Revisione del *consumer acquis* in Europa

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La proposta della Commissione sui diritti dei consumatori[1] solleva molti dubbi e suscita riflessioni relative al suo fondamento stesso, al suo effetto sullo sviluppo della politica e della legislazione a tutela del consumatore in Europa e, in particolare, all'impatto che avrebbe negli ordinamenti giuridici di alcuni Stati membri.

Applicare il principio dell'armonizzazione totale al diritto contrattuale dei consumatori europei è al centro del processo di riesame sul *consumer acquis* da parte della Commissione. Ciò si basa, tuttavia, su argomentazioni non sufficientemente motivate da prove o dati. La piena armonizzazione, così come proposta, porterebbe in molti Stati membri all'eliminazione o alla riduzione di importanti diritti per la tutela dei consumatori, in particolare per quanto riguarda garanzie di conformità e clausole vessatorie, mentre dall'altro lato lascia ancora irrisolte significative divergenze, per esempio il "*right to reject*" nel Regno Unito rispetto al diritto di recesso a livello nazionale e, quindi, non accresce la certezza giuridica né per le imprese né per i consumatori.

La mancanza di un'armonizzazione totale delle più importanti norme sulla tutela del consumatore nei contratti non è, infatti, una barriera chiave al commercio transfrontaliero, come mostrano le ultime analisi e l'esperienza delle organizzazioni dei consumatori. Nello *shopping* transfrontaliero non è importante che le regole siano esattamente le stesse in tutto il territorio comunitario, bensì che si stemperino altri ostacoli anche culturali, quali per esempio le differenze linguistiche, le percezioni di difetti di sicurezza nelle transazioni online, i timori connessi con la *privacy* e l'abuso di dati.

La Commissione ritiene che i vantaggi per le imprese derivati dalla riduzione dei costi di adeguamento normativo passeranno automaticamente ai consumatori in termini di riduzione dei prezzi e maggiore scelta. Ma questa ipotesi non è sufficientemente provata e deve essere comunque bilanciata con le significative diminuzioni nello standard di tutela dei consumatori in molti Stati membri che si verificherebbero se la direttiva proposta entrasse in vigore.

Al contrario, un'armonizzazione minimale associata a determinate norme pienamente armonizzate potrebbe soddisfare gli obiettivi della Commissione senza prestare il fianco al rischio del ridimensionamento della tutela esistente.

[1] Proposal for a directive of the European Council and of the Council on consumers rights, COM (2008) 614.

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La Commissione europea sta preparando un'analisi sull'impatto della proposta di direttiva sulla tutela dei consumatori negli Stati membri, poiché le prove e i dati forniti non sono stati ritenuti sufficienti dal Parlamento europeo per esprimere il proprio parere. Due sono le obiezioni principali: l'ambito di applicazione della proposta non è chiaro, in particolare per quanto concerne le sue conseguenze sul diritto contrattuale/civile in generale; la proposta, infatti, è troppo incentrata sulle direttive esistenti e i passi compiuti sono insufficienti per fornire un quadro normativo "a prova di futuro" per i consumatori europei.

Non è un caso che i parlamenti nazionali di alcuni Stati membri abbiano chiesto ai propri governi di rifiutare il consenso al progetto di direttiva così com'è e/o di garantire che tale proposta non porti a una riduzione della tutela dei consumatori esistente.

Allo stesso modo è significativo ricordare che nel luglio 2009 il Comitato economico e sociale nell'esaminare la proposta si sia espresso nel senso di escludere dall'ambito della direttiva il capitolo sulle clausole vessatorie e quello sulle garanzie e i contratti di vendita, in quanto inconciliabili con il principio di un'armonizzazione totale.

Anche se la Commissione europea si è mossa con le migliori intenzioni, la proposta sul *consumer acquis* deve essere profondamente rivista per poter costituire il quadro comune di riferimento delle regole a tutela del consumatore europeo del terzo millennio.

Occorre armonizzare quanto serve, ma senza svendere i diritti acquisiti, non solo per garantire ed estendere una tutela giuridicamente efficace, ma anche per mandare un messaggio politico importante: non esiste solo l'Europa dei banchieri o dei commercianti, ma anche quella dei cittadini-consumatori.

Questa è la pagina di storia che il legislatore europeo deve ancora scrivere, con la *chance* di scegliere se avere o meno un lieto fine.

