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Time to Do the Job Properly—The Case for a New Approach to EU Consumer Legislation

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Abstract Following 25 years of legislative activity in the field of consumer law, the EU has proposed major reforms to the consumer law acquis. Existing legislation is largely based on directives harmonizing aspects of national consumer laws. This paper argues that a more appropriate approach for EU consumer law would be legislation in the form of a regulation which is applicable to cross-border transactions only. This argument will consider the constitutional constraints of the EU Treaties, before examining the case for a cross-border-only measure. It will be argued that the cross-border approach is preferable, because it would provide clearer benefits for consumers seeking to buy goods/services across borders, while not upsetting domestic law unnecessarily, in particular in the context of e-commerce.

Keywords EU Consumer Law · Cross-border contracts · Regulation

The start of the second decade of the twenty-first century marks an important watershed for the development of EU Consumer Law. Following the adoption of various consumer law measures over the preceding 25 years, the EU has undertaken a thorough review of the consumer *acquis* and has proposed major reforms. The development of EU Consumer Law has largely proceeded on the basis of directives which have sought to harmonize aspects of national consumer laws. Initially based on a minimum harmonization approach which allowed Member States to adopt more protective rules, more recent measures have been based on a full harmonization approach, removing Member States' freedom to legislate in the areas covered by those measures.[1] It was widely expected that the outcome of the *Acquis* review would be a new directive, seeking full harmonization, with a much wider

[1]E.g., Distance Selling of Financial Services (2002/65/EC) and Consumer Credit (2008/48/EC).

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scope than previous measures. However, what might have been expected to be an inevitable development seems to have encountered such significant difficulties that the new Commissioner, Viviane Reding, has indicated at least a rethink of the Commission's general approach towards the extent of harmonization pursued (Reding 2010).

However, while these deliberations might produce a modification to the Commission's full harmonization policy, it does not seem that a wider review of the EU's approach to consumer law will be undertaken. The *Acquis* review was an ambitious and welcome exercise, but it is regrettable that a number of fundamental features of EU consumer law would not appear to have been open to serious reconsideration. In particular, the general preference for harmonization of national laws over any other approach for creating EU consumer law was never put into any doubt, and it is unlikely to be so now. Nevertheless, the objective of this paper is to reject this fundamental feature of EU consumer law—the harmonization of national consumer laws—and to argue that a more appropriate way forward would be for the EU to concentrate on legislation (adopted as a regulation) which is applicable to cross-border transactions only. It will be suggested that the constitutional framework of the European Treaties, properly interpreted, lends considerable support to such an approach while constraining the extensive harmonization of national laws and the application of EU rules to purely domestic transactions. The case for a cross-border-only measure will then be explored, as well as the difficulties associated with this approach. It will be argued that, on balance, the cross-border approach is preferable, because it would provide clearer benefits for consumers seeking to buy goods/services across borders, while not upsetting domestic law unnecessarily, in particular in the context of e-commerce.[2] Furthermore, by developing a strong legal framework for cross-border transactions, the EU would lead the way in drafting a legal framework which could serve as a model for the development of an international consumer law framework suitable for cross-border transactions in the globalized economy.

The Story so Far

Before setting out the case for a cross-border framework in detail, it is appropriate to provide a short overview of the developments which have led to the present situation.

The Landscape of EU Consumer Law

The current shape of EU consumer law is well known, and a brief sketch will suffice (for a fuller account, see Micklitz et al. 2008). EU Consumer Law is largely created through the harmonization of national laws. The need for such harmonization is based on a simple, yet deceptive argument: each transaction—whether domestic or cross-border—is governed by a particular national law. By definition, a cross-border transaction could produce a conflict between at least two national laws—those of the consumer and the trader respectively.[3] Domestic consumer law generally has the character of "mandatory law," i.e., it cannot be displaced by the terms of the contract between consumer and trader. If there are significant

[2] The Commission's recent cross-border e-commerce communication (Commission 2009) in which the difficulties for cross-border B2C e-commerce are discussed. Emphasis is placed on harmonization of national law, but this paper will argue that a cross-border-only focus should be pursued instead.

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

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differences between national consumer laws, then traders and consumers may be deterred from transacting across borders, because the lack of knowledge of other laws creates both an additional cost factor and affects the confidence especially of consumers. This, however, would undermine one of the core purposes of the EU, the establishment of an internal market. Consequently, it is necessary to harmonize key aspects of national consumer law rules to minimize the impact of such rules on cross-border business, because the disparity of national laws is an obstacle to the operation of the internal market.

To this, there is often added the "consumer confidence" argument: consumers are deterred from shopping cross-border because of the differences in consumer law, which makes them insufficiently confident in the protection they have when buying goods or services from another Member State (for critique, see Wilhelmsson 2004). There is some doubt as to how much weight should be put on differences in national consumer laws, when there are other factors, such as linguistic difficulties or practical difficulties (e.g., transport), which might be a much more immediate deterrent to engaging in cross-border transactions.

This is, essentially, the justification given for the bulk of EU consumer law measures. It is possible that this was conceived out of necessity in the early days of EU activity in this sphere: the EC Treaty (now the Treaty on the Functioning of the European Union (TFEU)) did not contain a formal legal basis for action in the field of consumer protection until the Maastricht Treaty 1992 became law, and so an alternative legal basis had to be found. Initially, this was the then Article 100 (subsequently Article 94 EC, now Article 115 TFEU), but following the entry into force of the Single European Act, the then Article 100a (subsequently Article 95 EC, now Article 114 TFEU) became the legal basis for all subsequent consumer law directives. This provision permits the adoption of measures approximating national rules which have the object of establishment and functioning of the internal market. This is not a general power to regulate the internal market, and a clear link between any harmonization measure and the operation of the internal market has to be established.[4] However, where action is permitted in principle, it is not limited to removing disparities on a lowest common denominator basis; rather, in the context of consumer protection (among others), a high level of protection should be pursued (Article 95(3) EC; Article 114(3) TFEU). The choice of this legal basis immediately defined the approach that EU consumer law and policy would take, i.e., the approximation of *national* law, because Articles 114/115 TFEU and their respective predecessors do not envisage the adoption of measures which leave national law effectively untouched.

