

The Draft Directive on Consumer Rights: Choices Made and Arguments Used

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Abstract:

The 2008 proposal for a Directive on Consumer Rights (hereinafter: the Draft) aims at reorganizing the *acquis* of four specific European directives on consumer protection into a more coherent codification of consumer rights. Specifically, it contains rules on precontractual information duties, on withdrawal rights for distance and off-premises contracts, on consumer sales and on general contract terms in consumer contracts. In replacing the four directives with a minimum harmonization character, the Draft marks a further step towards full harmonization of consumer contract law in Europe. This is an unsettling step because the level of protection offered to consumers in the Draft hardly exceeds the level of protection offered by the four directives mentioned earlier. Instead, it diminishes this protection in some regards. In light of all this, the question arises whether the policy choices underlying the Draft are, in fact, convincingly underpinned by solid argumentation. This article addresses this issue by first analyzing the Draft's use of the generic concept of "contracts between consumers and traders". It is argued that full harmonization of a badly delineated territory is ill-advised. Subsequently, the argumentative power of the policy considerations forwarded by the European Commission in its Regulatory Assessment Study is tested. The article concludes that the Commission's assessment of expected costs and benefits of the Draft is waver-thin and geared towards persuading the reader of the aptness of choices already made. In some respects, the evidence presented by the Commission is outright unconvincing. At certain points, the Draft even fuels the reader's suspicion of foregone conclusions. Overall, the need for reduction of the level of protection offered by the current minimum harmonization directives is poorly argued by the Commission and appears, in a number of important ways, not to reflect the socio-economic relationships that exist in at least some of the Member States.

Keywords:

European consumer law; full harmonization; domestic preferences; Regulatory Impact Assessment

THE SO-CALLED CONSUMER ACQUIS – THE COLLECTION OF RULES OF EUROPEAN ORIGIN governing contracts, commercial practices and products involving consumers – was not created "wie aus einem Guss" (as a unified whole). Instead, the *acquis* is a mishmash of various European directives and regulations that are badly coordinated, let alone harmonized. The 2008 Proposal for a Directive on Consumer Rights (hereinafter: the Draft) aims at reorganizing the "*acquis*" of four specific directives into a more coherent codification of consumer rights.¹

¹ *Proposal for a Directive of the European Parliament and of the Council on Consumer Rights*, COM(2008) 614 final.

In essence, the Draft proposes a general framework for contracts between consumers and 'traders'. Specifically, it contains rules on precontractual information duties, on withdrawal rights for distance and off-premises contracts (also known as cooling-off periods), on consumer sales and on general contract terms in consumer contracts. Obviously, the Draft thus aims at replacing and integrating four existing Directives: 85/577/EEC (doorstep selling), 93/13/EEC (unfair terms in consumer contracts), 97/7/EC (distance contracts) and 1999/44/EC (sale of consumer goods and associated guarantees).

Moreover, the Draft seems to hint at slowly moving towards a genuine European Code on Consumer Law by proposing a full harmonization whereas the original four Directives were of a mere minimum harmonization nature.² Hence, the Draft is much more than a redraft of (a part of) the existing consumer *acquis*. In striving for full harmonization, the Draft follows in the footsteps of the 2005 Directive on Unfair Commercial Practices³, which marked a fundamental change in EU consumer policy.⁴ This is an unsettling step to say the least because the level of protection offered to consumers in the Draft hardly exceeds the level of protection offered by these four Directives. In some aspects it even diminishes this protection.⁵

In light of all this, the question arises whether the policy choices underlying the Draft are, in fact, convincingly underpinned by solid argumentation. This article addresses this issue by first analyzing how the Draft uses the generic concept of "contracts between consumers and traders". It is argued in the second section of the article that full harmonization of a badly delineated territory is ill-advised. In the third and subsequent sections, the argumentative power of the policy considerations forwarded by the European Commission is tested. In doing so, the analysis in the article is limited to the Draft and related explanatory policy documents. Hence, adjacent initiatives such as the *Green Paper on the Review of the Consumer Acquis* (2007), the *Common Frame of Reference* (2009), and the work done by the European Research Group on Existing EC Private Law (2009) will not be subject of investigation here. Although it may be useful to take notice of those issues in order to gain a richer understanding of the background against which the Commission has taken its current stand, it seems they can be left disregarded for the purpose of this article.⁶

² Art. 4 Draft ("Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection.").

³ Dir. 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149/22; see ECJ 23 April 2009, joined cases C-261/07 and C-299/07.

⁴ On the shift in EU consumer policy from minimum to full harmonization, see, e.g., Geraint G. Howells, *The Rise of European Consumer Law - Whither National Consumer Law?*, 28 Sydney L.Rev. 2006, 63 ff.; H.-W. Micklitz et al., *Understanding EU Consumer Law* (2009) 58 ff.; V. Mak, *Review of the Consumer Acquis: Towards Maximum Harmonization?*, ERPL 2009, 55 ff.

⁵ For criticism on this point, see, e.g., Geraint Howells/Reiner Schulze, *Overview of the Proposed Consumer Rights Directive*, in: Geraint Howells/Reiner Schulze (ed.), *Modernising and Harmonising Consumer Contract Law* (2009) 6 ff.; Hugh Beale, *The Draft Directive on Consumer Rights and UK Consumer Law - Where now?*, in: Geraint Howells/Reiner Schulze (ed.), *Modernising and Harmonising Consumer Contract Law* (2009) 294 f.