The future of EC consumer legislation

The proposed consumer rights directive,[2] *which the Commission presented in October 2008 merges four existing directives, namely the directive on Unfair contract terms (93/13/EC), the directive on Sales and Guarantees (99/44/EC), the Distance Selling (97/7/EC) and the Doorstep Selling Directive (85/577/EC), into a single "horizontal" Directive. The directive represents the most far reaching change in the approach to consumer law in Europe proposed to date.*

The proposed directive would provide the legal regime for basically all consumer purchase contracts, be they of a domestic or a cross border nature, when shopping in the grocery store around the corner or online from the Internet. This piece of EC legislation will therefore clearly have a direct and tangible impact on the everyday life of each consumer in the EC.

[2] COM (2008) 614.

The drastic change does not come from amendments to the substance of the revised directives, but it is due to the fact that the proposed Directive applies the principle of full harmonisation to directives that currently follow a minimum harmonisation approach. For the rest, the proposal is very limited: in principle, it compiles the content of the four directives, without proposing any significant novelties or improvements to the current standards of consumer legislation.

From a consumer advocates point of view, the proposed directive is therefore first of all disappointing: The impression persists, that the Commission used the excuse of the review of the acquis only to leave behind the "old" minimum harmonisation approach to these directives and turn them into fully harmonised rules, which seemingly suit the Internal Market better. The application of full harmonisation has since many years been a "programmatic" element of the Commission's strategies for EC consumer policy, and recent consumer law has been based on the model of full harmonisation, for example the Directive on Distance Selling of Financial Services (2002/65/EC), the Directive on Unfair Commercial Practices (2005/29/EC) and the Directive on Timesharing (2008/122/EC).

Yet, with the exception of the Unfair Commercial Practices directive, so far this approach was limited to harmonising specific sectors and these texts contain derogations that leave room for Member States to maintain their specificities. What is different with the proposed consumer rights directive is that, although the proposal pretends to follow the approach of "targeted full harmonisation", it applies in reality full harmonisation to an unprecedented broad body of law. Finally, the level of protection proposed to become the maximum protection across the EC is far too low.

In principle, the Commission's initiative to review the EC consumer law acquis is desirable: Current EC consumer legislation dates back to the 1980's, when the off-premises sales directive was adopted. In the meantime, many factors have changed with the use of new business models, new technologies and products and different consumers demands and needs. The body of EC consumer law has ever since grown, yet applying diverging definitions and concepts, so that more coherence and clarification is needed. Moreover, a review should provide more legal certainty for business and consumers as well as introduce more modern thinking allowing to respond efficiently to future societal, economic and technological changes. It should continue the promotion of high standards of protection, which to date have served the interest of European consumers and business well.

Aware of the need to modernize the 'consumer acquis' the Commission launched a Green Paper consultation in 2007,[3] which considered possible approaches for a revision. The acquis was defined as including the directives on the following issues: time-sharing, package travel, price indication, distance selling, door-step-selling, unfair contract terms, product guarantees and injunctions.

After the adoption of the time-share directive in its revised version in 2008, the proposed consumer rights directive is the second and by far largest initiative in the revision process. According to the Commission's planning, it will be followed by a proposal for a reviewed package travel directive, to be issued in 2010.

[3] COM (2006) 744.

In this context it is important to mention that the proposed directive on consumer rights seems to completely ignore the recommendations and the work done in the so-called "Common Frame of Reference" project,[4] *which is a Commission initiative launched in 2003 to find common principles for a European civil law, and which came up with the Draft Common Frame of Reference (DCFR-interim outline edition) in the beginning of 2008. Most surprisingly no reference is made in the explanatory memorandum of the proposed consumer rights directive to the CFR project and no traces of the draft CFR can be found in the text of the proposal. The European Parliamentary Committee for legal affairs notes that «*this is strange given that the whole purpose of the Common Frame of Reference was meant to be to serve as a toolbox for the Commission when revising the acquis communautaire in the area of contract law*».*[5] *Indeed the Commission could have learned from the Draft Common Frame of Reference as it provides for a higher level of consumer protection than the proposed directive on several issues, in particular as regards the provisions on sales contracts, such as on the lack of conformity and guarantees. It is expected that the European Parliament will examine this question further and take a closer look at the differences between the solutions in the proposed consumer rights directive and in the DCFR, with a view to reconnect the two exercises and to ensure consistency between the two projects.*

The proposed directive on consumer rights raises many fundamental questions, reaching into the very heart of EU consumer protection policy and its future development, it also touches upon the fundamental concepts and the vision of the Internal Market. Finally, it will have a big impact on national civil law regimes in general.