The main tool for the introduction of consumer law at the European level has been the directive, which requires that the national laws of the Member States are amended to ensure that the outcomes pursued by a particular directive are reflected in national law. 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, int.al., with doorstep selling (85/577/EEC), package travel (90/314/EEC), unfair terms (93/13/EEC), timeshare (94/47/EC), distance selling (97/7/EC), and the sale of consumer goods and guarantees (99/44/EC). All these directives adopted a minimum harmonization standard, which gave the Member States the freedom to adopt or retain rules which are more favorable to consumers.

The use of directives has several immediate implications: first, directives do not operate as free-standing measures but need to be transposed into national law. Thus, each Member State has to adopt or amend legislation to ensure that the requirements of a directive are

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

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met. It has long been established that this does not require a verbatim, or "copy-out," approach to transposition;[5] rather, it is for each Member State to decide how the outcomes prescribed by a directive are best attained, using whichever legal concepts and terminology will achieve this.[6] Second, directives only deal with selected aspects of the law, and so rules based on a directive have to slot into existing national law; indeed, directives do expressly leave some matters to national law. Third, if a directive adopts a minimum harmonization standard, the corresponding national legislation (either pre-existing or adopted to transpose a directive) may go further than the directive. Not infrequently, the existence of a minimum harmonization clause in a directive made it possible for Member States to implement a directive by retaining existing national law without major change on the basis that it already exceeded this minimum standard (Schulte-Nölke et al. 2008).

The landscape of EU consumer law is, therefore, characterized by a combination of EU-based and national law rules. Where EU legislation exists, there should be at least the same minimum standard in each Member State, and national laws provide the padding for those aspects which have escaped EU regulation to date. However, what this approach has not produced is the existence of a consistent body of consumer law which is truly European; rather, there now are 27 national rules on doorstep selling, distance selling, and so on. National consumer laws have become a mix of "pointillist" (Roth 2002) EU measures and provisions of existing national law (some of which specifically concerned with consumer protection, the remainder the general law applicable to all transactions alike).

The application and enforcement of this body of consumer law falls to the national courts. The courts are obliged to adopt an interpretation of the national legislation that conforms to the directive which it implements, with the possibility of seeking guidance from the European Court of Justice on the interpretation of the relevant EU rules. The number of Article 267 TFEU (Article 234 EC) references on aspects of the consumer *acquis* is small, particularly if one bears in mind that the key directives have been in force for at least a decade and most for much longer than that. As a consequence, the European Court of Justice (ECJ) has only had a very limited opportunity to clarify the meaning of relevant EU provisions, which will have contributed to the continuing diversity between national consumer laws as national courts give their own interpretation to key terms of the various directives. 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.[7] Moreover, as EU-based provisions merely form islands of varying size within the ocean of national (consumer) law, courts may not always be fully aware of the European origin of particular provisions of national law, which might lead the courts to interpret such provisions purely in the context of national law (especially where existing rules of national laws are deemed to comply with the requirements of a directive (Loos 2007)). Admittedly, this would bring any national court into conflict with its obligations under the EU Law to respect the autonomous meaning of European law,[8] but it would seem extremely unlikely in practice that such failures would have any consequences, irrespective of the legal position.

[5] E.g., case C-59/89 *Commission v Germany* [1991] ECR I-2607, para. 18.
[6] E.g., case 363/85 *Commission v Italy* [1987] ECR 1733.
[7] *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.
[8] 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.

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Overall, therefore, while the contribution of EU measures in the field of consumer law has resulted in a degree of approximation of national laws and a reduction of differences (largely by introducing provisions on withdrawal rights and pre-contractual information duties not previously found in all national laws), it has really only shifted the degree of diversity between the national laws of the Member States into a different, and possibly more complex, pattern.

The Acquis Review

Faced with the situation sketched above, the European Commission commenced an ostensibly thorough review of the consumer *acquis*. A major component of this review was the so-called EC Consumer Law Compendium and Database (the Compendium project). This sought to examine the transposition of eight consumer law directives[9] into the national laws of the 27 EU Member States, together with an analysis of available case law on the application and interpretation of these national laws. A database was produced which makes it possible to track how each provision in a directive has been transposed into the laws of each of the 27 Member States.[10] This allows for the identification of variations between national laws, e.g., because the transposition of a particular provision is inaccurate, incomplete, or missing altogether or because a Member State has chosen to exceed the minimum standard laid down in a directive. A separate comparative analysis identified how each directive has been transposed and applied across the Member States and continuing discrepancies in areas already harmonized (Schulte-Nölke et al. 2008). The Compendium project is, therefore, primarily concerned with providing a full picture of the state of national laws in light of existing harmonizing directives. The many variations were put down to three factors: (1) incoherence and ambiguity within the existing *acquis*, including inconsistencies between the different language versions of particular directives; (2) regulatory gaps filled in different ways in national law; and (3) the use of minimum harmonization clauses by the Member States (Schulte-Nölke et al. 2008, pp. 497–504).

In discovering variations between national laws, it provided useful ammunition for the European Commission, which had by then already decided that the minimum harmonization approach should be abandoned in favor of full, or maximum, harmonization (Commission 2002, 2006).

Following the publication of the Compendium, and separate reports prepared by the Commission on the directives on consumer sales and distance selling,[11] a *Green Paper on the Review of the Consumer Acquis* was published (Commission 2007c). At the same time, work on a new Timeshare Directive proceeded, and a replacement directive was adopted in 2008.[12] The *Green Paper* canvassed a range of policy options regarding the future development of EU consumer law. In particular, the commission did invite comments on 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.[13] The *Green Paper* gave a clear steer in favor of the latter option, arguing that the risk of legal fragmentation—between domestic and cross-border transactions or face-to-face and

[9] 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).

[10] Available at http://www.eu-consumer-law.org/

[11] Sales (COM (2007) 210 final); Distance Selling (COM (2006) 514 final).

[12] Directive 2008/122/EC.

[13] The arguments presented by the Commission are analyzed in more detail below.

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distance transactions, respectively—meant that neither approach should be favored. Similarly, the question of whether there should be a shift to full/maximum harmonization was put up for consultation, but again, the Commission made clear its preference for this shift. It was, therefore, fairly clear that full harmonization of consumer law was the preferred option, and other matters—including whether the use of directives should be continued, as well as the legal basis for future legislation—were not even raised for discussion.

