97/7/EC), sales (99/44/EC), unfair terms (93/13/EEC), package travel (90/314/EEC), timeshare (94/47/EC), unit pricing (98/6/EC) and injunctions (98/27/EC).

<sup>11</sup> Available at <http://www.eu-consumer-law.org/>.

<sup>12</sup> Published as H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers (eds.), *EC Consumer Law Compendium* (Munich: Sellier, 2008).

<sup>13</sup> *Ibid.*, 497–504. <sup>14</sup> COM (2006) 744 final.

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to full/maximum harmonisation, much of the Green Paper expressed a thinly disguised bias in favour of particular options.<sup>15</sup> The Green Paper was duly followed by a proposal for a Directive on Consumer Rights,<sup>16</sup> which – if adopted – would adopt a full harmonisation standard, removing the possibility for Member States to maintain or introduce more favourable rules than those specified in the directive. The proposal met with quite severe criticism of both its scope and substance,<sup>17</sup> and significant changes are expected to be made during the legislative stages. However, if this proposal were to become law, then two fundamental features of EU consumer law – harmonisation of national law and the use of directives – would be maintained. Somewhat unexpectedly, however, the involvement of a new Commissioner and the transfer of responsibility for the reform of EU consumer law to DG Justice both seem to have been the catalyst for thinking again about the best way forward in EU consumer law. Although work on the Consumer Rights Directive will continue for the time being, it seems that a change of direction may be on the cards.

### A change of direction?

On 1 July 2010, the European Commission published a Green Paper on policy options for progress towards a European Contract Law for consumers and businesses (the 2010 Green Paper).<sup>18</sup> The purpose of this Green Paper is to reinvigorate the development of a CFR on EU contract law, and to explore potential future action in the field of contract law. The genesis of the CFR is well known and there is no need to go into detail here.<sup>19</sup> It suffices to say that a pan-European research network prepared the so-called Draft Common Frame of Reference (DCFR)<sup>20</sup> and submitted

<sup>15</sup> Cf. B. Heiderhoff and M. Kenny, 'The Commission's 2007 Green Paper on the Consumer Acquis: Deliberate Deliberation' (2007) 35 *ELR* 740–51.

<sup>16</sup> COM (2008) 614 final. See G. Howells and R. Schulze (eds.), *Modernising and Harmonising Consumer Contract Law* (Munich: Sellier, 2009).

<sup>17</sup> M. Faure, 'Towards Maximum Harmonization of Consumer Contract Law ???' (2008) 15 *Maastricht Journal* 433–45; P. Rott and E. Terry, 'The Proposal for a Directive on Consumer Rights: No Single Set of Rules' (2009) 17 *ZEUP* 456–88 at 458–65; T. Wilhelmsson, 'Full Harmonisation of Consumer Contract Law?' (2008) 16 *ZEUP* 225–9. H. Micklitz and N. Reich, 'Crónica de una muerte anunciada: the Commission Proposal for a "Directive on Consumer Rights"' (2009) 46 *CMLRev*, 471–519.

<sup>18</sup> COM (2010) 348 final.

<sup>19</sup> See e.g. C. Twigg-Flesner, *Europeanisation of Contract Law* (London: Routledge-Cavendish, 2008), ch. 5.

<sup>20</sup> C. von Bar, E. Clive and H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (Munich: Sellier, 2009).