

A Cross-Border-Only Regulation for Consumer Transactions in the EU

1 Introduction

For more than 25 years, the European Union (EU) and its legal predecessor, the European Community, have adopted legislation directly aimed at improving the position of consumers who wish to take advantage of the opportunities offered by the internal market. This legislation generally deals with selected issues only, such as the provision of pre-contractual information or a right of withdrawal from a contract where the circumstances in which it was made (at a distance or at the consumer's home) or the nature of the transaction so justifies. There are some measures of more general application, such as the regulation of unfair contract terms or the sale of goods to consumers. The particular type of measure used by the EU has been the Directive. A directive does not apply directly, but needs to be transposed into the national laws of each of the 27 EU Member States, i.e., each Member State has to adopt legislation, or amend existing legislation, to give effect to the requirements of a particular directive. This process is commonly referred to as "harmonisation", although the terminology used in the EU Treaties is that of "approximation".¹ What this means is that the EU has tried to introduce a common set of consumer protection rules by requiring each national law to be adjusted, rather than by adopting legislation which would apply directly without the need of further action by the Member States. As the directives adopted to date only deal with specific aspects of consumer protection, there is considerable interaction between national provisions giving effect to EU directives and related areas of domestic law; indeed, it is often the case that domestic rules had to be adopted to supplement particular rules required by a directive.

¹ Cf. the wording of Art.114 TFEU (ex Art. 95 EC).

In 2005, the European Commission commenced a wide-ranging review of the development of EU Consumer Law to date and concluded that reforms were needed. A proposal for a new directive was put forward in the autumn of 2008, but its progress through the legislative procedure was slow and there was a great deal of debate. Many of the proposal's features proved to be controversial, not least the proposed shift from the hitherto utilised "minimum harmonisation" approach, which gave Member States the freedom to adopt or retain legislation which offered more stringent levels of consumer protection than those demanded by a directive, to one of "full harmonisation", which would fix one common standard of protection across the EU. Agreement on a new Directive was eventually secured in June 2011, but its substance is much reduced from the original proposal.

In parallel with the attempt to reform EU Consumer Law, the European Commission sponsored work on what has become known as the Draft Common Frame of Reference on European Contract Law (DCFR). Initially launched as a separate exercise focusing on the possible need for EU legislation to support contracting within the internal market, it became closely linked to the review of EU Consumer Law, only to be sidelined as a separate academic project.² However, in July 2010, the European Commission published a *Green Paper on Policy Options towards a European Contract Law for Consumers and Businesses*,³ which raised the possibility of new European legislation for Business-to-Business (B2B) and Business-to-Consumer (B2C) transactions which would be made available as an optional alternative to national laws.

It is against the backdrop of these developments that the present work considers the case for an entirely new approach towards EU Consumer Law. A number of discrete, but inter-related, steps are suggested. First, it is argued that the process of harmonisation by directives has failed to achieve its stated objective, which was the creation of a level playing field for consumers who wish to buy goods from another Member State and traders who want to sell their products across the internal market. It is therefore suggested that the EU should abandon any further use of directives and grasp the nettle of adopting a regulation instead. Secondly, it will be argued that the EU should confine itself to the adoption of legislation which has a cross-border dimension, leaving national governments to adopt whichever measures are regarded as necessary to regulate purely domestic consumer transactions. It will be considered which sort of transactions should be regarded as "cross-border" rather than "domestic" transactions, a distinction which is admittedly difficult to draw. The overall conclusion will be that the EU should concentrate its efforts on adopting a Regulation for Cross-Border Consumer Transactions. The discussion will then turn to the debate about creating some sort of European Contract Law, most probably through the adoption of an optional instrument. It will be examined how the proposal made in this *Brief* compares to the notion of an optional instrument, and several differences be highlighted. Having made the case for a change of approach and located this in

² See G. Howells, "European Contract Law Reform and European Consumer Law – Two related but distinct regimes" (2011) 7 *European Review of Contract Law* 173–194.

³ COM (2010) 348 final.

the debate about European Contract Law, there will be a brief discussion of the potential substantive content of the Regulation and relevant arrangements for enforcement and cross-border dispute resolution, as well as the potential role of such a Regulation as a model for a legal framework to govern transnational consumer transactions.

1.1 Two Assumptions

The argument presented in this *Brief* makes a fundamental assumption about the acceptable impact of EU law on consumer contracts and, more particularly, to what extent the EU should be concerned with matters with a purely national dimension. Instead of taking a broad reach, it is suggested that the EU should concentrate only on matters which cross national boundaries. It is not possible within the confines of this *Brief* to explore this assumption more fully⁴; instead, the focus is on the specific argument made for a new approach to EU Consumer Law.

Moreover, it is also assumed that there is a need to put into place a legal framework for cross-border consumer transactions in order to facilitate such transactions. This should not be understood as dismissing the need for a careful scrutiny of the factors which might impede consumers from engaging in cross-border transactions and, indeed, consideration of whether such impediments could be tackled through legislation. This *Brief* takes as its starting point the assumption that there is a need for a legal framework for cross-border consumer transactions and is concerned with its scope and nature.

2 Background

This section will provide the background against which the argument in favour of a Regulation with a cross-border scope for consumer transactions is developed. It will first look at the basic legal issues associated with cross-border contracting before providing a synopsis of the evolution of EU Consumer Law to date.

2.1 Legal Issues of Cross-Border Contracting

The starting point for this discussion is the basic problem associated with any kind of transaction which, in some way, straddles national (or jurisdictional) boundaries. Each transaction—whether domestic or cross-border—is governed by one particular

⁴Cf. the distinction made by Hesselink between a nationalist, Europeanist and dualist understanding of private law in M. Hesselink, “The Common Frame of Reference as a Source of European Private Law” (2009) 83 *Tulane Law Review* 919–971, pp. 932–933.

national law.⁵ By definition, a cross-border transaction could produce a conflict between at least two national laws—those of the consumer and the trader respectively.⁶ Some mechanism therefore has to be found that can solve the basic question of which law should be applicable to the contract in question. Within the EU, the relevant measure which determines the applicable law is Regulation 593/2008 on the law applicable to contractual obligations,⁷ commonly known as the “Rome I Regulation”.⁸ Fundamentally, the applicable law is a question of party autonomy, i.e., the parties to a contract can choose which law they wish to apply to their contract.⁹ However, this freedom of choice is subject to several constraints. First, the law chosen must be the law of a particular jurisdiction, which means that “non-state laws” (such as the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law or the Draft Common Frame of Reference) cannot be chosen as the applicable law, although they can be incorporated into the contract itself as the terms of the contract.¹⁰ Secondly, if the parties choose a particular law, but “all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen”, then the rules of law of the country where “all the other elements are located”, and which cannot be derogated from by agreement between the parties, will continue to apply.¹¹ These rules are what are commonly known as “mandatory rules”, i.e., provisions which apply and which the parties cannot contract out of under that particular law. Similarly, the choice of the law of a non-EU Member State cannot preclude the application of “mandatory rules” of EU law where “all other elements relevant to the situation ... are located in one or more Member States ...”.¹² In broad terms, the choice of law by the parties is therefore subject to the “mandatory rules” of the jurisdiction with which the contract is otherwise connected. Domestic consumer law rules generally have the character of “mandatory rules”, i.e., they cannot be displaced by the terms of the contract between consumer and trader. So any agreement as to the choice of law between a trade and a consumer would be subject to these provisions on mandatory rules.

⁵ Although there are instances where more than one law might be applicable to different aspects of one transaction, but for the sake of simplicity, this is not considered further here.

⁶ If a neutral law is expressly chosen as governing the contract, then a third national law comes into the picture.

⁷ (2008) O.J. L177/6.

⁸ The Regulation replaces the Rome Convention 1980, an international Treaty concluded by the Member States of the EU outside the then existing Treaty framework because the European Economic Community, as it then was, had no competence to adopt legislation in the field of private international law. Following amendments made since the Treaty of Amsterdam 1997, the EU now has such competence, and the Regulation was adopted to bring private international law within the scope of EU-based legislation.

⁹ Art. 3(1) Rome-I Regulation.

¹⁰ Recital 13.

¹¹ Art. 3(3) Rome-I Regulation.

¹² Art. 3(4) Rome-I Regulation.

However, as far as consumer contracts are concerned, the Rome-I Regulation contains a specific provision in Art. 6, according to which the applicable law is the law of the country where the consumer has his habitual residence.¹³ There are two alternative preconditions, one of which needs to be met for this provision to apply:

1. The trader pursues his commercial or professional activities in the country where the consumer has his habitual residence.
2. The trader by any means directs such activities to that country or to several countries including that country.

In either case the contract which has been concluded has to fall within the scope of the traders commercial or professional activities.

The parties may still choose the applicable law in accordance with Art. 3 in these circumstances, but where they do so, the mandatory rules of the country where the consumer has his habitual residence continue to apply.

So for Art. 6 to apply, the trader needs to either pursue his activities in the country where the consumer has his habitual residence or direct his activities to that country. “Pursuing activities” might presumably include matters such as engaging in door-to-door sales or operating through a branch. More difficulty is posed by the “directed activity” criterion, which merits further exploration. It should be noted that similar requirements to Art. 6 can be found in Art. 15 of Regulation 44/2001 (known as the “Brussels Regulation”, which deals with another private international law issue: the determination of which court has jurisdiction to adjudicate on a particular dispute involving more than one country).¹⁴ Recital 24 of the Rome-I Regulation emphasises the need to interpret the concept of “directed activity” in the same way under both regulations.

A particular difficulty is posed by websites. In the context of the Brussels Regulation, a joint declaration by the Council and the Commission states, *inter alia*, that “the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor”.¹⁵ However, beyond this, the exact scope of “directed activity” is not entirely clear; in particular, the wording of the Regulation does not make it easy to identify the point at which websites which allow for the placing of an order are to be treated as a “directed activity”.¹⁶ According to the joint

¹³ For a fuller analysis, see P. Cachia, “Consumer Contracts in European private international law: the sphere of operation of the consumer contract rules in the Brussels I and Rome I Regulations” (2009) 34 *European Law Review* 476–490.

¹⁴ For the purposes of this brief, a fuller discussion of the jurisdiction rules in the Brussels-I Regulation is not needed and has therefore been omitted.

¹⁵ Cited in Recital 24.

¹⁶ For a fuller discussion, see, e.g., L. Gillies, *Electronic Commerce and International Private Law* (Aldershot: Ashgate, 2008).

declaration, the mere fact that the website is accessible is clearly insufficient, but the mechanism by which distance contracts are concluded is a relevant factor. Presumably, this means that where the website provides clear delivery information for a range of countries including that of the consumer's habitual residence, this might strongly suggest that the business has used the website to direct its activities to the country of the consumer's habitual residence. The matter was considered by the European Court of Justice in some detail *Pammer v Schlüter*,¹⁷ and whilst this case offers important guidance, some uncertainty remains. The ECJ first observed that by the very nature of the Internet, websites are, in principle, accessible throughout the EU and beyond, but the mere accessibility of a website beyond the country where the trader is established does not mean that the trader directs his activities beyond the borders of this country (paras. 68–69). Instead, it is necessary to show that the trader has “manifested its intention to establish commercial relations with consumers from one or more other Member States, including that of the consumer's domicile” (para. 75). So it needs to be shown that the trader was willing to conclude contracts with consumers domiciled in Member States other than his own. To facilitate the application of this basic test, the ECJ offered a number of criteria to be considered by a national court. First, the ECJ held that the mere provision of the trader's email address or geographical address, or of his telephone number without the international dialling code, was irrelevant as such information had to be given under EU legislation even where the trader did not wish to enter into contracts with consumers from other Member States. Whilst it does enable the consumer to contact the trader electronically, this was insufficient (paras. 76–79). Secondly, a clear statement by the trader on the website that its goods or services are offered in one or more Member States mentioned by name, or the paid inclusion in search engines accessed from particular Member States, would be relevant evidence (para. 81). Thirdly, more specific factors might include “the international nature of the activity at issue; ... telephone numbers with the international dialling code; use of a top-level domain name other than that of the Member State in which the trade is established ... or the use of neutral top-level domain names such as ‘.com’ or ‘.eu’; ... mention of an international clientele composed of customers domiciled in various Member States ...” (para. 83). Fourthly, by way of refinement of the point about language and currency made in the joint declaration, the ECJ stated that if the website permits the use of a language or currency different from that of the Member State where the trader is established, then this *can* be taken as evidence that the trader directs his activities to other jurisdictions (para. 84). Whilst this ruling does not provide an exhaustive and comprehensive answer as to the scope of Art. 15(1) (c) of the Brussels-I Regulation (and therefore the corresponding provision in Art. 6 of the Rome-I Regulation), it does offer more substantial guidance on what might be relevant considerations in bringing the consumer-specific rules into play. Also, beyond the difficulties posed by websites, the protective provision will clearly apply

¹⁷ Joined cases C-585/08 and 144/09 *Peter Pammer v Rederei Karl Schlüter GmBH & Co KG; Hotel Alpenhof Gesmbh v Oliver Heller* [2010] ECR I-xxxx (judgment of 7 December 2010).

where the trader has sent advertising or other material inviting the conclusion of a contract directly to the consumer.¹⁸

If the conditions of Art. 6 are not satisfied, and the parties have not chosen a law in accordance with Art. 3, then there are default provisions in Art. 4(1) of the Rome-I Regulation that would apply. As far as the most common consumer contracts are concerned (sale of goods and supply of service), the applicable law would, in essence, be the law where the seller or service provider has his habitual residence.

What this brief discussion of the private international law context shows is that traders contracting with consumers from other Member States will need to be aware of the mandatory consumer protection rules applicable under the law of the consumer's habitual residence. A trader who intends to operate across all of the 27 Member States therefore needs to ensure that he is familiar with, and complies with, the mandatory rules of each of the Member States, particularly where that trader is engaged in e-commerce or distance selling. This could, potentially, be very burdensome. One solution would be to establish subsidiaries in all the Member States and to use these subsidiaries for transactions only in those national markets. However, that would be very costly and, in view of the opportunities for cross-border selling now provided by the Internet, seem unnecessary.

There are two general solutions towards reducing the burden on traders in these circumstances: first, steps could be taken to make sure that the mandatory consumer rules are the same in all the Member States, or second, a dedicated legal framework for cross-border transactions within the EU could be established. To date, the EU has focused on the first of these two solutions, and the following section will chart the evolution of EU Consumer Law in this vein. The focus of this *Brief* is to consider the second solution and to argue that this should be the preferred approach. Before doing so, it is necessary to examine the approach adopted to date and the problems which can be identified.

2.2 *Evolution of EU Consumer Law*

This section will explain briefly how EU Consumer Law has evolved over the past three decades.¹⁹ As already mentioned, EU Consumer Law is largely created through the adoption of legislation which seeks to harmonise selected aspects of national law, i.e., to require all national laws to provide the same basic legal rules applicable to consumer transactions. One might ask why there is any need for the EU to pursue this objective. One reason frequently advanced follows from the difficulties both traders and consumers face if they wish to transact across borders. It was explained above

¹⁸ Cf. C-180/06 *Renate Ilsinger v Martin Dreschers* [2009] ECR I-3961.

¹⁹ Generally, see S. Weatherill, *EU Consumer Law and Policy* (Cheltenham: Edward Elgar, 2005), or H. Micklitz, N. Reich and P. Rott, *Understanding European consumer law*. (Antwerp: Intersentia, 2008).

that transactions involving parties from more than one jurisdiction create a conflict of laws, particularly with regard to consumer protection rules which generally have mandatory character. Significant differences between the national consumer laws in the trader's and consumer's jurisdiction respectively may deter both trader and consumer from transacting across borders. The trader will not know whether there are legal provisions in the law of the consumer's jurisdiction which would have to be complied with, and the consumer will not know whether rights familiar from domestic transactions will still be available, or enforceable, when dealing with a trader in another jurisdiction. This uncertainty creates both an additional cost factor in that both trader and consumer might need to seek out information about the legal situation, and it is arguable that this might deter either from transacting across borders.

In addition to this cost-based reason, a second reason is frequently given in the context of consumer law: the "consumer confidence" argument. The gist of this is that consumers are deterred from shopping across borders because the differences in national consumer laws mean that consumers cannot be sufficiently confident about the legal protection they have when buying goods or services from another Member State.²⁰ Although attractive at face value, it is debatable whether variations in consumer laws really are a crucial factor in a consumer's decision (not) to shop abroad.²¹ Other factors, such as linguistic difficulties or practical difficulties (e.g., transport or complaint resolution), might be more significant deterrent factors. Professor Goode famously once put his views thus

This conjures up a vision of a woman from, say, Ruritania, who visits Rome and there, in the Via Condotti, sees a fabulous dress, a dress to die for. She is about to buy it but then caution prevails: I must not buy this dress because I am not familiar with Italian law. Clearly a very sophisticated consumer, and one who by inference *is* familiar with Ruritanian law.²²

But if both these reasons are accurate, then this would undermine one of the fundamental objectives of the EU: the creation of an internal market among all its Member States. The disparity of national consumer laws is regarded as an obstacle to the operation of the internal market.

2.2.1 Free Movement Provisions and Consumer Law

If national consumer laws are an obstacle to the operation to the internal market, then one might rightly ask whether such rules could be in conflict with the provisions guaranteeing the free movement of goods and services within the EU.

²⁰ The leading article with a critical stance on this is T. Wilhelmsson, "The abuse of the "confident consumer" as a justification for EC consumer law" (2004) 27 *Journal of Consumer Policy* 317–337.

²¹ The most recent Eurobarometer survey suggested that almost 60% of EU Consumers were concerned about scams or fraud when purchasing goods or services in another Member State and a similar number were concerned about resolving problems, should something go wrong. See Flash Eurobarometer 299, *Consumer attitudes towards cross-border trade and consumer protection* (March 2011). The replies were given to prompted answers, rather than through open questions.

²² R. Goode, "Contract and commercial law: the logic and limits of harmonization" in F.W. Grosheide and E. Hondius (Eds.) *International Contract Law* (Antwerp: Intersentia, 2004), p. 320.

However, the European Court of Justice has generally proceeded rather cautiously in considering the compatibility of national consumer protection measures (particularly in the private law field) with the fundamental freedoms guarantees by the Treaties, notably the free movement of goods. Thus, Article 34 TFEU prohibits quantitative restrictions and all measures having an equivalent effect on the import of goods into a Member State (Article 35 deals with similar restrictions on exports). Initially, the ECJ gave Art. 34 a wide scope, stating in its famous *Dassonville* formula that Art. 34 covered “[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade ...”.²³ It is not limited to measures which are overtly discriminatory against imports from other countries and can also apply to national rules which apply to both imports and domestically produced goods (“indistinctly applicable measures”). In *Cassis de Dijon*,²⁴ the ECJ confirmed the application of Art. 34 to indistinctly applicable measures, although crucially, the Court also held that not all domestic provisions would be incompatible with Art. 34; in particular, some restrictions on the marketing of products were acceptable

[...] insofar as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and *the defence of the consumer*.²⁵

In 1993, the ECJ restricted the rather broad scope of Art. 34 in *Keck and Mithouard*,²⁶ where it held that “certain selling arrangements” were not caught by the *Dassonville* test, provided that these affected domestic and imported goods in the same manner, in law and in fact. Only rules which relate to “requirements to be met” by goods were to be regarded as falling within Art. 34. In holding so, the ECJ deliberately narrowed the scope of Art. 34, which had taken on a very broad reach.

The ruling in *Keck* occurred around the same time when the ECJ was asked whether certain private law rules were compatible with Arts. 34 and 35. In C-339/89 *Alsthom Atlantique v Compagnie de construction mécanique Sulzer SA*,²⁷ the ECJ considered whether a French rule imposing strict liability on the supplier of goods for any latent defects was compatible with Art. 35.²⁸ It was argued that this meant that French law differed from that in other Member States and therefore had the effect of obstructing the free movement of goods. This was rejected by the Court, because the French rule was not directed at exports, but applied to all contracts subject to French law.²⁹ In addition, parties to an international sales contract could

²³ Case 8/74 *Procureur de Roi v Dassonville* [1974] ECR 837.

²⁴ Case 120/78 *Rewe v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.

²⁵ *Ibid.*, para. 8, emphasis added.

²⁶ Case C-267/91 *Keck and Mithouard* [1993] ECR I-6097.

²⁷ [1991] ECR I-107.

²⁸ Note that, historically, for a national provision to fall foul of Article 35, it must be discriminatory, and a rule of reason along the *Cassis de Dijon* lines is not available. See L. Woods, *Free Movement of Goods and Services* (Aldershot: Ashgate, 2004), chap. 6.

²⁹ See also C-69/88 *H. Krantz GmbH & Co. v Ontvanger der Directe Belastingen and Netherlands State* [1990] ECR I-583.

choose the law applicable to the contract and thereby avoid the application of the French rule altogether (para. 15). A similar approach was taken in *C-93/92 CMC Motorradcenter GmbH v Pelin Baskiciogullari*,³⁰ concerning the compatibility with Art. 34 of a German rule on pre-contractual liability (*culpa in contrahendo*). The ECJ held that this rule applied to all contractual relationships to which German law applied and that it was not a rule designed to regulate trade (para. 10). In addition, the Court observed that the impact of this rule was “too uncertain and too indirect” to constitute an obstacle to trade between Member States.

Although neither case unequivocally rules out the potential for private law rules to conflict with Arts. 34 and 35 TFEU, it seems very unlikely that such rules could be challenged successfully under either provision. Of course, neither case was concerned with mandatory rules of consumer law, and there is still a question whether it might be arguable that such rules could be caught by Art. 34. But even if that were to be the case, it would generally be possible to justify consumer protection rules on the basis of the *Cassis de Dijon* “mandatory requirements”.³¹ It has even been argued that all private law rules could be treated as “mandatory requirements” to avoid the consequences of finding that they might breach Article 34.³²

However, even though consumer law might generally not fall foul of the free movement provisions,³³ that does not mean that they might not impede trade. Clearly, the need of having to comply with different mandatory consumer protection rules when dealing with consumers from a number of Member States makes trading more complicated, and probably more costly. To reduce the impact of the variation between national consumer laws, it was deemed necessary to harmonise the main elements of national consumer law rules to minimise the impact of such rules on cross-border business.

2.2.2 Legal Basis and Legal Form

The focus on the internal market is the primary reason for much of the measures adopted by the EU in the field of consumer protection. This might have been more of a “historical accident” than a conscious decision to instrumentalise consumers in pursuing the goal of a market that crosses the national boundaries of the Member States. Initially, the EC Treaty [now the Treaty on the Functioning of the European Union (TFEU)] did confer direct competence on the EU to adopt legislation in the field of consumer law. It was not until the Maastricht Treaty adopted in 1992 became law that a legal basis was inserted into the Treaty to give the EU some

³⁰ [1993] ECR I-5009.