In the following paragraphs some of the main pending issues on in the proposed directive are discussed.

Objectives of the proposed directive

The objectives of the proposed directive are that:

- *businesses, large and small, are able to provide their goods and services free from unnecessary obstacles, to consumers across the 27 Member States of the Union;*
- *consumers across all EU 27 Member States have confidence in a high level of consumer protection in the EU;*[6]

Furthermore the directive aims to simplify and update the existing rules and to make them more coherent.[7]

[4] The Academic "Draft Common Frame of Reference" (DCFR), prepared by the Study group on a European civil code and the research group on EC private law (Acquis group); in the meantime the full out-line edition has been published in February 2009 (see http://www.sellier.de).

[5] *EP working document on consumer rights,* Legal Affairs Committee, PE423.804v01-00, 15 April 2009, p. 3.

[6] See the Explanatory Memorandum of the proposed directive, p. 2: «*To achieve a real business to consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises...*».

[7] See recital 2 of the proposed directive.

Who would not support such objectives? But when it comes to the question, how these objectives have to be attained, opinions differ substantially.

The Commission's underlying concept is based on the assumption that the differences between national consumer laws, which in the Commission's view exist because of the minimum harmonisation of the "older" EC consumer legislation, are a decisive obstacle for traders to offer their services and goods across borders.

Consequently, the Commission deems that consumer legislation should be fully harmonized: the same, identical rules apply everywhere across the EU as a whole. Once the "defragmentation" of national legislation and consequently of markets through full harmonization would be achieved, the increase in legal certainty for business and consumers would "automatically" lead to more competition, more consumer choice and sharper prices.

The second part of the Commission's concept is based on the believe, that consumer confidence will rise once the legislation is the identical regardless from which country the consumer buys.

Firstly, both assumptions have worrying downsides in many respects:

- *there is not sufficient evidence that fragmentation through legal differences is the main reason for lack of cross-border trade;*
- *full harmonization as it is presented by the proposal does not lead to unification of legal systems: a lot of legal uncertainty will remain or will be newly created;*
- *the lack of Consumers' confidence cannot be remedied by imposing the same rules across the EU (and in doing so, taking away many well established consumer rights in many countries).*

Secondly, the Commission's preparatory groundwork is not convincing: The Impact Assessment[8] only looks into a limited number of relevant questions and does not provide clear answers on the real impact of the proposed legislation on national legislation. Moreover, it is not based on sound, qualitative consumer research to find out what really matters to consumers when shopping at home and cross-border, the problems that consumers face in the fields of both, domestic and cross-border shopping, what the products are that consumers want to buy online, or what kind of redress they need in case a product is faulty.

The most recent Eurobarometer surveys show that most traders would not increase their cross-border sales even if the laws were made identical throughout the EU.[9] Other factors (eg. the lack of appropriate cross-border redress mechanisms, language barriers, Internet access, fears regarding security and data protection) influence consumers and businesses attitudes toward cross-border con-

[8] For a summary of the Impact Assessment see Commission Staff Working Document accompanying the proposal for a directive on consumer rights, SEC (2008) 2545.

[9] According to the 2008 Flash Eurobarometer (Flash EB nr 224) only 16% of traders would increase their cross-border sales if the laws were the same throughout the EU; in total 74% of traders claimed that hamonised laws would make little or no difference to their cross-border activities.

tracts much more.[10] Consumer organizations also observe increasingly unjustified market segmentation through territorial discrimination of consumers by bigger businesses. Companies often prevent consumers from accessing their products/ services in another country than the consumer's country of residence and exclude them from benefiting from better prices and eventually more choice.

It is therefore simply wrong to claim that consumers do not buy cross-border because the laws are not the same in all countries as experience of consumer organizations across the EU as well as relevant consumer research demonstrates: For example, consumers shop cross border in cross border areas, because this is "local" (Strasbourg-Kehl for example) despite the fact that different legislation applies (for example, the fact that the right to a "garantie décennale"[11] does not exist in Germany, does not prevent French consumers to buy from German companies).

