

**European Consumer Law: A Law for the Consumer or the
Internal Market? The case of the Consumer Rights Directive
and its application to the UK and Cypriot regime**

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To an angel up in the skies, I know you feel proud now...

Abstract

In 2008 the European Commission has put forward a Proposal for a Consumer Rights Directive with the aim to increase consumer confidence in the internal market. Based on the principle of maximum harmonisation, the proposed Directive provided for amendments in the areas of unfair contract terms, consumer remedies, distance and doorstep selling. However, the disagreement of Member States regarding the contentious amendments to unfair contract terms and consumer remedies which involved a reduction of consumer protection led to those changes being dropped from the final Directive. The shift to maximum harmonisation and the contentious amendments in the two areas constitute the starting point for the argument put forward in this thesis. Increasing consumer confidence has not been the actual aim behind the Commission's legislative efforts.

With the application of the moral panic theory to the case of European Consumer Law, the aim is to show how the European Commission has used the consumer confidence justification as a smokescreen for the shift to maximum harmonisation which can better support its internal market project. The Consumer Rights Directive as adopted constitutes a compromise and only amends Distance Selling and Doorstep Selling Directives. Although reduction to the level of consumer protection was prevented, the eventual approach followed under the Consumer Rights Directive still constitutes indication of the fact that the driving force has been the internal market. The application of the Directive to the domestic regimes of UK and Cyprus provides an opportunity to test the main argument of this thesis.

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Chapter 1 - Introduction to the Research

Introduction

The twentieth century has been characterized as the century of consumer society¹ where people have exhibited increased consuming activity. During the twentieth century, consumer goods had not only become widely available but in addition every aspect of daily life had turned out to be affected by the prevalence of consumption in society: from the food sector to the clothing sector, from the means of communication to the transportation used for travelling.² All aspects of life have more or less been touched by consumption.³ In an era when consumption had become an indispensable aspect of people's everyday life, the European Union, after a number of changes brought to its Constitution which will be analysed in a subsequent part of this study, gained competency to regulate within the area of Consumer Law. The European Commission has thus gradually managed to become a key player in legislating in this area. Nevertheless, the competency of the European Community to legislate within the particular field has been tied to the internal market project, which had implications for the subsequent development and shape of the European Consumer law.

The consumer confidence argument, more particularly within the context of cross-border trade, has formed the justification that the Commission has employed through the years for the need to take action within the area of consumer protection at the European level.⁴ The former President of the European Commission, José Manuel Barroso, in his guidelines for the European Commission, had referred to the effect that consumer policy has on the integration of the internal market as well as to the fact that European

¹ Martyn J Lee, *The Consumer Society Reader* (Blackwell Publishers 2000) ix.

² *ibid.*

³ *ibid.*

⁴ Thomas Wilhelmsson, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' (2004) 27 *Journal of Consumer Policy* 317, 317.

consumers should not be discouraged from shopping across borders.⁵ For these reasons he emphasized the need to have an effective consumer policy which will boost consumer confidence.⁶ The desire to increase cross border trade across Europe should not nevertheless be considered as accidental since it comprises a valuable means for the integration of the internal market. While the rate of cross-border border trade constitutes evidence of the degree of integration of the retail dimension of the internal market, the number of cross-border transactions is at the same time indicative of the extent to which traders are willing to trade throughout the internal market as well as an indication of the consumer confidence to enter into cross-border transactions within the internal market.⁷

Cross border trade involves transactions made by consumers either when they travel abroad or through means of distance sale such as internet, phone or post.⁸ The particular type of trade widens the choices that are available for consumers as it provides them with the opportunity to buy goods or services which are not available in their own country⁹ and in some instances at better prices.¹⁰ At the same time, cross-border trade furthers commercial opportunities for sellers who can offer their goods and services in other countries. Cross border trade is thus a way of not only increasing consumer welfare but it at the same time increases competition within the internal market.¹¹

⁵ Commission Directorate-General for Health & Consumers 'The Consumer Markets Scoreboard' (2010) 3rd edn <http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/3_edition/docs/cms_3_en.pdf> accessed 15 April 2016.

⁶ *ibid.*

⁷ *ibid.*

⁸ *ibid.*

⁹ Commission, 'Report on cross-border e-commerce in the EU' (Staff Working Document) SEC(2009) 283 final, 9.

¹⁰ Flash Eurobarometer 358, 'Consumer Attitudes towards Cross-Border Trade and Consumer Protection' (June 2013) 16

<http://ec.europa.eu/public_opinion/flash/fl_358_en.pdf> accessed 26 April 2016.

¹¹ Commission, 'Report on cross-border e-commerce in the EU' (Staff Working Document) (n 9) 9.

The efforts made by the Commission, through a number of directives comprising the Consumer Acquis¹², to increase consumer confidence and thus make consumers engage into cross border shopping seem to have been fruitless as the number of cross border transactions have remained steady over the last years.¹³ According to a Eurobarometer survey on Consumers' Attitudes Towards Cross-border Trade and Consumer Protection which was undertaken in 2011, while the number of distance shopping, especially over the internet, had considerably increased, cross-border distance shopping was still not widespread.¹⁴ While the Commission makes great efforts to promote cross-border trade within the internal market by harmonizing consumer rights, consumers seem unwilling to play the game of the Commission.

While, as it has already been stated, the consumer confidence justification has formed the argument that the European Commission has employed throughout the years¹⁵, based on the same justification, the Commission has in 2008 put forward the Proposal for a Consumer Rights Directive. The main objective of the proposal was again to enhance consumer confidence within the internal market by providing for the full harmonization of national consumer protection regimes so as to in this way increase cross border trade. Nevertheless the increasing reference to the need to boost consumer confidence as well as the shift towards maximum harmonization raises concerns as to whether making consumers feel confident to shop cross border is what the Commission really aims to achieve.

Scope of the Study

Interestingly, it is the shift from minimum to maximum harmonization in the Consumer Rights Directive and the continuing reference to the consumer

¹² Wilhelmsson, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' (n 4) 317.

¹³ Commission Directorate-General for Health & Consumers 'The Consumer Markets Scoreboard' (n 5).

¹⁴ Flash Eurobarometer 332, 'Consumers' Attitudes Towards Cross-Border Trade and Consumer Protection' (May 2012) 7

<http://ec.europa.eu/public_opinion/flash/fl_332_en.pdf> accessed 26 April 2016.

¹⁵ Wilhelmsson, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' (n 4) 317.

confidence argument that have acted as an incentive for proceeding with a research on the real motives behind the legislative activity of the European Commission. Although the internal market is as the Commission has itself stated the ultimate context for consumer policy¹⁶, at the same time it should not be disregarded that the consumer policy constitutes a great tool in the hands of the European Commission to indirectly improve the functioning of the internal market as consumption expands on many aspects of our lives. Nevertheless, with the recent development of the Consumer Rights Directive, the view adopted in this study is that the Commission has so overtly shifted the focus of the European Consumer law on the internal market project that not only consumers seem to have been put in the second place but in addition the real intentions behind the legislative activity of the Commission are becoming obvious.

Accordingly, the main contention that is articulated in this study is that European Consumer Law has been used and is still used by the European Commission to achieve means other than consumer protection, albeit in the name of consumers. What this argument denotes is that the Commission with its legislative efforts within the area of EU Consumer Law has shifted its focus on completing the internal market by thus putting the protection of consumers in second place. There are three issues that are brought forward with regard to this main formulation. The first issue is the consumer confidence justification which is viewed as a rather constructed problem by the European Commission. The second issue is the debate between minimum and maximum harmonization which raises the tension between consumer protection and the purpose of increasing cross border trade and thus completing the internal market. The third issue to be considered is the Consumer Rights Directive which is regarded as the most explicit example of this trend and whose application within the domestic regimes of UK and Cyprus will form the test for the main argument that is put forward in this study.

¹⁶ Commission, 'EC Consumer Policy Strategy 2007-2013 – Empowering consumers, enhancing their welfare, effectively protecting them' COM (2007) 99 final, 4.

EU Consumer Law and the Moral Panic argument

The increasing use made to the consumer confidence justification, and more particularly its use in the latest shift to maximum harmonization in the Consumer Rights Directive¹⁷, constitutes an indication of the European Commission's power to manipulate Consumer Law to the direction that better serves its interests. Contrary to what the Commission passionately advocates, this study supports what was argued by Thomas Wilhelmsson namely that maximum harmonization relates only minimally to the actual creation of consumer confidence.¹⁸ A purpose of this study is to present the argument that the European Commission has formed a moral panic around consumer confidence which had as a consequence its conception as a social problem. Therefore, by employing the moral panic approach, the process by which the consumer confidence has been translated into a social problem can be examined.

The idea of moral panic was first developed by Cohen who provided the definition of moral panic as:

'A condition, episode, a person or group of person emerges to become defined as a threat to societal values and interests, its nature is presented in a stylized and stereotypical fashion by the mass media, the moral barricades are manned by for example politicians or other right-thinking people, socially accredited experts pronounce their diagnoses and solutions, ways of coping are evolved or resorted to, the condition then disappears, submerges or deteriorates. Panic might produce such changes as those in legal and social policy or even in the way the society conceives itself.'¹⁹

¹⁷ The resulting approach is full targeted harmonisation, maximum harmonisation is the prevailing approach in most provisions, albeit with some limited exemptions where some discretion has been left to Member States. Those issues will be better analysed in a later chapter.

¹⁸ Wilhelmsson, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' (n 4) 318.

¹⁹ Stanley Cohen, *Folk Devils and Moral Panics: The creation of the Mods and Rockers* (3rd edn, Routledge 2002) 1.

What Cohen denotes with the term moral panic is a less manifest social process²⁰ which comes to the forefront when the actors involved, whether those are politicians, legislators or any other moral crusaders who try to persuade others, collaborate to define and combat a perceived threat through public discourse, legislation or public policy.²¹ However, this is not to say that they do so consciously but rather it is their activities in their entity that form and sustain a moral panic.²² Being a sociological concept, moral panics are thus an approach which can be employed to explain an overreaction to a perceived social problem, to bring to light the process by which a concern about a social problem is generated, a concern that although is not proportionate to the actual problem, it constitutes the justification for a change in the social or legal codes.²³

The enactment of legislation constitutes one of the forms which a moral panic may take.²⁴ “How do laws get passed?” and “Why are they enforced” are questions to which moral panic can provide an answer to.²⁵ The actors involved in the majority of moral panics have as their aim to affect the content and enforcement of the law which are the two most evident and extensively employed practices to combat an alleged threat.²⁶ Laws are perceived to represent, and that is the reason they are actually passed, the views, ideology, interests and demands of the more powerful and influential groups within the society. Although, this does not mean that the more powerful predominate over the less powerful on every issue that arises neither the less powerful will be unsuccessful in all instances.²⁷ Moral panics commence with a premise which assumes that something is wrong and should thus be addressed. This event or condition may subsist although

²⁰ Charles Krinsky, *The Ashgate Research Companion to Moral Panics* (Ashgate 2013) 4.

²¹ Stuart Hall, Chas Critcher, Tony Jefferson, John Clarke and Brian Roberts, *Policing the Crisis: Mugging, the State and Law and Order* (Macmillan 1978) 16.

²² Cohen, *Folk Devils and Moral Panics: The creation of the Mods and Rockers* (n 19) 1; Krinsky, *The Ashgate Research Companion to Moral Panics* (n 20) 293.

²³ Amanda Rohloff and Sarah Wright, ‘Moral Panic and Social Theory: Beyond the Heuristic’ (2010) 58(3) *Current Sociology* 403, 2.

²⁴ Erich Goode and Nachman Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (2nd edn, Wiley-Blackwell 2009) 117.

²⁵ *ibid* 119.

²⁶ *ibid* 121.

²⁷ *ibid* 123.

in a less serious nature from that presented or it may not exist at all. Claims and arguments are accordingly developed to support the presupposition that is put forward.²⁸

Equally, the consumer confidence argument has been constantly presented by the European Commission as the main problem of European Consumer Protection and it has served as a longstanding justification for the EU's intervention within the area of Consumer law with a series of minimum harmonization directives that formed the Consumer Acquis. As the moral panic approach can provide the basis for explaining overreaction to a perceived social problem, this part of the study will accordingly examine whether the consumer confidence justification constitutes a rather constructed social problem around which the European Commission has formed a moral panic. As already stated, by using the moral approach, the process by which a concern about a social problem is generated can be brought to light and for this purpose an examination of the development of the Consumer Acquis will be critically examined for determining whether the Commission, for the purpose of creating a perfect internal market, has manipulated European Consumer Law which, although in the name of consumer, may prove not to be for the protection of consumers.

In addition, with consideration to what has earlier been stated namely that legislation is one of the forms that a moral panic may take this study views the Consumer Rights Directive as being the most manifest indication of the real intentions behind the Commission's intervention within the field of consumer protection. The initial purpose of the Commission was to implement a horizontal maximum harmonization directive which would cover four existing consumer protection directives. Despite the great efforts of the Commission during the legislative process to defend maximum harmonization, what has in the end been achieved is a full targeted harmonization directive merely merging the existing Doorstep Selling and Distance Selling Directives under the Directive 2011//83 on Consumer

²⁸ Goode and Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (n 24) 144.

Rights²⁹ while important amendments to the Directive on Unfair Contract Terms as well as to the Consumer Goods and Associated Guarantees Directive were left behind.³⁰ Questions such as how do laws get passed and why certain laws are enforced are among the questions that the moral panic approach can give an answer to and will form part of the analysis of the process that preceded the Consumer Rights Directive.

The three year period that passed from the time that it was initially proposed in 2008 until 2011 when it was finally adopted has included long discussions and changes to the scope of the Directive. Accordingly, a critical examination of the process that preceded the adoption of the Consumer Rights Directive is also necessary at this point as it will contribute in determining the reasons that the adoption of the Directive was delayed as well as to look beyond the final choice of considerably reducing its scope. What do the disagreements among the relevant actors during this three year process reveal about their intentions, beliefs and views? The answer to such questions can shed light in relation to the approach followed in the area of European Consumer Law and on deeper issues involved.

Minimum and Maximum Harmonization

The debate between minimum and maximum harmonization constitutes the second issue that arises in this study and also raises the tension between consumer protection and the internal market. Minimum harmonization was the prevalent philosophy of European Consumer law for many years and enabled the European legislators to set the floor for the mandatory level of protection that Member States needed to provide for consumers. Member States could at the same time create higher standards within their national regimes. Nevertheless, the scene has been subjected to change with the shift towards maximum harmonization.

²⁹ Hans-W Micklitz, 'What Does Consumer Law Reveal About The Nature Of The EU?' in Erik Jones, Anand Menon and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (Oxford University Press 2012) 532.

³⁰ The only amendments brought to the Directive on Unfair Contract Terms and to the Consumer Goods and Associated Guarantees Directive were simply reporting requirements for Member States when adopting stringent, than those provided in the two Directives, provisions in relation to certain mentioned Articles.

Consumer confidence has been linked to the full utilisation of the internal market in the sense that if consumers do not have confidence in the internal market and in the protection of their interests, they will be unwilling to enter a cross border transaction. It is in response to those problems that the Proposal for a Consumer Rights Directive emerged with its main objectives being to enhance consumer confidence and to reduce business reluctance in an effort to reduce fragmentation by proposing a full harmonization measure.³¹ The consumer confidence argument has formed once again the justification that the Commission has used for the adoption of the Consumer Rights Directive.³² Arguments that have been made and which this study supports suggest that the real intention of the Commission is in essence the encouragement of business while the effect that this will have for consumers is taken for granted³³, a fact which became obvious with the approach of maximum harmonization.

Vanessa Mak has argued that with consideration to the twin objectives that the EU Consumer law seeks to achieve, namely the advancement of internal market on the one hand and the strengthening of consumer protection on the other hand, it is not surprising, according to her own view, that the Commission ended up with a proposal for a maximum harmonization directive.³⁴ Geraint Howells has contended that the European consumer law will not be for the benefit of consumers anymore as it was previously the case with the minimum standards that the EU provided. According to his argument, maximum harmonization on the other hand will turn EU consumer law into a guardian of the interests of traders.³⁵ Along the same line of argument, there were authors who have expressed the view that consumer

³¹ Sarah Edgar, 'Cross-border B2C e-commerce in the EU and the introduction of the Consumer Rights Directive: A cure for fragmentation?' (2012), 11 <http://lib.ugent.be/fulltxt/RUG01/001/892/204/RUG01-001892204_2012_0001_AC.pdf> accessed 17 April 2016.

³² *ibid* 9-10.

³³ *ibid* 15.

³⁴ Vanessa Mak, 'Two Levels, One Standard? The Multi-level Regulation of Consumer Protection in Europe' (2010) TISCO Working Paper Series on Banking, Finance and Services 01/2010, 7 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1585786> accessed 24 April 2016.

³⁵ Geraint G Howells, 'The Rise of European Consumer Law – Whither National Consumer Law?' (2006) 28 Sydney Law Review 63, 65.

protection policy has become an internal market policy³⁶ aiming at boosting cross border trade. Part of this study will be accordingly devoted on the debate between maximum and minimum harmonization and will, by examining existing commentary, demonstrate what each approach in essence promotes. This thesis will in addition provide the reasons why there is a weak connection between maximum harmonisation and the desire to increase consumer confidence and which constitute further evidence that the consumer confidence argument has been hijacked.

A further argument which adds to the debate between minimum and maximum harmonization relates to the resulting definition of consumer which will also form part of this examination. The definition of consumer constitutes an issue which is substantively connected with the notion of consumer confidence and cannot be ignored in this study. The Commission's view that the maximum harmonization of different national consumer policies will increase consumer confidence seems to be based on a single standard consumer. What is accordingly presumed is the existence of a European consumer who is present in every country across Europe. The situation is nevertheless more complex than suggested by the maximum harmonization approach. The EU not only includes 495 million consumers coming from 28 different countries but in addition, European Consumers come from various and greatly different economic and political circumstances while each consumer has its own unique historical and cultural development.³⁷ Consumer consumption patterns vary among the different EU Member States and this is not attributed to a single reason. Consumption behaviour is subject to various psychological, sociocultural and situational factors.³⁸

³⁶ Howells, 'The Rise of European Consumer Law – Whither National Consumer Law?' (n 35) 65.

³⁷ Michael R Solomon, Gary Bamossy, Søren Askegaard and Margaret K Hogg, *Consumer Behaviour – A European Perspective* (4th edn, Pearson Education 2010) 4.

³⁸ Leon G Schiffman and Leslie Lazar Kanuk, *Consumer Behaviour*, (8th edn, Pearson Prentice Hall 2004) 121.

Meanwhile, the definition of consumer has lost its protective outlook since the focus has now shifted on the competent consumer who, according to the Commission, once the laws across all European Member States are harmonized, will be able to make the greatest possible use of the internal market. Nevertheless, if consumer confidence was the real aim behind the legislative activity of the Commission and especially behind the Consumer Rights Directive with the more radical approach of maximum harmonization that it provides, the question that is accordingly posed is why the position of vulnerable, poor and uneducated consumers is nowhere mentioned and not envisaged in the Consumer Rights Directive³⁹. The situation becomes even worse with consideration to the fact that maximum harmonization will render national legislators unable to extend the protection to those categories of consumers. The new outlook given to the definition of consumer is viewed in this study is another indication of the Commission's real intention which is in essence to create a perfect internal market and accordingly only the more powerful consumers are seen as better positioned to act as the driving force for the attainment of this goal.

Harmonizing European consumer law in order to increase consumer confidence is not as a straightforward issue as it has been presented. As Alberto Alemanno has enunciated EU should, apart from paying consideration to the social, economic and environmental impact of all policy options, also pay regard to the behavioural impact they have.⁴⁰ Until now, EU has relied on the assumption that people's behaviour can change through rules, regulations and incentives.⁴¹ While the time for the EU to begin designing policies that reflect how people really behave and not how they are assumed to behave has come⁴², the Commission continues to

³⁹ Although the Unfair Commercial Practices Directives deals to some extent with consumer vulnerability, the argument made here relates simply to the Consumer Rights Directive.

⁴⁰ Alberto Alemanno, 'The EU needs to embrace behavioural insights in the design of its policies' (2012) <<http://blogs.lse.ac.uk/europpblog/2012/06/26/eu-behavioural-insights-policies/>> accessed 30 July 2013.

⁴¹ *ibid.*

⁴² Alemanno, 'The EU needs to embrace behavioural insights in the design of its policies' (n 40).

focus on an approach that better serves the objectives of the internal market and is more consistent with the internal market project.

An insight into sociological and consumer behaviour literature will provide the underlying basis for the analysis of this part. What are the factors that really influence consumers' behaviour as well as in what ways do the culture in one country may influence people's choices and consumption lives are questions that this part will examine. A purpose of this consideration is to show that the choice of consumers to enter into a cross border transaction is connected with issues that go beyond legislation issues and alterations in law. Engaging into sociological and consumer behaviour literature can provide an insight on what affects people's consumption activity and choices and thus provide an awareness of the complexity involved in this area. Simply expecting that altering the law will at the same time alter consumer's beliefs, habits and traditions is regarded as an elusive view that the European Commission has chosen to develop upon. This may be the perfect point to allude that having the same legal standards across all Member States serves others' interests rather than those of consumers as the consumer confidence justification suggests.

The Consumer Rights Directive and its application to the national regimes of UK and Cyprus

The third issue that arises with regard to the main assumption of this study is the Consumer Rights Directive. While it constitutes one of the most recently adopted directive within the area of European Consumer Law, this study takes the view that it is at the same time the most explicit example of the manipulation of the European Consumer Law by the European Commission. The third part of this study will engage into a comparison between the application of the Consumer Rights Directive into the UK and Cypriot regime in order to test the main hypothesis that is developed in this thesis. The view adopted in this study supports that consumer protection has turned into a by-product of European Consumer Law while the driving force behind legislating in the area is to promote the internal market project. The aim is accordingly to determine the consequences of the Directive and what it

really means for consumers and to demonstrate how the ultimate consequence of the EU's approach will not necessarily assist the consumer although it professes this is its aim.

A brief reference to key points in relation to what a comparative study is as well as which particular method will be employed is a helpful starting point before moving on with details of the comparison that will be undertaken in this study. To begin with, comparative law has been characterized as an intellectual activity with law being its object and comparison being its process.⁴³ It has always been regarded as a unique type of legal research and study.⁴⁴ The term comparative law refers to the study of legal traditions and legal rules on a comparative basis.⁴⁵ Nevertheless, a true comparative law bears the element of internationalism by thus going beyond an ordinary comparison between the different rules situated in a single legal system which is a task that lawyers normally do.⁴⁶ What is accordingly required for a comparative legal study is the comparison of two or more different legal systems or selected aspects of two or more legal systems.⁴⁷

The reason for employing a comparison in this study goes beyond the traditional purposes of comparative law which is either to understand one's own legal culture by comparing it to another legal culture⁴⁸ or to determine the better law.⁴⁹ Edward J Eberle has in a paper called 'The Method and Role of Comparative Law' published in 2009, referred to the possibility of using comparative law beyond those traditional purposes and undertaking it in more expansive projects. What Eberle has suggested is the use of

⁴³ Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Oxford University Press 1998) 2.

⁴⁴ Peter De Cruz, *Comparative Law in a Changing World* (3rd edn, Routledge – Cavendish 2007) 1.

⁴⁵ *ibid* 3.

⁴⁶ Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (n 43) 2.

⁴⁷ De Cruz, *Comparative Law in a Changing World* (n 44) 3.

⁴⁸ Edward J Eberle, 'The Method and Role of Comparative Law' (2009) 8(3) *Washington University Global Studies Law Review* 451, 453.

⁴⁹ Mathias Reimann and Reinhard Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 342.

comparative law in providing an answer to public policy questions, questions that may go beyond national borders and acknowledged consumer protection as being one of the areas that comparative law could accordingly be used.⁵⁰

In our case, the efforts of the European Commission to harmonize the different consumer protection regimes across the European Community have intensified over the last years with the Consumer Rights Directive being the apogee of those efforts. As it has earlier been stated in this introductory chapter, concerns exist as to whether the real aim behind the legislative efforts of the Commission is rather to complete the internal market than to provide consumers with adequate protection. The role of the comparative law thus becomes even more crucial as in the current case an understanding of the relevant legal regimes of UK and Cyprus and an understanding of the effects that the Consumer Rights Directive will have on the existing national provisions of each Member State respectively and will accordingly aid in providing an answer to the hypothesis that is brought forward in this study.

The comparison between the effects of the Consumer Rights Directive on UK and Cyprus will adopt a functionalist perspective. Functionalist comparative law is factual and focuses on the effects of rules.⁵¹ In our case, focusing on the effects that the Consumer Rights Directive will have on the two national legal regimes contributes in providing an answer to the main hypothesis of this study. According to Zweigert and Kötz, as in all intellectual activity, every research of comparative law commences with either the posing of a question or the setting of a working hypothesis. While there is not just a single function of functionalist comparative law, the function of comparison in this study is that of *tertium comparationis*.⁵² Comparability is achieved by laying a third invariant element, a common problem between the two legal systems that will be compared and which

⁵⁰ Eberle, 'The Method and Role of Comparative Law' (n 48) 454.

⁵¹ Reimann and Zimmermann, *The Oxford Handbook of Comparative Law* (n 49) 342.

⁵² *ibid* 367.

acts as 'a common comparative denominator'.⁵³ Following this approach, the comparison can accordingly serve as an experiment by which the hypothesis of the study can be tested.⁵⁴ The common problem between the two legal systems in the current study against which the comparison will be made is that the Consumer Rights Directive does not really aim at providing consumers with protection and will accordingly diminish the level of protection that is offered to consumers in the two relevant Member States.

While functionalism has been criticized for failing to take into consideration the cultural, political and social context within which legal rules exist, this study takes the view that merely comparing the words on page, that is the text of the legislation, is not enough. Accordingly, in order to better comprehend what the law in a particular legal system is and its function within a society, factors affecting the law such as culture, custom, philosophy or ideology will, where feasible, be considered.⁵⁵ The importance of contextual factors lies in the fact that because they may vary from country to country, they may for this reason give rise to different results in different countries.⁵⁶

A purpose of this examination will be to provide an answer as to whether the Consumer Rights Directive really increases the level of consumer protection provided in each or whether the improvements brought remain minimal due to the fact that the whole process has been driven by the purpose to benefit the internal market. An important aspect to that is the need to determine whether and what important aspects of consumer protection in the domestic laws of UK and Cyprus will have to be sacrificed because of the maximum harmonization. This further supports the view that the real purpose behind the Consumer Rights Directive has not been to increase consumer confidence as the European Commission has repeatedly put forward and

⁵³ Roger Merino Acuña, *Comparative Law from Below – The construction of a critical project in Comparative Legal Studies* (Lambert Academic Publishing 2012) 5.

⁵⁴ Reimann and Zimmermann, *The Oxford Handbook of Comparative Law* (n 49) 367.

⁵⁵ Eberle, 'The Method and Role of Comparative Law' (n 48) 452.

⁵⁶ Christopher A Whytock, 'Legal Origins, Functionalism and the Future of Comparative Law' (2009) *Brigham Young University Law Review* 1879, 1898.

that the Consumer Rights Directive is another indication of the moral panic that the European Commission has created to support the internal market project.

Methodology

This study will undertake the research by employing both a doctrinal and a qualitative method in order to examine commentary and texts on the issues that arise. Legislation as well as existing empirical research will be examined for the purposes of this study. The doctrinal methodology is rarely discussed in the methodology section of research publications and this is attributed to the fact that it constitutes a process of analysis rather than a method for data collection.⁵⁷ Nevertheless, a brief reference to both methods as well as the reason why they are employed in this research cannot be ignored.

Doctrinal research is also known as library based research and it constitutes the most common methodology for researches within the area of law.⁵⁸ A doctrinal research, apart from asking what the law is on given issue, it additionally examines the development and application of law.⁵⁹ Doctrinal research involves the locating and analysing of primary sources of law in order to determine the nature and parameters of law, although this does not constitute a simple description of the law.⁶⁰ Doctrinal approach is by its nature inferential as it can provide explanations as to why laws are enacted.⁶¹

⁵⁷ Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 1, 100.

⁵⁸ Ashish Kumar Singhal and Ikramuddin Malik, 'Doctrinal and socio-legal methods of research: merits and demerits' (2012) 2(7) *Educational Research Journal* 252, 252.

⁵⁹ Adilah Abd Razak, 'Understanding Legal Research' (2009) 4 *Integration & Dissemination* 19, 20 <<http://econ.upm.edu.my/researchbulletin/artikel/Vol%204%20March%202009/19-24%20Adilah.pdf>> accessed at 26 July 2013.

⁶⁰ Hutchinson and Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (n 57) 113.

⁶¹ Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press, 2007) 20.

The task of doctrinal or library-based research is to provide the right answer to a set of questions. This means that the methodology is employed for the purpose of addressing specific enquiries which determine the piece of information that the researcher will need to locate.⁶² In addition, doctrinal research provides the researcher with the opportunity to, after undertaking a background research of secondary sources, to critically analyse existing research literature, both theoretical and empirical.⁶³ Doctrinal research not only requires extensive knowledge on a given issue but also certain skills such as precise judgement, detailed description, depth of thought and accuracy. Since doctrinal research involves a high level of critical analysis, the voice and experience of the researcher unavoidably affect the outcome of the research.

The analytical aspect of a doctrinal research is a qualitative one.⁶⁴ While the doctrinal method is employed by the researcher to define the law, a consideration of any problems that exert influence on the law as well as of the policy which underpins the law, giving emphasis, for example, on any flaws in the policy, can add to that.⁶⁵ Research dealing with given problems and policies can include the consideration of any social factors that are involved or the social impact that the law in question has.⁶⁶ Nevertheless, the assessment of the problem in question and the evaluation of the policy may require some engagement with qualitative method⁶⁷ as in the current case where an examination of surveys and interviews that have previously been conducted can be adduced in order to further complete the overall argument.⁶⁸ Although, this thesis as a doctrinal research may not involve

⁶² Singhal and Malik, 'Doctrinal and socio-legal methods of research: merits and demerits' (n 58) 252.

⁶³ Hutchinson and Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (n 57) 113.

⁶⁴ *ibid* 116.

⁶⁵ McConville and Chui, *Research Methods for Law* (n 61) 20.

⁶⁶ *ibid*.

⁶⁷ *ibid*.

⁶⁸ *ibid*.

any empirical method, this does not mean that inferences will not be drawn from the materials that will be found⁶⁹ for the purposes of this study.

As it has earlier been stated, doctrinal research is employed in order to provide answers to questions and this method will in our case aid in providing an answer to the question whether the European Commission, through its legislative efforts within the area of EU consumer law aims to complete the internal market rather than to provide consumers with adequate protection. A reason for engaging into a doctrinal research is because it provides the opportunity to not only determine what is the law in relation to consumer protection at the EU level but furthermore it provides the possibility of critically examining its development and application. A further reason for engaging into a doctrinal research is since it presupposes extensive knowledge on the issue that is being researched, an analysis of existing theoretical and empirical literature is required which can as in the current study achieve to demonstrate deeper thought and accuracy on the issues involved.

The place of this study in the relevant body of knowledge

A considerable amount of research exists in relation to the European Consumer Law and more particularly in relation to its instrumentalization for the purposes of the internal market. Wilhelmsson has referred to the EU Consumer Law as being a Janus-faced policy with its two sides being the internal market on the one hand and the protective goals on the other hand.⁷⁰ Nonetheless, the importance of this study lies in the fact that the approach taken differs from existing literature as it will draw a number of arguments together in order to support the main contention of this study.

⁶⁹ McConville and Chui, *Research Methods for Law* (n 61) 19.

⁷⁰ Wilhelmsson, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' (n 4).

Arguments that the European Commission has made use of the European Consumer Law in an effort to build and complete the internal market, have already been put forward by authors such as Micklitz.⁷¹ While the argument that is formulated in this study is not new, the current study aims at unfolding not only how the Commission has achieved to drive EU Consumer Law to the direction that it better serves its interests but also how this trend is becoming more obvious from the actions of the Commission. An attempt to come to a conclusion as to what are the real interests behind the shifting of the focus on the internal market project will also be made in this study.

In addition, while much have been written on the notion of consumer confidence by authors such as Poncibo⁷² and Wilhelmsson⁷³, the moral panic approach applied to it in this study will aid in presenting how the consumer confidence justification was developed as a social problem and also how the European Commission has formed a moral panic around it. An examination of the reasons why the consumer confidence justification and the consumer protection at the EU level more generally have been so strongly inflated can add to the existing literature.

Insofar as the debate between minimum and maximum harmonization is concerned, existing literature has touched upon issues whether harmonization is what consumers really need as well as upon what each approach in essence promotes. While existing literature will be reviewed for the purposes of this study, a step forward will be taken. Following the argument of Alemanno and the reference that he has made in relation to the need to consider the behavioural effect that EU Consumer legislation has⁷⁴, consumer behaviour and sociological literature will contribute into providing

⁷¹ Micklitz, 'What Does Consumer Law Reveal About The Nature Of The EU?' in Jones, Menon and Weatherill (eds), *The Oxford Handbook of the European Union* (n 29).

⁷² Cristina Poncibo, 'Some Thoughts on the Methodological Approach to EC Consumer Law Reform' 21(3) *Loyola Consumer Law Review* 353.

⁷³ Wilhelmsson, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' (n 4) .

⁷⁴ Alemanno, 'The EU needs to embrace behavioural insights in the design of its policies' (n 40).

additional evidence for the view that maximum harmonization does not really aim at providing consumers with adequate protection. This argument also complements Howells's argument that maximum harmonization is the guardian of the interests of traders.⁷⁵

Nevertheless, the originality of this study is primarily attributed to the Comparison that is made between the effects of the Consumer Rights Directive on the consumer protection of UK and Cyprus with the latter's position being the substantive element of the originality of the current study as the effect that the Consumer Rights Directive will have on the Cyprus Law has not until that time been subject to examination. The relevant comparison will provide additional evidence for arguments such as that of Weatherill who argued that the Consumer Rights Directive does not deserve its name⁷⁶ by thus suggesting that the particular Directive does not really provide consumers with adequate protection.

Structure of the Study

The current study consists of eight chapters. Following the introduction, Chapter Two of this study will provide a review of how the European Commission gained competence to legislate within the area of consumer protection as well as where its power come from and how EU consumer protection developed. Chapter Three will apply the moral panic approach to the consumer confidence justification in order to explain how the European Commission has constructed a social problem around it so as to be able to use its legislative competence within the area of Consumer Law. For this purpose, this chapter will include an examination of the development of the Consumer Acquis while Chapter Four will be devoted on the process that preceded the implementation of the Consumer Rights Directive.

⁷⁵ Howells, 'The Rise of European Consumer Law – Whither National Consumer Law?' (n 35) 65.

⁷⁶ Stephen Weatherill, 'The Consumer Rights Directive: How and Why a Quest for "Coherence" has (largely) failed' (2012) 49 Common Market Law Review 1279.

Further on, the focus of Chapter Five will be on the shift from minimum to maximum harmonization and will accordingly examine existing commentary in relation to both approaches. The aim behind this examination is to present on the one hand how the debate between the two is another evidence of the Commission's purposes and on the other hand how each approach relates to the tension between the protection of consumers and the internal market. Chapter Five will also show the weak connection between the shift to maximum harmonisation and increasing consumer confidence while it will also be focused on the definition of consumers accruing from the Commission's approach. This part will partly be dedicated on an examination of the resulting definition of consumer while it will additionally, by providing an insight into consumer behaviour and sociological literature, present the factors which influence consumers' behaviour and consumption activity. This can shed light on the fact that increasing consumer confidence is not an easy task that can be achieved with a shift towards maximum harmonization as the Commission puts forward.

Chapters Six will examine the actual provisions of the Consumer Rights Directive as eventually adopted and the approach followed in it while Chapter Seven will engage into an examination of the effects that the Consumer Rights Directive will have on the UK and Cyprus consumer protection respectively. The function of this chapter is to test the theory that has been developed throughout the study. The relevant comparison will provide additional evidence for the main contention of this study which raises concerns as to whether the purpose behind European Consumer Law is really to provide protection to consumers. Finally, this study will end up with a last chapter which will draw the conclusions of this study together.