³¹ H. Muir-Watt, “The Conflict of Laws as a Regulatory Tool” in F. Cafaggi, *The Institutional Framework of European Private Law* (Oxford: OUP, 2006), p. 129.

³² B. Heiderhoff, *Gemeinschaftsprivatrecht* (Munich: Sellier ELP, 2005), pp. 25–26.

³³ See also the discussion in J. Stuyck, “The European Court of Justice as a Motor of Private Law” in C. Twigg-Flesner (ed.), *The Cambridge Companion to European Union Private Law* (Cambridge, Cambridge University Press, 2010).

direct powers to legislate on consumer matters. Early action therefore had to be based on an alternative provision in the Treaty. Initially, this was the then Article 100 (subsequently Article 94 EC, now Article 115 TFEU), but after the entry into force of the Single European Act, the then Article 100a (subsequently Article 95 EC, now Article 114 TFEU) was utilised as the legal basis for all subsequent consumer law directives. Article 114 TFEU provides for the adoption of measures approximating national rules which have as their object the establishment and functioning of the internal market. It will be necessary to return to the scope of this provision in more detail later, but it is important to note here that this Article does not provide a general power for the EU to regulate the internal market. In a landmark ruling, the ECJ emphasised that a clear link between a measure adopted on the basis of Art. 114 TFEU and the establishment/operation of the internal market had to be established.³⁴ Once this threshold has been crossed, any action taken is not limited to removing disparities by approximating national laws at the level of the “lowest common denominator”. In particular, in the context of consumer protection (among others), a high level of protection should be pursued (Article 114(3) TFEU). The ECJ has since refined its position on the scope of Article 114 TFEU.³⁵

In “borrowing” the internal market legal basis, the EU also effectively settled the particular approach to be taken to the adoption of consumer law measures: from the wording of both Articles 114 and 115 TFEU and their respective predecessors, it is clear that the focus of any measure adopted will be on the approximation of *national* law. This meant that EU Consumer Law would be created by requiring all of the Member States to make changes to their domestic law to ensure that whatever set of rules was agreed at the European level would be incorporated into national law. Consequently, EU-based rules would apply to all types of consumer transactions: local, regional, national and cross-border. A serendipitous advantage of this approach was that the general level of consumer law across all the Member States would be raised, and this might well have been an additional motivating factor.

In pursuing its harmonising strategy, the EU has the choice between two types of legislative measure: the *directive* and the *regulation*. The main difference between these is encapsulated in the respective definitions now found in Article 288 TFEU. First, a directive is “binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”. Secondly, a regulation is “binding in its entirety and directly applicable in all Member States”. The essential distinction is that a regulation will apply directly in all the Member States as adopted by the EU, whereas a directive will need to be given effect by appropriate national legislation which incorporates the requirements set by the directive.

³⁴ C-376/98 *Germany v Parliament and Council* (“Tobacco Advertising”) [2000] ECR I-8419.

³⁵ See, e.g., C-491/01 *The Queen v Secretary of State for Health ex parte British American Tobacco (Investment) Ltd and others* [2002] ECR I-11543; C-210/03 *Swedish Match AB, Swedish Match UK Ltd v Secretary of State for Health* [2004] ECR I-11983, and C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573. See also K. Gutman, “The Commission’s 2010 Green Paper on European Contract Law: Reflections on Union Competence in Light of the Proposed Options” (2011) 7 *European Review of Contract Law* 151–172.

In creating its body of consumer law, the EU has used directives. Crucially, therefore, EU Consumer Law evolved by infiltrating selected areas of national law, and EU-based rules became applicable to all consumer transactions, whether local, regional or cross-border. A series of directives were adopted between 1985 and 2002, dealing, *inter alia*, with doorstep selling (85/577/EEC),³⁶ consumer credit (87/102/EEC),³⁷ package travel (90/314/EEC),³⁸ unfair terms (93/13/EEC),³⁹ time-share (94/47/EC),⁴⁰ distance selling (97/7/EC)⁴¹ and the sale of consumer goods and guarantees (99/44/EC).⁴²

A core feature of all of these directives is that they are based on a minimum harmonisation standard. This means that each directive specified a minimum level of consumer protection which had to be met by all the national laws. Beyond this, Member States have the freedom to adopt or retain rules which are more favourable to consumers. As will be discussed later, the European Commission has more recently pursued a policy of “full” or “maximum” harmonisation, which would remove the possibility for Member States to derogate upwards from the standard set by any directive. However, at present, the bulk of EU Consumer Law remains of a minimum harmonisation level. This means that the corresponding national legislation (either pre-existing or adopted to transpose a Directive) can go further than the relevant directive. The existence of a minimum harmonisation clause in a directive has allowed the Member States to implement a Directive by retaining existing national legislation without major change on the basis that it already exceeded the minimum standard postulated by a directive.⁴³

There are a number of implications which flow from the use of directives and which have come to shape the current form of EU Consumer Law. As noted, directives are not free-standing measures, but need to be transposed into national law. This requires each Member State to adopt new legislation, or amend existing laws, to ensure that the requirements of a directive are met. Article 288 TFEU leaves the form and methods of doing so to the discretion of the Member States, and the ECJ has confirmed that Member States are not required to adopt a verbatim, or “copy-out”, approach to the transposition of a directive.⁴⁴ Rather, each Member State has to decide how the outcomes prescribed by a directive can best be given effect to in national law, using whichever legal concepts and terminology will achieve this.⁴⁵

³⁶ (1985) OJ L 372/85.

³⁷ (1987) OJ L42/87; since replaced by Directive 2008/48/EC; (2008) OJ L133/66.

³⁸ (1990) OJ L158/90.

³⁹ (1993) OJ L95/93.

⁴⁰ (1994) OJ L280/94; since replaced by Directive 2008/122/EC; (2008) OJ L33/10.

⁴¹ (1997) OJ L144/19.

⁴² (1999) OJ L171/12.

⁴³ For a detailed analysis of this, see H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers, *EC consumer law compendium* (Munich: Sellier, 2008).

⁴⁴ For example, case C-59/89 *Commission v Germany* [1991] ECR I-2607, para. 18.

⁴⁵ For example, case 363/85 *Commission v Italy* [1987] ECR 1733.

Moreover, the directives which have been adopted to date are concerned with selected aspects of consumer law only. This means that the rules introduced into the national laws in transposing a directive have to be made to “fit” with existing national law. Additionally, there are some instances when a directive expressly leaves particular matters to be determined by national law, either by giving Member States the option to introduce certain provisions⁴⁶ or by specifying that Member States should deal with a particular issue in their national law as they see fit.⁴⁷

In short, the landscape of EU Consumer Law in its current form is a complex jigsaw of EU-derived and national rules. Matters which are subject to EU legislation have resulted in setting at least a common minimum standard for all of the Member States, although national laws have to fill in the gaps for those aspects which are not subject to EU regulation. As a result, EU Consumer Law is not a coherent and consistent body of legal rules which is truly European; rather, there are now 27 national sets of legal rules dealing with doorstep selling, distance selling, consumer sales, unfair contract terms, and so on. It was famously observed by Roth some time ago that consumer law across the EU is a mix of “pointillist”⁴⁸ EU measures and existing national law, some of which focuses specifically on consumer protection, although other provisions of national law are part of the set of legal rules which applies to all types of transactions.

2.2.3 Application of EU Consumer Law

The foregoing brief sketch of how a body of EU Consumer Law was created suggests that this has not resulted in an altogether satisfactory legal framework. However, this is only one part of the overall picture. Adopting relevant legal rules is one stage in creating law, but the subsequent application and interpretation by the courts are just as important if the overall objective pursued by the law is to be attained. Because EU Consumer Law takes effect as measures of national law, the application, interpretation and enforcement fall to the national courts. However, national courts cannot simply treat national rules which give effect to an EU measure in the same way as they would treat non-EU based national rules. Instead, courts are obliged to interpret national legislation which implements a directive in

⁴⁶ For example, Art. 5(2) of the Consumer Sales Directive (99/44/EC): “Member States may provide that, in order to benefit from his rights, the consumer must inform the seller of the lack of conformity within a period of 2 months from the date on which he detected such lack of conformity”.

⁴⁷ For example, Art. 7 of the Doorstep-Selling Directive (85/577/EC): “If the consumer exercises his right of renunciation, the legal effects of such renunciation shall be governed by national laws, particularly regarding the reimbursement of payments for goods or services provided and the return of goods received”.

⁴⁸ W.H. Roth, “Transposing ‘pointillist’ EC guidelines into systematic national codes—problems and consequences” (2002) 10 *European Review of Private Law* 761–776.

such a way that this interpretation conforms to the directive. This is known as the principle of “autonomous interpretation” of EU law.⁴⁹

As with other aspects of EU Law, the national courts are not entirely left to their own devices. They are able to seek guidance from the ECJ on the interpretation of the relevant EU rules under the preliminary reference procedure provided in Article 267 TFEU (Article 234 EC). However, this possibility seems to have remained rather more theoretical than one would hope: Article 267 references on aspects of the consumer *acquis* have been made rather infrequently, which is even more surprising if one bears in mind that the key directives have been in force for over 12 years, and many for much longer than that. Consequently, the ECJ has only had a small number of opportunities to provide guidance to the national courts on how certain provisions should be interpreted. The lack of such guidance will have contributed to the continuing diversity between national consumer laws as national courts adopt their own interpretation of key provisions of national law which are based on a directive. In the UK, for example, the highest court in the land (both as Supreme Court and its former incarnation as Judicial Committee of the House of Lords) has twice decided that a reference to the ECJ regarding the meaning of key terms in the Unfair Contract Terms Directive (93/13/EEC) was unnecessary.⁵⁰

But perhaps the small number of references is not due to the reluctance of the national courts to involve the ECJ. As explained earlier, EU-based provisions are effectively “islands” of varying size within the ocean of national (consumer) law, and so national courts may not always be fully aware that a particular provision in issue is of the European origin. In such a situation, a national court is likely to interpret such provisions purely in the context of national law and even more so where existing rules of national laws are deemed to comply with the requirements of a directive.⁵¹ Of course, from a technical EU law perspective, a national court doing this would contravene its obligations under EU Law to ensure that national law is interpreted in accordance with EU law, but it seems extremely unlikely in practice that such failures would have any consequences, despite the fact that this would be a breach of EU law and could in some circumstances provoke a claim for state liability.⁵²

Thus, at the end of the first era of EU Consumer Law, the situation is that there has been a degree of approximation in the national consumer laws, which has meant that the differences in consumer protection between the Member States have been reduced and a minimum standard of protection now applies across the EU.

⁴⁹ Case C-287/98 *Luxembourg v Linster* [2000] ECR I-6917; case 327/82 *Ekro v Produktschap voor Vee en Vlees* [1984] ECR 107, paragraph 11; C-151/02 *Landeshauptstadt Kiel v Jaeger* [2003] ECR I-8389, para. 58.

⁵⁰ *Director-General of Fair Trading v First National Bank* [2001] UKHL 52; *Office of Fair Trading v Abbey National plc and others* [2009] UKSC 6.

⁵¹ Cf. M. Loos, “The influence of European consumer law on general contract law and the need for spontaneous harmonization” 15 *European Review of Private Law* 515–531.

⁵² On the basis of C-224/01 *Köbler v Austria* [2003] ECR I-10239.

Although substantively, therefore, consumers are now guaranteed a minimum set of rights, the legal framework itself which now exists is rather unsatisfactory. In fact, the real outcome after this era of harmonisation is that the degree of diversity between the national laws of the Member States has been reshuffled rather than reduced and has produced simply a different and altogether more complex pattern.

2.3 *The Reform of the Consumer Acquis*

By the turn of the millennium, EU Consumer Law had taken shape. As explained above, it was based on directives dealing with particular aspects of consumer law and pursued a minimum level of harmonisation that left Member States free to provide more protective rules. Whilst this meant that differences between national consumer laws were reduced, there remained scope for considerable variation above the minimum threshold. The thinking within the Commission's Directorate-General responsible for consumer law at the time (DG Sanco) changed, and it was proposed to consider a shift to full harmonisation, i.e., to set one European standard that would be applicable throughout the EU Member States without scope for deviation, even where this would be more favourable to consumers.⁵³

As part of this proposed shift, the European Commission launched what has become known as the *Acquis Review*. This involved gathering evidence about the extent to which minimum harmonisation has retained fragmentation between national consumer laws and also consideration of whether changes need to be made to the substance of the existing measures, particularly if there were a shift to full harmonisation.

The evidence-gathering exercise was undertaken by a group of legal scholars who produced the *EC Consumer Law Compendium and Database* ("the Compendium project"). This analysed the transposition of eight consumer law directives⁵⁴ into the national laws of the 27 EU Member States, together with the available case law on the application and interpretation of these national laws. A database was created which makes it possible to see how each provision of the various directives was transposed into the national laws of each of the 27 Member States.⁵⁵ The database therefore provides an easy mechanism for identifying variations between national laws, resulting from, for example, the inaccurate transposition of a particular provision or the choice by a Member State to exceed the minimum standard required by a directive. In addition to the database, a comparative analysis examined in more

⁵³ See *Consumer Policy Strategy 2002–2006* COM(2002) 208 final and *EU Consumer Policy Strategy 2007–2013*. COM (2007) 99 final.

⁵⁴ 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).

⁵⁵ Available at <http://www.eu-consumer-law.org/>.

detail how each of the directives under review was transposed and applied across the Member States. In particular, it identified continuing discrepancies in areas already harmonised.⁵⁶ The Compendium project therefore provides a full picture (albeit a snapshot) of the state of the national consumer laws following the transposition of the existing harmonising directives. Unsurprisingly, it was discovered that even in areas subject to harmonisation, there were considerable variations between national laws. These were attributed to three dominant factors (1) incoherence and ambiguity within the existing *acquis*, including inconsistencies between the different language versions of particular directives; (2) the fact that regulatory gaps were “filled” in different ways in the various national laws; and (3) the use of minimum harmonisation clauses by the Member States.⁵⁷

The findings of the Compendium project therefore confirmed the Commission’s assumption that minimum harmonisation had not managed to create the level playing field for consumer transactions in the internal market. Although a policy decision to abandon minimum harmonisation had already been taken and actively pursued in the adoption of two key consumer law directives,⁵⁸ the findings of the Compendium project seemed to provide DG Sanco with further ammunition for a shift to full harmonisation.

This was confirmed when the Commission issued its *Green Paper on the Review of the Consumer Acquis*,⁵⁹ accompanied by two separate reports on the directives on consumer sales and distance selling.⁶⁰ The *Green Paper* was essentially concerned with the directives on doorstep selling, distance selling, unfair terms and consumer sales. At the same time, a new Timeshare Directive was proposed and adopted in 2008, again applying a full harmonisation standard.⁶¹

The *Green Paper* dealt with both general policy choices and a range of potential changes to the substance of the present *acquis*. Of particular relevance to this work was the question whether future legislation should be limited to cross-border transactions or even distance contracts only, or whether it should—as before—cover all consumer transactions.⁶² The *Green Paper* was anything but neutral on this issue,⁶³ and it was fairly obvious that the Commission’s preferred view that the *status quo* ought to be maintained. Briefly, the Commission argued that the risk of legal fragmentation posed by having separate regimes for domestic and cross-border transactions, or face-to-face and distance transactions, would rule out any alternative to

⁵⁶ H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers, *EC consumer law compendium* (Munich: Sellier, 2008).

⁵⁷ H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers, *EC consumer law compendium* (Munich: Sellier, 2008), pp. 497–504.

⁵⁸ Directive 2002/65/EC on Distance Marketing of Consumer Financial Services (2002) OJ L271/16 and Directive 2005/29/EC on Unfair Commercial Practices (2005) OJ L149/22.

⁵⁹ COM (2006) 744 final.

⁶⁰ Sales (COM (2007) 210 final); Distance Selling (COM (2006) 514 final).

⁶¹ Directive 2008/122/EC.

⁶² The arguments presented by the Commission are analysed in more detail below.

⁶³ As on several others: see B. Heiderhoff and M. Kenny, “The Commission’s 2007 Green Paper on the Consumer Acquis: Deliberate Deliberation” (2007) 35 *European Law Review* 740–751.

continuing with the harmonisation of national laws. A related question was whether there should be a shift to full/maximum harmonisation, and again, the Commission's preference in favour of such a shift was fairly obvious. The full harmonisation of consumer law was therefore going to be the focus of the second era in the evolution of EU Consumer Law. Other fundamental matters, which one might have expected to see in a fundamental review of the consumer *acquis*, such as whether the use of directives should be continued and what the legal basis for future legislation should be, were not even included in the *Green Paper* as matters for discussion.

2.3.1 The Way Forward

Following a period of consultation, the Commission published its proposal for a Directive on Consumer Rights in October 2008.⁶⁴ As expected, a key feature of the proposal was the shift to a full harmonisation standard. Moreover, the proposed Directive would have combined the areas of doorstep selling, distance selling, unfair terms and consumer sales, supplemented by new rules on delivery and risk, as well as a standardised set of rules on the right of withdrawal and pre-contractual information obligations. Despite this more coherent approach and the broadened scope, the Directive as proposed would still not have covered the field of consumer law exhaustively. Some matters would continue to be left to national law, such as the remedies to be made available to a consumer for a trader's failure to comply with pre-contractual information duties.

The publication of the proposal provoked intense academic debate, both about the substantive changes that would be made to EU Consumer Law and the policy move towards full harmonisation.⁶⁵ Full harmonisation as a blanket approach largely received a hostile reception, with only a small number of scholars willing to give it support.⁶⁶ Some scholars argued that at best, selective (or targeted) full harmonisation should be pursued.⁶⁷ The proposal had a troubled progress throughout the legislative stages. However, when the new Commission took office in 2010, the responsibility for guiding the proposal through its legislative stages passed from DG Sanco to DG Justice, and a new Commissioner, Viviane Reding, accepted that blanket full harmonisation would not be attainable, favouring instead a more nuanced approach to harmonisation, talking of "targeted harmonisation where it is practical".⁶⁸

⁶⁴ COM (2008) 614 final; see, for example, G. Howells and R. Schulze (eds.), *Modernising and harmonizing consumer contract law* (Munich: Sellier, 2009).

⁶⁵ See, for example, M. Faure, "Towards maximum harmonization of consumer contract law !?" (2008) 15 *Maastricht Journal* 433–445; P. Rott and E. Terry, "The proposal for a directive on consumer rights: no single set of rules" (2009) 17 *Zeitschrift für Europäisches Privatrech*, 456–488.

⁶⁶ For example, E. Hondius, "The proposal for a European directive on consumer rights: a step forward" (2010) 18 *European Review of Private Law* 103–127.

⁶⁷ H. Micklitz and N. Reich, "Crónica de una muerte anunciada: the Commission proposal for a 'directive on consumer rights'." (2009) 46 *Common Market Law Review* 471–519.

⁶⁸ V. Reding, *An ambitious consumer rights directive: boosting consumers' protection and helping businesses*. 15 March 2010, SPEECH/10/91.

Eventually, political agreement on a Consumer Rights Directive was secured in June 2011, albeit one with a much-reduced scope. In particular, plans to incorporate and amend the provisions found in the Unfair Terms Directive and Consumer Sales Directive were abandoned.

Leaving aside the debate about the degree of harmonisation, the other key feature of the proposal was the continuation of harmonising domestic consumer laws and applying the harmonised rules to all types of consumer transaction. There would still be a directive, albeit with a broader scope and more coherent than the existing *acquis*.

Had the broader proposal put forward by the Commission found favour with the Member States, then, taken together, full harmonisation by directive would certainly have reduced the risk of residual variation between national laws hitherto posed by the minimum harmonisation approach. But it would not have removed all of the problems created by harmonisation. In particular, Member States would still have been required to transpose the final directive into their national laws, and this would still have produced 27 separate consumer law regimes, albeit substantively more aligned than previously. So whilst a directive with a wider scope and at least a “targeted” full harmonisation standard would have resulted in a more uniform set of substantive consumer protection rules throughout the EU, it would still only have taken effect through the national laws of the Member States (as, indeed, the more limited Consumer Rights Directive as agreed will have to). Traders and consumers alike would still need to be aware of the relevant national legislation (in particular, with regard to matters left to national law). After all, should a dispute arise, a consumer could not invoke the directive against a trader directly, as this is precluded under EU law.⁶⁹

Earlier,⁷⁰ it was suggested that there are two possible solutions for dealing with the problem of legal diversity when transacting across borders. The first—harmonisation—has clearly run into considerable difficulties. The purpose of this *Brief* is to develop the case for the second solution, which would entail an altogether different approach to EU Consumer Law, based on two significant changes: first, instead of using directives, it will be argued that a regulation would be more appropriate to ensure that a coherent and accessible legal framework for consumer transactions in the internal market is created; and second, it will be suggested that EU action should concentrate on the cross-border context, and, more particularly, on transactions concluded by distance means, mainly in the context of e-commerce. Although these ideas initially developed in the context of the *Acquis Review* process outlined above, they have taken on new currency in the light of a reinvigorated push towards a legislative proposal in a related policy area, that of EU Contract Law. In parallel to the reform of the consumer *acquis*, the EU has been considering whether wider action

⁶⁹ This is the so-called principle of horizontal direct effect of a directive, which has time and again been rejected by the ECJ. See, for example, C-91/92 *Faccini Dori v Recreb SRL* [1994] ECR I-3325 and C-192/94 *El Corte Ingles SA v Rivero* [1996] ECR I-1281.

⁷⁰ See above, p. 7.

in the field of contract law is needed. Interestingly, the reform of EU Consumer Law and the development of EU Contract Law have, at various points, been inter-twined, only to become two distinct exercises. But most recently, both have become firmly tied together under the auspices of DG Justice. Having considered the case for moving to a Regulation and limiting its application to cross-border transaction in general terms, it will then be considered how this argument fits into the present debate about taking action in the field of European Contract Law.

3 From Directives to a Regulation

This *Brief* intends to make the case for switching to a Regulation, or regulations, for the further development of EU Consumer Law. The task for this section is to set out the case for this shift. The next section will argue that such a regulation should be limited to cross-border transactions only.

The starting point of the case for a switch to Regulation is that the process of harmonisation pursued thus far has not achieved one of its main objectives: to create a coherent legal framework to support consumer transactions in the internal market. As explained earlier, the piecemeal harmonisation of selected aspects of consumer law by directives has not resulted in the creation of one coherent set of rules for consumer transactions across the EU, but rather a mix of EU-based and national rules in each of the 27 Member States.