⁶ On these issues, see, e.g., M.B.M. Loos, *Review of the European Consumer Acquis* (2008) 1 ff.; H. Schulte-Nölke, *How to Improve EC Consumer Law*, *Tijdschrift voor Consumentenrecht en Handelspraktijken* 2007, 1 ff.; Stefan Vogenauer/Stephen Weatherill (ed.), *The Harmonization of European Contract Law - Implications for European Private Laws, Business and Legal Practice* (2006); Jan Smits (ed.), *The Need for a European Contract Law - Empirical and Legal Perspectives* (2005); M. van Hoecke/F. Ost (ed.), *The Harmonisation of European Private Law* (2000).

Full harmonization of a badly charted territory

The Draft entails a coherent 'horizontal' directive for 'consumer rights' in a broad sense. This is evidenced by the sphere of application. The Draft covers 'consumer contracts', meaning all contracts between 'trader' and consumer concerning either the sale of tangible movables (sales contract) or the rendering of a service (service contract).⁷ The definition of 'sale' used in the Draft is relatively clear, but 'service' is certainly not. The definition of 'service contract' in Article 2(5) of the Draft merely refers to "any contract other than a sales contract whereby a service is provided by the trader to the consumer".⁸ It leaves 'service', as such, undefined. Perhaps Article 50 EC Treaty should be taken as a point of reference? This article considers 'services' to be "normally provided for remuneration" and to include, in particular, activities of an industrial or commercial character, activities of craftsmen and professions.⁹ Contrary to Article 2 of the Services Directive (2006/123/EC), the current Draft does not exclude certain services contracts from its ambit. As a result, the Draft seems to have a wide sphere of application including most business-to-consumer (B2C) contracts. To mention but a few consequences thereof, a lawyer employed by a consumer would be obliged to fulfil the information duties laid down in Article 5 and a hairdresser paying a home visit would be obliged to make the customer sign an order form (on penalty of invalidity of the contract!).¹⁰ On the one hand, then, the Draft has a rather wide ambit. On the other, however, it seems to be a limited attempt to harmonization.

Three issues deserve mentioning in this respect. Firstly, the Draft purports to harmonize *certain* aspects of the contracting process and it seems that national laws on general issues of contract law (offer, acceptance, unconscionability, mistake, misrepresentation, rescission for breach, damages for breach) are left unaffected.¹¹ This causes a certain ambiguity given the aim of full harmonization. For example, attempts at fully harmonizing precontractual information duties amounts to an illusive operation if the maximum harmonization character is easily circumvented by the use of national legal concepts such as misrepresentation.¹²

Secondly, the Draft merely merges four Directives into a single 'horizontal instrument' and it does not affect various specific directives such as those on consumer credit (2008/48/EC) and distance contracts for financial services (2002/65/EC). Furthermore, it does not affect the 'horizontal' Services Directive.¹³ Hence, there is considerable overlap and even divergence. The Draft attempts to coordinate all these specific directives but the result is a patchwork of cross references. For example, the Draft is in principle not applicable to financial services, except in regard of the rules pertaining to off-premises selling and unfair contract terms.¹⁴ However, the Draft simultaneously provides that the rules concerning off-premises selling are not applicable to insurance contracts, financial products with

⁷ Art. 1 jo. art. 3 (1) Draft Directive.

⁸ The Draft does not specifically exclude certain services from its ambit although some provisions are not (fully) applicable with regard to certain services. See, e.g., art. 19 and 20 Draft.

⁹ Similar definition used by the Services Directive (Directive 2006/123/EC of 12 December 2006 on services in the internal market), OJ L 376, p. 36.

¹⁰ See art. 5 jo. art. 2 (5) and art. 10 (2) jo. art. 2 (5) respectively.

¹¹ *European Commission Staff, Commission Staff Working Paper accompanying the proposal for a directive on consumer rights - Impact Assessment Report (2008b)* 34. Note, however, that in art. 24 ff. the Draft does to some extent provide for harmonization of rescission and damages.

¹² *Thomas Wilhelmsson, Full Harmonisation of Consumer Contract Law?, Zeitschrift für Europäisches Privatrecht* 2008, 227.

¹³ Directive 2006/123/EC on services in the internal market, OJ L 376/36.

¹⁴ This follows from art. 3 (2) Draft. See *EC, Proposal for a Directive of the European Parliament and of the Council (2008) 13*, recital 11.

fluctuating value and consumer credit.¹⁵ If package travel or timeshares are involved, only the rules on unfair contract terms are to be applied.¹⁶ More generally, the Draft is without prejudice to “the provisions concerning information requirements” contained in the Services Directive (2006/123/EC) and the E-Commerce Directive (2000/31/EC).¹⁷ In effect, one can hardly uphold the assertion that this Draft offers a single instrument by any standard.¹⁸

Thirdly, the Draft understandably leaves the choice of enforcement instruments open to national legislators.¹⁹ In private law, however, remedies and substantive rights are closely linked and in some instances even unidentifiably merged into one legal concept. Attaining full harmonization of consumer contract law without aspiring to harmonize the remedial aspects fully appears to be a less than comprehensive harmonization effort.

All in all, it is possible to conclude that the maximum harmonization character of the Draft is highly problematic. It sets out to fully harmonize a territory that is badly charted both in regard of the subject matter (what types of contracts are included?) and the legal aspects that are in fact to be harmonized (what aspects of the contracting process are included?).

Choosing between alternatives

After this brief survey of the ambit of the Draft and the deficiencies it brought to light, this section will focus on the arguments used to underpin the policy choices underlying the Draft. Does Europe really need this directive? Apparently, the European Commission is convinced it does. The arguments boil down to the following.