Summary

The aim of this study is to bring together a number of arguments to support the main contention of this study, namely that European Consumer Law is

manipulated for the purpose of increasing cross border trade and thus completing the internal market while consumer protection, which should be the primary purpose of it, has been put in the second place. By following a chronological order, the way in which the Commission acquired its competency to regulate within the area of consumer protection as well as the development of the Consumer Acquis and subsequently the process towards the Consumer Rights Directive will all be the subject of examination. Their analysis will provide evidence for the resulting transformation of the European Consumer Law and its use by the European Commission for purposes beyond consumer protection. To add to this argument, the effect that the contentious Consumer Rights Directive, has brought on the national regimes of UK and Cyprus will also be considered. Meanwhile, the consumer confidence justification, the resulting definition of consumer as well as the debate between maximum and minimum harmonization could of course not be disregarded in this study.

Chapter 2 - The Development of European Consumer Law

Introduction

Chapter 2 of this thesis examines the way in which European Consumer Law has developed and in more particular the way in which the European Commission acquired competency to regulate within the area of consumer protection through Treaty Revisions. The first Resolutions and Consumer Policy Strategies that were meanwhile adopted as well as the principle of subsidiarity which have enabled the Commission to pursue its objectives by furthering the Commission's ability to legislate in the area will also form part of this examination. However, before moving on, it would be helpful to make a brief historical reference on how the European Union was initially created and developed as we know it today. The purpose of this historical review reflects how the economic emphasis has always been there since the early formation of both the European Union and consumer policy itself. While, as this historical reference will show, consumer protection has always been connected to the internal market, the current thesis voices a concern; consumer protection has perhaps been used as a smokescreen by the European Commission to promote the internal market.

The first step towards economic integration which constitutes a predecessor of as well as the first step towards what is today the European Union is the European Coal and Steel Community which was initially established in 1951 by the Treaty of Paris.⁷⁷ The European Coal and Steel Community became a reality after a proposal that was put forward in 1950 by the Foreign Minister of France, Robert Schuman in an effort to put their coal and steel

⁷⁷ Michelle Cini and Nieves Pérez – Solórzano Borragan, *European Union Politics* (4th edn, Oxford University Press 2013) 12.

resources together.⁷⁸ The European Coal and Steel Community constituted the first major step that was taken towards European Integration particularly after the World War II⁷⁹ as well as the first organization of Western Europe resembling a supranational authority with economic objectives aiming at creating a common market in coal and steel, common policies and eliminating any barriers that impeded trade in the particular commodities.⁸⁰ Its Member States were limited to six and those included France, Germany, Italy, Belgium, the Netherlands and Luxembourg.⁸¹ Its formation was seen as a result of an initial integrationist desire which at the same time set the scene for the subsequent development of the Community.⁸²

After a Dutch proposal in 1952 which supported the idea of creating a common external tariff by which the Member States of the then Community would be free from quotas and tariffs obligations, the Foreign Ministers of the countries involved agreed to make a new step towards the building of Europe. This had as a result efforts being made in order to put in place a customs' union as well as a common market and which ended up with the formation of the European Economic Community (EEC) in 1957 known as the Common Market.⁸³ With the Treaty establishing the EEC which was signed in 1957 in Rome, referred to as the Treaty of Rome, the European Economic Community was initially created with its members being only the six Member States of the European Coal and Steel Community. With its far-reaching implications, the important point in relation to the Treaty of Rome was that it dictated its signatories to create a common market which equated to the free movement of goods, persons, services and capital, as well as to deploy common policies which would apply to all of its Member States.⁸⁴

⁷⁸ Cini and Pérez – Solórzano Borrigan, *European Union Politics* (n 77) 15-16.

⁷⁹ Barry Eichengreen and Andrea Boltho, 'The Economic Impact of European Integration' (2007) *International Macroeconomics and Economic History* 6820, 10
<http://eml.berkeley.edu/~eichengr/econ_impact_euro_integ.pdf> accessed 15 April 2014.

⁸⁰ Karen Davies, *Understanding European Union Law* (5th edn, Routledge 2013) 8-9.

⁸¹ Treaty establishing the European Coal and Steel Community (ECSC Treaty) [1951].

⁸² Cini and Pérez – Solórzano Borrigan, *European Union Politics* (n 77) 16.

⁸³ *ibid* 17.

⁸⁴ *ibid* 17-18.

The approach that the European Economic Community followed was broad with its objective being the integration of its Member States economies. While the purpose was initially to achieve integration within the economic area⁸⁵, the Preamble to the Treaty of Rome referred to the fact that the longer-term goals of the EEC, wider in nature, would lay the base for creating 'an ever closer union among the peoples of Europe'. The latter could perhaps be taken as an indication that integration would step in other areas such as political and social. The aim of the Community was extended from merely achieving a Common Market to an internal market with the latter term having been introduced by the Single European Act of 1986. The internal market, as Article 14 EC of the Single European Act provides, constitutes an area in which no internal frontiers exist while the movement of goods, persons, services and capital is free.

The Maastricht Treaty, known as the Treaty on European Union, created a three-pillar structure under the umbrella of the European Union, a structure which still exists today.⁸⁶ In addition, the Maastricht Treaty renamed the European Economic Community to European Community⁸⁷ which signified the expansion of its competency to areas which go beyond the economic sphere.⁸⁸ Along with the European Coal and Steel Community and the European Atomic Energy Community the European Community fall under the umbrella of the European Communities under the then newly introduced Pillar 1. While one may assume that the European Community enjoyed from the beginning an integrated regulatory system which would cover every policy area so as to help it achieve an integrated market for Europe, this was not the case. The Treaty establishing the European Community and Article 5(1) in more particular have formed a cornerstone of the Community's constitution,⁸⁹ What was provided was that 'the Community shall act within

⁸⁵ Margot Horspool and Matthew Humphreys, *European Union Law* (Oxford University Press 2006) 12.

⁸⁶ *ibid* 12.

⁸⁷ Davies, *Understanding European Union Law* (n 80) 10.

⁸⁸ Horspool and Humphreys, *European Union Law* (n 85) 19; Martin J Dedman, *The Origins and Development of the European Union 1945-2008 – A History of European Integration* (2nd edn, Routledge 2010) 12.

⁸⁹ Stephen Weatherill, *EU Consumer Law and Policy* (Elgar European Law 2005) 5.

the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.⁹⁰

The European Community had power to legislate only within the areas that the Treaty of Rome provided to it competency to do so. For some years, this limitation on the Community's power barred it from adopting measures in relation to consumer protection which were unconnected to competition or to the common market project. Accordingly, this constituted an impediment for the development of an explicit consumer protection policy.⁹¹ The Community's limited competence led to the consumer policy being a tool which was used for competition and common market purposes. Nevertheless, its competence could be, and was in fact, increased by amendments to its Constitution, through Treaty Revisions.⁹² While consumer protection was eventually transformed into an overt European Law policy, the link between consumer policy and the promotion of the internal market project is still the case as this study supports and the latter objective comprises the driving force behind legislating in the area.

The case of the EC consumer policy constitutes an example of this situation where the European Community after gradual Treaty changes has achieved to gain competency within an area. With an analysis of the different developments that came through the various EU Treaties, the purpose is at the first point to show that consumer policy was always there, albeit in a less explicit form, as well as to pave the way for the argument that the fact that EU consumer policy acquired a separate legal title under European law was not accidental but rather its existence serves purposes that extend beyond merely providing consumer protection. As it has earlier been stated the European Economic Community and its predecessor the European Coal and Steel Community were largely driven by economic objectives, with that being the economic cooperation between their Member States. While initially the aims were to create a common market for their coal and steel productions,

⁹⁰ Consolidated Version of the Treaty Establishing the European Community [2002] OJ C325/33, art 5(1).

⁹¹ Hans-W Micklitz and Stephen Weatherill, 'Consumer Policy in the European Community: Before and After Maastricht' (1993) 16(3-4) *Journal of Consumer Policy* 285, 291.

⁹² Weatherill, *EU Consumer Law and Policy* (n 89) 5.

this subsequently turned into a more general project of creating a common market for their commodities in general as a means of integrating the economies of the then Member States.

The removal of the word Economic from the former's name with the Maastricht Treaty aimed to reflect the change by which the cooperation between Member States would no longer be merely an economic one as it would be extended to other, not economic, fields, of which consumer protection forms part. Nevertheless, with the approach followed within the European consumer policy, it seems that the shift from economic goals to social goals, especially in relation to consumer protection, was not really ever effectuated. It was rather a change which constituted a smokescreen behind which the European Commission has striven to achieve its economic objectives closely connected to the internal market project as this thesis will show. Accordingly, it may be suggested that the beginnings of the predecessors what we call today the EU, have largely survived nowadays even despite the decision to shift to other areas not economic in nature. This leads us to the view taken in this study and which supports the argument that increasing cross border trade, a direct consequence of and an opportunity provided by market integration, was always the primary purpose despite any references to the contrary that were at different points made.

Treaty Amendments

Treaty of Rome 1957

At the early stages of its formation, the European Union was a political institution whose powers, political in nature, were considerably narrow under the Treaty of Rome, known as the Treaty establishing the European Economic Community.⁹³ With the adoption of the Treaty of Rome, the broader responsibilities of the European Union aimed at, among others, establishing a common market, a common commercial policy, as well as a

⁹³ Mark A Pollack, 'The End of Creeping Competence? EU Policy-Making Since Maastricht' (2000) 38(3) *Journal of Common Market Studies* 519, 520.

common agricultural policy.⁹⁴ The particular Treaty made only minimal reference to the concept of consumer. The underlying basis of the Treaty of Rome rested on a belief that the consumer is the ultimate beneficiary who will enjoy the economic objectives of the Community. The view was that turning national markets of small scale into a large single market will boost competition which at the same time increases the choice of goods and services that are available for consumers. Consumers are ultimately benefited by the improvements that this will cause to the quality of the goods and services and by the subsequent reduction in the prices.⁹⁵ With a list of consumer rights and interests being absent from the Treaty of Rome, the consumer would simply reap the benefits flowing from the market integration.⁹⁶

The agreement for the Treaty of Rome came in 1957 while the treaty entered into force in the following year. “Consumer” was mentioned at five different points.⁹⁷ Those included first of all Article 39 which referred to the five objectives that the common agricultural policy would seek to achieve and amongst those there was the need “to ensure that supplies reach consumers at reasonable prices”. In addition Article 40 which provided for a common organization of agricultural markets stipulated that “any discrimination between producers or consumers within the Community” should be excluded. Article 85(3) contains an exemption from Article 85(1) which prohibits the agreements that have as their object or effect the prevention, restriction, or distortion of competition and this is where it allows consumers “a fair share of the resulting benefit”. Further on, there was Article 86 which provided a list of abusive conduct by dominant firms within the common market and this included the situations where there is a “limiting production, markets or technical development to the prejudice of consumers”. The fifth reference made to consumer in Article 92(2) acknowledged the fact that any aid granted by a Member State which has a

⁹⁴ Pollack, ‘The End of Creeping Competence? EU Policy-Making Since Maastricht’ (n 93) 521.

⁹⁵ Micklitz and Weatherill, ‘Consumer Policy in the European Community: Before and After Maastricht’ (n 91) 285.

⁹⁶ *ibid.*

⁹⁷ Weatherill, *EU Consumer Law and Policy* (n 89) 3.

social character and is granted to individual consumers is compatible with the common market.

As Stephen Weatherill has rightly put forward those references to the consumer within the original Treaty of Rome are rather incidental and none of them constitutes an indication that there was an attempt to develop a regime providing for the consumer rights or interests.⁹⁸ What was rather assumed under the Treaty of Rome is that, as it has earlier been stated, the consumer will derive the benefits that flow from the market integration in the sense that they will be in a position to enjoy a more efficient market which will generate more competition resulting in wider choice, lower prices and products and services of better quality for the consumers.⁹⁹ The tension between the economic goal of establishing a single market and the consumer interest can be traced back to that point and this was the beginning as well as the first indication of the tension that we evidence.

Other provisions found within the Treaty of Rome whose purpose is to eliminate the barriers to the free circulation of goods, persons and services, found under Articles 30, 48 and 59 of the relevant Treaty had as an indirect purpose to benefit consumers.¹⁰⁰ Accordingly, what could be argued is that the particular Articles constitute, implied though not directly expressed, instruments of consumer policy.¹⁰¹ Nevertheless, an explicit basis for legislating within the area of consumer protection was entirely absent and for this reason, since the European Community can only act in those areas in which it enjoys competence to do so, any legislative action having an effect upon consumers could only be indirect.¹⁰²

While several provisions of the Treaty of Rome were either directly or indirectly related to the consumer, at the same time there was no provision offering the European Community competency to adopt secondary legislation "in the name of consumer protection".¹⁰³ Meanwhile, the power of

⁹⁸ Weatherill, *EU Consumer Law and Policy* (n 89) 3-4.

⁹⁹ *ibid* 4.

¹⁰⁰ *ibid*.

¹⁰¹ *ibid*

¹⁰² *ibid*.

¹⁰³ *ibid* 6.

the European Community under Article 100 of the same Treaty to approximate the laws of the Member States has initially been a general one and it only required such approximation “to the extent required for the proper functioning of the common market”¹⁰⁴ without again any reference being made to the field of consumer protection.

While this meant that the European Community had no competence in the field of consumer protection, a number of amendments brought to the EU constitution had as a consequence consumer protection gaining a legal basis under EU law.¹⁰⁵ During the period of 1976-1981, the role of the European Commission, as the legislative body of the European Community, was considerably confined in the field of consumer protection with its only power being the coordination of the Member States’ national consumer policies.¹⁰⁶ Such coordination should not nevertheless be considered as accidental or insignificant. It could be taken as a first step towards integrating the national markets of the different Member States as well as a step closer to European economic integration. By employing a rather social welfare outlook, the main preoccupation was to protect consumers against information deficits, misleading advertising, risks to their health and safety as well as to provide them with appropriate rights.¹⁰⁷ The protection that then European consumer policy sought to provide to consumers was limited to merely provide consumers with certain basic rights as a first step towards empowering them and giving them voice in the enforcement of their rights.

Meanwhile, the fact that Article 100 of the Treaty of Rome provided a general power to the Council to adopt, acting on a proposal from the Commission, to issue directives for the approximation of the national laws of Member States, generally and not particularly in relation to consumer

¹⁰⁴ Treaty establishing the European Economic Community (EEC Treaty) [1957] art 3.

¹⁰⁵ Annalies Azzopardi, ‘The Contribution of EU Directives to the Objective of Consumer Protection’ (2012) Edition II, *Elsa Malta Law Review* 41, 41.

¹⁰⁶ Micklitz, ‘What Does Consumer Law Reveal About The Nature Of The EU?’ in Jones, Menon and Weatherill (eds), *The Oxford Handbook of the European Union* (n 29) 527.

¹⁰⁷ *ibid.*

protection, provided that those laws affect either the establishment or the functioning of the common market¹⁰⁸ could be fairly regarded as the first step that showed the connection between the economic goal of establishing the single market and the consumer interest may be Article 100. The early task of the Commission, based on this Article, by which it aimed to coordinate the different national consumer policies was at the same time an indication that consumer protection policy would not be an independent policy but rather a policy linked to economic integration.

The Single European Act 1986

While the Treaty of Rome made no reference to the existence of consumer protection as a policy as well as no indication existed that a separate regime would be created, the Single European Act was the first step in turning consumer policy into a separate and autonomous European legal policy.¹⁰⁹ With the adoption of the Single European Act in 1986 and in particular Article 100a, a mandate was imposed on the European Commission to take regulatory measures in order to approximate the laws of the different Member States for the purpose of completing the internal market in a number of areas, including the area of consumer protection. According to Article 100a, the competence of the Commission to make legislative proposals was tied to the achievement of the objectives contained in Article 8a, namely to progressively establish the internal market by December 1992.¹¹⁰ During the late 1980s, this objective turned into the most important feature of the Community policy. The Single European Act which was entered into force in 1987 signified the outset for the initiatives in the area of consumer protection to be viewed as forming a part of the internal market strategy.¹¹¹ Although, the Single European Act required the European Commission to “take as a base a high level of protection” as subsection (3)

¹⁰⁸ EEC Treaty, art 100.

¹⁰⁹ Katalin J Cseres, *Competition Law and Consumer Protection* (Kluwer Law International 2005) 196.

¹¹⁰ Micklitz and Weatherill, ‘Consumer Policy in the European Community: Before and After Maastricht’ (n 91) 295.

¹¹¹ Weatherill, *EU Consumer Law and Policy* (n 89) 8.

of Article 100a stipulated, consumer protection nonetheless constituted a rather complementary policy for the purpose of establishing the internal market.

The Single European Act heightened the concerns of actors, such as the United Kingdom, who until the adoption of the particular Treaty feared that the process of completing the common market would unavoidably lead to a gradual broadening of the European Commission's competence and unavoidably to an expansion of the European Commission's power.¹¹² Member States such as the United Kingdom had from that point formed the opinion that the European Community's programme would not merely result in losing their national sovereignty but it would also raise the tension that subsisted up to that point between regional and national authorities.¹¹³ This was an initial indication of the fear that the Commission might misuse its authority to adopt common market legislation so as to extend its influence to other policy areas that were within the competency of the Member States' national legislation.

The Single European Act has been seen as the Act which not only gave shape to the subsequent Community agenda and to its *modus operandi*¹¹⁴ as it formed the beginning for the subsequent tie between the internal market project and the field of consumer protection but it was also a step towards expanding the jurisdictional limits of the Community as well as their content.¹¹⁵ While the competency of the Commission within the area of consumer protection was initially limited with any legislation that would be adopted at the regional level affecting the consumer only indirectly, with the changes of the Single European Act consumer policy started taking a different shape. As it has earlier been referred to, consumers were regarded as the ultimate beneficiaries from the competition that market integration would bring. Nevertheless, the important point about the Single European

¹¹² Kees Van Kersbergen and Bertjan Verbeek, 'The Politics of Subsidiarity in the European Union' (1994) 32(2) *Journal of Common Market Studies* 215, 219.

¹¹³ *ibid.*

¹¹⁴ Joseph Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" And Other Essays on European Integration* (Cambridge University Press 1999) 63.

¹¹⁵ *ibid.* 55.

Act is that with its adoption, the single market project was seriously put on the European agenda.¹¹⁶

The Single European Act was not only the first time that the area of consumer protection was recognized as a legislative area, although a separate title was not introduced¹¹⁷, but of equal importance was the introduction of the Qualified Majority Voting in the Council. With the latter development, the consequence was that Member States disagreeing with a harmonization measure could only simply vote against it without having the power to veto it. This meant that not only Member States which are in a minority position in the Council may find themselves being outvoted and bound by legislation to which they disagree but also this development opened the way for a dynamic regulatory activity during the 1990s.¹¹⁸

The shift towards the Qualified Majority Voting is neither insignificant nor random¹¹⁹ as the purpose behind this change was to push forward the legislative programme by removing the power of Member States to veto Community legislation in the field of harmonization.¹²⁰ As Howells and Weatherill have argued, this shift to qualified majority was required in order for the deepening of the integrative process to become a reality.¹²¹ The shift from unanimous vote towards qualified majority vote was thus regarded as being necessary in order to guarantee the adoption of controversial legislation whose aim is to remove national borders.¹²² This development was however not a welcome change for all the Member States of the European Community. Member States such as Greece, Spain and

¹¹⁶ Christoph Hermann, 'Neoliberalism in the European Union' (2007) 79 *Studies in Political Economy* 61, 70.

¹¹⁷ Micklitz and Weatherill, 'Consumer Policy in the European Community: Before and After Maastricht' (n 91) 295.

¹¹⁸ Micklitz, 'What Does Consumer Law Reveal About The Nature Of The EU?' in Jones, Menon and Weatherill (eds), *The Oxford Handbook of the European Union* (n 29) 527.

¹¹⁹ Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" And Other Essays on European Integration* (n 114) 3.

¹²⁰ Geraint G Howells and Stephen Weatherill, *Consumer Protection Law* (2nd edn, Ashgate 2005) 105.

¹²¹ *ibid.*

¹²² Micklitz and Weatherill, 'Consumer Policy in the European Community: Before and After Maastricht' (n 91) 295.

Poland¹²³ opposed to further extending qualified majority voting within the EU Council of Ministers while Member States such Austria, Sweden and Finland which are the latest members of the EU, also expressed their reservations towards the majority voting. On the contrary, the founding States of the European Community were those which were in favour of moving from the unanimous to the qualified majority voting.¹²⁴ What this shows is that the founding and at the same time the most powerful Member States of the Community had as their purpose to smooth the path towards legislations that would not be welcomed by all Member States. Qualified majority voting was probably a route towards achieving their purpose and thus adopting legislation which would not otherwise pass had the unanimous voting been in place.¹²⁵

While the SEA 1986 may be taken as the first step in providing the opportunity for the subsequent instrumentalization of the European consumer and the European consumer law for the purposes of perfecting the internal market¹²⁶, the adoption of the Maastricht Treaty in 1992 was a further major development towards this direction.

Maastricht Treaty 1992

The agreement for the Maastricht Treaty came in 1992 and was then signed by the then Members of the European Community in the Netherlands. As it has been earlier referred to, an important point in relation to the particular Treaty is that it has created the European Union as we know it but the significance that it had at the same time for consumer protection cannot be disregarded. A special section in relation to consumer protection was for the first time provided in the particular Treaty. This led to explicitly confirming

¹²³ Micklitz, 'What Does Consumer Law Reveal About The Nature Of The EU?' in Jones, Menon and Weatherill (eds), *The Oxford Handbook of the European Union* (n 29).

¹²⁴ 'European Union: Continued UK Resistance to More Qualified Majority Voting' (1996) <<http://www.europolitics.info/european-union-continued-uk-resistance-to-more-qualified-majority-voting-artr170328-32.html>> accessed 11 September 2013.

¹²⁵ Micklitz, 'What Does Consumer Law Reveal About The Nature Of The EU?' in Jones, Menon and Weatherill (eds), *The Oxford Handbook of the European Union* (n 29) 132.

¹²⁶ *ibid.*

the power of the European Union to regulate within the particular area which until to that time was a rather indirect and implicit policy area.¹²⁷

The separate title provided to consumer protection under Article 129a of the Maastricht Treaty accordingly granted competence to the European Community to legislate within the field of consumer law. According to Article 129a, the Community shall, by supplementing the national policies of the Community Member States, “contribute to the attainment of a high level of consumer protection”.¹²⁸ This objective included the protection of the health, safety and economic interests of consumers as well as the provision of adequate information to consumers.¹²⁹ Consumer protection was offered a separate title under Title XI and conferred on the EC legislative competence within the area of consumer protection which was for the first time explicitly contained in a European Treaty. This had at the same time constituted the first major step that was made towards the development of a more transparent as well as effective European consumer protection regime.¹³⁰ The Maastricht Treaty officially added consumer protection to the activities of the Community which are contained in Article 3 of the same treaty. According to Article 3(s) the Community shall contribute to the strengthening of consumer protection.

The Maastricht Treaty seemed to have provided a departure from the attainment of economic goals and the focus of the regulatory policy-making of the European Community had taken a rather social character by implementing policies for example within areas such as education, public health and which consumer protection forms a part. There have been made arguments suggesting that the expansion of the European Community’s competence in, amongst others, the area of consumer protection was critical as it would prevent the situation where the increasing focus of the European Commission on the completion of the internal market would undermine the

¹²⁷ David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (2nd edn, Harvard University Press 1997) 54.

¹²⁸ Treaty on European Union (Maastricht Treaty) [1992] OJ C191, art 129a (1).

¹²⁹ Maastricht Treaty, art 129a(1)(b).

¹³⁰ Charlotte Burns and Emma Harrison, ‘Setting strategies for a new Europe’ (2010) 10(1) *Consumer Policy Review* 25, 25.

national consumer protection measures.¹³¹ Nonetheless, with the developments that followed within the particular area, there are doubts as to this expansion really prevented the European Consumer law from being too focused on the internal market.

The insertion of consumer protection as a separate title within the particular Treaty may be regarded as a milestone for the EC consumer policy. Nonetheless, regard must be paid to the fact that the term internal market was not absent from the Maastricht Treaty either. More particularly, the high level of consumer protection would be, according Article 129a (1)(a), attained through “measures adopted pursuant to Article 100a in the context of the completion of the internal market”.¹³²

The competence of the Community to harmonize the national laws of the various Member States has remained tied to the purpose of achieving market integration and this is evident from the subsequent adoption of the various consumer protection directives which will be examined at a later point.¹³³ Their adoption has been primarily, either indirectly or directly tied to the internal market project. Accordingly, the fact that consumer protection was since the Maastricht Treaty offered explicit and separate competence, has not, as Weatherill and Howells have in the same line of argument put forward, changed the primary role of harmonization in shaping consumer policy at the European level.¹³⁴

The fact that Maastricht Treaty inserted a separate title for consumer protection does not only constitute the point at which a more explicit consumer policy actually began to rise but it the same time reflects a change in how the concept of consumer protection was conceived. The early 1990s then constitute the point at which the importance of the role of consumers within the integration process began to be acknowledged. Consumers could in their entirety perfect or break the internal market and therefore it is not

¹³¹ Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (n 127) 54.

¹³² Maastricht Treaty, art 129a(1)(a).

¹³³ Howells and Weatherill, *Consumer Protection Law* (n 120) 123.

¹³⁴ Weatherill, *EU Consumer Law and Policy* (n 89) 19 ; Geraint G Howells and Stephen Weatherill, *Consumer Protection Law* (n 45) 129.

surprising that the Maastricht Treaty resulted with a more independent legal basis for the European consumer policy for which the purpose was to strengthen consumer protection within the European Community. Nevertheless the fact that there was again reference to the internal market reasserted the assisting and secondary role of the European consumer policy.¹³⁵ Accordingly the Maastricht Treaty used two pillars as a basis for consumer protection. While consumer protection was on the one hand an internal market policy, it on the other hand had a rather supporting character which would aid the corresponding national legislations.¹³⁶

Treaty of Amsterdam 1997

Some years later with the adoption of the Treaty of Amsterdam in 1997 which was put into effect in 1999, Article 129a as contained in the Maastricht Treaty became Article 153. Nevertheless, by following a similar approach, Article 153(1) provided that “in order to promote the interests of consumers and to ensure a high level of consumer protection, the Community 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”.¹³⁷ The list of objectives that consumer protection would seek to achieve was largely extended with the Treaty of Amsterdam. The Treaty of Amsterdam, instead of referring to the ‘interests’ of consumers, referred to them as the ‘rights’ of consumers.

The second paragraph of Article 153 provides for the first time within the history of the European consumer policy that “consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities”.¹³⁸ The importance of this Article is that it does not only give consumer protection credibility as a separate Community competence but it additionally puts it within the wider European

¹³⁵ Cseres, *Competition Law and Consumer Protection* (n 109) 198.

¹³⁶ *ibid* 198.

¹³⁷ Treaty of Amsterdam [1997] OJ C340, art 153(1).

¹³⁸ Treaty of Amsterdam, art 153(2).

policy-making framework.¹³⁹ The insertion of the particular clause within the Treaty of Amsterdam signifies or rather confirms the importance and relevance of consumer policy within the European Community.¹⁴⁰ The Treaty of Amsterdam accordingly brought a strengthening of the consumer protection policy and of its provisions as contained within the Treaties.¹⁴¹ This constitutes evidence of the efforts that were then made to both incorporate consumer protection into other European policies as well as to turn it into a more transparent policy.¹⁴²

However, reference to the internal market project was not absent from the Treaty of Amsterdam either. Paragraph 3(a), provided for once again a possible route to law-making within the particular area which is tied to the common market project. What the particular section provided is that pursuant to Article 95 which formerly was Article 100a, the measures adopted shall contribute to the completion of the internal market¹⁴³ by thus cross referring to the traditional competence of the Community in relation to consumer protection at the European level.¹⁴⁴ In addition to that, Paragraph (3)(b), which may be seen as an innovation within the particular area, provides an additional route through which Community legislation could be adopted and this was through measures aiming to “support, supplement and monitor the policy pursued by the Member States”. Article 95 which in essence portrayed the rather subordinate role of the European Consumer Policy, is now Article 114 of the consolidated version of Treaty on the Functioning of the European Union, an amendment brought by the Treaty of Lisbon.

Both Article 153 of the Treaty of Amsterdam and, as it has earlier been mentioned, its corresponding Article 129 of the Maastricht Treaty have constituted a novelty for the European consumer policy in the sense that

¹³⁹ Weatherill, *EU Consumer Law and Policy* (n 89) 16.

¹⁴⁰ Cseres, *Competition Law and Consumer Protection* (n 109) 200.

¹⁴¹ Frank McDonald, ‘Consumer Protection policy in the European Union’ (2000) 12(1) *European Business Journal* 39, 42; Burns and Harrison, ‘Setting strategies for a new Europe’ (n 130) 25.

¹⁴² Burns and Harrison, ‘Setting strategies for a new Europe’ (n 130) 26.

¹⁴³ Treaty of Amsterdam, art 153(3)(a).

¹⁴⁴ Howells and Weatherill, *Consumer Protection Law* (n 120) 128.

they constitute the first attempts to formally and explicitly put forward a legal base for the European consumer policy. Despite the potential that Article 153 provided by which a European policy in relation to consumer protection could be developed independent from the harmonization and the internal market process, the subsequent development of European consumer policy have, as it will be presented at a later point in this study, remained tied to the harmonization process for the purposes of the internal market project. What can be also argued by an examination of the paragraphs contained under those Articles is that they are in essence connected with the pre-existing policy, which was adopted in the form of Resolutions.¹⁴⁵ Those resolutions, which will be analysed in the next part of this Chapter, bear the same character with Article 129 and Article 153 contained under the Maastricht Treaty and Treaty of Amsterdam respectively. It is nonetheless important to clarify at this point that the successor of Article 153 is now Article 169 after the Treaty of Lisbon which consolidated the Treaty on the Functioning of the European Union and follows the exact same wording.

Council Resolutions of 1975, 1981, 1986 and 1989

This part of Chapter 2 will be devoted on an analysis of the four Council Resolutions that were passed at four different points with the first being adopted a number of years after the Treaty of Rome and the last one being adopted soon after the Single European Act. Council resolutions set up political commitments or positions and they are adopted by the Council after a debate during a Council meeting.¹⁴⁶ They are not foreseen in the Treaties and therefore they are not legally binding but only set up the political position on topics which relate to the EU's areas of activity.¹⁴⁷

While consumer protection did not form a separate European policy until the adoption of the Single European Act in 1986, the First Council Resolution of

¹⁴⁵ Weatherill, *EU Consumer Law and Policy* (n 89) 16.

¹⁴⁶ 'Council Conclusions and Resolutions' <www.consilium.europa.eu/en/council-eu/conclusions-resolutions/> accessed 20 April 2016.

¹⁴⁷ *ibid.*

1975 contradicts this position. The Council Resolutions examined in this part perhaps prepared the ground for the development of consumer policy that would follow. Although the formal recognition for a consumer protection policy at the European level came later on, the Council Resolution of 14 April 1975 on a preliminary programme for a Community consumer protection and information policy may be reasonably taken to be the very first attempt to create a more systematic framework for the development of European consumer policy although a legal basis providing for the adoption of legislation in relation to the interests of consumers was entirely absent at that point.

As early as 1972, during the Paris summit, the Heads of the then Community Member States had emphasized the need to coordinate as well as to strengthen consumer protection through the implementation of a relevant Community policy.¹⁴⁸ Three years after the Paris Summit, the Council Resolution of 1975¹⁴⁹ was a confirmation of the fact that the European Economic Community would proceed with the implementation of a consumer protection and information policy. The particular Resolution as well as the Annex to it with the title “Preliminary programme of the European Economic Community for a consumer protection and information policy” were the very first steps taken and signified that a consumer policy would begin to emerge at the European level.

According to the Annex to the Council Resolution of 1975, changes that emerged within the market, such as new methods of manufacture and retailing, new means of communication as well as the expansion of markets, resulted in an increased abundance and complexity of goods and services.¹⁵⁰ This situation eventually turned the consumer into a unit in a mass market where he was for the first time the subject of advertising campaigns as well as the subject of pressure by the producers and

¹⁴⁸ Meetings of the Heads of State or Government, ‘The First Summit Conference of the Enlarged Community Conclusion of the Preparatory Work’ (Paris 19-21 October 1972) Bull EC 10-1972, 19.

¹⁴⁹ Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy [1975] OJ C92.

¹⁵⁰ Annex to the Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy [1975] OJ C92.

distributors of goods and services who were better positioned to determine market conditions.¹⁵¹

The new changes to the market had shifted the balance between the consumers and suppliers in favour of the latter. It was accordingly acknowledged that there was a need to keep consumers better informed of their rights and thus make freer choices within the market as well as to protect them against any abuse from producers or distributors. Rights such as the right to the protection of their health and safety, the right to the protection of their economic interests, the right of redress, the right to information and education and the right to be heard were all listed within the Annex to the First Council Resolution.¹⁵² The rights included within the Annex to the Resolution along with the reference to the fact that the balance within the market has shifted to the favour of traders were both early indications of the conception of consumer as the weaker party within the transaction and may be accordingly argued that it was at that point the particular conceptualization of consumer began to emerge.

While, the Second Council Resolution of 3 June 1981¹⁵³ followed the same line with the First Resolution, by stressing again the importance of implementing a consumer protection and an information policy which would aid in improving the quality of life by protecting the health, safety and interests of consumers and by again referring to the five fundamental consumer rights, a greater step was made by a Third Resolution which was put forward in 1986.¹⁵⁴ The Third Council Resolution of 23 June 1986, following the path of the two previous resolutions, had once again reemphasized the importance of having in place a consumer protection and information policy so as to achieve the tasks that the Community had set and which were above mentioned in relation to the two previous Resolutions

¹⁵¹ Annex to the Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy [1975] OJ C92.

¹⁵² *ibid.*

¹⁵³ Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy OJ [1981] C133/1.

¹⁵⁴ Council Resolution of 15 December 1986 on the integration of consumer policy in the other common policies [1986] OJ C003.

but, it gave extra weight to consumer protection in terms of product quality and safety.

However, the importance of the latter Resolution is the reference that it made on the first place to “a high level of consumer protection” which signified that consumer protection at the European Level would go beyond simple standards. Reference was made to the connection between consumer protection and internal market as it was emphasized that measures providing for a high level of consumer protection could be adopted at the Community level by thus contributing in achieving the internal market.¹⁵⁵ With consideration to the aim of completing the internal market, the Council had fixed its goals and in this way invited the Commission to submit proposals to achieve that end. It should be born in mind that the Third Council Resolution was adopted by the time the European Community had already set the goal of completing the internal market by the end of 1992 and only one year after the Single European Act which is the point at which consumer protection started taking shape at the European level with its subsequent connection with the internal market also beginning to emerge.

The fact that the Community had set the objective of completing the internal market by 1992 had implications not only for the Third Council Resolution, but it also affected the fourth Council Resolution of 9 November 1989 which set the future priorities of the European Community.¹⁵⁶ By setting the future priorities of the Community, the particular Resolution was a further indication of the fact that a consumer protection policy began to be formulated. An initial reference to the adoption of harmonization measures which would prevent obstacles to the proper functioning of the internal market. Of greater importance was the emergence, for the first time, of the term consumer confidence. What was provided was that the Commission, in adopting harmonization measures which would have as their aim the establishment and functioning of the internal market, would need to take as a base a high

¹⁵⁵ Council Resolution of 15 December 1986 on the integration of consumer policy in the other common policies [1986] OJ C003.

¹⁵⁶ Council Resolution of 9 November 1989 on future priorities for relaunching consumer protection policy [1989] OJ C294.

level of protection so as to ensure consumer confidence in the internal market.¹⁵⁷

While no power was assigned to the European Community to adopt any consumer protection policy measures, what was achieved through the years was the smoothing of the path towards the formal recognition of the Community's competence to regulate consumer protection. The fact that the Commission gain competence in the area has also made it easier for the Commission to pursue its goals which as this study supports go beyond simply providing consumer protection. As it has been made evident from an analysis of the four Resolutions, there was from an early point, an initial interest in the consumer which was confined at providing consumers who were seen as the weakest party within a transaction with the basis standard of protection. Consumer protection had gradually not only attracted more attention with a higher level of protection beginning to be seen as required but the connection between it and the internal market began to take shape. While the four particular Resolutions ensured some level of intervention by the Community in relation to consumer protection, nevertheless in order for the Community to engage into more expansive projects such as harmonization, the Treaty amendments which provided more power and ground for the European Commission to use consumer protection policy as a basis or even as a tool for legislating were thus required. What could be highlighted at this point is that the four Resolutions also reflect the changes that were brought to the Community's constitution. After the adoption of the Single European Act in 1986 the connection between consumer protection and the internal market began which began to take shape was at the same time reflected within the relevant Resolutions.