The Way Forward

In October 2008, the European Commission duly presented its proposal for a Directive on Consumer Rights (Commission 2008; see, e.g., Howells and Schulze 2009), one feature of which would be the shift to a full harmonization standard. This would mean that instead of specifying only a minimum level of protection, the directive would prescribe the standard of protection to be set in all the Member States, without permitting derogation from this, even where this would be more favorable to consumers. However, the directive would not exhaustively cover the field of consumer law and national laws would continue to deal with aspects not regulated in the directive. The proposed shift to harmonization xis controversial (e.g., Faure 2008; Rott and Terryn 2009), and has far from met with universal support (but Hondius 2010)—many commentators are critical of the Commission's proposed approach (e.g., Wilhelmsson 2008), often arguing that at most, selective (or targeted) full harmonization should be pursued (e.g., Micklitz and Reich 2009). Indeed, objections have been so strong that Commissioner Reding now appears to be advocating a more nuanced approach to harmonization, talking of "targeted harmonization where it is practical" (Reding 2010).

But irrespective of which degree of harmonization will ultimately be pursued, the fundamental approach towards further EU consumer legislation would remain the same. There will be a directive which will continue the approach of harmonizing aspects of national law, albeit with a broader scope and less piecemeal than the existing *acquis*. Nevertheless, there would still be matters left to national law (such as the remedies for failing to comply with pre-contractual information duties or damages in respect of non-conforming goods). Although the risk of variation posed by minimum harmonization clauses would be largely eliminated, other problems would remain. In particular, Member States would still have to transpose this directive into their national laws, which would still result in 27 separate consumer law regimes. Adopting a wider scope and at least a "targeted" full harmonization standard may, therefore, result in a more uniform substantive level of consumer protection across the EU. However, as this would only take effect through national law, it would still be necessary for traders and consumers alike to be aware of the relevant national legislation, should a dispute arise, because direct reliance on a directive by a consumer against a trader is not possible under EU law.[14]

In light of such unease over further-reaching harmonization, surely the time has come to subject the present approach to EU consumer legislation to a more thorough re-think. Perhaps harmonization of national laws could be abandoned altogether in favor of an entirely new approach. The remainder of this paper will develop the case for this.

[14] This is the so-called principle of horizontal direct effect of a directive, which has time and again be rejected by the ECJ. See e.g., 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.

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The Case for a New Approach

It will be apparent from the foregoing discussion that both the current and the likely future approach to EU consumer law are unsatisfactory. The starting point for arguing for a different approach is the deficiencies in the harmonization of national consumer laws. Before summarizing those, it is acknowledged that there have been some benefits of the harmonization process to date; in particular, it has resulted in the introduction of rights, such as cancelation rights or the right to have faulty goods repaired or replaced, which might otherwise not have become part of some national consumer laws. Indeed, for some Member States, utilizing the EU route may have been a useful means of reforming national law without having to engage in detailed debates about policy at the national level—after all, EU measures must be transposed into national law once adopted and cannot be rejected by national legislatures.

However, there are several major drawbacks to the harmonization approach, as explained above. EU harmonization is not exhaustive, in the sense that while large swathes of consumer law fall within the ambit of EU regulation, there are issues deliberately left to national law; moreover, to the extent that an EU Directive does not cover a particular issue at all, national law still has to step in. Harmonization, therefore, concentrates on selective aspects, and national law continues to have a role to play in supplementing the harmonized legal framework. This invariably means that while harmonization manages to reduce the differences in the legal rules, it cannot create a completely uniform picture. This is further exacerbated by the choice of instrument: directives require transposition into national law and only take effect as rules of national law, so knowledge of the laws of the Member States implementing directives continues to be relevant. National courts are then tasked with the application and interpretation of these rules, and in the absence of regular request for a preliminary ruling on the interpretation of particular provisions, divergent approaches are likely. Overall, harmonization, while ensuring greater similarity between the jurisdictions, falls a long way short of establishing a legal framework that would truly be suitable opening the internal market to consumers.

Therefore, the case for a different approach to creating an EU consumer law will be explored. The starting point is the constitutional framework of the Treaty on European Union (TEU) and TFEU.

The Constitutional Framework

Any action in the field of consumer law needs to have a legal basis in the Treaties. Past practice has been to utilize what is now Article 114 TFEU (ex-Article 95 EC) for the majority of consumer law directives. Article 169 TFEU (ex-Article 153 EC) provides an alternative legal basis for consumer protection, 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 hitherto not been used widely. A further distinction between the two provisions is that Article 114 TFEU is concerned with the harmonization of national laws, whereas Article 169(2)(b) TFEU is not expressed in such terms; however, Article 169(2)(a) TFEU emphasizes the importance of Article 114 in pursuing policy objectives in the sphere of consumer protection. This might suggest that the focus of EU consumer law should be on harmonizing national laws, although Article 169(2)(b) TFEU could support the adoption of a measure concerned only with cross-border transactions. This matter will be explored further below.

In addition to the constraints imposed by needing to find a suitable legal basis, action at the EU level is further confined by the principles of conferral, proportionality, and

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subsidiarity (Article 5 TEU). The principle of conferral limits EU action to the competences conferred on it by the Treaties (Article 5(2) TEU). Some competences are exclusive to the EU, but many are shared between the EU and the Member States. In order to allocate responsibility for action between the European and national level, the principle of subsidiarity is engaged. Thus, 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 does not fall within the EU's exclusive competence 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, EU action is only permissible if the "objectives of the proposed action" cannot be achieved at national level. Now, surely, it would be difficult to sustain an argument that Member States are not able to adopt appropriate consumer protection frameworks (or at least less able than the EU). What Member States cannot do is to legislate to cover transactions in other Member States or to legislate for cross-border transactions. This seems to suggest that the principle of subsidiarity points towards a cross-border-only approach.

The difficulty with reasoning based on the subsidiarity principle is that its use in the European context appears to be procedural and, therefore, mainly a political issue rather than jurisdictional and, therefore, about the proper allocation of legislative authority between Union and Member States (Schütze 2009). Consequently, the focus may be more on giving the national level a greater involvement in approving EU action. Nevertheless, this does not preclude the possibility of challenging EU action on the basis that it infringes the principle of subsidiarity.