The core issue is the *legal fragmentation* resulting from the minimum harmonization clauses in the four directives. Member States have taken different routes towards different levels of consumer protection and unmistakably the result has been fragmentation (although arguably the intensity of fragmentation must have been attenuated as a result of the approximation character of these directives).²⁰ This is not merely unsurprising but also hardly a sign of failure of EC consumer policy. Minimum harmonization is what it says: a minimum. To define the outcome of minimum harmonization as the root cause of ‘problem’ downplays the fact that differences in the level of consumer protection in the different Member States may well be a matter of deliberate domestic choice and differences in national preferences within the European Union.

To start with, it seems plausible that national preferences, domestic wealth, socio-economic equilibria and media strength go a long way in explaining differences in

¹⁵ Art. 20 (2) Draft.

¹⁶ Art. 3(3) Draft.

¹⁷ Art. 3 (4) Draft leaves it to the reader to find out exactly which articles in the Services Directive and E-commerce Directive are meant. I think the cross-reference should read art. 7, 21, 22 and 27 Services Directive (Directive 2006/123/EC on services in the internal market, OJ L 376/36) and art. 5, 6, 7, 10, 12 E-commerce Directive (Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178/1).

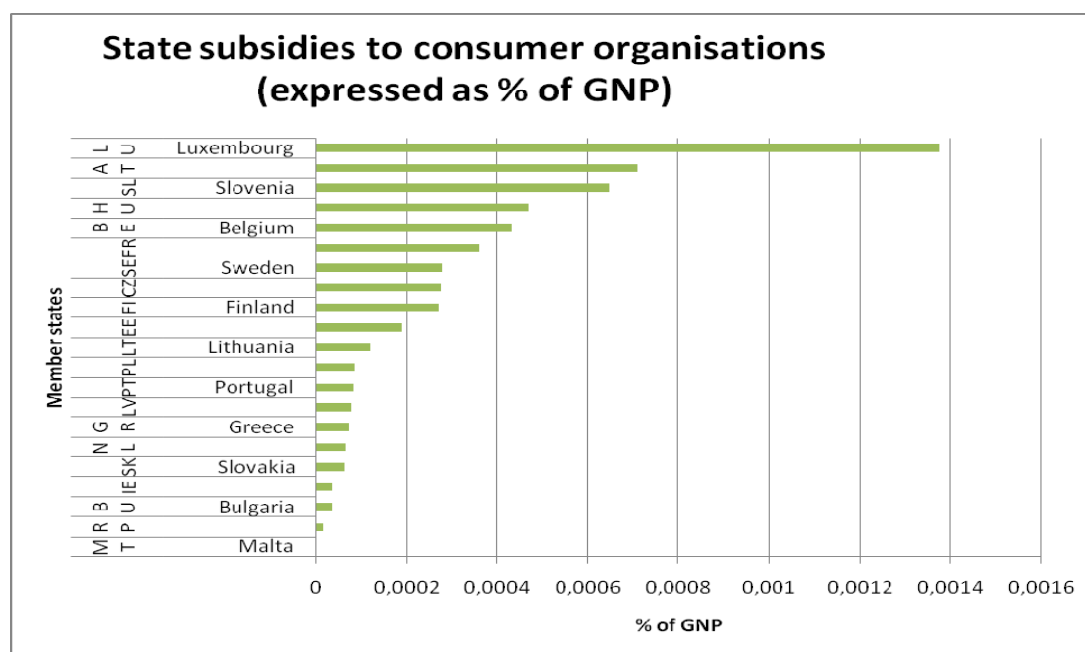
¹⁸ See H.-W. Micklitz/N. Reich, *Crónica de una Muerte Anunciada: The Commission Proposal for a "Directive on Consumer Rights"*, 46 *Common Market Law Review* 2009, 481.

¹⁹ See, e.g., art. 6 (2) Draft. Note, however, that this article does provide that member states “shall provide in their national laws for effective contract law remedies”. It is quite unusual for a Directive to specify the branch of law within which the enforcement instrument shall be positioned.

²⁰ See EC, Proposal for a Directive of the European Parliament and of the Council (2008) 5. Evidence of legal fragmentation is presented by, e.g., Hans Schulte-Nölke et al., *EC Consumer Law Compendium - Comparative Analysis* (2006) 1 ff.

consumer protection. Consider for example Table 1. This table displays subsidies given by EU Member States to private consumer organizations expressed as a percentage of gross national product (GNP).²¹ Although the comparison presented in this table does not produce conclusive evidence on national preferences, it does shed some light on the disparate valuations placed on consumer empowerment and it may thus be indicative of differences in consumer protection preferences.

Table 1: Member States' subsidies to consumer organisations²²



National institutional settings explain and even justify the existence of legal fragmentation between Member States.²³ Another type of fragmentation may be less convincing: the fragmentation caused by the various directives currently in force in the field of consumer contracts.²⁴ This is a serious issue by any measure, but as mentioned earlier the current Draft does little to eradicate this type of fragmentation.

As far as the Commission is concerned, the upshot of all this is that legal fragmentation undermines consumer confidence in the internal market, making consumers reluctant to engage in cross-border consumption,²⁵ and restrains businesses from entering other markets because legal fragmentation forms a barrier to entry.²⁶ The Commission uses the 'power of percentages': surveys show that 75 percent of traders that currently refrain from

²¹ Admittedly, the table is far from perfect. Germany is not represented and the table does not indicate substitutes such as amounts spent by member states on public enforcement of consumer law.

²² Source: (2006 data): Available at: <http://epp.eurostat.ec.europa.eu>;

<http://www.europa-nu.nl/9353000/1/j9vvh6nf08temv0/vh77krn6r4ws>; and

http://ec.europa.eu/consumers/strategy/sec_2008_87_en.pdf. Last accessed 30 October 2009.