Moreover, the average consumer is usually not aware of the laws in force in his/her country of residence but this does not stop him/her to conclude contracts within national borders. Consumers do not expect to find everywhere the same commercial culture as in their own country but they mostly worry about effective ways to solve eventual problems or disagreements with the seller.

The increase of cross-border trade and legal certainty is definitely an aim worth to be pursued, but we should not throw out the baby with the bath. Indeed, only 7% of all consumer contracts currently concluded online are cross-border transactions.[12] Even though this figure will continue to rise in the coming years, one has to bear in mind that the vast majority of contracts concluded by consumers in their daily life will always remain domestic, or local, or regional, even in an Internal Market. A far-reaching overhaul of national consumer contracts law and general civil law as proposed by the Commission, with negative implications for consumers is therefore not proportionate.

In this context it is also worth looking at the US, a market comparable to the EU in size: there is no such thing as a fully harmonized consumer contract law in the USA. On the contrary, a variety of laws applies both at the federal level and at the level of the federal states, including different state consumer laws. It has not been heard however that this situation prevents US citizens to buy from another state than theirs. Interestingly, the idea of more uniformity or a more national and harmonized approach has not gained a lot of support in the US to date.[13]

[10] 71% of consumers answered that it is harder to resolve problems such as complaints, returns, price reductions, guarantees, when purchasing from providers located in other EU countries compared to the ones based in their home country (2006 Eurobarometer). 59% of traders mentioned as an important barrier the perceived cost of the difficulty in resolving cross-border complaints (Special Eurobarometer 244, 2008).

[11] Specific legal guarantee in French law in the construction sector.

[12] European Commission, Memo/08/609, Frequently asked questions on the proposed consumer rights directive, to be accessed at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/609&format=HTML&aged=0&language=EN.

[13] See in the *Report of the UK House of Lords* - "EU Consumer rights directive: getting it right" - July 2009, point 55, to be accessed at: www.parliament.uk.

The drawbacks of full harmonization

With these reflections in mind, what is then the right way forward in combining the aim to promote cross-border trade with the need to preserve and develop valuable consumers' prerogatives and rights that matter to consumers in their daily purchases? How can consumer legislation be improved most efficiently to the benefit of both, consumers and businesses?

Imposing "full harmonization" on EC consumer law has unfortunately become a 'fixation' for the European Commissions it seems. Commissioner Kuneva has said that it is a point on which she "will not compromise".[14] Full harmonisation may seem an attractive concept to some. Yet, applying it to the whole body of EC consumer contract law which is inseparably linked to national civil law, with many national particularities and in many countries dual regimes for example in the field of remedies in case of a lack of conformity,[15] is bound to fail.

The Commission underlines, that the proposed directive does not cover every aspect of a contractual relationship, for example it does not deal with the capacity to contract or the question when the contract is concluded. However, the scope of the proposal is vast: Firstly, it covers in principle all sectors of commerce, including financial services, social services and immovable property; secondly, it deals with pre-contractual information requirements for all consumer contracts for all goods and services, unless specific information requirements in EC legislation exist. Thirdly, the regime for the right of withdrawal for distance and off-premises contracts as well as major aspects of sales law for goods (not for services) and the entire body of legislation on unfair contract terms fall within the proposal's remit und therefore under full harmonization.

There are certainly benefits to fully harmonise certain aspects of the EC consumer legislation, such as definitions, certain aspects of the right of withdrawal, certain information requirements etc. First and foremost, it is however a matter of getting the right dose of full harmonisation: How much is necessary and at what level of protection? The Commission in its proposed directive prescribes an overdose risking to severely damage the health of the patient.

The level of protection

The EC treaty requires the EU institutions to set measures in the field of consumer law at a high level of consumer protection (Article 153 para 2, Article 95 para 3 ECT) and it stipulates that the activities of the Community must contribute to a strengthening of consumer protection (Art 3 paragraph 1 (t)).

[14] Commissioner Kuneva's address to the European Parliament on 4 May 2009.

[15] The examples often quoted for "dual regimes" remedies (national civil law and national consumer law remedies existing in parallel and being both available to the consumer) are to be found in the UK (the "right to reject") and in France, Belgium and Luxembourg (the so called "*vice caché*" guarantee).

