

EU CONSUMER LAW – THE PAST AND THE FUTURE

Đurđa Bolanča Kekez, mag. iur.

University of Split
Faculty of Law, Civil law department
Domovinskog rata 8
21000 Split
Croatia
e-mail: durda.bolanca@pravst.hr
telephone: +385915770703

Abstract

The start of the second decade of the 21st century represents an important turning point for the further development of consumer law within European Union. Following the adoption of various consumer law measures over last 25 years, the EU has decided to make a profound review of the consumer acquis, and has proposed major reforms. This article represents the shortcomings of the established practice of creating EU Consumer Law through directives which harmonize selected aspects of national law. In the beginning, activities of the EU were based on a minimum harmonization approach which allowed Member States to adopt more protective rule. Recently activities reveal the change in performance of the EU, since measures have been based on a full harmonization approach, removing Member States' freedom to legislate in the areas covered by those measures. Unfortunately, it is argued that both approaches have failed to provide a suitable legal framework to support cross-border consumer transactions. It then goes on to develop an alternative and more appropriate legislations' approach in the form of a regulation which is applicable to cross-border transactions only.

Keywords: *EU Consumer Law, harmonization, directive, regulation*

1. Introduction

The field of consumer law is very important and relevant for the establishment and functioning of the internal market in the European Union (EU). Why? Well, we could say there are many reasons, but the following one is basic. Knowing the fact that EU has 28 Member States and more than 508 millions habitants, it is essentially for the EU to encourage people from one Member State to buy goods or services from another Member State. In that way, on the one side consumers have multiple choices and on the other producers and sellers are having larger range for their business activities. The problem with these cross-border transactions is that consumers are usually deterred from shopping in other Member State because of the differences in consumer law, which makes them insufficiently confident in the

protection they have when buying products outside their own country.¹ Something had to be done with 28 different national legal systems. As a result, the landscape of EU Consumer Law is characterized by a combination of EU- based and national law rules.

The development of EU Consumer Law was mostly based in a form of directives² which have sought to harmonize aspects of national consumer laws. These directives initially were based on a minimum harmonization approach which allowed Member States to adopt more protective rules.³ Where EU legislation exists, there should be at least the same minimum standard in each Member State, and national laws provide completing for those aspects which have escaped EU regulation to date.⁴ Unfortunately, directives with minimum harmonization level didn't accomplish the main objective – approximation of national legal systems in the area of consumer law protection – so, more recently actions brought different measures based on a full harmonization approach, removing Member states' freedom to legislate in the areas covered by those measures.⁵ As a consequence, full harmonization would cause consumers and traders to be able to rely on the fact that in the whole EU one uniform set off rights and obligations of the parties applies. Whereas the benefits that full harmonization could provide are not unambiguous, it is clear that full harmonization is not easy to reconcile with the aim of consumer protection, especially not where the directive would require Member States to repeal protective provisions that exceed the maximum level of protection allowed under certain directive with maximum harmonization.⁶ The experience with the consumer *acquis* to date shows that the practice of harmonizing national law (minimum or maximum level) does not necessarily create a better legal framework for consumer transactions in the internal market. Although national laws have become

¹ Wilhelmsson, Thomas, The Abuse of the “Confident Consumer” as a Justification for EC Consumer Law, *Journal of Consumer Policy*, 2004, vol. 3, pp 317-337., Twigg-Flesner, Christian, Innovation and EU Consumer Law, *Journal of Consumer Policy*, 2005, vol. 28, pp 409-432.

² Art. 288/3 TFEU: *A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.* The Treaty on the functioning of the European Union – consolidated version (OJ C 2010, 83, 47). See also: Prechal, Sacha, *Directives in EC Law*, 2nd ed., Oxford: Oxford University Press, 2005.

³ Minimum approach means the lowest level of protection is defined with provisions of certain directive and it is not allowed to go under given level.

⁴ Twigg-Flesner, Christian, Time to Do the Job Properly - The Case for a New Approach to EU Consumer Legislation, *Journal of Consumer Policy*, 2010, vol. 33, pp 358, (hereinafter referred to as: Twigg-Flesner 2010).

⁵ For the example: Directive 2002/65/EC of the European parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ 2002, L 271/16.