²³ See *Willem H. van Boom*, *Harmonizing Tort Law: A Comparative Tort Law and Economics Analysis*, in: M. Faure (ed.), *Tort Law and Economics* (Encyclopedia of Law and Economics Series) (2009).

²⁴ EC, Proposal for a Directive of the European Parliament and of the Council (2008) 12, recital 6.

²⁵ EC, Proposal for a Directive of the European Parliament and of the Council (2008) 12, recital 7.

²⁶ EC, Proposal for a Directive of the European Parliament and of the Council (2008) 12, recital ov. 7.

cross-border trade would engage in such trade if legislation were harmonized at EU level.²⁷ Apparently, consumers likewise state that they will have increased confidence in cross-border consumption if rules are identical. Overall objective is to “contribute to the better functioning of the B2C Internal Market and achieve a high common level of consumer protection” by stimulating “cross-border competition (and) thus provide consumers with wider range of goods and services at lower prices”.²⁸ Against the background of these goals, the defined problem is framed by the Commission by presenting six policy alternatives²⁹:

1. Refrain from legislative intervention and continue the status quo;
2. Stimulate self regulatory solutions and raise awareness by stimulating consumer education;
3. Promulgating four separate Directives that are both coordinated (e.g. as far as terminology and definitions is concerned) and fill certain loopholes;
4. Promulgating one general Directive, fully harmonizing consumer sales and services contracts and including new rules on passing of risk, exhaustive lists of general contract clauses deemed or presumed unfair, uniform withdrawal periods, information duties, etc.
5. Identical as option 4, but also including rules on recurring defects, information on after-sales and replacement parts
6. Slightly similar to option 4, but including an internal market-clause allowing traders and consumers choice of law (which would necessitate revoking the consumer protection rules under the Rome I Regulation)

The presentation of these policy alternatives seems to be classical example of ‘framing choices’.³⁰ This presentation of a number of unviable alternatives encourages the reader towards preferring some alternatives to others. Alternative 6 is an unviable alternative (who would want to delete consumer protection rules from the newly enacted Rome I Regulation?), as is alternative 1 (who would want to do nothing in view of the problematic issues raised by the Commission?). This leaves the reader with the alternatives 2 to 5 to choose from. The Commission argues that the issue of legal fragmentation can neither be solved by the Member States individually, nor by the enactment of further instruments of minimum harmonization.³¹ In the eyes of the Commission, choosing full harmonization is inevitable in order to eliminate fragmentation. Moreover, the Commission asserts that purely domestic contracts without cross-border aspects should be included in the harmonization effect because complete unification would prevent both fragmentation and ‘distortion of competition’.³² In conclusion, the Commission believes that essentially policy alternative 4 is the optimal solution.

One might be tempted to believe that full harmonization would be served optimally by the use of a regulation rather than by a directive; but the Commission argues otherwise. It

²⁷ *European Commission Staff*, Commission Staff Working Paper accompanying the proposal for a directive on consumer rights - Impact Assessment Report (2008b) 38.

²⁸ *European Commission Staff*, Commission Staff Working Paper accompanying the proposal for a directive on consumer rights - Impact Assessment Report (2008b) 15-16.

²⁹ See also the policy alternatives presented in the Green Paper on the Review of the Consumer Acquis, COM(2006)744def.

³⁰ On the psychology of influencing decision-making by framing choices, see, e.g., *Dan Ariely*, *Predictably Irrational - the hidden forces that shape our decisions* (2008) . Critical of the ‘framing’ method *H.-W. Micklitz*, *The Targeted Full Harmonisation Approach: Looking Behind the Curtain*, in: Geraint Howells/Reiner Schulze (ed.), *Modernising and Harmonising Consumer Contract Law* (2009) 73-75.

³¹ EC, Proposal for a Directive of the European Parliament and of the Council (2008) 6.

³² EC, Proposal for a Directive of the European Parliament and of the Council (2008) 8.

states that Member States should be left some margin of appreciation to preserve domestic legal concepts and, if they prefer, to implement the European rules in a cut-up version into national Consumer Law Codes. Thus, the Draft Directive would be adjusted to the national legal setting instead of the other way around.³³ The Commission believes that its choice (in essence no. 4) is ideal: the internal market will benefit from full harmonization because it 'levels the playing field' and stimulates SMEs in border regions into actually crossing borders.³⁴ It will enhance legal certainty for both consumers and businesses,³⁵ and it will lower the 'administrative costs' of cross border commerce for businesses.³⁶

From the analysis presented by the Commission it can be gleaned that the Commission mainly considers legal differences between member states to be superfluous 'transaction costs' standing in the way of trade opportunities. In its policy documents, the Commission calculates that if a trader would like to enter the market for distance contracts (e.g. internet sales) in the EU, he would have to spend compliance costs in 27 Member States up to a total of some €70,000. In contrast, under the regime of the Draft the trader is said to face the expenditure of compliance only once to a mere total of some €5,500.³⁷ Taking away legal fragmentation by use of full harmonization eliminates 'transaction costs' and trade should flourish unimpeded, or so the Commission reasons. This distinctive way of reasoning raises the question whether these 'transaction costs' are just that or perhaps something more. As mentioned earlier, the idea of 'domestic preferences' might need some exploration as well.

The choice for or against full harmonization is a political decision. National governments reach a compromise and give up their national preferences.³⁸ Hence, full harmonization always comes at a cost if 27 Member States have different preferences: some may have to increase the level of consumer protection and others will have to lower their standards.