But perhaps there is a case to be made for harmonization despite subsidiarity.[15] 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.[16]

In order to consider whether harmonization of consumer law is compatible with the principle of subsidiarity, it will be illuminating to examine the Commission's reasoning on this matter. For example, the Commission's compliance statement issued with its proposal for the Consumer Rights Directive seems to emphasize that action is needed to encourage cross-border transactions (Commission 2008, p. 7) but does not explain why harmonization to cover both national and cross-border consumer transactions is necessary.

Thus, the commission states that legal fragmentation is the main problem and that this cannot be resolved by the Member States themselves (Commission 2008, p. 6). If

[15] For an early discussion of this, see Micklitz and Weatherill (1993), esp. pp. 304-313, although the authors do not consider whether the principle could be deployed to focus EU action on cross-border issues.
[16] Article 5 of the Protocol on the application of the principles of subsidiarity and proportionality.

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Member States took action without EU coordination (for which read "harmonization of national laws"), then this would not assist the development of the internal market. Consequently, only (full) harmonization resulting in a single set of rules would ensure that consumers and traders could benefit from the internal market, and that is why the proposal, and, therefore, the general approach of harmonizing national laws, is compatible with the requirements of the principle of subsidiary (Commission 2008, p. 7).

This reasoning fails to convince. For a start, it assumes that the internal market would work better *only* if national laws were harmonized—but that is begging the question. Crucially, nothing at all is said why harmonization is preferable to legislation dealing only with cross-border transactions. If one properly engages the subsidiarity principle, then the justification of harmonization of national laws becomes difficult, and the Commission has not, it seems, discharged that burden.

However, EU legislation dealing only with cross-border transactions would pass the subsidiarity test much more easily. Member States can only legislate within their own jurisdictions and cannot individually adopt legislation that would be applicable in other Member States (other than through the principles of private international law). One Member State cannot create a legal framework to regulate cross-border transactions that would be applicable in all the other Member States. For such a measure, the EU level is more appropriate.

In addition to the subsidiarity principle, the proportionality principle requires that the "content and form of Union action" does not exceed what is necessary to achieve the particular objective. Again, one can ask whether harmonization of national laws, which is both intrusive and disruptive to national legal systems, could be challenged on the basis of the proportionality principle, especially if the preferred approach was to pursue full harmonization (Schulte-Nölke 2010).

On the basis of the foregoing, it is submitted that the constitutional framework of the EU points the primary focus of EU action towards creating a legal framework for consumer transactions with a cross-border dimension only, rather than covering the entirety of consumer transactions that occur within the EU. Of course, the strength of this reasoning depends on just much "bite" one attributes to both principles. Case-law from the ECJ offers little by way of encouragement, with the court giving short shrift to challenges to EU legislation on the grounds that this may be incompatible with subsidiarity or proportionality. In *ex parte BAT*,[17] the Court merely observed that subsidiarity in the context of Article 114 TFEU (Article 95 EC) applies "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" (para. 179) but did not consider whether this might mean that there might be occasions when the principle would preclude legislation going beyond cross-border circumstances. As for the principle of proportionality, the ECJ has been prepared[18] to grant the EU legislature "broad discretion in areas which involve political, economic and social choices on its part" (*IATA* (C-344/04), para. 18). This means that a challenge to a measure on the basis of its infringement of the principle of proportionality would only succeed where a "measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue" (*ibid.*). The requirement of "manifest

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

[18] 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.

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inappropriateness" might well mean that a legal challenge to the further harmonization of national laws on basis of disproportionality would face a very high hurdle to overcome to be successful. This does not mean, however, that a shift in focus to cross-border transactions is impossible. While harmonization may be compatible with the Treaty, it does not follow that it is the best option for EU consumer law, nor that harmonization is entirely within the spirit of the Treaties.

Legal Form: Directive or Regulation?

A further element of the case for a new approach is that the use of directives is no longer appropriate for the development of EU Consumer Law. The need to implement directives into national law largely undermines the stated reason for harmonization, i.e., to ensure that the legal framework applicable to transactions within the EU is the same. As noted, directives need not be implemented verbatim, as the form and method is left to the Member States (Article 288 TFEU (ex-Article 249 EC)). There is no obligation to create a "Consumer Code," for example, into which all the various EU provisions are slotted. There can be a string of national legislative measures which transpose the various directives; indeed, even the proposed Consumer Rights Directive would not have to be transposed as one single national measure. Interestingly, in the Explanatory Memorandum to the proposed directive, the Commission regards this as a positive feature 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" (Commission 2008, p. 8). This would give Member States enough leeway to maintain existing provisions which already comply with the objectives of the directive. But this will still result in diverse national laws, utilizing legal language, or concepts which differ from that in the directive.

Furthermore, quite how this tallies with the view expressed in the same paragraph 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" (Commission 2008, p. 8) is unclear: if Member States remain free to implement directives in ways that suits them best (subject to ECJ case-law on what is and is not permissible), then the end result may well be anything but a single set of law.

The idea of creating a single and coherent set of rules is tied-in with the idea of full harmonization by directive. Although this might create a uniform level of consumer protection across the EU with regard to the areas regulated by the proposed directive, it would not obviate the need for consumers and traders to identify whichever national legislation applied to their contract, e.g., because they are in dispute and might have to go to court. Both consumers and traders would continue to have to seek advice on the relevant national law but is reducing the need for this not exactly one of the key justifications for harmonization?[19] And will consumer confidence really be boosted simply by the fact that they can now be told that the law is the same wherever they shop? There are many unanswered (and perhaps unasked) questions about the real value of harmonization.

The key argument put forward in this paper that instead of continuing with the harmonization of national consumer laws by directive(s), a regulation dealing with cross-border transactions only should be adopted. As the preceding paragraphs show, the commission's reasoning for continuing with directives is unconvincing. Indeed, one of the aims of the *Acquis* review is that there should be "better regulation" as well as simplification of the legal framework. Directives unlikely achieve the latter because of

[19] Legrand (2005, pp. 26-7) provides a colorful illustration of this problem in the context of the debate about a European Civil Code.