Full harmonization prevents Member States from introducing more protective measures and it forces them to repeal legislation going beyond the level of protection prescribed. The proposed directive would therefore clearly reduce the level of consumer protection in many member states as shown by academic research, including the Commission's own Law Compendium.[16]

In some Member States these downward adjustments would concern core provisions of consumer legislation:

The most blatant examples of a reduction of consumer rights through the newly proposed directive concerns can be found in the consumer sales law part (chapter IV) of the proposal, currently regulated in the directive on consumers sales of 1999: The Commission's proposal would deprive consumers in at least 7 or 8 Member States from key rights in their national legal regime for guarantees: these concern the right to reject (UK and Ireland) or similar and even more advantageous national provisions in Portugal, Slovenia, Greece, Lithuania and Latvia, which allow the consumer to directly proceed with the termination of the contract, if a product is faulty and get the money back, instead of letting the trader choose whether he/she wants to repair (or replace) the defective good, as suggested by the proposed directive.[17]

In the meantime, the Commission has made it clear that according to its interpretation, the right to reject in the UK and Ireland would not be affected by the proposed directive and could be maintained. This is good news for the UK and the Irish consumers, but firstly, the European Court of Justice might have a diverging view and secondly one wonders what the consumer in countries of less political 'weight' than the UK, such as the ones mentioned above who currently enjoy similar rights, will be told?

Another example in the field of guarantees is the proposed provision that in case of a lack of conformity, the trader - not the consumer!- has the choice between the remedies that he wishes to make use of. This provision puts things upside down in relation to the current 1999 Consumer Sales Directive, which stipulates that the consumer has the right to choose which remedy he/she prefers. This consumer prerogative appears to be only natural and fair, as it is the trader who is in breach of the contract, not the consumer. The proposal to change the current regime would lead to a decrease in consumer protection across all 27 Member States.

Furthermore, in many countries, the legal guarantee period is longer than the proposed 2 years, which is particularly important and justified for durable goods such as cars and household appliances: the periods range from 3 years to 6 years or even to "the expected life span period".[18] *The proposed introduction of an obligation for consumers to notify the trader*[19] *within two months from discovery*

[16] To be accessed at: *http://ec.europa.eu/consumers/rights/cons_acquis_en.htm#comp*.

[17] The wording of the proposal would imply that UK and Irish consumers would lose the UK/Ireland's "right to reject", a very well established consumer remedy, which allows the consumer to cancel the contract and get the money back in case a product is faulty, without having to accept repair or replacement of the good. In any case, consumers in Portugal, Greece, Slovenia, Latvia and Lithuania would loose the initial right to choose between four remedies, including the right to rescind from the contract.

[18] Finland, Sweden, Ireland, the Netherlands and the United Kingdom provide for a longer guarantee period than the proposed 2 years.

[19] Consumers from 10 EU countries (Austria, Belgium, Czech Republic, France, Germany, Greece, Ireland, Latvia, Luxembourg, UK and the Netherlands) would be worse of than today.

that the purchased good is defective (if they don't want to loose the right to a guarantee), as well as the limitation of the period for withdrawal where consumers are not informed of their right to cancel to 3 months,[20] the obligation to meet certain formal requirements when exercising the right of withdrawal in distance selling contracts[21] etc. can be added to the list of examples of the negative impact of the proposed directive on important national consumer law.

Another new provision, which would decrease consumer protection in all Member States, is Article 16, which in case of a withdrawal from the contract, introduces a right for the trader to withhold the reimbursement for payments already received from the consumer until the trader has received his goods back. According to the Commission, this rule is necessary to protect traders against dishonest consumers, who do not intend to give back the product.

Overall, the Commissions has turned the current minimum level of protection into the maximum level of protection. Logically, this approach can only lead to a reduction of consumer protection throughout the EU, in particular in the "older" Member States.

Applying full harmonisation as proposed by the Commission to the field of unfair contract terms would even be counterproductive in relation to the Commission's objective to achieve more legal certainty: Unfair contract terms legislation is a principle based field of law, inseparably linked to national civil law. Not only would several Member States, which have developed higher standards through case law, more encompassing lists of what constitute unfair terms or a broader definition of what constitutes "unfairness" generally,[22] be forced to repeal these rules, but much more cases would have to be decided individually before the courts. Consequently decisions would vary from judge to judge more than today in a national context. Obviously court decisions of what constitutes an unfair clause or not would diverge even more between member states and it would take many years - if at all - before the European Court of Justice would render orientation on how the clauses in the proposed directive would have to be interpreted. What the Commission actually proposes is to decrease legal certainty and at the same time lower protection in this field.