At first glance, full harmonization seems more in order with regard to some topics than others do. For instance, the Draft's attempt at a uniform withdrawal form may well be a reasonable effort at approximating the practice of withdrawal in Europe and at reducing unnecessary differences in the formats of such forms. However, for other aspects of the Draft it remains to be seen whether differences between Member States are mere 'transaction costs' or reflect national preferences.

There are two sides to the differences between Member States that deserve attention here. Firstly, differences may be salient points for regulatory competition. If Member State A maintains a withdrawal period of 20 working days for distance contracts and Member State B 10 working days, consumers in Member State A might prefer to do their internet

³³ EC, Proposal for a Directive of the European Parliament and of the Council (2008) 8.

³⁴ EC, Proposal for a Directive of the European Parliament and of the Council (2008) 12, recital 5.

³⁵ EC, Proposal for a Directive of the European Parliament and of the Council (2008) 12, recital 8.

³⁶ EC, Proposal for a Directive of the European Parliament and of the Council (2008) 8. Note that businesses are allowed to consensually offer more protection to consumers through their contract terms. See EC, Proposal for a Directive of the European Parliament and of the Council (2008) 18, recital 56. The Commission admits that certain businesses – identified as certain second hand shops and those businesses not engaging in cross border sales- will potentially be burdened by the Directive.

³⁷ *European Commission Staff, Commission Staff Working Document - Accompanying Document to the Proposal for a directive on consumer rights - Annexes (2007b) 232.*

³⁸ The literature on preferences and harmonization abounds. See the references at *Willem H. van Boom, Harmonizing Tort Law: A Comparative Tort Law and Economics Analysis*, in: M. Faure (ed.), *Tort Law and Economics (Encyclopedia of Law and Economics Series)* (2009) .

shopping in state B (all other things being equal). Fully harmonizing the withdrawal periods effectively stifles cross-border competition on points of legal protection.³⁹

Secondly, giving up on differences may actually cause a setback for consumer protection. A case in point is doorstep selling in The Netherlands. After the introduction of an interventionist regulatory framework in the early 1970s, doorstep selling in The Netherlands has virtually ceased to exist. The 1971 Doorstep Selling Act (Colportagewet) obliged salesmen to register themselves and to file every single sales contract with the Chamber of Commerce. Up to this day, the filing requirement for substantial transactions (i.e. contracts with a value over €34) is in place.⁴⁰ Apparently, this system has rendered doorstep selling practices virulent before enactment of the 1971 Act unappealing marketing method in the Netherlands. If the Draft is adopted, this will have two important consequences for the Netherlands (apart from the harmonization of the withdrawal period):

- In the doorstep sales conversation the commercial purpose of the conversation no longer has to be actively disclosed by the salesman (see Article 11 (2) Draft, *a contrario*);
- Salesmen may no longer be obliged to file their sales contracts with the Chamber of Commerce (Article 10 (3) and 11 (5) Draft).

The Draft disposes of the Dutch preferences for a high level of consumer protection against doorstep selling. It is difficult to predict what the consequences of adoption of the Draft would be for the Dutch situation, given that the recent Unfair Commercial Practices Directive should (in theory at least) take care of rogue doorstep sellers.⁴¹ Nevertheless, the issue remains whether the Dutch consumer (= voter) would in fact favour this Draft if it would lead to an increase of doorstep selling in The Netherlands.⁴² Other countries may have a slightly different consumer culture, in which doorstep selling is a more accepted form of marketing.⁴³ In effect, full harmonization irons out legal differences and assumes that 'one size fits all' for European consumers. In view of these implications, national governments are well advised to take the interest of their domestic consumer culture at heart when deciding on the Draft.

Arguments used for founding choices made

In this section the methodology used by the Commission for founding its policy is reflected upon. From the outset it should be self-evident that choosing full harmonization needs firm and convincing underpinning because the level of protection offered by the Draft hardly exceeds the level offered by the current four directives.

³⁹ On regulatory competition, see, e.g., *Willem H. van Boom*, Harmonizing Tort Law: A Comparative Tort Law and Economics Analysis, in: M. Faure (ed.), *Tort Law and Economics* (Encyclopedia of Law and Economics Series) (2009).

⁴⁰ See currently art. 25 and 26 Colportagewet (Doorstep Selling Act) in conjunction with art. 3 Uitvoeringsbesluit Colportagewet (Doorstep Selling Regulations). See for overview of thresholds for doorstep selling in the EU, *European Commission Staff*, Commission Staff Working Document - Accompanying Document to the Proposal for a directive on consumer rights - Annexes (2007b) 178.

⁴¹ See the list of 'aggressive practices' (Annex I with the Directive Unfair Commercial Practices).

⁴² Consumer organisations have alluded to this potential effect of full harmonization; see *European Commission Staff*, Commission Staff Working Document - Accompanying Document to the Proposal for a directive on consumer rights - Annexes (2007b) 181.

⁴³ *G. Howells/Twigg-Flesner*, What sort of Europe do consumers want?, 15 *Consumer Policy Review* 2005, 169 ff. rightly raise the question 'what sort of Europe' consumers want.

Indeed, it seems that consumers will gain little from this proposed directive.⁴⁴ It is difficult to ascertain why the Commission in its 'impact assessment study' asserts that 'important positive effects' on the level of consumer protection are to be expected from the Draft.⁴⁵ It is also difficult to find convincing evidence of such effects, which is all the more relevant since the Commission was asked at earlier occasions by several stakeholders to collect and present objective data on costs and benefits of further harmonization of consumer law.⁴⁶ The Commission has executed this assignment in the following three ways.