⁶ Loos, Marco, Full Harmonisation as a Regulatory Concept and its Consequences for the National Legal Orders: The Example of the Consumer Rights Directive (July 13, 2010). Centre for the Study of European Contract Law Working Paper Series No. 2010/03. Available at SSRN: <http://ssrn.com/abstract=1639436>., (hereinafter referred to as: Loos 2010)

approximated in substance, there are continuing problems of accurate implementation, as well as the subsequent interpretation of the law by national courts.⁷

Therefore, it was a time for a new pursuit of the better access in further development of the EU consumer law. Luckily, there was already an alternative provided in EU law: a regulation.^{8,9} Irrespective of the fact whether such a regulation would apply to all consumer transactions or cross-border ones only, the use of a regulation would mean that the many difficulties associated with transposition of directives could be avoided.¹⁰

Considering everything above mentioned, this paper deals with former and present solutions existing in the field of EU Consumer Law.

2. The Evolution of Consumer Policy in the European Union

Consumer protection was not considered as an objective of the Treaty of Rome (TEEC).¹¹ Under the TEEC, protection of consumers' interests appeared to be a mere by-product of more fundamental Community policies and of the application of rules designed to serve wider purpose such as the creation of a fully competitive environment in the market.¹² The notion of specific rights for consumers at the European Community level (EC) was first introduced into EC law and policy by a Council resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy.¹³ This programme laid the foundations for an important framework of legislative protection for the consumer at EC level. The adoption of the Single European Act (SEA)¹⁴ in

⁷ Twigg-Flesner, Christian, *Good - Bye Harmonisation by Directives, Hello Cross - Border only Regulation? – A way forward for EU Consumer Contract Law*, available at: http://ec.europa.eu/justice/news/consulting_public/0052/contributions/309_en.pdf, (hereinafter referred to as: Twigg-Flesner, *Good – Bye Harmonisation*).

⁸ Art. 288/2 TFEU: *A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.*

⁹ Norbert Reich first mooted the idea of replacing directives with a Regulation, basing his reasoning predominantly on the drawbacks of using directives. See more in: Reich, Norbert, *A European contract law, or an EU contract regulation for consumers?*, *Journal of Consumer Policy*, 2005, vol. 28, pp 383-407.

¹⁰ Twigg-Flesner 2010, pp 361.

¹¹ The Treaty establishing the European Economic Community (TEEC) was signed on March 25th 1957 by Belgium, France, Italy, Luxembourg, the Netherlands and West Germany, and led to the founding of the European Economic Community (EEC) on 1 January 1958.

¹² Nebbia, Paolisa, Askham, Tony, *EU consumer law*, Oxford: Oxford University Press, 2004, pp 5, (hereinafter referred to as: Nebbia/Askham 2004), Weatherill, Stephen, *EU consumer law and policy*, UK: Edward Elgar Publishing (EE), 2005, pp 3-5, (hereinafter referred to as: Weatherill 2005), Weatherill, Stephen, *Consumer policy*, Craig, Paul, de Búrca, Gráinne (ed): *The Evolution of EU Law*, 2nd ed., Oxford: Oxford University Press, 2011.

¹³ Council Resolution OJ C 92/1, 1975).

¹⁴ The Single European Act (OJ L 169, 1987), signed February 28th 1986, entered into force July 1st 1987.

1986, which represented the first amendment to the TEEC, could have filled in the gap left by the latter in the field of consumer protection but unfortunately the authors of the SEA didn't go so far to introduce a specific provision regarding the competences of the Community in the field of the promotion of consumers interests.¹⁵ By the beginning of the 1990s a string of "soft law" commitments to the virtues of a consumer protection policy at EC level had been forthcoming. During the discussions concerning the Treaty on the European Union,¹⁶ the question of a specific provision concerning EC competence in the field of consumer protection was raised at a very early stage. The Maastricht Treaty contained an explicit legal basis for EC action in the field of consumer policy - Art. 129a (later on Art. 153).^{17,18} This for the first time created a separate title devoted to "Consumer Protection" which conferred on the EC a legislative competence in the field of consumer protection which was not tied to the imperative of market integration.¹⁹ Some difficulties of interpretation have arisen since the adoption of the provision, but in spite of that, the Maastricht Treaty put an end to the controversies arising from the lack of an explicit legal basis for Community initiatives to promote consumer interests.²⁰ When Maastricht Treaty came in to force, an alternative legal basis had to be found. Initially, this was the then Art. 100 (later on Art. 94 EC as a consequence of the Amsterdam Treaty's²¹ renumbering of the EC Treaty, today Art. 115). Also there was Art. 100a (subsequently Art. 95 EC, today Art. 114), which became the legal basis for all subsequent consumer law directives.²² These provisions allow adoption of measures which contribute to the approximating national rules which have the object of establishing and functioning of the internal market. The intimate connection between

¹⁵ Nebia/Askham 2004, pp 7-8, Weatheril 2005, pp 11.