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the continuing problems associated with transposition and regulatory gaps. Moreover, the Commission has acknowledged in another context 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” (Commission, 2007a, n.12; Commission 2007b). Using a regulation for the future development of EU Consumer Law is clearly not legally impossible. Even if Article 114 TFEU were to remain the legal basis for EU Consumer Law measures, it is not specified that harmonization has to be undertaken by directive. National rules can be “approximated” through a regulation which might necessitate the repeal of national laws falling within its scope.

Irrespective of whether such a regulation would apply to all consumer transactions or cross-border ones only (to be discussed in the next section), the use of a regulation would mean that the many difficulties associated with transposition of directives could be avoided. There would be a single regulation, and all national provisions falling within the scope of such a regulation, would simply be repealed.[20] It would create the “single and coherent” set of national law which the Commission craves, and the same measure would be applicable to all consumer transactions, without any need for consumers and traders to seek advice on the national legislation implementing a particular directive. Of course, there would be other challenges; a regulation would have its own terminology and concepts, and Member States would lose the freedom to utilize more appropriate national legal terminology when transposing a directive. However, this would be a small loss, if one at all: it is trite law that national legislation giving effect to a directive has to be interpreted in line with the corresponding European provision, and so any specific terms used will not be given a national interpretation, but a European one. Indeed, it is arguable that a regulation would make it easier for national courts to interpret and apply the law because it would be immediately obvious that European law is being used. It would avoid the somewhat contorted approach whereby national courts state which national legislation applies and then proceed to move on to interpret and apply the text of the corresponding directive, rather than the national law implementing it. This kind of approach all but treats directives as de facto regulations, and if this is how the courts approach European-based legislation, then it seems that one might as well adopt a regulation.

In fact, this apparent conflation between the function of directives and regulations in the context of EU Consumer Law is a further reason why the step towards utilizing regulations should be taken. As noted, a directive only specifies a result to be achieved, whereas regulations are directly applicable in national law (Article 288 TFEU). Yet, in practice, the text of consumer law directives has become increasingly detailed, and there is often intense debate during the legislative stages as to how particular provisions should be worded. The end result has been that directives are adopted which contain very detailed provisions. Although notionally, Member States retain the freedom of choice of form and methods of giving effect to a directive, it is often difficult for a Member State to deviate from the wording of a directive (Rott 2003). Full harmonization, whether targeted or broad, would only exacerbate this situation. The level of detail now found in directives is much more appropriate to regulations (Johnston and Unberath 2006), and it might be wiser to accept the reality of this and shift towards using (a) regulation(s).

The limitations imposed by the principle of subsidiarity have already been discussed. In the context of which legislative form a future EU Consumer Law measure should take, the

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

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Commission argued, rather strangely, that the use of a directive is "more in line with the subsidiarity principle" (Commission 2008, p. 8). 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 (Reich 2005, p. 398)). Subsidiarity is about the allocation of responsibility for the substance of regulation between the European and national levels. The particular instrument used for the adoption of a European measure surely has no relevance in this context. Although Member States would continue to adopt national measures, the regulatory direction will have come from the European level. It cannot be right to justify the use of a directive over a regulation on the basis of subsidiarity.

In addition to considering the "legal possibility" of a using regulation, there is the question of "political unacceptability." No convincing arguments to suggest political unacceptability have been put forward. Indeed, a positive aspect—from the European perspective—is that the adoption of a regulation would send a clear signal to the citizens of Europe that the EU has put into place a coherent legal framework to encourage cross-border transactions. Both consumers and traders would find it much easier to find out which law applied as there would only be one measure applicable across all the Member States.

However, a regulation applicable to both domestic and cross-border transactions could create political difficulties. It would mean that even the smallest domestic consumer transaction would visibly be subject to European rules. It would make it much more obvious that European law governs many aspects of consumer law, rather than national law. The current practice of harmonizing national law through directives has the political advantage that reforms at national level which might otherwise be difficult to achieve for lack of political will or Parliamentary time can be imposed from above; i.e., the European route can be used to push through changes on the basis that they are mandated under European law when these might not have succeeded at a purely domestic initiative. At the same time, there will still be national implementing legislation, and the government of the day can claim to be looking after consumers when it publishes the national measure transposing a directive. But if the impact of using a regulation for *all* consumer transactions might be politically difficult, it might be much more acceptable if such a regulation were concerned only with cross-border transactions (discussed in the next section).

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 (Reich 2005). The difference between Professor Reich's argument and the one presented in this paper is mainly in respect of the scope such a regulation should adopt. Professor Reich favored 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.

Scope: Cross-Border Only?

The previous section sought to make the case for preferring a regulation over (a) directive(s) for the future development of EU Consumer Law. The next task is to consider the case for such a regulation being applicable to cross-border transactions only, leaving domestic transactions to domestic law.

It can be noted that the Commission's position on this issue, stated during the *Acquis* review, was lukewarm at best about the possibility of limiting future European action to cross-border transactions only. The question for a cross-border approach was put to consultation in the *Green Paper*, although the Commission thinly disguised its opposition to this. In the *Green Paper*, three alternatives for the scope of a new measure were presented:

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(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; and (3) a horizontal instrument limited to distance-shopping applicable to both domestic and cross-border transactions. One difficulty with (2) identified in the *Green Paper* was the challenge of coming up with a good definition of what makes a transaction a cross-border transaction, although there was no exploration of the possible solutions and associated difficulties. One cannot help but assume that this was because the Commission did not regard this as a serious alternative to (1). The main objection to both (2) and (3) was that either approach would result in legal fragmentation because different rules would govern domestic and cross-border transactions (or face-to-face and distance transactions). The introduction of parallel regimes would conflict with the pursuit of better regulation.

However, if this is the main objection to a cross-border-only measure, then the case against it is rather weak. Admittedly, the introduction of two parallel regimes does entail the risk that those consumers who actively engage in cross-border shopping may be confused by the existence of two separate legal regimes with—potentially—different degrees of protection. However, it is equally plausible that consumers could be educated with relative ease about when their domestic law and when the cross-border rules apply—assuming, of course, that it is possible to draw a clear dividing line between the two.