The Regulatory Impact Assessment Study

The European instrument for weighing the expected costs and benefits of proposed policy decisions is the so-called Regulatory Impact Assessment (RIA).⁴⁷ As far as costs of the Draft are concerned, one can think of the administrative burden imposed on businesses with respect to complying with newly imposed information duties. One of the plausible benefits, i.e. the decrease in compliance costs for European internet selling, was mentioned above (pages 459-460). The most important benefit – or rather the overriding objective advanced in support of the Draft – would have to be the increase of cross border consumption and trade. Calculating the expected size of this benefit, or even giving a ballpark figure approximating a best guess seems extremely perilous.

This by no means disqualifies impact assessments as an instrument of objective policymaking, it merely puts their value in the right perspective. RIAs are soft instruments of quantification and as such, they are useful for weighing policy alternatives.⁴⁸ However, the problem is that RIAs may give a sense of exactness that they in fact lack. A case in point is the use of evaluation grids with "+", "-" to indicate a strong, minor or negative impact on given policy objectives. Take for example the grid used by the Commission to evaluate the impact of introducing a so-called grey and a black list of unfair contract terms instead of a purely indicative list:

<i>Nature of the "legislative change"</i>	<i>Contribution to the better functioning of the IM</i>	<i>Minimising the burden of EU legislation for business</i>	<i>Enhancing consumer confidence</i>	<i>Improving the quality of legislation</i>
<i>Introducing a grey and a black list of unfair contract terms with legal effects instead of a purely indicative list</i>	+++	++	+	+

⁴⁴ See *Michael Faure*, Towards a maximum harmonization of consumer contract law?!, 15 *Maastricht Journal of European and Comparative Law* 2008, 441 f.

⁴⁵ See *European Commission Staff*, Commission Staff Working Paper accompanying the proposal for a directive on consumer rights - Impact Assessment Report (2008b) 36.

⁴⁶ E.g., *DTI*, UK Government's response to the EU Commission's Green Paper on the Review of the Consumer Acquis (2007) .

⁴⁷ See, e.g., *A.C.M. Meuwese*, Impact assessment in EU lawmaking (2008) 2 ff. The European Commission uses a standard protocol for RIAs; see *European Commission*, Impact Assessment Guidelines (SEC (2009) 92) (2009) .

⁴⁸ Generally on RIAs, e.g., *Colin Kirkpatrick/David Parker* (ed.), *Regulatory impact assessment : towards better regulation?* (2007) .

The Commission essentially asserts that replacing the current indicative list in the Unfair Contract Terms Directive (93/13/EEC) with a 'black and grey list' will have strong positive effects on the internal market, will minimize the burden of EU legislation for businesses, will slightly enhance consumer confidence and will improve the quality of legislation. It seems hardly possible to underpin empirically (either ex ante or ex post) any of these assertions,⁴⁹ however plausible they may be.⁵⁰

Equally debatable is the calculation of costs of implementing the suggested policy decisions. The Commission expects the costs of the Draft for business to be negligible in comparison to the benefits that will accrue. It is foreseen that companies will incur some one-off costs of adapting their contract conditions and practices, but companies that already had ambitions to trade across borders would be supported more effectively by the Draft. Essentially, those companies win. The businesses that are inconvenienced without gaining major benefits are those that have no intention of cross border marketing (and second hand shops).⁵¹ There may be some credence to this argument as far as B2C *trade* is concerned (although it seems more plausible by far that the viability of cross-border B2C trade depends on other factors than the legal regime, such as transport costs), but it remains to be seen whether unification of (some aspects of) consumer contract law will create favourable conditions for cross border B2C *services*. The regulated services, such as lawyers, especially seem to be mainly oriented on domestic markets for other reasons than the high costs of compliance with foreign consumer contract laws.

Furthermore, the Commission's RIA focuses mainly on the direct financial consequences of the Draft, thus underestimating the indirect financial consequences. For instance, the Draft proposes the introduction of a comitology procedure on unfair contract terms. The Draft proposes that Member States collect information on contract clauses declared unfair by national authorities (e.g. public consumer authorities, courts) and send this information to the Commission. The collection of Member State decisions on unfair contract terms is then used by the Commission to evaluate and, if necessary, to amend the 'grey and black list' frequently. For the purpose of this process, the Commission is helped by a proposed Committee on unfair terms.⁵² The Commission estimates the costs of this administrative procedure at the mere annual salary of one civil servant (secretary of the committee). The direct costs of the committee members are ignored (who pays for them?), as are the indirect costs of collecting information at Member State level.⁵³

⁴⁹ See the critical remarks by *H.-W. Micklitz/N. Reich*, *Crónica de una Muerte Anunciada: The Commission Proposal for a "Directive on Consumer Rights"*, 46 *Common Market Law Review* 2009, 474-475.

⁵⁰ Sometimes the plusses and minuses in the policy documents are less than persuasive. For instance, the Commission argues that a fully harmonized right to reimbursement of payments through bank card in case of annulment of the primary (sales) contract would *not* contribute to better working of the internal market but would help decrease the burden of EU legislation for business. At face value I would be inclined to argue exactly the opposite. Indeed, the calculations by the EC (see *European Commission Staff*, Commission Staff Working Document - Accompanying Document to the Proposal for a directive on consumer rights - Annexes (2007b) 209-210) indicate that there are substantial costs involved for business with introducing such a rule.

⁵¹ *European Commission Staff*, Commission Staff Working Paper accompanying the proposal for a directive on consumer rights - Impact Assessment Report (2008b) 38-39; *European Commission Staff*, Commission Staff Working Document - Accompanying Document to the Proposal for a directive on consumer rights - Annexes (2007b) 232-233.