Action Plans and Community Policies

While the four Resolutions that were cited above led to consumer protection being gradually developed, the Treaty Revisions, and particularly the Single European Act, was the first step towards the formal recognition of consumer

¹⁵⁷ Council Resolution of 9 November 1989 on future priorities for relaunching consumer protection policy [1989] OJ C294.

protection as being a European policy. Soon after the Single European Act 1986, the Commission had on 3 May 1990, proceeded with its first action plan, the Three Year Action Plan of Consumer Policy for the period of 1990-1992.¹⁵⁸ The purpose of the particular document was to lay down a more coherent outline for the subsequent formulation of a policy. The Community had from an early point supported the view that consumer confidence is a vital aspect of the internal market and for this reason consumer representation, consumer information, consumer safety and consumer transactions should attract the Community's focus. The points covered under the Action Plan 1990-1992 were accordingly those which contributed to the increase of consumer confidence which following the Commission's argument contributes to the internal market project. In addition, the fact that the European Commission issued its first Action Plan in relation to shaping of the consumer policy at the Community level further stressed out the importance of the particular policy within the Community context.

The Commission had in its first Three-Year Action Plan, made clear that its focus would turn on four main areas which were considered as the most important for building consumer confidence and those were Consumer Representation, Consumer Information, Consumer Safety and Consumer Transactions. By the time the 1990-1992 Action Plan was put forward, the Doorstep Selling Directive, forming part of the Consumer Acquis had already been adopted while the Action Plan encouraged the implementation of, amongst others, the Unfair Contract Terms Directive, the Distance Selling Directive which are also part of the Consumer Acquis. At the same time, the Action plan had in the context of the actions that would be taken set as a further objective to examine any possible initiatives that would aid in simplifying cross border consumer contracts, guarantees as well as after sales service.¹⁵⁹

The importance of consumer protection was soon reasserted in the Second Commission Three-Year Action Plan for 1993-1995 and thus, soon after the Maastricht Treaty, the particular documented with its title being "Placing the

¹⁵⁸ Commission, 'Three year action plan of consumer policy in the EEC (1990-1992)' COM (90) 98 final.

¹⁵⁹ *ibid.*

single market at the service of European consumers” was a further indication of the early connection between consumer protection and the single market that began to take shape.¹⁶⁰ In line with the previous Action Plan, the Second Three-Year Action Plan again showed a commitment to only certain areas which were seen as relevant to increasing consumer confidence and those included Consumer Information and Concertation, Consumer Safety, Access to Justice as well as Financial Services.

The Third Three-Year Action Plan dealt with the period 1996-1998 and amongst others, what was in essence acknowledged was that there were certain details within the internal market which should be addressed in order for the internal market to be complete.¹⁶¹ The focus of consumer policy envisaged for the particular period was broader and it was expanded on issues such as the protection of the interests of consumers within the supply of essential services of public utility as well as to adopt measures that would provide the opportunity to consumers to benefit from the information society. While reference to the need to increase consumer confidence within the internal market was missing in the particular document, the subsequent consumer policy strategies showed a change in the approach and consumer policy had gradually took a different character.

It seems that the subsequent policy strategies that followed, in particular the Commission’s Three-Year Action Plan for the period 1999-2001 and the Consumer Policy Strategy 2002-2006, had shifted their focus to the advantages that consumers should enjoy as a result of an integrated market. The Community had, in an effort to ensure that the benefits that accrue from an integrated market reach consumers, tried to address the lack of consumer confidence that had by then become evident. Accordingly, the Community had for the years 1999-2001 expressed a commitment to not only ensuring a high level of health and safety of consumers but also providing them with a more powerful voice throughout the EU while there would be full respect for the economic interests of consumers.

¹⁶⁰ Commission, ‘Consumer Policy. Placing the single market at the service of European consumers, Second Commission three-year action plan 1993-1995’ COM (93) 378 final.

¹⁶¹ Commission, ‘Priorities for Consumer Policy 1996-1998’ (Communication) COM(95) 519 final.

Along the same lines, the Consumer Policy Strategy for the period 2002-2006, had highlighted that there was a need to make consumers feel more confident within the internal market so as to take full advantage of it. For this reason, the objectives that the Commission had set were to achieve a high common level of consumer protection across the Community and the involvement of consumer organizations in the EU policies as well as to ensure the effective enforcement of those rules dealing with consumer protection. What was thus aimed to be achieved was the maximization of the benefits flowing from the internal market.¹⁶²

What could be accordingly argued from an examination of the different policy documents brought forward by the European Commission is that the internal market was from an early point connected to the European consumer policy. In addition to that, consumer confidence has more or less been at the heart of consumer policy from an early stage as well. Nevertheless, there was an effort to increase consumer confidence by, amongst others, providing for the safety of consumers and for their access to justice while the provision of information and the respect for their interests both in the internal market and in financial transactions were also seen as means to increase consumer confidence. However, the concerns that are posed in this study question the Commission's shift towards adopting measures that contribute to the completion of the internal market rather than really increasing the confidence of consumers and those concerns have intensified with the emergence of the Consumer Rights Directive.

Subsidiarity

The preceding part referred to the process by which the European Community had managed to gain competence within the area of Consumer Law as well as to a historical overview of how European Consumer Law gradually developed through the various consumer policies. Nevertheless, a question that arises at this point is how the European Member States reacted to such an expansion of the European competences and which the

¹⁶² Commission, 'Consumer Policy Strategy 2000-2006' [COM \(2002\) 208](#) final - OJ C137/2.

area of consumer protection forms part. As it has earlier been referred to, there were Member States such as the United Kingdom which expressed their concerns towards this expansion particularly when the Single European Act was adopted. It was perhaps as a response to those concerns that the principle of subsidiarity as a general principle was introduced some years later within the Maastricht Treaty.¹⁶³ The principle of subsidiarity as contained in Article 3(b) of the Maastricht Treaty provides, in those areas which do not fall within its competence, the Community, in taking any action, shall pay regard to the principle of subsidiarity and only take action when the objectives are not sufficiently met by the Member States which accordingly makes action at the Community level more appropriate.¹⁶⁴ While the principle of subsidiarity which had as its aim was to provide a clear separation of the responsibilities of the Community on the one hand and the Member States on the other hand, it was at the same time regarded as having been proposed to justify the expansion in the Community's competences as well as to settle, as it will be seen below, the diverging interests of the various political actors involved.

The Council of Ministers had soon after the adoption of the Single European Act, started considering ways in which they could limit the expansion of the European Commission's power without of course hindering the spirit that the Community had by then acquired, the purpose of which was to achieve the completion of the internal market.¹⁶⁵ As a concept, subsidiarity made its appearance during the mid-1970s in a number of Reports in which the European Parliament was making an effort to stop the pessimistic feelings that had been then made evident about Europe.¹⁶⁶ The common feature of all the Committees that had prepared the relevant reports was the existence of Christian democratic politicians from the countries of Belgium, Germany, Italy and the Netherlands. Nevertheless, the prominent presence of Christian democrats in those efforts to achieve optimism towards Europe

¹⁶³ Van Kersbergen and Verbeek, 'The Politics of Subsidiarity in the European Union' (n 112) 216.

¹⁶⁴ Maastricht Treaty, art 3(b).

¹⁶⁵ Van Kersbergen and Verbeek, 'The Politics of Subsidiarity in the European Union' (n 112) 217.

¹⁶⁶ *ibid* 217-18.

may not be regarded as surprising as it was Christian Democrats that developed the vision of European integration after the Second World War.¹⁶⁷

Most reports in relation to subsidiarity had initially presented it as a way in which the problems that the European Member States were facing during the mid- 1970s and early 1980s could be resolved. With the principle of subsidiarity, Member States would transfer their sovereignty in certain areas to the Community which would step in and help them in resolving the problems that the Member States then encountered. Accordingly, subsidiarity soon became a way in which the expansion of the Community competences was promoted. The adoption of the principle of subsidiarity was both welcomed by Member States such as France and Germany which were defendants of the Community acquiring more authority as well as by Member States such as the United Kingdom who was opposing to such a development. Subsidiarity was a principle which all gave it the meaning they want and this is also an indication of the fact that its adoption was a solution to the conflicts of interests and the disagreements among the different actors involved and upon whom the common market would have an effect.¹⁶⁸

While the United Kingdom was concerned with the issue that the completion of the common market would gradually diminish the national sovereignty of Member States, the European Commission was primarily concerned with minimizing the impression that the programme that the Community had set and by which it would be able to legislate in a number of policy areas would lead to an increased power in the hands of the Community.¹⁶⁹ Despite the adoption of the subsidiarity principle and the prominent importance that was attached to it, it has nevertheless been rarely used to strike down measures on the basis that they violate the particular principle. Despite the expectation that subsidiarity would constrain the scope of the EC rule making, the Community has without interferences carried on legislating within the area of consumer protection.¹⁷⁰

¹⁶⁷ Van Kersbergen and Verbeek, 'The Politics of Subsidiarity in the European Union' (n 112) 217-218.

¹⁶⁸ *ibid* 220.

¹⁶⁹ *ibid* 216,219.

¹⁷⁰ Weatherill, *EU Consumer Law and Policy* (n 89) 5.

Conclusion

This Chapter has showed the early stages of formation of European Consumer Law and how the European Commission, while not initially having competence to regulate in the particular area, eventually became a key player. This historical reference additionally acknowledges how the internal market considerations are unavoidable as consumer policy has from its early formation been connected to the internal market. Of course this more or less had implications for its subsequent development. Therefore the shift of focus on benefiting the internal market and which has put consumer protection considerations in the second place should perhaps not surprise us. Having set the scene, this Chapter paves the way for subsequent Chapters which attempt to show how the concerns voiced in relation to the uneven balance between the objectives that European Consumer Law seeks to achieve are indeed valid. The question at this point turns as to whether the integration of the internal market, as opposed to providing consumers with a high level of protection which the relevant Treaty provisions stipulate, is the actual driving force behind European Consumer Law. And if this is the case, how European actors achieve it remains to be seen in this thesis.

Chapter 3 - The Moral Panic Theory

Introduction

Chapter 3 of this study deals with the Moral Panic Theory, a social sciences theory which is concerned with the process in which increased concern is created over a given issue which leads to the exaggeration of a social problem as well as a calling need for greater social regulation or control in order to address the problem arising.¹⁷¹ It could accordingly be argued that the creation of moral panics serves as a diversionary tactic which seeks to make a given solution seem more valid or convincing. Although the competency of the Commission to legislate in the area of Consumer Law has been tied to the internal market project, there are concerns that the focus has in reality shifted on the internal market by thus putting consumers on the second place. The question posed is whether the consumer confidence justification employed by the European Commission has simply served as a smoke screen behind which the European Commission has primarily sought to achieve objectives beyond simply providing consumer protection. The moral panic theory is therefore applied in the case of European Consumer Law in an effort to examine the process in which the increased concern around the low levels of consumer confidence in the internal market has been created and subsequently to determine whether this constitutes another example of a moral panic.

The Moral Panic Theory and the case of European Consumer Law

The moral panic theory portrays a condition, an episode, a person or a group of persons which becomes defined as a threat to societal values and interests while the actors involved present it in a stylized and stereotypical way so as to in this way take the opportunity to provide a solution to the

¹⁷¹ Kenneth Thompson, *Moral Panics* (Routledge 1998).

problem which is favourable to them and their interests.¹⁷² The solution to a given problem accordingly creates the condition for the emergence of a moral panic. The panic created around a particular issue may thus lead to changes in legal or social policy or in the way the society ultimately conceives a certain issue or even itself. According to Critcher, moral panics acquire more strength when politicians, or we could even speak of influential people more generally, such as in our case the various European actors involved, make an effort to define and combat a given “threat”, or to better say it a major obstacle, by adopting relevant legislation or by adopting public policies which will help them to deal with it.¹⁷³ Equally in the current case, the consumer confidence justification has constituted the reason used by the European Commission to achieve their desired outcome that is to achieve a shift towards maximum harmonisation which as this thesis will make an attempt to show better serves the interests of the internal market.

While moral panic theory constitutes a theory which in most cases has focused on an alleged danger caused by the behaviour of a certain group of people, it is the element of misrepresentation of the actual goals of a public policy that has in other situations fuelled a moral panic.¹⁷⁴ The latter constitutes the main reason for choosing to apply this theory to the area of European Consumer Law and particularly to the use of the consumer confidence justification. With this theory forming the ground of this Chapter, there will be an attempt to examine whether the concern around consumer confidence that the European Commission could be seen as another emerging moral panic as well as to examine what lies behind, as Cohen puts it, the discrete social process that is involved in a moral panic.¹⁷⁵

We live in an era where the contemporary world has resulted in being loaded with institutions that constantly make attempts to protect people from certain risks, whether those are social, political or economic, and they do so in an

¹⁷² Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (n 19) 1.

¹⁷³ Hall, Critcher, Jefferson, Clarke and Roberts, *Policing the Crisis: Mugging, the State and Law and Order* (n 21) 5.

¹⁷⁴ Krinsky, *The Ashgate Research Companion to Moral Panics* (n 20) 12-13.

¹⁷⁵ *ibid* 3-4.

effort to ensure that the discipline required by capitalism is achieved.¹⁷⁶ For this to be achieved, a social problem needs to be first created. However, it should be born in mind that this does not imply that a condition or an issue is non-existent and that the reaction caused around it is totally based on fantasy and illusion.¹⁷⁷ What the moral panic theory rather denotes is that the extent and significance of an issue is largely exaggerated.¹⁷⁸ At any given time, there are advocates who seek to construct social problems and in doing so their purpose is to attract the attention of policymakers, the media or even the public.¹⁷⁹ Every now and then, claims about a given situation suggesting that something is wrong and should be addressed are made. This constitutes the most common way in which social movements begin¹⁸⁰ as well as the first steps towards preparing the ground for the subsequent concern created around a given issue.

From an early point, the idea created around such social movements was that they are engaged in “the politics of reality” as Erich Goode has put it.¹⁸¹ What this denotes is that those involved in claim making, use evidence or to better say presumed evidence, in an effort to determine and present to the public and generally to others the nature of a situation.¹⁸² This enables the actors involved in such social movements to subsequently make suggestions as to how a situation ought to be.¹⁸³ Attempts to define a perceived reality for others does not only constitute a first step towards, as it has earlier been stated, the creation of a moral panic but it is at the same time a serious achievement of claim makers along the wider journey of attaining their goals.¹⁸⁴

¹⁷⁶ Krinsky, *The Ashgate Research Companion to Moral Panics* (n 20) 12-13.

¹⁷⁷ Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (n 19) viii.

¹⁷⁸ David Lemmings and Claire Walker, *Moral panics, the Media and the Law in Early Modern England* (Palgrave Macmillan 2009) 27.

¹⁷⁹ Krinsky, *The Ashgate Research Companion to Moral Panics* (n 20) 71.

¹⁸⁰ *ibid* 144.

¹⁸¹ Erich Goode, ‘Marijuana and the Politics of Reality’ (1969) 10(2) *Journal of Health and Social Behavior* 83, 83.

¹⁸² *ibid*.

¹⁸³ Krinsky, *The Ashgate Research Companion to Moral Panics* (n 20) 144.

¹⁸⁴ *ibid* 144.

It should not be of course disregarded that the power and the ability to define reality for others and more importantly to construct reality in a convincing way, is generally connected to the power one has in the society.¹⁸⁵ The way in which those actors define reality is often the subject of debates and long discussions. The most difficult part in this process is in essence the effort to make a claim seem more convincing and legitimate and this primarily constitutes the subject of the debates and discussions among the different actors occupied with a given claim.¹⁸⁶ In such situations, bringing a certain condition that was earlier ignored to the forefront is in itself an important achievement for movements aiming to attract the attention of others to such a condition¹⁸⁷ and accordingly to unconsciously create a moral panic.

Accordingly, the aim of this Chapter is thus to throw light on how the European actors, and primarily the European Commission, have gradually created a moral panic around consumer confidence in an effort to divert attention towards a misconceived social threat, a social problem in this case, which is a key characteristic of moral panics. Those participating in moral panics are most of the time able, and purport, to exert influence on the content as well as the enforcement of law.¹⁸⁸ Moral panics are based on the premise that “There ought to be a law” and legislation and law enforcement constitute the most apparent and often resorted to ways in which the concerns of moral panics are said to be addressed.¹⁸⁹ In the case of the European Consumer Law, the moral panic that has been created around consumer confidence is indispensably connected with legislation and for this reason the consideration of legislation cannot be absent.¹⁹⁰

As relevant legislation and law enforcement are an indispensable part of examining a moral panic situation, the Consumer Rights Directive which is in this study regarded as being the most recent and manifest materialisation of

¹⁸⁵ Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (n 19) 120.

¹⁸⁶ Krinsky, *The Ashgate Research Companion to Moral Panics* (n 20) 144.

¹⁸⁷ *ibid.*

¹⁸⁸ Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (n 19) 121.

¹⁸⁹ *ibid.* 122.

¹⁹⁰ Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (n 19) 119.

the moral panic that has been created around consumer confidence and for this reason the basis upon which European actors have based its adoption will be examined. The process preceding the Consumer Rights Directive will be to some extent considered here, however there will be greater examination of the issue in a later chapter in this thesis. In addition, the smoothening of the path throughout the Consumer Acquis will also be investigated at this point as this can help in tracking the development of the concern that was gradually created around consumer confidence. Ultimately, the theory of moral panics, once employed, can provide answers to questions relating to the process involved in passing laws as well as in even determining such as why certain laws are adopted.¹⁹¹

Key Attributes of Moral Panics:

From an early point of the development of the moral panic theory, Goode and Ben Yehuda have provided five characteristics that moral panics bear. Those include the element of concern, hostility, consensus, disproportionality and volatility.¹⁹² The question posed is whether, given the peculiarities of the area in question, in the absence of one of the characteristics of a moral panic in the current situation, it could still be argued that the concern created around consumer confidence constitutes another instance of a moral panic. The moral panic theory will for the first time be applied in an analogous situation where the increased concern in question has not been created around a given condition, event or behaviour but rather around a particular argument serving to conceal the actual driving force behind legislative activity in the area of European Consumer Law.

¹⁹¹ Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (n 19) 119.

¹⁹² Goode and Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (n 24) 37.

Concern

Moral panic theory has rested on the conception that an increased concern in relation to the behaviour of certain individuals viewed a threat for the society is created.¹⁹³ Concern is in essence a considerably significant as well as indispensable part of a moral panic. Through the concern created, it could be said that moral panics have resulted in a way in which certain issues are brought to the forefront.¹⁹⁴ The heightened concern created does not need to relate to the actual behaviour of a group of individuals; a concern over a supposed behaviour or over presumed consequences may suffice as well.¹⁹⁵

However, in our case, the concern created around the behaviour of consumers does not involve a threat in the sense that the moral panic theory has traditionally provided. While in other instances people whose behaviour was being attacked, were actually doing something, in our case it is the reluctance of consumers and the fact that they are abstaining from doing something that is at stake. Namely, the fact that consumers are not considerably keen on purchasing online and cross border puts their behaviour under the focus of the Commission's legislative activity. In this way, the European Commission has managed over the years to create a concern around the lack of consumer confidence by constantly stressing the need to harmonize the national Consumer protection regimes of the various Member States and thus achieving an increase in consumer confidence.¹⁹⁶ The disparities that exist among the different national provisions have been presented as the cause of concern in the case of European Consumer law and at the same time as a major "threat" – obstacle to better state it – which deters consumers from entering into generally online and online cross border transactions.

¹⁹³ Krinsky, *The Ashgate Research Companion to Moral Panics* (n 20) 7.

¹⁹⁴ Angela McRobbie and Sarah Thornton, 'Rethinking 'Moral Panic' for Multi-Mediated Social Worlds' (1995) 46(4) *The British Journal of Sociology* 559, 560.

¹⁹⁵ Erich Goode and Nachman Ben-Yehuda, 'Moral Panics: Culture, Politics and Social Construction' (1994) 20 *Ann Rev Sociol* 149, 156.

¹⁹⁶ Commission, 'Consumer Policy Strategy 2000-2006' (Communication) COM (2002) 208 final ; Commission, 'EC Consumer Policy Strategy 2007-2013 – Empowering consumers, enhancing their welfare, effectively protecting them' (n 16).

In developing the characteristics of moral panics, what Goode and Ben-Yehuda have stipulated in relation to the element of concern is that this concern should be over the actual or presumed behaviour of a group of individuals. However the question posed at this point is whether in absence of a particular behaviour posing a threat to the society, the particular element could still be satisfied. Although the theory was originally developed to question sociological events where the antisocial behaviour of certain individuals was involved, it is for the first time applied in the area of European Consumer Law which greatly differs from the areas that the theory was initially applied to. With those differences in mind and the absence, due to the peculiarity of the area, of a group's behaviour posing a threat for the society, the element of concern could still be satisfied. What one rather witnesses in the current case is reluctance on the part of consumers to actually act in the way that the European Commission desires.

The concern involved in a moral panic situation becomes visible and its magnitude can be measured in concrete ways which include among others public opinions, proposed legislation as well as the speeches of political actors. Political activity constitutes one of those sphere in which moral panics are most of the times expressed while lawmakers and politicians are amongst the characters that Cohen has in developing his theory determined as those who seem to be most worried about a perceived threat.¹⁹⁷ Equally, in our case, at different points of time reference to the consumer confidence argument was made by various European Actors. Politicians either give speeches or propose legislation regarding a certain perceived threat with the purpose being to make their view more convincing and consequently to make it shared by others. Nevertheless, what is interesting in our case is that the law makers themselves have caused the moral panic in question to be created. The fact that those involved in the efforts to create such concern around the lack of consumer confidence are at the same time those involved in the legislative process of the European Consumer Law could provide an affirmation that their efforts were directed at justifying – or even “legitimizing”

¹⁹⁷ Goode and Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (n 24), 49.

their legislative efforts and particularly the shift towards maximum harmonisation.

Viviane Reding, who was the then Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship has in 2010 delivered a speech for the purposes of the European Consumer Day conference, made an effort to emphasize that the lack of consumer confidence acts as a discouraging factor for consumers' online shopping activity.¹⁹⁸ Even if a claim is to a certain extent true, constant reference to it may create an exaggerated level of concern. For example, reference to the argument that the level of consumer confidence is connected with the level of online and cross border trading may, to a certain extent, be accurate. However, the fact that it has been again and again put forward as well as the way in which different European actors, such as members of the Commission and of relevant to the consumer committees, talk about it has led to its conceptualization as a more serious issue than really is. Reding, has in the same speech, stressed that only 7% of European consumers take the opportunity that the Single Market provides them to buy online from another country and blamed the lack of consumer confidence for it¹⁹⁹ for which full harmonization was presented as the cure. The fact that Reding attributed the low levels of cross border trading to consumer confidence seems to disregard wider issues involved as well as factors that obviously affect consumer's confidence and of course go beyond the extent to which legislation is harmonised. Those wider issues and factors affecting consumer confidence are analysed in great detail in a later part of this thesis.

Nonetheless, this was not the only time that claims to convince for the validity of the consumer confidence justification were put forward. Staffan Nilsson, who has been the President of the European Economic and Social Committee for the period of 2010-2013, was amongst those who made analogous efforts and what he argued was that there exists a dangerous

¹⁹⁸ Viviane Reding, 'An ambitious Consumer Rights Directive: boosting consumers' protection and helping businesses' (European Consumer Day, Madrid 15 March 2010) <http://europa.eu/rapid/press-release_SPEECH-10-91_en.htm> accessed 16 April 2016.

¹⁹⁹ *ibid.*

crisis of consumer confidence.²⁰⁰ In a speech of 2012 presented by him at the European Consumer Day conference he stressed out that the our century faces apart from a financial, economic and social crisis, a crisis of consumer confidence which he characterized as being far more dangerous.²⁰¹ It is interesting that Staffan Nilsson used the word “dangerous” to characterize the crisis of consumer confidence. Language is an important factor in such instances and it contributes towards changing the gravity and seriousness of an argument. Such bold statements not only attract greater attention but can also lead to the gradual creation of concern enabling the presentation of a given situation as being more important than it is in reality. In addition when referring to the fact that European consumers must be at the heart of any initiative²⁰² constitutes a way in which his argument can attract more trust and can thus be more convincing.

Hostility

In moral panic situations, the alleged social threat must be viewed with a bitter feeling of resentment in the sense that it is the behaviour of those responsible that is threatening for the society.²⁰³ The behaviour of such a group was envisaged by Goode and Ben-Yehuda as being damaging to certain values and interests.²⁰⁴ In our case, there exists no threat in its ordinary meaning that poses a danger to the society and this is attributed to the very nature of the situation. What rather exists in the current situation is a wider state of affairs that pose a threat to the society as consumers will be deprived of the opportunity to improve their situation unless they engage in online and cross border trading. A feeling of missing out has accordingly been created and unless the national consumer laws of the various Member

²⁰⁰ Edgar, ‘Cross-border B2C e-commerce in the EU and the introduction of the Consumer Rights Directive: A cure for fragmentation?’ (n 31) 9.

²⁰¹ Staffan Nilsson, ‘Sustainable consumption in a time of crisis’ (European Consumer Day, Copenhagen, 15 March 2012) <<http://www.eesc.europa.eu/?i=portal.en.former-eesc-presidents-staffan-nilsson-speeches.22675>> accessed 16 April 2016.

²⁰² *ibid.*

²⁰³ Krinsky, *The Ashgate Research Companion to Moral Panics* (n 20) 7.

²⁰⁴ Goode and Ben-Yehuda, ‘Moral Panics: Culture, Politics and Social Construction’ (n 195) 157.

States are fully harmonized, it is presumed that consumer confidence is at threat in the sense that consumers will be deprived of the benefits that flow from the internal market.

In our case, a 'bitter feeling', seems to have been created around consumer confidence and more accurately around the disparities that exist among the different national provisions which are blamed for the low levels of online cross border trading. The creation of this 'bitter feeling' has been based on the view that this state of affairs had as a result depriving consumers from the EU's crown jewel as Viviane Reding characterized the Single Market²⁰⁵. The fact that the moral panic theory constitutes a social theory involves a need of adaptation in the case of the European Consumer Law. In the current case, the element of hostility differs from what already exists and, it is, in its literal meaning, entirely absent. While in other situations where a moral panic existed, there was a heightened level of hostility towards the people whose behaviour posed a threat to the society²⁰⁶, in the current case as it has already been put forward, there exists no behaviour that can be recognized as a threat to the society. Although hostility per se is absent in the current case, the feeling of dissatisfaction that European actors tried to create around minimum harmonization, which is blamed for the lack of consumer confidence, should not be disregarded. This forms part of their efforts to convince about the presumed need to move away from minimum to maximum harmonization and of their wider efforts, whether conscious or not, of creating a moral panic around consumer confidence.

Consensus

Consensus constitutes another key feature of a moral panic and according to it there must be at least some minimal agreement that the societal threat is real and indeed serious.²⁰⁷ Goode and Ben-Yehuda in developing the characteristics of moral panics, have made clear that a given societal threat

²⁰⁵ Viviane Reding, 'An ambitious Consumer Rights Directive: boosting consumers' protection and helping businesses' (European Consumer Day, Madrid 15 March 2010) <http://europa.eu/rapid/press-release_SPEECH-10-91_en.htm> accessed 16 April 2016.

²⁰⁶ Goode and Ben-Yehuda, 'Moral Panics: Culture, Politics and Social Construction' (n 195) 157.

²⁰⁷ *ibid.*

does not need to resonate across the whole society, a threat must rather be achieved with a large or powerful segment of the public capable of counteracting the given threat with policies that are preferable to them.²⁰⁸ This element is perhaps the most straightforward that needs no further analysis both in general as well as in the current case. A satisfactory number of European politicians and the European Commission itself share common views both in relation to the issue of consumer confidence as well as to the ways in which they can address it.

In addition to the view expressed by Viviane Reding in her speech where she emphasized that full harmonization constituted the way in which the lack of consumer confidence could be addressed, there have in addition been more instances where full harmonization was presented as the solution to the lack of consumer confidence.²⁰⁹ The European Commission has, as it has earlier been stated, in its various consumer policy strategies stressed the importance of having common rules for increasing consumer confidence as well as for protecting consumers effectively.²¹⁰

However, apart from Members of the Commission, there have been members of the European Parliament such as the French Liberal Robert Rochefort who supported that it was time to harmonize the different national rules across the EU so as to in this way increase trust in regulation and fuel the common market.²¹¹ To add to that, Andreas Schwab, a German centre-right member of the European Parliament stated that online cross border shopping would be, once the Consumer Rights Directive was adopted, easier and safer for consumers. By putting emphasis on cancellation rules, what he once again put forward was that only if rules were common, consumers would feel confident to shop across borders.²¹²

²⁰⁸ Krinsky, *The Ashgate Research Companion to Moral Panics* (n 20) 7.

²⁰⁹ Commission, 'Review of the Consumer Acquis' (Green Paper) COM (2006) 744 final 7.

²¹⁰ Commission, 'Consumer Policy Strategy 2000-2006' (Communication) COM (2002) 208 final; Commission, 'EC Consumer Policy Strategy 2007-2013 – Empowering consumers, enhancing their welfare, effectively protecting them' (n 16) 16.

²¹¹ <www.euractiv.com/consumers/battle-eu-consumer-rights-links-dossier-504087?display=normal> accessed 15 January 2014.

²¹² *ibid.*

Disproportionality

Yet another important key characteristic of a moral panic is the element of disproportionality.²¹³ Disproportionality which equates to exaggeration is widespread in moral panics and it constitutes the most common element present in most situations where claims giving rise to a social problem are being made.²¹⁴ The level of concern caused in moral panic situations is unrealistic and does not accord to the relative importance of seriousness as well as the nature of the threat itself.²¹⁵ The concern created by the advocates involved is accordingly much greater than the actual threat which a sober and a sensible assessment of it would bring forward.²¹⁶

It is, according to Hilgartner and Bosk, unlikely for the advocates of a moral panic to understate the importance of the issue that they are making an effort to present as a problem.²¹⁷ It should not be disregarded that in such instances, the arguments that are put forward are only scarcely occupied with the consideration of the advantages and disadvantages of the both sides of an issue in question. What one can rather witness in these situations is evidence being put forward in a one-sided fashion, as opposed to a scholarly reasoned fashion.²¹⁸ It is in addition unlikely for those advocates to critically consider the statistical numbers presenting the size of the problem. The numbers are presented as right and seek to make the problem look more convincing.²¹⁹

The act of generating and disseminating numbers is an important aspect of moral panics that should not be disregarded. The figures provided as empirical evidence by claim makers to support a particular claim are in most situations considerably exaggerated.²²⁰ In the case of European Consumer

²¹³ Goode and Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (n 24) 40.

²¹⁴ Krinsky, *The Ashgate Research Companion to Moral Panics* (n 20) 72.

²¹⁵ *ibid* 7.

²¹⁶ Goode and Ben-Yehuda, 'Moral Panics: Culture, Politics and Social Construction' (n 195) 157.

²¹⁷ Krinsky, *The Ashgate Research Companion to Moral Panics* (n 20) 72.

²¹⁸ *ibid* 145.

²¹⁹ *ibid* 72.

²²⁰ Goode and Ben-Yehuda, 'Moral Panics: Culture, Politics and Social Construction' (n 195) 158.

Law, Eurobarometer surveys have been used by the European Commission to make the consumer confidence seem convincing. What is interesting in this regard is the fact that Eurobarometer constitute surveys for which the European Commission has the role of the principal investigator and this raises questions as to their validity.²²¹

Differences in the national regimes have been blamed for the low levels of consumer confidence and subsequently the lack of consumer confidence has been seen as the reason for the low levels of cross border, and particularly online, shopping. With questions that were too focused and directed towards receiving the desired answers, a disproportionate concern for the low consumer confidence accruing from minimum harmonisation standards began to emerge. Nonetheless from other parts of the same Eurobarometer surveys that are adduced below, it can be seen that from consumers' answers, legislation and maximum harmonisation can in reality be an irrelevant consideration when consumers have to consider legislation as a factor among others.

In the Eurobarometer survey of 2002, the respondents' answers have showed that the fear that there may be lower standards in other EU countries was cited as being last in the list of the very important reasons which inhibit consumer confidence in cross border purchases.²²² Consumers were more concerned with issues such as their ability to return a good and receive refund and how to deal with a problem that may arise as well as with issues such as delivery problems. In the same survey, when respondents were asked as to what would increase their confidence in cross border trading, the least important factor was to be informed about the different specific consumer rights and protection measures that exist in each EU country.²²³ However, more interesting it is the fact that although it seemed that consumers considered the fear for lower standards in other EU

²²¹ Eurobarometer surveys are conducted by TNS opinion & social at the request of the European Commission. The surveys are requested and co-ordinated by the European Commission.

²²² Flash Eurobarometer 128, 'Public Opinion in Europe: Views on Business-to-Consumer cross-border trade' (November 2002) 39
<http://ec.europa.eu/public_opinion/archives/ebs/ebs_175_fl128_en.pdf> accessed 26 April 2016.

²²³ *ibid.*

countries as the least important reason for the low confidence in cross border trading, the survey at a subsequent point contained a question exclusively focused on consumer rights and protection. Consumers were asked a question in relation to six factors from which three of them related to consumer protection laws and rights and to information regarding them.

More particularly, consumers were asked as to how important maximum harmonisation is for making them feel more confident in cross border shopping. Consumers had to answer whether they would feel more confident if consumer protection laws were strengthened in all EU countries, if they enjoyed the same consumer rights and protection as for purchases in their country or if they were given information about the different specific consumer rights and protection measures that exist in each EU country.²²⁴ Consumers to their majority regarded those factors as very important and fairly important when shopping across border, but this constitutes an example of a loaded question. It could nonetheless be suggested that the question was directed towards a desired answer that could be used to back up the shift to maximum harmonisation. Nevertheless, as this thesis will later argue, doubts as to whether the level of consumer protection offered in a foreign Member State is a relevant consideration in consumer's decision making process. What should rather raise concerns here is perhaps an effort made through the particular survey to direct the attention of consumers towards factors relating to consumer rights and consumer protection.²²⁵ Those could well be regarded as early attempts to justify the intervention of the European Community in the particular area.

A subsequent Eurobarometer survey of 2003 has interestingly showed that Europeans who were more confident in internet cross border trade, were neither particularly confident nor particularly sceptical with respect to their own countries.²²⁶ This raises some initial doubts as to whether the different

²²⁴ Flash Eurobarometer 128, 'Public Opinion in Europe: Views on Business-to-Consumer cross-border trade' (November 2002) 45
<http://ec.europa.eu/public_opinion/archives/ebs/ebs_175_fl128_en.pdf> accessed 26 April 2016.

²²⁵ *ibid.*

²²⁶ Special Eurobarometer 193, 'Consumer Protection in the EU' (November 2003) 22
<http://ec.europa.eu/consumers/archive/topics/eb_59-2_en.pdf> accessed 26 April 2016.

national laws is really what keeps consumers back from cross border trade which will be solved through the shift to maximum harmonisation. In addition, the particular survey has showed that consumers are not even aware of their rights in their own countries, how are they then expected to being paying considerable regard to the laws of other countries is a question that remains unaddressed. Contrary to that, the European Commission places considerable weight upon the differences in the various national regimes while in essence consumer confidence unavoidably depends, among others, upon wider issues and various factors that will be expanded in greater detail in a later part of this thesis.²²⁷

While great emphasis is paid upon the fact that the Internet constitutes a recently developed medium with which not all consumers are familiar with, the fact that cross border trading is generally low, including purchases made by phone and post and not merely Internet²²⁸, signifies that it is the idea of a cross border transaction where the seller is physically out of the reach of the consumer that actually estranges European consumers. This was also made evident from the fact that the majority of consumers have in the same survey expressed the view that they are less interested in cross border shopping because they prefer to shop in person.²²⁹

However, with a slight increase being highlighted in cross border trade in the Special Eurobarometer Survey of 2008²³⁰, three years before the adoption of the Consumer Rights Directive whose purpose was to boost consumer confidence and thus increase cross border trade²³¹, what could be argued is that trends change and as time passes people gradually become more familiar with new methods of transacting such as for example distance shopping. The same could of course be argued for domestic distance shopping. The slight increase noted perhaps constitutes an unconscious

²²⁷ Chapter 5 of this thesis deals with the factors that affect consumer confidence.

²²⁸ Special Eurobarometer 252, 'Consumer Protection in the Internal Market' Special (September 2006) 47 <http://ec.europa.eu/public_opinion/archives/ebs/ebs252_en.pdf> accessed 26 April 2016.