The proposal provides for some novelties, yet most of these points already exist in at least a few Member States and even if they do not, it is questionable whether they are rights that are really important or if they will be valued by consumers if compared to the potential losses at stake. Such provisions concern for example the inclusion of "non organised" distance selling schemes into the scope of the directive and the fact that in on-line transactions pre-ticked boxes are not binding for the consumer. The introduction of a horizontally applicable 14-day

[20] A longer/unlimited withdrawal period in case of the omission of information about the right to withdrawal for doorstep selling exists in all Member States and for distance selling exist for example in: Austria, Germany, UK , Spain, Finland and Greece.

[21] Consumers in 19 Member States, when buying at a distance, would lose the right to exercise withdrawal by any means. Instead they would have to fulfil certain form requirements (Czech Republic, Austria, Belgium, Greece, Denmark, Estonia, Finland, France, Hungary, Ireland, Latvia, Luxembourg, Malta, Netherlands, Portugal, Slovenia, Sweden, Romania, and Spain).

[22] Germany, Austria, Spain, Greece, Finland, Norway, Denmark, Italy, to name only a few.

withdrawal period and the inclusion of solicited visits in door-step-selling are however considerable improvements.

Due to the unclear scope of the proposal in particular regarding its impact on national civil law remedies and to the delimitation problems linked to that, the factual impact of the proposal remains in the dark to a large degree. The Commission is expected now to provide an assessment of the impact of the proposal on national consumer protection, which has been requested by the European Parliament, the Council working group and by stakeholders. Such an analysis about national rules that would have to be eliminated in the Member States since not in conformity with the proposed directive is necessary because the Commission's Impact Assessment does not throw any light on this crucial issue. A regulatory impact assessment should have been delivered much earlier. The Commission could at least have consulted Member States and stakeholders on a draft proposal, before adopting it, as it has done in other, less wide-ranging fields.

The Commission's rules for impact assessments should be changed in order to ensure that whenever the Commission intends to put a cap on national standards of protection, as it is the case with the proposed directive, it is obliged to include an assessment of (the most important) national laws which have to be repealed or changed.

Some useful lessons about the potential of full harmonization can be drawn from past and recent rulings of the European Court of Justice:

- *many years after the implementation of the product liability directive, the European Court of Justice ruled that the directive requests Member States to repeal certain national provisions in favour of consumer protection;*[23]
- *the unfair commercial practices directive, which was implemented by the Member States only in 2007 has already led to unexpected consequences: The European Court of Justice ruled in April 2009,*[24] *that a Belgian law, prohibiting so-called "combined offers" ("offres jointes", i.e. linking the acquisition of one product or service to the acquisition of another product or service) was not in conformity with the directive on unfair commercial practices as this Belgian commercial practice was not on the directive's exhaustive list of unfair commercial practices (black list) and therefore is permissible under the Directive. Belgium had to repeal its legislation. Other Member States might face similar problems soon.*

This ruling on unfair commercial practices came at the right moment. It hopefully will serve as a "warning" for the EC legislators, the Council of the European Union and the European Parliament. It clearly demonstrates that if the scope covered by the fully harmonizing EC law is not crystal clear and the language not free of ambiguities, bad surprises are likely to follow.

[23] For example see the case law of the European Court of Justice C-293/91, C-327/05.

[24] European Court of Justice, joined cases C- 261/07 and C - 299/07.

The relationship with general contract law

Consumer law naturally develops alongside contract law and one cannot be isolated from the other. The full harmonization approach of the proposed directive would lead to a "freezing" effect of consumer contract law at EU level while general contract law would continue to evolve freely. Such an approach is likely to create inconsistencies and paradoxes in the long run (for example. businesses having more rights than consumers). According to the proposal's Explanatory Memorandum, the directive is without prejudice to "more general contract law concepts".[25] Hence the question arises as to whether general contract law in fields falling within the scope of the proposal, e.g. in relation to remedies to exercise the legal guarantee, are affected or not. If civil law remedies remain unaffected, important legal divergences would remain, despite the full harmonisation character of the proposal. Legal uncertainty would not be decreased.

The proposed directive raises a series of further questions in relation to what kind of contracts are covered (for example contracts for housing, immovable property) and how the proposed directive relates to other EC legislation, such as the e-commerce directive and the services directive, which cannot be discussed here.

