Towards a maximum harmonisation of consumer contract law?

EDITORIAL

TOWARDS A MAXIMUM HARMONIZATION OF CONSUMER CONTRACT LAW?!?

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§1. INTRODUCTION

This journal has paid a great deal of attention over the years to one of the core questions in the debates concerning a European private law, that is, the extent to which a harmonization of private law at a European level is either necessary or desirable. Indeed, in the very first MJ issue, Van den Bergh provided an economic analysis of the subsidiarity principle providing economic criteria for centralization.[1] He subsequently applied these economic notions to the domain of European private law and concluded that none of the economic rationales for centralization may justify a far-reaching unification or harmonization of the rules of private law.[2] However, criticism of the idea of harmonizing private law at the European level has not only come from law and economics scholars: legal scholars writing in the core of European private law have also argued that a competition between legal rules is likely to create better results than a forced harmonization at the European level.[3] Further, in specific domains such as environmental law[4] and tort liability,[5] criticism has been formulated of the tendency towards centralization of private legal rules at a European level.

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1 R. Van den Bergh, 'The subsidiarity principle in European Community Law: some insights from law and economics', 1 *MJ* 337 (1994).

2 R. Van den Bergh, 'Subsidiarity as an economic demarcation principle and the emergence of European private law', 5 *MJ* 129 (1998).

3 See for such a plea in favour of a 'free movement of legal rules' in this journal, J. Smits, 'A European private law as a mixed legal system. Towards a ius commune through the free movement of legal rules', 5 *MJ* 328 (1998).

4 See my editorial M. Faure, 'Ius Commune and Transboundary Environmental Pollution', 2 *MJ* 215 (1995).

5 See T. Hartlief, 'Harmonization of European Tort Law. Some critical remarks', in M. Faure, J. Smits & H. Schneider (eds.), *Towards a European ius commune in legal education and research* (Intersentia, 2002), 225–230.

In a similar vein, the domain of consumer contract law does not seem to be able to escape this tendency towards centralization by the European Commission. On 8 February 2007, the Commission adopted the Green Paper on the review of the consumer *acquis*, summarizing the Commission's initial findings and initiating a public consultation process.[6] Commentators on the Green Paper argued that it had become clear that the European Commission envisaged the drafting of a European Code on consumer contractual rights.[7] The Green Paper generated a great deal of reaction, some of which were very critical,[8] some less so.[9]

In October 2008, the European Commission published a proposal for a directive of the European Parliament and of the Council on consumer contractual rights.[10] This proposal is *inter alia* based on the responses that the Commission invited to the Green Paper from a wide range of stakeholders: businesses, consumers, the European Parliament, Member States, academics and legal practitioners. The most noteworthy element is that the proposal is based, as it clearly states, on a full harmonization of community consumer contract law.[11] It would, in other words, be a maximum harmonization – necessary according to the Commission to remedy the existing fragmented regulatory framework, 'which causes significant compliance costs for businesses wishing to trade cross-border'.[12] This proposal seems to be a revolutionary shift in approach, which therefore merits a critical discussion.

§2. SHIFT IN APPROACH

The current proposal makes clear that it aims at revising four directives, more particularly Directive 85/577/EEC on contracts negotiated away from business premises,[13] Directive 93/13/EEC on unfair terms in consumer contracts,[14] Directive 97/7/EC on distance contracts[15] and Directive 1999/44/EC on consumer sales and guarantees.[16] These four directives all adopted a so-called minimum approach, meaning that Member States

6 COM(2006) 744 final, O.J. C61, 15 March 2007.

7 See e.g. M.W. Hesselink, 'Naar een (Europees) Wetboek van Consumentenrecht?', 14 *Nederlands Juristenblad* 850 (2007).

8 C.H.R. Twigg-Flesner, 'No sense of purpose or direction? The modernization of European consumer law', 3 *Eur. Rev. of Contract Law* 198 (2007).

9 E. Terryn, 'The Green Paper on the review of the consumer acquis', *Tijdschrift voor Consumentenrecht* 105 (2007). See also E. Hondius, 'Kroniek van het Consumentenrecht. Europa in Nederland', 34 *Nederlands Juristenblad* 2199 (2008).

10 COM(2008) 614 final, 8 October 2008 [the Proposal].

11 *Ibid.*, 6.