²²⁹ *ibid* 75.

²³⁰ Special Eurobarometer 298, 'Consumer Protection in the Internal Market' (October 2008) 18 <http://ec.europa.eu/public_opinion/archives/ebs/ebs_298_en.pdf> accessed 26 April 2016.

²³¹ *ibid* 20.

change which in essence depends on a personal willingness on the part of consumers. To add to that argument, it is worth mentioning that when consumers were asked questions in relation to their levels of confidence in 2008, the survey has showed that consumer confidence has increased since 2006.²³² While the slight increase noted seems not to be enough for the European Commission, it nevertheless points towards the fact that it takes time for consumers as ordinary people to familiarize themselves with distance shopping in more particular and with the fact that the seller is out of their reach. This can also be made evident from the reluctance on the part of consumers to enter into a transaction even while they are on a trip.²³³ As regards their view in relation to the level of protection they are provided, over half of Europeans have in 2008 expressed their satisfaction with the existing protective standards.²³⁴ This is not just an additional indication of the fact that the level of legislative protection offered is indeed not the primary concern for consumers but it also shows how the concern created around consumer confidence and the reliance on maximum harmonisation to address this is not consonant with what happens in reality.

Volatility

The last key feature of a moral panic is volatility. Moral panics have been regarded as volatile phenomena which break out suddenly, although as Goode and Ben-Yehuda have stated “they may lie dormant or latent for long period of times”.²³⁵ This means moral panics may exist long before they erupt but in an undeveloped and more hidden state. By saying that moral panics are volatile does not equate to say that moral panics do not have

²³² Special Eurobarometer 298, ‘Consumer Protection in the Internal Market’ (October 2008) 85 <http://ec.europa.eu/public_opinion/archives/ebs/ebs_298_en.pdf> accessed 26 April 2016.

²³³ Flash Eurobarometer 299, ‘Consumer Attitudes towards Cross-Border Trade and Consumer Protection’ (March 2011) 23 <http://ec.europa.eu/public_opinion/flash/fl_299_en.pdf> accessed 26 April 2016.

²³⁴ Special Eurobarometer 298, ‘Consumer Protection in the Internal Market’ (October 2008) 74 <http://ec.europa.eu/public_opinion/archives/ebs/ebs_298_en.pdf> accessed 26 April 2016.

²³⁵ Goode and Ben-Yehuda, ‘Moral Panics: Culture, Politics and Social Construction’ (n 195) 158 ; Goode and Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (n 24) 41.

structural or historical development.²³⁶ In the current case, the moral panic began to emerge, a long time before the Consumer Rights Directive took place. For a number of years, both the European Commission and various European actors have with their words and actions led to the conception of the low levels of consumer confidence as a social problem which ought to be solved. The moral panic was made explicit with the efforts of the European Commission to achieve a shift towards maximum harmonisation.

There are according to Goode and Ben-Yehuda two types of moral panics; firstly there are moral panics which become routinized or institutionalized which means that they remain in place in the form of a social movement, legislation or even enforcement practices. On the other hand, there are moral panics that disappear without leaving traces behind and by leaving the legal, cultural, moral and social structure more or less intact. In the current case the moral panic against consumer confidence was gradually institutionalized and led to a change in law, that is the shift towards maximum harmonisation. At the moment, the indications available show how the emerging moral panic has in the current case began to cause a change in legal structure and leaving its impact on legislation, however it cannot be determined yet whether the moral panic will evaporate easily or not.

Pattern of Development

Undoubtedly, moral panics differ from one another and undoubtedly their causation varies from case to case. Three different patterns of development for moral panics were put forward by Goode and Ben-Yehuda and those include the grassroots model, the elite-engineered model and the interest group theory.²³⁷ Interestingly, the pattern of development of the concern caused in moral panics can shed light upon the causes and consequences of such a moral panic. Before determining the pattern of development of the concern around consumer confidence in this case, a brief reference to all

²³⁶ Goode and Ben-Yehuda, 'Moral Panics: Culture, Politics and Social Construction' (n 195) 158.

²³⁷ Krinsky, *The Ashgate Research Companion to Moral Panics* (n 20) 7.

three models could aid in a better understanding as to which model best applies.

The grassroots model

What the grassroots model suggests is that a given concern originates within the public and its roots lie in wider public concerns that pre-existed and have been widespread amongst the populace.²³⁸ According to this theory, it is the public itself that both forms and maintains a moral panic.²³⁹ In such situations, neither interest groups nor the elites are involved in presenting issues aimed at spreading concern around an issue. From the analysis that has been made of the current situation, it is evident that the grassroots model does not apply in the case of the European Consumer Law as there is no indication of a pre-existing public concern. Rather the concern that has been created around consumer confidence constitutes a creation of the various European actors involved in the legislative process of the relevant policy.

The elite-engineered model

The choice between the two remaining models for the pattern of development of the current moral panic is more difficult to be made and a further analysis of the two models is required. The elite-engineered model on the one hand provides that those who are the richest and most powerful in the society, including members of the political and economic area, “orchestrate” moral panics.²⁴⁰ They do so through the control of major institutions of the society. The elite-engineered model involves campaigns which contribute in not only creating but also in upholding a concern around an issue by thus causing fear and panic to the public.²⁴¹ However, the purpose behind such moral panics is to draw the attention of the public and drive it away from other problems that may exist in the society.²⁴² Of course, the motive behind such moves is to protect the political and economic

²³⁸ Goode and Ben-Yehuda, ‘Moral Panics: Culture, Politics, and Social Construction’ (n 195) 161.

²³⁹ Krinsky, *The Ashgate Research Companion to Moral Panics* (n 20) 7.

²⁴⁰ *ibid* 8.

²⁴¹ *ibid*.

²⁴² *ibid*.

interests of the elites by directing concern towards a condition that the elites do not consider as being considerably threatening to the society. The supposed threat that is posed to the society can be either a considerably less serious problem that is amplified or it can even be totally made up.

The interest-group model

On the other hand, according to the interest-group model, legislators as well as moral entrepreneurs seek to influence the society and thus persuade them that a certain condition constitutes a societal threat. This constitutes the most common approach to moral panics.²⁴³ This will provide them the opportunity to enact new rules however it is firstly required to achieve the recognition of an issue or a problem around which a moral panic attracting the concerns of the society is created. The interest-group model considers moral panics as emerging from the acts of the media or other groups that construct a problem which may bear little or no connection to public concerns that are dominant in the society. For Goode and Ben-Yehuda the interest-group model constitutes the most common approach into which legislators and moral entrepreneurs engage and initiate a series of actions directed towards achieving a particular end which is often to ensure that certain desired rules are passed.²⁴⁴

The pattern of development in the current case

Having referred to what each model suggests and having dismissed the grassroots model which does not resemble the pattern of development of the current moral panic, the question posed is which of the two remaining models, the elite-engineered and the interest-group model, applies to the current situation. With consideration to the characteristics of each model, it could at this point be argued that it is the interest-group model that seems to apply according to the way in which the moral panic around consumer confidence was actually created. As the interest-group model provides, legislators often with their actions manage to create a concern around a given issue so as to in this way grab the opportunity to pass certain rules

²⁴³ Goode and Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (n 24) 67.

²⁴⁴ Goode and Ben-Yehuda, 'Moral Panics: Culture, Politics, and Social Construction' (n 195) 165; Krinsky, *The Ashgate Research Companion to Moral Panics* (n 20) 8.

directed towards a particular, and even a less obvious, end. In the current case, the constant reference that was being made to the lack of consumer confidence aimed at turning their argument into a convincing one and thus achieving recognition of it as a social problem that needs to be addressed through the shift to maximum harmonisation.

The interest-group model seeks to provide answers to questions such as "...For whose benefits it is? Who profits? Who wins out if a given issue is recognized as threatening to the society? To whose advantage is a widespread panic about a given behaviour or institution? Who stands to gain?"²⁴⁵ From an early point, ideological moral gains have been distinguished from material moral gains as the motivation and driving force behind each of them differs. Interest-groups politics which aim at material moral gains have been regarded as "cynical, self-serving, devoid of sincere conviction".²⁴⁶

The validity of the Moral Panic theory in the case of the European Consumer Law

Moral panic constitutes a sociological theory which once employed can aid in explaining overreaction to a perceived social problem.²⁴⁷ Being a theory that has been developed during the late 1960s in a time where there was considerable political and intellectual turbulence, its main aim was to throw light at the process by which a concern about a given social problem is created, and although such concern is not proportionate to the actual problem, it has nonetheless provided the basis for change in the social or legal codes.²⁴⁸ However, one may question the validity of the particular theory in the case of European Consumer Law and in more particular in relation to the consumer confidence justification. However, it would be

²⁴⁵ Goode and Ben-Yehuda, 'Moral Panics: Culture, Politics, and Social Construction' (n 195) 166.

²⁴⁶ Goode and Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (n 24) 67.

²⁴⁷ Rohloff and Wright, 'Moral Panic and Social Theory: Beyond the Heuristic' (n 23) 404.

²⁴⁸ *ibid.*

helpful at this point to compare the current case with another instance where the moral panic theory has been applied to.

When the concept first appeared in Cohen's work entitled *Folk Devils and Moral Panics*, the phenomenon being at stake was the Mods and Rockers traced back in 1960s in Britain which was a form of adolescent deviance by British young people belonging to the working-class and which involved seaside fights between two groups of young people.²⁴⁹ Their activities were presented as being immoral and as threatening the then established way of life.²⁵⁰ What was then noticed was an escalation of measures to address the problem which became manifested in calls to "tighten up" and "take strong measures".²⁵¹ Stronger propositions such as "don't let it get out of hand" were in addition evoked with the image of innocent holidaymakers, parents, children playing with the sand, tradesmen, as the groups of people who had to be safeguarded against the problem at stake was put forward in an attempt to make those efforts seem legitimate.²⁵² What is also important to mention in relation to the current case is that the degree as well as kind of control were both extended with new methods of control being proposed. An example of that in the case of Mods and Rockers was to introduce new methods of control, by making new powers and new penalties available in the hands of the police.²⁵³

As if this was not enough, further control in the form of legislation was additionally proposed and this constitutes the most important way in which the government can exert control.²⁵⁴ "The most important interface", as Thompson Kenneth puts it, in this control culture is in those instances where legislation proposed as a means of state control as well as legislators have to face the pressure that claim-makers and moral entrepreneurs inflict upon them. However it should not be disregarded that this issue acquires even more significance where the claim-makers and moral entrepreneurs involved

²⁴⁹ Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (n 19) 12.

²⁵⁰ Thompson, *Moral Panics* (n 171) 14.

²⁵¹ *ibid* 60.

²⁵² *ibid*.

²⁵³ *ibid*.

²⁵⁴ *ibid*.

are themselves politicians.²⁵⁵ In the case of Mods and Rockers, the threat was perceived as going contrary to commercial interests. Spokespersons made efforts to form increased reaction against the issue as its resonance had to reach the national level²⁵⁶ in order to ensure that a more powerful government response that would safeguard the commercial interests of local tradesmen or seaside resorts owners.

An anxiety around the issue as well as a general feeling that the existing control was not adequate was created. The issue ended occupying the House of Commons where MPs spoke with bold language about the “young hooligans” for which there was a need of “urgent and serious consideration” of punishments that would act as deterrents.²⁵⁷ Legislation to address the problem was without delay put forward while the then responsible Minister honestly admitted that there was a great degree of exaggeration in relation to the issue.²⁵⁸ Although, the young hooligans, as they have been characterized, symbolized more than one may think of, the degree of exaggeration as well as the fact that the problem was exploited for achieving hidden purposes, which in that case were to safeguard commercial interests, are both elements resembling the case examined in this thesis. In the case of Mods and Rockers, the concern created served to justify an increase in social control and thus broadening the scope of law enforcement.²⁵⁹ Equally, what we witness in the case of the European Consumer Law is a further step towards maximum harmonisation²⁶⁰ with a new legislation being proposed, that is the Consumer Rights Directive. Reactive law solutions have from an early point been regarded as a fundamental element of modern moral panics.²⁶¹

²⁵⁵ Thompson, *Moral Panics* (n 171) 60.

²⁵⁶ *ibid.*

²⁵⁷ *ibid* 61.

²⁵⁸ *ibid.*

²⁵⁹ Goode and Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (n 24) 25.

²⁶⁰ This constitutes a further step towards maximum harmonisation after the Unfair Commercial Practices Directive which was adopted in 2005.

²⁶¹ Lemmings and Walker, ‘Moral panics, the Media and the Law in Early Modern England’ (n 178) 10.

The consumer confidence justification throughout the development Consumer Acquis

The consumer confidence argument has comprised the justification that the European Commission has occasionally used throughout a period that led to the development of the Consumer Acquis. At that stage the particular justification was employed more sparingly and in certain instances it could be argued more legitimately. Although the Consumer Acquis is comprised of eight different Directives, only four of them, that is the Directives that were contained in the Consumer Rights Directive as it was initially proposed, will be examined. Part of this analysis connects back to Chapter 2 which deals with development of the European Consumer Law and for this reason reference to issues that have already been discussed will unavoidably be made throughout this part. The Doorstep Selling Directive adopted in 1985 was the first directive of the Consumer Acquis. However, as it has already been pointed out, the consumer confidence justification had not until that point made its appearance and this may be attributed to the fact that the particular type of contracting, that is contracts negotiated at the doorstep, was not perhaps greatly connected to the internal market.

The first references to the term consumer confidence made their appearance a couple of years later with the first Action Plan of 1990-1992. With considerable emphasis being put on consumers, what was put forward in the Action Plan for the period of 1990-1992 was that the internal market, once successfully constructed, would be greatly to the advantage of the consumer.²⁶² This constitutes an early indication of presenting the internal market as particularly advantageous for consumers. However, this perhaps diverted attention away from the fact that it is in essence a rather greater advantage for businesses. For businesses, the internal market constitutes the channel by which they can expand their trading across the Community and thus increase their sales by attracting consumers from Member States beyond their own country. It is from that point that the Commission, whether consciously or not, began to construct its argument which would contribute

²⁶² Commission, 'Three year action plan of consumer policy in the EEC (1990-1992)' COM (90) 98 final 3.

in convincing the society that the internal market was primarily for the advantage of consumers perhaps driving attention away from the fact legislating in the name of consumers would at the same time contribute in coming a step closer to complete the internal market project.

What this thesis supports is that the purpose of the Commission has not been as pure as presented. It could not be denied that there are provisions providing valuable rights and protection to consumers, nevertheless the suspicion that this study puts forward is that the primary purpose or to better say the driving force in European Consumer Law has been the desire to complete the internal market. Providing consumers with adequate rights and protection have not been the concern per se for the Commission but it is rather the power of consumers in completing the internal market that seems to count the most. Consumer confidence was presented by the Commission as a necessary ingredient of the internal market and to a certain extent this is true. The position of consumers is vital for the smooth functioning of the internal market as all depend on consumer activity and namely their willingness to transact. However, the overemphasis that is being put on consumers and their confidence does not seem as the real and only concern of the Commission but it has on the contrary been repeatedly used in its desire to achieve further market integration with the shift to maximum harmonisation.²⁶³

The Commission had from an early point singled out areas which it regarded as important for building consumer confidence and among others those included consumer information and consumer transactions²⁶⁴. The provision of adequate information was from that point recognized as having effect on consumer confidence and at the same time on the extent to which it would

²⁶³ Analogous concerns were put forward by various scholars in the following articles: Thomas Wilhelmsson, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' (n 4); Christian Twigg-Flesner, "Good-Bye Harmonisation by Directives, Hello Cross-Border only Regulation? A way forward for EU Consumer Contract Law' (2011) 7(2) *European Review of Contract Law* 235 ; Poncibo, 'Some Thoughts on the Methodological Approach to EC Consumer Law Reform' (n 72); Geraint Howells and Reiner Schulze, 'Overview of the Proposed Consumer Rights Directive' in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Sellier European Law Publishers, 2009) 3.

²⁶⁴ Commission, 'Three year action plan of consumer policy in the EEC (1990-1992)' COM (90) 98 final 5.

help consumers enjoy the full benefits flowing from the internal market. Cross border trading was as early as 1990 acknowledged as a possible method of selling however up to that point, cross border trading could be effectuated by using means such as telephone, mail order as well as other communication technology. Undoubtedly, cross border trading through the use of Internet was not envisaged and did not even exist. However, the concern over the different national provisions in relation to sale contracts began to emerge by stressing out that the differences among the various Member States in the conditions of sale in contracts being further complicated by the existence of different languages across the Community and by the fact that each Member State used to have its different legal system. The view formed was that the inability of consumers to deal with those complexities with confidence would act as a discouraging factor for entering into cross border transactions. The new state of affairs needed to be addressed and the Unfair Contract Terms and the Distance Selling Directive were then proposed by the Commission to address complexities arising.

Neither the Directive on Unfair Contract Terms and the Distance Selling nor their Preambles contained any explicit reference to the term consumer confidence per se. However, it should not be disregarded that both legislative measures were results of the emphasis that the Commission had previously put on consumer confidence as those expressed in the Action Plan 1990-1992 and the Action Plan 1993-1995 accompanied by a willingness to adopt further legislative measures in those areas which were regarded as important for consumer confidence and could aid in boosting consumer confidence. Consumer confidence has accordingly been an old argument that the Commission has rested upon in numerous occasions, and the fact that it was not explicitly contained in the two directives does not seem to undermine the fact that an emerging concern began to be formed from that point. To add to the number of areas which were regarded as affecting consumer confidence, the Commission had some years later proposed the Directive on certain aspects of the sale of consumer goods and associated guarantees, known as the Consumer Sales Directive which

was adopted in 1999 which would contribute in strengthening consumer confidence through the minimum harmonisation of the area.

The consumer confidence justification and the Directive on Consumer Rights

The Consumer Rights Directive which was eventually adopted in 2011, after a three year process full of obstacles which will be examined with greater detail at a later part of this study, has repealed the Distance Selling and Doorstep Selling Directive and made some slight amendments to the Directive on Unfair Contract Terms and to the Consumer Sales and Associated Guarantees Directive. In a press release that preceded the adoption of the Consumer Rights Directive, the Commission had emphasized that the adoption of the new directive will strengthen consumer rights and that it will help ensure that the provisions of it would be implemented promptly in all Member States so as to make consumers feel more confident whether they shop online or offline.²⁶⁵ The Commission in its attempt to be more convincing about the adoption of the Consumer Rights Directive has in a considerably ambitious way employed the consumer confidence justification. By putting forward a rather bold argument, the Commission tried to persuade that the prompt implementation of the particular directive would have the power to put consumers who shop online in the same position with those who shop offline.²⁶⁶ The question is nonetheless to what extent this can be achieved give the perplexities involved in online shopping, not to mention online cross border shopping which is even more burdensome due to the fact that the trader is out of the reach of the consumer and delivery and return issues may arise. Is that really attainable? The answer to this might be a statement put forward by Cohen years ago when developing the moral panic theory, legislation is in

²⁶⁵ Commission, 'Consumer Rights: 10 ways the new EU Consumer Rights Directive will give people stronger rights when they shop online' (MEMO) 450 (Brussels, 23 June 2011).

²⁶⁶ *ibid.*

moral panic situations regarded as being in line with the interests or even the views that the members of a given group have.²⁶⁷

The more power that a group possesses, the greater the possibility that they will be successful in exerting their influence on the legislation adopted.²⁶⁸ In the case of European Consumer Law, if the internal market has constituted the actual driving force, the questions remains: which Member States may exert influence and what are the reasons behind this? This issue is examined in Chapter 4 which analyses the trends and preferences involved in the adoption of the Consumer Rights Directive. However it suffices to say at his point that perfecting the internal market can be particularly beneficial for businesses found in Member States with the most powerful industries who can expand their trading across the Community.

The argument that is put forward in this thesis is based on an assumption that a more harmonized legislation will diminish costs for businesses that under the previous law, they should spend a considerable amount of money in order to be in compliance with the different national regimes of the countries they wished to trade in. On the contrary, the harmonized consumer protection regime will involve one time compliance costs which will not be considerably onerous and burdensome for big businesses. However, for small businesses the situation is much more different. What could be insinuated at this point is that the willingness on the part of the Commission to create a harmonized consumer protection regime which will at the same time provide an opportunity to business to reap the advantages of the internal market are rather favourable for the biggest businesses which come from the most powerful and industrialized countries in the Community. It nonetheless remains to be seen which Member States have indeed favoured further integration and maximum harmonisation.

²⁶⁷ Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (n 19) 122.

²⁶⁸ *ibid.*

Limitations and Concerns

The concept of moral panic has over the years acquired great dynamic and it has had an impact not only on sociology where a separate field of study in relation to moral panics was developed, but also as David Garland had put it “on the language of cultural debate and on the practice of journalists and politicians”.²⁶⁹ Allegations made at various points that certain social reactions are in reality moral panics have become more and more frequent in discussions about social problems.²⁷⁰ In an era where exaggeration is widespread, where either the media or politicians converge on creating concern around an issue with the purpose of exploiting it, it is not surprising that the concept of moral panic has become part of the armoury used in public debate as a means of showing one’s disapproval towards hyperbole that manipulates sectors of our lives. Despite the fact that moral panic was initially developed as a strictly defined concept by Cohen in its earlier mentioned work, *Folk Devils and Moral Panics*²⁷¹, it has with the passing of time, become a rhetorical move in cultural politics. Nevertheless, its extensive use is not free from conceptual problems and limitations and this part of the chapter will be devoted on some of the majors concerns and criticisms in relation to the concept of moral panic.

Despite the existence of criticisms that have repeatedly attacked moral panics, the value of the concept has nevertheless not been undermined. As Cohen’s suggest, those problems and limitations in relation to moral panics should be kept in mind when applying the particular theory. The issue of proportionality has been the subject of concerns and David Garland, in a paper commenting about the problems and limitations of the moral panic concept, has stated that the assumption of disproportionality involves empirical disputes as to the actual nature and extent of a given problem and the question posed is whether the reaction to such a problem is indeed out of proportion or whether the problem is in fact greater than one may think.²⁷²

²⁶⁹ David Garland, ‘On the concept of moral panic’ (2008) 4 *Crime Media Culture* 9, 9.

²⁷⁰ *ibid.*

²⁷¹ *ibid.*

²⁷² *ibid* 21.

The issue of disproportionality requires careful evaluation of the data available and careful consideration of it in relation to the given problem. Empirical disputes in the case of disproportionality are difficult to be managed and the reason for that is because there is a need to consider the relativity of the actual problem to the perceived threat that is posed to society whose nature is always more difficult to be measured.²⁷³ For this reason this thesis, will make an attempt to show that despite Eurobarometer surveys adduced by the European Commission to support its argumentation, there are issues and factors, as it will be seen in Chapter 5, which are far more significant for affecting consumer's decision making and consumer confidence. This can further prove the disproportionate level of concern that has been created around the consumer confidence justification and its misplaced character.

Another criticism in relation to moral panics is temporality. Moral panics have been characterized as temporary, short-lived episodes. However, there are criticisms that most of the studies that were engaged with the moral panic theory have put much emphasis on the present of a panic by failing to take its historical process into consideration. According to Amanda Rohloff and Sarah Wright, it is perhaps the desire on the part of the writer to expose the reaction to the perceived threat and prove that such a reaction is indeed "misplaced, displaced and tendentious", which have caused the tendency to ignore what preceded a certain event. This is rather ironic since when considering the different elements of a moral panic, a historical consideration is unavoidably required.²⁷⁴ The criticism that most moral panics are "present-centred" does not constitute a concern for the current case as it is overcome by the fact that adequate consideration has been paid to the historical process of the consumer confidence argument which has provided a comprehensive picture of its development going beyond the present.

The moral panic theory as it was initially developed by Cohen in 1972 was criticized for presenting a moral panic as a development that has been

²⁷³ Garland, 'On the concept of moral panic' (n 269) 22.

²⁷⁴ Rohloff and Wright, 'Moral Panic and Social Theory: Beyond the Heuristic' (n 23) 406.

neither intended nor anticipated. However, this concern seems to have been addressed as Goode and Ben-Yehuda had in 1994 made a distinction between actions that were intended as opposed to developments that took place unintentionally. Goode and Ben-Yehuda have by distinguishing the three different types of moral panics, the grassroots, the interest group and the elite-engineered model, paid emphasis on the elements of motive and responsibility.²⁷⁵ The three different types of panics have been examined in an earlier part of this study and a conclusion as to which of the three models applies has been drawn. Accordingly, as the motive behind the moral panic that has been formed around consumer confidence has been considered, the concern in relation to unintentionality does not seem to constitute a problem for the current study.

Conclusion

This Chapter has provided the underlying theory of the moral panic concept which constitutes the basis for the analysis of the consumer confidence argument. Moral panics aid our understanding of the society and changes that take place within it²⁷⁶ and the adoption of certain laws as well as the shift of focus of legislation form part of such changes. The efforts of the European Commission have been accordingly aimed at presenting the argument in relation to the lack of consumer confidence as convincing as possible and which has thus enabled the Commission to use the argument as a smokescreen for benefitting the internal market. The purpose of this Chapter has accordingly been to set a hypothesis that the consumer confidence argument constitutes a moral panic behind which the European Commission has hidden the actual goals of the European Consumer Law, which this thesis is called upon to prove.

The analysis of the different key attributes of moral panics and the application of each of them in the current case further complete the picture for the analysis of the consumer confidence justification. Although the nature of the European Consumer Law greatly differs from the areas where

²⁷⁵ Rohloff and Wright, 'Moral Panic and Social Theory: Beyond the Heuristic' (n 23) 407.

²⁷⁶ Goode and Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (n 24) 28.

the theory has been previously applied, most of the key characteristics applied in our case with the exception being the element of hostility which was adapted as what rather exists in our case is a bitter feeling and not hostility in its ordinary sense. The concern that has been created around consumer confidence constitutes another moral panic, of which the Consumer Rights Directive is the most evident and recent manifestation, a moral panic that started leaving its traces behind by leading to adoption of legislation. Minimum harmonisation and national legal disparities resulting from it have been presented as harming consumer confidence. But, in reality the goal behind the current moral panic has been to achieve maximum harmonisation which further supports the internal market and the interests of businesses and therefore maximum harmonisation. However, it remains to be seen in this thesis whether the moral panic has eventually been successful with the adoption of the Consumer Rights Directive.

Chapter 4 – The Road to the Consumer Rights Directive

Introduction

After acknowledging the root of the problem, namely the lack of consumer confidence in the internal market, the European Commission had in 2004 initiated the revision of the Consumer Acquis. The aim was to put in place a common high level of protection to enhance consumer confidence in the internal market and at the same time create a more predictable regulatory regime that would decrease compliance costs for businesses who by expanding their trading across their national borders would contribute to the smooth functioning of the internal market.²⁷⁷ Those efforts led to the proposal for a Consumer Rights Directive in 2008²⁷⁸ which has constituted a highly debatable Directive due to the maximum harmonisation principle it provided and the reduction of consumer protection in many regards. With consideration to the fact that the Commission has repeatedly stressed out the need to increase consumer confidence by providing a higher level of consumer protection, one may wonder about the true purpose of the proposed Directive which would lead to a diminishing of consumer protection.

The three years that passed from the proposed Directive as initially proposed in 2008 until its adoption in 2011, of course led to considerable improvement being made, this does not allow one to argue that the Directive is a milestone. As subsequent parts of this thesis will show, the approach taken in the final version as adopted is but a manifestation of its instrumentalist nature and the fact that the primary consideration is still the internal market. Nonetheless, the initial proposal for the Commission allow the argument that this thesis supports to be made again, consumer protection considerations have been overridden by the increased desire to

²⁷⁷ Commission, 'Review of the Consumer Acquis' (Green Paper) COM (2006) 744 final, 4.

²⁷⁸ Commission, 'Proposal for a Directive of the European Parliament and of the Council on Consumer Rights' COM(2008) 614 final.

expand cross border trade which is particularly beneficial for the internal market. The purpose of this Chapter is to throw light upon the process that preceded the Directive and examine whether the fact that the worst consequences have perhaps been prevented may be attributed to the differences in approach between the main European Union institutions involved. For this this reason, this Chapter will examine the process that preceded the adoption of the Consumer Rights Directive, the disagreements that emerged throughout this process, and more importantly, the possible role that the position of the European Parliament and the Council of the European Union have played in this regard .

Legislative Procedure

Before examining the road to the Consumer Rights Directive, it is useful to provide some basic information as to the legislative process in which it was adopted. The Consumer Rights Directive has been adopted using the ordinary legislative procedure²⁷⁹ as provided by Article 289 of the Treaty on the Functioning of the EU²⁸⁰ in which the European Commission, the Council of the European Union and the European Parliament are all involved. The ordinary legislative procedure constitutes the method used for the adoption of the vast majority of European legislative instruments.²⁸¹ The role of all three bodies could be considered as decisive as they directly affect the outcome that will eventually be achieved. Under the ordinary legislative procedure, legislation is in all circumstances initiated by the European Commission which comes up with proposals resulting from long consultation process.

Under the ordinary legislative procedure, the Commission's proposal is forwarded to the European Parliament and the Council which enjoy an equal

²⁷⁹ It constitutes the one of the two EU legislative procedures under which legislation can be adopted as there is also the special legislative procedure in addition to the ordinary legislative procedure.

²⁸⁰ <www.europarl.europa.eu/aboutparliament/en/20150201PVL00004/Legislative-powers> accessed 17 April 2016.

²⁸¹ <www.europarl.europa.eu/aboutparliament/en/20150201PVL00004/Legislative-powers> accessed 17 April 2016.

footing in this process and together act as co-legislators and can adopt legislation, provided that agreement has been reached, either at the first or second reading. The European Parliament is asked to consider the proposal and deliver a position on it which is usually developed by a Rapporteur and considered by the relevant Parliamentary committee. The proposal is forwarded to the Committee of the Regions and the Economic and Social Committee who are in this way called to provide their opinions as well as to the various National Parliaments.²⁸² Under the ordinary legislative procedure the European Parliament is on equal footing along with the Council and their influence in the stages of adopting a piece of legislation should in no case be considered insignificant. The majority of the work is being carried out behind the scenes in Committees and Working Groups which eventually formulate their positions. However, the fact that under the ordinary legislative procedure there are hoops that a piece of legislation needs to pass through before it is finally adopted, raises questions regarding any influences that may lead to some change during the legislative process and which this Chapter is called to examine.

Structure of the Chapter

In the first part of this Chapter, there will be an examination of the position of the European Parliament by drawing upon the debate that was held in the plenary of the European Parliament on the 23rd of March 2011²⁸³ regarding the proposed Consumer Rights Directive in an effort to determine the main areas of disagreement both within the institution itself as well as with the European Commission's approach. As the part examining the position of the European Parliament will show, there have been Members of the European Parliament (MEPs) who exhibited a more balanced approach between consumer protection and internal market consideration while there have on the other hand been MEPs who exhibited a rather pro-integrationist approach by supporting maximum harmonisation for the benefit of the internal market. This provides an opportunity to check whether any

²⁸² <www.europarl.europa.eu/aboutparliament/en/20150201PVL00004/Legislative-powers> accessed 17 April 2016.

²⁸³ European Parliament Deb 23 March 2011, CRE 23/03/2011 – 20.

particular trends from those belonging to the same political grouping or the same Member State could be drawn. There will additionally be an examination of the amendments proposed by the European Parliament in its final report regarding the originally proposed Directive. The purpose behind the consideration of both the debate and the amendments remains to show the differences in the approach between the European Parliament on the one hand and the European Commission on the other hand. A relevant question in this regard of course remains as to the influence of the rapporteurs and the Committees involved and whether those affect the position that the European Parliament as a body adopts. The last part of this Chapter will be devoted on statements put forward by the Council of the European Union at various points throughout the legislative process of the Consumer Rights Directive and on the outcomes of the Policy Debates held by thus providing an insight into their position and further complement the picture regarding the position of all actors involved in the process.

The Position of the European Parliament

The Debate in the European Parliament

The debate that was held in the European Parliament on the 23rd of March 2011 in relation to the proposed version of the Directive brought the most controversial issues of the Directive to the forefront, with the level of harmonization being the main one. This part will examine individual opinions expressed by the different MEPs by separating them based on their political affiliation. The political groups in which the MEPs sit in the European Parliament are 7 in number and those include: the Group of the European Parliament People's Party (PPE Group), the Group of the Progressive Alliance of Socialists and Democrats in the European Parliament (S&D Group), the Group of the Alliance of Liberals and Democrats for Europe (ALDE Group), the Group of the Greens/European Free Alliance (Greens/EFA Group), the European Conservatives and Reformists Group (ECR Group), the Confederal Group of the European United Left – Nordic Green Left (GUE/NGL Group) and the Europe of Freedom and Democracy

Group (EFD Group). Of course, the fact that MEPs are organized according to their political affiliation does not prevent conclusions regarding their nationalities to be drawn where that is possible.

PPE Group

Two trends can be highlighted from the opinions expressed by the Members of the European People's Party (PPE Group). The majority of the members coming from the PPE group have been particularly sympathetic to maximum harmonisation who viewed it as important for the benefit of the internal market but also exhibited an interest in e-commerce and in increasing cross-border trade in the Union. The Italian MEP Raffaele Baldassarre expressly stated that "this fundamental harmonisation action is an essential condition for the development of the internal market."²⁸⁴ To his view, the full harmonisation of the right of withdrawal and the rules on information requirements are improvements which will increase consumer confidence particularly in cross-border trading as they provide the essential legal certainties required for the further development of electronic commerce. The Swedish MEP Anna Maria Corazza Bildt, did not hesitate to express that her vision "has been and remains full harmonisation" as minimum harmonization supported by the Social Democrats prevents consumers from enjoying the full advantages that flow from the common market. To her view, harmonisation should go further in the areas of consumer remedies and unfair contract terms too.²⁸⁵ As she more importantly stated, the resulting approach in the Consumer Rights Directive, which she characterised as a milestone, can contribute in relaunching the internal market, injecting confidence required to boost growth and increase competitiveness.²⁸⁶ The Polish MEP Malgorzata Handzlik²⁸⁷ stressed out that the Directive is important for consumers, trade and particularly electronic commerce and cross border trade. To her view, maximum harmonisation is beneficial for consumers and at the same time will make life easier for companies operating in the field of electronic commerce.

²⁸⁴ European Parliament Deb 23 March 2011, CRE 23/03/2011 – 20, 102.

²⁸⁵ *ibid* 106.

²⁸⁶ *ibid*.

²⁸⁷ *ibid* 108.

For the German MEP, Kurt Lechner²⁸⁸, the resulting approach, with maximum harmonisation being more limited contrary to the initial proposal, will not be greatly beneficial to allow the desired progress in the internal market in Europe conceived as a convenient business location. The French MEP Damien Abad had referred to the fact that there has been an attempt to strengthen the framework conditions for increasing cross-border trade which is particularly beneficial for the economy at a time of recession but at the same time ensure that the level of consumer protection is not lowered.²⁸⁹ He gave emphasis on the need to create new sources of growth in order to exit from recession and that the simplification of European law will provide business the opportunity to benefit from the single market.²⁹⁰ In the same line of argument, the Portuguese PPE Group member Regina Bastos had showed her optimism in relation to the new Directive which according to her view will lead to progress in the internal market, help in boosting the economy and making the European Union more competitive and dynamic in the global economy.²⁹¹ The speech of the Estonian MEP Tunne Kelam pointed to the same direction who additionally referred to the need to boost the economy through harmonizing the rules across the EU.²⁹² Lastly, the Irish MEP, Seán Kelly expressed that this is about the internal market with harmonisation adding value to it²⁹³ while the Finish MEP, Ville Itälä, expressed, how hopefully the resulting approach will increase cross border distance sales.²⁹⁴

What can be concluded from the consideration of the PPE Group's approach is that the adoption of the Directive has been driven by internal market considerations. The PPE Group has more or less favoured the maximum harmonisation approach as a way to increase cross border trade which can help in the economy of the Union as a whole. They exhibited increased concern in putting in place a legislation that accords not only with the

²⁸⁸ European Parliament Deb 23 March 2011, CRE 23/03/2011 – 20, 109-10.

²⁸⁹ *ibid* 110-11.

²⁹⁰ *ibid* 110-11.

²⁹¹ *ibid* 111-12.

²⁹² *ibid* 118.

²⁹³ *ibid*, 119.