That said, it is, of course, true that there have been some benefits of the harmonisation initiatives adopted so far: in particular, it has resulted in the introduction of new rights for consumers which might otherwise not have found their way into national consumer laws, such as cancellation rights or the right to have faulty goods repaired or replaced. Also, it would not be wrong to suggest that for some Member States, an EU measure to harmonise certain aspects of consumer law might have been the best way of reforming national consumer law without necessarily having to involve full Parliamentary procedures, especially when Parliamentary time might be taken up with other business. This is because EU directives, once agreed, must be transposed into national law, and there is no scope for amendments or outright rejection of such measures by national legislatures. This might seem a rather crude way of ensuring law reform, and one that will not always have produced quite the desired outcome that might have been achieved through a full debate at the national level, but it nevertheless will have been a mechanism for improving consumer rights.⁷¹

⁷¹ And this may well have been what was originally intended when the Council of Ministers first resolved to include consumer protection within the focus of (then) EEC activities when it agreed its resolution on a preliminary programme for a consumer protection and information policy (1975) OJ C92/1.

However, the drawbacks of the harmonisation approach are now apparent, and, learning from the experience to date, it should be clear that this cannot be maintained as the preferred means of developing EU Consumer Law.

As noted earlier, EU harmonisation is not exhaustive: although significant chunks of consumer law are now based on EU legislation, many issues are still for national law to resolve—either because a directive expressly provides for this or because a directive does not cover a particular issue at all, and so national law still has to step in. As a result, national law continues to have a role to play in supplementing the harmonised legal rules, and so whilst harmonisation has reduced the substantive differences in the legal rules, the resulting picture is far from uniform.

It is submitted that the main problem has been the choice of instrument for the adoption of EU measures in the field of consumer law. Directives need to be transposed into national law in order to become effective, and the legal rules which will govern a consumer transaction will be those of the applicable national law. Neither a consumer nor a trader can rely directly on a directive and will instead have to investigate the relevant legal rules of the applicable national law if they want to know the full extent of their rights and obligations. Moreover, the national courts have to apply and interpret these rules. Whilst these courts have the opportunity to request guidance from the ECJ, experience shows that this happens rather infrequently, which means that divergences in the interpretation of particular provisions based on an EU directive between national courts are likely.

Problems associated with the transposition of directives into national law are perhaps the main reason why this approach should be abandoned. The reason given for harmonisation is to ensure that the legal framework applicable to consumer transactions within the EU is essentially the same. Whilst harmonisation might achieve substantive approximation, the law in one Member State remains as inaccessible to a consumer or trader from another Member State as it was before the EU started its harmonisation drive. It is well known that directives do not have to be implemented verbatim, as the form and method is left to the Member States [Article 288 TFEU (ex Article 249 EC)]. This means that there is no obligation on the Member State to adopt specific measures such as a “Consumer Code” which compiles the various EU-based rules in one measure. Although Member States which do have such a code might amend and add to this in response to an EU directive, not all countries follow this approach. In some, there will be discrete national legislative measures transposing the various directives. As mentioned earlier, the Consumer Rights Directive as proposed would have brought together four separate directives in one new measure, but there would have been no obligation on the Member States to then transpose the Directive as one single national measure. In the UK, for example, the Unfair Terms in Consumer Contracts Regulations 1999, which implement the Unfair Terms Directive (93/13/EEC), could have been retained with a few amendments to reflect the changes that would have been made to the rules on unfair terms in the Consumer Rights Directive, had it been enacted as originally proposed.

This raises the question why the EU has continued to favour the directive as the main vehicle for the creation of EU Consumer Law. As noted earlier, in the *Green Paper on the Review of the Consumer Acquis*, continuing with this approach was

taken as read and there was no consultation on whether there should be a change to using regulations instead. The Commission did, however, state its case for continuing with a directive in the Explanatory Memorandum to the proposed Consumer Rights Directive. It is appropriate to consider the arguments presented there to see if the case for maintaining the harmonisation-by-directive approach was made out.

First, the Commission regards the freedom given to the Member States to choose the method of transposition as a positive aspect of the use of directives. It suggests that the transposition of a directive would “allow a smoother implementation of the Community Law into the existing national contract laws or consumer codes”.⁷² Member States would have enough leeway to maintain existing provisions which already comply with the objectives of the Directive. However, what the Commission does not address is the fact that this approach would still result in diverse national laws, which would utilise legal language or concepts different from that used in the Directive. Indeed, the Commission appears to contradict itself in the same paragraph, when it goes on to say that “the implementation of a Directive may give rise to a single and coherent set of law at national level which would be simpler to apply and interpret by traders”.⁷³ This statement simply does not make sense. Member States are free to implement directives in ways that work best for their particular legal system, and the end result may well be anything but a single set of law in a particular Member State.

These comments need to be read in the context of the proposal to adopt a full harmonisation standard in the proposed Directive. This certainly appears to be the source of the idea that this would create a single and coherent set of rules. Full harmonisation might create a uniform level of consumer protection across the EU in respect of the areas regulated by the Directive. However, traders and consumers would still need to identify whichever national legislation applied to their contract, particularly if a dispute has arisen and court action is likely. Ultimately, both consumers and traders would continue to have to seek advice on the relevant national law, which seems to undermine of the key justifications for harmonisation.⁷⁴ Also, it may be questioned whether consumer confidence would really be boosted simply by the fact that they can now be told that the law is the same wherever they shop.

It is therefore argued that instead of continuing with the harmonisation of national consumer laws by directive(s), a Regulation should be adopted. The preceding discussion of the Commission’s most recent statement in favour of using directives shows that its case is unconvincing. One of the aims of the *Acquis Review* is to provide “better regulation”, which includes the simplification of the legal framework as one aspect. The problems associated with the transposition of directives, and the fact that they will leave some matters to national law in any event, mean that the use of directives is unlikely to achieve simplification.

⁷² COM (2008) 614 final, p. 8.

⁷³ *Ibid.*

⁷⁴ P. Legrand, “Antivonbar” (2005) 1 *Journal of Comparative Law* 13–40, at pp. 26–27, provides a colourful illustration of this problem in the context of the debate about a European Civil Code.

Strangely, even by 2008, the view that directives are the best means of creating legislation for the internal market appears not to have been universally shared within the Commission. In a policy document issued by another Directorate-General, a footnote made the important point that “replacing directives with regulations can, when legally possible and politically acceptable, offer simplification as they enable immediate application and can be directly invoked before courts by interested parties”.⁷⁵ This observation (really little more than an aside) makes a number of important points. Firstly, it acknowledges that simplification of the regulatory environment is better achieved by regulations than by directives. Based on the experience of EU Consumer Law to date, it is certainly the case that the use of directives has not created a simple legal framework, so shifting to regulations would almost certainly stand a better chance of providing a simple legal framework. Secondly, there are two criteria suggested against which the shift from a directive to a regulation might be measured (1) legal possibility and (2) political acceptability. Both merit consideration in turn.

3.1 *Legal Possibility*

Taking “legal possibility” first, what is presumably meant here is whether it is legally possible to use a regulation to adopt legislation in a particular area. The wider constitutional context will be examined later,⁷⁶ but it can be noted here that both Article 114 TFEU or Article 167 TFEU—both contenders as the relevant Treaty basis for the adoption of a regulation—do not preclude the use of a regulation. There is no requirement that harmonisation can only be undertaken by directive. It is perfectly possible for national rules to be “approximated” through a regulation. This would mean that existing national rules in the field covered by such a regulation would have to be repealed and that the regulation would then be directly applicable to govern the area of law in question.

Leaving aside the potential scope of such a Regulation (cross-border-only or all consumer transactions) for the moment, one significant advantage of using a Regulation would be that the many difficulties which have been identified as resulting from the transposition of directives into national law and the resulting fragmentation of the legal framework applicable to consumer transactions could be avoided. Instead of 27 national sets of legal rules transposing relevant EU directives, there would be one directly applicable Regulation. The only action required at national level would be to repeal all those national provisions within the scope of such a Regulation.⁷⁷

A Regulation would establish the “single and coherent” set of legal rules which the Commission is seeking to create, because the same measure would be applicable

⁷⁵ Commission, *A Europe of results—applying community law*. COM (2007) 502 final, n.12; cf. Commission, *Working document—Instruments for a modernised single market policy*. SEC(2007) 1518.

⁷⁶ See page 37.

⁷⁷ The potential difficulties this would create are dealt with below, in arguing for a cross-border only measure.

to all consumer transactions, rather than whichever national provisions of the law which happens to be applicable to the transaction under the principles of private international law. Traders and consumers would find it easier to identify the relevant legal rules, should they so wish, as there would be no need for them to seek advice on what the national legislation implementing a particular directive might be.

Of course, shifting to a Regulation is not a panacea for all the woes of harmonisation by directive. At a fundamental level, a Regulation would have its own terminology and concepts, which all the national courts would have to become familiar with. In contrast with directives, Member States would not be able to choose more appropriate national legal terminology. On the other hand, the difficulties associated with ensuring the autonomous interpretation of EU law identified in respect of national measures implementing a directive would be reduced. A Regulation should make it easier for national courts to interpret and apply the law autonomously because it should be more apparent to a national court that they are dealing with EU Law. Moreover, the shift to a Regulation would render unnecessary the approach adopted by some national courts whereby only token reference is made to national legislation implementing a directive, followed by directly relying on the text of the directive itself on the basis that national law would have to be interpreted in line with it anyway. This kind of approach effectively treats directives as directly applicable measures, albeit through the back door of ostensibly ensuring an interpretation of national law in accordance with EU law. As Regulations are intended to be directly applicable, and this approach treats Directives as *de facto* Regulations, then one would find greater clarity by adopting a Regulation in any event.

This practice is mirrored by a debate in the scholarly literature about the status of directives in the context of EU Consumer Law. The conflation between the function of directives and regulations in this regard has been observed repeatedly, which lends further support to the suggestion that it would be better to shift to regulations outright. Although directives should only specify a result to be achieved, in reality, the text of consumer law directives has become increasingly detailed. Indeed, there is often intense debate during the legislative stages about the wording of a particular provision, resulting in directives containing detailed and quite technical rules. Whilst Member States notionally retain the freedom of choice of form and methods in transposing such a text, in practice, it is often difficult for a Member State to deviate from the wording of a directive.⁷⁸ The level of detail contained in many directives is much more appropriate to regulations,⁷⁹ and a shift towards using regulation would merely reflect what happens in practice already. The planned move towards full harmonisation would also have strengthened the argument for switching to regulations.⁸⁰

⁷⁸ P. Rott, "Minimum harmonization for the completion of the internal market? The example of consumer sales law" (2003) 40 *Common Market Law Review* 1107–1135.

⁷⁹ A. Johnston and H. Unberath, "Law at, to or from the centre"? in F. Cafaggi (Ed.) *The institutional framework of European private law* (Oxford: Oxford University Press, 2006).

⁸⁰ Cf. H.W. Micklitz, "The Targeted Full Harmonization Approach: Looking behind the curtain" in G. Howells and R. Schulze, *Modernising and Harmonizing Consumer Contract Law* (Munich: Sellier, 2008), p. 55.

So as far as any question of “legal possibility” is concerned, there is no indication that one could object to a switch to regulations on that basis. If anything, it would make for a clearer and more accessible legal framework.

3.2 *Political Acceptability*

The second issue raised by the Commission was that it would have to be “politically acceptable”. Of course, that prompts the immediate question of which level of political acceptability would be of concern here—would it have to be acceptable to the European institutions, or national governments and parliaments? It is assumed that the focus was on the latter. Clearly, from a European perspective, there seems no obvious objection on the grounds of political unacceptability. Instead, a Regulation would have the very positive aspect of sending a strong signal to the citizens of Europe that the EU has adopted a coherent legal framework for consumer transactions, in particular with a view to encouraging cross-border transactions.

From a national perspective, however, one could envisage potential political difficulties. Switching to a Regulation would mean that every consumer transaction, including minor local transactions, would obviously be subject to European rules. It would be much more obvious that European law rather than domestic law now governs many aspects of consumer transactions. As noted earlier, one political advantage of the practice of harmonising national law by means of directives is that reforms at national level which might otherwise be difficult to achieve for lack of political will or Parliamentary time can be pushed through via “the European route”. This is because once legislation has been adopted by the EU legislature, it has to be transposed into domestic law, and changes can be brought about which might not have succeeded as a purely domestic initiative. As an added political bonus, a national government can claim consumer protection credentials when new legislation transposing a directive is adopted.

The real uncertainty here is whether there would be enough concern at national level to render a regulation politically unacceptable. There is some experience with regulations, notably the so-called “Denied Boarding” regulation,⁸¹ which should provide some reassurance to national politicians that an EU regulation can work successfully. Also, if using a Regulation for *all* consumer transactions would be politically unacceptable, perhaps it would be much acceptable if such a Regulation were concerned only with cross-border transactions—which is the second strand of the argument of this *Brief* and a matter discussed in Sect. 4.

⁸¹ Regulation 261/2004 establishing common rules on the compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights – (2004) OJ L46/1.

Based on the foregoing, there seems to be no strong case against the use of a regulation. Encouragingly, there are signs that the thinking at the European level with regard to the respective suitability of directives and regulations might be changing. The case for a switch to regulations was made by Professor Monti in his report *A New Strategy for the Single Market*.⁸² He said that

Currently, 80% of the single market rules are set out through directives. These have the advantage of allowing for an adjustment of rules to local preferences and situations. The downsides are the time-lag between adoption at EU level and implementation on the ground and the risks of non-implementation or goldplating at national level. ... There is thus a growing case for choosing regulations rather than directives as the preferred legal technique for regulating the single market. Regulation brings the advantages of clarity, predictability and effectiveness. It establishes a level playing field for citizens and business and carries a greater potential for private enforcement. However, the use of regulation is not a panacea. Regulations are appropriate instruments only when determined legal and substantial pre-conditions are satisfied.⁸³

He continues by saying that

Harmonization through regulations can be most appropriate when regulating new sectors from scratch and easier when the areas concerned allow for limited interaction between EU rules and national systems. In other instances, where upfront harmonization is not the solution, it is worthwhile exploring the idea of a 28th regime, a EU framework alternative to but not replacing national rules. The advantage of the 28th regime is to expand options for business and citizens operating in the single market: if the single market is their main horizon, they can opt for a standard and single legal framework valid across Member States; if they move in a predominantly national setting, they will remain under the national regime ...⁸⁴

Professor Monti's comments further underline the fact that, logically speaking, the case for using Regulations is a strong one. Although Monti talks about new sectors which might become the focus of EU regulation, there is no reason why this approach could not similarly help to improve the quality of legislation in existing fields of EU law where established practice has not produced all of the results intended.

The idea of replacing directives with a Regulation is not a new one, of course—Professor Reich made a strong case for this in 2005, basing his reasoning predominantly on the drawbacks of using directives.⁸⁵ The difference between Professor Reich's argument and the one presented here is mainly in respect of the scope such a Regulation should adopt. Professor Reich favoured a Regulation of general application, whereas the present argument is that such a Regulation should be limited to cross-border transactions only. This issue is addressed next.

⁸² M. Monti, "A New Strategy for the Single Market – At the Service of Europe's Economy and Society" (Brussels, 2010) [available at http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf; last accessed 14 June 2011].

⁸³ *Ibid.*, p. 93.

⁸⁴ *Ibid.*, p. 93. Note that the final sentence of this extract lends support for the approach argued for in this *Brief*, i.e., to distinguish between the cross-border and domestic contexts respectively.

⁸⁵ N. Reich, "A European contract law, or an EU contract regulation for consumers?" (2005) 28 *Journal of Consumer Policy* 383–407.

4 The Case for Focusing on Cross-Border Transactions

In the previous section, the case for switching from directives to a Regulation for the future development of EU Consumer Law was made. In this section, it will be argued that such a Regulation should concentrate on dealing with cross-border transactions only, which would mean that domestic transactions would be removed from the ambit of further EU activity. In essence, therefore, this section will advocate an end to the harmonisation of domestic laws in favour of EU action concerned with cross-border matters only.

4.1 Defining “Cross-Border Transaction”

It will be necessary to consider what sort of transactions should be regarded as constituting a “cross-border transaction”. As will become clear below, this is not as simple a matter as one might think. Whilst the suggestion that EU Law should be concerned with cross-border transactions and domestic law with everything else is stated easily enough, it begs one key question: when should a particular transaction be regarded as a “cross-border transaction”? Indeed, this question can be phrased differently and rather more normatively as: what should be the types of transactions properly within the scope of EU Law?

The answer to this question is not straightforward. It will be suggested below that treating any transaction involving some kind of multi-jurisdictional aspect as a cross-border transaction would not be appropriate. The difficulty of determining where the line should be drawn between “domestic” and “cross-border” transactions is best illustrated by considering a number of different situations. In each of the situations listed here, the word “based” is used to indicate the connection of consumer and trader respectively with a specific jurisdiction. Also, the word “jurisdiction” is used here to refer to different Member States, rather than separate jurisdictions within one Member State (such as England and Scotland within the United Kingdom). Finally, the respective nationalities of consumer and trader are not relevant here.

The following are the most common situations which fall to be considered:

- (1) Consumer and trader are based in the same jurisdiction and the contract is concluded by whichever means (face-to-face, distance, online).
- (2) Consumer and trader are based in separate jurisdictions and the contract is concluded at a distance (online).
- (3) Consumer and trader are based in separate jurisdictions but in a border region and the consumer travels into the neighbouring country to conclude a contract face-to-face.
- (4) A variant on (3), but the consumer is on holiday in another country and concludes a contract face-to-face.
- (5) Consumer and trader are based in separate jurisdictions, but the trader visits the consumer’s jurisdiction and concludes a contract (e.g., doorstep selling, markets, exhibitions).

At first sight, all of these situations except for (1) appear to raise cross-border issues. Does this mean, however, that all of (2)–(5) should be regarded as “cross-border transactions”, and consequently be the focus of EU law, rather than domestic law?

Trying to distinguish between domestic and “non-domestic” transactions is a challenge that has had to be addressed in other fields of law, notably in the sphere of Transnational Commercial Law. There are a number of conventions which have been adopted to regulate transnational commercial transactions. Their scope of application is usually determined with reference to a criterion of “internationality” to demarcate the scope of the convention from any applicable domestic law. The most prominent example to consider is the UN Convention on the International Sale of Goods 1980 (CISG). To determine when a contract is to be treated as an international sale of goods contract to which the CISG would apply, it is necessary to consider where the respective places of business of the parties to such a contract are. If their respective places of business are in different states, then this is an international contract and the CISG applies (Article 1(1) CISG). The requirement of “internationality” is therefore satisfied with reference to the location of the respective places of business of the parties, rather than the fact that goods cross borders, for example.

Could this approach be applied in the context of consumer law to distinguish between cross-border and domestic transactions? The first difficulty is that consumers obviously do not have a place of business, but the analogous criterion would be to refer to the consumer’s place of residence. If this criterion were applied, a contract concluded in one Member State where both the consumer has his place of residence and the trader his place of business (i.e., situation (1) above) would be a domestic transaction. This would mean that a transaction concluded between a consumer with his place of residence in one Member State and the trader with his place of business in another would be a cross-border contract (situations (2)–(5) above).

However, it might be questioned whether it would be appropriate, and indeed practicable, to treat all of situations (2)–(5) as cross-border transactions, despite the fact that consumer and trader are based in different jurisdictions. It seems that the only situation which could be classed as “cross-border” without difficulty is situation (2), where the contract is concluded through distance means, which would generally mean via online shopping. The order is (notionally⁸⁶) placed from the consumer’s place of residence in one jurisdiction and received at the trader’s place of business in another jurisdiction.

Matters are less clear-cut with the face-to-face situations [(3)–(5) above]. Here, the consumer still has his place of residence in one jurisdiction and the trader in another, but the consumer is physically present in the jurisdiction where the trader has his place of business. The two obvious examples of when this occurs are situations (3) and (4)—contracts entered into in border regions and whilst the consumer

⁸⁶ The word “notionally” is used here because it is of course possible for a consumer to use a computer based in yet another jurisdiction to place an order, but the location from which the order is placed should not be determinative if the transaction is a distance transaction.

is on holiday. If one were to adopt the CISG approach and apply this by analogy, this would lead to the conclusion that these situations should be regarded as cross-border transactions, but is this rather too simplistic? On the one hand, the consumer is based in one country and the trader in another. On the other hand, however, both consumer and trader are physically present in the same jurisdiction when the contract is concluded. Looking at the situation from the trader's perspective, he might well not know that the consumer actually has his place of residence in another Member State (although admittedly, in the holiday situation, this would probably be fairly obvious, at least where the transaction takes place in a tourist hotspot) and that therefore this transaction could potentially be qualified as a cross-border transaction and be subject to EU, rather than domestic rules. The trader would probably expect—reasonably so, one might add—that this transaction would be subject to the domestic law of the jurisdiction where the transaction occurs. If one were to consider what a *consumer* might reasonably expect in this situation, it seems entirely plausible that a consumer buying an item in another country would assume that the domestic law of that jurisdiction applies to the transaction. On this basis, it would seem that situations (3) and (4) should *not* be regarded as cross-border transactions, but rather as domestic to the place where the transaction is entered into. It might be thought that if the consumer clearly declared that his place of residence is in another jurisdiction, this would mean that the transaction should be regarded as a cross-border transaction. However, that would undoubtedly create the risk that the trader might then refuse to enter into the transaction with the consumer altogether.

One might vary these two scenarios to distinguish between circumstances where the consumer just happens to be in another country and where the consumer travelled there in response to a specific invitation issued by the trader.⁸⁷ In the latter situation, it can be argued that the trader should know that the consumer is based in another jurisdiction and therefore that a law other than that of the trader's jurisdiction should apply. Under Art. 6(1) of the Rome-I Regulation, this would probably be so as such an invitation is likely to be regarded as a “directed activity” within the meaning of Art. 6(1) and would therefore be subject to the law of the consumer's jurisdiction.⁸⁸ Should a cross-border Regulation be adopted, it might be argued that this situation should also be treated as a cross-border case. Whilst there is some merit in this suggestion, for present purposes, this alternative situation should also be treated as a domestic, rather than a cross-border transaction, because the consumer will still be physically present in the trader's jurisdiction.⁸⁹

⁸⁷ As might be the case particularly in scenario (3).

⁸⁸ See p. 5, above.

⁸⁹ This is perhaps more an argument based on convenient simplicity, but in practical terms, it would avoid confusion: a trader dealing with two separate consumers from another jurisdiction might not be able to identify whether one, both or neither received a specific invitation, and so would not necessarily know whether domestic law or the cross-border Regulation would apply.