⁵² Critical of this proposed comitology procedure, e.g., *H.-W. Micklitz/N. Reich*, *Crónica de una Muerte Anunciada: The Commission Proposal for a "Directive on Consumer Rights"*, 46 *Common Market Law Review* 2009, 517.

⁵³ *European Commission Staff*, Commission Staff Working Paper accompanying the proposal for a directive on consumer rights - Impact Assessment Report (2008b) 39, merely states that the costs of collecting and giving information to the Commission are negligible. See also the critical remarks by

Even more pressing is the lack of appreciation of the indirect costs to businesses and consumers – both in terms of money, time and annoyance concerned with the *order form*. Article 10 of the Draft rather casually states that “an off-premises contract shall only be valid if the consumer signs an order form”, but it does not include a threshold value for minor transactions nor does it exclude services as such. Some contracts are explicitly excluded from the scope of the specific rules on off-premises contracts (e.g. contracts concluded through automatic vending machines, insurance, consumer credit, door-to-door selling of foodstuffs) and consequently do not require the signing of an order form.⁵⁴ Other contracts, however, are not excluded and this inevitably results in the introduction of an overly burdensome and impractical formality for, e.g., trifle and emergency contracts. The plumber responding to an emergency call to repair sprung water mains, the doorstep seller that wants to sell Christmas cards or low-value lottery tickets for a charitable cause, or even the ambulant cashier at a temporary open-air parking facility, they all seem to be obliged to make the consumer sign a form. This formality is not actually worth the effort in case of most low-value transactions.⁵⁵ Therefore, the introduction of a threshold value should be considered in order to escape this superfluous formality.

Conclusion on the Impact Assessment

The RIA is illustrative but it remains unconvincing in some respects. The Commission’s assessment of costs and benefits is waver-thin and geared towards convincing the reader of the aptness of choices already made. In some respects, the evidence presented by the Commission is unconvincing. Two more examples may illustrate this point.

The first example relates to the use of figures. The Green Paper on the Revision of the Consumer Acquis yielded over 300 responses.⁵⁶ Unsurprisingly, most responses originated from business representatives, consumer organisations, Member State representatives, lawyers and others. Hence, or so the Commission concludes, 62% of respondents to the Green Paper are in favour of full harmonization.⁵⁷ In my opinion this is highly unconvincing use of statistics.⁵⁸ At a closer look, the majority of business representatives favour full harmonization, consumer associations predominantly favour minimum harmonization, while the Member States emphasize the need for full harmonization where there is evidence of trade barriers impeding the internal market and consumer confidence.⁵⁹ These diverging responses need no numerical weight.

H.-W. Micklitz, The Targeted Full Harmonisation Approach: Looking Behind the Curtain, in: Geraint Howells/Reiner Schulze (ed.), *Modernising and Harmonising Consumer Contract Law* (2009) 55.

⁵⁴ Zie art. 20 ontwerp-richtlijn.

⁵⁵ See *Geraint Howells/Reiner Schulze*, Overview of the Proposed Consumer Rights Directive, in: Geraint Howells/Reiner Schulze (ed.), *Modernising and Harmonising Consumer Contract Law* (2009) 15.

⁵⁶ The responses were collected in *European Commission Staff*, Commission Staff Working Paper - Report on the Outcome of the Public Consultation on the Green Paper on the Review of the Consumer Acquis (2007).

⁵⁷ *European Commission Staff*, Commission Staff Working Paper - Report on the Outcome of the Public Consultation on the Green Paper on the Review of the Consumer Acquis (2007) 4.

⁵⁸ Also critical of this juggling with statistics: *H.-W. Micklitz*, The Targeted Full Harmonisation Approach: Looking Behind the Curtain, in: Geraint Howells/Reiner Schulze (ed.), *Modernising and Harmonising Consumer Contract Law* (2009) 66-67; *Cristina Poncibò*, Some Thoughts on the Methodological Approach to EC Consumer Law Reform, 21 *Loyola Consumer Law Review* 2009, 357; *Michael Faure*, Towards a maximum harmonization of consumer contract law?!, 15 *Maastricht Journal of of European and Comparative Law* 2008, 443 f.

⁵⁹ *European Commission Staff*, Commission Staff Working Paper - Report on the Outcome of the Public Consultation on the Green Paper on the Review of the Consumer Acquis (2007) 4; See the underlying report by *GHK et al.*, Preparatory Work for the Impact Assessment on the Review of the

A second example concerns the use of evidence on price similarities in consumer markets. In one of the policy documents the Commission presents an overview of retail prices charged for certain perfumes, MP3 players and sport shoes in various Member States. The commission finds substantial differences in price between Member States and infers a relationship between these differences and consumer rights.⁶⁰ Although it is not entirely clear how the Commission sees this relationship, what is striking is the fact that the price of many products is the lowest in the UK and most continental retailers charge an identical (!) higher price. If nothing else, this seems to indicate that there is a vertical price cartel on the European continent and it is clear that cartels are not a problem directly addressed by this Directive.