Subsidiarity and proportionality

Against the background of the above, the Commission's choice of tool for achieving the objectives of the directive is not proportionate in relation to the clearly negative effects in many Member States, but also in relation to the potential consequences, which may amount to an "overhaul" of civil law in some Member States.

Furthermore, in the field of consumer contract law, the principle of subsidiarity can probably only be respected by applying minimum harmonization. The European legislator should only take over from the national legislator where there is a clear need to do so. As explained above, the Commission has not provided the proof for the necessity to apply full harmonization across the main aspects of consumer contracts.

How could full harmonization be applied?

In the light of the previous considerations the conclusion is that full harmonization should only be envisaged from a consumer perspective, if the following strict conditions are met:

[25] Explanatory Memorandum of the proposed directive p. 7.

- *it only applies to technical and/or cross-cutting issues (such as the length of the withdrawal period, the conditions to exercise it, certain definitions such as the definition of a consumer and a trader for example etc.);*
- *its application does not result in a decrease of the level of consumer protection, but is set at a truly high level of protection;*
- *the scope of the fully harmonised field is clear from the text of the directive so that legal certainty is provided;*
- *in relation to issues which are very closely linked to national civil law orders, such as unfair contract terms or the main elements of legal guarantees, the approach of the legislative revision should be based on minimum harmonisation.*

Consequently, the most appropriate way forward in reviewing the EC consumer law acquis would be the application of a "mixed" or "differentiated" approach for harmonisation, which applies minimum harmonisation as the basic rule, but allows for full harmonisation according to the principles as explained above.

Wanted: a "future proof" legal framework for European consumers

The consumer rights directive will undoubtedly determine the daily transactions of consumers in the EU for the generations to come, but the proposal in its present form does not provide for a framework to make consumer legislation future proof, such as for example in the field of digital content products/services (for example purchases of downloaded content like music, films, software, games etc): Transparency and fairness of content license conditions, consumer remedies in case of non-conformity o the services or insufficient and misleading information about the feature of such products/services are the main issues, which needed to be addressed. Whilst the proposed directive is promoted as a means to boost e-commerce and on-line shopping,[26] only one element[27] can be found in the proposal to take new consumer challenges and problems stemming from digital technology into account. Recently however the Commission launched a call for tender,[28] in order to study firstly the practical problems that consumers face when buying digital content and secondly national and EC consumer legislation which could be applied to such contracts. The results of this study will probably be come too late to be taken into account in the proposed directive, which is regrettable as there are not many opportunities to review EC consumer legislation.

[26] European Commission, Memo/08/609, Frequently asked questions on the proposed consumer rights directive, to be accessed at: *http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/609&format=HTML&aged=0&language=EN*.
[27] See Article 31 paragraph 3 of the proposed directive.
[28] European Commission, Call for tender. Digital content services for consumers: assessment of problems experienced by consumers and comparative analysis of the applicable legal frameworks (2009/S 141-205388) to be accessed at: *http://ec.europa.eu/eahc/documents/consumers/tenders/digital/Service_contract_Contract_notice_205388-2009_EN.pdf*.

New concepts should have been taken into account also in other fields, to allow for a more tangible manifestation of the Internal Market also for consumers: the introduction of a joint responsibility of the trader and the producer for faulty products would greatly help to make the Internal Market finally come true. A consumer who bought a faulty item abroad should be able to invoke remedies in his/her home country, if the producer has a branch there, instead of being obliged to send the faulty product back to the seller, what might imply from one corner in the EU to the other, struggling with foreign languages and procedures.

What will happen now?

The proposed directive is dealt with under the legislative co-decision procedure, which provides for an equal standing of the Council of the European Union and the European Parliament. To date the two institutions have been approaching work on the proposal in very different ways:

Due to the end of term and the European Parliaments elections in June 2009, the previous Parliament was not able to undertake a first reading of the proposal; however, the Parliamentary Committee for the Internal Market and Consumer Protection, summarized its deliberations - which included a public hearing, an on-line consultation of stakeholders and a joint meeting with national Parliaments - in a working document[29] in which the need for more evidence and data was underlined: the Committee calls in particular for clarification of the relationship between the fully harmonised provisions in the proposed Directive and the general remedies available in national contract law, for an analysis of the practical effects of the proposal on consumer rights in each Member State and clarification of the interplay of the draft proposal with existing Community legislation, for an ex post assessment of the Unfair Commercial Practices Directive to analyse the application of full harmonisation and for further work to be done by the Commission on the impact assessment to fully analyse the benefits and costs of this proposal.