12 *Ibid.*, 2.

13 Council Directive 85/577/EEC of 20 December 1985, O.J. L372, 31 December 1985.

14 Council Directive 93/13/EEC of 15 April 1993, O.J. L095, 21 April 1993.

15 Directive 97/7/EC of 20 May 1997, O.J. L144, 4 June 1997.

16 Directive 99/44/EC of 5 May 1999, O.J. L171/12, 7 July 1999.

were allowed to maintain or adopt stricter national rules than those laid down in the directive.[17] The current proposal makes clear that it wishes to 'move away from the minimum harmonization approach followed in the four existing directives',[18] a point further reinforced by Article 43 of the proposal, which proclaims that the directive will have an 'imperative nature'.[19]

§3. WHY WOULD MAXIMUM HARMONIZATION BE NECESSARY?

The European Commission provides various arguments as to why the current approach of minimum harmonization is not satisfactory. The explanatory memorandum holds *inter alia* that 'the overarching aim of the Review is 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, while ensuring respect of the principle of subsidiarity'.

The explanatory memorandum continues that the Directives under review contain minimum harmonization clauses, 'meaning that Member States may maintain or adopt stricter consumer protection rules', and they have made extensive use of this possibility. Thus, as the memorandum continues, the outcome is a 'fragmented regulatory framework across the Community which causes significant compliance costs for businesses wishing to trade cross-border'. The memorandum goes on to note that, 'the internal market effects of the fragmentation are a reluctance by businesses to sell cross-border to consumers which in turn reduces consumer welfare'. Since consumers cannot sufficiently benefit from competitive cross-border offers, 'they do not fully reap the benefits of the internal market in terms of more choice and better prices'. The Commission concludes that 'the level of consumer confidence in cross-border shopping is low' as a consequence of the fragmentation of the consumer *acquis*. The overall objective of the proposal should therefore 'be attained by decreasing the fragmentation, tightening up the regulatory framework and providing consumers with a high common level of consumer protection'.

The explanatory memorandum continues to argue that surveys have shown that, for the majority of traders, such compliance costs constitute an important barrier to

17 See for example Art. 8(2) of Directive 1999/44/EC on the sale of consumer goods and associated guarantees which stipulates that 'Member States may adopt or maintain in force more stringent provisions, compatible with the Treaty in the field covered by this Directive, to ensure a higher level of consumer protection'. For an overview of the European consumer law (there were indeed many more directives than merely the four which the Commission now wants to incorporate into the proposal), see M.B.M. Loos, *Review of the European Consumer Acquis* (Sellier, 2008).

18 Proposal, 3.

19 Art. 43 reads 'If the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by this Directive'.

cross-border trade, which reduces their incentive to sell cross-border, particularly to consumers in small Member States.

The explanatory memorandum pays a lot of attention to the reactions the Commission received to the Green Paper, noting that 'the majority of respondents to the Green Paper called for the adoption of a horizontal legislative instrument applicable to domestic and cross-border transactions, based on full targeted harmonization'. This should be targeted 'at the issues raising substantial barriers to trade for business and/or deterring consumers from buying cross-border'.

The European Commission describes in the explanatory memorandum six options which have been subject to an impact assessment,[20] yet argues throughout that only full harmonization would remove regulatory barriers in the internal market, reduce burdens for businesses and increase consumer confidence.

Finally, the explanatory memorandum briefly discusses the compatibility of their chosen approach with existing legal principles, including subsidiarity and proportionality. As far as subsidiarity is concerned, the explanatory memorandum argues that the legal fragmentation problem cannot be solved by the Member States individually, 'since it is the uncoordinated usage by the Member States of the minimum harmonization clauses contained in the existing Directives that is at the root of the problem'.[21] Only a coordinated community intervention can adequately respond to the needs of the internal market. Since the proposal is based on a full harmonization of consumer contract law, the Commission argues that 'its positive impact on the retail market would be considerable' and 'the savings in terms of administrative burden on business wishing to sell cross-border would be high'.

