The Consumer Rights Directive

Improved as a cross-border-only Regulation and toward a European Consumer Code influenced by the Common Frame of Reference?

Master’s thesis in Commercial and Tax Law (European Consumer Contract Law)

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The proposal of the European Commission for a Consumer Rights Directive in 2008 marked the culmination of the review of the acquis communautaire in the area of consumer contract law within the EU, launched in 2003 with the Action Plan for European Contract Law. Even though it was not initially restricted to consumer contract law, but concerned the contract law as a whole and targeted toward achieving a more coherent regulatory framework without making a sharp distinction between B2B and B2C transactions, the final version of the Consumer Rights Directive has the specific aim of creating a real business-to-consumer Internal Market. This is to be achieved through the merging of a number of Directives in the area of consumer contract law into a single horizontal instrument that regulates common aspects in a systematic fashion through maximum harmonization, and will result in simplification and completion of the existing regulatory framework. The three main reasons as to why the Commission want to intervene in the consumer contract law of the Member States is, in other words, that differences in national legislation hinder the development of the Internal Market, that maximum harmonization would put an end to the legal fragmentation in the area of consumer contract law and that the EU is in need of a higher level of consumer protection.

These three arguments put forward by the Commission as to why the European legislator should be active in the area of consumer contract law are, however, not motivating such far reaching interventions in the national legislation of the Member States and does not manage to find equilibrium between the competitiveness of businesses and the protection of consumers. Rather on the contrary, maximum harmonization does not seem to put an end to legal fragmentation at the same time as it is hard to reconcile with consumer protection. Legal fragmentation is, furthermore, far from the main reason as to why domestic trade has increased more than international trade within the EU during the past years.

In the Green Paper on the Review on the Consumer Acquis, the Commission presented two options for the scope of the Consumer Rights Directive of interest for this Master's thesis. The first was a horizontal instrument of maximum harmonization applicable to both national and international consumer transactions within the EU and the second a horizontal instrument limited to cross-border contracts. Whereas the first option was the one finally chosen for the Consumer Rights Directive, it seems as if the Commission neither considered the second option nor the alternative of applying a Regulation instead of a Directive in depth. The in-
instrumental measure of a cross-border-only Regulation is more in line with the with the proper interpretation of the constitutional framework that is the European Treaties, and would have contributed to a general improvement of the Consumer Rights Directive when it comes to the effectiveness of reaching the overall objective. The main reasons for this are that it is effective straight away, only affects them wishing to participate in the Internal Market and thereby take into consideration the different national preferences of the Member States at the same time as it is considerably less costly. Parallel legal regimes therefore seem to be even more in line with the objective of simplification of the regulatory framework of the EU than a Consumer Rights Directive of maximum harmonization. The problems associated to the definition of a cross-border-only Regulation can, together with the private international law issues, be solved through the use of Transnational Commercial Law and the Rome-I Regulation.

The instrumental measure formally adopted by the Member States on the 10th of October 2011 was, however, a horizontal Consumer Rights Directive of maximum harmonization which is to be transposed into the national consumer contract laws by the 13th of December 2013 and applied in all Member States no later than the 13th of June 2014. The specific aim of creating a business-to-consumer Internal Market along with the narrow personal and broad substantive scope make it well suited for the plausible development of that it is heading toward a European Consumer Code. This is especially so if it is allowed to get influenced by the Common Frame of Reference, which contain all characteristics of a European Civil Code and therefore has a great potential of contributing in making European contract law more coherent overall and bridge the sharp distinction between B2B and B2C transactions. Since the Commission has not made its intentions clear in this matter, it is for the future to reveal whether this will become reality.
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Abbreviations

APE – Action Plan for European Contract Law
B2B – Business-to-business
B2C – Business-to-consumer
CFR – Common Frame of Reference
CRD – Consumer Rights Directive
CUE – United Nations Convention on the Use of Electronic Communications in International Contracts
EU – European Union
GC – General Court
GPP – Green Paper on Policy Options towards a European Contract Law for Consumers and Businesses
GPR – Green Paper on the Review on the Consumer Acquis
Rome-I – Rome-I Regulation
TCL – Transnational Commercial Law
TEU – Treaty on the European Union
TFEU – Treaty on the Functioning of the European Union
The Commission – European Commission
The Council – The Council of the European Union
The Parliament – The European Parliament
I Introduction

1.1 Background

Businesses and consumers of today do no longer confine themselves or their activities within the national borders. The boundaries of the twenty-seven Member States of the European Union (EU) are of less significance in the global economy and, in the light of this increase in cross-border trade, it is often argued that harmonization of the consumer contract law would be beneficial for all parties involved.¹

The four Directives of 85/577/EEC on contracts negotiated away from business premises², 93/13/EEC on unfair terms in consumer contracts³, 97/7/EC on distance contracts⁴ and 1999/44/EC on consumer sales and guarantee⁵ have the common denominator of containing minimum harmonization clauses, giving the Member States the right to maintain or adopt even stricter national consumer protection rules than those laid out in the articles. Since extensive use has been made of this possibility, the regulatory framework of the EU has become fragmented in the area of consumer contract law. This has in turn increased the costs for businesses wishing to trade cross-border as well as resulted in low consumer confidence, affecting the Internal Market negatively.⁶

The proposal of the European Commission (the Commission) for a Consumer Rights Directive⁷ (CRD) in 2008 marked the culmination of the review of the acquis communautaire in the area of consumer contract law within the EU, launched in 2003 with the Action Plan for European Contract Law⁸ (APE). The review was, in other words, not initially restricted to consumer contract law, but concerned the contract law as a whole and targeted toward

achieving a more coherent regulatory framework without making a sharp distinction between business-to-business and business-to-consumer transactions.9 The central instrument announced by the Commission to be applied in this regard was the Common Frame of Reference10 (CFR), but the general European contract law seemingly about to materialize changed radically in 2005 as issues relating to consumers instead became prioritized.11

The first step in the return from contract to consumer law was the Green Paper on the Review on the Consumer Acquis12 (GPR) in 2007.13 From this review it could be concluded that noticeable differences existed between the national consumer contract laws of the Member States, caused by inconsistencies and uncertainties in the acquis communautaire and resulting in regulatory gaps that were being addressed differently throughout the EU.14 In the Green Paper on Policy Options towards a European Contract Law for Consumers and Businesses15 (GPP), the Commission presented several alternatives of how the legal fragmentation could be improved. Without containing a single reference to the CFR it later resulted in the final version of the CRD16, adopted by the Member States in 2011.17

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The objective of the CRD is to simplify and complete the existing regulatory framework in order to achieve an end product of a fully developed business-to-consumer Internal Market. This involves reducing the compliance costs for businesses and increasing the consumer confidence, and is to be achieved by merging the four Directives listed above into a single horizontal instrument that regulates common aspects in a systematic fashion through maximum harmonization. The existing articles are thereby to be simplified and updated, the inconsistencies and uncertainties removed and the regulatory gaps closed.

The main reasons as to why the Commission want to intervene in the consumer contract law of the Member States is, in other words, that differences in national legislation hinder the development of the Internal Market, that maximum harmonization would put an end to the legal fragmentation in the area of consumer contract law and that the EU is in need of a higher level of consumer protection. Stated as important in this quest is also to find equilibrium between the competitiveness of businesses and the protection of consumers, while ensuring respect of the principle of subsidiarity.

The questions to be asked are if the Commission has managed to uphold this balancing act, if the arguments put forward motivate such far reaching interventions in the national legislation of the Member States and if consumer contract law really is an area suited for the instrumental measures chosen. It can be argued that the Commission has failed to consider all possible ways for future EU action within the area of consumer contract law in depth, in particular the alternative of a cross-border-only Regulation combined with the continued issuing of Directives of minimum harmonization which seems to be more in line with the proper interpretation of the constitutional framework that is the European Treaties.

1.2 Purpose and delimitation

This Master’s thesis reviews the CRD, as proposed by the Commission and later adopted by the Member States of the EU, covering a number of Directives in the area of consumer contract law. The purpose is to examine whether the CRD would have been improved as a

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19 Ibid.
20 Ibid.
cross-border-only Regulation, as well as the possibility of that it is heading toward a European Consumer Code influenced by the CFR.