The upshot of this analysis is that despite the attractiveness of adopting a bright-line test developed by analogy with Art. 1(1) of the CISG, a rather more refined criterion is needed for consumer transactions. Perhaps the guiding criterion might be to consider which law consumer and trader would reasonably expect to be applicable to the transaction where it is entered into in face-to-face circumstances. The discussion above points towards the conclusion that a face-to-face contract concluded in the jurisdiction of the trader's place of business should be subject to the trader's domestic law. Although it might be suggested that this could potentially deter consumers from buying goods whilst abroad, it seems rather doubtful that this would really be so in practice—potential variations in the respective national consumer laws would quite probably not be a deciding factor in keeping a consumer from entering into a contract whilst abroad.

Finally, turning to the converse situation in scenario (5), a transaction would be subject to the consumer's domestic law if the trader was present in the jurisdiction where the consumer has his place of residence and the transaction was entered into there.⁹⁰

The logical conclusion of suggesting that the scope of the Regulation should be limited to cross-border transactions is effectively to suggest that it should only apply to transactions which are conducted online or at a distance, with consumer and trader respectively based in different jurisdictions (although still within the EU, of course). Although other transactions might have a cross-border element, treating these as cross-border transactions for regulatory purposes would not necessarily be in accordance with the reasonable expectations of both trader and consumer that face-to-face transactions are subject to the law of the jurisdiction where the transaction is concluded. This would mean that a significant number of transactions would be removed from the scope of EU law and become subject to domestic law.

4.2 *Arguments in Favour of a Cross-Border Approach*

The last time when there was an opportunity to consider a change from the established practice of harmonisation by directives without distinguishing between domestic and cross-border transactions was the *Green Paper on the Review of the Consumer Acquis*. There, three possible options for determining the scope of a new measure were presented:

- (1) A broad instrument applicable both to domestic and cross-border consumer contracts (except for areas where there is sector-specific regulation, such as Financial Services)
- (2) A horizontal instrument limited to cross-border cases only
- (3) A horizontal instrument limited to distance-shopping applicable to both domestic and cross-border transactions

⁹⁰ This would be in accordance with Art. 6(1) of the Rome-I Regulation as the trader would be pursuing his activities in the country of the consumer's habitual residence. See p. 5, above.

It can be noted immediately that there was no suggestion that action should be limited to cross-border distance shopping only. The Commission was in favour of the first option and presented a number of arguments against the other two options. The main objection to option (2) identified in the *Green Paper* was the potential difficulty of finding an appropriate definition of what makes a transaction a “cross-border transaction”. As the analysis in the previous section showed, this is indeed a difficult exercise and one that might lead to a conclusion that many might regard as surprising. Unfortunately, there was no exploration in the *Green Paper* of possible definitions and any associated difficulties. An explanation for this might be that the Commission did not regard a distinction between cross-border and domestic purposes as a viable option for the future development of EU Consumer Law and chose not to pursue this in depth.

In addition to the definitional problem, the main objection to both (2) and (3) was that this would result in legal fragmentation because different rules would apply to domestic and cross-border transactions or, indeed, face-to-face and distance transactions. This, it was claimed, would conflict with the pursuit of better regulation.

Undoubtedly, the objection of legal fragmentation could similarly be raised against what is proposed in this *Brief*, i.e., limiting EU action to cross-border distance transactions. After all, this would mean that traders who engaged in both face-to-face and distance/online transactions would have to work with the domestic legal rules applicable to face-to-face transactions, any additional requirements for *domestic* distance transactions and potentially different rules still for *cross-border distance* transactions. However, a closer look at the additional requirements imposed on traders involved in distance selling transactions indicates that these are generally concerned with providing additional information and with making available a right of withdrawal. Following agreement on the new Consumer Rights Directive, these rules are subject to full harmonisation already, and it would be expected that this level of harmonisation would remain even if there was a move towards a Regulation with cross-border scope. Insofar as necessary, the Regulation should match these information obligations and the right of withdrawal. The upshot of this is that as far as the specific distance-selling obligations are concerned, these would be common to cross-border and domestic transactions, and a trader would effectively only have to deal with two legal regimes, depending on whether the transaction is domestic or cross-border. There would be some degree of “legal fragmentation”, but one that would be a considerable improvement over the current situation and with clearer dividing lines between the domestic and cross-border spheres.

Moreover, should the concern over legal fragmentation be such as to rule out pursuing the approach advocated in this *Brief*? Of course, having two parallel regimes dealing with domestic and cross-border transactions does create the risk that those consumers who actively engage in online or distance cross-border shopping could be confused by the substantive differences between the two legal regimes. On the other hand, if the dividing line between the spheres of application of the two legal regimes is clearly drawn, then consumers could be educated fairly easily about the consequences of engaging in cross-border distance shopping.

Until recently, the Commission's drive towards full harmonisation was based on what can only be described as a very narrow focus, being concerned only with the needs of the internal market. As will be discussed later, this position could be the result of the legal basis which is available in the TFEU to support action in the field of consumer law, but that cannot be the overriding criterion. After all, focusing too much on the needs of the internal market creates the risk that the impact of a fully harmonised legal framework on domestic transactions is not fully appreciated. There is clearly plenty of room for expanding cross-border consumer distance transactions, particularly via the Internet, but these will never, in terms of volume, displace domestic, especially local, transactions. It seems right, therefore, that the idea of striving for further and full harmonisation of national consumer laws (especially by continuing with the use of directives) in order to create a one-size-fits-all framework applicable to all types of consumer transactions appears to have been largely abandoned in the run-up to reaching agreement on the new Consumer Rights Directive. It is submitted that full harmonisation, had it been pursued to the extent initially proposed by the Commission, would have caused confusion and uncertainty on a much wider scale than the suggested shift to a Regulation on cross-border transactions. Those businesses and, to a lesser extent, consumers not interested in participating in the opportunities for cross-border shopping offered by the internal market would have had to adapt to a new legal framework at the domestic level, potentially with reduced levels of protection, with no obvious benefits in return. If the Commission's concern is with encouraging greater use of the internal market by consumers, then recognition of the fact that a measure focusing on those cross-border transactions most likely to allow consumers to take greater advantage of the internal market would be preferable. It would also mean that those consumers who choose not to shop abroad would not be affected by the introduction of new legal rules which were designed for a different context.

Full harmonisation by Directive would mean changing the legal rules applicable to *all* consumer transactions in the interest of encouraging a potentially small increase in the number of cross-border transactions. On the other hand, for domestic transactions, the effect of full harmonisation could have been a negative one in respect of existing levels of consumer protection. Of course, if the level of protection under full harmonisation had been sufficiently high, then it might just about have to be acceptable politically, although the experience of the proposed Consumer Rights Directive shows that this is not necessarily the case. If the level of protection adopted under full harmonisation would have required a reduction in the degree of consumer protection in some Member States, then this would have a negative impact on domestic transactions. Although Article 114(3) TFEU (ex Article 95(3) EC) mandates a "high" level of consumer protection, it is not clear how "high" it needs to be to satisfy Art. 114(3) TFEU. The advantage of a cross-border-only Regulation would be that it would set a standard for cross-border transactions, leaving Member States free to determine the legal rules and levels of consumer protection to suit the needs of consumers within their jurisdiction for both face-to-face and distance transactions conducted domestically.

Interestingly, the *Green Paper on Policy Options for a European Contract Law* (discussed in the following part) acknowledged the potential advantage of distinguishing between cross-border and domestic consumer transactions:

An instrument applicable to cross-border and domestic consumer contracts would further simplify the regulatory environment, but would impact on consumers who may not wish to venture into the internal market and prefer to preserve national levels of protection.⁹¹

As noted earlier, the desire to ensure a simplified regulatory environment would most easily be met by having one set of rules, but in order to create this, a Regulation should be used. However, many consumers might prefer to have the choice to “stay at home” and benefit from whatever existing level of protection is already provided in domestic law. Whilst the Commission would, in the past, have given preference to the idea of regulatory simplification above everything else, it seems to have come round to the view that the interest of the internal market might be served better by a different approach.

4.3 A European Consumer Transactions Regulation

The main thrust of the argument put forward in this *Brief* is that there needs to be a fundamental recasting of the focus of EU Consumer Law, concentrating on those transactions which are most likely to encourage greater utilisation of the opportunities offered to consumers and traders alike by the internal market. The kind of measure that should evolve is essentially a “European Consumer Transactions Regulation” (hereinafter EUCTR) which regulates distance and online transactions where the trader’s place of business and the consumer’s place of residence are in different Member States. All face-to-face transactions would be subject to one particular national law, which will be that of the jurisdiction where the transaction in question was entered into.

Although it may be counter-intuitive to have two sets of consumer protection rules, with some traders and consumers having to be familiar with both, it would still be a vast improvement on the present situation and, ultimately, all that can realistically be achieved. One concern is that consumers are at risk of being confused about the level of protection they would benefit from when entering into a particular transaction. Domestic law would govern the vast majority of consumer transactions, and a consumer is more likely to be familiar with those rules. When they enter into a transaction which would be regarded as a “cross-border” transaction as defined above, the EUCTR would apply. The one area of potential concern is where consumers are frequently buying goods online and are dealing with both domestic and non-domestic traders. Thus, some of their online transactions would be subject to domestic law, whereas others would fall under the EUCTR. If the level of protection

⁹¹ P. 12.

under the EUCTR was lower than that of the consumer's domestic law, there is the potential risk that he or she might unwittingly enter into a transaction expecting that there will be a particular degree of protection when, in fact, that is not so. However, this concern is easily overstated. One should not forget that there has already been a degree of harmonisation between national laws, and a common base-line level of protection has been established. It seems unlikely that an EUCTR would adopt a level of protection lower than that already agreed. The extent to which any particular national law would then provide protection which is significantly higher than the EUCTR is unlikely to be that great, because many domestic laws are equivalent to the harmonised standard which already exists, and whilst there are many instances where individual Member States have exceeded the minimum standard, this was often done in order to maintain existing domestic rules rather than because of any immediate concern that a harmonising directive was setting too low a standard. Overall, whilst one would expect some variations, they are unlikely to be so significant that there would be large numbers of consumers entering into transactions and then left without adequate legal recourse when things go wrong. Moreover, it would technically not be that difficult to present a warning message of some kind to a consumer who is about to conclude a transaction online which would make them aware that the transaction will be a cross-border transaction governed by the EUCTR. Of course, in circumstances where a particular domestic law is more favourable to consumers—or perceived by them as such—than the EUCTR, then this might deter some consumers from proceeding with the transaction.⁹² This would seem to reflect a natural bias towards one's own national law, i.e., consumers tend to think that the consumer law of their jurisdiction is better than that elsewhere,⁹³ but one would hope that appropriate consumer education initiatives would boost consumer confidence.

From a trader's perspective, there would similarly be some need to be familiar with multiple regimes. Online traders would have to be familiar with two sets of rules, and those with an online and face-to-face retail operation would have to work with three, although it is assumed that in the domestic context, much of the basic obligations of a retailer would be the same in face-to-face and distance transactions, with only a few additional obligations in respect of the latter. However, the one advantage is that there would be greater clarity as to which set of rules would apply when, and as far as the cross-border context is concerned, one would find the relevant rules in a single text (the EUCTR itself), rather than having to investigate which particular national law transposes relevant EU rules.

In an ideal world, one would undoubtedly like to see a situation where there is one legal framework which covers all types of transaction, which is interpreted and applied consistently across the EU. However, it is simply unrealistic to expect this to

⁹² J. Rutgers, and R. Sefton-Green, "Revising the consumer *acquis*: (half) opening the doors of the Trojan horse" (2008) 16 *European Review of Private Law* 427–442, p. 437.

⁹³ J. Smits, "Full harmonization of consumer law? A critique of the draft directive on consumer rights" (2010) 18 *European Review of Private Law* 5–14.

emerge. So the idea of a regulation designed for cross-border consumer transactions as defined above would seem to be a much more sensible way forward to ensure that consumers which are interested in taking advantage of the internal market can do so.

The advantage of the EUCTR would be that one text would apply throughout the EU, and although there might be substantive variations in the level of protection between domestic law and the EUCTR, it would be easier for a consumer to identify what that level of protection might be.

4.4 A Practical Problem: Determining Locations

There is one practical difficulty for which a solution would need to be found. As explained earlier, the kinds of cross-border transactions to which the EUCTR should apply are essentially distance and online transactions where the consumer has his place of residence in one jurisdiction and the trader has his place of business in another. This raises the immediate question of how one can determine where a trader has his place of business in the online environment, and, indeed, how to establish the location of the consumer's place of residence. The problem is that in cyberspace, it is rather difficult to determine where exactly a consumer or trader is based (something known as "de-localisation"). One possible solution might be offered by the UN Convention on Use of Electronic Communications in International Contracts 2005, which has attempted to address this problem. Article 6(1) states that a person's place of business is the location indicated by that person (and, in the case of a natural person, its habitual residence⁹⁴). The location of the technical equipment used by a party is not determinative,⁹⁵ nor is the fact that the domain name or email address used is linked to a particular country.⁹⁶

Consumers, as individuals, will have their place of residence, so that would be the determining factor. The difficulty is how it might be identified by the trader, or indeed by the website software through which an online order is placed. One possible solution might be to get the consumer to indicate his country of residence when accessing a website (which already happens in the case of some website, such as those of airlines). Alternatively, when the consumer completes his personal details prior to placing an order, he could be required to confirm his country of residence, particularly if neither the billing nor the delivery address coincides with his place of residence.⁹⁷

⁹⁴ Art. 6(3).

⁹⁵ Art. 6(4).

⁹⁶ Art. 6(5).

⁹⁷ Although one would assume that the proportion of instances where the billing address is not the same as that of the consumer's residence is likely to be small.

Traders will similarly have a registered business address. Admittedly, cyberspace does offer rogue traders an opportunity to hide behind the complexities of the World Wide Web, but one should not let this determine how to deal with the vast majority of cases. After all, genuine traders will want to comply with the relevant law and are unlikely to take advantage of the de-localisation problem. They can be expected to disclose their place of business accurately. It might be necessary to introduce a positive duty on businesses to disclose their place of business on their website, which would have to be of general application and not be limited to cross-border circumstances.⁹⁸ Indeed, the pre-contractual information duties already widely imposed under EU law would require that this information is disclosed in any event, and so there is no concern here.

Overall, whilst determining the location of the parties might be a challenge, it seems far from an insurmountable hurdle. A simple solution such as the one suggested above should work in the vast majority of cases. Although there may be some instances where this could prove difficult, one should also be careful not to let the what might be a very small number of difficult cases determine how one could deal with the majority of transactions.

4.5 *Private International Law Issues*

Earlier, the basic difficulty caused by contracts involving parties from different jurisdictions was explored. It was seen how the rules of private international law, particularly those in the Rome-I Regulation, are used to determine the law applicable to such contracts and also how, in the case of consumer contracts, the rules of the consumer's habitual residence can apply irrespective of the law chosen by the parties.⁹⁹ A regulation dealing with cross-border consumer transactions only would raise a number of private international law issues which would need to be addressed. Two primary concerns can be identified (1) what should be done about national mandatory rules which would apply under existing private international law rules, especially when they are more favourable to consumers than the EUCTR; and (2) which national law would be applicable in respect of any matters not addressed in the EUCTR?

With regard to the first issue, there is the inevitable risk that some domestic rules might be more protective than the EUCTR. If the EUCTR is to govern cross-border transactions as defined (distance contracts), then there might be instances where consumers could risk being subject to a lower level of protection than under their domestic law. This concern is most acute where there is a significant difference in

⁹⁸ The Convention does not include such a positive duty because of the difficulty in determining what should happen if such a duty is not complied with—see UN, *Convention on the Use of Electronic Communications in International Contracts* (Vienna, 2005), p. 42.

⁹⁹ See above, p. 5.

the level of consumer protection to the consumer's detriment under the EUCTR. If domestic law and the Regulation provided similar levels of protection, any remaining minor variations would probably not be of significant concern. Although this is certainly of theoretical concern, it might be less significant in practice, because in reality, there is no fundamental variation between the national laws of the Member States, and the EUCTR would undoubtedly reflect at the very least the common standard already obtained through harmonisation.

So the assumption would be that for cross-border transactions within the scope of the EUCTR, only the rules of the EUCTR would apply without scope for any domestic mandatory rules to override the provisions of the EUCTR. In order to achieve this, it would be necessary to modify the relevant provisions of the Rome-I Regulation (593/2008/EC) to ensure this outcome.¹⁰⁰

As for the second issue, it is clear that there will be instances when a domestic law has to step in to fill a gap in the EUCTR or deal with matters not regulated in the EUCTR at all. Whenever it is necessary to refer to a domestic law, the rules of Private International Law in the Rome-I Regulation (as amended to allow for the EUCTR) would have to be deployed to identify the national law which would act as a "gap-filler". However, the EUCTR as envisaged here should have a broad scope and cover the broad spectrum of consumer law so as to minimise the circumstances when recourse to national law might be necessary.

4.6 Would Domestic Consumers Lose Out?

Although the process of harmonisation has brought with it many difficulties, and its central objective has not been achieved entirely, it should not be ignored that the harmonisation effort by the EU has lifted the standards of consumer protection in many Member States, at the very least in some areas. Moreover, it has made consumer protection a central feature of EU law, now confirmed in Article 12 TFEU which emphasises the significance of consumer protection for other Union policies. Shifting away from harmonisation would mean that as far as domestic transactions are concerned, variations between Member States could be recreated. At the EU level, consumer law is firmly tied to the internal market objective, i.e., the primary concern has been with market integration. Although there are signs that national policymakers are also utilising consumer policy as a market-building tool, there is a much stronger social policy element to domestic consumer law. Indeed, it cannot be denied that even at the EU level, there is a social policy aspect to EU consumer legislation. Adopting the approach argued for in this *Brief* might lead to concerns

¹⁰⁰ Also, if the distinction between "domestic" and "cross-border" situations developed above (pp. 26–29) is adopted, then it might be necessary to consider whether a modification of the notion of "directed activity" is necessary in respect of a situation where a consumer travels to the trader's jurisdiction and concludes a contract face-to-face there (see p. 5, above).

that a cross-border-only approach could undermine the social policy objective of improving consumer protection across the EU. This need not be the inevitable consequence: first of all, existing minimum harmonisation measures would be maintained and refined by the provisions in the Consumer Rights Directive. So a good level of consumer protection would be ensured as a base-line level. If it is felt necessary to work on raising levels of consumer protection across the EU, it might not be necessary to go for a harmonisation approach. Other policy tools developed at the European level could be utilised, such as the “Open Method of Coordination”.¹⁰¹ Under the OMC approach, rather than using directives or regulations for creating “hard” legal rules, Member States would agree on broad policy objectives, with each Member State free to take appropriate action at the domestic level. The Commission would coordinate domestic initiatives and monitor progress towards the agreed objectives. Such an approach would have the advantage of giving greater freedom to the Member States for taking action and would also encourage experimentation and might reveal that there are a number of possible routes towards attaining the same objective.

5 The Constitutional Dimension

It is necessary to consider how the proposed shift to a Regulation dealing with cross-border transactions only would fit into the overall constitutional structure of the EU Treaties. This section will consider the constitutional dimension to EU Consumer Law and will consider whether the approach advocated in his *Brief* would be constitutionally on stronger ground than harmonisation of domestic laws by directives or regulation.

As already mentioned, any action by the EU, whether in the field of consumer law or elsewhere, needs to have a legal basis in the TFEU. As far as consumer law is concerned, established practice has been to base consumer law directives on what is now Article 114 TFEU (ex Article 95 EC). It should be noted that Article 169 TFEU (ex Article 153 EC) provides an alternative legal basis for consumer protection measures, but this is limited to “measures which support, supplement and monitor the policy pursued by the Member States” (Article 169(2)(b) TFEU) and has not been used widely. In addition, Article 114 TFEU is overtly concerned with the harmonisation of national laws, whereas Article 169(2)(b) TFEU makes no reference to this. However, Article 169(2)(a) TFEU refers back to Article 114 TFEU as the main legal basis for pursuing policy objectives in the sphere of consumer protection. There is therefore a predisposition towards harmonisation of domestic laws in the constitutional framework, although Article 169(2)(b) TFEU leaves open the door to

¹⁰¹ Cf. W. van Gerven, “Bringing (private) laws closer at the European level” in F. Cafaggi (ed.), *The institutional framework of European private law* (Oxford: Oxford University Press, 2006).

an alternative approach which is not concerned with harmonisation and could be the legal basis for a measure concerned only with cross-border transactions. This issue will be explored more fully below.

Once a legal basis has been identified, the EU has the competence to adopt measures in that field, but there are several constraints on the extent to which the EU may act. It is necessary to comply with the principles of conferral, proportionality and subsidiarity (Article 5 TEU). The principle of conferral limits EU action to the competences conferred on it by the Treaties (Article 5(2) TEU). In some areas, the EU has exclusive competence, but in many areas, competence is shared between the EU and the Member States. Where the EU has exclusive competence, its ability to act is broad, but in areas of shared competence, the principle of subsidiarity is designed to ensure the proper distribution of competences between the EU level and the Member States. Article 5(3) TEU states that

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Consumer Protection is not one of the EU's exclusive competences, but is one of the areas of shared competence (Article 4(2)(f) TFEU), as, indeed, is the internal market (Article 4(2)(a) TFEU). Thus, in the field of consumer protection, there should only be EU action where the "objectives of the proposed action" cannot be achieved at Member State level. How would this principle work if applied to the field of consumer protection? Member States are clearly able to adopt legislation to ensure that consumers within their territory are adequately protected, and so there can be no question that they can "sufficiently achieve" this particular objective. However, Member States cannot, individually, adopt legislation that will deal with multi-jurisdictional issues created by cross-border consumer transactions. So if the objective is to encourage consumers to make better use of the internal market, then this means focusing on cross-border transactions, suggesting that the dominant focus of EU action ought to be on those transactions.

It is not entirely clear if that would be an accepted reading of the subsidiarity principle. It seems that the general view is that it is more of a procedural, and therefore political, issue than about the proper distribution of competences between EU and Member States.¹⁰² All this principle might require is that the national level has a greater involvement in approving EU action. However, it remains open to challenge EU action on the basis that it infringes the principle of subsidiarity, and there is at least an arguable case that the detailed harmonisation of national consumer laws might just be open to such a challenge.

¹⁰² R. Schütze, "Subsidiarity after Lisbon: reinforcing the safeguards of federalism?" (2009) 68 *Cambridge Law Journal* 525–536.