²⁹⁴ *ibid* 120.

interests of consumers but more importantly with the interests of traders and consequently the internal market. Although none of the MEPs of PPE Group would be happy to see a reduction of consumer protection, their opinions are but indications of the fact that consumer policy at the European level is not solely focused on protecting consumers but in essence has another function, reducing costs which although is in the end beneficial for consumers, it should not nevertheless constitute the driving force behind the European Commission legislative efforts. Their position seems to be more consistent with the approach followed under the proposed Consumer Rights Directive which unevenly shifted the focus on what is in the best interests of the internal market as opposed to providing real consumer protection. However, it is perhaps fortunate that, as it will be seen below, the rest of the political groups in the European Parliament followed a rather balanced approach and have perhaps contributed in some improvements to the Directive to be achieved.

S&D Group

As the Progressive Alliance of Socialists and Democrats (S&D Group) is concerned, most of its members have showed their sympathy towards keeping in place minimum harmonization. The German Evelyne Gebhardt (S&D) have acknowledged the fact that indeed there have been a number of improvements and she more importantly stressed the fact that the fundamental principle in the Consumer Rights Directive is once again minimum harmonization²⁹⁵, albeit with the exception of certain areas that are to be fully harmonized.²⁹⁶ The fact that Evelyne Gebhardt characterised minimum harmonisation as a fundamental principle could perhaps been taken as an indication that the maximum harmonization approach under the proposed Directive and which the European Commission has presented as the optimal solution has not been the preferred option by all. Members of the S&D have in more particular been particularly concerned with the

²⁹⁵ European Parliament Deb 23 March 2011, CRE 23/03/2011 – 20, 102, 109.

²⁹⁶ In reality the approach followed in the Directive is that of maximum harmonisation in most of the issues covered in the Directive; information requirements, the right to withdraw, the provisions in relation to additional charges while Member States have discretion to provide among others the threshold for low value off-premises contracts or language requirements.

maximum harmonisation of the list of unfair contract terms and particularly categorical against the fact that the list would be exhaustive. The Spanish MEP Antonio Masip Hidalgo expressed how “establishing the maximum possible harmonisation across the Member States would reduce the protection of many consumers, since in many countries there is a greater tradition of protecting consumer rights.”²⁹⁷ In addition, the French MEP, Bernadette Vergnaud, stated that the maximum harmonisation of unfair terms is unacceptable as it would mean that fraudulent practices that may change over time and require responsiveness at times, would in this way be ignored.²⁹⁸ To her view, the Commission’s proposal was absurd and maximum harmonisation would only be justifiable so long as it increases and not reduces consumer protection s as it was the case with the proposed Consumer Rights Directive.²⁹⁹ the French Liem Hoang Ngoc also referred to the fact that maximum harmonization would take away Member States’ ability of reacting to commercial practices that make their appearance every now and then and which indeed involve important risks for consumers.³⁰⁰

Analogous views which expressed their disapproval to full harmonization and their preference to the minimum harmonization were those expressed by S&D members such as the Greek Sylvana Rapti and by the Estonian Antolín Sánchez Presedo, the Spanish María Irigoyen Pérez and the Romanian Vasilica Viorica Dăncilă. To the latter’s view, the better harmonization of the internal market which will at the same time ensure a high level of consumer protection can be achieved by increasing the current minimum level of harmonization to the degree provided by the best existing national practices. Although Antolín Sánchez Presedo stated that an internal market with a high protection in place is key for growth, the opinions expressed by the members of the S&D Group can hardly be regarded as driven by internal market considerations. As the Polish member of the S&D Group Lidia Joanna Geringer de Oedenberg rightly acknowledged, the level

²⁹⁷ European Parliament Deb 23 March 2011, CRE 23/03/2011 – 20, 107.

²⁹⁸ *ibid* 109.

²⁹⁹ *ibid*.

³⁰⁰ *ibid* 118.

of harmonisation has been the most controversial issue in the proposal. The Polish MEP felt pleased that the rapporteur from the Committee on the Internal Market and Consumer Protection agreed with the arguments that the S&D Group put forward in which they have been highly critical with the Commission's initial proposal with the rather sweeping effect that maximum harmonisation would have. Not only Lidia Joanna Geringer de Oedenberg³⁰¹ but most members coming from S&D Group expressed the view that Member States need to have the opportunity to maintain higher standards if they wish. The fact that some improvement was made in the Consumer Rights Directive as eventually adopted is not due to the Commission's decision to reduce the scope of the Directive but rather because the actors involved in the process have not been satisfied with its proposal. An evident example is the S&D Group which constitutes the second largest grouping in the European Parliament.

ALDE Group

As regards the ALDE Group, they also referred to the economic growth that cross-border trade can bring for the Community with Robert Rochefort referring to the usefulness of electronic commerce which widens the choices available to consumers, provides them an opportunity to find the lowest prices while at the same time enables small and medium-sized enterprises and craftspeople to find new markets for their products and services.³⁰² To his view, in order to move forward in the particular area, there are specific points that require the complete harmonization of everyone's rights and duties. He acknowledged the fact that this will obviously upset existing habits within each Member State's legal culture but living together in Europe involves for him slightly changing our habits for the benefit of the Community and the general interest.³⁰³ An analogous opinion was also expressed by the Irish Liam Aylward who also paid emphasis on the need to facilitate cross-border trade.³⁰⁴ To his view, transparency as well as better information for businesses and consumers would contribute at increasing

³⁰¹ European Parliament Deb 23 March 2011, CRE 23/03/2011 – 20, 119.

³⁰² *ibid* 103.

³⁰³ *ibid*.

³⁰⁴ *ibid* 117.

consumer confidence in the market and consequently promote economic growth accruing from consumers' increased activity. Cristian Silviu Buşoi, while first speaking about the improvements that have been achieved in the Directive, he then expressly referred to the initial intention of promoting cross-border business by characterising it as important and very good.³⁰⁵

ECR Group

The Polish Adam Bielan expressed how despite the fact that the directive constitutes a compromise, hopefully it will bring legal certainty and increase consumer confidence in cross border trade and online purchases as a result.³⁰⁶ He also referred to the hope that the Directive will prove to be a favourable stimulus for the popularisation of online selling which will encourage a great number of traders to enter new markets in the European Union and which will in turn improve the performance of the market.³⁰⁷ He nonetheless referred to the need to strike a right balance and while trying to bring advantages to consumers it should at the same time be ensured that this does not result on adverse effects for traders.³⁰⁸ Malcolm Harbour and Edvard Kožušník also expressed their support for more harmonization.³⁰⁹ To the latter's view, full harmonization will not only eliminate cross border barriers but it will at same time bring greater competition in the internal market which means that the focus shifts from protection to providing consumers with choices.³¹⁰

EFD, GUE/NGL, Verts/ALE Groups

The position of the three smaller groupings in the European Parliament are all considered under one part due to the fact that only one MEP of each grouping expressed their opinion. As regards the EFD Group, the Italian MEP Oreste Rossi expressed how the proposal for the Consumer Rights

³⁰⁵ European Parliament Deb 23 March 2011, CRE 23/03/2011 – 20, 114.

³⁰⁶ *ibid* 104.

³⁰⁷ *ibid*.

³⁰⁸ *ibid*.

³⁰⁹ *ibid* 107-09.

³¹⁰ *ibid* 109.

Directive has been bad from the outset and if the general level of harmonisation in the Directive is raised they will vote against it.³¹¹ For them, being Eurosceptics as he expressly stated, a high degree of harmonisation is acceptable only when it coincides with common sense and the public interest, which has not been perhaps the case with the European Commission's attempts.³¹² The Cypriot Kyriacos Triantaphyllides on behalf of the GUE/NGL Group referred to the fact that the reduction in consumer rights which the proposal would have brought was avoided. To him, the initial proposal put forward by the Commission was unable to meet the needs of consumers and it would more importantly lower the level of protection.³¹³ Lastly as regards the Verts/ALE Group, the Danish MEP Emilie Turunen acknowledged that the Directive is not a perfect piece of legislation and there is a need to ensure that the result will benefit consumers in Europe. She cited what the European Commission expressly wrote in its draft of the Single Market Act that Europeans need to be at the centre of the work to develop the single market.³¹⁴ To her view, Member States should accordingly retain freedom to produce additional legislation when that is needed.

Conclusions as to the Position of the European Parliament

The fact that maximum harmonisation which was a major reduction in the areas of consumer remedies and unfair contract terms was eventually removed is from a consumer protection perspective an improvement. This could partly be attributed to the role of the European Parliament whose opinion was not consonant with the Commission's proposal. Accordingly, the breaks that were put on the Commission prevented the worst results that the Directive could have brought. Of course the role that the rapporteurs have played in this and to which a great number of MEPs referred to in their speeches in the particular debate should not be disregarded as they

³¹¹ European Parliament Deb 23 March 2011, CRE 23/03/2011 – 20, 106.

³¹² *ibid.*

³¹³ *ibid* 105.

³¹⁴ *ibid.*

contributed towards achieving some improvement to the original proposal. Nevertheless, the debate in the European Parliament has provided an opportunity to see beyond the overall approach of the European Parliament and have regard to what the different political groupings and the MEPs aligning with those political affiliations have actually expressed and for this reason there is an attempt at this point to draw some conclusions accruing from the current debate. When issues relating to the single market are at stake, two opposing camps are unavoidably formed, although the two considerations are inextricably linked, there are Member States that are more consumer-oriented on the one hand and more business-oriented on the other hand³¹⁵ and this has also been the case for the Consumer Rights Directive.

There have been MEPS expressly referring to the fact that the purpose has been to increase cross border trade and thus contribute in the development of the internal market while there have at the same time been members expressing their concerns for keeping in place a high level of consumer protection. As the debate in the European Parliament has showed, not all actors involved have favoured maximum harmonisation especially given the wide ambit of the proposed Consumer Rights Directive which would result in adverse consequences in the areas of consumer remedies and unfair contract terms. What has been highlighted from the analysis of the debate held in the European Parliament is that MEPs coming from the same Member States had in some instances exhibited common approaches, a fact which is difficult to be considered as random. When either the majority or a considerable number of a Member States' MEPs align with a particular political group, to a certain extent the political positions of the group are not expected to greatly stand apart from those generally supported by the Member State. There will be at this point a brief reference to the composition of the two largest political groups, the PPE and the S&D Group, as this can more or less contribute in reaching some conclusions regarding the wider political stance of certain Member States.

³¹⁵ Micklitz, 'What Does Consumer Law Reveal About The Nature Of The EU?' in Jones, Menon and Weatherill (eds), *The Oxford Handbook of the European Union* (n 29) 250.

To begin with, the PPE Group which constitutes the largest political group in the European Parliament in terms of representation, brings together the centre and centre-right pro-European political forces of the EU. It is interesting in promoting growth in Europe through closer economic integration.³¹⁶ In this group in which almost one third of the European Parliament total MEPs sit, Germany is the most represented Member State with more than the one third of its MEPs, 42 out of 99, sitting in it. Italy and France comprise the second and third most represented Member States in the PPE group with a number almost reaching the one half of their MEPs sitting in this group, 34 out of 78 and 30 out of 78 respectively. Member States such as Poland, Hungary, Romania and Portugal are also well represented in the PPE Group with over half of Poland's and Hungary's MEPs sitting in it. With consideration to the fact that the PPE Group is primarily focused on promoting growth in Europe through economic integration³¹⁷, it is perhaps not surprising that the majority of Germany's, France's and Italy's MEPs sit within the particular group. The three Member States, and especially the former which is perhaps the largest and most industrialized country in the EU³¹⁸ and for which economic integration may prove particularly beneficial. The fact that the MEPs of all three Member States have in their speeches express their support for further harmonisation which, following their arguments, can help to expand cross border and therefore the development of the internal market, should not accordingly be regarded as random.

On the other hand, as regards the UK, with consideration to the statements expressed by Malcolm Harbour and Diana Wallis, a desire to achieve further integration can hardly be inferred in that case. On the contrary, Malcolm Harbour was particularly concerned with taking rights away for consumers which for him has constituted the biggest problem in the whole process. For him, the Directive does not constitute a milestone but it is at least a

³¹⁶ See for example 'Tories leaving Europe's EPP Group' *BBC NEWS* (11 March 2009) <http://news.bbc.co.uk/1/hi/uk_politics/7938482.stm> accessed 17 April 2016.

³¹⁷ Information taken from the group's website <www.eppgroup.eu/> accessed 17 April 2016.

³¹⁸ 'Germany country profile full overview' *BBC NEWS* (15 January 2016) <www.bbc.co.uk/news/world-europe-17300915> accessed 16 April 2016.

compromise which, as he had expressed, has prevented a downgrade to consumer protection.

Protecting traders' interests and at the same time increasing their confidence to trade across the EU is at the heart of ensuring the smooth functioning of the internal market which is actually in line with achieving an integrated market. As it has already been seen in the preceding part, for the Italian MEPs Raffaele Baldassarre and Anna Maria Corazza Bildt, the position of traders has formed an important consideration which seems to have outweighed consumer protection considerations. The opinion of the Italian MEP Oreste Rossi, although a member of the EFD Group, also pointed to the same direction. He was particularly concerned with the position of traders and feared about the consequences that the level of harmonization will have on small and medium-sized enterprises. Safeguarding the interests of traders as well as promoting their confidence in cross border trade has accordingly been a common consideration in the Italian approach, an approach which greatly abstains from being regarded as a pro-consumer approach.

In addition, as it has been seen in the preceding part, the German MEPs have also in their majority expressed their concern about the position of traders and the need to have a practicable directive, as opposed to an over-complex one. The opinions of Andreas Schwab and Kurt Lechner are sound examples of this. As regards the French Position, particular regard to distance selling was again paid by the French MEPs Robert Rochefort and Damien Abad in their speeches. Concerns in relation to the position of traders were expressed, as it has already been stated, by the Portuguese Regina Basto, by the Polish Malgorzata Handzlik, as well as by the Hungarian MEPs Alajos Mészáros and Ildikó Gáll-Pelcz. It is important to say at this point that all three Member States, Poland, Portugal and Hungary are well represented, according to their size, in the PPE Group with the two latter countries constituting the strongest manufacturing forces in Central

and Eastern Europe.³¹⁹ Accordingly, their sympathy towards traders could be presumably 'justified' to some degree.

As far as the S&D is concerned, the second largest group in the European Parliament, it is important to state that those Member States whose presence is noteworthy in the PPE Group and in more particular Germany, France, Poland, Hungary, have far less MEPs sitting in the S&D Group as well as in the rest of the political groups. The approaches of the two Groups seem to be found on the two edges of the spectrum. The mission of the S&D Group is to achieve social justice, to ensure that everyone receives the benefits of growth while citizens' rights both as humans and consumers are protected and overall to ensure that not only societies and markets are fairer but also that Europe is generally democratic for all.³²⁰ For this to be achieved they acknowledge the importance of making people trust the European Union as a whole. From their main position, one may expect that their stance in relation to European Consumer Law will be more in line with a more pro-consumer approach which is not primarily driven by a desire to benefit the internal market through common principles across the EU. This is what has indeed been highlighted from the views of the MEPs that align with the S&D as those were expressed in the Parliament's debate regarding the Consumer Rights Directive. Amongst the examples to be cited here is the opinion of the Czech S&D Member Olga Sehnalová and the Estonian MEPs Antolín Sánchez Presedo and María Irigoyen Pérez who all spoke about the need to enhance consumer protection and thus avoid deterioration in consumer rights. In addition, MEPs such as the Estonian Antonio Masip Hidalgo, the Greek Sylvana Rapti have also expressed their concerns in relation to maximum harmonization and to the adverse effects this will have on consumer protection.

³¹⁹ Reinhilde Veugelers (ed), 'Manufacturing Europe's Future' (Policy Paper) (2013) 21 Bruegel Blueprint Series XXI, 14.

³²⁰ Information taken from the group's website <www.socialistsanddemocrats.eu/> accessed 17 April 2016.

What could be thus argued is that the political positions of the group to which an MEP belongs as well as the Member State which an MEP comes from are both influential factors in this regard. Although one may consider such observations as obvious, it should be disregarded that there may be motive behind the stances that MEPs take.

Concerns as to whether there was a group of Member States, “a core Europe” to better state, which actually led the integration process and guided change in the EU have nonetheless been formed from an early point.³²¹ It cannot be denied that certain Member States have favoured integration more than others. France and Germany were regarded as forming that core group which managed to steer the integration process.³²² Their decisive role in the integration project of the European Community was acknowledged by scholars who characterized them as the driving force of Europe³²³, as the “engine”, “heart”, “vanguard” of integration.³²⁴ For this reason, it should not be surprising that MEPs coming from the particular Member States have, as it has been seen from the debate held in the European Parliament, followed a rather pro trader approach and have supported greater harmonization. As the integration of the European Community has always constituted one of those Member States’ objectives, their desire to increase the confidence of traders in the internal market should also not be surprising and this this could only be achieved by ensuring that a piece of consumer protection legislation is not onerous for traders as well as by safeguarding certain provisions which have the potential to improve traders’ position. Maximum harmonization is but an example of this.

While the agreement of both is necessary to achieve an end result, it is nonetheless not sufficient as their views need to be shared by other Member States but through the use of pretext this is not difficult to be achieved. Although a relationship of followers and leaders was acknowledged to exist between EU Member States, it should not be disregarded that the desired

³²¹ Micklitz, ‘What Does Consumer Law Reveal About The Nature Of The EU?’ in Jones, Menon and Weatherill (eds), *The Oxford Handbook of the European Union* (n 29) 306.

³²² *ibid* 312.

³²³ *ibid* 193.

³²⁴ *ibid* 312.

outcome which in the current case is to promote cross border trading, may at the same time be beneficial to other Member States as well. This may be the reason why Member States such as Poland, Italy and Hungary and Portugal have been particularly concerned with improving the position of traders and developing electronic commerce which they regarded as a vital component for the smooth functioning of the internal market. There is nothing to prevent smaller countries from improving their position and benefiting their economies through the expansion of cross border trade in EU but it may not constitute the driving force for them.

The motives that Member States may have are always important as they can justify certain approaches and this is the case for the European Consumer Law. The degree of industrialization of a Member State has been regarded as a factor affecting the emphasis that the Member State's politicians may place on economic interests³²⁵ when discussing an issue at stake. This may provide an initial justification as to why greater emphasis has been placed on finding ways to promote cross border trading and thus the ensuring the smooth functioning of the internal market as opposed to tackling the real consumer problems which should be the primary aim of European Consumer Law. The greater the harmonization the more firms will take the advantage of the common rules to expand their trading activities to other EU Member States as it has already happened, to a certain extent, within Western Europe. In line with Neil Fligstein's views, a sociologist at the University of California, common rules have constituted one of the reasons that the interlocking of the economies of Western Europe was achieved by thus making economic integration an economic reality and not just a political project.³²⁶ Nonetheless, this does not suggest that the approach taken and the increased integration will harm consumers. It is the fact that the efforts to provide firms the opportunity to expand on a European basis are actually taking place behind the smokescreen of providing consumer protection and increasing consumer confidence in the cross border trading. France and

³²⁵ Micklitz, 'What Does Consumer Law Reveal About The Nature Of The EU?' in Jones, Menon and Weatherill (eds), *The Oxford Handbook of the European Union* (n 29) 250-51.

³²⁶ Neil Fligstein, 'Markets and Firms' in Adrian Favell and Virginie Guiraudon (eds), *Sociology of the European Union* (Palgrave Macmillan 2011) 101.

Germany have been amongst those Member States that have pushed this integration as they from an early point acknowledged the advantages that this would have for them.³²⁷ The 'Europeanization' of their economies was without doubts a way to ensure economic growth.³²⁸

The Report of the European Parliament

Committees and Rapporteurs

Whenever a Commission puts forward a legislative proposal, a Parliamentary Committee is responsible to provide an opinion.³²⁹ The Committee appoints a rapporteur whose task is to produce a document containing proposed amendments which the Parliamentary committee has to vote upon before those are submitted to the plenary of the European Parliament.³³⁰ Rapporteurs are accordingly Members of the European Parliament and they are those who in essence develop the position that the Parliament finally delivers when asked to consider a particular legislative proposal. At the same time, the various political groups in the committee have the opportunity to appoint a shadow-rapporteur whose role is to observe the work of the rapporteur on the report. This has as a consequence the report being a result of discussions of political groups involving the rapporteur and the shadow-rapporteurs.³³¹ This provides shadow-rapporteurs the opportunity to promote the preference of their political groups which subsequently guarantees that the political points of view of all groups will be taken into consideration.

³²⁷ Fligstein, 'Markets and Firms' in Adrian Favell and Virginie Guiraudon (eds), *Sociology of the European Union* (n 326) 121-22.

³²⁸ *ibid.*

³²⁹ Centre for Public Scrutiny, 'Rapporteurs in the European Parliament' Research Report No 4 (2006) 3.

³³⁰ 'A "rapporteur" – the person who presents reports to Parliament' (27 June 2016) <www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20060725STO09938&language=EN> accessed 17 April 2016; Centre for Public Scrutiny, 'Rapporteurs in the European Parliament' (Research Report) No 4 (September 2006) 2.

³³¹ Centre for Public Scrutiny, 'Rapporteurs in the European Parliament' Research Report No 4 (2006) 4.

The role of rapporteurs has been considered as being vital in the European Parliament due to the fact that their opinion carries a lot of weight. The wide powers that are given to rapporteurs, which include apart from producing the first draft, the ability to lead debates, exert influence on the timetable as well as on the agenda and also to organize conferences makes their post considerably decisive.³³² The fact that they generally receive great attention from the media provides a great opportunity for them to be convincing and thus get their views across.³³³ For this reason if a Member of the European Parliament wishes to influence a particular proposal, it is important for them to make sure that their concerns are known to the rapporteurs³³⁴ as they are those who give shape to the position of the European Parliament regarding a legislative proposal.³³⁵ However, the internal leadership of committees and the post of main rapporteur gives rise to concerns regarding their actual role in the process as they have all relevant information concentrated in their hands.³³⁶ There have been made arguments suggesting that the influence that the rapporteur may have in the legislative process may be sometimes driven by national interests as well as by the interests of the European Parliament group they belong to.

The responsible committee throughout the legislative process of the Consumer Rights Directive had been the Internal Market and Consumer Protection Committee (IMCO) while the responsible rapporteur was the German Andreas Schwab belonging to the PPE Group working together with six other MEPs coming from the rest of the political groupings who acted as shadow-rapporteurs in this process. The shadow-rapporteurs had in this case been the German Evelyne Gebhardt coming from the S&D Group, the French Robert Rochefort belonging to the ALDE Group, the Danish Emilie

³³² Centre for Public Scrutiny, 'Rapporteurs in the European Parliament' Research Report No 4 (2006) 6.

³³³ *ibid.*

³³⁴ 'EU Parliament: What is a Rapporteur?' <www.europeanlawmonitor.org/what-is-guide-to-key-eu-terms/eu-parliament-what-is-a-rapporteur.htm> accessed 17 April 2016.

³³⁵ Rory Costello and Robert Thomson, 'The policy impact of leadership in committees: Rapporteurs' influence on the European Parliament's opinions (2010) 11(2) European Union Politics 219, 221.

³³⁶ *ibid.* 220.

Turunen a member of the Greens/EFA Group, the Polish Adam Bielan, a member of the ECR Group, the Cypriot Kyriacos Triantaphyllides of GUE/NGL Group and the Italian Matteo Salvini belonging to the EFD Group. Although the amendments that were eventually contained in the Final Text adopted on 24 March 2011 presented in plenary provided considerable improvements in terms of consumer protection, the draft report initially provided in the Report of 22 February 2011 had initially failed to address certain important issues. Perhaps, the more conservative approach that was followed at the beginning with an evident reluctance to actually depart from the Commission's proposal may be attributed to the rapporteur of the Committee itself. As it has been seen in the preceding chapter, the German MEPs and the PPE Group in general, including the rapporteur Andreas Schwab, exhibited a more pro-integration approach which showed the additional, perhaps primary aim, of the Directive which goes beyond simply providing consumer protection. This provides ground to suspect that this would be reflected in IMCO's draft report for which Andreas Schwab was responsible to produce. However, as it will be seen from the examination of the amendments put forward by the European Parliament, the fact that some improvement was achieved in the Final Report may be attributed to the presence of the shadow-rapporteurs whose post ensures that the views of all political groups are heard throughout the process.

The amendments proposed by the European Parliament

The amendments that the European Parliament put forward in relation to proposed Consumer Rights Directive are included in its Report of 22 February 2011 and in the Text adopted on 24 March 2011. Those amendments constituted the result of the work carried by the IMCO Committee of which the rapporteur was Andreas Schwab. The purpose of this analysis is to present the different approaches between the European Commission and the European Parliament. In certain instances, the Parliament has managed, with either certain insertions or slight changes to the Commission's proposed text, to clarify a number of issues for consumers as well as to increase the level consumer protection. The amendments that

the European Parliament has put forward are numerous, however, reference will only be made to those which are of greater significance in terms of consumer protection and which at the same constitute examples for the differences in approach between the two institutions. There will be, where this is feasible, reference to the amendments that, although contained in the final Parliament's report, were initially absent from the draft report prepared by IMCO in an effort to insinuate that this may have been a result of the involvement of the shadow rapporteurs in the process whose existence perhaps contributed in ensuring a more balanced approach.

The purpose of the Directive and the level of harmonisation

The amendment made by the European Parliament to the wording of Article 1 which may seem totally insignificant, simply reflects upon the difference in approaches between the European Parliament and the European Commission. While the Commission had in Article 1 of the Directive provided that "The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection..." the European Parliament has shifted the sequence of the two terms by stating that "The purpose of this Directive is to achieve a high level of consumer protection and contribute to the proper functioning of the internal market...". Although this constitutes a slight amendment which merely rephrases Article 1, it at the same time constitutes an indication of the importance that each body attaches to the two particular terms and the tension between consumer protection and the internal market. This slight change was initially not included in the draft report prepared by IMCO.

The European Commission has evidently been keen on full harmonisation by presenting it in Recital 8 of the Proposed Directive as the only way to ensure legal certainty in the internal market through the creation of uniform rules. The particular Recital accordingly stipulated that the existence of a single regulatory framework will have the effect of eliminating barriers that result from the fragmentation of rules as well as completing the internal market in the area. On the other hand, the European Parliament had been

willing to leave some space for discretion to Member State which would provide them the opportunity to adopt or maintain more stringent provisions in their national laws which will improve consumer protection. The amendment that the European Parliament secured was the full harmonisation of some key regulatory aspects of the Directive, which following their argumentation, can be justified 'in order to secure a single regulatory framework for consumer protection' and in order to increase legal certainty for consumers and traders in cross-border trading. In addition, the rephrasing of the part of the Commission's Recital 8 stating that 'These barriers *can only be* eliminated by establishing uniform rules at Community level' to 'by establishing uniform rules at Union level, this *should* eliminate the barriers stemming from the disproportionate fragmentation of the rules and complete the internal market in this area' is but a manifestation of the different opinion that the European Parliament has in relation to full harmonization. The fact that the Parliament states that uniform rules at Union level 'should' eliminate barriers leaves scope for some doubt as to the effectiveness of this approach as opposed to the Commission's approach which tries to convince that the advantages of full harmonization should be taken for granted. These amendments were initially not included in the IMCO's draft report.

The initial Commission's desire to fully harmonize the level of consumer protection was as it has already been made clear the main area of disagreement in relation to the proposed Consumer Rights Directive. Article 4 of the proposed Directive which provided for full harmonization approach was amended by the European Parliament by thus enabling Member States to maintain or introduce in their national laws more stringent provisions in those instances that are not covered in paragraphs 1a and 1b so as to ensure a higher level of consumer protection. Although the concerns as to level of harmonization became evident from an early point in the proposal's legislative process, the amendment of Article 4 and to the level of harmonization was probably still emerging at the point where the report of IMCO began to be prepared as no amendment was initially made to it in the draft version.

The ambit of the Directive

A significant change brought has been the inclusion of digital content under the ambit of the Directive which was not initially contained in the European Commission's original proposal. The European Parliament had rectified this gap by inserting Recital 11e which provides that digital content which is transmitted to the consumer in a digital format and there is the possibility of the consumer using it on a permanent basis or in a way which is similar to possessing a good, should be regarded as a good for the purposes of the Consumer Rights Directive. This has as a result the provisions of the directive to be applied to digital content with the exception that the right of withdrawal is lost at the time when the consumer chooses to proceed with download the digital content. The European Parliament by expanding protection to digital content made a great step towards safeguarding the rights of a great number of people who nowadays enter into contracts for the purchase of digital content.

In addition, by amending Article 2(1), the European Parliament expanded the scope of the protection that the Consumer Rights Directive would provide by providing Member States the opportunity to either maintain existing legislation or extend the application of the Consumer Rights Directive to either legal or natural persons which do not fall within the definition of consumer as provided in the same Article. This will ensure that the Directive will also apply to any legal or natural person who might due to a peculiarity involved lose the protection offered by the Directive. While a wider array of instances where protection will be provided is in this way ensured, this amendment was not initially included in the IMCO's draft report. This was equally the case with the further amendment brought by Article 3(1) which expanded the ambit of the Directive and was at the first place not addressed by IMCO. Nonetheless, the improvement made extended the protection offered by the Consumer Rights Directive to dual-purpose contracts by thus ensuring that contracts concluded for purposes partly within and partly outside the person's trade are covered, provided that the trade purpose is so limited as not to be predominant in the overall context of the contract.

Information Requirements

Although the amendment made to Recital 17 was absent from the initial draft report of IMCO, is of great importance owing to the insertion of a new requirement by which the trader, in providing comprehensive information to the consumer prior to the consumer being bound by the contract, is under a duty to take into account any specific needs that a vulnerable consumer may have. According to the stipulation inserted those specific needs may be a result of their mental, physical, or psychological infirmity, age or credulity. This addition made by the European Parliament at least acknowledges the existence of vulnerable consumers, an issue which the European Commission failed to refer to altogether. The fact that the special position of vulnerable consumers was not mentioned anywhere in the directive as that proposed by the Commission is amongst the issues that raise questions as to whether the Directive was indeed put forward to increase consumer confidence.

Article 9 dealing with the pre-contractual information requirements simply constitutes another example of the improvements that were made to the proposed directive by the European Parliament. The European Parliament attempted to provide more clarity in relation to the pre-contractual information that the trader is under an obligation to provide to the consumer in distance and off-premises contracts by creating a separate list independent of that contained in Article 5 which merged the general information requirements for on premises, off premises and distance contracts. Creating a separate part dealing more specifically with off premises and distance contracts whose nature greatly differs from on premises contracts signifies that the European Parliament paid some regard to the peculiarities involved due to the surprise element on the one hand and on the fact that the trader is out of the consumer's reach as well as the fact that the consumer does not have the opportunity to examine the products before entering into the contract on the other hand.

Article 9 as amended by the European Parliament in a way clarifies the point at which the information requirements need to be provided, an important issue that was not at all determined in the proposed version of the directive. The amended Article 9 changes not only the title from "Information

requirements for distance and off-premises contracts” to “Pre-contractual information requirements for distance and off-premises contracts” but it more importantly stipulates under section (1) that the trader shall provide the information included in the Article in good time before the consumer is bound by the contract and in a clear and intelligible manner. The insertion of the requirement “in good time” has the potentials for increasing protection of consumers as they can in this way be provided the opportunity to carefully consider the information available to them before they enter an off premises or distance contract. Nonetheless, the actual meaning of the requirement “in good time” is left unclear which raises questions as to whether it will indeed improve the position of consumers. The fact that a gap in relation to its actual meaning has been left open leaves the possibility to traders to make use of it. At the same time it constitutes a term whose meaning may differ from Member State to Member State. The introduction of this requirement has the potential, once its meaning is made clear, to provide consumers the opportunity to make an informed choice and thus avoid situation where certain issues become known to the consumer at the last point. Although this amendment has the potential to increase consumer protection it was not at first contained in the IMCO’s draft report.

In addition to that, the insertion by the European Parliament of the statement requiring information to be written in a clear and intelligible manner will avoid instances where traders might use complicated and difficult for the consumer to understand language which is in essence deterring for consumers. However, apart from diminishing consumers’ confidence, it should not be disregarded that consumers may be layman people, people with poor education, poor cognitive skills or even vulnerable consumers. For this reason, although minor this amendment might look, it could be said that it is greatly to the advantage of consumers since requiring traders to use clear and intelligible language when providing the pre-contractual information to consumers can place consumers in a better position to comprehend the pre-contractual information before them.

What Article 11(1) merely provided was the information requirements contained in Article 9 to “be given or made available to the consumer” before the conclusion of the contract “in a way appropriate to the means of distance

communication used". However, the European Parliament added to this rather general clause and Article 11(1) now additionally stipulates that such information "shall be given or made available to the consumer on a durable medium" by thus avoiding situations where a disagreement between the parties, over to whether such information was indeed provided by the trader or not, might arise.

The Right to withdraw

As regards the withdrawal period, an important step towards greater consumer protection was made by extending the withdrawal period, in those cases where the trader has failed to inform the consumer about his right of withdrawal, from three months to one year. This provides greater legal certainty by setting in place an adequate period in which consumers can withdraw from a contract they entered ignorant of their right to withdraw. In addition, the originally proposed Recital 28 which dealt with the mode in which the right of withdrawal is exercised required the standard withdrawal form as the method which the consumer could use to exercise his right. However, a slight change made by the European Parliament to the wording stating that the consumer "may use" the form signifies that the wish of the Parliament is to provide the withdrawal form as one of the possible ways in which the consumer can exercise his right of withdrawal and not the only way he can do so. More freedom and flexibility is also provided to consumers who owing to the addition that the European Parliament has made by which the consumer will also be free to withdraw by using their own wording, "provided that his statement to the trader is clearly worded". Sending the goods back, sending a letter or even making a telephone call are actions which meet the requirement and in which the consumer can freely communicate his decision. The significance of these amendments lies in the fact that consumers who might be uneducated or unfamiliar with technology will have in their disposal alternative ways for withdrawing and thus avoid the situation where consumers wishing to withdraw from a contract are kept from enjoying their right because of technicalities.

In the main body of the Directive, the European Parliament amended Article 14(2) and expressly extended the options for consumers by thus giving them the opportunity to fill in and submit the model withdrawal form electronically or to submit any other clearly worded statement on the trader's website. An additional option was provided to consumers, consumers would be able to withdraw from the contract by telephone. While the original Article 14(2) as proposed required the acknowledgement of receipt of the withdrawal to be sent by email, the Parliament's amendment provided this to be communicated in any durable medium. Accordingly, what could be argued is that the latter option as proposed by the European Parliament had the potential of simplifying the withdrawal process for consumers to a considerable degree and could increase the confidence of those who would feel that completing the model withdrawal form would be a burdensome and difficult task and would accordingly refrain from exercising their right. Although those may seem minor, slight changes to a single provision contained in the Consumer Rights Directive, it should not be disregarded that their possibilities of increasing consumers' overall confidence in the withdrawal right are great.

The European Parliament has reduced the reimbursement period in which the trader is required to return any payment he had received from the consumer. While the proposed period provided reimbursement to be made within thirty days from the day which the trader receives the communication of withdrawal, the European Parliament's amendment provided that trader shall reimburse the consumer any payment received, and where applicable the delivery costs as well, without delay in a period of no later than fourteen days which is a considerably shorter period than that originally proposed and undoubtedly more favourable to consumers who will receive their money without delay.

As far as the right of withdrawal is additionally concerned Article 9(b) of the proposal merely provided that the conditions and procedures for exercising that right should form an integral part of the contract while the amended Article 9(1)(e) contains an additional statement which requires the trader to inform the consumer regarding any eventual costs that may be involved when the consumer decides to return the goods. Also, Article 9(1)(ea)

imposes a further obligation on the trader to inform the consumer, in those cases where the right of withdrawal does not apply, of the fact that he cannot exercise it. Both amendments constitute important clarifications which can enable consumers to make more informed choices.

Although the consumer is the party who bears the direct cost of returning the goods, the European Parliament introduced a considerably advantageous provision for consumers in Article 17(1). Consumers shall only bear the cost for returning goods whose price is below the limit of EUR 40 while when the price of the goods being returned exceeds the limit of EUR 40 the trader is who shall bear the cost. The introduction of this provision aimed to safeguard the interests of consumers who might be reluctant to return expensive and valuable goods for which they are not satisfied with due to the fact that they would have to bear the direct cost of returning the goods back to the trader.