The European Parliament has not shied away from the effort to look behind the Commission's reasoning for the proposed directive and to care about the foundations and the future vision of EC consumer policy. It has convincingly fulfilled its task of representing the interest of European people.

At the time of writing this article, and more than 5 month after the publication of the working document, the Commission has still not responded to the Parliament. Hopefully the new Parliament, which started the debate on the proposed directive in early September 2009, will continue on the same basis and in the same spirit as the previous one.

[29] Working document of the IMCO Committee, 4 May 2009, EP 423.778.

In the Council of Ministers negotiations on the proposed directive, firstly under the Czech and now under the Swedish presidency, progress steadily. Apparently Member States show an "appetite" for full harmonization even when it comes to the difficult issues of remedies for faulty products or the length of the guarantee period. Concrete amendments are discussed. The Swedish presidency announced that it aims at achieving an informal agreement on key issues as early as in December 2009 - at a time, when presumably the work in the European Parliament will still be in its beginnings. From the point of view of "good governance" this is not desirable. The co-decision procedure foresees that the European Parliament, representing the voice of the European people, gives its opinion first and only then can the Council of ministers decide on its position.

This is particularly important in the case of the proposed directive, which has encountered strong doubts and criticism, expressed not only by various stakeholders, including consumer organizations across the EU and academics but also by national and European institutions: Below the most telling examples are mentioned:

- *In July 2009, the UK House of Lord called on the UK Parliament to withhold agreement from the proposal as drafted.[30] It recommends that further progress on the Directive should be subject to a more comprehensive Impact Assessment, which - inter alia - should include more consumer research, better statistics on cross-border trade and examine the extent to which legal harmonization can promote the use of the Internal Market by consumers;*[31]
- *the German Parliament's second chamber, the Bundesrat has also given a very critical recommendation[32] to the Bundestag: it says that the EU does not have competences for what the Commission has proposed, which namely amounts de facto to the creation of a European consumer civil law code and a European consumer sales law. This according to the German Bundesrat is neither necessary nor desirable;[33]*
- *the Greek national Parliament rejected the proposed directive mainly on the grounds of its negative impact on key provisions of the Greek national consumer legislation and the lack of data to proof the economic consequences of legal fragmentation. It called for a minimum harmonization approach to be pursued.[34]*

Finally, the proposed directive could have been an interesting test case for the functioning of the new powers of national Parliament's under the Lisbon Treaty: According to the new Treaty and its protocols (no 1 and no 2) on the role of national Parliaments and the application of the principle of subsidiarity, national

[30] Report of the UK House of Lords - "EU Consumer rights directive: getting it right" - European Union Committee , July 2009, point 198. , to be access at: www.parliament.uk.
[31] Report of the UK House of Lords - "EU Consumer rights directive: getting it right" - European Union Committee , July 2009, point 199.
[32] Bundesrat, Empfehlungen der Ausschüsse, 765/1/08, März 2009.
[33] Bundesrat, Empfehlungen der Ausschüsse, 765/1/08, März 2009, point 18.
[34] Opinion on the proposed directive of the Hellenic Parliament, 18 June 2009.

parliaments have a scrutiny function on draft legislative acts of the EU and - if a certain number of votes allocated to the national Parliaments is achieved - can ask for a review of the legislative act in question.

It is also interesting to note that the European Economic and Social Committee in its opinion on the proposal could only conclude that Chapter IV on sales law and Chapter V on unfair contract terms should be withdrawn from the scope of the proposed directive, as these sections according to the ECOSOC cannot be dealt with appropriately under full harmonization.[35]

The above mentioned opinions and recommendations clearly point to the challenge of nowadays EC consumer legislation: The proposed directive needs to be substantially changed and the right balance between minimum and maximum harmonization needs to be found, in order to achieve a truly high degree of protection across the EU and to refrain from eliminating well-established and well functioning consumer rights. The Commission pursues the right objectives but has based the proposed directive on wrong assumptions and proposed the wrong solutions. It is now the task of the EC legislator to show to European citizens/ consumers, what it means to put consumers' interest at the heart of the Single Market.

[35] Opinion of the European Economic and Social Committee, 16 July 2009, INT/464.