It is interesting to note that the European Commission relies on a variety of arguments to justify this far reaching (maximum) harmonization. A first argument is that the differences in legal rules create high costs for business and consumers. The Commission assumes hence that a harmonization of law always reduces costs. A second argument explicitly mentioned is that the current differentiation of legal rules (referred to as 'a fragmented regulatory framework') would limit cross-border trade (and thus endanger market integration in Europe). The implicit assumption is that harmonization of law and in this particular case consumer contractual rights would be necessary to realize the ideal of an integrated European market. The third argument given is that European intervention would lead to a high level of consumer protection. These three arguments all merit a critical response. Since the Commission implicitly uses economic arguments (reduction of administrative costs and market integration), it seems appropriate to use the economic literature referred to in the introduction to judge the validity of the arguments presented by the Commission.

20 Proposal, 3–4.
21 Proposal, 6.

§4. MAXIMUM HARMONIZATION FOR MARKET INTEGRATION?

The first argument made by the Commission is that the current differences in regulation (Member States providing in some cases further reaching rules than the minimum harmonization) limits cross-border trade. It is a classic argument and one often advanced by the Commission to justify any type of harmonization: the argument that differences in legal rules create unequal market conditions is, however, general and unbalanced and lacks any distinctive feature. Such an argument can justify a (largely useless) harmonization of all kinds of legal rules, since a law undoubtedly always has some influence on marketing conditions. Nevertheless, many arguments can be advanced against this reasoning.[22]

1. The mere fact that legal rules differ between Member States is, from an economic perspective, not problematic but rather desirable. The advantage of different legal rules is that legislators can provide rules that correspond to the preferences of citizens and that learning processes can take place. In some cases, legislators can learn from (in some cases superior) alternatives abroad to improve national legislation.[23] These learning processes are no longer possible where harmonization has taken place.[24]
2. If no differences of marketing conditions were to exist between Member States, there would be no interstate trade. It is the differences between marketing conditions that create conditions for interstate trade.
3. The harmonization of legal rules is an inappropriate instrument for the creation of similar marketing conditions. Even where in theory all legal rules concerning consumer contract rights were harmonized, the costs of doing business for industry would still vary. There would still be other differences concerning other types of regulation (for example, environmental standards). Moreover, more important differences in infrastructure, productivity, level of wages etc would still continue. Those differences cannot be removed through a harmonization of consumer law.[25]
4. The argument wrongly suggests that an integrated economic market would only be possible where legal rules in a federal system were completely harmonized. Yet there

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22 See for a recent criticism on harmonization of consumer law from an economic perspective R. Van den Bergh, 'The uneasy case for harmonizing consumer law', in K. Heine and W. Kerber (eds.), *Zentralität und Dezentralität von Regulierung in Europa. Schriften zu Ordnungsfragen der Wirtschaft* (Lucius & Lucius, 2007), 184–206. A similar criticism with respect to the harmonization of tort law was recently also formulated by R. Van den Bergh and L. Visscher, 'The principles of European tort law: the right path to harmonization?', 14 *Eur. Rev. of Private L.* 511 (2006).

23 Van den Bergh and Rekiti provide an interesting example of cooling-off periods in consumer law (P. Rekiti and R. Van den Bergh, 'Cooling-off periods in the consumer laws of the EC member states: a comparative law and economics approach', 23 *Journal of Consumer Policy* 371 (2000)).

24 Van den Bergh 'The uneasy case for harmonizing consumer law'.

25 *Ibid*., 202.

are important empirical counter examples. Switzerland and the US show that an integrated economic market is reconcilable with competition between legal orders. It is, however, required that within this integrated market a free movement of products, services, labour and capital can take place.

5. From the perspective of the consumer it is highly doubtful whether the true barriers to interstate purchases are indeed constituted by differences in national legal rules, as suggested by the European Commission. It seems likely that barriers are not so much constituted by differences in legal rules, but rather by differences in culture, language, distance, service after sales and travel costs, all of which would influence the decision of a consumer to purchase across the border.[26] This shows that even with a fully harmonized legal system (as proposed now) there would not necessarily be more transboundary trade with consumers, as the argument of the Commission wrongly supposes.
6. The importation of products from another Member State can to a large extent be discouraged through other factors than differences in the level of consumer law. For example, differences in national taxation systems (e.g. differences concerning the value added tax on cars) can be far more important than differences in private legal rules. Moreover, differences in safety regulation can *de facto* constitute an important restriction on cross-border purchases. When, for example, a Belgian consumer looks to purchase a television set in the Netherlands, he will quickly discover that he cannot use his new television in Belgium for the simple reason that the Netherlands and Belgium use different plugs. This difference constitutes a far more important restriction on the cross-border purchase of electronic and other products than the mere fact that the rules of private law between the two countries might differ.
7. The argument of the Commission wrongly suggests that companies today are reluctant to engage in transboundary trade because of differences in legal rules. Wagner, however, showed in an impressive study that multinational companies are not deterred from cross-border sales, even where this means that they have to adapt to local legal rules.[27] For small and medium sized companies, the costs of adaptation to local legal rules can be more substantial. However, it is striking that associations of those companies strongly rejected the idea that the full harmonization of contract law was necessary to increase competition within the internal market.[28] Thus the Commission uses the argument that differences in private law limit cross-border trade when in fact there is no empirical evidence supporting this assertion. Moreover,