The Commission had in the Proposed Directive provided that in the case the trader has not provided the consumer with the information on the right of withdrawal, the withdrawal should expire three months after the trader has fully performed his other contractual obligations. However, the European Parliament has extended this period to one year from the end of the initial withdrawal period, a change which is undoubtedly advantageous for consumers and can thus ensure that there is sufficient chance for consumers to exercise their withdrawal right when such a situation arises.

As regards the mode of withdrawal, the European Commission's proposal and Article 14 in particular required withdrawal on a durable mean, by which the consumer could either inform the trader of his decision by using the standard withdrawal brought forward in the proposed version of the Directive or by addressing the statement which has been drafted in his own words to the trader. Nevertheless, the European Parliament involves a more relaxed approach by providing for a model withdrawal form. The standard withdrawal form that the European Commission had initially desired could save time and money for traders as no further action would be required in order to adapt it as required by the model withdrawal form which needs to form the basis of the forms that traders will provide for their consumers. In

addition to that, the European Parliament, has in section 1(b) introduced a provision which gives an additional choice to consumers who can simply return the goods to the trader accompanied by a clearly worded statement by the consumer himself which sets out his decision to withdraw. The introduction of this new method constitutes the most straightforward and easy method for consumers in general and most importantly for consumers who are not educated enough and are accordingly reluctant to make use of the withdrawal form provided or they might even face difficulties in completing it.

Recital 34 of the Proposed Directive dealt with the instances in which the consumer loses his right to withdraw from a distance contract for the provision of services, particularly where performance begins, with the consumer's prior express agreement, during the withdrawal period and the consumer has enjoyed the service full or in part. The European Parliament provided further clarification to the particular recital by providing that the express agreement on the part of the consumer needs to be an informed consent given by the consumer after he has been informed of the consequences of his decision which result in losing his right of withdrawal. This improvement, which was initially absent from the IMCO's draft report, can be advantageous for consumers as it not only safeguards them from such surprises but it also provides them the opportunity to make more informed decisions.

Non-conforming goods

The addition by the European Parliament of Recital 39 stipulating that where goods are other than those ordered or where an insufficient quantity of goods have been delivered, then they should be presumed not to be in conformity with the contract is also capable of providing extra protection to consumers where such a situation arises. The changes made by the Parliament to Recital 40 are also considerably important as the freedom that the original text had left to the trader to choose, in case of non-conformity, between repairing and replacing the goods has been removed. Owing to those changes, the option is left to the consumer to choose by thus avoiding

the situation in which traders could act in their own motives and choose the option that would better serve their interests. As far as non-conformity is concerned, the addition of Recital 42a by the Parliament will render the trader liable for lack of conformity that existed at the time the risk was transferred to the consumer although the lack of conformity becomes apparent only at a subsequent point by thus protecting consumers from surprising consequences. Despite the amendments proposed by the European Parliament, the changes in the particular area were eventually removed entirely from the Consumer Rights Directive.

Article 26(2) deals with the consequences in those cases where the goods do not conform to the contract. In those cases where the trader shall remedy the lack of conformity to the consumer, the European Commission has in its proposal left the choice between repair and replacement to the trader himself. However, the European Parliament has transferred this choice to the consumer who has the right to first require the trader to repair the goods or to replace them when this remedy is either not possible or disproportionate.

Contractual Terms

Recital 47 also contains an important addition by the European Parliament requiring all contracts to be expressed in a clear and comprehensible manner, an issue which was left untouched by the Commission in the proposal as well as in the initial draft report of IMCO and it is undoubtedly considerably important if one pays regard to the fact that consumers are most of the times ordinary people with no special legal knowledge or people to whom complex clauses and statements are difficult to understand. Moreover, while the Commission had in Recital 50 suggested that the Directive should contain two lists of unfair terms which should in all circumstances be considered unfair, the European Parliament had in the final Report gone a step forward by providing that the two lists should be non-exhaustive by thus providing a greater opportunity for consumer protection as the list is in this way expanded to situations beyond those strictly included in the list. Although, the chapter on Unfair Contract terms

was eventually dropped, the requirement by which the list would be non-exhaustive was absent from the draft report of IMCO as well.

In Article 31(1) dealing with contract terms in more general, the European Parliament added the requirement for the contract terms to be expressed in a clear and comprehensible manner by thus making an effort to avoid the creation of lengthy and puzzling contract terms that ordinary consumers might struggle with to understand. Additionally, while paragraph 4 of the same Article provided that Member States shall refrain from imposing any presentational requirements as to the way in which contract terms are expressed or made available to the consumer, the European Parliament made a step further once again and provided for an exception to this provision in cases where there persons with disabilities or where the goods or services may present a risk to the health and safety of the consumer or a third person or where there is evidence that they may lead to consumer detriment.

Assessment of amendments proposed

Amendments proposed by the European Parliament touch upon individual issues that are important for a consumer protection perspective

The position of shadow-rapporteurs in a Directive's legislative process can ensure that the work of the Committee rapporteur is monitored throughout it and as Costello and Thompson argue this is a solution to which political groups resort to when they are not provided with the rapporteurship on a legislative proposal.³³⁷ The representation of other political groups in this process possibly may have contributed to avoiding the situation where the PPE Group would have the only saying through Andreas Schwab's rapporteurship. The PPE Group constitutes a group supporting the promotion of a European model which they consider as vital in order to adapt the European Union in the changing world of the 21st century. A European Political Union and further enlargement is what they aspire to and EU policies can contribute towards achieving economic development across the whole Europe. It briefly constitutes a group favouring integration and

³³⁷ Costello and Thomson, 'The policy impact of leadership in committees: Rapporteurs' influence on the European Parliament's opinions (n 335) 222.

paying considerable regard to the idea of a Single Market. Accordingly, consideration of the general position of the PPE Group, which had generally been in favour more maximum harmonisation, raises questions as to whether the same result would have been achieved in the final version of the IMCO's opinion presented in the plenary unless the representation of the other political groups was guaranteed in this process.

Accordingly, it could at this point be argued that certain amendments that included in the European Parliament's final opinion which considerably improve consumer's position in the Consumer Rights Directive may be attributed to the existence of shadow-rapporteurs which aims at ensuring that a wide array of opinions are represented and all taken into consideration. This led to the Consumer Rights Directive being at least improved in and preventing the reduction of consumer protection which the PPE Group was, due to its interest in the internal market, promoting through retaining the changes to consumer remedies and unfair contract terms. The general ideology of the majority of the European Parliament groupings coincides with a more balanced approach if one compares it to the Commission's approach in the proposal which was strictly focused on the integration of the internal market.

At the same time, the various political groups in the committee have the opportunity to appoint a shadow-rapporteur whose role is to observe the work of the rapporteur on the report. This is primarily done by the bigger party groups.³³⁸ This has as a consequence the report being a result of discussions of political groups involving the rapporteur and the shadow-rapporteurs.³³⁹ Shadow-rapporteurs enjoy considerable power over the report which in this way guarantees that all the political points of view of all groups are taken into consideration. However, it should not be disregarded that this also leaves scope for manipulation as shadow rapporteurs in essence carry the weight of the political group they belong to behind them³⁴⁰

³³⁸ Centre for Public Scrutiny, 'Rapporteurs in the European Parliament' Research Report No 4 (2006) 9.

³³⁹ *ibid* 4.

³⁴⁰ *ibid* 9.

and the various groups involved in this way provided with the opportunity to promote their preferences.

The Position of the Council of the European Union

The Council held a policy debate on the draft Consumer Rights Directive during its Meetings held on 3-4 of December 2009. The general view was that there was still a need for more work to be done in relation to the directive and for which the outcomes of the Council's debate would provide guidance. The Council has emphasized that there is a need to consider the situation of consumers and citizens in the internal market as well as to achieve a balance between the rights of consumers and the obligation that are placed on traders. Interventions should also according to the Council focus on important challenges ahead such as technical developments, the e-Commerce and the cross-border dimension of the internal market. To the Council's view and as expressly stated in the Press Release summarizing its meeting's outcomes, there is a "need for more common rules to achieve a modern, clear European consumer policy providing legal certainty".³⁴¹ The Council has in more particular expressed their support for broadening of the definitions of distance and off premises contracts so as to guarantee that consumers are provided with specific information and with the right of withdrawal in wider array of instances which pushes towards greater consumer protection. The Council expressed that a large majority of delegations agreed with common rules for a 14-day right of withdrawal in distance and off premises contracts while there were evident concerns in relation to the provisions dealing with faulty goods. However, the Council's view was that the text of the Commission proposal was in need of further clarifications in terms of its scope.

Along with the outcome of the first debate of 3 December 2009, the outcome of the second ministerial debate held on 25 May 2010 provided further guidance and would constitute a solid basis for the subsequent work on the

³⁴¹ Council of the European Union, 'Competitiveness (Internal Market, Industry and Research)' (Press Release) (3-4 December 2009) 9.

Directive.³⁴² In its particular debate, the Council expressed how the objectives of improving the functioning of the internal market and ensuring a high level of consumer protection cannot be realised with the Commission's proposal. They expressly acknowledged how maximum harmonisation in all aspects contained in the draft Directive led to concerns being developed among Member States, consumer organisation as well as among Members of the European Parliament. The Council had remained categorical against full harmonisation and acknowledged that such approach would reduce the level of protection that consumers enjoy by the national regimes of certain Member States. The Council referred to the fact that there have been Member States who did not agree with the maximum harmonisation of information requirements as this would remove them the opportunity to add to the list of information requirements and thus be able to react promptly once new types of contracts requiring specific information requirements arise. To the Council's view, a solution involving "a new reflection" and which will strike a balance is necessary so as to secure the agreement of all Member States.³⁴³ For that reason, the Council expressed its support for a mixed approach which would combine both levels of harmonization. In addition, as far as other more specific issues are concerned, the Council once again emphasized the need to come up with an updated legislation that would be both clearer and more consistent so as to in this way achieve the stated objectives of the legislation, to contribute to the proper functioning of the internal market and at the same to achieve a high level of consumer protection.³⁴⁴

The minutes of the ministerial debates are not available and for this reason only a partial conclusion can be reached in relation to the Council's position through the two press releases commenting upon their meeting's outcomes. Although both Press Releases are particularly short and only provide a summary of key points raised in the Council debates, they nonetheless allow an initial conclusion to be drawn. The Council, unlike the European

³⁴² Council of the European Union, 'Competitiveness (Internal Market, Industry and Research)' (Press Release) (3-4 December 2009) 2, 11.

³⁴³ Council of the European Union, 'Proposal for a Directive of the European Parliament and of the Council on consumer rights – General Approach' 2008/0196 (COD) 5.

³⁴⁴ *ibid.*

Commission, follows a rather balanced approach and does acknowledge the evident flaws in the Commission's proposal as well as the very fact that maximum harmonisation would lead to adverse effects for national consumer protection regimes. The position of the Council in no case seems to be primarily driven by internal market concerns and neither by a passionate desire to incite an increase in cross-border trade through maximum harmonisation. The Council is evidently concerned with individual issues arising from the Commission's proposal and do not seem ready to accept a deterioration of consumer rights across the Union.

Conclusion

The purpose of this Chapter dealing with the process that preceded the adoption of the Consumer Rights Directive was not only to provide an insight into the differences between the approaches of the bodies involved but also to uncover deeper issues involved. The main areas of disagreements and the different opinions regarding individual issues of the Directive which were the reasons for its delayed adoption have in this way helped to throw light upon what the different actors involved actually pursue. A consideration of the Parliamentary debate in relation to the Consumer Rights Directive has showed that both the political group and the nationality of an MEP might in certain instances be a factor affecting the stance that MEPs take in the European Parliament. In the debate held in the European Parliament plenary, there were instances where MEPs expressed views which were evidently more concerned with the position of traders and the desire to increase cross border trade which is beneficial for the internal market rather than for consumer protection per se.

The European Commission has shifted its efforts towards promoting cross border trade by putting a legislative proposal in place that would be particularly attractive for traders but not protective enough for consumers. However, the disagreement of the European Parliament towards the Commission's approach and the considerable improvements that were achieved to the Commission's original text through the Parliament's

amendments prevented a major reduction of consumer protection and thus the success of the European Commission in passing the Directive in its proposed form. However, as it has been seen in the current Chapter some of those amendments – improvements – were not initially contained in the draft Report produced by the IMCO Committee. Nonetheless the fact that those amendments were eventually safeguarded may be attributed to the presence of shadow-rapporteurs whose role is to promote the views of all political groups. With consideration to the fact that the Members of the PPE Group and most German MEPs had followed an approach which was more consistent with the Commission's proposal, it is fortunate that the concerns expressed by all political groups in the end safeguarded some changes. In addition, the Council of the European Union by again following an approach which evidently stands apart from the European Commission's preferences is a further contributing factor that has prevented a downgrade to consumer protection.

The two subsequent Chapters of this thesis will show how despite the fact that the Consumer Rights Directive as eventually adopted greatly differs from the initial proposal it still constitutes evidence of the focus of the European Commission. The European Commission, by hiding its primary objectives, has proved ready to sacrifice consumer protection in an effort to promote cross border trading which is vital for the smooth functioning of the internal market. Despite the improvements made, the Directive can hardly be regarded as a milestone, but in reality it still constitutes indication of the function, and manipulation, of European Consumer Law.

Chapter 5 – The level of Harmonisation

Introduction

This chapter seeks to question the very fact that maximum harmonisation was, according to the Commission's argumentation, put forward to increase consumer confidence in cross border trade. The chapter initially provides an account of the differences between minimum and maximum harmonisation as well as criticisms that have been made in relation to the latter level of harmonisation. In addition, Chapter 5 makes an attempt to prove the weakness of maximum harmonisation to increase consumer confidence, an argument that has been repeatedly put forward by academics, however relevant evidence from Eurobarometer surveys as well as factors affecting consumers' attitude from the perspective of consumer behaviour literature are adduced to add to this argument. Despite the fact that there is a possibility for some partial improvement to consumer confidence, there are factors beyond legislation that do influence consumer confidence. As this chapter attempts to show the consumer confidence argument seems to be rather misplaced because of the limited ability of maximum harmonisation to really contribute towards increasing consumer confidence as the European Commission suggests. On the contrary the ultimate driving force behind the Commission's shift to maximum harmonisation rather seems to be the internal market integration. The arguments that are put forward accordingly seek to further prove that the European Commission's actual aims when legislating within the area of the European Consumer Law actually go beyond consumer protection.

Despite the fact that the proposed Directive which provided for the maximum harmonisation of four areas was not eventually adopted, the approach followed in the final Consumer Rights Directive still provides for maximum harmonisation while it leaves some limited areas for Member States to expand.³⁴⁵ The Consumer Rights Directive harmonises among others the

³⁴⁵ The actual provisions of the Consumer Rights Directive will be examined in Chapter 6 of this thesis.

information requirements and the withdrawal period across the Union and it still provides evidence of the actual focus of the European Commission. The debate in relation to the level of harmonisation is the subject of this Chapter and central to this is an important question that has attracted the attention of scholars such as Wilhelmsson. The question is whether there is a connection between maximum harmonisation and consumer confidence that is whether the maximum harmonisation of European Consumer Law can positively affect consumer confidence as the European Commission argues.³⁴⁶ The purpose of this Chapter is to dispute the Commission's argumentation according to which maximum harmonisation was put forward to increase consumer confidence in cross border trading and to suggest that rather maximum harmonisation is particularly beneficial for the internal market. The examination goes beyond a simple consideration of arguments that have already been made in relation to the level of harmonisation as the purpose of this Chapter is to uncover the weak connection between consumer confidence and maximum harmonisation. The analysis of this chapter will make a step further by enumerating factors, beyond legislation, such as consumer's perceptions, attitudes and the wider culture in which a consumer lives, which do affect consumer's decision making.

With the underlying purpose being to reveal the misplaced character of the consumer confidence argument and the actual focus of the European Commission, this chapter also analyses the underlying basis of the entity of consumer. The shift to maximum harmonisation has brought to the forefront the use of a standard consumer by the European Commission. European Consumer Law seems to envisage a consumer who, once all rules in relation to consumer protection are harmonised across the Union, will automatically be ready and confident to engage into cross border trading. Accordingly, the shift to maximum harmonisation seems to be focused on a single standard consumer which can hardly be the case in reality and this will be supported by a number of examples drawn from relevant surveys. Relevant evidence from Eurobarometer surveys that have been carried out

³⁴⁶ Wilhelmsson, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' (n 4) 318.

as well as consideration of factors that affect consumers' attitudes from the perspective of consumer behaviour literature will be also considered.

The two levels of harmonisation

With minimum harmonisation being the default position, the European legislators set the floor of protection that Member States need to provide in their national regimes. With minimum harmonisation national legislators are prevented from adopting any legislation that is below the standard provided by European legislation in the future.³⁴⁷ Minimum harmonisation directives can be absorbed easily into national legislation due to the fact that only the minimum requirements provided have to be met.³⁴⁸ As far as pre-existing national standards are concerned, the advantage of minimum harmonisation lies in the fact that only those standards that are lower than the harmonised standard are displaced. Higher standards and further consumer protection remain unaffected.³⁴⁹ At the same time, the particular approach accordingly provides an opportunity for Member States not only to maintain but also to introduce more exacting standards of consumer protection in their national regimes.³⁵⁰ Consumers' rights can at the same time be considerably improved as national legislators can choose to go beyond the minimum standard and develop their national legislation in accordance with the best practice from the rest of Member States.³⁵¹ This, for example, was the case for the Doorstep Selling and Distance Selling Directive. Member States had taken advantage of the minimum harmonisation and provided additional

³⁴⁷ Fernando Gomez, 'An Economic Analysis of Harmonization Regimes: Full Harmonization, Minimum Harmonization or Optional Instrument?' (2011) 7(2) *European Review of Contract Law* 275, 285.

³⁴⁸ Marco B M Loos, 'Full Harmonisation as a regulatory concept and its consequences for the national legal orders - The example of the Consumer Rights Directive' Centre for the Study of European Contract Law Working Paper Series No 2010/03, 5 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1639436> accessed 17 April 2016.

³⁴⁹ Gomez, 'An Economic Analysis of Harmonization Regimes: Full Harmonization, Minimum Harmonization or Optional Instrument?' (n 347) 285.

³⁵⁰ Loos, 'Full Harmonisation as a regulatory concept and its consequences for the national legal orders - The example of the Consumer Rights Directive' (n 348) 4.

³⁵¹ Howells, 'The Rise of European Consumer Law – Whither National Consumer Law' (n 35) 64.

rights for consumers under their relevant national provisions.³⁵² An obvious example is the extension of the withdrawal period by some Member States from 7 days that was provided under the two Directives to 14 days.³⁵³

Nevertheless, it cannot be denied that the effect of minimum harmonisation is limited and emerging differences between the national laws are but an unavoidable consequence of the minimum harmonisation approach. As Marco Loos has noted even if only one Member State chooses to transpose a directive into its national regime by providing extra protection than that provided in the directive, a process known as 'gold-plating', differences automatically emerge.³⁵⁴ From the consumer's interest perspective, doubts exist as to whether such differences are indeed problematic as well as whether they constitute the reason for the low levels of consumer confidence. Minimum harmonisation, by setting the floor of protection, provides a safety net for consumers and there is no reason why further protection offered in a foreign regime may discourage consumers from engaging in cross border shopping. While, the adverse consequences of minimum harmonisation for consumers has constituted a longstanding argument put forward by European policy makers and as Chapter 3 have shown doubts exists as to whether this indeed the case, it should not be disregarded that minimum harmonisation has a rather limited potential to aid in the functioning of the internal market.³⁵⁵ Minimum harmonisation increases the risk for traders who are particularly willing to trade across border as they may be surprised by the differing national rules of Member States. Differences in national laws may discourage traders from trading beyond their borders and thus prevent the full potential of the internal market from becoming a reality and hindering further economic integration. The goal of European integration was from an early point to reduce heterogeneity

³⁵² Directorate-General for Internal Policies – Policy Department C: Citizens' Rights and Constitutional Affairs, 'Extent of Harmonisation in Consumer Contract Law' (Note) (2010) PE 432.728, 25.

³⁵³ Hans Schulte-Nölke (ed), Christian Twigg-Flesner and Martin Ebers, 'EC Consumer Law Compendium – Comparative Analysis' (2008) 56
<http://ec.europa.eu/consumers/archive/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf> accessed 19 April 2016.

³⁵⁴ Loos, 'Full Harmonisation as a regulatory concept and its consequences for the national legal orders - The example of the Consumer Rights Directive' (n 348) 5.

³⁵⁵ *ibid* 8.

amongst Member States which would no longer follow unilateral and diverging policies³⁵⁶ and achieve as much convergence as possible. It could be in this way argued that the more harmonised standards the closer to the political ideology of integration they are. Harmonised standards have the potential to facilitate trade and they can in this way be regarded as important in terms of the European political ideology to achieve integration.

On the contrary, with the shift to maximum harmonisation, EC rules become the ceiling of protection.³⁵⁷ Pre-existing national standards, irrespective of whether they are higher or lower, are completely displaced by the harmonised standard as provided by European legislation. The pre-emptive effect of maximum harmonisation thus limits the legislative power of Member States in the areas to which a directive applies and this would also be the case for the Consumer Rights Directive had the proposal been adopted with the maximum harmonisation provision.³⁵⁸ Maximum harmonisation leaves less scope to national legislators' for manoeuvring while at the same time it deprives them the opportunity to take additional legislative measures.³⁵⁹ Particular regard should be paid to the fact that maximum harmonisation brings the onerous consequence of wiping out even more protective pre-existing national legislation that consumers in certain countries would otherwise enjoy.³⁶⁰ The latter shows the considerably radical character of maximum harmonisation which exceeds that of minimum harmonisation to a great extent.³⁶¹

³⁵⁶ Enrico Spolaore, 'What is European Integration Really About? A Political Guide for Economists' Tufts University and NBER (June 2013) 1-2
<<http://sites.tufts.edu/enricospolaore/files/2012/08/Euro-June-2013.pdf>> accessed 17 April 2016.

³⁵⁷ Howells, 'The Rise of European Consumer Law – Whither National Consumer Law' (n 35) 65.

³⁵⁸ Hans W Micklitz and Norbert Reich, 'Cronica De Una Muerte Anunciada: The Commission Proposal for a Directive on Consumer Rights' (2009) 46 *Common Market Law Review* 471, 478.

³⁵⁹ *ibid* 517.

³⁶⁰ Gomez, 'An Economic Analysis of Harmonisation Regimes: Full Harmonisation, Minimum Harmonisation or Optional Instrument?' (n 347) 285.

³⁶¹ Directorate-General for Internal Policies – Policy Department C: Citizens' Rights and Constitutional Affairs, 'Extent of Harmonisation in Consumer Contract Law' (Note) (2010) PE 432.728, 25; Gomez, 'An Economic Analysis of Harmonization Regimes: Full Harmonization, Minimum Harmonization or Optional Instrument?' (n 347) 284.

The shift to maximum harmonisation

Low consumer confidence has been regarded as the reason why cross border trading across the Union has not greatly expanded. The existence of different national regimes have been regarded as affecting consumer confidence, a concern which rose to the level of the European Commission which has from an early point used the consumer confidence as the justification for legislating within the area of European consumer law. The vision of the European Commission has accordingly been to make consumers feel confident within the internal market and thus engage into cross border trading, an opportunity that the internal market provides. While the consumer confidence argument initially served the justification for the minimum harmonisation directives that were put forward within the particular area, by using the same justification³⁶², the European Commission shifted its focus on the maximum harmonisation of European Consumer Law³⁶³ through the proposed Consumer Rights Directive although this was not the first maximum harmonisation directive that was proposed. The Unfair Commercial Practices Directive had in 2005 been adopted as the first directive based on the principle of maximum harmonisation. The consequences of maximum harmonisation are unavoidably far-reaching and while this may not be particularly problematic with regard to the Unfair Commercial Practices Directive which has been limited to the harmonisation of merely one area, maximum harmonisation acquired a more radical character in the proposed Consumer Rights Directive as it expanded in a wide array of issues.

Concerns in relation to the use of the consumer confidence are nevertheless not new as similar arguments have already been put forward by authors such as Christian Twigg-Flesner³⁶⁴, Cristina Poncibo³⁶⁵, Geraint Howells and

³⁶² Commission, Proposal for a Directive of the European Parliament and of the Council on Consumer Rights 8 October 2008, COM(2008) 614 final, 3,7

³⁶³ Wilhelmsson, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' (n 4) 317.

³⁶⁴ Twigg-Flesner, "'Good-Bye Harmonisation by Directives, Hello Cross-Border only Regulation?" A way forward for EU Consumer Contract Law' (n 263) 240.

Reiner Schulze³⁶⁶. Twigg-Flesner doubted the persuasiveness of the consumer confidence argument due to the existence of practical factors which will be examined at a later point in this chapter and which cannot be addressed through legislative amendments.³⁶⁷ Doubts as to the effect that maximum harmonisation may have on consumer confidence were expressed by Poncibo who questioned whether this is the best approach.³⁶⁸ Evidently, the relationship between maximum harmonisation and consumer confidence has been an issue with which a significant number of authors have been concerned. The only view which departed from those expressed by most authors is that of Vanessa Mak who has not been strongly categorical about the relationship between maximum harmonisation and its effect on consumer confidence. To her view, maximum harmonisation will benefit consumers' confidence as consumers will in this way feel secure by knowing that the same rules apply in all Member States.³⁶⁹ On the other hand, Wilhelmsson has spoken about the misleading nature of the argument which has been employed perhaps purposively by the European Commission despite the weak connection between maximum harmonisation and consumer confidence.

Maximum harmonisation and the consumer confidence argument

The consumer confidence argument, as it has already been stated, has constituted the leading justification that the European Commission has put forward both in relation to the various minimum harmonisation directives as well as for shift to maximum harmonisation. The purpose of this part is to

³⁶⁵ Poncibo, 'Some Thoughts on the Methodological Approach to EC Consumer Law Reform' (n 72) 354, 358.

³⁶⁶ Howells and Schulze, 'Overview of the Proposed Consumer Rights Directive' in Howells and Schulze (eds), *Modernising and Harmonising Consumer Contract Law*, (n 263) 8.

³⁶⁷ Twigg-Flesner, "'Good-Bye Harmonisation by Directives, Hello Cross-Border only Regulation?'" A way forward for EU Consumer Contract Law' (n 263) 240.

³⁶⁸ Poncibo, 'Some Thoughts on the Methodological Approach to EC Consumer Law Reform' (n 72) 354, 358.

³⁶⁹ Vanessa Mak, 'Review of the Consumer Acquis – Towards Maximum Harmonisation?' Tilburg Institute of Comparative and Transnational Law Working Paper 6/2008, 12 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1237011> accessed 17 April 2016.

show the weak connection between the maximum harmonisation of European consumer legislation and consumer confidence. This argument has already attracted considerable criticisms by authors such as Cristina Poncibo, Erin O'Hara O'Connor and Thomas Wilhelmsson. Poncibo was sceptical about the relationship between maximum harmonisation and consumer confidence.³⁷⁰ The fact that consumers' decision making is affected by factors that go beyond legislation suffices to dispute the persuasiveness of the consumer confidence argument³⁷¹ and as Erin O'Hara O'Connor has rightly cited "Harmonisation alone is unlikely to do the trick".³⁷² Although, a slight change in consumer's trust and confidence may be achieved through legislative amendments, law is nevertheless not the only and definite means in which such trust can be created. In fact, consumers rarely take differences of law into consideration.³⁷³

As it has already been stated, Thomas Wilhelmsson has been amongst those who have exhibited particular opposition to the use of the consumer confidence justification which has been overused and possibly abused by the European Commission in its legislative efforts.³⁷⁴ To his view, substantive harmonisation measures that have been justified by reference to it relate minimally to the actual creation of consumer confidence³⁷⁵ and it is upon this premise that this part seeks to expand. Expecting that maximum harmonisation will automatically bring an increase in consumer confidence, equates to disregarding wider complexities involved and actual factors affecting consumer's decision and the very fact that consumer is a much more complex entity than one may think. A more thorough consideration of

³⁷⁰ Poncibo, 'Some Thoughts on the Methodological Approach to EC Consumer Law Reform' (n 72) 361.

³⁷¹ Howells, 'The Rise of European Consumer Law – Whither National Consumer Law' (n 35) 67; Twigg-Flesner, "'Good-Bye Harmonisation by Directives, Hello Cross-Border only Regulation?" A way forward for EU Consumer Contract Law' (n 263) 240.

³⁷² Erin O'Hara O'Connor, 'The limits of contract law harmonisation' (2012) 33 Eur J Law Econ 505, 517.

³⁷³ Jan M Smits, 'Introduction to special issue: Harmonisation of contract law: an economic and behavioural perspective' (2012) 33 Eur J Law Econ 473, 478.

³⁷⁴ Wilhelmsson, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' (n 4) 317; Edgar, 'Cross-border B2C e-commerce in the EU and the introduction of the Consumer Rights Directive: A cure for fragmentation?' (n 31) 15.

³⁷⁵ Wilhelmsson, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' (n 4) 317; Edgar, 'Cross-border B2C e-commerce in the EU and the introduction of the Consumer Rights Directive: A cure for fragmentation?' (n 31) 15.

how consumers really behave in the marketplace provides evidence for this. At the same time, with the resulting approach, European Consumer Law seems to be focusing on a single standard consumer and consumers, as human beings, bear various peculiarities. Consumers do react in various ways within the marketplace, whether this is due to their age, vulnerability or simply perhaps due to reasons in relation to their national markets. Examples drawn from various surveys will provide an insight into this with the purpose of attacking the presumed single standard of consumer that European Consumer Law seems to be focused on.

Factors affecting consumer's decisions

Consumers base their decisions on a number of factors that go beyond issues in relation to legislation and therefore not associated with the level of harmonisation.³⁷⁶ Those factors which Jan Smits called as “natural barriers” involve among others language and distance.³⁷⁷ Eurobarometer surveys have showed that language constitutes a factor that inhibits consumers from buying across border with the majority of consumers expressing, in a Eurobarometer survey published in 2008 when the proposal for the Consumer Rights Directive was proposed, that they were unprepared to enter into a cross border transaction in another language.³⁷⁸ Not only two years before, consumers had expressed the same view with 62% of consumers regarding the use of a foreign language as a barrier to cross border shopping³⁷⁹ but also the same pattern prevailed in the Eurobarometer of 2011 on “Consumer attitudes towards cross-border trade and consumer protection”.³⁸⁰

³⁷⁶ Micklitz and Reich, ‘Cronica De Una Muerte Anunciada: The Commission Proposal for a Directive on Consumer Rights’ (n 358) 478.

³⁷⁷ Smits, ‘Introduction to special issue: Harmonisation of contract law: an economic and behavioural perspective’ (n 373) 477.

³⁷⁸ Special Eurobarometer 298, ‘Consumer Protection in the Internal Market’ (October 2008) 92 <http://ec.europa.eu/public_opinion/archives/ebs/ebs_298_en.pdf> accessed 26 April 2016.

³⁷⁹ Special Eurobarometer 252, ‘Consumer Protection in the Internal Market’ (September 2006) 69 <http://ec.europa.eu/public_opinion/archives/ebs/ebs252_en.pdf> accessed 26 April 2016.

³⁸⁰ Flash Eurobarometer 299, ‘Consumer Attitudes towards Cross-Border Trade and Consumer Protection’ (March 2011) 30 <http://ec.europa.eu/public_opinion/flash/fl_299_en.pdf> accessed 26 April 2016.

The fact that European consumers choose to enter into a cross border transaction with a US business than with a business located in another European Member State also points to this direction.³⁸¹ The difference between a European Member State's law and US law is evidently far more striking than the difference between two European Member States' national regimes.³⁸² However, consumers seem not to worry about legal differences in this instance. An important factor to this is possibly the linguistic element. The main languages in the United States are English and Spanish and most consumers residing in European Member States may be able to understand one or the other of these two languages as opposed to for example languages such as German and French. This accordingly seems obvious with regard to transactions made by UK Consumers who choose to transact with US traders due to the fact that the language between the two is the same. The same argument could be maintained for the issue of currency as the exchange rates involved where a cross border transaction is concluded with a currency other than Euro may equally affect consumer's willingness and confidence to shop from a seller in a Member State where the Euro is not applicable.

The mere geographical distance that exists between the trader and the consumer is also a factor that may in certain circumstances dissuade consumers from engaging into cross border shopping. This can be supported from the 2008 Eurobarometer survey in which it was made evident that European citizens are more confident to make a cross border purchase when that involves face-to-face contact with the seller as for example a purchase made in another Member State whilst on holiday, shopping trip or a business trip.³⁸³ More particularly, two thirds of European citizens were less interested in cross-border shopping because they prefer

381 Loos, 'Full Harmonisation as a regulatory concept and its consequences for the national legal orders - The example of the Consumer Rights Directive' (n 348) 12; Commission, 'A Digital Agenda for Europe' (Communication) COM (2010) 245, 10.

382 There is a safety net due to minimum harmonisation which ensures that a degree of convergence exists between the national laws of two European countries.

383 Special Eurobarometer 298, 'Consumer Protection in the Internal Market' (October 2008) 91 <http://ec.europa.eu/public_opinion/archives/ebs/ebs_298_en.pdf> accessed 26 April 2016; Flash Eurobarometer 299, 'Consumer Attitudes towards Cross-Border Trade and Consumer Protection' (March 2011) 23 <http://ec.europa.eu/public_opinion/flash/fl_299_en.pdf> accessed 26 April 2016.

to shop in person.³⁸⁴ However, the fact that distance constitutes an indispensable characteristic of an online and more particularly a cross border transaction means that the only way this can be dealt with is with a change in consumers' mentality towards it. The wider culture of a Member State and the general attitude of a country's consumers towards cross border shopping are central to this and may affect consumers' choice.³⁸⁵ There are for example Member States where distance shopping may not be well embedded within the country's culture and not well developed at all. In Member States where cross-border shopping has begun becoming more popular, it is likely that more and more consumers may change their attitudes towards it and thus engage into cross border shopping more easily. As the Eurobarometer Survey of 2008 has showed, respondents in Member States where there is higher incidence of cross-border shopping are likely to express that they intend to make a cross-border purchase in the coming year.³⁸⁶

Convenience issues that are connected to distance also exist and they are actually concerns in relation to delivery itself.³⁸⁷ The fear of late delivery, non-delivery, or even the costs involved are all factors that affect consumers' willingness to shop from a seller that is located in another Member State.³⁸⁸ However, concerns in relation to delivery are according to surveys not limited to distance cross border transactions. Consumers may also be reluctant in distance domestic transactions due to delivery problems.³⁸⁹ This

³⁸⁴ Special Eurobarometer 298, 'Consumer Protection in the Internal Market' (October 2008) 97 <http://ec.europa.eu/public_opinion/archives/ebs/ebs_298_en.pdf> accessed 26 April 2016.

³⁸⁵ Poncibo, 'Some Thoughts on the Methodological Approach to EC Consumer Law Reform' (n 72) 363.

³⁸⁶ Special Eurobarometer 298, 'Consumer Protection in the Internal Market' (October 2008) 107 <http://ec.europa.eu/public_opinion/archives/ebs/ebs_298_en.pdf> accessed 26 April 2016.

³⁸⁷ Twigg-Flesner, "'Good-Bye Harmonisation by Directives, Hello Cross-Border only Regulation?'" A way forward for EU Consumer Contract Law' (n 263) 240; Howells, 'The Rise of European Consumer Law – Whither National Consumer Law' (n 35) 67.

³⁸⁸ Flash Eurobarometer 299, 'Consumer Attitudes towards Cross-Border Trade and Consumer Protection' (March 2011) 39 <http://ec.europa.eu/public_opinion/flash/fl_299_en.pdf> accessed 26 April 2016.