The subject-matter relates, more specifically, to the overall objective of the CRD, to simplify and complete the existing regulatory framework in order to achieve an end product of a fully developed business-to-consumer Internal Market, and if this could have been reached more effectively through a cross-border-only Regulation. The focus is targeted toward the three main arguments put forward by the Commission as to why the European legislator should be active in the area of consumer contract law, more specifically regarding the Internal Market, maximum harmonization and consumer protection. Included is also a brief outline of the possible development of the CRD toward a future European Consumer Code influenced by the CFR. This part is, however, deliberately held short as not least history has shown that the future development within the area of (consumer) contract law is close to impossible to predict. But since a European Consumer Code or, as was the initial purpose of the APE, even a European Contract Code is a plausible development of the CRD it is still deemed to be of interest in this analysis.

Neither the specifics of the CRD nor the CFR will be subject to investigation, since the approach is more general in nature and has its aim directed toward the instrumental measures chosen by the Commission rather than the single articles provided by these regulatory frameworks. Although it may be useful to take notice of these aspects in order to gain a richer understanding of the background against which the Commission has formed its standpoint in the matter, it seems as if it can be left disregarded for the purpose of this Master’s thesis. Space precludes a detailed investigation of other alternatives presented by the Commission, besides the CRD and the cross-border-only Regulation.

1.3 Disposition

The purpose of this Master’s thesis is addressed by first analyzing the legal concept of harmonization within the Internal Market in general, including the legal grounds in this regard, as well as the present situation of consumer contract law, in the second chapter. The CRD is thoroughly analyzed and discussed in the third chapter. This includes the scope and objective, as well as the three main arguments, concerning the Internal Market, maximum harmonization and consumer protection, put forward by the Commission as to why the European legislator should be active in the area of consumer contract law. The instru-
mental measures chosen for the CRD, horizontal rather than a vertical approach and the
use of a Directive instead of a Regulation, are furthermore discussed along with the alterna-
tive of a cross-border-only measure and the plausibility of that a European Consumer Code
influenced by the CFR is about to emerge.
An analysis of the previous chapters, answering the questions raised in the introduction and
taken into consideration the discussions included in the third chapter, is conducted in the
fourth chapter.
A conclusion based on the analysis is finally presented in the fifth chapter.

1.4 Method and material

In the analysis of if the CRD would have been more effective as a cross-border-only Regu-
lation when it comes to reaching its objective of simplifying and completing the existing
regulatory framework in order to achieve an end product of a fully developed business-to-
consumer Internal Market, a problem oriented approach is used in order to identify prob-
lems and propose alternative solutions. The first three chapters are, in line with this, pri-
marily descriptive in nature whereas the fourth and fifth chapters take on more of a norma-
tive approach. The work of gathering information about the consumer contract law in the
EU of today has been governed by a method of jurisprudence.22

The three sources of EU legislation consist of primary, secondary and supplementary law,
together forming the _acquis communautaire_ or body of EU law. The primary law is to a large
extent derived from the founding Treaties, namely the Treaty on the EU23 (TEU) and the
Treaty on the Functioning of the EU24 (TFEU), setting out the distribution of competences
between the EU and the Member States as well as establishing the powers of the European
institutions. The secondary law consists of legal instruments based on the primary law, in-
cluding unilateral acts, conventions and agreements. This Master’s thesis is limited to those
listed in Article 288 of the TFEU, more specifically Regulations and Directives, along with
Transnational Commercial Law (TCL) with the main focus targeted at the CRD. This in-
(CISG) and the United Nations Convention on the Use of Electronic Communications in

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22 Sandgren, Claes, _Rättsvetenskap för uppsatsförfattare_, p. 36-39.
9, 2008.
International Contracts\textsuperscript{26} (CUE) as well as COM-documents. The supplementary law consists of case-law from the Court of Justice, international law and general principles of law.\textsuperscript{27}

\textsuperscript{26} United Nations Convention on the Use of Electronic Communications in International Contracts, November 23, 2005.

2 Harmonization within the Internal Market

The benefits of free trade can hardly be overestimated. It allows for specialization, leading to comparative advantage and finally resulting in economies of scale which maximize consumer welfare and ensure the most efficient use of European resources. The reason for this is that it provides each Member State with the possibility of concentrating its efforts on the areas of production for which it is most suited, given factors such as national resources, climate and workforce. Standing in the way of this properly functioning Internal Market is, however, the fact that it is premised on the utopia of perfect competition. The reality does not offer these conditions, but is instead filled with obstacles such as legal fragmentation. The EU has therefore assigned itself the task of creating an Internal Market with the free movement of goods, persons, services and capital at its core. These provisions were in theory enough to amount to successful regulatory competition among the Member States, but not in practice. The development did not result in the anticipated outcome and actually still has not done so. In fact, there will probably always be a need for legislative harmonization enacted by the institutions of the EU in order for the Internal Market to function properly as well as to protect vital public interests such as consumer protection. Harmonization is, however, a sensitive matter both legally and politically. Decisions about to what extent a single harmonized standard at European level should replace the diverse national laws and at what level this should be set are controversial questions that need to be answered, along with which legal basis to apply.

2.1 Present situation of the consumer contract law

The area of consumer contract law is no different from what is described above, but faces the same issues as other legal areas when it comes to the Internal Market and the four principal freedoms. The present situation is probably best characterized as diverse. The national laws of the Member States alone comprise a total of twenty-seven different regimes, implying that each national legislator has its own competence in drafting consumer contract law rules and that each country has its own national courts to deal with consumer contract cas-

This cannot be described as problematic in so far as these do not interfere with each other, but problems might arise when the contracting parties are from different Member States and several law regimes are applicable to the same contract. In that case the rules of the Rome-I Regulation (Rome-I) are to be relied upon. To protect the rights of the consumer, and according to the principle of the protection of the weaker party, business-to-consumer contracts are governed by the law of the country in which the consumer has his habitual residence. This is unless the parties decide otherwise, but the choice of law may in no circumstances work to the disadvantage of the consumer by depriving him of the possibly more favorable protection afforded by the law of his home country.

### 2.2 Legal grounds

The regulatory framework directly concerning the CRD is the one created by the EU, which only can act in so far as there is a legal basis for it in the TEU and the TFEU. One of the main tasks of the EU is the establishment of an Internal Market, involving a customs union and the prohibition of quantitative restrictions, customs duties and charges having equivalent effect on imports and exports among the Member States. The reach of this concept is broad, affecting all trading rules enacted by Member States and capable of, directly or indirectly as well as actually or potentially, hindering trade within the Internal Market.

It is in the light of this that the EU aims at harmonizing the various national legal systems to the extent required for the proper functioning of the Internal Market. Harmonization in

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40 Case 8/74 *Procureur de Roi vs. Dassonville* [1974] ECR 837.
itself is, in other words, not an end goal but plays a functional role, implying that the competence of the EU in the area of consumer contract law is no more than indirect since it is only allowed to act in so far as the national legislation stands in the way for further development of the Internal Market.

The partial overlapping of uncoordinated national, international and supranational layers, rarely based on the same dogmatic structures, legal principles and sociopolitical understandings, results in vertical and diagonal normative conflicts. The former embodies those situations in which national consumer contract law clashes with the EU law provisions, whereas the latter covers conflicts between national consumer contract law and other legal branches of EU law, such as the four fundamental freedoms. But even though it is obvious that inconsistencies between the Member States in this regard can affect the proper functioning of the Internal Market negatively, it is uncertain in what way these rules can be challenged. This is especially the case since additional grounds or mandatory requirements on which measures restricting trade can be justified were recognized in the case Cassis de Dijon. The meaning of this concept is that measures acting as barriers to trade may be acceptable if they protect a certain interest that the Member State has the right to defend, for example the fairness of consumer transactions and the defense of the consumer. The limited amount of case law available seem to take the view that it is generally difficult to demonstrate any effect on cross-border trade within the EU as a result of legal fragmentation, meaning that articles 34 and 35 of the TFEU cannot be applied on national consumer contract law. Rather on the contrary, it is very plausible that these un-harmonized and domestic rules can be justified on the basis of the earlier mentioned mandatory require-

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ments set out in the case Cassis de Dijon. The CRD is, in line with this and as has been the case for the majority of consumer contract law Directives in the past, instead based upon article 169 of the TFEU which refers to article 114 of the TFEU:

Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, Regulation or administrative action in Member States which have as their object the establishment and functioning of the Internal Market.