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26 See K. Cseres, *Competition law and consumer protection* (Kluwer, 2005), 233.

27 G. Wagner, 'The economics of harmonization: the case of contract law', 39 *C.M.L. Rev.* 1004 (2002).

28 See Cl. Ott and H.B. Schäfer, 'Die Vereinheitlichung des Europäischen Vertragsrechts. Ökonomische Notwendigkeit oder akademisches Interesse?', in Cl. Ott and H.B. Schäfer (eds.), *Vereinheitlichung und Diversität des Zivilrechts im transnationalen Wirtschaftsraumen* (Mohr Siebeck, 2003), 236.

empirical evidence that shows that the lack of cross-border trade is little related to the differences in private law is systematically neglected by the Commission.[29]

Wagner quotes in this respect an interesting study from the Swiss canton of Zürich showing that a consumer travels a maximum of 6.8 kilometres to satisfy his needs. He therefore argues that it is very unlikely – if this study is generalizable – that a strong cross-border market would open up as a result of the harmonization of consumer contract law. The consumer in Bonn will still prefer to buy her car in Germany rather than in Maastricht, not least because she will prefer to go to her local dealer in Bonn for servicing. Interestingly, Wagner notes that there are exceptions for products where no service after sale is required, such as the purchase of cigarettes, perfume, alcohol or CD's. It is, however, striking that for these products a truly international market has emerged in the absence of a uniform consumer contract law. These examples suggest therefore that the harmonization of contractual rights is not necessary to create a uniform market where there is scope for its emergence.[30]

In sum, there is no support for the Commission's argument that a maximum harmonization of consumer contractual rights is necessary to stimulate cross-border trade, neither from a theoretical nor from an empirical perspective. It is not because of differences in contractual rights that little cross-border trade occurs. Hence, it cannot therefore be anticipated that the harmonization of consumer contractual rights will increase cross-border trade; rather it is mainly the differences in distance, language, culture and tax level that limit the scope of cross-border purchases by consumers. These differences will continue to exist even after a maximum harmonization of consumer contract law.

§5. LOWERING OF TRANSACTION COSTS?

An argument strongly linked with the market integration argument is that the current differences between legal rules in the Member States lead to substantial administrative costs for consumers but more particularly for businesses. 'The savings in terms of administrative burden on business wishing to sell cross-border would be high',[31] so the explanatory memorandum argues. This assumption simply holds that uniform rules are easier to apply than differentiated legal rules, as a result of which a substantial savings on costs are available. At first sight, this argument is seductive: uniform rules reduce information costs because study of the different legal systems in the Member States is no

29 See Van den Bergh 'The uneasy case for harmonizing consumer law', 202–203.
30 See Wagner, 'The economics of harmonization: the case of contract law', 1016–1017.
31 Proposal, 6.

longer necessary.[32] There are, however, some problems with this simple presentation of the argument:

1. The argument wrongly suggests that the costs of harmonization would be nil or at least very low. However, merely the translation problems with directives and the differences that arise in that respect can lead to differences in interpretation. Moreover, a new legal concept (imposed by a directive) has to be applied within the context of a particular legal culture. This supposes that a 'legal transplant' takes place, the cost of which can be extraordinarily high and, according to some, even prohibitive.[33]
2. The argument that administrative burdens would be reduced if legal rules were harmonized implicitly assumes that current differences are meaningless and that hence uniformity would have only advantages. However, the economic literature has often pointed to the fact that differences are related to varying preferences of citizens and hence are not meaningless at all.[34] Uniformity hence always creates a cost related to the loss of differentiation: the result will be that harmonized legal rules are less able to satisfy the preferences of the citizens of Europe.
3. Further, one can highlight the fact that (as the European Commission underlines) the differences between levels of consumer contractual rights in the Member States are still substantial. This supports the argument that the preferences in this domain vary considerably as a result of which harmonization is in principle undesirable.[35] Secondly, the apparently large differences in legal culture in the domain of consumer contractual rights also underline the difficulty of applying a fully harmonized system within differing legal cultures.[36] This may make such a harmonization effort impossible.
4. Experiences in the past where Europe attempted to harmonize rules of private law have shown the high costs of harmonization and in some cases even the impossibility of doing so; for example, the European Directive concerning product liability. There

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32 Van den Bergh 'The uneasy case for harmonizing consumer law', 199.

33 See P. Legrand, 'The impossibility of legal transplants', 4 *MJ* 111 (1997), and P. Legrand, 'Antivonbar', 1 *J. of Comp. L.* 13 (2008). Legrand's argumentation was recently supported by Van Dam who, using the framework of Hofstede concerning cultural differences also highlights the importance of diversity in national legal cultures and the high costs of harmonization (C. Van Dam, 'European tort law and the many cultures of Europe', in Th. Wilhemsson (ed.), *Private law and the cultures of Europe* (Kluwer Law International, 2007), 53–76.

34 See for example R.J. Van den Bergh, 'Towards an institutional legal framework for regulatory competition in Europe', 53 *Kyklos* 435 (2000), and A.I. Ogus, 'Competition between national legal systems: a contribution of economic analysis to comparative law', 48 *I.C.L.Q* 405 (1999).

35 Van den Bergh 'The uneasy case for harmonizing consumer law', 186–189.

36 See generally for the differences in contract law in Europe, S. Vogenauer and S. Weatherill (eds.), *The Harmonization of European Contract Law. Implications for European private laws, business and legal practice* (Hart Publishing, 2000), and see also the contributions to F. Cafaggi (ed.), *The Institutional Framework of European Private Law* (OUP, 2006). See for the differences in the approach to consumer contractual rights, M. Faure, A. Ogus and N. Philipsen, 'Enforcement practices for breaches of consumer protection legislation', 20 *Loyola Consumer Law Review* 361 (2008).

were many interpretation problems concerning the concepts used in the directive, as a result of which the savings on transaction costs were minimal.[37] Moreover, the directive itself provided plenty of scope to Member States for applying their own rules, and, as a consequence, the directive merely added an additional layer of complexity to already existing differences whilst creating no reduction in transaction costs.[38]

It is hence a myth to believe that when one strives for maximum harmonization (as in the current proposal) this will create legal certainty and a reduction of transaction costs: instead it is likely that vague concepts will lead to a difference in interpretation in the national legal systems of the Member States, based on the already existing differences in legal cultures.[39]

§6. A HIGHER LEVEL OF CONSUMER PROTECTION?

The Commission's proposal makes a third argument for maximum harmonization, that it would provide 'consumers with a high common level of consumer protection'.[40] In this respect, one can be brief in riposte: this reflects a type of legal paternalism that clearly disrespects national differences in preferences and in legal culture.[41] The Commission arrogantly believes that it knows better which legal rules are fit for a majority of citizens in particular Member States. The benefits of a differentiated approach are hence to be sacrificed.[42]

Given the differences in legal culture as far as consumer contractual rights are concerned, one can hence expect that this 'high common level of consumer protection' may be too low for particular Member States and too high for others. As far as the first category is concerned: the first responses to the Commission's proposal published, for example, in the Netherlands were extremely critical, arguing that the introduction of this proposal would effectively lead to a reduction of the level of consumer protection.[43]

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37 See Van den Bergh, 'Subsidiarity as an economic demarcation principle and the emergence of European private law', 146–147.

38 M. Faure, 'Product liability and product safety in Europe: harmonization or differentiation?', 53 *Kyklos* 467 (2000).

39 Van den Bergh 'The uneasy case for harmonizing consumer law', 200.

40 Proposal, 2.

41 On the diversity of legal cultures in Europe, see Van Dam, 'European tort law and the many cultures of Europe', 53–76.