¹⁶ The Treaty on European Union (OJ C 191, 1992), also known as Maastricht Treaty, signed February 7th 1992, entered into force November 1st 1993.

¹⁷ Art. 129a. stated that:

1. *The Community shall contribute to the attainment of a high level of consumer protection through:*
 - (a) *Measures adopted pursuant to Article 100a in the context of the completion of the internal market;*
 - (b) *Specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumer.*
2. *The Council,*

¹⁸ See also Weatheril 2005, pp11-15.

¹⁹ Weatheril 2005, pp 15.

²⁰ Nebia/Askham 2004, pp 9.

²¹ Treaty of Amsterdam (OJ C 340, 1997), signed October 2nd 1997, entered into force May 1st 1999.

²² Micklitz, Hans W., Reich, Norbert, Weatherill, Stephen, EU Treaty Revision and Consumer Protection, *Journal of Consumer Policy*, 2004, vol. 27, pp 374-376, Oughton, David, Willet, Chris, Quality Regulation in European Private Law, *Journal of Consumer Policy*, 2002, vol. 25, pp 300-302.

legislative harmonization and the consumer interest has also been highlighted by the Court of Justice of European Union (Court of the EU).²³

Nowdays, we have following situation. According to Treaty of Lisbon,²⁴ consumer policy does not fall within the EU's exclusive competence but is one of the areas of shared competences.²⁵ In the field of consumer protection,²⁶ EU action is only permissible if the "objectives of proposed action" cannot be achieved at national level.²⁷ As a result of that, EU Consumer Law is largely created through the harmonization of national laws.²⁸ Since every EU action had to have appropriate legal basis, here are relevant Articles 114²⁹ and 115³⁰ TFEU. The main tool for the development of consumer law within the EU has been in the form of directive, which requires that the national laws of the Member States are amended to ensure that the outcomes pursued by a particular directive are implemented in national law.³¹ EU consumer law progressed by infiltrating selected areas of national law and, as a consequences, EU-based rules became applicable to all consumers transactions (local, regional or cross-border).

²³ E.g. Case C-91/92 *Paola Faccini Dori* (1994) ECR I-3325, Cases C-178/94 et. al. *Dillenkofer* (1996) ECR I-4845.

²⁴ Treaty of Lisbon (OJ C 306, 2007), signed December 13th 2007, entered into force December 1st 2009.

²⁵ Art. 4 (2)(f) TFEU.

²⁶ Art. 169 TFEU: 1. *In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.*

2. *The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:*

(a) *measures adopted pursuant to Article 114 in the context of the completion of the internal market;*

(b) *measures which support, supplement and monitor the policy pursued by the Member States.*

3. *The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 2(b).*

4. *Measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them.*

²⁷ This is the principal of subsidiarity according to the Art. 5(3) TFEU. It would be difficult to sustain an argument that Member States are not able to adopt appropriate consumer protection frameworks, but what they cannot do is to legislate to cover transactions in other Member States or to legislate for cross-border transactions.

²⁸ Niglia, Leone, Of Harmonization and Fragmentation: The Problem of Legal Transplants in the Europeanization of Private Law, *Maastricht Journal of European and Comparative Law*, 2010, vol. 2, pp 119, Rösler, Hannes., Europeanisation of Private Law Through Directives – Determining Factors and Modalities of Implementation, *European Journal of Law Reform*, vol. XI, no. 3, pp 306-309

²⁹ Art. 114 TFEU: 1. *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.*

³⁰ Art. 115. TFEU: *Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.*

³¹ Twigg-Flesner, 2010, pp 357.