The main reason for adopting the CRD is, in other words, the functioning of the Internal Market and not consumer protection. Article 114 of the TFEU does not, however, provide an all-encompassing power to regulate the Internal Market since this is an area in which the competence is shared between the EU and the Member States. It therefore seems as if the consumer-specific provisions in article 169 suggest a less intrusive option than a Directive of maximum harmonization, such as a cross-border-only Regulation.

2.3 The principles of conferral, subsidiarity and proportionality

Even though the Commission only specifically states ensurance of respect of the principle of subsidiarity as important for the CRD, it also needs to comply with the principles of conferral and proportionality.

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The principle of conferral limits action at European level to the competences conferred upon the EU by the Member States in the TEU and the TFEU. The use is more specifically governed by the principles of subsidiarity and proportionality.58

The principle of subsidiarity is intended to determine the allocation of responsibility for action between the European and national levels. The EU shall, according to article 560 of the TFEU, only act “if and 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”. Neither the Internal Market nor consumer protection fall within the exclusive competence of the EU, but are areas of consumer contract law which are shared with the Member States.61 As far as the latter goes the Member States are not unable, or less able than the EU, to adopt appropriate regulatory frameworks.62 In fact, it is argued that the Member States are perfectly capable of regulating the whole area of consumer contract law at domestic level, but precluded to legislate for transactions in other Member States and for cross-border transactions.63 When it comes to the former, the standpoint of the Commission is that the legal fragmentation hinders the development of the Internal Market and that this issue neither can be solved by the Member States individually nor by further implementation of Directives of minimum harmonization.64 Directives of maximum harmonization are, in other words, necessary to eliminate the legal fragmentation according to the Commission, but it fails to explain why the harmonization has to cover both national and cross-border transactions. Instead it settles with simply assuming that the Internal Market would work better if the national consumer contract laws were to be harmonized and does not compare this alternative to a cross-border-only Regulation at all.65 In contrast with this reasoning, but in line with the principle of

subsidiarity, it is argued that the EU should focus more on cross-border issues since it is at that point the Internal Market questions become relevant.\textsuperscript{66} This is also the general view of the National Parliaments, required to ensure that the CRD complies with the principle of subsidiarity,\textsuperscript{67} with five of the six opinions from the chambers concluding that maximum harmonization of certain rights was not in line with this provision.\textsuperscript{68}

The principle of proportionality furthermore requires that the content and form of EU action does “\textit{not exceed what is necessary to achieve the objectives of the Treaties}”\textsuperscript{69}. With this in mind it can be argued that maximum harmonization of the national consumer contract laws of the Member States is both intrusive and disruptive to domestic legal systems.\textsuperscript{70} The rulings of the ECJ on this issue does not, however, preclude this legislative measure, but the competence of the EU would undoubtedly be stronger if it was limited to cross-border issues since this enables more comprehensive legislation.\textsuperscript{71}


\textsuperscript{68} Commission of the European Communities, \textit{Report from the Commission on Subsidiarity and Proportionality, Brussels, October 8, 2010, COM(2010), 547 final.}


3 Consumer Rights Directive

The CRD was formally adopted by the Member States of the EU on the 10th of October 2011 and will replace the four current Directives of 85/577/EEC on contracts negotiated away from business premises, 93/13/EEC on unfair terms in consumer contracts, 97/7/EC on distance contracts and 1999/44/EC on consumer sales and guarantees. The new rules are to be transposed into the national laws by the 13th of December 2013 and applied in all Member States no later than the 13th of June 2014.72

3.1 Scope

The scope of the CRD is wide by covering consumer contracts, meaning all contracts between businesses and consumers concerning either sales or service contracts.73 It more specifically aims to unify the rules governing the business-to-consumer relationship in the fields of definitions (chapter I), consumer information for contracts other than distance or off-premises contracts (chapter II), consumer information and right of withdrawal for distance and off-premises contracts (chapter III), other consumer rights (chapter IV) and general provisions (chapter V).

3.2 Objective

The Commission has, as mentioned in the introduction, used three main arguments in its proposal for a CRD as to why the European legislator should be active in the area of consumer contract law. These regard the Internal Market, maximum harmonization and consumer protection.74

3.2.1 Internal Market

The first argument as to why the Commission wants to intervene in the consumer protection schemes of the Member States of the EU is that differences in national legislation hin-
der the development of the Internal Market.\textsuperscript{75} This reasoning, that diversity of national law constitutes a non-tariff barrier to trade, is often used in favor of a greater degree of harmonization.\textsuperscript{76} The standpoint arise from the simple explanation of that a contracting party within the EU is less likely to be willing to pursue cross-border trade if the transaction is to be governed by the law of another Member State. A harmonized consumer contract law at European level has the appearance of neutrality that the law of a nation lacks, and may therefore reduce, if not eliminate, the potential impasse that might be reached in this regard.\textsuperscript{77} It is, however, important not to claim too much from this, since it is close to impossible to ascertain the extent to which legal fragmentation among the Member States actually hinder cross-border trade within the Internal Market.\textsuperscript{78} In fact, according to some Member States, especially the United Kingdom, the coexistence of different national consumer contract laws does not in itself necessarily stand in the way for the proper functioning of the Internal Market.\textsuperscript{79}

According to the Commission, however, legal diversity does in fact have a negative effect on cross-border trade by creating "significant Internal Market barriers affecting business and consumers."\textsuperscript{80} European transactions are, furthermore, argued to be more costly than domestic purchases, resulting result in that parties are not contracting abroad at all.\textsuperscript{81} But even though this might be true, the Commission fails to present any empirical evidence of that maximum harmonization is the most effective solution to the problem. It is argued that the standpoint of the Commission in this matter neither is based on serious scientific research nor providing a complete and balanced picture of the reality.\textsuperscript{82} An example of this is the statement that harmonized conditions for competition will lead to a "significant increase in

cross-border trade.** Whereas a level playing field will lead to uniform prices, the costs of shipping the purchased goods will still be significantly lower for national businesses than those of another Member State. Whether the final price, possibly as a result of other factors such as economies of scale, will be significantly higher or lower and affect cross-border trade correspondingly is therefore hard to predict. It is, rather on the contrary, argued to be highly unlikely that differences in consumer contract law is the main reason as to why domestic trade has increased more than international trade within the EU during the past years. From a psychological perspective, it is even questioned if harmonization, minimum or maximum, of consumer contract law is at all relevant to the amount of businesses and consumers participating in cross-border trade. The combination of factors such as language and culture, along with differences in e.g. tax law, is far more important when studying a fairly recent business survey, conducted amongst 175 firms based in eight Member States of the EU (see appendix). To this list can also factors such as currency, geographical distance, logistical problems and differences in technical standards, as well as different national customs and preferences and the fear of not being able to enforce contractual claims, be added.

### 3.2.2 Maximum harmonization

The second argument as to why the European Commission want to intervene in the consumer protection schemes of the Member States of the EU is that maximum harmonization will put an end to legal fragmentation in the area of consumer contract law. This reasoning is based upon the fact that legislative intervention of the EU in the area of consumer contract law usually has been shaped in the form of Directives of minimum harmonization, allowing each Member State to establish higher standards of protection as well as to

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83 Ibid.
84 Ibid.
make adjustments to the national context in the process of implementation. The unavoidable consequence of this is that differences arise between the various national laws transposing the Directives, meaning that it is necessary to determine which Member State’s regulatory framework applies for each and every cross-border transaction conducted.\textsuperscript{91} Many issues have also been left open or regulated inconsistently among the Directives and thus reinforced the legal fragmentation even further.\textsuperscript{92} Differences in the level of consumer protection among the Member States are, however, often based on deliberate and democratically made domestic choices within the multi-layered, multi-cultural and multi-language union of almost 500 million inhabitants that is the EU.\textsuperscript{93} The existing differences in consumer contract law between the Member States can therefore be seen as a reflection of different national preferences, which maximum harmonization to a greater extent than minimum harmonization set aside.\textsuperscript{94}

According to the Commission, however, legal fragmentation is nothing else than unnecessary transaction costs hindering trade opportunities.\textsuperscript{95} This is also a reason often cited by businesses as to why they do not pursue cross-border trade and even turn down opportunities to sell to consumers in other Member States. Thirty-three percent of all consumers participating in a fairly recent Eurobarometer\textsuperscript{96} reported that businesses have been refusing to deliver goods or services simply because they were not habitual residents of the same country.\textsuperscript{97} Fifty-five percent of the businesses expressing interest in cross-border trade considered the extra costs of compliance with different national legislations to be at least fairly