42 See for a critical assessment of the question of whether there is a legal basis for harmonizing a high standard of consumer protection, S. Weatherill, *E.U. consumer law and policy* (Edward Elgar, 2005), 64–66. I here merely provide an economic account.

43 See three critical papers by M. Loos: M. Loos, 'Herziening van het Europees consumentenrecht, deel I', *Nederlands Tijdschrift voor Europees Recht* 31 (2008); M. Loos, 'Herziening van het consumentenrecht: een teleurstellend richtlijnvoorstel', *Tijdschrift voor Consumentenrecht en Handelspraktijken* 173 (2008), and M. Loos, 'Een auto die na drie jaar kapot gaat? Pech gehad!', 37 *Nederlands Juristenblad* 23 (2008).

For other Member States (more particularly those in eastern Europe), one can expect that the 'high common level of consumer protection' mandatorily imposed by this proposal goes much further than the current level of consumer protection. In this respect, it should be remembered that the Coase Theorem teaches that there is always a relationship between a 'high common level of consumer protection' and the prices of products and services.[44] Increased protection always comes at the cost of increased prices of products and services. The paternalistic decision of bureaucrats in Brussels then leads to the situation that these bureaucrats apparently believe themselves to know better what the appropriate level of consumer protection is in Lithuania, Denmark and Portugal, whereas an economic perspective suggests instead that local authorities are more likely to have better information to create rules that better correspond with the preferences of the citizens in those Member States.[45] A high level of consumer protection on its own can therefore never provide an adequate justification for European intervention.

§7. LEGAL BACKGROUND

The explanatory memorandum makes clear[46] that Article 95 of the Treaty is the legal basis for this proposal. Article 95(1) explicitly provides the competence to harmonize in order to improve the functioning of the internal market. However, in its well-known *Tobacco Advertising Judgement*,[47] the European Court of Justice held:

> The measures referred to in article 100a (1) [now Article 95 (1) EC] of the Treaty are intended to improve the conditions for the establishment and functioning of the internal market. To construe that article as meaning that it vests in the community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above... but would also be incompatible with the principles embodied in article 3b of the EC Treaty [now Article 5 EC] that the powers of the community are limited to those specifically conferred on it.

This judgement has been interpreted, for example by Weatherill, as meaning that in the area of consumer law, the European Commission only has the competence to regulate to the extent that cross-border transactions are stimulated. The Court was clear that the EC can only regulate consumer law where the measure of harmonization actually contributes to the elimination of obstacles to the free movement of goods or to the free movement to provide services, or to the removal of appreciable distortions of competition.[48] Yet my

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44 R.H. Coase, 'The problem of social cost', 3 *Journal of Law and Economics* 1 (1960).

45 Van den Bergh 'The uneasy case for harmonizing consumer law', 192.

46 Proposal, 6.

47 *Germany v. Parliament and Council*, case C-376/98 (2000), ECRI-8419. See *inter alia* T. Hervey, 'Community and national competence in health after tobacco advertising', 38 *C.M.L. Rev.* 1421 (2001).

48 See Weatherill, *E.U. consumer law and policy*, 74.

analysis shows that the proposal cannot be justified as a market integration instrument. What the European Commission is trying to achieve is instead the regulation of the market itself, for which it has no competence. Hence, the basis for this directive is legally doubtful.[49]

§8. THE PROPOSAL: A BRIDGE TOO FAR?

I have already noted that consumer lawyers came out strongly against this proposal since it would lead to a reduction of consumer protection in Member States with a high level of protection, such as for example, the Netherlands. Moreover, law and economics scholars such as Van den Bergh have also provided clear arguments against a maximum harmonization of consumer law like the one attempted in this proposal.[50] Van den Bergh argues that the classic economic arguments in favour of centralization cannot be used to justify harmonization in the field of consumer law. He argues that it is 'surprising that the European Commission will not give up the discussion on the harmonization of contract law and recently even strives towards a maximum harmonization of consumer law'.[51] Repeating that, especially where consumer contract law is concerned, the preferences of consumers in the Member States strongly diverge, he further notes that given the high level of income differences across the EU, one can predict that the desired consumer protection and the corresponding preferences in that respect will largely diverge. Forced harmonization therefore prevents the consumer from choosing between lower prices and higher quality.