That said, harmonisation has been pursued without complaint even after the introduction of the subsidiarity principle into the TEU. Can a case be made for harmonisation that would still be in compliance with the subsidiarity principle?¹⁰³ The protocol on subsidiarity requires that any legislative proposal

should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators.¹⁰⁴

Guidance on the Commission's view regarding the compliance of harmonisation with the subsidiarity principle can be gleaned from its compliance statement which was part of the proposal for the Consumer Rights Directive. Interestingly, this emphasises that action is needed to encourage cross-border transactions,¹⁰⁵ but does not set out clearly why this necessitates harmonisation to cover both national and cross-border consumer transactions.¹⁰⁶

Instead, the Commission highlights that legal fragmentation is the main problem and that overcoming this cannot be resolved by the Member States themselves.¹⁰⁷ If Member States took action without EU coordination (i.e., "harmonisation of national laws"), then this would be unlikely to further the development of the internal market. As a result, only (full) harmonisation which would produce a single set of rules would ensure that consumers and traders could benefit from the internal market. On this basis, the Commission claims, the proposal, and therefore the approach of harmonising national laws in general, is compatible with the requirements of the principle of subsidiarity.¹⁰⁸

Does this reasoning convince? It is submitted that it does not. It appears to assume that the internal market would work better *only* if national laws were harmonised, but that is begging the question. The Commission never considers limiting action to cross-border transactions only and therefore fails to explain why harmonisation is preferable to dealing only with cross-border transactions. Assuming that the subsidiarity principle is intended to have a meaningful role in appropriately allocating responsibilities, the threshold of justifying harmonisation of national laws over

¹⁰³ For an early discussion of this, see H. Micklitz and S. Weatherill, "Consumer policy in the European Community: before and after Maastricht" (1993) 16 *Journal of Consumer Policy* 285–322, esp. pp. 304–313, although the authors do not consider whether the principle could be deployed to focus EU action on cross-border issues.

¹⁰⁴ Article 5 of the Protocol on the application of the principles of subsidiarity and proportionality.

¹⁰⁵ COM (2008) 614 final, p. 7.

¹⁰⁶ One reason was, presumably, to deal with the more generous provisions as regards consumers under Art. 6 of the Rome-I Regulation (cf. p. 5, above).

¹⁰⁷ COM (2008) 614 final, p. 6.

¹⁰⁸ COM (2008) 614 final, p. 7.

restricting action to cross-border transactions is a high one. Certainly in the Explanatory Memorandum, the Commission has not done enough to make out a convincing case.

It is argued here that EU legislation limited to cross-border transactions would pass the subsidiarity test much more easily. Member States can only legislate within their own jurisdictions. A single Member State cannot create a legal framework for cross-border transactions which would be applicable in all the other Member States. This would be just the kind of measure which should be the focus of EU action.

As far as the type of measure (directive or regulation) is concerned, the European Commission has argued, somewhat strangely, that using directives would be “more in line with the subsidiarity principle”.¹⁰⁹ This seems to be a rather odd reading of the subsidiarity principle (albeit one that was adopted in the Protocol on Subsidiarity in its Treaty of Amsterdam version).¹¹⁰ Subsidiarity is about the allocation of responsibility for the substance of regulation between the European and national levels. The type of legislative instrument used for any particular European measure is surely not of relevance in this context. Whilst it is true to say that Member States would adopt the measures to give effect to a directive, the regulatory direction will have come from the European level, so the substantive content of the various national measures will be European. Consequently, there is no regulatory competence being exercised by the Member States when directives are used. It seems difficult to justify using a directive instead of a regulation on the basis of subsidiarity.

Furthermore, even if the subsidiarity principle is satisfied, there is the additional requirement of demonstrating that EU action complies with the proportionality principle. This requires that the “content and form of Union action” does not exceed what is necessary to achieve the particular objective. One can ask whether harmonisation of national laws, which is both intrusive and disruptive to national legal systems, complies with the proportionality principle, particularly if the standard of harmonisation pursued would be full rather than minimum harmonisation.¹¹¹

Taken together, it seems that in light of the principles of subsidiarity and proportionality, there is a strong case to be made that EU activity should be restricted to matters which have a cross-border dimension only. This argument assumes, of course, that both principles are interpreted in a particular way. Case law from the ECJ offers little by way of encouragement. The Court has not accepted challenges to EU legislation on the grounds that such legislation was incompatible with subsidiarity or proportionality. In *ex parte BAT*,¹¹² the Court noted that subsidiarity in the

¹⁰⁹ COM (2008) 614 final, p. 8.

¹¹⁰ Cf. N. Reich, “A European contract law, or an EU contract regulation for consumers?” (2005) 28 *Journal of Consumer Policy* 383–407, p. 398.

¹¹¹ Cf. H. Schulte-Nölke, “The way forward in European consumer contract law: optional instrument instead of further deconstruction of national private laws” in C. Twigg-Flesner (ed.), *Cambridge Companion to European Union Private Law* (Cambridge: Cambridge University Press, 2010).

¹¹² C-491/01 *The Queen v Secretary of State for Health ex parte British American Tobacco (Investment) Ltd and others* [2002] ECR I-11543.

context of the internal market competence in Article 114 TFEU (Article 95 EC) applied “inasmuch as that provision does not give it exclusive competence to regulate economic activity on the internal market, but only a certain competence for the purpose of improving the conditions for its establishment and functioning”.¹¹³ The Court did not consider whether this might mean that it would be possible to argue that EU legislation should, at least in some circumstances, be limited to cross-border transactions. And with regard to the principle of proportionality, the ECJ has said that the EU legislature must be allowed a “broad discretion in areas which involve political, economic and social choices on its part”.¹¹⁴ For a challenge to a measure to succeed on the basis that it infringes the principle of proportionality, it would have to be shown that the “measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue”.¹¹⁵ The requirement of “manifest inappropriateness” seems to set a high hurdle for any challenge to the harmonisation of national laws on basis of disproportionality. Whilst this might mean that it would be wrong to say that harmonisation of consumer law is incompatible with subsidiarity and proportionality per se,¹¹⁶ it does not mean that the competence of the EU to concentrate on cross-border transactions is not stronger; it remains the argument here that the EU has a stronger mandate to adopt comprehensive legislation where this is limited to cross-border transactions. Subsidiarity might presently be “bark but not bite”,¹¹⁷ but part of the argument in this *Brief* is that it would be appropriate to reconsider the weight given to the subsidiarity principle.

5.1 Legal Basis for the EUCTR

As noted earlier, there are two potential candidates for a suitable legal basis for the EUCTR. They are Article 114 TFEU and Article 169(2)(b) TFEU. Although it has been argued that the constraints of the subsidiarity and proportionality principles should restrict the EU’s ability to adopt legislation that reaches beyond the cross-border context, it must be acknowledged that Article 114 TFEU itself is not limited to cross-border situations, i.e., legislation adopted on the basis of this Article does not have to be limited to situations dealing with the free movement between Member States.¹¹⁸ Legislation adopted on the basis of this Article therefore does not

¹¹³ *Ibid.*, para. 179.

¹¹⁴ C-344/04 *The Queen on the application of International Air Transport Association, European Low Fares Airline Association v Department for Transport* [2006] ECR I-403, para. 80.

¹¹⁵ *Ibid.*

¹¹⁶ See also C-58/08 *R ex parte Vodafone and others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR-n.y.r.

¹¹⁷ S. Weatherill, *EU Consumer Law and Policy* (Cheltenham: Edward Elgar, 2005), p. 22. See pp. 19–22 of Weatherill for a useful, if now slightly dated, overview of subsidiarity in the context of EU Consumer Law.

¹¹⁸ C-465/00, C138/01 and C-139/01 *Rechnungshof v Österreichischer Rundfunk and others; Neukomm and Lauermaun v Österreichischer Rundfunk* [2003] ECR I-4989.

have to be limited to cross-border transactions, nor does the application of legislation adopted on the basis of Art. 114 TFEU have to be restricted to circumstances involving a cross-border element. In the *Rechnungshof* case (C-465/00), a case involving the application of the Data Protection Directive¹¹⁹ in the context of data collection internal to one Member State, the ECJ observed that restricting the application of legislation adopted on the basis of Article 114 TFEU (Article 95 EC) to circumstances involving the exercise of the fundamental freedoms in the Treaty “could make the limits of the field of application of the directive particularly unsure and uncertain, which would be contrary to the essential objective of [Article 114 TFEU]” (para. 42).¹²⁰ However, whilst Art. 114 TFEU is not inherently limited to cross-border circumstances, it is equally clear that there is nothing to suggest that measures adopted on the basis of Article 114 TFEU could not be limited to cross-border circumstances (cf. para. 43 of the judgment). Whether such a limitation is appropriate would depend on the general objective pursued by the measure in question, with the principles of subsidiarity and proportionality acting as constraints on the scope of Article 114 TFEU. That said, Article 114 TFEU would not be an appropriate basis for a regulation dealing with cross-border issues only, because it is concerned with the approximation of national laws, but under the EUCR national consumer laws would remain unaffected by such a measure.

So it would be necessary to consider an alternative legal basis, and the obvious candidate is Article 169(2)(b) TFEU. As noted, this can be used for measures which support the activities of the Member States in the field of consumer protection. Although it has not yet been fully explored what exactly might be meant by measures which support the activities of the Member States, there seems no reason to suggest that a measure dealing with cross-border consumer transactions would not fulfil this purpose. So Article 169(2)(b) would be an appropriate basis for the EUCR. Using this legal basis would also have the additional benefit that the primary focus of the measure would be on consumer protection and not the internal market. Article 169(2)(b) TFEU should be the legal basis for the EUCR.¹²¹

5.1.1 Article 352 TFEU: Residual Competence

One further Treaty provision could be utilised in adopting a Regulation dealing with cross-border consumer transactions, should Art. 169(2)(b) TFEU not be regarded as appropriate. This is Article 352 TFEU (formerly Art. 308 EC), which provides a residual

¹¹⁹ Directive 95/46/EC (1995) OJ L281/31.

¹²⁰ Although this observation turned on the scope of the particular Directive in issue in this case.

¹²¹ The additional advantage in Article 169(4) TFEU, according to which any measures adopted on the basis of Article 169(2)(b) only have minimum harmonization character would not be relevant as the EUCR proposed here would only be of cross-border application. Contrast N. Reich, “A European contract law, or an EU contract regulation for consumers?” (2005) 28 *Journal of Consumer Policy* 383–407.

competence for the EU to act “[i]f action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers”.¹²²

Although this provision could be used potentially quite widely, the legislative procedure to be followed might make it less attractive. First, the Council must act unanimously for measures to be adopted. Secondly, Art. 352 TFEU requires only that the “consent” of the European Parliament is sought, but does not envisage full involvement of the Parliament, unlike the ordinary legislative procedure under Article 294 TFEU which would be followed for measures based on Articles 114 or 169(2)(b) TFEU.¹²³

Article 352 TFEU and its predecessors were of some relevance when the earlier versions of the Treaties did not contain as broad a range of legal bases for action as the TFEU does now, and it is not used as widely now. Nevertheless, it still has some relevance, and there may be circumstances when Art. 352 TFEU rather than Art. 114 TFEU should be utilised as a legal basis. A key ruling on this point is *C-436/03 European Parliament v Council of the European Union*.¹²⁴ Here, the ECJ had to consider the relationship between Articles 308 and 95 of the EC Treaty (now Arts. 352 and 114 TFEU, respectively) in considering whether Regulation 1435/2003 on the Statute for a European Cooperative Society (SCE) had been adopted on the correct legal basis.¹²⁵ The Regulation created a new legal structure, the European Cooperative Society, as a new legal entity to be recognised in all the EU Member States. The initial proposal was put forward on the basis of the then Article 95 EC, but the Council substituted Article 308 EC and the Regulation was adopted on this basis. Unsurprisingly, the European Parliament challenged this decision, because its involvement in the adoption of legislation based on this Article was much more restricted compared to Article 95 EC. However, the Council argued that the Regulation created a new European entity which exists alongside domestic cooperative societies. Article 95 EC is the basis for measures which are designed to approximate domestic law and remove barriers to the internal market caused by the diverging domestic legislation. As the SCE could not be created purely on the basis of domestic law, no approximation of national laws was involved. The ECJ generally shared this view. It confirmed that Article 308 EC (now Art. 352 TFEU) could only be used if there was no other legal basis in the Treaties which could be the basis for a particular measure.¹²⁶ Article 95 EC (Art. 114 TFEU) was the appropriate base for measures which genuinely have as their object a contribution to the establishment

¹²² It should be noted that in its earlier incarnation as Art. 308 EC, the provision was limited to action necessary “in the course of the operation of the common market”, but this was removed by the Treaty of Lisbon.

¹²³ Note that the position of the European Parliament has been strengthened slightly in that it now has to consent to whatever measure is adopted, whereas previously, it only had to be consulted.

¹²⁴ [2006] ECR I-3733.

¹²⁵ (2003) O.J. L 207/1.

¹²⁶ Para. 36 of the judgment.

and functioning of the internal market, and this includes circumstances where obstacles to the internal market are likely to be caused by the heterogeneous development of domestic laws.¹²⁷ The Regulation did not aim to approximate domestic laws on cooperative societies, but instead create a new type of cooperative society, and therefore Article 308 EC had been correctly chosen as the legal basis for the Regulation.¹²⁸ This was so even though the SCE Regulation left certain matters to national law, particularly with regard to certain operational rules affecting the SCE.¹²⁹ This ruling therefore indicates that Article 114 TFEU can only form the basis of legislation approximating the national laws but not be used for creating of new, supranational legal forms. These have to be based on Article 352 TFEU.¹³⁰ In later cases, the ECJ confirmed that Article 95 EC (and therefore Art. 114 TFEU) could be used for measures which include the replacement of divergent national rules with a uniform Community procedure enacted by way of regulation¹³¹ or the creation of a monitoring agency.¹³²

The implications of this ruling might be that the adoption of something like the EUCTR, which deals only with the cross-border context and could, by definition, not be adopted at the domestic level, could not be based on Art. 114 TFEU, but—assuming that Art. 169(2)(b) TFEU was also not suitable¹³³—only on Art. 352 TFEU.

5.1.2 Constitutional Issues: Conclusion

The constitutional picture is such that both the continuing harmonisation of national laws so as to affect all consumer transactions or the change to a Regulation limited to cross-border transactions would be possible. However, it is submitted that the EU would have a stronger mandate to adopt a comprehensive measure for consumer transactions if this were limited to the cross-border context, because the principles of subsidiarity and proportionality might act as more of a brake on a comprehensive harmonisation of national laws (leaving aside any political considerations). The idea of an EUCTR could easily be accommodated in the constitutional framework.

¹²⁷ Paras. 37–38.

¹²⁸ Para. 44.

¹²⁹ Para. 45.

¹³⁰ See also *Opinion 1/94* [1994] ECR I-5267, where the ECJ observed that Article 308 EC would be the appropriate basis for the creation of a new intellectual property right which would exist in addition to national rights.

¹³¹ C-66/04 *United Kingdom v Parliament and Council* [2005] ECR I-10553.

¹³² C-217/04 *UK v Parliament and Council* [2006] ECR I-3771.

¹³³ Which might be the case if there was to be a Regulation dealing also with non-consumer transactions, for example, one version of the “optional instrument” idea discussed in the following section.

6 The EU Contract Law Project

The preceding sections have made the case for a Regulation on cross-border consumer transactions. The task for this section is to relate this idea to the debate about the possible introduction of an optional instrument on European Contract Law. Before turning to this, it is necessary to provide a synopsis of the developments in the field of European Contract Law to date. For more than a decade now, the European Commission has been exploring the need and potential for action in the field of contract law generally, rather than just consumer contract law.¹³⁴ This is based on the assumption that businesses find it more difficult to enter into contracts with parties from other Member States because this raises questions as to which law is applicable to the various stages of the contract. The Commission therefore launched a process in 2001 to discover whether there was scope, and indeed a mandate, for legislative action on contract law generally. It issued a *Communication on European Contract Law*,¹³⁵ which was designed to launch a debate about what could, and should, be done at the European level to make contracting with parties from other Member States easier. It also called for concrete evidence of existing problems which could be used to identify whether further EU action in the field of contract law was needed. One element of the Commission's position in 2001 was that it had already identified problems with regard to both the quality of the various harmonisation directives adopted up to that point¹³⁶ and in their transposition into Member State Law. The core of the Communication was a choice of four possible options, not all of which were mutually exclusive. They were:

- (1) No EC action (i.e., the “do nothing” option).
- (2) Promote the development of common contract law principles, for improving EU legislation, as guidance to domestic courts applying a foreign law, and as a template for domestic legislators when adopting legislation in the contract law field.¹³⁷
- (3) Improve the quality of legislation already adopted by improving the coherence of the terminology used and revising current exceptions from the scope of

¹³⁴For a general discussion, see C. Twigg-Flesner, *The Europeanisation of Contract Law* (Abingdon: Routledge, 2008).

¹³⁵COM (2001) 398 final, 11 July 2001. See, for example, “On the way to a European contract code?” (editorial comments) (2002) 39 *Common Market Law Review* 219–255.

¹³⁶In the Annex to the *Communication*, there is a long list of measures which arguably have some impact on contract law, or even private law generally. It has been noted that the extent of this impact is not always clear: see N. Reich, “Critical Comments on the Commission Communication ‘On European Contract Law’” in S. Grundmann and J. Stuyck (eds), *An Academic Green Paper on European Contract Law* (The Hague, Kluwer Law International, 2002).

¹³⁷Paras. 52–55.

existing directives to increase coherence in the scope of application of the *acquis*.¹³⁸

- (4) Adopt new comprehensive legislation at EU level, resulting in “an overall text comprising provisions on general questions of contract law as well as specific contracts”.¹³⁹ This could be purely optional, to be selected by the parties; an “opt-out” or default framework, which would apply unless excluded by the parties; or a non-excludable framework which could national contract laws.¹⁴⁰

It will not come as a surprise that this *Communication* prompted a huge volume of consultation responses, as well as extensive academic debate. Indeed, one might even go so far as to say that it created a new discipline of “European Contract Law”. Over the last decade, there have been numerous books, edited collections and conferences on the idea of a European Contract Law, and there are no signs that this might slow down in the foreseeable future. Having considered the responses to the initial *Communication*, the Commission then issued a first follow-up document, *A More Coherent European Contract Law—An Action Plan*,¹⁴¹ in February 2003. By then, the Commission had received 181 responses to its *Communication*,¹⁴² which generally came out in favour of options (2) and (3), with very few respondents supporting option (1). The majority of respondents opposed option (4). In the *Action Plan*, the Commission proposed a number of specific forms of action that would be taken, which, after a period of further consultation, were confirmed in the third key Commission document, *European Contract Law and the revision of the acquis: the way forward*.¹⁴³

First, it was accepted that steps would have to be taken to improve the quality and consistency of the *acquis* in the field of contract law. As already explained, the Commission had commissioned separate research on the implementation of eight consumer law directives into the national laws of the Member States (the *EU Consumer Law Compendium* mentioned earlier¹⁴⁴). However, in order to improve the quality and consistency of the *acquis*, the Commission decided to create a “Common Frame of Reference” (CFR) on European Contract Law, which would provide common principles, rules and terminology. Any proposals for reform of the *acquis*, particularly of the consumer law *acquis*, were to have been based on the CFR,¹⁴⁵ although subsequent developments have revealed that this has not been

¹³⁸ Paras. 57–60.

¹³⁹ Para. 61.

¹⁴⁰ Para. 66.

¹⁴¹ COM (2003) 68 final.

¹⁴² Cf. M. Kenny, “Globalization, Interlegality and Europeanized Contract Law” (2003) 21 *Penn State International Law Review* 569–620.

¹⁴³ COM (2004) 651 final, 11 October 2004. See D. Staudenmeyer, “The Way Forward in European Contract Law” [2005] *European Review of Private Law* 95–104.

¹⁴⁴ See p. 15.

¹⁴⁵ *The way forward*, pages 2–5.

the case, at least not in the way envisaged in 2004. Overall, the Commission set out three general purposes for the CFR:

- (1) It could be used to help with the review of existing legislation, as well as when new measures are proposed, by providing common terminology and rules on fundamental concepts.
- (2) It could promote convergence between domestic legal systems both within and outside the EU.¹⁴⁶
- (3) It could form the basis for considering the usefulness of an optional instrument on contract law.¹⁴⁷

A second strand of action would be to promote the development of EU-wide standard contract terms for particular industry sectors. Initially, the Commission intended to facilitate the exchange of information, possibly through a Commission-hosted website, and to give guidance on the use of standard terms and conditions within the context of EU law, particularly on unfair contract terms and competition law.¹⁴⁸ However, the Commission subsequently abandoned its plans to host a website. One reason was that it would have been difficult to keep this site up-to-date. More significantly, EU-wide standard contract terms would have to be effective under the most restrictive national rules, which would make them unattractive to most businesses, particularly those operating in jurisdictions with less restrictive rules.¹⁴⁹ There would have been other practical problems, such as difficulties associated with translating standard terms into the different EU languages, variations in national default rules in the various domestic laws and variations in the way standard terms are interpreted.¹⁵⁰ Although action to facilitate the use of standard contract terms would have been welcomed,¹⁵¹ it was not pursued further.

As a third initiative, the Commission stated that it would reflect further on whether there could be a “non-sector specific measure”, such as an optional instrument. As already noted, this would entail considering the suitability of the CFR for such an instrument.¹⁵²

In the period between the third Commission document and late 2008, a network of legal scholars was entrusted with the task of creating what became known as the “Draft Common Frame of Reference”, or “DCFR”. The Commission envisaged that

¹⁴⁶ Whatever “convergence” might mean in this context: cf. R. Brownsword, *Contract Law—Themes for the Twenty-First Century* (Oxford: OUP, 2006), p.173/4.

¹⁴⁷ Para. 62.

¹⁴⁸ Paras. 81–88.

¹⁴⁹ *First Annual Progress Report on European Contract Law and the Acquis Review* COM (2005) 456 final, 23 September 2005, page 10.

¹⁵⁰ S. Whittaker, “On the Development of European Standard Contract Terms” (2006) 2 *European Review of Contract Law* 51.

¹⁵¹ U. Bernitz, “The Commission’s Communications and Standard Contract Terms” in S. Vogenauer and S. Weatherill (eds.), *The Harmonization of European Contract Law* (Oxford: Hart Publishing, 2006).

¹⁵² Page 5.

the DCFR would provide “common terminology and rules”,¹⁵³ which essentially meant that it would contain definitions of the relevant legal terms, a statement of fundamental principles of contract law and coherent model rules. Substantively, it would be based on a combination of the existing *acquis* and best solutions which have emerged from a comparative study of Member States’ laws. This would enable the DCFR, and the CFR ultimately created by the Commission, to act as a “toolbox” for improving existing legislation and for the adoption of future measures.¹⁵⁴ Having presented an interim version of the DCFR in December 2007,¹⁵⁵ the final version was submitted to the Commission in 2008,¹⁵⁶ and subsequently published as a six-volume encyclopaedia¹⁵⁷ comprising model rules, together with comments on the meaning and application of those rules and national laws explaining how the model rules related to the national laws of the Member States. At that point in time, there was some uncertainty as to what would happen with the DCFR after it had been submitted to the Commission. The Commission’s initial enthusiasm had waned considerably in the intervening years, with the DCFR ostensibly confined as being relevant only to the reform of the consumer *acquis* before not even being used visibly for that purpose.