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important, and forty-three percent of all businesses thought that harmonization of consumer protection laws would have a positive effect on their cross-border activities.\textsuperscript{98}

It is, however, argued that the fact that the choice of maximum harmonization is a political decision, in which national governments reach a compromise and give up their national preferences, is neglected in this investigative material.\textsuperscript{99} Since these vary throughout the EU, some Member States will have to increase their levels of consumer protection whereas others actually will be forced to lower their standards.\textsuperscript{100} Eliminating the legal fragmentation may, in other words, result in a setback of consumer protection, at the same time as the different consumer cultures would not be taken into consideration at all.\textsuperscript{101} Furthermore, the elimination of legal fragmentation also eliminates the salient points for regulatory competition and thereby stifies cross-border competition on points of harmonized consumer protection.\textsuperscript{102}

\subsection{3.2.2.1 Costs and half harmonization}

Even though the CRD seems to reflect an economic analysis of the functioning of the Internal Market and the obstacles created by the four Directives of minimum harmonization, it in fact does not. Excluded from the Commission’s proposal, leading up to the choice of maximum over minimum harmonization, is the considerable costs that will result from the implementation of the CRD and faced by the Member States.\textsuperscript{103} This has not least to do with the fact that the area in which the efforts take place is consumer contract law, a subject dealt with under general contract law in many national legal systems.\textsuperscript{104} The CRD will, even though it is the end product of a sharp distinction between business and consumer transactions made by the Commission, in other words have an impact on not only the na-

\textsuperscript{100} Ibid.
tional consumer contract law of the Member States. In order to maintain the overall coherence of national contract law, and making sure that businesses do not suddenly receive better protection than consumers, also commercial contracting will be affected. More specifically requiring attention from the Member States is, firstly, the case law that is needed to be scrutinized and adapted on a large scale. Secondly, lawyers throughout the EU would have to undergo re-training in order to become familiar with the new regulatory framework and, thirdly, the national courts of the Member States would frequently have to refer questions on the interpretation of this to the European courts in order to assure a unified application of the rules and concepts therein. Wilhelmsson refers to this as a “legal mess” in the national contract law of the Member States, which actually might lead to even further legal fragmentation overall since it is optional in what way to solve this predicament as well as whether or not to solve it at all. If the latter alternative is applied, the level of harmonization provided by the CRD might be decreased from maximum to half. The reason for this is that, even though it might be the case from a European perspective, maximum harmonization from a national perspective of the user of these provisions might not lead to less leeway for the Member States and thereby to a greater amount of uniformity within the EU. This is so since the CRD is to be implemented in the national legal systems of each Member State, which in fact is the law that consumers and businesses have to deal with on a daily basis. Consumer contract law is, no matter the extent of harmonization at EU-level, only a small part of this. As the Member States are allowed to maintain the rules that have a different legal basis than the CRD but deal with similar issues, the national legislators and courts can use these to circumvent the maximum harmonization which thereby is transformed into no more than a relative concept.

The CRD can be perceived as a Directive of half harmonization also for other reasons, not least as a result of that it entail maximum harmonization only in regard to certain aspects of the contracting process and leave national laws on general issues of consumer contract law unaffected. An example of this is that it does not aspire to harmonize the remedial aspects of consumer contract law, which is argued to be a less than comprehensive effort given the fact that these are closely linked and in some instances even unidentifiably merged into a single legal concept in the field of private law. As the CRD for obvious reasons only can regulate what is within its scope, and since this is fairly limited, the consumer contract law will continue to differ among the Member States. The need for identifying the national law governing a specific contract, increasing compliance costs for businesses and decreasing consumer confidence, may therefore be diminished as a result of the CRD but not completely removed.

3.2.2.2 Consumer confidence and legal uncertainty

The CRD will, according to the Commission, lead to an increase in consumer confidence. The reason for this is that consumers currently are deterred from engaging in cross-border trade since the national differences in consumer contract law of today makes them insufficiently confident in the protection they receive when acquiring goods or services from another Member State. The effect of a Directive of maximum harmonization in this regard is, however, even more challenging than calculating the costs of maximum harmonization and, as mentioned in part 3.2.1, other factors might be of greater importance. Legal uncertainty, resulting in lack of consumer confidence as well as affecting the willingness of businesses to engage in cross-border trade, occur when the contracting parties are uncertain of the effects of the provisions of the regulatory framework governing the transactions on the results of their actions. The concept can be divided into the two...
parts of subjective and objective legal uncertainty,\textsuperscript{116} with the latter describing an objective reality not accepted to an equal extent by everyone involved. This part is not of concern for the CRD and therefore not of interest for this Master’s thesis, but the former certainly is. The root of subjective legal uncertainty is the individual assessment of marginal costs and marginal utility. Simply put the term can be referred to as the personal knowledge that each contracting party, business or consumer, has about the regulatory framework governing the transaction. The increase in marginal costs for acquiring information is directly linked to the decrease in marginal utility of additional legal knowledge, resulting in that businesses and consumers only will engage in this search until equilibrium has been reached between these two antitheses. Ignorance beyond this point will, of course, always exist and decisions thereby continue to be taken regardless of the subjective legal uncertainty,\textsuperscript{117} but it is argued that the EU has the potential of considerably improving this situation without the help of a CRD of maximum harmonization.\textsuperscript{118} A solution that goes hand in hand with the economical aspects of improvements in this regard is that the EU instead focuses on educating the consumers on the rights already in place at both national and European level.\textsuperscript{119} The so-called “assurance effect” of legislation should in no way be underestimated, but the use of the concept is argued to be underdeveloped as a result of that the marketing of European protection is poorly executed overall and nowhere to be found in the policy documents of the Commission.\textsuperscript{120} Enhancing consumer confidence is about changing attitudes and perceptions, and in this regard the introduction of maximum harmonization may well prove to be ineffective as a result of that it is insufficiently recognized by both consumers and businesses.\textsuperscript{121} Moreover, the choice between maximum and minimum harmonization in this regard might not be as obvious as argued by the Commission. From the viewpoint of the consumer, the use of maximum harmonization only reaches its full potential of providing the same level of protection throughout the EU if this is high enough. Otherwise consum-


\textsuperscript{119} Ibid.


\textsuperscript{121} Ibid.
ers from a Member State with traditionally high levels, such as Sweden, are more likely to lose their confidence in the Internal Market.  

### 3.2.3 Consumer protection

The third argument as to why the Commission wants to intervene in the consumer protection schemes of the Member States in the EU is that it wants to introduce a higher level of consumer protection. Since consumer contract law no longer is derived solely from national sources, but also from regulatory frameworks at European and international level, the question of which the optimal level of consumer protection is and at what geographical level this should be regulated has arise. The Commission answered this by shaping the CRD as a Directive of maximum harmonization, and thereby opted for a one-size-fit-all type of approach. It can, however, be questioned if such a single and ideal level of consumer protection really exist when the different national circumstances, priorities and preferences are being taken into consideration.

Since businesses and consumers are equally important in cross-border trade, it is necessary to protect the last only insofar as it would not restrict the economic activity of the first. The objective of the EU in this regard is therefore to enhance the competitiveness of Europe by attaining a text that is well-balanced for both sides and constitutes a reasonable level of consumer protection. But since consumers not only represent the largest economic group by pivoting all economic activities, but also the most unaware and voiceless group, it is argued that they deserve special attention. This is, however, a standpoint which not necessarily is shared by the Commission, as the CRD prioritize the functioning of the Internal Market over a high level of consumer protection. The end result of maximum harmonization in this regard is that some Member States will have to increase their

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levels of consumer protection, whereas others actually will be forced to decrease their standards. In fact, it can even be questioned if the EU will experience an overall increase or decrease of the standards through this development, which might be in contrast with not only the principles of conferral, subsidiarity and proportionality, as earlier mentioned in part 2.3, but also the overall preference of the Member States for a mixed and flexible harmonization, as expressed in the European Council (the Council).

The CRD is, as earlier mentioned in part 2.2, based upon Article 114 of the TFEU, mandating a high level of consumer protection. Exactly how high this level has to be in order to meet this requirement is unclear, but it is argued that it at least has to exceed the existing minimum in the EU of today. The fact that the legal fragmentation resulting from minimum harmonization has caused concern enough for the Commission to propose a shift towards maximum harmonization is evidence of that many Member States are unsatisfied with the level of protection provided by the current acquis communautaire. It therefore also ought to be the intention of the Commission that the CRD at least would contribute to a general raising of the level of consumer protection across the EU, but this is far from necessarily the case. Not to forget in this context is the Member States that value consumer protection to a lower, and thereby freedom of contract to a higher, degree and will be affected to the same extent as the Member States forced to decrease their consumer protection, for what is conceived as the greater good of the Internal Market.