Yet the Commission seems to advance seemingly convincing arguments in favour of the maximum harmonization. As epilogue to this editorial, the following replies can be provided to the arguments provided by the Commission:

The argument of the Commission that compliance costs constitute an important barrier to cross border trade is not based on serious scientific research, but instead on questionnaires in which respondents were asked if they would see an advantage to a full harmonization. It should not therefore be surprising that most respondents found uniform legal rules attractive. The value of that type of research is, however, very doubtful. Consumers and businesses have only been asked how they would hypothetically trade in a future in which legal barriers resulting from differing legal systems were reduced. It is well-known that reactions to those hypothetical questions can be quite different than the actual behaviour of people. The Commission did not empirically examine whether

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49 In the words of Weatherill: 'Some measures harmonizing rules on consumer protection are explained not simply as contributions to the elimination of distortions caused by legislative diversity among the member states'. This is, according to him, 'of unclear constitutional status' (*Ibid*., 77).

50 See also R. Van den Bergh, 'Der gemeinsamen Referenzrahmen. Abschied von der Harmonizierung des Vertragsrechts?', in Th. Eger and H.B. Schäfer (eds), *Ökonomische Analyse der Europäischen Zivilrechtsentwicklung* (Mohr Siebeck, 2007), 111–125.

51 *Ibid*., 115.

businessmen would offer more products or services cross borders were legal rules to be harmonised where they do not do so today; nor has research been conducted to establish whether consumers would purchase more goods and services cross border where legal rules were uniform.

More interesting would have been research, for example, between Member States where relatively little differences exist as far as consumer contractual rights are concerned. In that case a so-called regression analysis could have been used to examine the relative influence of not only differences in law, but also of all the other elements that may influence consumer choice such as taxes, travel costs, cultural and language differences. Only a regression analysis could have made clear what the relative influence is of differences in legal rules on the choice of consumers. That type of research has not been undertaken.

The major problem with the surveys presented by the Commission in the explanatory memorandum is that the presentation by the Commission is completely one-sided: respondents have only been asked if they would today be hindered by differences in law and if, where there was uniformity in legal rules (in theory), cross border transactions would increase. Hence the surveys focus on only one type of cost, namely the administrative burdens for business. That there are substantial (and potentially even prohibitive) costs of harmonization is not mentioned at all, and respondents are not asked about it. There is also no mention of the substantial costs imposed by the overriding of different preferences by mandatory rules. The Commission therefore does not provide a complete, balanced and correct picture in what is a complex harmonization debate. It seems irresponsible to draw policy conclusions (as the Commission does) as far as the desirability of maximum harmonization is concerned on the basis of such a fragmented approach.

The Commission seems to believe that facilitating cross border trade is the only argument they need to put forward to justify harmonization, neglecting the legal and economic theory that seriously contests this view. Traditional arguments (transboundary externalities and the race to the bottom) do not, however, apply to the area of contract law or to the area of consumer law.[52] Yet these arguments are completely neglected by the Commission. One argument is taken out of the harmonization debate (facilitating cross border trade) to come to far-reaching conclusions concerning the allocation of competences (to the central level). All other potential arguments against centralization are not mentioned.

The advantages of differentiation and decentralised legal rules (better information of local authorities, better corresponding rules to local preferences, competition between legal orders as a learning process) are not even mentioned once in the explanatory memorandum.

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52 See for example also R. van den Bergh, 'Forced harmonisation of contract law in Europe: not to be continued', in S. Grundmann and J. Stuyck (eds.), *An academic green paper on European contract law* (Kluwer Law International, 2002), 249–268.

The costs of harmonization are not mentioned at all. The European Commission apparently implicitly assumes that these costs are nil. However, given the fact that important differences exist in legal culture particularly as regards consumer contractual rights, one can expect these costs to be high, if not prohibitive.

In sum, none of the arguments presented by the European Commission in its explanatory memorandum justifies a maximum harmonization in the field of consumer contractual rights. The arguments in favour of decentralization and differentiation are to the contrary both theoretically and empirically substantiated. The recent proposal by the Commission should hence be considered as either an interesting thought experiment or a political mistake. In any case, it should immediately be discontinued in order to avoid further damage to the Commission's reputation.[53]

[53] This text was concluded on 1 December 2008. Evolutions after that date could hence not be taken into account.