After a period of silence, the transfer of responsibility for the Contract Law project to DG Justice prompted renewed interest. In April 2010, the Commission established an Expert Group which was asked to create a “CFR” out of the academic DCFR,¹⁵⁸ a task subsequently modified to study the feasibility of producing an optional instrument on European Contract Law. Whilst this work was ongoing, 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*”) on 1 July 2010.¹⁵⁹ This *Green Paper* explores what potential future action might be taken by the EU in the field of contract law. Although the *Green Paper* covers both business-to-consumer and business-to-business contracts, the focus here will be on business-to-consumer contracts. It is noted in the *Green Paper* that the differences in national consumer laws have the effect of deterring both consumers and traders from engaging in cross-border transactions,¹⁶⁰ although, in

¹⁵³ *Action Plan*, para. 62.

¹⁵⁴ *Way Forward*, p. 3.

¹⁵⁵ C. von Bar, E. Clive and H. Schulte-Nölke (eds.) *Principles, Definitions and Model Rules on European Private Law – Draft Common Frame of Reference Interim Outline Edition* (Munich: Sellier, 2008).

¹⁵⁶ C. von Bar, E. Clive and H. Schulte-Nölke (eds.) *Principles, Definitions and Model Rules on European Private Law – Draft Common Frame of Reference Outline Edition* (Munich: Sellier, 2009).

¹⁵⁷ C. von Bar, E. Clive and H. Schulte-Nölke (eds.) *Principles, Definitions and Model Rules on European Private Law – Draft Common Frame of Reference* (Munich: Sellier, 2009).

¹⁵⁸ Commission Decision setting up the Expert Group on a Common Frame of Reference in the area of European Contract Law (2010) O.J. L105/109.

¹⁵⁹ COM (2010) 348 final.

¹⁶⁰ P. 5.

a change from previous policy documents, it is also acknowledged explicitly that linguistic and other practical barriers are equally problematic.¹⁶¹ Furthermore, it is conceded that the Consumer Rights Directive (then still going through the legislative stages) will not overcome the problem of legal diversity, not least, because the negotiations over the proposal “have highlighted that there are limits to an approach based on full harmonisation”.¹⁶² There is therefore an implicit acknowledgement that full harmonisation may not be attainable, and other action may be needed if there is to be a set of legal rules suitable for supporting the operation of the internal market. In brief, the *Green Paper* offers seven potential options for a potential future instrument on European Contract Law:

- (1) The text to be prepared by the Expert Group could become a “source of inspiration”¹⁶³ for European and national legislators when developing new legislation. It could also be included in higher education and professional training programmes to promote a better understanding of contract law in the EU. Somewhat aspirationally, it is suggested that might, over time, lead to the voluntary convergence of national contract laws. As a counter-argument, it is noted that a non-formal text would have little immediate impact on the current diversity of contract laws.
- (2) Going beyond using the Expert Group text as a source of inspiration, this text could be elevated to the status of an official toolbox for the legislator, binding either the Commission only when proposing new legislation, or—by virtue of an inter-institutional agreement between the Commission, Council and Parliament—on all of the EU institutions. Once again, it is noted that this would not remove current divergences, at least not until legislation based on the toolbox is adopted, but would increase the likelihood that future legislation would be more coherent.

Both these initial proposals were overtaken by events in the work of the Expert Group, which, far from creating a Common Frame of Reference, was ultimately asked to prepare a draft optional instrument. That being the case, options (1) and (2) were effectively dismissed by the Commission even before the consultation had closed.

The options which followed essentially moved to ever greater levels of formal intervention in the national laws of the Member States:

- (3) A recommendation could be adopted by the Commission, which would encourage the Member States to adopt, over time and to suit national legislative priorities, an agreed set of EU Contract rules as part of their national legal systems. This could either replace national contract law rules or be an optional alternative to existing national law. Once more, it is noted that this, too, would not deal with present divergences; moreover, because Member States would be free to

¹⁶¹ P. 4.

¹⁶² P. 5.

¹⁶³ P. 7.

select which provisions to adopt, this could result in incomplete or incoherent adoption of the recommended text.¹⁶⁴

- (4) Going one step further, an “optional instrument” on EU Contract Law could be adopted by means of a Regulation. This would operate alongside the national laws and could offer an alternative to choosing one particular national law for the parties to a contract. Specific reference is made to the implications for consumer contracts: consumer confidence, and consequently their willingness to agree to the choice of the optional instrument, would depend on the level of consumer protection adopted in the optional instrument. One particular difficulty to be addressed is the existence of national mandatory rules on consumer protection: these would have to be displaced by the rules contained in the optional instrument if it is to achieve its objective of providing a clear single set of rules for the internal market, but might cause concern if the level of protection provided by the mandatory rules in the optional instrument fell significantly below those known from national law.¹⁶⁵
- (5) Rather than using a Regulation, the EU could instead adhere to established practice and adopt a Directive on European Contract Law, which would harmonise national contract laws. For reasons not made explicit (but perhaps reflecting a recognition of the political realities emerging when the *Green Paper* was drafted), the *Green Paper* suggests that this would be of a minimum standard and allow Member States to retain more protective rules. Unsurprisingly, this is not welcomed because of the diversity in national contract laws this would produce. Indeed, it is acknowledged that past experience shows that directives do not always result in uniform rules and interpretation of those rules. Consequently, directives might not provide the degree of legal certainty required by business.
- (6) Going further than the idea of optionality, there could instead be a Regulation establishing one European Contract Law that would replace all the national laws. This would produce one single text applicable throughout the EU, i.e., a uniform EU Contract Law. However, it is (rightly) noted in the *Green Paper* that this might be difficult to justify on the basis of the fundamental principles of proportionality and subsidiarity,¹⁶⁶ especially if this Regulation applies to domestic as well as cross-border transactions.
- (7) Perhaps more for the sake of completeness than any realistic prospect of gaining support, the idea of a European Civil Code is the final option present in the *Green Paper*. This would have the advantage of covering the entirety of the law of obligations and consequently provide even greater legal certainty across the EU.

As well as these broad policy options, two questions of scope are raised. First, the Commission invited responses on whether whatever policy approach is adopted should apply to both business-to-business and business-to-consumer transactions,

¹⁶⁴ This would be similar to Model Laws used in Transnational Commercial Law.

¹⁶⁵ And now that “full harmonization” of substantive consumer law has been all but abandoned, that issue is perhaps more significant than it was previously.

¹⁶⁶ See above at p. 40.

or to one of these only. Thus, it is plausible that whatever action is taken might be limited to B2C, or B2B transactions only.

Secondly, it asked, if there were to be an optional instrument, whether this should apply to both domestic and cross-border contracts, or to cross-border contracts only. Here, the *Green Paper* repeats the concerns from the earlier *Green Paper on the Review of the Consumer Acquis* that consumers might find the existence of two regimes confusing, but then also suggests that “an instrument covering cross-border contracts only, capable of resolving the problems of conflicts of laws could make an important contribution to the smooth functioning of the internal market”.¹⁶⁷ There is therefore at least recognition that limiting an optional instrument to cross-border transactions only would have an important beneficial function for the internal market.

Although it might seem remarkable that a broad range of policy options is put out for consultation, one can still detect a slight steer by the Commission. For example, with regard to the less interventionist options [(1)–(3)], the Commission spells out the drawbacks for the internal market. On the other hand, there no longer seems to be the desire to defend established practice, unlike in the 2007 *Green Paper on the Review of the Consumer Acquis*.

In particular, there is now a distinct possibility that the use of directives might come to an end and that a Regulation will be used instead for the future development of EU Consumer Law. Secondly, serious consideration might be given to the possibility of restricting further EU action to cross-border transactions only. In the previous part of this *Brief*, the case for both changes was considered. The move to a Regulation would have several advantages over maintaining the use of directives, particularly with regard to clarity and legal certainty. Moreover, limiting EU action to cross-border transactions would allow it to focus on those transactions which are essential for promoting the internal market. It will be recalled that, in general terms, the kinds of transactions which should be treated as “cross-border transactions” should be distance and e-commerce transactions only. This was presented as an “EU Consumer Transactions Regulation”, or EUCTR. In the following section, it will be considered to what extent the idea of the EUCTR is mirrored by the discussion about an optional instrument and where there are variations from this basic idea.

6.1 The EUCTR and the Optional Instrument

Since the *Green Paper* was issued, the Expert Group appointed in 2010 has completed and published what is now known as its *Feasibility Study on a European Contract Law for Consumers and Businesses* (“Feasibility Study”).¹⁶⁸ This is, effectively, a draft optional instrument. Based on this, it is expected that the Commission will make

¹⁶⁷ P. 12.

¹⁶⁸ This can be accessed via http://ec.europa.eu/justice/contract/index_en.htm [last accessed 3 August 2011]. The Feasibility Study has undergone further revisions since its publication and work-in-progress versions can also be accessed via this webpage.

a firm legislative proposal for an optional instrument towards the end of 2011. There will still be a number of questions to be considered, particularly the scope of the optional instrument.¹⁶⁹ The basic conception of the optional instrument is that it would be regarded as a “2nd regime in each Member State, thus providing parties with an option between two regimes of domestic contract law”,¹⁷⁰ rather than a 28th regime which effectively hovers above the existing national contract law regimes. This conception might raise a number of difficulties, not least from the perspective of private international law, which are briefly considered below.

6.1.1 Scope of the OI

In the discussions about the optional instrument, a number of questions have been raised about the potential scope of such an instrument. It should be recalled that the origins of the optional instrument are in the EU Contract Law discussions and are therefore not limited to the consumer context. Nevertheless, there is at least some discussion as to whether the optional instrument should be limited to B2C transactions only or whether it should also be applicable to B2B transactions. It does not seem that the focus would be exclusively on B2B transactions however, i.e., the optional instrument will as a minimum deal with B2C transactions. A second issue is whether whatever optional instrument is ultimately proposed should be limited in its scope to cross-border transactions. Following on from the arguments presented earlier in this *Brief*, the position taken here is that an instrument limited to cross-border B2C transactions is desirable (more will be said on the question of “optionality” later). However, this should not be understood as a rejection of the idea of an optional instrument for B2B transactions as a separate venture.

6.1.2 B2B or B2C

It might be suggested that it could be difficult to find an appropriate dividing line between B2B and B2C transactions and that it would consequently be better to have one optional instrument dealing with all types of transactions.¹⁷¹ One reason given for this is that there are some instances where it has been shown to be problematic to classify a transaction as either a consumer or a non-consumer transaction, particularly so-called “dual purpose transactions”. However, this argument is little more than a red herring. Even if there was an optional instrument which applied equally to B2B and to B2C transactions, there would still have to be consumer-specific provisions within such an instrument, and questions of demarcation would still arise in the same way, albeit in respect of particular provisions rather than the instrument as a whole.

¹⁶⁹ See V. Reding, *Opening trade and opportunities: From the Hanseatic League to European Contract Law* (SPEECH/11/539), 19 July 2011.

¹⁷⁰ *Green Paper*, p. 9.

¹⁷¹ For example, S. Augenhöfer, “A European Civil Law – for whom and what should it include?” (2011) 7 *European Review of Contract Law* 195–218, p. 203.

More significantly, this approach effectively seems to assume that the relevant legal principles and rules could be the same for all contracts, with some modifications made where the “general” rules of contract law might be too disadvantageous for consumers. In other words, B2C provisions would be treated merely as a derogation in specific circumstances from the general rule. This is certainly in line with the way consumer law (whether domestically or at the European level) has evolved. However, consumer law as an area of law has matured to such an extent that it seems odd to maintain an approach which treats consumer law merely as a partial derogation from general contract law. The fundamental basis for consumer law is different from general contract law, particularly because consumer law pursued a particular regulatory objective and is based on guiding principles which are different from the essentially facilitative nature of general contract law.¹⁷² This fundamental difference would suggest that a legal framework for consumer transactions needs to be designed differently, and whilst there might be some parallels with general contract law, it no longer seems appropriate to treat consumer law simply as a derogation from general principles where this is felt desirable. This point will be considered further in the following part dealing with the substantive content of a cross-border regulation for consumer transactions.

6.1.3 Cross-Border or All Transactions

A second theme in the current debate is whether the optional instrument should be limited to cross-border transactions only or whether it should apply, in principle, to all transactions. It needs to be borne in mind that this consideration is linked to the question of optionality, i.e., the key issue is whether a business (or a consumer?) should have the choice to conclude a contract under the optional instrument irrespective of whether the contract has a cross-border dimension or not.

The main argument in favour of an optional instrument which is applicable to cross-border and domestic transactions is that this would create the choice for traders to offer their goods and services across the EU on the basis of one legal framework¹⁷³ and consequently one set of standard terms. Now, the focus of this argument seems to be very much on the benefits for traders, rather than the resulting impact on consumers. It is, of course, correct to say that having an optional instrument that is designed to be applicable to both cross-border and domestic transactions would create a single set of legal rules which could be used by traders for contracts across the internal market, and that the option of being able to do so is likely to encourage more traders to make their goods and services available in a cross-border context.¹⁷⁴

¹⁷² Cf. V. Mak, “Policy choices in European Consumer Law: regulation through ‘targeted differentiation’” (2011) 7 *European Review of Contract Law* 257–274. See also below, p. 61.

¹⁷³ For example, S. Augenhöfer, “A European Civil Law – for whom and what should it include?” (2011) 7 *European Review of Contract Law* 195–218, p. 213.

¹⁷⁴ Although precise figures as to how many more traders would actually take advantage of this opportunity, and the resulting economic benefits for all actors in the internal market, have yet to be provided—if, indeed, it is possible to quantify such benefits *ex ante*. The European Commission has stated that there will be a regulatory impact assessment.

However, from the *consumer's* perspective, the idea of an optional instrument applicable across the board might be less attractive and, indeed, potentially detrimental. It may be true that the number of consumers who are aware of their legal rights is not as large as would be desirable, and there is probably a high level of ignorance. But at the same time, if consumers are familiar with the relevant law, it will be the rules of their domestic law. Such basic knowledge creates a few basic expectations as to the level of protection a consumer has when buying goods or services in a domestic context. For example, in the UK, most consumers understand that they have a short period after buying an item when this can be returned for a full refund if it is faulty.¹⁷⁵ If there was an optional instrument which prioritised remedies such as repair and replacement, and left the entitlement to a refund as a remedy of last resort, then consumers would quite possibly be rather surprised if they discovered that such a fundamental entitlement could be lost in a domestic setting if the trader simply chose to offer his goods or services to all consumers on the basis of the optional instrument. Indeed, this raises the issue whether an optional instrument with a differing level of consumer protection applicable to domestic transactions might be caught by controls over unfair terms if the choice by the trader of the optional instrument has the effect of depriving a consumer of certain rights provided by the existing national law.¹⁷⁶

Moreover, the focus on making contracting easier for traders also seems to ignore the fact that if the optional instrument is to live up to its name, then both contracting parties should opt for this instrument. In a B2C context, there is a risk that the only person making that choice would be the trader. Consumers would therefore quite possibly not have any choice and find that they can suddenly only buy certain goods or services from some traders on the basis of a non-domestic law. There is a strong argument that this would run against the reasonable expectations of consumers, which would mean that a limitation to cross-border transactions is preferable.

A second reason commonly advanced in favour of not restricting the optional instrument to cross-border transactions is the difficulty associated with determining the location of the parties to a contract. For example, in a document prepared by the *Acquis Group*, the following observation is made:

It is technically difficult to discern, let alone verify the place of residence of a consumer on a web-based platform, as this may differ from both billing address and delivery address. This would also require customers to disclose their place of residence before being presented with the contract terms which would apply to the transaction...¹⁷⁷

¹⁷⁵ Cf. Law Commission, *Consumer Remedies for Faulty Goods*, Report 317 (London: TSO, 2009), paras. 3.5–3.12.

¹⁷⁶ See S. Whittaker, “The optional instrument of European Contract Law and freedom of contract” (2011) 7 *European Review of Contract Law* 371–398.

¹⁷⁷ G. Dannemann (ed.), “Draft for a First Chapter (Subject Matter, Application and Scope) of an Optional European Contract Law” (2011) *Oxford University Comparative Law Forum* 2 at oucl. iuscomp.org.

However, determining the place of residence (in the case of private individuals) or the place of business (in the case of traders) is necessary in various other contexts, not least in the context of determining the applicable law and jurisdiction in the context of private international law.¹⁷⁸ So perhaps it is necessary that consumers disclose their place of residence before a contract is concluded, and, if following such disclosure, the contract is to be treated as a cross-border contract, then the optional instrument would become available. Of course, one of the hallmarks of the electronic environment is delocalisation which does, perhaps, make this more of a problem, but it would surely not be too difficult to come up with an appropriate mechanism, as discussed earlier.¹⁷⁹

A further concern in this regard is that there is a possibility that there could be confusion about which pre-contractual rules are applicable, because until the point when the consumer's place of residence has been notified to the trader or the website, either national law or the rules of the optional instrument/EUCTR might be applicable. This can, of course, be done as soon as the consumer accessed a website. This is already the case with some websites, such as those of many airlines. So websites could easily be amended to require a consumer to state his country of residence before embarking on placing an order.

But even if the consumer does not reveal his country of residence until a later stage, as far as many of the consumer-specific pre-contractual information obligations are concerned, the recent agreement on the Consumer Rights Directive will mean that these are now largely subject to full harmonisation, so the pre-contractual stage should not be a problem. Similarly, marketing and advertising rules are fully harmonised under the Directive on Unfair Commercial Practices.¹⁸⁰ In the vast majority of cases, therefore, it would not be a significant problem, if the consumer did not disclose his place of residence until he is about to place an order.

There is a further argument against an optional instrument applicable to both cross-border and domestic transactions. The underlying assumption made when arguing for an optional instrument with a broad scope is that one set of rules can and will be suitable and appropriate for use both domestically and in a cross-border setting. However, that may not be borne out if this was examined more closely. As Mak puts it:

The nature of [cross-border and domestic] transactions, and especially the position of the consumer in each, is clearly different. In one, the transaction takes place in an environment with which the consumer is familiar (the domestic context), whereas in the other, it goes outside that comfort zone (the cross-border context).¹⁸¹

¹⁷⁸ See above, p. 3.

¹⁷⁹ See above, p. 34.

¹⁸⁰ Directive 2005/29/EC.

¹⁸¹ V. Mak, "A shift in focus: systematisation in European Private Law through EU Law" (2011) 17 *European Law Journal* 403–428, pp. 425–426.

On this basis, Mak suggests that the cross-border context calls for a different and higher level of protection than domestic law, if only to ensure that a consumer who engages in the cross-border context is in a comparable position to a consumer who sticks to the domestic market. This further underlines the need to recognise that a one-size-fits-all framework for all consumer transactions seems inappropriate.

Turning to a specific example, in the domestic context, relying on a liability rule according to which only the trader who supplied goods to a consumer is liable for any non-conformity of the goods with the contract seems defensible. It reflects the contractual nature of the transaction, and the fact that in the vast majority of cases, the trader will be fairly easily accessible for the consumer, should it become necessary to return goods if they are faulty. In the cross-border context, the physical distance between trader and consumer will be much greater, making it considerably more difficult and potentially more costly to return goods to the trader if they are faulty.¹⁸² So in this context, a different liability system, for example, one which holds the producer directly liable, or even all the members of a distribution network system, might be more appropriate.¹⁸³ Similarly, the remedies available to a consumer might need to be different, depending on whether the transaction is domestic or cross-border. The key point here is that the assumption that there can be a one-size-fits-all framework has not been subjected to sufficiently thorough scrutiny. It seems more likely that different transaction contexts call for different rules, and this would, once again, suggest that limiting action to the cross-border context would be more appropriate.

6.1.4 Cross-Border or All Distance/E-Commerce Contracts?

At this juncture, one question needs to be considered. The preceding discussion, and, indeed, the thrust of this entire *Brief*, is that the focus of future EU action in the sphere of consumer law ought to be on cross-border consumer transactions. In exploring the notion of “cross-border” earlier, the conclusion was reached that this should, essentially, be distance contracts where the habitual residence of the consumer and the place of business of the trader are in different countries. This would mean that a trader operating in the electronic environment would have to deal with at least two sets of legal rules, one for domestic customers and one for customers from other jurisdictions. In the context of the optional instrument debate, it is often suggested that the reference point should be a trader running an e-shop, who should be able to conduct his entire business on the basis of one legal framework.¹⁸⁴

¹⁸² The costs of postage or transport should, of course, be borne by the seller under Art. 3(2) of the Consumer Sales Directive (99/44/EC).

¹⁸³ For a fuller discussion, see, for example, R. Bradgate and C. Twigg-Flesner, “Expanding the Boundaries of Liability for Quality Defects” (2002) 25 *Journal of Consumer Policy* 342–377.

¹⁸⁴ H. Schulte-Nölke, “EC law on the formation of contract – Frame from the Common of Reference to the ‘blue button’” 3 (2007) *European Review of Contract Law* 332–349.

As acknowledged above, if one focuses exclusively on the position of the trader, then it would, indeed, be logical to have an optional instrument which applies both to domestic and cross-border transactions, at least in circumstances where such transactions are concluded at a distance or online. However, if one takes into account the interests of the *consumer*, then the distinction drawn between cross-border and domestic transactions seems more sensible. Although in need of empirical testing, it is submitted that it would be the reasonable expectation of consumers that contracts entered into with a trader who has his place of business in the same jurisdiction as the consumer's residence would be subject to the consumer's domestic law, irrespective of whether such contracts are concluded online, at a distance or face-to-face. In addition, consumers who are going to buy from a trader located in another jurisdiction would reasonably expect, or at least reasonably allow for the possibility, that a different law will apply. In the case of cross-border transactions as defined earlier,¹⁸⁵ this would be the EUCTR, whereas in face-to-face transactions, the local law of the place where the transaction is concluded. Consequently, it is suggested that the EUCTR should be restricted to cross-border transactions and that all domestic transactions should be subject to the domestic law of the consumer's residence.