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133 Ibid.

134 Ibid.


136 Ibid.


3.2.4 Discussion

The personal opinion of the author of this Master’s thesis in this matter is that, even though legal fragmentation among the Member States of the EU to some extent hinders cross-border trade within the Internal Market, a one-size-fit-all type of approach not necessarily suit all of Europe’s businesses and consumers. Since it is unlikely that maximum harmonization will put an end to legal fragmentation, as argued by the Commission, it seems as if this legislative measure goes too far in disregarding the different national preferences and impose unnecessary costs of implementation. Other factors are, furthermore, deemed to be far more important in solving the problem of subjective legal uncertainty; not least education is a considerably more effective solution when it comes to improving consumer confidence.

The fact that maximum harmonization is hard to reconcile with consumer protection is, furthermore, evidence of that the optimal level of the latter is nothing else than a political decision, not suited for being taken by the Commission through the legislative instrument of the former.138 Minimum harmonization is instead more suitable in this regard, as this legislative measure provides the consumers with at least the protection offered by the Directive in question rather than requiring some Member States to increase their levels of consumer protection whereas other actually will be forced to lower their standards.139

3.3 The alternative of a cross-border-only measure

In the GPR the Commission presented three alternatives for the scope of the CRD. The first was a horizontal instrument of maximum harmonization applicable to both national and international consumer transactions within the EU, and the one finally chosen for the CRD. The remaining two were a horizontal instrument limited to cross-border contracts, as well as a horizontal instrument limited to distance-shopping.140 The third option, in other words, contained the disadvantage of that different conditions would apply to distance and

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face-to-face transactions for both domestic and cross-border contracts, and is disregarded in this Master’s thesis.

The main problems associated with the second option was the need of constructing a suitable definition of what constitutes a cross-border transaction, as well as that this approach would lead to legal fragmentation as a result of the parallel legal regimes.\footnote{141} According to the Commission, a CRD applicable to both domestic and cross-border contracts is more in line with the overall objective of simplification of the regulatory framework of the EU.\footnote{142} But even though this might be true, it is argued that equally strong reasons exist in favor of a cross-border-only measure.\footnote{143}

The first two of the three main arguments used by the Commission in favor of a CRD applicable to both national and international consumer transactions within the EU concerned the Internal Market and maximum harmonization. The Commission justified the latter by arguing that that legal fragmentation hinders the proper functioning of the former, and that a coherent regulatory framework is needed in order to increase cross-border trade.\footnote{144} Regardless of to what extent legal fragmentation in fact does act as a barrier to cross-border trade, the differences in national legislation does not pose an obstacle for the vast majority of consumer transactions. The reason for this is that these remain not only domestic, but local, and therefore does not invoke a cross-border element. To include these in the change of the regulatory framework, in the interest of encouraging what is still a comparatively small proportion of the transactions conducted within the EU, might have a negative effect on the level of consumer protection provided by some Member States. In fact, it is argued that the CRD would not even contribute to a general rising of the level of consumer protection across the EU.\footnote{145} This is not in line with the third argument used by the Commission in favor of a CRD applicable to both national and international consumer transactions within the EU, concerning the introduction of a higher level of consumer protection

amongst the Member States. The focus of the Commission on the Internal Market whilst disregarding the implications for purely domestic transactions is therefore argued to be rather narrow, not least as far as consumer confidence is concerned. The continued harmonization of national consumer contract law by Directives, and the creation of a single regulatory framework applicable to all consumer transactions, might actually cause confusion and uncertainty on a much wider scale. The reason for this that businesses and consumers not interested in cross-border trade would have to adapt to a new regulatory framework without receiving any real benefits. A cross-border-only measure would instead be of use to those wishing to be a part of the Internal Market, whilst reducing the impact on those not interested in cross-border trade.

3.3.1 Definition

The first problem identified by the Commission and a key question that needs to be answered in order for a cross-border-only measure to emerge is what the definition of this concept should be and, thereby, what types of transactions that should be regulated at EU-level. Guidance in this matter can be sought from the field of TCL, and more specifically the CISG which applies to all transactions where the (commercial) contracting parties have their place of business in different (Member) States. This basic criterion, that the element of transnationality is the location of the respective places of business rather than the fact that the goods in question cross national borders, can be analogically transferred to consumer contracts and habitual residence. On that basis it would be easy to separate the purely domestic contracts from those involving cross-border trade, but such a definition still involves a vast range of consumer transactions which are more suited to be regulated by national legislation. Without going into great depth of the various possible scenarios it is argued that it would be least controversial to exclude the consumer contracts concluded face-to-face, leaving those transactions in which the parties are based in different jurisdictions and the transaction is performed at distance. If the CISG approach was to be fully applied, all of these transactions would have been considered as cross-border contracts. This

would, however, not necessarily improve the functioning of the Internal Market, but rather on the contrary interfere with the reasonable expectations of both businesses and consumers. Establishing a regulatory framework that does not distinguish between domestic and cross-border consumer transactions is, furthermore, to assume that these two situations raise the same issues. This is, however, far from always the case. The two examples of either acquiring goods face-to-face in a local store or to perform the same transaction at distance with a business from another Member State are vastly different for both the consumer and the trader, and creates a need for different legislations. This is not least the case as the latter primarily would take place in the on-line environment, raising the question of how to determine where a trader has his place of business and the consumer has his habitual residence in this setting. Once again the answer can be derived from TCL, with the CUE stating that “a party’s place of business is presumed to be the location indicated by that party” and in case a natural person does not have a place of business, “reference is to be made to the person’s habitual residence”. Other factors, such as the location of the technical equipment and the link between the domain name or e-mail address and a particular Member State, is not determinative.

3.3.2 Parallel legal regimes and automatic or optional

The second problem identified by the Commission is that the use of a cross-border-only measure will result in the existence of two parallel regimes with different levels of protection, confusing consumers and thereby deterring them from engaging in cross-border trade. But, as mentioned in part 3.2.2.2, this is a problem which can be solved by appropriate consumer education and only affects them truly wanting to participate in the Internal Market.

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From a business point of view the main concern is faced by on-line traders operating both domestically and cross-border, since these potentially would have to deal with two different types of legislation.\textsuperscript{158} The so-called “blue button” idea addresses this predicament by providing businesses with the opportunity of offering a consumer contract on the basis of EU law regardless of whether the transaction is domestic or cross-border.\textsuperscript{159} This reduces the risk of increased costs and thereby also distortions of competition between businesses trading only domestically and those also trading cross-border.\textsuperscript{160} Firstly in need of consideration is, however, if the CRD as a cross-border-only measure should be automatically applicable to all cross-border consumer transactions within its scope, or if there should be a choice to apply the relevant national law to a consumer contract concluded at EU-level. It is argued that, from a business point of view, the latter would be taken advantage of to such an extent that the choice provided in theory would more or less vanish in practice, whereas the former would provide a clear regulatory framework much earlier in the contracting process and therefore is to prefer from a consumer point of view.\textsuperscript{161} These two solutions does, in other words, not change the fact that the cross-border-only measure will result in two separate regimes, but compliance with such a regulatory framework is at least much less burdensome than the potential observance of twenty-seven different national schemes.\textsuperscript{162}

\section*{3.3.3 Private international law issues}

The CRD as a cross-border-only measure also give rise to a number of private international law issues in need of consideration, the two in particular being how to deal with national mandatory rules of the Member States and which domestic law should be applied to deal with matters left unregulated.\textsuperscript{163} Consumer contract law is often regarded as mandatory


\textsuperscript{162} Ibid.

since it applies irrespective of the specific terms and aspects concluded by the contracting parties, and cannot be displaced.\textsuperscript{164} This is a problem which can be solved by amending the Rome-I in order to provide that the mandatory rules are not applicable within the scope of the cross-border-only measure.\textsuperscript{165} The Rome-I can also to be deployed to identify the domestic law applicable to fill possible gaps in relation to this. It is argued that the concern of that the domestic laws of the Member States will compete with the cross-border-only measure is unlikely to develop into a real problem in practice, since the overall consumer contract law, as far as the key issues are concerned, is not that diverse. The situation would, however, have been different if significantly different levels of consumer protection were to be offered.\textsuperscript{166}