³⁸⁹ Special Eurobarometer 298, 'Consumer Protection in the Internal Market' (October 2008) 100 <http://ec.europa.eu/public_opinion/archives/ebs/ebs_298_en.pdf> accessed 26 April 2016.

throws light upon the fact that distance shopping still alienates consumers. Concerns of consumers are based on a presumed risk attributed to the rather impersonal character of distance, more particularly online, shopping which not all consumers are ready to accept yet. The impersonal character involved is also perhaps the reason why consumers fear of falling victim to scams, a factor that does affect their confidence to a considerable extent.³⁹⁰ However, concerns in relation to delivery as well as the possibility of falling victim to scam are in the root of distance selling and whatever legislation amendments are made, perhaps such concerns are likely to persist as factors inhibiting consumers' confidence unless consumers either acquire experience personally or decide to disregard them. As the 2011 Eurobarometer has showed, respondents who had already made at least one cross-border distance purchase seem less worried about delivery than those respondents who had not made any cross-border distance purchase.³⁹¹

Consumers may also be reluctant to shop from other Member States because of difficulties involved once the need to exchange or repair the products ordered emerges as well as once the need to solve a conflict with the seller arises.³⁹² It is the possibility of having to resolve a problem, whether this is the need to make a complaint or return the goods ordered³⁹³, that discourages a consumer from entering into a cross border transaction as the trader is out of their reach. The majority of consumers in 2006,

³⁹⁰Special Eurobarometer 298, 'Consumer Protection in the Internal Market' (October 2008) 100 <http://ec.europa.eu/public_opinion/archives/ebs/ebs_298_en.pdf> accessed 26 April 2016; Flash Eurobarometer 299, 'Consumer Attitudes towards Cross-Border Trade and Consumer Protection' (March 2011) 39 <http://ec.europa.eu/public_opinion/flash/fl_299_en.pdf> accessed 26 April 2016..

³⁹⁰ Special Eurobarometer 298, 'Consumer Protection in the Internal Market' (October 2008) 18 <http://ec.europa.eu/public_opinion/archives/ebs/ebs_298_en.pdf> accessed 26 April 2016; Flash Eurobarometer 299, 'Consumer Attitudes towards Cross-Border Trade and Consumer Protection' (March 2011) 37 <http://ec.europa.eu/public_opinion/flash/fl_299_en.pdf> accessed 26 April 2016..

³⁹¹ Flash Eurobarometer 299, 'Consumer Attitudes towards Cross-Border Trade and Consumer Protection' (March 2011) 32 <http://ec.europa.eu/public_opinion/flash/fl_299_en.pdf> accessed 26 April 2016.

³⁹² Wilhelmsson, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' (n 4) 329.

³⁹³ Flash Eurobarometer 299, 'Consumer Attitudes towards Cross-Border Trade and Consumer Protection' (March 2011) 38 <http://ec.europa.eu/public_opinion/flash/fl_299_en.pdf> accessed 26 April 2016.

reaching the percentage of 71%, agreed that it is harder to resolve problems such as complaints and returns when entering into a cross border transaction.³⁹⁴ Apart from complaining, access to justice is also an important factor that affects consumers' decision making.³⁹⁵ Uncertainties as to whether their rights can be enforced once such a need arises or uncertainties in relation to the process they have to follow to solve a conflict or to seek redress equally suffice to discourage consumers from shopping across border. However, prior experience is once again important. In the Eurobarometer Survey of 2011³⁹⁶, consumers who had made at least one cross-border distance purchase seemed less worried about difficulties involved when the need to resolve problems such as complaints and returns would arise.³⁹⁷

Whatever legislative amendments are made, consumers' concerns in relation to delivery, scams or returns and complaints will continue to exist due to the nature of distance selling and due to the fact that they are rooted in the consumers' beliefs and perceptions. The nature of those factors renders it infeasible to be addressed through legislative amendments.³⁹⁸ Since it is unlikely that legislation alone can do the trick, doubts exist as to whether maximum harmonisation presented as the optimal solution for will in the end prove successful and have an effect on consumer confidence. In addition, the debate between the two levels of harmonization in the process of adopting the Consumer Rights Directive has largely been based upon legal arguments while a wider approach embracing arguments from an economic and behavioural science is absent. Although, the European Commission has acknowledged the importance of taking behavioural

³⁹⁴ Special Eurobarometer 252, 'Consumer Protection in the Internal Market' (September 2006) 55 <http://ec.europa.eu/public_opinion/archives/ebs/ebs252_en.pdf> accessed 26 April 2016.

³⁹⁵ Howells, 'The Rise of European Consumer Law – Whither National Consumer Law' (n 35) 67; Twigg-Flesner, "'Good-Bye Harmonisation by Directives, Hello Cross-Border only Regulation?" A way forward for EU Consumer Contract Law' (n 263) 240.

³⁹⁶ Flash Eurobarometer 299, 'Consumer Attitudes towards Cross-Border Trade and Consumer Protection' (March 2011) 30 <http://ec.europa.eu/public_opinion/flash/fl_299_en.pdf> accessed 26 April 2016.

³⁹⁷ *ibid* 32.

³⁹⁸ Twigg-Flesner, "'Good-Bye Harmonisation by Directives, Hello Cross-Border only Regulation?" A way forward for EU Consumer Contract Law' (n 263) 240.

economics into consideration when adopting its various policies³⁹⁹, this has not been the case with the Consumer Rights Directive. Consideration of behavioural economics in the context of the Consumer Rights Directive was limited to the removal of pre-ticked boxes in relation to additional charges that are imposed on consumers, with an example of this being the priority boarding in flights, as well as in relation to increasing the cooling off period.⁴⁰⁰

Consumer Behaviour Perspective

Behavioural economics also throw light upon the complexity involved in consumer decision making process. Evidence from the perspective of consumer behaviour shows how consumers' decision can be affected by a wider array of issues⁴⁰¹ with consumer's perceptions, attitudes and the wider culture in which a consumer lives being some examples. A consumer's confidence constitutes an internal process which can be influenced by the consumers' own views as well as by external factors accruing from his wider environment. An important observation that has been made supports that consumers' decision may depend on context and there may be instances where a consumer does not feel confident on a particular day⁴⁰², without this meaning that he overall lacks confidence. Also consumers may in certain circumstances be overconfident and put much weight on their own power of judgement while in others the fear of appearing less competent or less prudent keeps them back from entering into a transaction. Accordingly, the extent to which legal standards are harmonised across the Union seem a minor consideration within the pool of factors that seem to affect consumers' confidence and decision to proceed with a particular transaction.

Consumers' preferences are contingent upon behavioural biases and consumers are often hesitant to step out their comfort zone. Consumers' own perceptions constitute a reason why consumers stick to their habits and

³⁹⁹ <http://ec.europa.eu/consumers/archive/behavioural_economics/index_en.htm> accessed 18 April 2016.

⁴⁰⁰ *ibid.*

⁴⁰¹ Richard E Hattwick, Robert W Jefferson and Michael Houston 'Toward a Behavioral Theory of Consumer Choice' (1972) 1(1) *Journal of Behavioral Economics* 53, 61.

⁴⁰² Jacqueline Minor, 'Consumer Protection in the EU: Searching for the Real Consumer' (2012) 13 *European Business Organization Law Review* 163, 164.

at the same time a reason why online cross border shopping has not been embraced by EU consumers.⁴⁰³ Consumer behaviour literature acknowledges that consumers have the tendency of depending on heuristics. The availability heuristic in more particular constitutes a mental shortcut by which consumers base their decisions on issues that immediately spring to their mind.⁴⁰⁴ Examples of this are prior first-hand experience or consumers' existing knowledge about a product or service that affects their choice and decisions.⁴⁰⁵ Consumers hesitate to buy a product that they do not have direct experience due to a degree of insecurity accruing from the fact that consumers put much emphasis on direct experience⁴⁰⁶ or to better state it, in the current case, lack of experience. At the same time, consumers form their own attitudes within the marketplace which is the reason why consumers exhibit, in most of the times, an extent of predisposition.⁴⁰⁷ Consumers may either be predisposed to certain products or perhaps to certain methods of purchasing as for example online cross border shopping. Central to this is the high level of perceived risk which may discourage consumers from entering into a transaction. This could be argued for online cross border shopping as well. The perceived risk involved accordingly affect consumers' behaviour and their confidence in cross border shopping is likely to increase after first-hand, positive, experience which can create positive attitudes towards it, a process which takes time.

The skills of consumers, both the technical expertise of consumers as well as the extent of their familiarity with online shopping are equally important factors which tend to be ignored. Undoubtedly, skills relate to the ease of

⁴⁰³ Yi Maggie Guo, 'Online Shopping Experience: A conceptualization and Preliminary Results' in Mehdi Khosrow Pour (ed) *The Social and Cognitive Impacts of E-Commerce on Modern Organizations* (Idea Group Publishing 2004) 27.

⁴⁰⁴ Park C Whan and Lessig V Parker, 'Familiarity and Its Impact on Consumer Decision Biases and Heuristics' (1981) 8 *Journal of Consumer Research* 223, 224; Wayne D Hoyer, Deborah J MacInnis and Rik Pieters, *Consumer Behavior* (6th edn, Cengage Learning 2013) 242.

⁴⁰⁵ Hattwick, Jefferson and Houston 'Toward a Behavioral Theory of Consumer Choice' (n 401) 67.

⁴⁰⁶ Manon De Groot, Gerrit Antonides, Daniel Read and Willem Fred van Raaij, 'The effects of direct experience on consumer product evaluation' (2009) 38 *The Journal of Socio-Economics* 509, 510.

⁴⁰⁷ Hattwick, Jefferson and Houston 'Toward a Behavioral Theory of Consumer Choice' (n 401) 69.

use as well as to the need for the consumer to be in control and they are a precondition, among other factors of course, for a consumer to proceed with an online purchase.⁴⁰⁸ However, the list does not end there and to add to what has earlier been put forward in this part, the age, education and of course the income of consumer are all factors that influence consumers' behaviour.⁴⁰⁹ When a consumer has a rather limited income, he will probably hesitate to spend it on online shopping, and especially cross border shopping where a greater degree of risk is involved.

Not only risk but also loss aversion is an important element within consumer's decision making process. Through the choices they made, consumers try to minimise or if possible to avoid losses.⁴¹⁰ This is again associated with the fact that consumers tend to overvalue those products that they have direct experience of.⁴¹¹ It could be said that online shopping and perhaps cross border online shopping have proved the complex nature of consumer's decision making process as consumers' behaviour is indeed affected by multiple factors. It would accordingly be unreal to expect that a mere harmonisation of consumer protection legislation could increase consumer's confidence in cross border trading. Consumer is not only a far more complex entity, but also online shopping is from its nature a peculiar means of purchasing that not every single person is ready to accept and make use of.

Some further observations

Additionally, from research studies that have been carried out, it could be said that the Member State in which a consumer lives in is also a factor that has an impact on consumers' choice to shop online cross-border. Consumers coming from Member States such as Malta, Luxembourg, Cyprus, Austria, Ireland and Belgium have already been particularly familiar

⁴⁰⁸ Guo, 'Online Shopping Experience: A conceptualization and Preliminary Results' in Khosrow Pour (ed) *The Social and Cognitive Impacts of E-Commerce on Modern Organizations* (n 403) 24.

⁴⁰⁹ Patricia Sorce, Victor Perotti and Stanley Widrick, 'Online Shopping for Positive and Negative Reinforcement Products' Mehdi Khosrow Pour (ed) *The Social and Cognitive Impacts of E-Commerce on Modern Organizations* (Idea Group Publishing 2004) 11.

⁴¹⁰ De Groot, Antonides, Read and van Raaij, 'The effects of direct experience on consumer product evaluation' (n 406) 510.

⁴¹¹ *ibid.*

with online cross border shopping and are likely to do so in the future.⁴¹² In certain respects, surrounding circumstances do play an important role; the market size and the geographic location of a Member States are factors that have a direct impact on the likelihood of consumers engaging into online cross border shopping.⁴¹³ It could in this way be stated that consumers from smaller Member States seem to be more attracted by cross border. This may be attributed to the small size of their markets where choices for consumers are rather limited. In countries where there is enough choice for consumers, it is perhaps less likely for consumers to enter into a cross border transaction as they are satisfied with their country's market.⁴¹⁴ Just at the same time, cross border shopping provides far more choices for consumers. Consumers' behaviour is thus affected by various factors and evidently differs from one Member State to another. However from the continuing reference of the European Commission to the consumer confidence arguments, it seems that this fact is more or less disregarded.

Consumers pay regard to beliefs as opposed to actual knowledge. Although, they may be totally unaware of details found under their own national regimes, they may nevertheless have a false impression that the level of protection offered in their own system is higher than that provided under any other Member State.⁴¹⁵ Empirical evidence from Consumers Survey, such as Eurobarometer surveys, has thrown light on the fact that consumers do not always pay regard to law and legal differences, a fact which the European Commission perhaps disregards with the desire to shift to maximum harmonisation. This is of course not the case in all circumstances. There are consumers from certain Member States, such as countries situating in the Southern Europe, who constitute an exception to this. Consumers coming from Member States such as Italy, Greece and Portugal as opposed to consumers coming from Member States such as

⁴¹² Commission, 'Bringing e-commerce benefits to consumers' (Working Paper) SEC 2011/1640, 7.

⁴¹³ Edgar, 'Cross-border B2C e-commerce in the EU and the introduction of the Consumer Rights Directive: A cure for fragmentation?' (n 31) 9.

⁴¹⁴ Commission, 'Bringing e-commerce benefits to consumers' (Working Paper) SEC 2011/1640, 36.

⁴¹⁵ Wilhelmsson, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' (n 4) 326.

Germany, Sweden and Denmark trust foreign systems more than their own Member State.⁴¹⁶ This may be attributed either to the fact that some countries have developed more protective rules in their consumer protection regimes, or to the fact that in certain countries legislation is more respected and better applied which increases the trust of consumers. Consideration of those examples shows that consumers do not always have more trust in their own system and this also contradicts the nationalist consumer beliefs which are rooted in the consumer confidence argument as put forward by the European Commission.⁴¹⁷

Consumers' confidence in foreign legal systems may additionally depend upon issues such as age.⁴¹⁸ Younger consumers exhibit more trust to foreign systems than older people. This may be attributed to the fact that younger people are not conservative to the extent that older people are. Younger consumers are less fearful, they travel more and come in touch with foreign cultures but what is more they through the use of internet familiarise themselves to new customs and trends such as online and cross border shopping. However, this is not to say that harmonisation is not important for all consumers but it is despite anything to the contrary dubious as to whether harmonisation alone will achieve a change in consumer's attitudes and willingness to enter into transactions beyond their national borders with firms and traders of other Member States.

With regard to those arguments, one can support that those who have questioned the consumer confidence justification as having a weak and unreliable basis in European Consumer Law are indeed right.⁴¹⁹ It cannot be denied that the level of consumer confidence is decisive for the fate of cross border trading across the Union, however the particular justification has been used by the European Commission in a rather misleading manner as its real aim is to encourage businesses to start trading cross border while the actual effects for consumers are in essence a second place

⁴¹⁶ Wilhelmsson, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' (n 4) 326.

⁴¹⁷ *ibid* 327.

⁴¹⁸ *ibid*.

⁴¹⁹ Edgar, 'Cross-border B2C e-commerce in the EU and the introduction of the Consumer Rights Directive: A cure for fragmentation?' (n 31) 15.

consideration. Had the real aim of the European Commission been to increase consumer confidence, a different approach aiming at educating consumers could perhaps have been followed.

Not only factors that in essence affect consumer confidence should be taken into consideration, but in addition other measures such as education campaigns could have taken to promote consumer confidence.⁴²⁰ The European Commission runs various campaigns to make consumers aware of their rights as well as exercise them⁴²¹, however consumer education should go beyond this and help consumers realise how the market really works. Of course the importance of education in terms of their rights should not be disregarded as with education, consumers will no longer be hesitant to seek remedies and redress. However, in an era with various technological developments such as online shopping, perhaps further education in relation to the peculiarities of distance shopping may contribute in spreading trust among consumers. Although, as it has already been seen trust can eventually be achieved through experience, appropriate consumer education can boost consumer confidence. Not only in terms of knowing and enforcing their rights as they have done so far but also to help consumers to better understand the opportunities that the marketplace offers them.

Consideration of factors that affect consumers' choices has showed that consumers are not primarily concerned with legislation issue. This is actually an irrelevant factor when a consumer is considering to shop online either from a local trader or a trader outside their Member State. It is inferred that it is perhaps distance shopping as a means of purchasing that still alienates consumers and education can help familiarise consumers with it. Consumers may in this way see distance shopping from a different, less sceptical, perspective. Education is important for consumers to acquire confidence within the unique market of the 21st century where products or

⁴²⁰ Edgar, 'Cross-border B2C e-commerce in the EU and the introduction of the Consumer Rights Directive: A cure for fragmentation?' (n 31) 15.

⁴²¹ Consumer Rights Awareness Campaign, Details can be found at: http://ec.europa.eu/consumers/consumer_rights/consumer_rights_awareness_campaign/index_en.htm accessed 17 April 2016.

services are just a click away from the consumer. Consumer's age, culture and more importantly level of understanding differs from individual to individual and there are instances where things should not be taken for granted and consumer education has an important role to play. Education can help in achieving long run changes with consumers developing critical thinking and awareness and ultimately can bring an increase in consumer confidence in the market.

Definition of consumer

Connecting maximum harmonisation with a definite increase of consumer confidence in cross border shopping implies that cross-border trading is a way of purchasing that all consumers are interested in and once all rules are harmonised, they will happily engage in cross border shopping. In reality, for a large number of consumers cross border shopping and generally online shopping may be totally uninteresting and not even a possibility. Connected to this are arguments made which maintain that policy measures are to their entirety directed at the average consumer to whom policy-makers as well as legislators have put a considerably high expectation. In most instances, the average consumer is viewed as reasonably well-informed, observant and circumspect.⁴²² The fact that the European Commission has focused on consumer as a cross-border shopper⁴²³ whose activity was vital for the functioning of the internal market may be a direct consequence of the fact that consumer protection measures should from the very beginning be adopted in the context of completing the internal market.⁴²⁴

The consumer is mistakenly perceived as omniscient who once he considers all the alternatives facing him he makes the best choice, the one that brings maximum satisfaction to him.⁴²⁵ However, this is not the case as much more

⁴²² Minor, 'Consumer Protection in the EU: Searching for the Real Consumer' (n 402) 167.

⁴²³ Wilhelmsson, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' (n 4) 318.

⁴²⁴ As the legal competency of the European Commission provides under Article 169(2)(a) of the Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/01.

⁴²⁵ Hattwick, Jefferson and Houston 'Toward a Behavioral Theory of Consumer Choice' (n 401) 54.

complexity is involved in reality. Consumers even make compromises and as consumer behaviour literature portrays consumers, they are in reality individuals who seek to satisfy their needs through the purchases they make. It is not unlikely once consumers are satisfied with a product to stop looking for alternatives although there may be superior alternatives to the one they have become accustomed with. This is perhaps the case with online cross border trading. The fact that consumers stick to their habits may be one of the reasons that cross border trading within the internal market has not prospered to the extent desired by the European Commission. This is explained not only by the fact consumers seem loyal to brands they are familiar with⁴²⁶ but it can also be explained in terms of the need to feel competent in an environment. Consumers show fear for the unknown and prefer to master the environment rather than being dominated by it.⁴²⁷

As the internal market constitutes the driving force, it is not surprising that the European Commission focuses on a standard consumer who is not only above the average but it can hardly be the case in practice. Well-informed, observant and circumspect consumers can of course through their increase shopping activity contribute in boosting the internal market. The emerging approach in the Consumer Rights Directive which is discussed in Chapter 6 of this thesis also gives an idea as to how the consumer is portrayed at the EU level. Less than the standard consumer cannot help to the same degree in the internal market project. Whatever the reasons are for the consumer being portrayed as such, consideration of categories of consumers who might be vulnerable due to their age, education, skills, leads to the conclusion that a single standard of consumer is difficult to exist. It is vital to understand that consumers do not all fall in one category and if there is one group that may feel disadvantaged by the new state of affairs with online shopping being given prominence, it is the old. Old people are not only unfamiliar, albeit not all, with technology but their income considerably

⁴²⁶ Hattwick, Jefferson and Houston 'Toward a Behavioral Theory of Consumer Choice' (n 401) 65.

⁴²⁷ *ibid* 66.

falls as they get older⁴²⁸ and it is unlikely that they will risk their limited income to try new methods of purchasing such as online, and particularly cross border, shopping as well as new, unfamiliar to them, products through a means of distance sale.

The Commission's argumentation

The Commission's argumentation itself is not free from criticism and concerns as well. An interesting observation is the fact that the European Commission has claimed to be acting in accordance with the views expressed in the responses to the Green Paper on the Review of the Consumer Acquis. The Commission used questionnaires to which all the interested persons, including governments of both Member States and non-Member States, the academic community as well as the business community and other stakeholders, European Consumer Centres, consumer organization,⁴²⁹ all were called to provide their answers as to whether they would see an advantage to maximum harmonisation. The Commission has contended that the majority of respondents, reaching the percentage of 62% and comprising of both Member States and the business sector, have been in favour of maximum harmonisation. What has more paradoxically been maintained by the European Commission is that minimum harmonisation has been supported by only four Member States⁴³⁰, but it did not refer to which particular Member States.⁴³¹ Nonetheless, an analysis of the responses provided by Member States, as those published in the European

⁴²⁸ John Baldock, 'On being a Welfare Consumer in a Consumer Society' (2003) 2 Social Policy & Society 65, 67.

⁴²⁹ Jacobien W Rutgers and Ruth Sefton-Green, 'Revising the Consumer Acquis: (Half) Opening the Doors of the Trojan Horse' (2008) 3 European Review of Private Law 427, 432; Some examples are the Financial Services Consumer Panel response available at http://www.fs-cp.org.uk/publications/pdf/consumer_acquis.pdf, the Council of Bars and Law Societies of Europe response available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/pr_0307_enpdf1_1178801403.pdf), the British Retail Consortium response available at http://ec.europa.eu/consumers/archive/cons_int/safe_shop/acquis/responses/BritishRetailConsortium.pdf

⁴³⁰ Loos, 'Full Harmonisation as a regulatory concept and its consequences for the national legal orders - The example of the Consumer Rights Directive' (n 348) 7.

⁴³¹ Poncibo, 'Some Thoughts on the Methodological Approach to EC Consumer Law Reform' (n 72) 357.

Commission's website⁴³² does not point to the same direction. While nine Member States, with Cyprus being one of them⁴³³, were in favour of maximum harmonisation, five Member States, as opposed to four that the Commission had put forward, were on the other hand in favour of minimum harmonisation, with UK being one of them.⁴³⁴ Also, no less than eight Member States regarded maximum harmonisation as being justified for measures of technical nature only as for example the length of the right of withdrawal. It is nonetheless too simplistic as Rutgers and Sefton-Green have put forward to say that the majority of respondents have been in favour of full targeted harmonisation as the various respondents can be distinguished from one another.⁴³⁵ In essence, the responses of Member States differ from those given by consumer organisations and those of consumer organisations can be discerned from those given by actors coming from the business sector.⁴³⁶ The Commission made in this way an effort to present maximum harmonisation, albeit in certain areas, as the most favourable option so as to safeguard its adoption. Full targeted harmonisation eventually prevailed with maximum harmonisation provided only for certain aspects and not for the Directive as a whole.

At the same time, there are flaws within the Commission's argumentation if one considers the fact that although the European Commission has presented the shift to maximum harmonisation as the optimal solution, it has nonetheless failed to consider some further consequences accruing from the shift to maximum harmonisation. Lawyers across the Union would have to undergo training in order to familiarise themselves with the new harmonised

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<http://ec.europa.eu/consumers/archive/cons_int/safe_shop/acquis/responses_green_paper_acquis_en.htm> accessed 24 April 2016.

433 Cyprus Government Response to the EU Commission Green Paper on the Review of the Consumer Acquis

<http://ec.europa.eu/consumers/archive/cons_int/safe_shop/acquis/responses/ms_cyprus.pdf> accessed 24 April 2016.

434 UK Government Response to the EU Commission Green Paper on the Review of the Consumer Acquis

<http://ec.europa.eu/consumers/archive/cons_int/safe_shop/acquis/responses/ms_uk.pdf> accessed 24 April 2016.

435 Rutgers and Sefton-Green, 'Revising the Consumer Acquis: (Half) Opening the Doors of the Trojan Horse' (n 429) 432.

436 *ibid.*

legislation while maximum harmonisation would lead to an increase in preliminary references to the European Courts for interpretation of the new concepts and rules in a desire to achieve a uniform interpretation of the harmonised rules.⁴³⁷ The latter consequence would be considerably time consuming and expensive as national courts will need time as well as guidance in order to become cognizant with the harmonised rules.

However, differences in the application of the directive are nevertheless likely to persist and this contradicts the power of maximum harmonisation. Even maximum harmonisation, presented by the Commission as what consumers really need, will not achieve full uniformity owing to the day-by-day role of national courts.⁴³⁸ National courts enjoy much more freedom when interpreting a directive as opposed to regulation, an alternative legislative measure at the EU level. This is due to the fact that since directives do not need to be implemented verbatim, Member States can employ national legal terminology when transposing a directive in their national regimes and which national courts are then called to interpret as opposed to the actual wording of the Directives. Accordingly, particular regard should be paid to the fact that national courts interpret the relevant national law that implements a directive and not the actual directive.⁴³⁹ Although interpretation of more practical issues such as the length of the cooling period may not be problematic, there may be provisions as implemented in the national legal order that may require further interpretation by national courts. Accordingly, the possibility of national courts interpreting EU provisions in the context of their national laws⁴⁴⁰ may be regarded as an additional indication of the fact that the European Commission's argument in relation to maximum harmonisation is unconvincing.

⁴³⁷ Loos, 'Full Harmonisation as a regulatory concept and its consequences for the national legal orders - The example of the Consumer Rights Directive' (n 348) 9.

⁴³⁸ Poncibo, 'Some Thoughts on the Methodological Approach to EC Consumer Law Reform' (n 72) 363-64.

⁴³⁹ National courts do not rely directly on directives. This would amount to horizontal direct effect of directives which goes contrary to their nature as they have to be implemented in national legislation.

⁴⁴⁰ Christian Twigg-Flesner, "'Time to do job properly" – The case for a new approach to EU consumer legislation' (2010) 4 Journal of Consumer Policy 33, 5.

Questioning maximum harmonisation does not stop here. Not only empirical evidence that maximum harmonisation is the optimal solution is missing from the Commission's argumentation but in addition the methodological approach employed which as it has already been said included questionnaires, renders its argumentation even more problematic. The responses given to the Commission's Green paper neither constitute evidence for the effect of maximum harmonisation nor do they constitute a serious scientific research as Faure argues.⁴⁴¹ This method of "leading questions" employed by the European Commission in the consultation process was not free from criticisms and many authors have been concerned with the choice of the Commission. One should not be surprised by the fact that there have been positive reactions to the creation of uniform rules. Although, uniform legal rules were attractive to most respondents, it is important to say that the actual content of such rules was at that time not known. As Rutgers and Sefton-Green in their article "Revising the Consumer Acquis: (Half) Opening the Doors of the Trojan Horse" rightly argue, the questions contained in the Green Paper were rather focused on form than on the actual content. It is accordingly unlikely to give a correct answer to such questions due to the fact that the respondents were not aware of the content of the substantive provisions and this raises concerns as to whether their reactions would still be the same.⁴⁴²

Questions were hypothetically asked which raises questions as to whether the responses given by the various respondents would accord to their actual behaviour once maximum harmonisation was adopted. Respondents, who have provided a rather positive response for a hypothetic shift to maximum harmonisation, would have perhaps changed their mind once maximum harmonisation would become the norm. More importantly, no question regarding the negative aspects of maximum harmonisation or regarding the costs involved in the implementation of the Consumer Rights Directive was made. This means not only that the questionnaires were not all-embracing

⁴⁴¹ Michael Faure, 'Towards a Maximum Harmonization of Consumer Contract Law?!?' (2008) 15 Maastricht J Eur & Comp L 433, 443.

⁴⁴² Rutgers and Sefton-Green, 'Revising the Consumer Acquis: (Half) Opening the Doors of the Trojan Horse' (n 429) 431; Poncibo, 'Some Thoughts on the Methodological Approach to EC Consumer Law Reform' (n 72) 357.

in order to provide a spherical picture about harmonisation but also questions were skewed to get particular responses in relation to maximum harmonisation. By taking all those factors into consideration, one could argue that the validity and the weight of this research is rather limited⁴⁴³ and should not be greatly dependent upon.

The flaws highlighted in the Commission's argumentation complete the doubts in relation to the shift to maximum harmonisation. While a connection between minimum harmonisation and consumer confidence could be more easily be discerned, the same does not seem to apply for maximum harmonisation. Minimum harmonisation provides a safety net for consumers and prevents instances where consumers may be surprised as well as disadvantaged by the justices of a foreign system however there are doubts as to whether this is the case for the maximum harmonisation argument. An important question provoked is why then maximum harmonisation was so passionately sought to be achieved and an examination from a politics point of view could provide some answers to this.

From a politics point of view

In the current case there are indeed differing attitudes towards harmonization depending on the perspectives of the actors involved, whether those are state actors, consumers or commercial parties.⁴⁴⁴ Not only academics have been largely occupied with the idea of harmonisation but it at the same time constitutes an indispensable part of the political discussions of the European institutions and amongst the politicians coming from the various Member States as it has been seen in the preceding chapter. The different views of State officials in relation to harmonization as Jan Smits puts it is largely connected with their status. Their attitude towards achieving further harmonisation largely depends on whether they

⁴⁴³ Faure, 'Towards a Maximum Harmonization of Consumer Contract Law?!?' (n 441) 443.

⁴⁴⁴ Smits, 'Introduction to special issue: Harmonisation of contract law: an economic and behavioural perspective' (n 373) 478.

have strong incentives to change the current status quo.⁴⁴⁵ State officials are often reluctant to accept a change unless they have interests or any other countervailing factors that prompt change.⁴⁴⁶ In other words, of greatest importance is not whether there exists strong resistance to further harmonisation but whether there interest groups with strong incentives to strive for such a change.⁴⁴⁷

This provides an explanation for the difference that is noted between the approaches followed by Germany on the one hand and that followed by the United Kingdom on the other hand. With a high production of consumer goods for export in Germany and with 45% of German exports in 2013 comprising exports to European Union countries equating to €401.9 billions⁴⁴⁸, Germany constitutes the largest and most important market in the European Union⁴⁴⁹ and will considerably benefit from harmonization. On the contrary, the United Kingdom is a net importer of commercial legal businesses. According to The CityUK, a private association that promotes the financial and professional services of UK, 2014 report on legal services, UK is the world's leading centre for international legal services and accounts for the 7% of global law firms' fee revenue by thus rendering it the largest market in Europe.⁴⁵⁰ With £20,4 billion output, the legal services sector accounted for the 1,5% of the UK's gross domestic product in 2012.⁴⁵¹ With consideration of the fact that maximum harmonisation will have the biggest impact on cross border shopping and based on the above facts, it could be argued that the UK will not to gain, to the same degree as Member States such as Germany from the harmonisation of European Consumer Law. For Member States such as Germany which focus on industrially produced

445 Smits, 'Introduction to special issue: Harmonisation of contract law: an economic and behavioural perspective' (n 373) 478.

446 O'Hara O'Connor, 'The limits of contract law harmonisation' (n 372) 507.

447 *ibid.*

448 BDA Die Arbeitgeber (Confederation of German Employers), 'Germany's export strength – bad for Europe?' 1

<[www.arbeitgeber.de/www%5Carbeitgeber.nsf/res/DtExportstaerke_eng.pdf/\\$file/DtExports_taeerke_eng.pdf](http://www.arbeitgeber.de/www%5Carbeitgeber.nsf/res/DtExportstaerke_eng.pdf/$file/DtExports_taeerke_eng.pdf)> accessed 16 September 2014.

449 'Facts about Germany' <www.tatsachen-ueber-deutschland.de/en/economy/main-content-06/strong-economic-hub-in-the-global-market.html> accessed 16 September 2014.

450 TheCityUK, 'Legal Services' (Report) (January 2014) 2

<www.barcouncil.org.uk/media/278588/legal-services-2014.pdf> accessed 24 April 2016.

451 *ibid.*

goods, their traders will, as it will subsequently be shown, considerably benefit from a harmonised piece of legislation as the Consumer Rights Directive is. While it is consequently not surprising that Member States such as the UK have been less interested in harmonisation⁴⁵², this wider picture provides an explanation as to why Member States such as for example Germany have been more enthusiastic towards further harmonisation.⁴⁵³

The former chancellor of Germany, Gerhard Schröder was amongst those who argued that the legal diversity that exists in the EU constitutes one of the impediments that hinder the smooth functioning of the single market and the same time the European economic growth.⁴⁵⁴ Schröder 's view contradicts the statements made by Lord Falconer who has served as the Constitutional Affairs Secretary of UK until 2007 and who advocated against harmonisation. Lord Falconer supported that the diversity of laws provides businesses the opportunity to base their decision as to which country they want to trade in based on the legal regime of a country.⁴⁵⁵ In the same vein, he cited the importance of London as a competitive centre which attracts both European and international businesses due to the competitive advantage UK law offers.⁴⁵⁶ Although their statements and views relate in more particular with the wider harmonisation of contract law, they can be equally considered in the effort of finding an explanation for the different approaches of Member States towards the harmonisation of European Consumer Law as well which relates to business to consumer contracts only. Competitive economic considerations take the lead in the differences in approach between the various Member States.

The European Commission's seems to be primarily concerned with enabling businesses to enter foreign markets whose entry is impeded by the existence of different consumer protection regimes across the Union.⁴⁵⁷ The

452 O'Hara O'Connor, 'The limits of contract law harmonisation' (n 372) 508.

453 Smits, 'Introduction to special issue: Harmonisation of contract law: an economic and behavioural perspective' (n 373) 478.

454 O'Hara O'Connor, 'The limits of contract law harmonisation' (n 372) 506.

455 *ibid.*

456 *ibid* 508.

457 Micklitz and Reich, 'Cronica De Una Muerte Anunciada: The Commission Proposal for a Directive on Consumer Rights' (n 358) 474.

harmonisation of laws can bring considerable benefits for firms and traders that are willing to engage in cross border trading. Providing a harmonised regime will accordingly reduce the risk of traders who otherwise have to encounter the various national rules and languages as well as the differing practices and customs which are in essence an unavoidable part of both the common market⁴⁵⁸ and the cross border trade itself. Accordingly, businesses will feel the benefit of maximum harmonisation to a greater extent than individual consumers.⁴⁵⁹

The interests of the businesses seem to be greater in this regard and with maximum harmonisation businesses will merely have to rely and adapt to a single legal standard which makes it cheaper for them to trade across the whole Union. The fact that the level of protection will be the same in all Member States will save costs for businesses which were previously spent on either negotiations when a disagreement in relation to the transaction arose⁴⁶⁰ or on obtaining foreign legal advice in individual cases.⁴⁶¹ One single standard will reduce interpretation costs and legal advice that were before needed to comply with the 28 different national regimes in case they were willing to sell beyond their borders as well as compliance costs that were otherwise spent by businesses trading online in order to adapt their websites to the different regimes. This was also the view of Poncibo who has from an early point justifiably argued the adoption of the Consumer Rights Directive as proposed with the maximum harmonisation approach, would be a valuable tool for businesses as it would reduce compliance costs on the one hand while on the other hand it would turn the previous

⁴⁵⁸ Micklitz and Reich, 'Cronica De Una Muerte Anunciada: The Commission Proposal for a Directive on Consumer Rights' (n 358) 474.

⁴⁵⁹ Mak, 'Review of the Consumer Acquis – Towards Maximum Harmonisation?' (n 369) 12.

⁴⁶⁰ *ibid.*

⁴⁶¹ Stefan Vogenauer and Stephen Weatherill, 'The European Community's Competence to pursue the Harmonisation of Contract Law – an Empirical Contribution to the Debate' in Stefan Vogenauer and Stephen Weatherill (eds), *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and the Legal Practice* (Hart Publishing 2006) 126.

legislation into a simpler one⁴⁶² which would make their trading activity easier.

From a survey carried out by Vogeneaur and Weatherill in 2005, just three years before the shift to maximum harmonisation was put forward, regarding the perceptions of businesses⁴⁶³, it has been made evident that divergence between the various national laws was the major obstacle for businesses to trade cross border.⁴⁶⁴ Businesses had to change their trading patterns and restructure their standard business model due to the differing implementation of the Directives in an effort to comply with the various acquired consumer rights that Member States had in various instances provided in their national regimes.⁴⁶⁵ To the majority of businesses that participated in the survey, 59% of them expressed the view that the various European Directives, in relation to business to consumer transactions, have indeed reduced obstacles to cross border trade.⁴⁶⁶ Nonetheless, out of ten respondents had experienced problems with differences that accrued from the implementation of the directives⁴⁶⁷ which may be attributed to the minimum harmonisation approach which allowed Member States to go beyond what the Directives provided.