6.1.5 A Note on Constitutional Issues

There might also be a constitutional argument in favour of limiting the scope of the Regulation to cross-border transactions and, potentially, also B2C transactions. The Commission has suggested that the optional instrument would be a second regime within national law, on the basis that directly applicable regulations form part of national law. Elsewhere, there is reference to a 28th regime, i.e., a bolt-on European contract law framework. This distinction may be more than simply a question of semantics. Talking about a 2nd domestic regime created by Regulation in all of the Member State seems to reflect the fact that the preferred legal basis for adopting the optional instrument will be Art. 114 TFEU. As discussed earlier, that Article is concerned with the "approximation" of national laws. To justify the use of Art. 114 TFEU, therefore, it has to be shown that the optional instrument does, indeed, approximate national laws. The difficulty is that the optional instrument would not actually approximate anything; rather, it would *add* something to existing domestic laws. Existing national contract law rules would remain unaffected and, indeed, be available alongside the optional instrument in each legal system. If the reasoning of the ECJ in C-436/03 *European Parliament v Council of the European Union*,¹⁸⁶ discussed earlier, were applied in this context, then that might suggest that an optional instrument which does *not* approximate national laws, but simply adds to national laws, might not be within the scope of Art. 114 TFEU but only Art. 352 TFEU.

¹⁸⁵ See above, p. 26.

¹⁸⁶ [2006] ECR I-3733.

The optional instrument would be an addition to the legal landscape and one that could only be adopted by the EU if it dealt with matters that could not be achieved by individual legal systems. As discussed earlier, each legal system is perfectly capable of creating its own contract law rules but cannot create contract law rules for other Member States. This can only be done by the EU. But something which is to exist alongside national rules does not result in the approximation of national laws, which means Art. 352 rather than Art. 114 TFEU would be the appropriate legal basis.¹⁸⁷ It may then be asked whether an optional instrument that would extend to domestic transactions would exceed the limits of the EU's powers under Art. 352 TFEU. If that were so, then it might only be possible to introduce an optional instrument applicable to cross-border transactions. However, if the scope of the optional instrument were limited to consumer cross-border transactions, then it should be possible to use Art. 169(2)(b) TFEU, which would also allow for greater involvement of the European Parliament in the legislative process—and it would avoid the difficulties associated with the requirement of unanimity.¹⁸⁸

6.2 An “Optional” Instrument? The Case for Automatic Application

The hallmark of the optional instrument is that it will be “voluntary and optional”,¹⁸⁹ which means that there would be no obligation to use the optional instrument but the choice would be given to the contracting parties to select the optional instrument rather than a national law.¹⁹⁰ Thus, if the optional instrument were limited to cross-border transactions, there would then be the choice given to the contracting parties whether the contract should be subject to the optional instrument or a domestic law chosen by the parties (subject to the constraints mentioned earlier¹⁹¹).

The underlying assumption is that the optional instrument will be “optional” and the parties will not be compelled to select it. It would therefore respect party autonomy and preserve freedom of contract, which is a fundamental principle of EU law.¹⁹²

¹⁸⁷ For a contrasting argument, see J. Rutgers, “An Optional Instrument and Social Dumping” (2006) 2 *European Review of Contract Law* 199–212, who, at pp. 207/8, argues that an optional instrument could be based on Art. 114 TFEU because it would not create entirely new rights but enhance existing (national) contract laws.

¹⁸⁸ For a recent example of the difficulties associated with this, see the proposal for a European Private Limited Company (COM (2008) 396 final), progress on which seems to have stalled following the inability to reach consensus in the Council (see Council minutes of 30/31 May 2011).

¹⁸⁹ V. Reding, *The Next Steps Towards a European Contract Law for Businesses and Consumers* (SPEECH/11/411), 3 June 2011.

¹⁹⁰ For a critical assessment, see R. Sefton-Green, “Choice, Certainty and Diversity: why more is less” (2011) 7 *European Review of Contract Law* 134–150.

¹⁹¹ See above, page 4.

¹⁹² See S. Whittaker, “The optional instrument of European Contract Law and freedom of contract” (2011) 7 *European Review of Contract Law* 371–398.

However, it may be asked whether in practical terms consumers would really be offered a choice between a national law (which would almost certainly be the law of their habitual residence in accordance with Art. 6 of the Rome-I Regulation) and the optional instrument, or whether a trader would simply refuse to sell his goods or services to a consumer unless this was done under the optional instrument. If the optional instrument were not restricted to cross-border transactions, then, in a domestic context, removing such a choice could be contentious if that would take away a consumer's right to contract under domestic law and might well fall foul of domestic anti-avoidance rules. However, in a cross-border context (and this is irrespective of whether the optional instrument was limited to that context or not), it seems unlikely that a trader would continue to offer the choice between a domestic law and the optional instrument, as doing the former would effectively preserve the status quo of potentially having to comply with 27 different consumer protection laws. So one may assume that traders selling goods to consumers from another Member State would only do so if the optional instrument were "chosen" as the law applicable to that contract. If that assumption is correct, then there would be no real optionality, at least in B2C transaction.

On that basis, the question must be raised whether one should not abandon the idea of an optional instrument for B2C transactions, at least in the cross-border context, and to have a regulation dealing with cross-border B2C transactions apply *automatically*. Instinctively, one might balk at the suggestion of a "non-optional" instrument for cross-border consumer transactions, but would this really be so bad? In fact, provided that it is possible to have sufficiently clear rules for demarcating between cross-border and domestic transactions,¹⁹³ then this would achieve greater clarity, and it would also recognise the *de facto* situation that traders involved in cross-border shopping are likely to prefer the optional instrument anyway.

One might be concerned that this would create a situation in which consumers might be reluctant to enter into cross-border transactions because they would know that they would not be able to opt for their domestic law. The obvious reply to this is that they are unlikely to have that choice in practice anyway. In addition, it is unlikely, in most cases, that slight variations in the standard of protection under the EUCTR on the one hand, and domestic law on the other, would have a significant effect on consumers in deciding whether to buy at home or abroad, and the displacement of domestic mandatory rules would probably not be of practical concern. The situation might be different if either national law or the Regulation offered significantly higher levels of consumer protection. In the former case, consumers might prefer to contract under national law, i.e., domestic contracts, whereas in the latter situation, traders might be less willing to engage in cross-border transactions. However, this is a question of ensuring that the substance of the EUCTR is designed so as to minimise the risk of such problems. A few thoughts on the substance of the EUCTR will be offered in the following section.

¹⁹³ See the discussion above at p. 26.

6.3 A Few Final Thoughts

This section has considered how the suggestion that the future development of EU Consumer Law should proceed by developing a regulation dealing with cross-border transactions only (EUCTR) would fit into the ongoing debate about an optional instrument on European contract law. Whilst the fact that such a debate is underway allows for a range of options to be put on the table, it does seem that there is already a firm plan as to how to proceed. One feature of the current debate is that the focus seems to be too heavily on the interests of traders and not enough on those of consumers. Indeed, the conflation of B2C and B2B transactions in one measure is skewing the debate about the appropriate way forward, because it is clear that there are different requirements in the context of B2B and B2C transactions respectively.

As far as consumer transactions are concerned, the EUCTR developed in this *Brief* would be different from the optional instrument as it appears to have been conceived at the European level. This is regrettable and it is hoped that there is yet time for a re-think. It is important to stress that the preceding discussion focuses entirely on contracts between traders and consumers. Many of the points made cannot be deployed in the same way when considering contracts between traders, and none of the foregoing should be taken to reject the idea of an optional instrument for B2B transactions. The argument presented in this *Brief* is that in the consumer context, the notion of optionality is fictitious, and that for B2C transactions, an automatically applicable regulation for cross-border transactions should be developed, with all types of domestic transactions left to be regulated by national law.

7 Substantive Content of a Cross-Border Regulation and Its Enforcement

7.1 A Few General Observations

The main purpose of this *Brief* is to make the case for a change of approach to the development of EU Consumer Law and also to contrast this with the ongoing debate about the development of an optional instrument on European Contract Law in the hope that there might be some modification of the current plans. So far, nothing has been said about the substance of the EUCTR as envisaged here. Although it is not intended to propose detailed provisions in the context of the present discussion, a few specific observations are appropriate. There will also be consideration of the difficulties of enforcement of the EUCTR.

Before turning to these specific observations, it is necessary to refer to the development of the optional instrument as it appears to be occurring at the EU level. As explained earlier, the optional instrument would seem to be a development of the Draft Common Frame of Reference, and whilst some questions of scope have yet to be settled, work on a draft optional instrument has already advanced significantly.

It seems likely, therefore, that a legislative proposal by the European Commission will be some kind of developed version of the *Feasibility Study* presented by the Expert Group in May 2011, which, in turn, is based on provisions in the DCFR. This is not surprising: considerable time and effort was invested in preparing the DCFR, and it would be very difficult to justify not utilising the DCFR for future legislative action in the field of contract law. For the development of an optional instrument on B2B transactions, this seems entirely defensible. In the business context, much of the law of contract is *ius dispositivum*, i.e., many of its rules can be amended through the terms of a contract and therefore only provide a default setting.

However, the same is not true in the case of consumer law, where provisions are introduced with a very specific regulatory objective—consumer protection—in mind. Such provisions are mandatory, which means that they cannot be displaced by the terms of a contract between a trader and a consumer. Indeed, even if a consumer, with full knowledge of the legal implications, wanted to waive certain entitlements under consumer law in return for a lower price, he would be unable to do so because consumer rules are of an absolutely mandatory character.¹⁹⁴ This fundamental difference should mean that a measure which is intended to help consumers participate in cross-border transactions needs to be designed on the basis of clearly articulated criteria and cannot simply be established through a number of consumer-specific rules which deviate from the rules of general contract law, as seems to be the case with the proposed optional instrument. Brownsword, for example, has recently argued that the law regulating consumer transactions should not longer be treated as a sub-species of contract law, even though consumer rules are often dressed up as contract law rules.¹⁹⁵ This is because the traditional contract law paradigms of freedom of contract and consensual engagement by the parties of the contract to the relevant rules are no longer found in the context of consumer transactions. Rather, consumer rules are regulatory measures imposed on the parties to any consumer transaction, and the very nature of the regulatory framework for consumer transactions means that there is no choice for either party as to whether to accept these rules. The basis for creating consumer-specific rules therefore is some notion of fair dealing allowing consumers to make an informed choice and ensuring that their expectations are met, which, crucially,¹⁹⁶ is a long way away from the fundamental

¹⁹⁴ See, for example, Art. 25 of the new Consumer Rights Directive: “If the law applicable to the contract is the law of a Member States, consumers may not waive the rights conferred on them by the national measures transposing this Directive. Any contractual terms which directly or indirectly waive or restrict the rights resulting from this Directive shall not be binding on the consumer”.

¹⁹⁵ R. Brownsword, “Regulating Transactions: Good Faith and Fair Dealing” in G. Howells and R. Schulze (eds.), *Modernising and Harmonizing Consumer Contract Law* (Munich: Sellier, 2009); also R. Brownsword, “Contract, Consent and Civil Society: Private Governance and Public Imposition” in P. Odell and C. Willett, *Global Governance and the Quest for Justice – Civil Society* (Oxford: Hart, 2008).

¹⁹⁶ Cf. V. Mak, “A shift in focus: systematisation in European Private Law through EU Law” (2011) 17 *European Law Journal* 403–428, who identifies three main principles of EU Consumer Law: (1) party autonomy, (2) good faith or fair dealing and (3) correcting inequality of bargaining power or protecting the weaker party (pp. 424–425).

contract law notion of the will and consent of the parties determining the substance of their agreement. Any views about the substance of consumer law measures “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”.¹⁹⁷

It is therefore argued here that instead of creating an EUCTR simply derived from the DCFR, thought would need to be given to the fundamental criteria on which such a measure would be based, and any specific rules to be included in such a measure would need to be in accordance with such criteria. There is scant evidence that such a thought process has occurred at the European level, where the focus seems to be more on making life easier for traders. This has led some observers to suggest that a situation might arise where consumers will prefer not to be treated as such in order to gain better protection under the general law.¹⁹⁸ So what is needed is some debate as to the model of “fair dealing” or similar that is to underpin the EUCTR. This discussion is beyond the scope of this *Brief*, however, which is concerned primarily with advocating a change of approach in further developing EU Consumer Law.

7.2 *Specific Observations on the Substance of the EUCTR*

Although a detailed consideration of both the fundamental basis for the substantive provisions of the EUCTR is beyond the scope of this *Brief*, a few general observations are necessary.

7.2.1 **Defining Its Scope of Application**

As discussed earlier, the EUCTR would be limited to dealing with cross-border consumer transactions. This will necessitate a clear definition of both “consumer transaction” and “cross-border”.

The standard definition of “consumer” is “any natural person who... is acting for purposes which are outside his trade, business, craft or profession”.¹⁹⁹ However, it is now well recognised that there are instances when a particular transaction entered into by a natural person cannot be classified neatly as a consumer or non-consumer transaction because individuals often buy items which could be used partly for personal, and partly for professional purposes. This is recognised in the new Consumer Rights Directive in Recital 17: “however, if the contract is concluded for purposes partly within and partly outside the person’s trade (dual purpose

¹⁹⁷ Brownsword, “Regulating Transactions”, p. 113.

¹⁹⁸ See, for example, T. Wilhelmsson, “Full Harmonization of Consumer Contract Law?” (2008) 16 *Zeitschrift für Europäisches Privatrecht* 225–229.

¹⁹⁹ Cf. Art. 2(1) of the Consumer Rights Directive (A7-0038/2011).

contracts) and the trade purpose is so limited as not to be predominant in the overall context of the supply, that person should also be considered as a consumer”.²⁰⁰ It does mean that there will be instances when it will not be clear whether a natural person should be treated as a consumer, and the question might only be settled at a time when there is litigation before a court.

It would be appropriate to adopt this test for the EUCTR, because it is well established and widely applied in EU law. There would be one potential issue with regard to dual purpose contracts. If the transaction in question was a dual purpose (and cross-border) contract, then the application of the Regulation would depend on whether the trade purpose was “not predominant in the overall context of the supply”.²⁰¹ This means that there might be instances when the transaction could turn out not to be a consumer transaction, which would mean that the EUCTR could not apply and the transaction would be subject to a national law in accordance with the Rome-I Regulation.²⁰² This is one of the risks associated with a legal regime which is confined to consumer transactions, and might be one of the reasons why, in the debate about the optional instrument, a measure dealing with B2B and B2C transaction appears to have considerable support.²⁰³ However, whilst there is the possibility that difficult cases might arise, it is assumed that the vast majority of transactions will fall clearly within the scope of the EUCTR, so the number of “problem cases” is likely to be small in number. Moreover, as explained in the opening section of this chapter, it does not seem appropriate to treat consumer transactions as merely a derogation from contracts in general and limit consumer-specific rules to derogations from general contract rules; rather, rules concerned with consumer transactions should reflect a particular notion of fair dealing and other fundamental principles which would entail a regime designed specifically for consumer transactions.

As for the notion of “cross-border”, it was concluded earlier²⁰⁴ that the types of transactions covered by this term would essentially be transactions (1) where the consumer’s place of residence and the trader’s place of business are in separate countries and (2) the transaction is entered into at a distance. It was considered then that the second criterion (distance transaction) was essentially better to reflect the expectations of consumers, i.e., consumers (and traders) would reasonably expect that a transaction entered into face-to-face would be subject to the law of the place where this occurred.

²⁰⁰ Compare the ruling of the ECJ in the context of Arts. 13–15 of the “Brussels” Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1978) OJ L 304/36 in C-464/01 *Johann Gruber v BayWa AG* [2005] ECR I-439, where the court held that in the context of a dual purpose contract, the trade or professional purpose has to be “so limited as to be negligible in the overall context of the supply” and that it was irrelevant whether the private element was dominant.

²⁰¹ Adopting the test from Recital 17.

²⁰² See above at p. 4.

²⁰³ See above at p. 61.

²⁰⁴ See above at p. 29.

Some further elaboration might be needed as when a transaction should be deemed to have been concluded at a distance. In the new Consumer Rights Directive, a “distance contract” is defined as “any contract concluded between a trader and a consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded”.²⁰⁵ There are number of elements to this definition (1) the trader must operate an organised distance selling scheme, (2) consumer and trader do not meet face-to-face until the contract has been concluded and (3) the contact between trader and consumer has to be entirely through means of distance communication until the contract has been concluded. In order to assist with the application of this test, Recital 20 of the new Consumer Rights Directive contains the following additional observations:

[The definition] should also cover situations where the consumer merely visits the business premises for the purpose of gathering information about the goods or services and the subsequent negotiation and conclusion of the contract takes place at a distance. By contrast, a contract which is negotiated at the business premises of the trader and finally concluded by means of distance communication should not be considered a distance contract. Neither should a contract initiated by means of distance communication, but finally concluded at the business premises of the trader be considered a distance contract. Similarly, the concept of distance contract should not include the reservations made by a consumer through a means of distance communications to request the provision of a service from a professional, such as in the case of a consumer phoning to request an appointment with a hairdresser. The notion of an organised distance sale or service-provision scheme should include those schemes offered by a third party other than the trader but used by the trader, such as an online platform. It should not, however, cover cases where websites offer purely information on the trader, his goods and/or services, and how the trader can be contacted.²⁰⁶

Perhaps the only slightly surprising element of this elaboration of the notion of “distance contract” is the situation where the consumer visits premises to browse goods but then negotiates and concludes the entire contract at a distance. One might think that in such a situation, the consumer was physically present on the trader’s premises to browse goods and therefore this should be treated akin to a face-to-face contract, even if it is ultimately concluded at a distance. On the other hand, it might be quite difficult to prove that a consumer had visited the trader’s premises, because any contact between trader and consumer might be treated as constituting starting negotiations, in which case the contract would no longer exclusively be negotiated and concluded at a distance.

There is no definition of “organised distance selling scheme” in the Directive, nor in its predecessor, the Distance Selling Directive (97/7/EC). However, what must be intended here is that the trader concludes contracts at a distance with a degree of regularity or as an integral part of his business activities. A website which can be used to place orders would undoubtedly satisfy this definition, as would a

²⁰⁵ Art. 2(7).

²⁰⁶ Recital 20, Consumer Rights Directive (A7-0038/2011).

catalogue which contains an order form which the consumer completes and returns by post, fax or as a scanned email attachment.

Although the definition of “distance contract” in the Consumer Rights Directive could be more precise, it would, again, be advisable to adapt this definition as part of the wider definition of “cross-border” contract EUCTR, as it would maintain an established EU-law definition and is not inherently problematic.

7.2.2 The Pre-contractual Stage

A second area of potential difficulty is the pre-contractual phase, i.e., the stage during which a contract is negotiated. The issue here is that it will not necessarily be immediately clear when a consumer first makes contact with a trader that the situation is such as to be regarded as potentially leading to a cross-border transaction. For example, a consumer who navigates to a website and starts browsing and adding items to the electronic shopping basket might not yet have indicated his place of residence, and so there might not yet have been an opportunity to determine whether this is a situation within the scope of the EUCTR. This could be problematic because it will be unclear whether any pre-contractual requirements, such as pre-contractual information obligations or, perhaps, an obligation to negotiate in good faith, would be based on a particular national law or the EUCTR. Indeed, there might even be some uncertainty as to whether the pre-contractual stage should be regarded as a contractual or non-contractual matter. In C-334/00 *Fonderie Officine Meccaniche Tacconia Spa v Heinrich Wagner Sinto Maschinenfabrik GmbH*,²⁰⁷ a preliminary reference involving Articles 5(1) and (3) of the Brussels Convention, the Court was asked whether a claim for pre-contractual liability was a “matter relating to contract” or “matter relating to tort” for the purposes of the Convention. It observed that a dispute could be a matter relating to contract without there being a contract, but it was “essential ... to identify an obligation”.²⁰⁸ In the absence of an “obligation freely assumed by one party towards another”,²⁰⁹ there could be no matter relating to contract; consequently, an action based on pre-contractual liability would be a matter relating to tort.²¹⁰ This decision therefore points towards tort as the basis of liability for a breach of any pre-contractual obligations. This is now reflected in the provisions of the so-called Rome-II Regulation dealing with non-contractual obligations.²¹¹ In particular, Art. 12 of the Rome-II Regulation states that “the law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall

²⁰⁷ [2002] ECR I-7357.

²⁰⁸ Para. [22].

²⁰⁹ Para. [23].

²¹⁰ Para. [27].

²¹¹ Regulation 864/2007 on the Law applicable to non-contractual obligations (2007) OJ L199/40.

be the law that applies to the contract or that would have been applicable to it had it been entered into".²¹² What this would mean is that one would need to consider if the transaction which has ultimately entered into, or would have been entered into but for some failure to conclude the contract, is one falling within the scope of the EUCTR, in which case the Regulation would apply²¹³; otherwise, it would be the national law that would apply in accordance with the Rome-I Regulation.

In practical terms, this would only then be of concern if the pre-contractual obligations in the EUCTR differed from those found in the relevant national laws. If there was no difference in that respect, then from a practical perspective, the difficulty of identifying whether the situation would fall within the EUCTR or national law would be of hardly any concern. This means that there would have to be consistency with regard to the pre-contractual duties imposed on the parties both under the national laws of the Member States and the EUCTR. There are two ways of dealing with this: on the one hand, the EUCTR could remain silent on pre-contractual matters and refer everything back to national law, or, on the other hand, the EUCTR and national laws would have to contain identical obligations. To some extent, the latter seems more appropriate, and significant steps towards this have already been taken with the new Consumer Rights Directive. As mentioned earlier, whilst much-reduced from the initial Commission proposal, the new Directive will provide for full harmonisation of pre-contractual information obligations in distance contracts,²¹⁴ and these could easily be adopted in the EUCTR. This would provide a consistent approach to pre-contractual information duties. It would then have to be considered whether there was any need for other specific pre-contractual duties in the consumer context, such as a duty of cooperation or negotiation in good faith, and, if so, thought would have to be given to introduce such an obligation for consumer transactions across the EU.

Dealing with identifying the law applicable to pre-contractual information obligations is a matter also giving rise to some debate in the context of the discussions about an optional instrument, with no clearer answers emerging there. One suggestion has been to apply pre-contractual duties of such an optional instrument if the trader in question markets goods or services with reference to the instrument.²¹⁵ Alternatively, the pre-contractual rules of the optional instrument might only apply once the parties have opted for the instrument, but would then have to apply retrospectively.²¹⁶ This would be particularly undesirable from a practical perspective if there were variations between national laws and the EUCTR when it comes to pre-contractual duties.

²¹² Art. 12(1). Note the alternative provisions in Art. 12(2) for circumstances when the applicable law cannot be determined on the basis of Art. 12(1).

²¹³ Assuming that the Rome-II Regulation was adapted so as to recognise something like the EUCTR, similarly to the amendments that would need to be made Rome-I, as noted above at p. 59.

²¹⁴ See Arts. 6 and 8 of the Consumer Rights Directive.

²¹⁵ See, for example, G. Dannemann (ed.), "Draft for a First Chapter (Subject Matter, Application and Scope) of an Optional European Contract Law" (2011) *Oxford University Comparative Law Forum 2* at ouclf.iuscomp.org.