\textbf{3.3.4 Enforcement}

The question of enforcement of the CRD as a cross-border-only measure, in terms of which courts would have jurisdiction to deal with disputes related to cross-border trade, also needs to be answered. To continue with the multi-level structure of the EU of today, leaving the application of the majority of rules related to consumer contract law to the national courts, is argued to result in immediate divergences because of the different views of the Member States. In the absence of separate court systems for consumer and cross-border disputes, another mechanism might have to be put in place. A development in line with this new approach to EU consumer contract law would be a combination of a right to appeal to the General Court (GC) and the creation of specialized courts connected to the GC, as well as a network of consumer arbitration centers. The second could in that case apply to certain classes of proceedings and the third even be provided on-line.\textsuperscript{167}

\textbf{3.3.5 Discussion}

The personal opinion of the author of this Master’s thesis in this matter is that the forcing of businesses and consumers not interested in cross-border trade to familiarize themselves with a new regulatory framework is unnecessary bureaucracy and somewhat contrary to the


wish of creating a simplified regulatory environment. Even though the opportunities for cross-border trade have increased widely as a result of the popularity of on-line shopping, it seems unlikely that this development will significantly displace domestic transactions. To be expected is instead that the vast majority of consumer transactions will continue to be national, with no apparent need to be subject to international harmonization at EU-level.\textsuperscript{168} The alternative of a cross-border-only measure is possible to combine with the continued issuing of Directives of minimum harmonization, providing harmonization for cross-border contracts at the same time as the Member States still are able to create and uphold the regulatory framework most suitable for their domestic transactions.\textsuperscript{169} By applying TCL and the Rome-I, the problems identified by the Commission are far from impossible to overcome and more or less only leave the question of enforcement to be answered. It can therefore be argued that the Commission did not consider the alternative of a cross-border-only measure in depth, especially so since it seems to be more in more in with the proper interpretation of the constitutional framework that is the European Treaties.\textsuperscript{170}

3.4 The choice of a horizontal Directive

The Commission has identified two main strategies for the revision of the acquis communautaire in the area of consumer contract law: a vertical approach consisting of the individual revision of the four Directives in question and a horizontal approach consisting of the adoption of a framework instrument, underpinned by sectoral rules, to regulate common features.\textsuperscript{171} Connected to the choice between these two alternatives is also the decision of applying a Directive or Regulation as instrumental measure.\textsuperscript{172}

3.4.1 Horizontal instead of vertical

The CRD is to be implemented as a coherent horizontal Directive for consumer rights. This approach, rather than reviewing each Directive vertically, will on the one hand pro-

duce a simplified regulatory framework but on the other hand only have a limited potential in achieving this since it need to be transposed into national law. Even though the Member States are not required to copy out the CRD \textit{verbatim} in a single measure, the overall \textit{acquis communautaire} in the area of consumer contract law is, however, argued to become more coherent by utilizing consistent definitions and terminology.\textsuperscript{173}

If a vertical approach instead were to be applied, the four Directives could be amended separately and thereby adapted to market and technological developments. The specifics of each Directive could be addressed specifically, and the gaps and inconsistencies thereby eliminated. The EU would, however, have to deal with the same issues multiple times as a result of the different legislative procedures, as well as make sure that these are transposed consistently by the Member States for each Directive. This is time consuming and does not result in the simplifying effect of the horizontal approach. The amount of legislative acts would, furthermore, not be lowered and the same common concepts continue to be a part of, and regulated in, different Directives.\textsuperscript{174}

\subsection*{3.4.2 Directive instead of Regulation}

Directives are, as mentioned above, only binding for the Member States as to the result to be achieved, no matter the level of harmonization. The CRD as a Directive thereby provide considerable flexibility since the form and method are left to the Member States to decide,\textsuperscript{175} at the same time as it does not necessitate the creation of a single national measure where all consumer contract law are located.\textsuperscript{176} The fact that it will be possible to combine the EU designed guidelines with the adoption of the specific rules adjusted to, and sharing the same terminology as, each national legal system is an advantage according to the Commission. By allowing each Member State to choose the legal technique it considers most appropriate for the implementation of the CRD,\textsuperscript{177} and not even have to transpose it in a


single legislative measure,\textsuperscript{178} the end result will be a "smoother implementation of the Community Law into the existing national contract laws or consumer codes"\textsuperscript{179}.

But even though this might be true, it is also one of the identified reasons for the problems of the current \textit{acquis communautaire} in the area of consumer contract law.\textsuperscript{180} Although national legislation in the past has reached a higher level of harmonization in substance in this way, there are continuing problems of accurate implementation and subsequent interpretation as a result of errors and omissions made in the transposition process.\textsuperscript{181} Furthermore, the broad and rather vague character of provisions endorsed by Directives has been criticized for not being adequate for the harmonization of consumer contract law, which mainly consists of very precise rules.\textsuperscript{182} The fact that certain key issues and the responsibility of precise and coherent definitions are transferred to the Member States is argued to constitute a risk of that the purpose of the Directive is enlarged or restricted and that the very objective of harmonization thereby becomes jeopardized.\textsuperscript{183} The end result would, in other words, still be that of diverse national laws of different language and concepts, giving effect to the CRD, with the consequence of that the law applicable to the contract still needs to be identified in a cross-border transaction.\textsuperscript{184}

A more coherent, predictable and clearer single regulatory framework of consumer contract law could be achieved by the use of a Regulation as instrumental measure. The reason for this is that it provides a more systematic legislation than Directives by not necessitating any implementation, but is effective straight away through provisions that are binding as opposed to mere objectives in need of being materialized in the national legal systems.\textsuperscript{185} One of the reasons as to why the Commission supports the CRD is that it provides improved

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regulation and simplification, which seems to be in contrast with the choice of a Directive as legal instrument. The Commission has itself stated 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”. No empirical evidence has been presented against a Regulation in this regard, but only what is argued to be overall weak arguments in favor of a Directive. When it comes to the legal impossibility as constraining factor, neither article 114 nor article 169 of the TFEU poses any limitations to harmonizing national consumer contract laws though Regulations instead of Directives. The obstacles of political unacceptability is furthermore, from a European perspective, argued to be relatively easy to overcome since the CRD as a Regulation is likely to encourage cross-border trade on a much wider scale. From a national perspective, however, a need might arise to justify why every consumer transaction is to be governed solely by EU-law, rather than in combination with the consumer contract laws of the Member States, at the same time as the possible political benefit derived from the flexibility provided by Directives would be lost.

3.4.3 Discussion

The personal opinion of the author of this Master’s thesis in this matter is that a horizontal approach, rather than reviewing each Directive vertically, is to prefer. The main reason for this is that it is more in line with the overall objective of the CRD to produce a simplified regulatory framework. But since it only has a limited potential in achieving this as a Directive, a Regulation is a more beneficial instrumental measure in this sense. The problem of that the CRD as a Regulation would apply to both domestic and cross-border transactions can be solved through the appliance of a cross-border-only measure, making it both legally possible and politically acceptable.

187 Ibid.
3.5 European Consumer Code

The CRD has, as mentioned in the introduction, the specific aim of creating “a real business-to-consumer Internal Market”\(^{193}\), with the plausibility of that the scope of the CRD will get expanded in the near future so as to include also other Directives in the area of consumer contract law.\(^{192}\) The reason for this is that the instrumental measures chosen, horizontal approach and maximum harmonization,\(^{193}\) together with the narrow personal and broad substantive scope, only affecting the limited group of consumers in relation to the wide range of subjects that are sales and service contracts,\(^{194}\) make it an ideal basis for a future European Consumer Code.\(^{195}\) Such a development would contribute to an increasingly comprehensive regulatory framework and coherent *acquis communautaire* in the area of consumer contract law, as well as making it rational for the Commission to propose a change of the CRD from a Directive to a Regulation. The creation of what can be referred to as a directly effective European Consumer Code, possibly raising concerns regarding both sovereignty and democracy, will in that case become reality.\(^{196}\)

3.5.1 Sharp distinction between B2B and B2C

A European Consumer Code would continue the development of a sharp categorical distinction between business-to-business and business-to-consumer transactions, raising the question if this really is desirable.\(^{197}\) According to the Commission, “appropriate differentiation between business-to-business contracts is paramount” and the European Council emphasize “the need to acknowledge the distinction between business-to-business and business-to-consumer contracts”. Also the European Parliament is in favor of a sharp distinction in this regard, but none of these po-


itical institutions have provided any justifications for their standpoints. Businesses come in all shapes and sizes, and sole traders and small business are in some aspects even more vulnerable than consumers. These types of non-consumers often encounter situations identical to those invoked to validate consumer production, necessitating an extension of the protection prescribed for consumers so as to also include businesses. This requirement is imposed by the principle of equality, and can be met by allowing the European Consumer Code to get influenced by the CFR.