The Commission's focus on the issue seems rather narrow, being concerned only with the demands of the internal market. This may be motivated by the limitations of the available legal basis. There is a real danger that the focus on the internal market will disregard the implications for purely domestic transactions. While there is undoubtedly scope for expansion of cross-border consumer transactions, particularly via the internet, it seems highly unlikely that they will displace domestic, especially local, transactions. Therefore, continuing with the harmonization of national consumer laws by directive and striving towards a one-size-fits-all framework applicable to all types of consumer transactions might cause confusion and uncertainty on a much wider scale. This is because those businesses and, to a lesser extent, consumers not interested in cross-border shopping would have to adapt to a new legal framework at the domestic level which may not bring them any obvious benefits. A cross-border-only measure would establish a clear framework for such transactions and be of use to those wishing to participate in the Internal Market, while reducing the impact on those not interested.

The case for a cross-border-only measure seems strengthened further by the Commission's arguments in favor of the shift to full harmonization. According to the Commission, the main justification for full harmonization is that the differences in national consumer laws pose an obstacle to trade. To increase cross-border trade, one coherent legal framework is needed. But if the assumption that the vast majority of consumer transactions will not only remain domestic but also local is correct, then most will not involve a cross-border element at all (with the exception of "local" transactions within border regions (Commission 2008), Recital 5). Full harmonization by directive would alter the legal framework applicable to *all* consumer transactions in the interest of encouraging a potentially small increase in the number of cross-border transactions. Yet, as far as domestic transactions are concerned, the effect of full harmonization is potentially adverse as far as the existing level of consumer protection is concerned: if the level of protection under full harmonization was sufficiently high, then full harmonization might just about be acceptable politically, although persuading individual consumers of the merits may be more difficult. But if it adopted a level of protection that would require the lowering of protection in some Member States, then this would have a negative impact on domestic transactions. Article

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114(3) TFEU (ex-Article95(3) EC) mandates a "high" level of consumer protection, but it is far from clear just how "high" it needs to be to satisfy the requirement of this provision. The advantage of a cross-border-only regulation would be that this would set a standard for cross-border transactions, but Member States would be free to create a legal framework to suit the needs of consumers within their jurisdiction.

Distinguishing Cross-Border from Domestic Transactions

Perhaps the Commission was right in raising the difficulty of distinguishing adequately between cross-border transactions (which would be subject to EU law) and domestic transactions (which would be subject to national law). This question is not new; it has had to be addressed, e.g., in the context of Transnational Commercial Law, where various conventions have been adopted to deal with commercial transactions which have an international nature. Thus, the UN Convention on the International Sale of Goods 1980 (CISG) applies where the (commercial) parties to a contract for the sale of goods have their respective places of business in different states (Article 1(1) CISG).

Although consumers obviously do not have a place of business, one can develop a criterion for distinguishing cross-border from domestic transactions by analogy. Thus, a transaction which occurred in one Member State in which the consumer resides and the trader has his place of business would be a domestic transaction. Similarly, a transaction concluded, e.g., over the internet between a consumer residing in one Member State and the trader having his place of business in another, would be a cross-border contract. So far, so good.

Matters become more difficult where the consumer travels to a country where he does not reside and makes a purchase there. The two most common situations would be (1) a consumer who lives in a border region and goes shopping in the neighboring country and (2) a consumer who is on holiday in another Member State and purchases something there. Both situations have a cross-border element in the sense that the consumer is from one country and the trader from another; yet, both consumer and trader will be present in the same Member State when the transaction occurs—so should these be regarded as cross-border transactions or national transactions? The answer may lie in considering what consumers would reasonably expect in those circumstances. If a consumer made a purchase when visiting another country, would he expect his national law to apply, that of the other country, or some overarching European measure? In the absence of a European cross-border-only measure, it might be reasonable to assume that the consumer would expect the law of the other country to apply, but if such a measure existed, then the consumer could reasonably expect for this to govern the transaction. But even if these situations were treated as cross-border transactions, there would still be a practical difficulty. The consumer will know that he is in another country, but the trader might not be able to identify that this is so and consequently assume that he is conducting the transaction on the basis of his national law. It would be necessary to create some sort of disclosure mechanism to make both trader and consumer aware that the transaction would fall under the cross-border-only measure rather than under national law. Alternatively, one could adopt the more straightforward view that face-to-face transactions are conducted on the basis of the law of the Member State where they take place. Admittedly, some might then raise the consumer confidence argument, but Professor Goode's famous response surely holds:

> 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

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> 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. (Goode 2004)

At this juncture, one might be tempted to throw up one's hands and concede that harmonization may be the better strategy after all, because at least then, one does not have to worry about where to draw this line. And it if national laws were (fully) harmonized, there would be few substantive differences between the various national laws. However, the response surely has to be that the volume of cross-border face-to-face transaction, while not insignificant, will be considerably lower than purely domestic transactions (and possibly also distance/on-line cross-border transactions). Consequently, this category of transaction should not determine the entirety of EU consumer law—otherwise, the tail would end up wagging the dog! As argued above, the impact of harmonization generally is such that it does not improve the legal framework for consumer transactions; therefore, a cross-border-only measure is more appropriate, if only to ensure that at the domestic level, a framework more suited to domestic needs can be maintained.

Towards a European Consumer Transactions Regulation

The picture of EU Consumer Law developed in this paper is essentially that of a "European Consumer Transactions Regulation" (hereinafter EUCTR) applicable to cross-border transactions, with national laws free to regulate domestic transactions as appropriate.

Although this twin-track approach to consumer law has some risks, they seem manageable. Perhaps, the greatest risk is that consumers may be confused about the true level of protection they would enjoy under this scheme—indeed, this was the objection on the basis of which the Commission rejected this approach. The model envisaged here is that national law would govern the vast majority of the transactions they enter into, but whenever they enter into a contract which would fall in the category of "cross-border" (however this is defined—see above), the EUCTR would apply. Of course, it is conceivable that a particular national law might be more favorable to consumers—or perceived as being so—than the EUCTR, which might deter consumers from shopping abroad (Rutgers and Sefton-Green 2008, p. 437). To some extent, there appears to be a natural bias towards one's own national law, i.e., consumers tend to think that their national consumer law regime is better than that of any other jurisdiction (Smits 2010). It might be suggested that full harmonization could overcome this, because then consumers could simply be told that the law is the same irrespective of which national law applies. But this would only be successful if consumers trusted such attempts at reassurance, and it seems reasonable to assume that there would be some lingering doubt among consumers—after all, how can they be sure that the law really is more or less the same everywhere when they do not know—nor often can discover—what particular national laws provide?