Positive effects of EU policy on consumer confidence

More daunting than calculating the costs of full harmonization is measuring the positive effects of full harmonization on consumer confidence. As mentioned earlier, one of the fundamental arguments forwarded by the Commission is that the Draft will help increase consumer confidence. In theory, consumer confidence should not be affected by disparity of national laws. To a large extent, the Rome I Regulation already gives precedence to the level of protection offered by consumer law of the country of residence of the consumer.⁶¹ If consumers were really concerned with legal issues in cross border consumption, perhaps the European Union should rather focus on *educating consumers* on their domestic rights than on proposing full harmonization of those rights. Moreover, it seems debatable whether in practice fully harmonizing consumer contract law will have any effect on cross border consumption at all if language barriers, fear for the unfamiliar, affect for better known local brands and preference for lowest transport costs are more likely to be crucial factors in consumers' decision making.⁶²

This does not preclude, however, that a positive effect in consumer confidence may follow from the 'assurance effect' that European legislation may have. A case in point is the duty on air carriers to inform customers of their rights under the Denied Boarding Regulation.⁶³ The Draft also holds a particular duty to inform of the rights under the Directive as far as guarantees are concerned: the guarantee must include a clear statement that legal rights

Consumer Acquis - Analytical Report on the Green Paper on the Review of the Consumer Acquis submitted by the Consumer Policy Evaluation Consortium (2007) .

⁶⁰ See *European Commission Staff, Commission Staff Working Document - Accompanying Document to the Proposal for a directive on consumer rights - Annexes (2007b) 7.*

⁶¹ Art. 6 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177. See *Thomas Wilhelmsson, Full Harmonisation of Consumer Contract Law?*, *Zeitschrift für Europäisches Privatrecht* 2008, 229; *H.-W. Micklitz/N. Reich, Crónica de una Muerte Anunciada: The Commission Proposal for a "Directive on Consumer Rights"*, 46 *Common Market Law Review* 2009, 476..

⁶² See *Thomas Wilhelmsson, The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law*, 27 *Journal of Consumer Policy* 2004, 317 ff.; *Geraint Howells/Reiner Schulze, Overview of the Proposed Consumer Rights Directive*, in: Geraint Howells/Reiner Schulze (ed.), *Modernising and Harmonising Consumer Contract Law* (2009) 8; *H.-W. Micklitz, The Targeted Full Harmonisation Approach: Looking Behind the Curtain*, in: Geraint Howells/Reiner Schulze (ed.), *Modernising and Harmonising Consumer Contract Law* (2009) 53 and 71.

⁶³ Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, OJ L 46. Art. 14 (1) Denied Boarding Regulation reads: "The operating air carrier shall ensure that at check-in a clearly legible notice containing the following text is displayed in a manner clearly visible to passengers: 'If you are denied boarding or if your flight is cancelled or delayed for at least two hours, ask at the check-in counter or boarding gate for the text stating your rights, particularly with regard to compensation and assistance'".

are not affected by the commercial guarantee.⁶⁴ Notwithstanding these two examples, the use of ‘assurance effect’ in European consumer law seems underdeveloped. If indeed lack of knowledge of consumer rights restrains consumers from cross-border consumption, why does the European Commission – which is supposed to aim for improvement of consumer confidence – not assist consumers in *recognizing* European protection?⁶⁵ The Commission may want to consider a less intrusive but possibly more effective legislative approach by introducing the compulsory use of standard phrases such as: “These contract clauses do not affect your rights under the European Directive on Consumer Rights; visit www.rightsforconsumers.eu for further information.” It would be interesting to see if such an approach, which taps into the policymaker’s marketing skills more than it does into its legal drafting skills, would have a beneficial effect on consumer confidence.⁶⁶ Psychological lab experiments might provide a helpful tool to answer this question.

It is striking that this aspect of “marketing” European protection is missing entirely in the Commission’s policy documents. The Draft is said to be founded on the regulatory goal of improving conditions for cross-border competition and consumption, but what seems to be lacking is the acknowledgment that boosting confidence has much to do with changing attitudes and perceptions. Introducing harmonized legislation – which may not be recognized by consumers and business as the product of European legislative efforts – may well prove to be the least effective instrument for furthering these goals. Admittedly, building political support for consumer policy in the European Parliament, Council as well as in Member States is probably a lot easier if reference is made to goals pertaining to the internal market than if reference is made to such elusive ideas as ‘harmonizing legal consumer culture’. Concerning the Draft, the latter reference proves to be more convincing.

Concluding Appraisal

Full harmonization of some general aspects of B2C contracts is a troubling adventure, especially if it is unclear which contracts do or do not fall within the scope of application. Furthermore, it is difficult to predict which aspects of the intricate contracting process are in fact fully harmonized. In view of this inherently difficult position, the European Commission makes a serious effort at substantiating the need for this full harmonization attempt. Disappointingly, on some points the argumentation is less than convincing. At certain points the Draft even fuels the reader’s suspicion of foregone conclusions. Moreover, in some respects the Draft offers less protection to consumers than the current four directives it aims to replace. The need for reduction of the level of protection offered by the current minimum harmonization directives is poorly argued by the Commission and appears in a number of significant ways not to reflect the socio-economic relationship that exist in at least some of the Member States. That does not mean a compromise on this point is not inconceivable. It may even be rational for the EU to strive for a uniform “consumer legal culture” through instruments of full harmonization, but that would require an entirely different policy discussion (and further reflection on EU competence in that respect). In any event, Member States should be fully aware of what they forfeit when they agree to this Draft in light of both the uncertain benefits and certain disadvantages of full harmonization.

⁶⁴ See art. 29 (2) Draft; see art. 6 (2) Directive 1999/44/EC.

⁶⁵ Similar arguments are put forward by *H.-W. Micklitz*, *The Targeted Full Harmonisation Approach: Looking Behind the Curtain*, in: Geraint Howells/Reiner Schulze (ed.), *Modernising and Harmonising Consumer Contract Law* (2009) 73.

⁶⁶ Note that the blue-button approach may have a similar effect on consumer confidence. On the blue-button approach *H. Schulte-Nölke*, *EC Law on the Formation of Contract - from the Common Frame of Reference to the ‘Blue Button’*, *ECLR* 2007, 332 ff.).