3. Minimum and Maximum (Full) Harmonization through Directives

In the area of consumer law, directives used to contain a so-called minimum harmonization clause.³² On the basis of such a clause, Member States are allowed to introduce or maintain consumer protection rules that exceed the level of protection offered by these directives.³³ That makes it easier for Member States to absorb a directive into their legislation as only the minimum requirements of the directive must be met. However, this necessarily implies that the effect of the harmonization measure is limited: whereas the aim of harmonization is to approximate the laws of the Member States, these laws in fact still differ when Member States make use of the minimum harmonization clause.³⁴ The minimum harmonization approach therefore entails the risk that traders that offer their goods or services across the border may still face different rules that apply to their contracts than they are accustomed to in their home country. Consumers, on the other hand, cannot be sure that they will receive the same level of protection they are used to in their home country when they stop cross-border.³⁵ In this sense, minimum harmonization is thought not to remove the barriers to the internal market in a sufficient manner. Despite everything, harmonization based on the minimum clause was the beginning of activities in the sphere of EU consumer law which led to the bulk of directives adopted between 1985 and 2002 dealing with doorstep selling,³⁶ package travel,³⁷ unfair terms,³⁸ timeshare,³⁹ distance selling,⁴⁰ sale of consumer goods and guarantees.⁴¹ Taking account of directives based on minimum approach, it could be said that

³² See: Reich, Norbert, 'Chapter 1, Economic law, consumer interests and EU integration', in: H.-W. Micklitz, N. Reich, P. Rott, *Understanding EU Consumer Law*, Antwerp/Oxford/Portland: Intersentia, 2009, pp 40, Micklitz, Hans W., 'The targeted full harmonisation approach: looking behind the curtain', in: G. Howells, R. Schulze, *Modernising and harmonising consumer contract law*, Munich: Sellier, 2009, pp 48., Rott, Peter, Minimum harmonization for the completion of the internal market? The example of consumer sales law, *Common Market Law Review*, 2003, vol. 40, pp 1107- 1135.

³³ Loos 2010, pp 5.

³⁴ This would be different if minimum harmonisation would stand in the way of Member States adopting or maintaining more stringent consumer protection rules with regard to the core provisions of a directive based on Article 114 TFEU, as is argued by Rott, Peter, Minimum harmonization for the completion of the internal market? The example of consumer sales law, *Common Market Law Review*, 2003, vol. 40, pp 1109, 1115-1117.

³⁵ Green paper on the Review of the Consumer Acquis, COM (2006) 744 (final), pp 10.

³⁶ Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 1985).

³⁷ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 1990).

³⁸ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 095, 1993).

³⁹ Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ L 280, 1994).

⁴⁰ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 1997).

⁴¹ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 1999).

it still had some highlights. First, it has the ability to promote consumer interests by removing too disparate national legislation yet retaining national incentives to compete on quality. Second, it allows for unity in diversity, as there may exist varying (legitimate) values across the EU. Third, the relative ease of implementation and practicality favors minimum harmonization. Fourth, it requires less political compromise, which reduces the frequency of ambiguities from measures that are maximally harmonizing, which in turn reduces the stress on the courts. The contribution of minimum harmonization approach of the EU measures in the field of consumer law has resulted in a degree of approximation of national laws and reduction of differences. Unfortunately, the reality was unsatisfactory since it only shifted the degree of diversity between the national laws of the Member States into a different, and possibly more complex, way.

As an outcome of the ‘new situation’, the European Commission commenced a review of the consumer *acquis* (the so-called EC Consumer Law Compendium and Database Project). In discovering variations between national laws, the project provided useful ammunition for the European Commission, which had by then already decided to switch from the minimum harmonization approach to full, or maximum, harmonization.⁴² In case where the EU take legislative measures on the basis of full harmonization, Member States would be required to abrogate national legislation that is not in conformity with the European level of consumer protection, irrespective of whether the existing national level of consumer protection is higher or lower than the new European level.⁴³ This full harmonization would cause consumers and traders to be able to rely on the fact that in the whole of the European Union one uniform set of rights and obligations of the parties applies. Full harmonization therefore leads to a uniform level of consumer protection throughout the European Union, and therefore to a ‘level playing field’ for all traders and consumers. That in turn should make it easier for both businesses and consumers to conclude cross-border contracts and should ultimately lead to an increase in the use of the internal market. The policy shift to the full