The advantage of the EUCTR would be that one single measure would apply throughout the EU, and while this might give a different level of protection, at least it would be easier for a consumer to identify what that level of protection might be. The EUCTR would be available in all the official EU languages, and a consumer could discover this in his own language. Admittedly, concerns over variations in the level of protection under national law and EUCTR, respectively, may remain, but it is submitted that the EUCTR would provide greater transparency.

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A further problem is that consumers might be confused about the circumstances when the EUCTR would apply rather than to national law. One concern here is that consumers might unwittingly conclude a contract governed by the EUCTR rather than the consumer's national law. If a dispute arises and the EUCTR provided lower protection than the relevant national law with regard to the particular issue, then this would undoubtedly be detrimental to consumers. However, appropriate rules could be put into place to minimize the likelihood of this becoming a significant practical difficulty. For example, a trader could be obliged to disclose to the consumer that a contract is governed by the EUCTR and that this might provide a lower degree of protection than national law. A consumer concerned about this could seek further information from appropriate advice sources.

Legal Basis

As far as the appropriate legal basis is concerned, the obvious candidates are Article 114 TFEU and Article 169(2)(b) TFEU. It needs to be borne in mind that Article 114 TFEU (Article 95 EC) is not limited to cross-border circumstances, i.e., legislation need not be limited to situations dealing with the free movement between Member States.[21] Legislation adopted on the basis of this article, therefore, does not have to be limited to cross-border circumstances, nor is the application of such legislation to be so limited. In the *Rechnungshof* case (C-465/00), 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). But this does not mean that measures adopted on the basis of Article 114 TFEU could not be limited to cross-border circumstances (para. 43 of the judgment). Whether such a limitation is appropriate would surely depend on the overall objective pursued by a measure, with the principles of subsidiarity and proportionality imposing their limits on the scope of Article 114 TFEU. However, Article 114 TFEU is concerned with the approximation of national law and would, therefore, not be a suitable basis for a regulation dealing with cross-border issues only as developed in this paper. This is because national consumer laws would remain unaffected by such a measure.

Article 169(2)(b) TFEU can be used for measures which support the activities of the Member States in the field of consumer protection and could, therefore, be an appropriate basis for the EUCTR. This would have the added benefit that the primary focus of the measure could be on consumer protection rather than internal market considerations. It is, therefore, suggested the Article 169(2)(b) TFEU should be the legal basis for the EUCTR.[22]

The Substance of the EUCTR

This paper has concentrated on developing the case for a cross-border only regulation as the appropriate model for EU Consumer Law. Nothing has been said about what the substance of

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

[22] 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 EUCTR proposed here would only be of cross-border application. Contrast Reich (2005).

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this regulation might be. Space precludes a detailed discussion, and this is a matter for another paper. Nevertheless, a few brief observations are necessary here.

The EUCTR would undoubtedly deal with those issues already covered in the existing *acquis*—there is no point in undoing what has already been achieved. But it could go much further and contain more detailed provisions on matters not presently regulated in the *acquis*, such as questions of contract formation as well as remedies such as damages. The Unfair Commercial Practices Directive (UCPD; Directive 2005/29/EC) introduced a detailed framework for controlling the behavior of traders, but it does not provide for individual redress for consumers. As well as incorporating UCPD provisions, private remedies for consumers could be included.

An obvious source for more detailed provision would be the (Draft) Common Frame of Reference (von Bar et al. 2009), which has been developed alongside the *acquis* review. Although both projects were linked at one stage, they are now very much separate ideas. Nevertheless, the DCFR does contain a set of ready-made rules, including consumer-specific rules that could form the basis of a EUCTR. It is, however, not the intention of this paper to argue in favor of utilizing the DCFR for this purpose, nor to argue against it. The EUCTR should contain rules which would work best in the cross-border context and would be suitable for application by consumers and traders alike with the necessary ease. Discussions about what might happen with the DCFR could provide a useful context for deliberations on the EUCTR, but this should not invariably lead to a EUCTR based on the DCFR.

Private International Law Issues

Moreover, to the extent that the EUCTR does not address certain issues, a national law would be required to step in as a gap-filler so national law would not be entirely irrelevant in the cross-border context. However, the EUCTR should contain provisions that deal with as many matters affecting consumers as possible to minimize the need for recourse to national law. This would correspond with the approach adopted in other areas of law dealing with transnational aspects; for example, the CISG addresses the bulk of the buyer's and seller's respective duties and remedies, with other matters left to national law.

It would, however, be necessary to modify the current rules of Private International Law, notably those enshrined in the Rome I Regulation on the law applicable to contractual obligations (593/2008/EC). To the extent that the EUCTR would apply, the Rome I Regulation should not engage a particular national law, although for issues not covered by it, it should clearly identify which national law would apply. Article 6 of the Rome I Regulation could be utilized to that extent. A further modification to the Rome I Regulation would then be necessary to prevent the application of mandatory rules of the underlying national law in the areas within the scope of the EUCTR. Indeed, concerns have been expressed that national mandatory rules could be displaced by a cross-border measure (Muir-Watt and Sefton-Green 2010). It is assumed here that the EUCTR provisions would apply in preference to national mandatory rules within the EUCTR's scope, but this would mean that the aim should be for a high level of consumer protection to minimize the number of instances where national mandatory rules are more favorable to consumers.

Optional or Automatic Application?

A further issue regarding the EUCTR is whether it should be an optional measure, which parties could use instead of the relevant national law if they so wished, or whether it should be applied automatically. In the latter case, all cross-border transactions within the scope of

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the EUCTR would automatically be subject to it, with no possibility to modify its rules or opt-out altogether in favor of a national law. As an optional measure, EUCTR could apply by default, although the parties could agree to opt-out. Alternatively, the EUCTR could be an "opt-in" model.