### 3.5.2 Common Frame of Reference

The APE identified, as mentioned in the introduction, problems concerning the functioning of the Internal Market and the uniform application of Directives issued at EU-level in the area of contract law. The main aim was to create a more coherent European contract law, by applying a CFR providing clear definitions of legal terms, fundamental principles and coherent model rules applicable to both B2B and B2C contracts. Even though it seemed likely that the CFR eventually would lead to a European Code of Contracts, it is today evident that no such development took place and that the CFR instead faded out for the benefit of the CRD. The plausibility of that the CRD eventually will lead to a European Consumer Code does not, however, have to be the end for the CFR, whose sole purpose was to serve as a toolbox during the revision of the *acquis communautaire* in the area of contract law. Rather on the contrary it is well suited to take on a similar role for improving the CRD even further, by containing all the characteristics of a European Civil Code.

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Along with being comprehensive, systematic, coherent, static and located at a single level of governance, its academic origin of objectivity also provide it with an aura of neutrality in both cultural and ideological terms. It is therefore argued to have a great potential of contributing in making European contract law more coherent overall, when it comes to the relationship between consumer and commercial contract law as well as in regard to national contract law. The CFR could provide a general background against which the CRD is to be read, which is especially fitting as it is based on comparisons of the national contract laws of the Member States and thereby express a common identity shared by the citizens of the EU. Even though the CFR never will obtain any formal status, it has the potential of bringing the national and European regulatory frameworks closer together by simultaneously playing a role on both of these levels, as well as being used as a source of inspiration for the continuing process of Europeanization of (consumer) contract law.

3.5.3 Discussion

The personal opinion of the author of this Master’s thesis in this matter is that even though it seems plausible that the CRD is heading toward a European Consumer Code or even a European Code of Contracts, not least history has shown that the future development within the area of (consumer) contract law is close to impossible to predict. The CRD is, however, well suited for such a development. This is especially so if it is combined with the CFR, which has the potential of not only making the consumer contract law in the EU more coherent, but the European contract law overall. The Commission has, along with the Council and European Parliament, even referred to the CFR as a standard of “best solutions”, making it hard to believe that neither the proposal of the Commission for a CRD nor the GPR or the GPP contained a single reference to the CFR. If the develop-

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210 Ibid.
211 Ibid.
209 Ibid.
ment of that the CRD is providing the foundation for a European Consumer Code is at all envisaged, the Commission should instead have made its intentions clear as early as possible as such transparency is in the interest of all stakeholders. The current situation of that it is close to impossible to predict the future in this regard could then have been avoided.214


4 Analysis

The overall objective of the CRD is to simplify and complete the existing regulatory framework of consumer contract law in order to achieve an end product of a fully developed business-to-consumer Internal Market within the EU. The three main reasons as to why the Commission want to intervene in the consumer contract law of the Member States is that differences in national legislation hinder the development of the Internal Market, that maximum harmonization would put an end to the legal fragmentation in the area of consumer contract law and that the EU is in need of a higher level of consumer protection.

In the introduction, three questions are raised. The first relates to the finding of an equilibrium between the competitiveness of businesses and the protection of consumers, and if the Commission has managed to uphold this balancing act. Consumers constitute the largest economic group by pivoting all economic activities, but also the most unaware and voiceless group, and therefore deserve special attention. But instead of basing the CRD upon the consumer-specific provisions in article 169 of the TFEU, article 114 of the TFEU is applied and thereby gives priority to the functioning of the Internal Market over consumer protection. In combination with, and somewhat contrasting to, this the CRD has at its aim to provide a high level of consumer protection, as mandated by the latter provision. Exactly how high this level has to be in order to meet this requirement is unclear, but it is fair to assume that it at least has to exceed the existing minimum of the EU of today and contribute to a general improvement of the standards of consumer protection across the EU. Since it is unclear whether a CRD of maximum harmonization will have this impact, and it rather seems as it will not, it can be argued that the Commission has failed in this regard by not opting for a cross-border-only Regulation combined with the continued issuing of Directives of minimum harmonization instead.

The second relates to the three main arguments put forward by the Commission as to why the European legislator should be active in the area of consumer contract law, regarding the Internal Market, maximum harmonization and consumer protection, and if these motivate such far reaching interventions in the consumer contract laws of the Member States as provided by the CRD.
Legal fragmentation is, firstly, argued to act as a barrier to trade and thereby hinder the development of the Internal Market. No empirical evidence is, however, presented to support neither this perceived problem nor that a CRD of maximum harmonization is the most effective solution. In fact, it is rather on the contrary highly unlikely that differences in national consumer contract law is the main reason as to why domestic trade has increased more than international trade within the EU during the past years, and that harmonization of the regulatory frameworks of the Member States in this regard would lead to a “significant increase in cross-border trade”\textsuperscript{215}.

Maximum harmonization is, secondly, argued to put an end to legal fragmentation in the area of consumer contract law. But even though this might be true the Commission does not seem to regard the fact that the legal diversity is based upon different national preferences among the Member States of the multi-layered, multi-cultural and multi-language union of almost 500 million inhabitants that is the EU. Legal fragmentation is instead perceived as nothing else than unnecessary transaction costs hindering trade opportunities, but since the removal of this concept is equal to giving up national preferences the end result will be that some Member States are required to increase their levels of consumer protection whereas other actually are forced to decrease their standards. This one-size-fit-all type of approach neither necessarily benefits all of Europe’s businesses and consumers nor reflects an economic analysis of the functioning of the Internal Market. The costs of implementing a CRD of maximum harmonization are considerable and faced by the Member States, not least as consumer contract law is an area dealt with under general contract law in many national legal systems. A CRD of maximum harmonization will, in other words and even though it is an end product of a sharp distinction between business and consumer transactions, have an impact on not only the consumer contract law, but the contract law overall in the Member States in order for the general coherence to be maintained within this area. Since the CRD, for obvious reasons, only can regulate what falls within its scope, the end result might be that of a “legal mess” of the national contract laws as well as attempts of circumventions of national legislators and courts. The maximum harmonization could thereby be transformed to no more than a relative concept, more appropriately referred to as half harmonization, since the need for identifying the national law governing a

specific contract may be diminished but not completely removed. The statement that maximum harmonization "will considerably increase legal certainty for both consumers and businesses" therefore seems to be somewhat of a utopia. When it comes to the argument that the CRD will lead to an increase in consumer confidence, other factors than maximum harmonization yet again seems be of greater importance. According to the Commission, consumers are currently deterred from pursuing cross-border trade because legal fragmentation within the area of consumer contract law makes them insufficiently confident in the protection they receive when acquiring goods or services from a business of another Member State. The root of the problem is, in other words, subjective legal uncertainty, referring to the knowledge each contracting party, business or consumer, has about the regulatory framework governing each specific transaction. The CRD is one possible solution, but the EU has the potential of considerably improving this situation without the use of maximum harmonization, and for significantly less costs, by instead focusing on education about the rights already in place at national and European level. This is especially so since the Rome-I already today gives precedence to at least the level of protection provided by the consumer contract law of the country of residence of the consumer.

Consumer protection is, thirdly, argued to reach a higher level through a CRD of maximum harmonization. The Commission has, as earlier mentioned, answered the rather complex question of which the optimal level of consumer protection is and at what geographical level this should be regulated by opting for a one-size-fit-all type of approach. It can, however, be discussed if such a single and ideal level of consumer protection really exist when the different national circumstances, priorities and preferences are being taken into consideration, as well as if the EU even will experience an overall increase, or rather a decrease, of the standards through this development. No matter the final outcome in this regard, it can be argued that maximum harmonization is hard to reconcile with consumer protection and that the optimal level is nothing else than a political decision not suited for being taken at EU-level. Minimum harmonization is therefore more suitable, as this legislative measure provides the consumers with at least the protection offered by the Directive in question. In support of this is not least the fact that neither the Internal Market nor consumer protection fall within the exclusive competence of the EU, but are areas of consumer contract law which are shared with the Member States. As far as the latter goes, it can

hardly be argued that the Member States are unable, or less able than the EU, to adopt appropriate regulatory frameworks. When it comes to the former, however, they are precluded to legislate for transactions in other Member States as well as for cross-border transactions. With this and the principles of conferral, subsidiarity and proportionality in mind it can therefore be argued that maximum harmonization of the national consumer contract laws is both intrusive and disruptive to the domestic legal systems, and that the EU should focus more on cross-border issues since it is at that point the Internal Market questions become relevant. Since it has not managed to convincingly explain why a CRD of maximum harmonization is to prefer over a cross-border-only Regulation combined with the continued issuing of Directives of minimum harmonization when it comes to reaching the overall objective, it can be argued that the Commission has failed also in this regard.