⁴² Reich, Norbert, Harmonisation of European contract law: with special emphasis on consumer law, *China – EU Law Journal*, 2011, vol. 1, pp 57-59, 87-91, Smits, Jan, ‘Full harmonization of consumer law? A critique of the Draft directive on consumer rights’, *European Review of Private Law*, 2010, vol. 1, pp 5-14, Lilleholt, Kåre, Notes on the Proposal for a new Directive on consumer rights, *European Review of Private Law* 2009, vol. 3, pp 335-343; Mak, Vanessa, *The degree of harmonisation in the proposed consumer rights directive: a review in light of liability for products*, in: G. Howells, R. Schulze, *Modernising and harmonising consumer contract law*, Munich: Sellier, 2009, p. 320., Faure, Michael, Towards a maximum harmonization of consumer contract law?, *Maastricht Journal of European and Comparative Law*, 2008, vol. 4, p. 440-441., Rott, Peter, Maximum Harmonisation and Mutual Recognition versus Consumer Protection: The Example of Linked Credit Agreements in EC Consumer Credit Law, *The European Legal Forum* (E) 2/3-2006, pp 61-68, available at: <http://www.simons-law.com/eulf/>, pp 64-66.

⁴³ Loos 2010, pp 6.

harmonization was followed by the adoption the Directive on distance marketing of financial services,⁴⁴ the Unfair commercial practices directive,⁴⁵ the revised Consumer credit directive in 2008,⁴⁶ the revised Timeshare directive⁴⁷ and Consumer rights directive.⁴⁸

In conclusion of comparison of minimum and maximum (full) harmonization approach, it could be sad the following. Whereas the benefits that full harmonization could provide are not unambiguous, it is clear that full harmonization is not easy to reconcile with the aim of consumer protection, especially not where the directive would require Member States to repeal protective provisions that exceed the maximum level of protection allowed under the certain directive. Full harmonization could therefore lead to a reduction in consumer protection. In this respect, minimum harmonization may provide better results, as consumers will at least receive the protection that is offered by the directive, but Member States are allowed to introduce or maintain more protective rules if they see the need for that, given the national circumstances, priorities and preferences.

In a light of mentioned barriers, arose as a consequences of the various types of harmonization, the time has come to subject the present approach to EU consumer legislation to a more thorough re-think.⁴⁹ It could be said that it is the occasion for entirely new approach.

4. Time for the New Approach

The experience with the consumer *acquis* to date shows that the practice of harmonizing national laws does not necessarily create a better legal framework for consumer transactions in the internal market. Although national laws have become approximated in

⁴⁴ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ 2002, L 271/16).

⁴⁵ Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ 2005, L 149/22).

⁴⁶ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008, L 133/66).

⁴⁷ Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (OJ 2009, L 33/10).

⁴⁸ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011, L 304/64).

⁴⁹ Twigg-Flesner 2010, pp 360.

substance, there are continuing problems of accurate implementation, as well as the subsequent interpretation of the law by national courts.⁵⁰ Whilst approximation by directive has removed some of the more immediate variations between national laws, it certainly has not created a clear and coherent single legal framework for consumer transactions in the internal market. The starting point for the new approach is the constitutional framework of the TEU and TFEU.⁵¹ In addition to constraints imposed by the need to find a suitable legal basis, action at the EU level is further confined especially by the principle of subsidiarity. EU legislation dealing only with cross-border transactions would pass the subsidiarity test. One Member State cannot create a legal framework to regulate cross-border transactions that would be applicable in all the other Member States.⁵² For such a measure, the EU level is more appropriate. A further element of the case for a new approach is that the use of directives is no longer appropriate for the development of EU Consumer Law.⁵³ Instead of continuing with the harmonization of national consumer laws by directives, a regulation dealing with cross-border transactions only should be adopted, creating a uniform rules for all Member States. The key difference to directives is that regulations are directly applicable, which means that their effectiveness does not depend on transposition by the Member States. Even the European Commission has stated in their documents 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.”⁵⁴ Referring to a shift to regulations, Professor Monti stated in his report:⁵⁵ “...*There is thus a growing case for choosing regulations rather than directives as the preferred legal technique for regulating the single market. Regulation brings the advantages of clarity, predictability and effectiveness. It establishes a level playing field for citizens and business and carries a greater potential for private enforcement. However, the use of regulation is not a panacea. Regulations are appropriate instruments only when determined legal and substantial preconditions are satisfied...*”⁵⁶ He also said that: “*Harmonisation through regulations can be most appropriate when regulating new sectors from scratch and easier*

⁵⁰ Twigg-Flesner, *Good – Bye Harmonisation*, pp 6.

⁵¹ Here, we are still talking about Art. 114 and Art. 169 TFEU.

⁵² Twigg-Flesner 2010, pp 363.