The idea of an opt-in EUCTR is not dissimilar to the "Blue Button" optional instrument developed by Professor Schulte-Nölke in the context of the DCFR project (Schulte-Nölke 2007, pp. 348–9). This model is based on an on-line seller ("e-shop") which would give the trader the opportunity to offer to make a transaction subject to an EU optional instrument on consumer law instead of a national law. Traders who would not wish to have the sale made subject to the consumer's national law could make use of this alternative.

Although the EUCTR could similarly be merely optional, it would follow from the arguments above that the cross-border sphere is properly within the jurisdiction of the EU, that once a transaction takes on a cross-border nature, it should be subject to EU Law on an automatic basis without the possibility to opt-out, i.e., it should not merely be an alternative to national law. This would have to be justified on the basis of the proportionality principle, but if the application of the subsidiarity principle determines that the EU level is best placed to regulate cross-border transactions, then an EUCTR which is more than optional does not seem disproportionate. It would also establish a clear demarcation line between the national and EU sphere of responsibility.

Enforcement

Finally, thought would need to be given how the EUCTR could be enforced, i.e., which courts would have jurisdiction to hear claims. The current multilevel structure of the EU leaves the application of most of its rules to the national courts. In the context of the EUCTR, this would create fresh divergences as soon as the regulation entered into force, as national courts are likely to take different views on the application of the EUCTR. Relying on the Article 267 TFEU reference procedure is unrealistic, as national courts are notoriously reluctant to utilize this. In the absence of a separate court system for consumer disputes, or cross-border disputes generally, some other mechanism might have to be devised. One possible system could be a network of consumer arbitration centers applying the regulation, with a central advisory body. Such a system could even be provided online. This could be combined with the possibility of appealing to a special chamber of the European Court. Article 257 TFEU enables the creation of specialized courts attached to the General Court (formerly the Court of First Instance) for certain classes of action or proceedings. 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 (Rott 2005), but such a development would certainly support the new approach to EU consumer law advocated in this paper.

Final Observations

Before concluding, a few final observations are appropriate. It is acknowledged that the harmonization approach to EU Consumer Law has resulted in the lifting of standards of protection in many Member States in some areas, and it has also ensured that consumer protection is of general concern. Indeed, Article 12 TFEU confirms the significance of consumer protection for other Union policies. Abandoning the harmonization approach would mean that as far as domestic transactions are concerned, variations between Member

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States could be recreated. There are a number of ways of reducing the likelihood of this. Obviously, existing minimum harmonization measures could be maintained; indeed, the proposed Consumer Rights Directive could be utilized—as a minimum harmonization measure—to meet current concerns over incoherence within the *acquis*. Variations above the minimum level would not be of concern for cross-border transactions because the EUCTR would apply.

At the European level, consumer law is firmly wedded to the operation of the internal market. The primary concern therefore is market integration. However, at the national level, consumer law is an element of social policy, and even at the EU level, there is a social policy aspect to the creation of EU consumer legislation. This might lead to concerns that a cross-border-only approach could undermine the social policy objective of improving consumer protection across the EU. That need not be the case. To the extent that further action is necessary, other policy tools developed at the European level could be utilized, such as the "Open Method of Co-ordination" (van Gerven 2006). Instead of adopting directives or regulations, Member States would determine broad objectives, with each Member State free to take appropriate action in response. The Commission would coordinate activities and monitor progress towards the agreed objectives. This approach has the advantage of giving greater leeway to the Member States for taking action and also facilitates experimentation and the development of different approaches for attaining the same objective.

Finally, developing a successful cross-border-only measure could have global implications. The challenge of dealing with international consumer transaction is one that is not confined to the EU, or other trading blocks, but ultimately of global significance. If the EU were to create a cross-border-only regulation, then this could become a model for a global legal framework for consumer transactions (Twigg-Flesner and Micklitz 2010). There is a growing recognition of the need to take action towards a global consumer law framework (Reich 2008/9), and initial steps towards laying the foundations have been taken (Del Duca et al. 2008/9). Investing more effort into this could ensure that the EU maintains its leading role in the field of consumer law.

Conclusions

The overall message of his paper is that the process of harmonizing national laws by directive has come to the end of its useful life and should be consigned to the scrap heap. If the EU is serious about reforming consumer law, then harmonization of whatever degree by directive should be abandoned. If the intention is to adopt a uniform consumer law framework for the EU, then the appropriate legal measure is a regulation, not a directive. And if the limitations on the EU's competence to act are taken seriously, then a regulation dealing with cross-border transactions only should be the focus of the EU's activities. There would then be a need to distinguish cross-border from domestic transactions. For online and distance sales, this seems relatively straightforward, although greater difficulty for distinguishing between the two spheres would be caused by treating some face-to-face transactions as cross-border transactions, e.g., where trader's place of business and the consumer's residence are in different Member States. This is perhaps the greatest challenge and main point of objection to the approach advocated in this paper, but it is anything but an insurmountable hurdle.

The real question is whether there will be enough courage to go back to the drawing board and develop a whole new approach to EU Consumer Law along the lines developed

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in this paper. Unfortunately, the perceived challenges posed by the existence of parallel regimes for domestic and cross-border transactions, respectively, such as the risk of confusion and speculative increases in costs to business, have prevailed in steering current thinking at the European level away from this model. It is regrettable that the Commission did not consider the case for a cross-border-only measure more seriously. As the discussion above has sought to demonstrate, a cross-border-only measure would better suit the objective of encouraging greater use of the internal market. But perhaps all is not lost. Even if the change of direction in the context of the proposed Consumer Rights Directive is only a minor one, there is still the wider European Contract Law project. When the European Commission launched its wider action in the field of Contract Law, it raised the possibility that there might one day be an Optional Instrument (sometimes referred to as "28th regime") on Contract Law. Although there are no firm plans for this at present (and, indeed, the fate of the Common Frame of Reference has yet to be settled), a variation on this idea for consumer contracts has taken hold: the so-called Blue Button regulation (Schulte-Nölke 2007). Although the view expressed in this paper is that the EUCTR should not be regarded simply as a practical application of the (D)CFR, a debate about a "Blue Button" instrument by the European institutions would offer a fresh opportunity to reflect on whether an alternative approach to harmonization would be preferable and how this could be achieved in practice. This paper has attempted to make the case in favor of a better alternative. Time to do the job properly!

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