²¹⁶ *Ibid.*

The difficulty of dealing with pre-contractual obligations does show that there are instances when harmonisation—even full harmonisation—might still have a role to play. However, fully harmonising pre-contractual obligations is considerably less invasive and troublesome as fully harmonising the substantive rights of consumers against a trader, and allowing for some harmonisation does not undermine the general argument in this *Brief* that a regulation limited to the cross-border context is to be preferred.

7.2.3 Substantive Rules

It is beyond the scope of this *Brief* to comment in detail on the substantive scope of an EUCTR. However, in very general terms, it is suggested that it should be broad in its scope and not only deal with the supply of goods in a manner appropriate to cross-border consumer transactions, but also contain detailed provisions on the supply of services, notably in respect of remedies for faulty services, and potentially even on the liability of service providers for any loss or damage caused by the improper provision of a service. Ideally, the EUCTR would cover all the stages of a transaction, from its conclusion to its performance and discharge, as well as dealing with remedies for failure to perform the transaction as anticipated. Crucially, as noted previously, the substantive rules should be based on principles which reflect the nature of consumer transactions and the need to ensure fair dealing between trader and consumer, which means that a combination of general contract law rules with specific derogations for consumer transactions in some respects would not be desirable.

One other matter should be tackled in the EUCTR: there is considerable debate now about the need to regulate the provision of digital content²¹⁷ to consumers appropriately. As the electronic environment would be the key context for the application of the EUCTR, it would be essential to include provisions which deal with the particular consumer protection issues created by the supply of digital content.

7.2.4 Enforcement and Dispute Resolution

At the same time as providing substantive rights and obligations for traders and consumers engaged in cross-border transactions, some thought needs to be given to on how disputes which might arise in that context could best be resolved. In particular, questions might arise as to which courts should have jurisdiction to hear any

²¹⁷ “Digital content” is an umbrella term which refers to matters such as software, mobile phone applications, games, music, videos, ringtones, SMS messages, and so on. See also Recital 19 of the Consumer Rights Directive, and Art. 2(11) of the Directive, which defines “digital content” as “data which are produced and supplied in digital form”.

cases involving the EUCTR. In principle, the Brussels-I Regulation could be deployed, which would, in many cases, lead to granting jurisdiction to the courts of the consumer's place of residence.²¹⁸ To assist with cross-border disputes up to the value of €2,000, a dedicated small claims procedure has been established at the European level.²¹⁹

In line with the multi-level structure of the EU, the application of substantive rules of law to individual disputes is generally a matter for the national courts. Invariably, this creates the risk that the EUCTR would be interpreted and applied differently by the various national courts, although that is a problem which is not confined to the cross-border context but can similarly arise in the domestic context. The TFEU provides the Article 267 TFEU reference procedure, although experience to date suggests that, in the context of consumer disputes, national courts are reluctant to utilise this, not least because of the likely costs and time involved in seeking a ruling.

For the moment, it seems highly unlikely that there would be steps towards establishing a system of EU courts across the member states, so some other mechanism for dealing with cross-border disputes might have to be devised. One possible system could be a network of consumer arbitration centres, which are given the power of applying and interpreting the regulation. This would not have to be restricted to "physical arbitration", but could be provided online as a form of online dispute resolution (ODR).²²⁰ This would be a step up from the European Consumer Centres network (ECC Net) already in operation, where Consumer Centres situated in the various EU Member States provide advice and assist in the informal resolution of cross-border consumer disputes.²²¹

In addition, the task of national courts and such alternative dispute resolution mechanisms could be facilitated by utilising the possibility of establishing a special chamber of the European Court. Article 257 TFEU permits the creation of specialised courts attached to the General Court (formerly the Court of First Instance) for certain classes of action or proceedings. It would be possible to create such a specialised court for cross-border consumer disputes under the EUCTR. If felt desirable, a right of appeal (potentially on grounds of both law and fact) to the General Court could also exist. The creation of such a court would certainly change the role of the European court in the area of consumer law,²²² but it would undoubtedly facilitate the operation of a new cross-border framework for consumer transactions.

²¹⁸ See page 5, above.

²¹⁹ See Regulation 861/2007 establishing a European Small Claims Procedure (2007) OJ L199/1.

²²⁰ See, for example, P. Cortes, "Developing Online Dispute Resolution for Consumers in the EU" (2011) 19 *International Journal of Law & Information Technology* 1–28.

²²¹ See http://ec.europa.eu/consumers/ecc/index_en.htm [9 last accessed August 2011].

²²² P. Rott, "What is the role of the ECJ in private law?" (2005) 1 *Hanse Law Review* 6–17.

8 The Global Dimension: Creating a Template for Transnational Consumer Transactions

In suggesting the development of an instrument dealing with cross-border consumer transactions, the focus of this *Brief* has been on the European context. It is here that there is perhaps the most intensive debate about the kind of legal framework that is needed to encourage and support cross-border transactions, primarily in the deliberations about the feasibility of an optional instrument on European Contract Law. Although this debate is welcome because it provides the opportunity to consider seriously how best to move forward in creating a legal framework for consumer transactions in the internal market, it seems to be approaching the question from the wrong angle: much of the debate seems to be based around concerns about what to do with the Draft Common Frame of Reference which was presented at the end of 2008. As noted earlier, the notion of an optional instrument first evolved during the early phase of the European Contract Law project, and it is this idea which drives the present debate. So rather than starting by asking what would be best for consumers, the focus is on making the best use of the work already undertaken on the DCFR. Whilst this is understandable, it might also mean that a useful opportunity to create a strong model for cross-border consumer transactions is missed. As explained in the previous section, it would be unfortunate if the idea of an optional instrument on general contract law with some consumer-specific provisions were to be the final outcome of the present deliberations. Instead, a dedicated consumer-focused measure for cross-border transaction (the vision of the EUCTR in this *Brief*) would be the preferred outcome. Should the EU grasp this particular nettle, then the end product would be a comprehensive legal framework for cross-border consumer transactions, and whilst its scope of application would obviously be restricted to the EU (and possibly extend to the countries in the European Economic Area), it is suggested here that such a measure could become a beacon for the potential future development of a legal framework for transnational consumer law. This final section will briefly consider this suggestion further.²²³

The existence of regional organisations such as the EU, Mercosur, Ohada or Nafta is to make trade between members of such associations easier. However, business within such organisations will have trading partners outside of those. Similarly, whilst consumers might be focusing on buying goods from traders based in countries which are members of the same regional organisation as their home country, they may look beyond the boundaries of such organisations for certain goods or services. The rise of the Internet clearly makes it much easier for consumers who are willing to get involved in cross-border shopping to source goods and some services from anywhere in the world. There may, of course, be practical considerations

²²³ For similar thoughts about elevating the EU approach to the global level, see L.F. Del Duca, A.H. Kritzer and D. Nagel, "Achieving optimal use of harmonization techniques in an increasingly interrelated twenty-first century world of consumer sales: moving the EU harmonization process to a global plan" (2008) 27 *Penn State International Law Review* 641–654.

such as the cost of postage/transport which might make purchases from far afield less attractive, but the possibility is there.

Nevertheless, consumer law scholarship and initiatives by legislators have not looked much beyond the regional dimension. There is a wealth of literature on EU Consumer Law, for example, not least because there have been concrete legislative developments which are in force and can be the subject of scholarly scrutiny. At the transnational level, there is nothing comparable—the one key measure, the United Nations Guidelines on Consumer Protection, is not often considered to any significant extent. Fortunately, there are now signs that the tide may be turning and that consumer law scholarship and practice will take on a transnational dimension.²²⁴ It is to be expected that one of the themes to emerge is whether it would be desirable, necessary and feasible to take steps towards creating some sort of transnational framework for cross-border consumer transactions.²²⁵ If it is assumed, for the sake of argument, that such a legal framework would be desirable and would make it easier both for consumers to buy goods from around the world and for traders to offer their goods on a (near-)global scale, then considerable thought will have to go into its design.

It is at this point that a European measure designed specifically with cross-border consumer transactions in mind could be the keystone for debate and the future development of a transnational regime for cross-border consumer transactions. Now, clearly it would be politically completely impossible to envisage the harmonisation of consumer laws on a global scale, but limiting action to the cross-border context might just have a reasonable prospect of a successful outcome (although this would, undoubtedly, take a lot of time and effort).

In the still nascent scholarly literature, a number of themes on Transnational Consumer Law are beginning to emerge. Unsurprisingly, some authors appear to be drawing parallels with developments in the field of Transnational *Commercial* Law, where there is a complex web of international conventions, model laws, trade terms and contract principles competing with the notion of a free-standing *lex mercatoria*.²²⁶ Callies, for example, has suggested that Transnational Consumer Law could emerge outside the framework of state-sanctioned national and international law, created through a global civil society and based on general principles of law and the practice and custom of civil society, enforced through private dispute resolution mechanisms.²²⁷ This is a bold vision and has been criticised by Reich on the basis that what might work in transnational *commercial* law cannot be transplanted to

²²⁴ See C. Twigg-Flesner and H. Micklitz, “Think Global – Towards International Consumer Law (Editorial Note)” (2010) 33 *Journal of Consumer Policy* 201–207.

²²⁵ For one suggested approach, see D. Gawith, “Model laws relevant to preparation for the international regulation of international consumer transactions” [2010] *Journal of Business Law* 474–501.

²²⁶ On Transnational Commercial Law generally, see, for example, J. Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law*, 4th edition (Oxford, Hart Publishing, 2010), or S. Gopalan, *Transnational Commercial Law* (Buffalo: Hein, 2004).

²²⁷ G-P. Callies, *Grenzüberschreitende Verbraucherverträge* (Tübingen: Mohr Siebeck, 2006); see also G-P. Callies and P. Zumbansen, *Rough Consensus and Running Code – A Theory of Transnational Private Law* (Oxford: Hart, 2010), chap. 3.

the consumer context because of the inequality of bargaining strength between consumer and trader and the lack of freedom of choice for consumers.²²⁸ Ultimately, Reich argues, the final arbiter in a consumer disputes should be a court of law, which necessitates state endorsement. Presumably, this would also mean that there have to be state-sanctioned rules on consumer protection with a transnational reach. A European model developed for and tested in the context of cross-border consumer transactions might just be sufficiently attractive for states outside the European Union to consider signing up to a similar scheme.

Of course, one should not be under the illusion that it is easy to seek a consensus on a Transnational Consumer Law,²²⁹ and a European model might well be treated with scepticism rather than enthusiasm. However, if it can be demonstrated that it is possible to design a suitable legal framework for cross-border consumer transactions, then that alone might be a milestone in the emerging debate about a Transnational Consumer Law, even if any measure which might eventually emerge would be different in terms of substance from a European model. Moreover, whilst a formal legal instrument such as a convention on Transnational Consumer Law is yet a long way off, it has been argued convincingly that the development of a set of principles for transnational consumer contracts, in a similar vein to the UNIDROIT Principles of International Commercial Contracts, might be a more realistic intermediate step.²³⁰ A European model on cross-border consumer contracts would almost certainly be a major reference point for the development of such principles.

These few observations cannot give a full flavour of the immense complexity and the challenges associated with creating a Transnational Consumer Law framework. As an area of research, it is still in its infancy. However, if there is to be a serious effort towards creating such a transnational framework, then regional experiences will undoubtedly be of some influence in that global debate. Were the EU to take the opportunity to develop a coherent regulation on cross-border consumer transactions, then it could provide valuable lessons from its experiences with such a model. Whilst this is not regarded as a key reason for pursuing the idea of an EUCTR, it is nevertheless argued here that the wider benefits that might flow from such an approach for the development of a transnational consumer law should not be dismissed.

9 Conclusions

This *Brief* has considered how EU Consumer Law should develop in the future. Based on the fact that the experience of the approach hitherto applied—the harmonisation of aspects of national law—suggests that there are limits to harmonisation

²²⁸ N. Reich, “Transnational Consumer Law – Reality or Fiction?” (2008) 27 *Penn State International Law Review* 859–868.

²²⁹ Del Duca, Kritzer and Nagel (n. 223, above) conclude that an international convention on consumer law “is not realistic at the present time” (p. 646).

²³⁰ Del Duca, Kritzer and Nagel (n. 223, above).

which appear to have been reached. Consequently, a different approach is now necessary. The argument made here is that the most appropriate way forward is to adopt a Regulation which will be concerned with cross-border consumer transactions only. Cross-border transactions are defined to cover distance and online transactions where the consumer has his place of residence and the trader his place of business in different jurisdictions. It is argued that this is the most appropriate context within which EU Consumer Law can develop further and, indeed, make a useful contribution to the development of the internal market, and perhaps even an international framework for consumer law.

Having developed the case for a cross-border-only regulation, this *Brief* then considered how this idea would fit with the current discussion at the European level in the context of developing an optional instrument on European Contract Law. Although the fact that this is under serious consideration has re-opened a door which appeared to have been firmly shut when the European Commission chose to propose a directive on consumer rights based on a full harmonisation standard, the idea of an optional instrument as it appears to be under discussion at present differs in several ways from the notion of an EUCTR proposed in this *Brief*. In particular, it would seem that the optional instrument is likely to cover both B2B and B2C contracts, which would mean that there would be a set of general rules with some consumer-specific provisions, rather than a coherent set of legal rules suitable for cross-border consumer transactions. Moreover, there is, as yet, some uncertainty as to whether the optional instrument will be restricted to cross-border transactions only or also be available for domestic contracts. Whilst such a broader availability might be suitable for B2B transactions, it has been argued that in the B2C context, a clear distinction between cross-border and domestic transactions is essential. Furthermore, although the idea of “optionality” is entirely appropriate in the B2B context, where there might be a degree of negotiation about the applicable law, it is not suitable in the B2C context. This is because there is, in practice, unlikely to be a real choice for a consumer as a trader dealing with a consumer from another country would almost certainly only agree to transact on the basis of the “optional” instrument. For that reason, it is argued that the EUCTR should be applied automatically, with neither trader nor consumer exercising any kind of choice.

It is hoped that the debate about the final shape of whichever instrument on European Contract Law will emerge (if, indeed, one will emerge at all) will continue for some time yet, and that the idea of a separate regulation for cross-border consumer transactions will be given serious consideration. Indeed, one could go so far as to say that the kind of instrument with the best prospect of success might well be the kind of EUCTR envisaged in this *Brief*, but only if this is designed specifically for consumers. If this were to happen, then the added benefit would be that the EU could be at the forefront of creating a legal framework suitable for consumer transactions beyond the borders of the EU and perhaps establish a template for a transnational framework for cross-border consumer transactions.

Postscript: Proposal for a Common European Sales Law

General Comments

On 11 October 2011, the European Commission put forward a proposal for a *Regulation on a Common European Sales Law*.¹ This marks the culmination of the decade-long process towards EU action in the field of European Contract Law discussed earlier in this chapter. The proposal is in the form of a regulation. The main part of the proposed Regulation contains provisions dealing with its scope of application and related matters. The main text of the “Common European Sales Law” (“CESL”) is found in Annex I to the proposed Regulation. This is not the place to discuss the substance of the CESL in detail, although a couple of observations can be made. First, the substance is largely a modified version of the Expert Group text presented in May 2011, with some adjustments made to take into account the final text of the Consumer Rights Directive (which was agreed in June 2011 and adopted formally by the Council on 10 October 2011). As explained earlier, the Expert Group text was based on the DCFR but was restricted to issues of contract law in a narrower sense. This does mean that the text of the CESL has not, contrary to what has been suggested in this *Brief*, taken as its starting point the particular problems which arise with cross-border transactions and created rules that would make cross-border transactions easier.

Secondly, although generally dealing with “sales”, there are no provisions for some of the non-contractual aspects of contracts of sale, such as the transfer of ownership. On the other hand, the CESL would extend to the provision of digital content and so-called “related service contracts”, i.e., a service related to goods or digital content.²

The proposed CESL is structured as follows:

Part I: Introductory Provisions

Chap. 1: General Principles and Application

Part II: Making a Binding Contract

Chap. 2: Pre-contractual Information

Chap. 3: Conclusion of Contract

Chap. 4: Right of Withdrawal in Distance and Off-Premises Consumer Contracts

Chap. 5: Defects in Consent

Part III: Assessing What Is in the Contract

Chap. 6: Interpretation

Chap. 7: Contents and Effects

Chap. 8: Unfair Contract Terms

¹ COM (2011) 635 final, 11 October 2011.

² Cf. Art.2(m) of the proposed Regulation.

Part IV: Obligations/Remedies in Contracts of Sale or Contracts for the Supply of Digital Content

- Chap. 9: General
- Chap. 10: Seller's Obligations (Delivery and Conformity)
- Chap. 11: Buyer's Remedies
- Chap. 12: Buyer's Obligations
- Chap. 13: Seller's Remedies
- Chap. 14: Passing of Risk

Part V: Obligations/Remedies in Relate Service Contracts

- Chap. 15: Obligations and Remedies of the Parties

Part VI: Damages and Interest

- Chap. 16: Damages and Interest

Part VII: Restitution

- Chap. 17: Restitution

Part VIII: Prescription

- Chap. 18: Prescription

It can be seen that it goes beyond the basic contractual aspects of contracts of sale (compare, for example, the UN Convention on the International Sale of Goods, which is narrower), but at the same time does not address all of the issues associated with sales transactions.

Specific Observations on scope

A number of specific observations on the scope of the proposed CESL need to be made here:

1. The proposal is in the form of a Regulation, rather than a directive. For reasons explained earlier in this *Brief*, this is a welcome development because it will avoid many of the problems associated with the use of directives. The assumption is that because the CESL would be introduced as a Regulation, it will become part of the national laws of all the Member States. This view has one important implication: it would mean that there is a choice within each national law between two legal regimes—the existing domestic one, and the CESL. The assumption flowing from this is that the choice of the CESL would displace the mandatory rules of the law otherwise applicable to the contract (cf. Recital 12 of the proposed Regulation). This would mean that the specific provisions on consumer contracts from the Rome-I Regulation would have no practical application. The correctness of this view does depend on the exact nature of a Regulation within domestic law. According to Art. 288 TFEU, a Regulation is “directly applicable”, but it does not necessarily follow that it is part of domestic law, even if treated as equivalent to the rules of domestic law. And even if that is the case,

there might still be doubts whether the choice of the CESL would really have the effect of rendering domestic mandatory rules inapplicable.³ This will require further analysis.

2. The proposed Regulation would be optional, i.e., it would only apply if the parties agreed to use it. As far as consumer transactions are concerned, there is a danger that traders might seek to impose the choice of the CESL on consumers. To counteract this, Art. 8 of the proposal requires that the consumer has to consent explicitly to the use of the CESL which has to be distinct from the consumer's statement indicating his agreement to conclude a contract. A Standard Information Notice is provided in Annex II of the proposed Regulation and this has to be given to a consumer before a contract on the basis of the CESL is concluded. The intention here is clearly to address some of the concerns about consumers entering into contracts under the CESL unwittingly, although it seems doubtful whether the approach chosen in the proposal would be of significant practical benefit—it would only put additional hurdles in the way of concluding a contract.
3. The proposed Regulation would only apply if the seller of goods (or supplier of digital content) is a trader. It would therefore not apply to a contract under which a consumer sells goods to a trader. Also, it is not limited to trader-to-consumer transactions, but also extends to transactions between traders, provided one of those parties is classed as a small or medium-sized enterprise (see Art. 7 of the proposed Regulation).
4. The proposed Regulation is limited to “cross-border” transactions. This, too, is a welcome development, because, as argued earlier, the cross-border context should be seen as distinct from purely domestic transactions, and the focus of EU action should be on developing legal rules which will support cross-border transactions throughout the internal market. However, the definition of “cross-border contract” in the proposed Regulation is not ideal.⁴ Article 4(3) of the proposal reads as follows:

“For the purposes of this Regulation, a contract between a trader and a consumer is a cross-border contract if

- (a) Either the address indicated by the consumer, the delivery address for goods or the billing address are located in a country other than the country of the trader's habitual residence; and
- (b) At least one of these countries is a Member State.”⁵

³ Recital 14 to the Rome-I Regulation states that “[s]hould the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules”. This only relates to the choice of EU contract law rules, but does not resolve the effect of mandatory rules of domestic law.

⁴ Note that for contracts where both parties are traders, a contract will be a cross-border contract if the habitual residence of the parties is in different countries, of which at least one has to be a Member State (Art. 4(2)).

⁵ Note that in the German version of the proposal, instead of “the address indicated by the consumer”, there is simply a reference to “Anschrift”, which would simply be “address”. It is not clear why there is such a discrepancy and whether it would make a difference in practice.

The first element of this definition has two reference points (1) the trader's habitual residence; and (2) the consumer's address, the delivery address or the billing address. These must be in different countries. Crucially, this means that the proposed Regulation would not be limited to distance or online transactions (as argued for in this *Brief*), but that face-to-face transactions could also be covered. However, whether a trader in a face-to-face context would offer the choice of the CESL as an alternative to the applicable domestic law will depend on the disclosure by the consumer of at least one of the three addresses mentioned in Art. 4(3). In the distance/online context, this is unproblematic, but in the face-to-face context, the availability of the CESL as an alternative would depend on the trader being aware of one of these three addresses. In addition, of course, the trader has to be willing to consider concluding a contract under the CESL. It does seem to make for a somewhat uncertain state of affairs in the context of face-to-face transactions, and for reasons given earlier in this *Brief*, a limitation to distance and online cross-border transactions would be preferable.

The second element—the fact that one of the countries has to be a Member State, presumably relates to the territorial extent of the regulation. However, bearing in mind the optional nature of the proposed Regulation, it can be asked why it should not be possible for, e.g., a Swiss Trader selling goods to a Turkish buyer on the basis of German law to opt for the CESL. This element of the definition might also benefit from re-consideration during the legislative stages.

Conclusions

Space precludes a more detailed analysis of the proposal. The fact that a proposal has been presented is a welcome development, because this can now form the basis for more focused discussions. The use of a Regulation and the intention to restrict its scope to cross-border contracts is to be welcomed, even if the definition of “cross-border contract” needs to be refined. On the other hand, the utilisation of a modified version of the Expert Group text, whilst understandable in view of the considerable investment of time, effort and money over the last decade which has eventually resulted in this text, is regrettable because there has been insufficient consideration of the practical challenges of cross-border transactions and how these could be alleviated through an appropriate set of legal rules. Instead, the focus seems to be simply on creating a common set of rules and the hope that everything else will fall into place. Furthermore, the optional nature of the proposed CESL is likely to cause practical difficulties, at least for consumer transactions, which is why a separate instrument introducing a set of rules applicable automatically in consumer transactions has been argued for in this *Brief*. All in all, whilst the mere fact that a proposal has been tabled is a step in the right direction, there is still a lot that needs to be done.



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