The third relates to the instrumental measures chosen by the Commission and if consumer contract law really is an area suited for the horizontal Directive of maximum harmonization that is the CRD. As already mentioned, a CRD of maximum harmonization does not seem to reach the same level of compliance with the proper interpretation of the constitutional framework that is the European Treaties as does a cross-border-only Regulation combined with the continued issuing of Directives of minimum harmonization. The CRD is, furthermore, to be implemented as a Directive, which only is binding as to the result to be achieved and leaves the form and method for the Member States to decide. The smoother implementation envisaged by the Commission in this way is one of the identified reasons for the problems of the current acquis communautaire within the area of consumer contract law, and even constitutes a risk of that the very objective of harmonization becomes jeopardized since the specific law applicable to a contract still needs to be identified in a cross-border transaction. The situation is thereby more or less brought back to square one, and the view of the Commission that the implementation of the CRD as a Directive will “give rise to a single and coherent set of law at national level which would be simpler to apply and interpret” somewhat optimistic to say the least. A more coherent, predictable and clearer single regulatory framework of consumer contract law could instead be achieved by the use of a Regulation as legal instrument, which also seems to be more in line with the aim of providing improved simplification. The Commission has even itself stated that this is the case, as long as the replacement of a Directive with a Regulation is legally possible and politically ac-

ceptable. No empirical evidence has been presented against a Regulation in this regard, but only overall weak arguments in favor of a Directive. Neither article 114 nor article 169 of the TFEU poses any limitation in this regard and the political unacceptability would, from a European perspective, be relatively easy to overcome since the CRD as a Regulation instead of a Directive is likely to encourage cross-border trade on a much wider scale. The possible need of, from a national perspective, justifying why both domestic and international consumer transactions within the EU is to be regulated at European, rather than to be combined with regulation at national, level can be solved by applying cross-border-only Regulation combined with minimum harmonization. This would also make it possible for the horizontal approach opted for by the Commission to reach its full potential. This choice, rather than reviewing each Directive vertically, is in line with the aim of producing a simplified regulatory framework and to prefer even though the possibility of separate amendments thereby gets lost. This is so since it is less time consuming and will lead to a decrease in the amount of legislative acts, but since a Directive still has to be transposed into national law it will only have a limited outcome compared to a Regulation which is effective straight away.

The Commission disregarded the option of a cross-border-only measure on the grounds of that a CRD of maximum harmonization would lead to a simplified regulatory framework, by avoiding a twin-track approach and not encountering any problems definition wise. No exploration of possible solutions and associated difficulties was, however, conducted. Instead, it is plausible that the Commission simply did not consider this as a serious alternative.

A cross-border-only measure would be of use to those wishing to be a part of the Internal Market, whilst reducing the impact on those not interested in cross-border trade. This, combined with the continued issuing of Directives of minimum harmonization, provides a possibility of keeping the domestic legislation adapted to national preferences and familiar to local businesses and consumers, as well as implementing a harmonized measure across the EU to all cross-border transactions. Parallel legal regimes therefore seem to be even more in line with the overall objective of simplification of the regulatory framework of the EU than a CRD of maximum harmonization. When it comes to the definition, guidance can be sought from the field of TCL and, more specifically, the CISG and the CUE. The basic criterion of the former, that the element of transnationality is the location of the re-
spective places of business rather than the fact that the goods in question cross national borders, can be analogically transferred to consumer contracts and habitual residence. It is then fair to conclude that it would be least controversial to exclude the consumer contracts concluded face-to-face, leaving those transactions in which the parties are based in different jurisdictions and the transaction is performed at a distance. Since these primarily would take place in the on-line environment, the former can be applied to determine where a trader has his place of business and the consumer has his habitual residence in this setting. The Rome-I is, furthermore, to be deployed to identify the domestic law applicable to fill possible gaps in relation to the cross-border-only measure, as well as to provide that the mandatory consumer contract laws of the Member States are not applicable within the scope of this.

The cross-border-measure is, from a consumer point of view, to be preferred as automatically applicable, as the regulatory framework would be clear much earlier in the contracting process than if a choice of instead applying the relevant national law to a consumer contract concluded at EU-level was to be provided. When it comes to the question of enforcement of the cross-border-only measure, the continuation of the multi-level structure of the EU of today would most likely result in immediate divergences because of the different views of the Member States. A combination of a right to appeal to the GC and the creation of specialized courts connected to the GC, as well as a network of consumer arbitration centers, would instead be a development in line with this new approach to EU consumer contract law.

The instrumental measure formally adopted by the Member States on the 10th of October 2011 was, however, a horizontal Consumer Rights Directive of maximum harmonization which is to be transposed into the national consumer contract laws by the 13th of December 2013 and applied in all Member States no later than the 13th of June 2014. The specific aim of creating a business-to-consumer Internal Market along with the narrow personal and broad substantive scope of the CRD make it an ideal basis for a European Consumer Code. The plausible expansion of the CRD in the near future, so as to include also other Directives in the area of consumer contract law, would make it rational for the Commission to propose a change of the CRD from a Directive to a Regulation. The end result would be that of a more comprehensive regulatory framework and coherent acquis communautaire within the area of consumer contract law, but also an even sharper distinction be-
tween business-to-business and business-to-consumer transactions which is not desirable. Businesses come in all shapes and sizes, and it can in fact be argued that sole traders and small business are even more vulnerable than consumers and at least should receive the same level of attention. This is also supported by the principle of equality and a predicament which can be solved by allowing the CRD to get influenced by the CFR in its plausible development toward a European Consumer Code. The CFR contain all characteristics of a European Civil Code and therefore has a great potential of contributing in making European contract law more coherent overall. The Commission has, along with the Council and European Parliament, even referred to the CFR as a standard of “best solutions”, and with this in mind it is hard to believe that neither the proposal of the Commission for a CRD nor the GPR or the GPP contained a single reference to the CFR. If the CRD is meant to provide the foundation for a European Consumer Code, the Commission should instead have made its intention clear as early as possible as such transparency is in the interest of all stakeholders. The current situation of that it is close to impossible to predict if and when a European Consumer Code will become reality, even though it is plausible that CRD will take on this shape in the near future, could then have been avoided.
5 Conclusion

Since the CRD is to be implemented in the area of consumer contract law, it seems logical to prioritize the protection of consumers over the functioning of the Internal Market. It can therefore be argued that article 169 instead of article 114 of the TFEU should have been applied in this regard, giving rise to a horizontal cross-border-only Regulation combined with the continued issuing of Directives of minimum harmonization, as it is more in line with the founding Treaties of the EU including the principles of conferral, subsidiarity and proportionality. The Commission has failed to convincingly explain why this legislative measure is less effective in reaching the overall objective than a horizontal Directive of maximum harmonization. The former is both legally and politically acceptable and respects the fact that maximum harmonization is hard to reconcile with consumer protection, by only affecting them wishing to be a part of the Internal Market and leaving it for the Member States themselves to decide the level of consumer protection above the minimum standards. Streamlining the process of reaching the overall objective is also the fact that it is effective straight away and considerably less costly, but in spite of this the Commission opted for the latter which plausibly is a first step toward a European Consumer Code. Influence by the CFR in this development would prevent an even sharper distinction between B2B and B2C transactions, as well as provide improved overall coherence within the area of consumer contract law. Since the Commission has not made its intentions clear in this matter, it is for the future to reveal whether this will become reality.
List of references

Primary legislation


Secondary legislation


**Case law**

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**Doctrine**


Articles


**Internet sources**


Appendix

Factors impeding the ability to conduct cross-border transactions

- Language and cultural differences
- Tax
- Variation in legal systems
- Cost of foreign legal advice
- Different implementation of EU law
- Bureaucracy/corruption