⁵³ Twigg-Flesner 2010, pp 363.

⁵⁴ European Commission, *A Europe of results – applying community law*, COM (2007) 502 final, n. 12. European Commission, Working document – *Instruments for a modernised single market policy*, SEC (2007) 1518.

⁵⁵ M.Monti, *A New Strategy for the Single Market – At the Service of Europe’s Economy and Society*, (Brussels, 2010), available at http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf (hereinafter referred to as: Monti, 2010).

⁵⁶ Monti, 2010, pp 93.

*when the areas concerned allow for limited interaction between EU rules and national systems. In other instances, where upfront harmonisation is not the solution, it is worthwhile exploring the idea of a 28th regime, an EU framework alternative to but not replacing national rules. The advantage of the 28th regime is to expand options for business and citizens operating in the single market: if the single market is their main horizon, they can opt for a standard and single legal framework valid across Member States; if they move in a predominantly national setting, they will remain under the national regime...*⁵⁷ It could be stressed out that there is no obvious reason why this approach could not also be used for improving the quality of legislation in existing fields of EU law where existing practice has not produced all of the results intended. Assuming that Art. 114 TFEU continues as the legal basis for EU Consumer Law, there is no limitation by this Article to action based on directives only - national rules can be “approximated” through a regulation, although this would then require the repeal of national laws falling within its scope.⁵⁸ Of course, choosing a regulation would create its own challenges: it would adopt terminology and concepts distinct from any national law, and Member States could not utilize more appropriate national legal terminology as they can when transposing a directive; a regulation could create legal difficulties particularly for jurisdictions with a civil code which integrates consumer law into the code, because this would make it more complicated to accommodate a regulation in the specific domestic context.⁵⁹ A shift towards a regulation would bring legal practice more into line with the practical reality in that directives often seem to be *de facto* regulations already: the text of consumer law directives has become increasingly detailed, with complex terminology and intense debate during the legislative stages about the wording of particular provisions. It has been argued convincingly that the level of detail now found in directives would be more appropriate to regulations in any event.⁶⁰

As a consequence of all efforts and future aims, the new approach at the EU level would be creation of so-called “European Consumer Transactions Regulation”⁶¹ applicable to cross-border transactions, with national laws free to regulate domestic transactions as appropriate. Although this double approach to a consumer law has some risks, it seems

⁵⁷ Monti, 2010, pp 93.

⁵⁸ Twigg-Flesner 2010, pp 365.

⁵⁹ Twigg-Flesner, *Good – Bye Harmonisation*, pp 8.

⁶⁰ Johnston, Angus, Unberath, Hannes, “*Law at, to or from the centre?*” in F.Cafaggi (Ed.): *The institutional framework of European private law*, Oxford: Oxford University Press, 2006.

⁶¹ Hereinafter: EUCTR. This regulation was one of the options presented in *Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses* (COM/2010/0348 final). The purpose of this Green Paper is to launch a public consultation to gather orientations and views from relevant stakeholders regarding possible policy options in the field of European Contract Law.

feasible. Perhaps the greatest risk is that consumers may be confused about the true level of protection they would enjoy under this scheme – indeed; this was the objection on the basis of which the Commission rejected this approach.⁶² The model envisaged here is that national law would govern the vast majority of the transactions they enter into, but whenever they enter into a contract which would fall in the category of “cross-border” the EUCTR would apply. The advantage of the EUCTR would be that one single measure would apply throughout the EU, and whilst this might give a different level of protection, at least it would be easier for a consumer to identify what that level of protection might be.⁶³ The EUCTR would be available in all the official EU languages, and a consumer could discover this in his own language. As far as the appropriate legal basis is concerned, the most obvious choices are Article 114 TFEU and Article 169 (2) (b) TFEU. It needs to be borne in mind that Article 114 TFEU is not limited to cross-border circumstances, i.e., legislation need not be limited to situations dealing with the free movement between Member States.⁶⁴ The EUCTR would undoubtedly deal with those issues already covered in the existing *acquis* – there is no point in undoing what has already been achieved, but it could also go much further and contain more detailed provisions on matters not presently regulated in the *acquis*, such as questions of contract formation, as well as remedies such as damages.⁶⁵ A further issue regarding the EUCTR is whether it should be an optional measure, which parties could use instead of the relevant national law if they so wished, or whether it should be applied automatically (in the latter case, all cross-border transactions within the scope of the EUCTR would automatically be subject to it, with no possibility to modify its rules or opt-out altogether in favor of a national law).⁶⁶ As an optional measure, EUCTR could be applied by default, although the parties could agree to opt-out. Alternatively, the EUCTR could be an “opt-in” model. Finally, thought would need to be given to how the EUCTR could be enforced, (which courts would have jurisdiction to hear claims).⁶⁷ In the context of the EUCTR, this would create new divergences as soon as the regulation entered into force, as national courts are likely to take different views on the application of the EUCTR. Relying on the Article 267 TFEU reference

⁶² Twigg-Flesner 2010, pp 369.

⁶³ Twigg-Flesner 2010, pp 369.

⁶⁴ C-465/00, C138/01 and C-139/01 *Rechnungshof v Österreichischer Rundfunk and others; Neukomm and Lauermann v Österreichischer Rundfunk* [2003] ECR I-4989, Mak, Vanessa, *Harmonisation through ‘Directive-Related’ and ‘Cross-Directive’ Interpretation: the Role of the ECJ in the Development of European Consumer law*, Tilburg Institute of Comparative and Transnational Law Working paper No. 2008/8, available at: <http://www.ssrn.com/link/Tilburg-TICOM.html>.

⁶⁵ Twigg-Flesner 2010, pp 371.

⁶⁶ Twigg-Flesner 2010, pp 371

⁶⁷ Twigg-Flesner 2010, pp 371. The current multi-level structure of the EU leaves the application of most of its rules to the national courts.

procedure is unrealistic, as national courts are notoriously reluctant to utilize this. In the absence of a separate court system for consumer disputes, or cross-border disputes generally, some other mechanism might have to be devised.⁶⁸

In light of all this, the European Commission made a Proposal for a Regulation on a Common European Sales Law,⁶⁹ but unfortunately the Proposal was withdrawn. The reason given for the withdrawal is modified proposal in order to fully unleash the potential of e-commerce in the Digital Single Market. It remains to be seen what the modified proposal will look like. Presumably it will take into account amendments proposed by the European Parliament in a new and well-integrated way.

5. Conclusion

It is well-known fact that the harmonization approach to EU consumer law had, and still has, a positive impact since it resulted in lifting of standards of protection in many Member States in some areas, and it has also ensured that consumer protection is of general concern. It was argued in this paper that, in creating a totally new approach, activities in sphere of the EU should abandon further harmonization by directive because the conclusions of the past practices are that harmonization does not necessarily create sufficient approximation of national laws, because very often it remains necessary to understand national law in case a dispute arises. Abandoning the harmonization approach would mean that as far as domestic transactions are concerned, variations between Member States could be recreated. Since the demand for the well constructed EU Consumer Law still exists, the step forward has to be to change to regulations as the legal tool for future actions.

The main intention of this paper is to show why the process of harmonizing national laws by directive has come to the end and why is not anymore accepted as a useful tool for work. If the EU is serious about reforming consumer law, then harmonization of whatever degree by directive should be left a side. If the intention is to adopt a uniform consumer law framework for the EU, then the appropriate legal measure is a regulation, not a directive. Bearing in mind the limitations of the EU's competence to act, a regulation dealing with

⁶⁸ Twigg-Flesner 2010, pp 372. One possible system could be a network of consumer arbitration centres applying the regulation, with a central advisory body. Such a system could even be provided on-line. This could be combined with the possibility of appealing to a special chamber of the European Court.

⁶⁹ *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM/2011/0635 final.

cross-border transactions only should be the focus of the EU's activities. It seems that distance contracts where the consumer is based in one Member State and the trader in another are the obvious candidates, although there are other types of transactions which might also qualify. It is then proposed that whenever a transaction is of the cross-border kind, EU Law should be applicable automatically, rather than having an optional instrument of the blue-button variety. This would produce a clearer set of alternatives rather than the somewhat elusive idea that there is some sort of choice with the blue button.

The real question is whether there will be enough courage to go back to the source of this matter and develop a whole new approach to EU Consumer Law along the lines developed in this paper. Many challenges posed by the existence of parallel regimes for domestic and cross-border transactions respectively, such as the risk of confusion, and speculative increases in costs to business, have prevailed in current thinking at the European level away from this model. Unfortunately, mentioned obstacles only brought the situation to almost 'a dead end'.

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