The obstacles that businesses have experienced in trading cross border were actually costs resulting from legislative disparities between the different national regimes.⁴⁶⁸ This involved the costs to obtain legal advice as to the regime of a Member State they would like to trade in as well as to update their websites in the case of online distance shopping and thus comply with the relevant regime of a Member State. Those accrued from the variations between legal systems as well as the differences involved in the

⁴⁶² Poncibo, 'Some Thoughts on the Methodological Approach to EC Consumer Law Reform' (n 72) 362.

⁴⁶³ Vogenauer and Weatherill, 'The European Community's Competence to pursue the Harmonisation of Contract Law – an Empirical Contribution to the Debate' in Vogenauer and Weatherill (eds), *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and the Legal Practice* (n 461) 117.

⁴⁶⁴ *ibid* 125.

⁴⁶⁵ *ibid* 129.

⁴⁶⁶ *ibid* 127.

⁴⁶⁷ *ibid* 128.

⁴⁶⁸ *ibid* 126.

implementation of the European directives.⁴⁶⁹ Undoubtedly, further harmonization will benefit Member States producing consumer goods for export to other European Member States as this will enable their businesses to merely rely on single set of policy for their transactions.⁴⁷⁰ Avoidance of another jurisdiction's law by businesses which was a direct consequence of divergence in domestic laws will no longer be the case.⁴⁷¹ Maximum harmonisation has been particularly sought to avoid instances where businesses were reluctant to engage into cross border trading due to issues in the domestic laws of other Member States that are ignorant of and may have to, unavoidably, anticipate.⁴⁷² The overall uncertainty involved as well as high compliance costs have been regarded as deterrence for businesses who wished to engage into cross border trading and this was primarily a problem resulting from the fragmentation and regulatory barriers that the different consumer protection rules gave rise to.⁴⁷³ The complex, costly, as well as unpredictable business environment caused by the differing implementation of the various consumer protection directives would accordingly be considerably simplified with the shift towards maximum harmonisation.

As the effort to achieve harmonisation has been promoted by such incentives it is not surprising that it has taken the form of legislation where the interests of trader were given primal importance although in the name of consumer protection. It could be argued that the directive constitutes a "market access instrument"⁴⁷⁴ as the single standard across the Union strives to incite more traders to engage into cross border trading and

⁴⁶⁹ Vogenauer and Weatherill, 'The European Community's Competence to pursue the Harmonisation of Contract Law – an Empirical Contribution to the Debate' in Vogenauer and Weatherill (eds), *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and the Legal Practice* (n 461) 126.

⁴⁷⁰ O'Hara O'Connor, 'The limits of contract law harmonisation' (n 372) 508.

⁴⁷¹ Vogenauer and Weatherill, 'The European Community's Competence to pursue the Harmonisation of Contract Law – an Empirical Contribution to the Debate' in Vogenauer and Weatherill (eds), *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and the Legal Practice* (n 461) 128.

⁴⁷² Howells, 'The Rise of European Consumer Law – Whither National Consumer Law?' (n 35) 64.

⁴⁷³ Edgar, 'Cross-border B2C e-commerce in the EU and the introduction of the Consumer Rights Directive: A cure for fragmentation?' (n 31) 10.

⁴⁷⁴ Micklitz and Reich, 'Cronica De Una Muerte Anunciada: The Commission Proposal for a Directive on Consumer Rights' (n 358) 518.

ultimately this is to the advantage of the internal market and its smooth functioning. This may be to the advantage of consumers in terms of competition but not necessarily in terms of protection as it has been made evident from the preceding part in relation to the substantive provisions of the Consumer Rights Directive. An increased level of harmonisation seems to accord with the internal market needs⁴⁷⁵ as harmonised standards can facilitate trade. Harmonisation has been at the heart of achieving European integration which can be better achieved with more harmonised standards as the level-playing field ensured and the reduction in cross-border transaction costs provide greater incentives for businesses to expand their trading beyond their national markets. There should be no doubts that the greater convergence the greater the more advantageous it is in terms of the internal market objectives and it seems that consumer protection policy has in fact turned into an internal market policy in order for that purpose to be achieved.

Technological changes have changed the nature of the single market and as Sarah Edgar has noted, over the last years the development of the Digital Single Market and generally of the electronic commerce have taken the lead in the European Commission's considerations and have attracted particular recognition within the EU.⁴⁷⁶ As Viviane Reding, the Vice-President of the European Commission, had in 2012 stated, 'As a new digital economy emerges, so does the need to break down new barriers. This is why our Single Market must increasingly become also a digital Single Market.'⁴⁷⁷ To add to that, Malcolm Harbour, the Chairman of the Committee for the Internal Market and Consumer Protection (IMCO) has emphasized that in order for the Single Market to work, the functioning of the digital Single Market is a prerequisite. The shift of the European Commission towards

⁴⁷⁵ Peter Rott, 'Minimum Harmonization for the Completion of the Internal Market? The Example of Consumer Sales Law' (2003) 40 *Common Market Law Review* 1107, 1134.

⁴⁷⁶ Edgar, 'Cross-border B2C e-commerce in the EU and the introduction of the Consumer Rights Directive: A cure for fragmentation?' (n 31) 5.

⁴⁷⁷ Viviane Reding, 'The Common European Sales Law – breaking the mould to help businesses and customers'

(Realising the European Single Market Forum, Brussels, 6 March 2012) 2

<<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/164&format=HTML&aged=0&language=EN&guiLanguage=en>> accessed 14 November 2014.

maximum harmonisation and the choices that were made in the Consumer Rights Directive, which will be examined in the subsequent chapter of this thesis, focusing on aspects that are evidently related to electronic commerce point towards this direction. It could be argued that they more or less constitute changes that were required for the internal market to be efficient.

The European Commission, instead of paying regard to aspects that are within the primary considerations of consumers, has focused on harmonising aspects of distance selling that will primarily simplify the previous regime for traders who will be able after the adoption of the Consumer Rights Directive to rely on a single standard for their cross border trading. At the same time, it should not be disregarded that the Digital Single Market, being as it has already been stated an important component of the whole Single Market, can considerably increase the Union's GDP.⁴⁷⁸ Studies have showed that such an increase is estimated to provide an increase of 4% to the Union's GDP by 2020 which is equivalent to €500 billion.⁴⁷⁹ However, it is peculiar that there are there still digital issues that need to be resolved and have not been covered by the Directive. The focus has accordingly been to simplify legal standards with regard to cross border trading and thus provide the opportunity and an incitement for traders to expand their trading by thus leaving important issues behind.

The shift to Full Targeted Harmonisation

Concerns in relation to the maximum harmonisation provision led the European Commission to reduce the level of harmonisation to targeted full harmonisation which as its name reveals has a more limited scope.⁴⁸⁰ With full targeted harmonisation being the resulting approach, there is a combination of maximum and minimum harmonisation approach under the Consumer Rights Directive. Maximum harmonisation is limited to only certain aspects of the Directive which are in more particular consumer information and the right of withdrawal in distance and off-premises

⁴⁷⁸ Edgar, 'Cross-border B2C e-commerce in the EU and the introduction of the Consumer Rights Directive: A cure for fragmentation?' (n 31) 11.

⁴⁷⁹ *ibid* 5.

⁴⁸⁰ Mak, 'Review of the Consumer Acquis – Towards Maximum Harmonisation?' (n 369) 6.

contracts. At the same time, with the full targeted harmonisation approach, the European Commission has included “flexibility clauses” within the Consumer Rights Directive which provide the opportunity to Member States to go beyond the level of protection offered by certain provisions in the directive.⁴⁸¹

Targeted full harmonisation has been seen as a compromise between the two approaches and as a way out of the lengthy process involved in the adoption of the Consumer Rights Directive,⁴⁸² with the Commission not making great efforts to justify its decision. Equally, no justification was provided informing and making clear why full harmonisation should be accepted in those particular instances so as to achieve the aims of the Directive.⁴⁸³ It is also remarkable that there has been no effort on the part of the Commission to provide further details as to what this new harmonisation approach entails. As Howells and Schulze have rightly argued, “It is paradigmatic that neither the explanatory memorandum nor the recitals make any effort to give shape to what targeted harmonisation means and how it could be concretised”.⁴⁸⁴ However, for such an approach, it is important for the scope of those issues that the particular approach harmonises to be clearly elucidated⁴⁸⁵ so as to avoid uncertainties, this is what *targeted* full harmonisation actually means.⁴⁸⁶

What has rightly been argued there exists a possibility for the directive to be incorrectly transposed into domestic regimes but in addition, the mixing of maximum and minimum harmonisation into the full targeted harmonisation approach will not increase consumer confidence which the European

481 Andre Naidoo, ‘Consumer remedies following the sale of faulty goods’ (2011) *Journal of Business Law* 805, 807.

482 Cristina Amato, ‘The Europeanisation of Contract Law and the Role of Comparative Law: The Case of the Directive on Consumer Rights’ (2012) 1 *Op J* 1, 7.

483 Hans-W Micklitz, ‘The Targeted Full Harmonisation Approach: Looking Behind the Curtain’ in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law*, (Sellier European Law Publishers, 2009) 53.

484 *ibid.*

485 Mak, ‘Review of the Consumer Acquis – Towards Maximum Harmonisation?’ (n 369) 8.

486 Micklitz, ‘The Targeted Full Harmonisation Approach: Looking Behind the Curtain’ in Howells and Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (n 483) 54.

Commission has so passionately defended.⁴⁸⁷ Full targeted harmonisation may also give rise to confusion as to which issues have been fully harmonised and which have remained under the Member States' jurisdiction.⁴⁸⁸ Uncertainty will on the contrary be caused as a result of partial harmonisation.⁴⁸⁹ On that account, it seems that considering full targeted harmonisation as the optimal solution may be regarded as too optimistic as commentators such as Vanessa Mak⁴⁹⁰ have put forward.

However, it should not be disregarded the shift to full targeted harmonisation constitutes perhaps an additional indication of what the Commission actually strives to achieve. Had the real aim been to increase consumer confidence, full targeted harmonisation and maximum harmonisation would from that point of view never be the right approaches to provide. Even if consumers' real concerns cannot be addressed through legislation and will to their entirety remain unsolved, the level of uniformity achieved still leaves untouched important issues as redress which ensures that the rights of consumers can be enforced.⁴⁹¹ The Commission's increased desire for maximum harmonisation led to a compromise being adopted with maximum harmonisation remaining, as it has been seen, the default position with regard to information requirements and the right of withdrawal. The European Commission has from the beginning targeted at full harmonisation rather than targeted harmonisation⁴⁹² which was the eventual approach. The European Commission was accordingly particularly willing to achieve maximum harmonisation although it was not eventually successful in all aspects of the Directive.

The benefit that the eventual choice may have on businesses should not be underestimated for the reasons that have already been referred to earlier in

⁴⁸⁷ Edgar, 'Cross-border B2C e-commerce in the EU and the introduction of the Consumer Rights Directive: A cure for fragmentation?' (n 31) 36.

⁴⁸⁸ *ibid* 35.

⁴⁸⁹ Amato, 'The Europeanisation of Contract Law and the Role of Comparative Law: The Case of the Directive on Consumer Rights' (n 482) 17

⁴⁹⁰ Mak, 'Review of the Consumer Acquis – Towards Maximum Harmonisation?' (n 369) 14.

⁴⁹¹ *ibid* 16.

⁴⁹² Micklitz, 'The Targeted Full Harmonisation Approach: Looking Behind the Curtain' in Howells and Schulze (eds), *Modernising and Harmonising Consumer Contract Law*, (n 483) 53.

this Chapter. Businesses wishing to engage into cross border trade will not have to incur costs for adapting their websites in order to comply with the different information requirements and modalities in relation to the right of withdrawal as contained in the various national regimes. Greater certainty and confidence is in this way ensured for businesses. While the maximum harmonisation of the two particular aspects under the Consumer Rights Directive can bring certain advantages that to businesses by thus enhancing arguments such as that put forward by Geraint Howells suggesting that European Consumer Law will not be in favour of European consumers anymore but will become the guardian of traders' interests.⁴⁹³

Although it cannot be denied that maximum harmonisation has the potential to remove impediments to cross border trade⁴⁹⁴, there are concerns as to the effect that the resulting approach will have from the consumer's protection perspective. The question turns to the position of consumers and whether they will be better off after the transposition of the Consumer Rights Directive within their domestic regimes. Local preferences and long-standing traditions have to be sacrificed owing to the new harmonised standard and this takes place irrespective of whether there are obvious common local preferences among the various Member States.⁴⁹⁵ Differing national standards are advantageous in the sense that they accord to the preferences of consumers of a given Member State even if they do not serve cross border trade to the full. Retaining national standards and thus legal barriers in place which are an unavoidable consequence of the diversity that emerge from cross border trade may not always be disadvantageous. While the opportunity for protection to be adapted to the societal national preferences of consumers towards particular products or services⁴⁹⁶ is considerably important from the consumer's perspective, it seems that the

⁴⁹³ Howells, 'The Rise of European Consumer Law – Whither National Consumer Law' (n 35) 65.

⁴⁹⁴ Gomez, 'An Economic Analysis of Harmonization Regimes: Full Harmonization, Minimum Harmonization or Optional Instrument?' (n 347) 291-92.

⁴⁹⁵ Gomez, 'An Economic Analysis of Harmonization Regimes: Full Harmonization, Minimum Harmonization or Optional Instrument?' (n 347) 291-92.

⁴⁹⁶ *ibid* 292.

internal market needs more and which the European Commission has been particularly willing to give.

Conclusion

The purpose of this Chapter has not been to argue that the Consumer Rights Directive will not bring any improvements in terms of consumer protection as this an issue that will be examined in the subsequent Chapter of this thesis which will deal with the substantive provisions of the Directive in more detail. Chapter 5 was limited to an examination of the level of harmonisation. What has been more importantly attacked in this Chapter is the Commission's overdependence on increasing consumer confidence through the shift to maximum harmonisation. The increased importance placed on harmonisation for increasing consumer confidence implies an automatic link between consumer protection and consumer confidence which is not the case in reality. As it has been showed, this equates to disregarding the complexity involved. Consumer's decision making process is a much more complex issue and the perplexities involved make it difficult to accept that such a horizontal relationship between consumer confidence and maximum harmonisation exists. Minimum harmonisation not only accords with national values and preferences but it also provides an opportunity for national legislators to expand protection even further. Accordingly, there is no strong indication why the particular approach has been regarded by the European Commission as a reason for low consumer confidence. Eurobarometer surveys have also showed that this is not actually the case. On the other hand, maximum harmonisation by imposing a ceiling of protection deprives Member States the opportunity to go beyond the Directive in order to provide greater protection to consumers which can in essence be regarded advantageous from the consumer's perspective.

In addition, consideration of factors affecting consumers' choice and therefore confidence has thrown light on the complex entity of consumer as well as on the fact that a direct, horizontal relationship between consumer confidence and maximum harmonisation does not exist. What consumers lack is perhaps awareness and adequate education in relation to the wider

issues involved. In an era where constant technological developments take place and where consumers are offered with vast opportunities and choices that are only a click away from them, it is the time to focus on educating consumers and raise their awareness in relation to the peculiarities of online cross border trade and make them trust it as a means of purchasing. Consumers' awareness should not be taken for granted as consumers comprise of not only reasonable and confident shoppers but also old, less educated, vulnerable people.

The legislative efforts of the Commission were focused on safeguarding the level of harmonisation which is the reason the Directive ended up as a compromise. The eventual choice to provide for the maximum harmonisation of only two aspects of the Consumer Rights Directive is regarded in this study as an indication of the actual objectives pursued at the European level and which are hidden behind European Consumer Protection legislative efforts. Maximum harmonisation was limited to information requirements and the right of withdrawal. Although the provisions of the Consumer Rights Directive will be individually dealt with in the next chapter, as regards the decision to maximise them in full, it suffices to say that not only consumers struggle with the overload of information and rarely pay regard to them but also there is an evident reluctance on the part of consumers to exercise their right of withdrawal due to costs that they may have to incur in order to return products as well as due to the risk involved in returning products. Nevertheless the harmonisation of those two particular aspects is not considered as random as it ensures certain advantages for businesses wishing to trade across their border.

This Chapter has apart from presenting certain flows within the Commission's argumentation, focused on the European Consumer Law legislative efforts from a politics point of view to further support the concerns in relation to maximum harmonisation and full targeted harmonisation. More importantly, Chapter 5 altogether provides further evidence for the main contention of this study that European Consumer Law has been used to achieve means other than consumer protection, namely the completion of the internal market through promoting cross border trade. Considerations in relation to the position of traders have predominated over those of the

position of consumers in an effort to facilitate cross border trade, albeit in the name of consumers.

Chapter 6 – The Consumer Rights Directive as adopted

Introduction

Law-making at the European level has been characterised by an instrumentalist nature with the primary aim and driving force behind legislation being the completion of the internal market.⁴⁹⁷ The same seems to be the case for European Consumer Law which based on a neo-classical approach, has as its aim to empower consumers by facilitating consumers' decision making process in order to make choices that are beneficial to them.⁴⁹⁸ Empowering consumer does not seem to be an end in itself but it is rather important for the eventual benefits that widely accrue in the market. It could be argued that consumers are not only passive beneficiaries of the internal market but at the same time incidental beneficiaries in the whole process of legislating within the area of consumer protection.⁴⁹⁹ The concern voiced in this thesis supports that consumer protection seems to have turned into a secondary role of European Consumer Law.⁵⁰⁰ The examination of the actual provisions of the Consumer Rights Directive adds to this argument by showing the instrumental nature of the directive as emerging from the approach followed.

Micklitz has been amongst those who have rightly argued that consumer legislation at the EU level has turned from consumer protection law to consumer law.⁵⁰¹ Consumer policy should be perfectly conceptualised as an area of law with its aim being to provide protection to the end users of

⁴⁹⁷ Katalin J Cseres, 'Consumer Protection in the European Union' in Roger J Van Den Bergh and Alessio M Paces, *Regulation and Economics* (2nd edn, Edward Elgar Publishing 2012) 203.

⁴⁹⁸ Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32(3) *Journal of Law and Society* 349, 355.

⁴⁹⁹ Cseres, 'Consumer Protection in the European Union' in Van Den Bergh and Paces, *Regulation and Economics* (n 497) 204.

⁵⁰⁰ *ibid* 203.

⁵⁰¹ Hans-W Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in Civil Law – A Bittersweet Polemic' *EUI Working Papers* 3/2012, 1, 8

<http://cadmus.eui.eu/bitstream/handle/1814/20374/LAW_2012_03_Micklitz.pdf?sequence=1> accessed 18 April 2016.

products and services.⁵⁰² Although this envisages active regulatory protection, the majority of European consumer law instruments have amounted to consumer policy of the hidden type⁵⁰³, in the form of providing the means to consumers to make informed choices. There has been an overtly shifted reliance on the information paradigm with the emphasis being on providing the various information obligations as a way to facilitate the conclusion of consumer contracts.⁵⁰⁴ The prevailing approach at the EU level has presumed some standard skills for consumers and at the same time the existence of an “omnipotent multinational market actor”⁵⁰⁵ as Micklitz refers to him. The shift of focus from protecting the weak towards protecting the well-informed and circumspect consumer undoubtedly has, as it will be seen from the provisions of the Consumer Rights Directive, implications for consumers.⁵⁰⁶

Although the effect of the Consumer Rights Directive will be examined in Chapter 7 dealing with its transposition in the domestic regimes of UK and Cyprus, this chapter considers the actual provisions contained in the final version of the Directive and also provides a critical consideration of the approach followed. The scope of the directive was eventually significantly narrowed down by only repealing the Distance Selling Directive and Doorstep Selling Directive as opposed to the four directives, including the Directive on Unfair Contract Terms and the Consumer Sales Directive which was the initial purpose of the initial proposal. The Consumer Rights Directive as eventually adopted constitutes a more conservative approach due to the fact that maximum harmonisation did not prevail in all respects. Although complete harmonisation was better adjusted to the market needs and a step closer towards eliminating national variations which increase transactions costs of businesses, due to the political and economic choices embedded therein the two areas were eventually dropped. However,

⁵⁰² Miriam Hartlapp, Julia Metz and Christian Rauh, *Which Policy for Europe? Power and Conflict inside the European Commission* (Oxford University Publishing 2014) 160.

⁵⁰³ *ibid.*

⁵⁰⁴ Geraint Howells and Thomas Wilhelmsson, ‘EC Consumer law: has it come of age?’ (2003) 28(3) *European Law Review* 370, 370.

⁵⁰⁵ Micklitz, ‘The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in Civil Law – A Bittersweet Polemic’ (n 501) 1.

⁵⁰⁶ *ibid* 28.

maximum harmonisation still constitutes the default position of the directive with the exception of some clauses which allow Member States to go beyond the Directive. This chapter will eventually determine whether the Consumer Rights Directive as finally adopted can really make a change for increasing consumer confidence or whether it merely constitutes another weapon in the armour of European Consumer Law that aids to provide protection to a standard type of consumer, a competent consumer, who has the potential to aid in the internal market project. Answering this question in the affirmative will provide additional evidence for the main argument formulated in this thesis by which the primary objectives of the European Commission are being deployed.

Distance Selling and Doorstep Selling

To begin with, an important observation that may be made is the decision to merge Distance Selling Directive and Doorstep Selling Directive under the Consumer Rights Directive. The two types of concluding a transaction for the purchasing of goods or services greatly differ between them, a decision which raises concerns for choosing to include of them in one piece of legislation. According to Recital 20 of the Consumer Rights Directive, distance selling refers to the conclusion of a contract entered between a trader and a seller for the purchase of goods or services by using one or more means of distance communication such as internet, mail order, telephone or fax. While this type of purchasing does not entail the face to face presence of the trader and the consumer in the same place, off-premises contract on the other hand includes contracts concluded although they are concluded with the simultaneous physical presence of the trader and the consumer but outside the business premises of the trader. While the need to protect consumers in distance selling arises from the fact that consumers are seen as being in an inferior position, in off premises contracts the possibility of the consumer being surprised or under psychological pressure is what gives rise to the need to protect consumer. This need arises, according to Recital 21 of the Directive, from the fact that consumer may be under psychological pressure or may be confronted with an element of surprise irrespective of whether or not the consumer has

solicited the trader's visit. However, the argument that is put forward here is that from their very nature the two types of contracting greatly differ between them.

As it has been seen from the preceding chapters of this study, distance selling has formed the major type of transacting that European actors have been concerned with.⁵⁰⁷ Most of the questions asked in the various Eurobarometer surveys were also concerned with distance selling and issues around it including consumers' concerns and their levels of confidence when buying at distance. The European Commission's Consumer policy strategy documents have showed that the European Consumer Law legislative amendments have been informed by the findings of the Eurobarometer surveys.⁵⁰⁸ On the other hand, reference to doorstep selling remained minimal. Reference to it was limited to questions asking whether consumers have returned a product that they have bought at their doorstep or simply whether consumers were aware of the right to withdraw.⁵⁰⁹ Even the question in relation to the right of withdrawal was only asked after the Consumer Rights Directive was proposed and adopted which poses a question as to whether the amendments in relation to doorstep selling were actually based on sufficient well-grounded evidence or even whether there was a real concern for the European Commission in the area.

It cannot be denied that doorstep selling may not be as common nowadays as it was in the 1970s. Due to the rise of internet and online shopping, doorstep selling has become less popular⁵¹⁰ and as the Eurobarometer Survey of 2006 has showed, an evidently high percentage of 91% of the consumers that participated in the particular survey did not purchase

⁵⁰⁷ Viviane Reding, 'An ambitious Consumer Rights Directive: boosting consumers' protection and helping businesses' (European Consumer Day, Madrid 15 March 2010) <http://europa.eu/rapid/press-release_SPEECH-10-91_en.htm> accessed 16 April 2016; Viviane Reding, 'The Common European Sales Law – breaking the mould to help businesses and customers' (Realising the European Single Market Forum, Brussels 6 March 2012) <http://europa.eu/rapid/press-release_SPEECH-12-164_en.htm?locale=en> accessed 18 April 2016.

⁵⁰⁸ Commission, 'Consumer Policy Strategy 2000-2006' (Communication) COM (2002) 208 final ; Commission, 'EC Consumer Policy Strategy 2007-2013 – Empowering consumers, enhancing their welfare, effectively protecting them' (n 16).

⁵⁰⁹ Special Eurobarometer 342, 'Consumer Empowerment' (April 2011) <http://ec.europa.eu/public_opinion/archives/ebs/ebs_342_en.pdf> accessed 27 April 2016.

anything via doorstep selling in the earlier year. While there was no attempt to determine consumers' concerns in relation to doorstep selling and while the particular type of contracting did not seem to have attracted the same concern as distance selling, it is striking that both were combined under a single piece of legislation. Distance selling constitutes a much more complex way of transacting due to the means involved for its attainment. It accordingly seems that the Commission may have perhaps opted for a belts and braces approach to ensure to more easily secure the adoption of the Consumer Rights Directive and therefore the amendments to the Distance Selling Directive. The inclusion of doorstep selling which, contrary to distance selling has a rather limited potential to increase cross border trade in the internal market which seems to be the primary concern of the European Commission has perhaps served as a diversionary tactic to drive attention away from the actual force behind the Consumer Rights Directive. The inclusion of doorstep selling in the directive could more easily give the false presumption that the purpose is to achieve protection across the board while in reality consumer protection was perhaps a by-product of the particular piece of legislation.

The provisions of the Consumer Rights Directive

Having made an initial observation in relation to the Consumer Rights Directive, the focus of this Chapter will now turn on examining a number of the substantive provisions of the directive. This will pave the way for the subsequent Chapter that will deal with the transposition of those provisions in the domestic regimes of UK and Cyprus. There will not be reference to every single Recital and Article of the Directive but only to those that bear some importance and that have brought changes. Such examination has as its aim to contradict the Commission's repeatedly made claims to increase consumer protection and will provide further evidence as to where EU consumer legislation really focuses on.

To begin with, Recital 5 refers to the cross border potential of distance selling and to the fact that it should be one of the main tangible results of the internal market which is not yet fully exploited. It is stated that although

domestic distance selling has grown considerably, the growth of cross border distance sales has been rather limited. This discrepancy is according to Recital 5 significant particularly for Internet sales whose potential for growth is high. A less expansive reference to off premise contracts is made in a simple line mentioning that the cross border potential of contracts that are negotiated away from business premises is constrained by factors such as the different national consumer protection rules. Recital 5 is but an indication of the emphasis that is being put on distance selling and particularly electronic cross border transactions. At the same time, doubts exist as to the cross border potential of contracts negotiated away from business premises and this is the reason that it has been earlier argued that the inclusion of doorstep selling served a further purpose, to hide the internal market considerations that have constituted the actual driving force behind the Directive.

Recital 6 provides that certain disparities, by thus referring to differences in Member States domestic regimes, undermine consumer confidence and increase compliance costs for traders who wish to engage in cross border trading. While both constitute the aims that the European Commission makes an attempt to address through the Consumer Rights Directive, as it has already been argued the latter objective, for the sake of the internal market, seems to be the actual driving force. As regards the aim of increasing consumer confidence, preceding chapters of this thesis has showed legal disparities is just one factor among other more important factors that affect consumer confidence and contrary to the Commission's conceptions legislation may not be a determining factor in consumer's decision making at all. This thesis has viewed consumer confidence as the smokescreen which the European Commission has used throughout the Consumer Rights Directive. Recital 7 additionally states that the effect of harmonisation will be to eliminate barriers stemming from fragmentation of rules and to complete the internal market and barriers can only be eliminated by establishing uniform rules at Union level. Recital 7 portrays the increased emphasis that is being placed on the level of harmonisation by presenting it as the optimal solution which the European Commission has passionately tried to increase.

Subject matter, Definitions and Scope

Article 1 determines the subject matter of the Directive by determining that the purpose of it is through the achievement of a high level of consumer protection to contribute to the proper functioning of the internal market. The contribution of consumer protection towards the internal market project was not per se referred to in either Distance Selling or Doorstep Selling Directives. However, reference to the internal market was totally absent in the Doorstep Selling Directive which was adopted back in 1985 although not from the Distance Selling Directive which was adopted years later in 1992. This also demonstrates the development of the internal market and the move towards what is witnessed today. Distance Selling Directive was in its Recitals referring to the need to take measures for the consolidation of the internal market as well as to cross border trading that could be one of the tangible results flowing from the internal market. Evidently, reference to the relationship between the two in the Consumer Rights Directive constitutes an indication of the importance of consumer protection for the internal market and the fact that the two are interconnected.

Article 2 provides the relevant various definitions of key terms found under the Directive. As far as the definitions of consumer, trader (which was stated as supplier in the Distance Selling Directive) and distance contract which were also included in the Distance and Doorstep Selling Directive, no actual changes were made.⁵¹¹ However, the definition of trader seems to capture only those acting in some business, or professional, capacity. Attention should be drawn to the fact that in the online environment, consumers can never be sure about the identity of the trader and whether they are indeed entering a transaction with a professional or with a non-professional with the latter depriving them of the protection provided under the Directive.⁵¹² Equally, this raises questions as to the position of people on e-Bay that make use of the platform as one time sellers to sell goods. Despite the fact

⁵¹² Joasia Luzak, 'Online Consumer Contracts' Centre for the Study of European Contract Law Working Paper Series 8/2014, 4 <
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487222> accessed 18 April 2016.

that the contracts concluded on e-Bay under those circumstances bear all the characteristics of ordinary online contracts where the consumer only becomes aware of the nature of the goods once he receives it, consumers are nevertheless deprived of their right to withdraw⁵¹³.

As regards the rest of the definitions, the list was further expanded to provide the definitions of goods, goods made to the consumer's specifications, sales contract, service contract, off-premises contract, business premises, digital content, financial service, public auction, commercial guarantee, ancillary contract. An important improvement to be highlighted is the expansion of the protection of the Directive to all off premises contracts and not only those concluded at the consumer's home or workplace.

Further on, Article 3 determines the scope of the Directive by determining the contracts to which it applies and to those that it does not apply. It generally provides certain exceptions to which the Directive does not apply as well as provides discretion to Member States not to apply the Directive to off-premises contracts that do not exceed the amount of EUR 50. Although this has been informed by relevant practicalities and the costs for businesses who would have to accept low value goods back, there is at the same time the risk of depriving the protection of the Directive to consumers who might enter a contract whose value is below the particular threshold. Although one may regard the threshold as a satisfactory and reasonable one, it should not be disregarded that there are categories of consumers for whom an amount of up to EUR 50 constitutes a considerable amount. However, the economic status of a person can be a reason for rendering him vulnerable and at the same time affects his activity in the market. Poorer consumers and undoubtedly elderly people who do fall under the category of vulnerable consumers are often more prone to doorstep selling and should not be deprived of the protection provided under the Directive as a result of the threshold inserted. This to some degree contradicts the purpose of the Directive as that expressed by the Commission, to provide for a high level of

⁵¹³ The page of many goods being sold on eBay expressly states that no returns are accepted.

consumer protection. Consumer protection should be achieved for all and the protection of the Directive should cover at least all doorstep selling instances irrespective of the value of the contract. A threshold could be maintained in relation to the rest of off premises situations, but as regards doorstep selling instances where the consumer encounters traders at his house, the protection of the Directive should perhaps be compulsory.

Article 4 which probably constitutes the most debated provision since the initial proposed version of the Directive was put forward deals with the level of harmonisation. Although the initial proposal provided for maximum harmonisation, the eventual approach is that of targeted full harmonisation which is a combination of maximum harmonisation with some exceptions where there is otherwise provided in the Directive. Maximum harmonisation is accordingly the prevailing approach in almost all respects of the Directive. Two noteworthy examples are the important areas of the right of withdrawal and the various formalities in relation to it as well as information requirements in relation to distance and off-premises contracts that are fully harmonised. In those areas, Member States cannot go beyond what the Directive provides by providing additional protection in their national legislation. However, in relation to certain, although limited, instances Member States can go beyond what the Directive provides. For example, they can extend the application of the Directive to legal persons or even natural persons that are not regarded as consumers within the meaning of it. Member States can provide a lower threshold for low value off premises contracts to which the protection of the Directive will apply. Equally Member States have the opportunity to either maintain or introduce in their national laws language requirements in relation to contractual information and contractual terms. Penalties are also an area that is not fully harmonised and Member States can lay down penalties for infringements of the Directive.

Information Requirements

Chapter II of the Directive deals with consumer Information for contracts other than distance or off-premises contracts which constitute new

requirements have not been part of either Distance or Doorstep Selling Directive. Information requirements and the right of withdrawal for distance and off-premises contracts are covered in Chapter III of the Directive. Information requirements are in more particular found under Article 6 and Article 6(1) contains a list of information that need to be provided in a clear and comprehensible manner to the consumer and which shall form an integral part of the distance or off-premises contract. Article 6 replaces what was before covered by Article 4 of the Distance Selling Directive. As regards Doorstep Selling Directive, no list in relation to information requirements was actually provided. Consumer had to be merely informed about his right to withdraw. While information requirements had not formed an important part of the Doorstep Selling Directive, off premises contracts have now resulted in being governed by an extensive list of information requirements. As it has already been argued, the fact that the two types of contracting which greatly differ in nature were combined in a single piece of legislation but more importantly under the same Article in relation to information requirements is striking. The reason for this is the different sort of information that may be required in each situation or perhaps the more information needed in the instance of distance selling due to its nature.

The list of information under the Distance Selling Directive was considerably narrower and comprised of only 9 different pieces of information while the Consumer Rights Directive has expanded the list to 20. Information requirements under the Consumer Rights Directive include among others the duty on the part of the trader to inform the consumer about the main characteristics of the goods or services, identity of trader, his geographical address and contact information, the total price of goods or services including taxes as well as delivery or postal charges or any other costs. Information regarding the cost, if any, of using the means of distance communication when that is not calculated at the basic rate as well as information regarding payment arrangements, delivery, performance or the trader's complaint handling policy where applicable also have to be provided to the consumer. More importantly, the conditions, time limit and procedures for exercising the right of withdrawal and the model withdrawal form as well as information regarding the costs for returning goods. Where the trader

fails to inform the consumer about additional charges or any other costs that apply, the consumer shall not bear those charges or costs.

The list has evidently been extended which there are doubts as to whether this is really beneficial for consumers⁵¹⁴, it cannot be denied that there are requirements that do go beyond those contained under the previous legislation. A good example is the latter requirement in relation to hidden charges which now expressly frees the consumer of any obligation to pay in such circumstances.⁵¹⁵ However the problem with regard to additional charges and Article 6(1)(e) is where the charges cannot be calculated in advance, the Directive leaves a degree of freedom on the trader to simply state that additional charges may be payable but cannot be calculated. This leaves open the possibility for rogue traders to exploit this provision by expressly stating that additional charges may be payable⁵¹⁶ and once the consumer enters the contract he automatically becomes bound to pay.

Any information regarding the circumstances in which consumer will not benefit from the right of withdrawal or under which circumstances the consumer may lose his right of withdrawal also need to be provided to the consumer. In addition to that, the existence of a legal guarantee in the case of non-conformity goods or any other after sale customer assistance, after-sales services and commercial guarantees. The trader shall also provide the consumer, where applicable, any information regarding the functionality or technical protection measures of digital content or about the possibility of having recourse to an out-of-court complaint and redress mechanism to which the trader is subject and the methods of having access to it.

The provision of adequate information to the consumer has been rested on the assumption that the more information the consumer receives the better he is protected.⁵¹⁷ The provision of information which has constituted a

⁵¹⁴ Luzak, 'Online Consumer Contracts' (n 512) 4.

⁵¹⁵ Hartlapp, Metz and Rauh, *Which Policy for Europe? Power and Conflict inside the European Commission* (n 502) 177.

⁵¹⁶ Annette Nordhausen Scholes, 'Information Requirements' in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Sellier European Law Publishers, 2009) 220.

⁵¹⁷ Micklitz and Reich, 'Cronica De Una Muerte Anunciada: The Commission Proposal for a Directive on Consumer Rights' (n 358) 495.

central element of consumer policy as a means of enhancing consumer protection has been seen as the way to address the information asymmetry between the trader and the consumer which is in this way addressed by giving consumers the means to protect themselves through better informed decisions and choices. However, there are evident limitations to this as consumers either not read in full or do not pay attention to the information provided at all⁵¹⁸. Even in cases where consumers do read information, this does not guarantee that they will respond to rationally.⁵¹⁹ There are limitations regarding the ability of consumers as human beings to process information.⁵²⁰

The potential of information provision to address consumer inequality has been considerably overrated by European legislators and this is yet further exaggerated by the fact that the list has been considerably expanded under the Consumer Rights Directive. Although there has been some improvement with regard to information requirements, the extensive list may nevertheless lead to a situation where consumers are lost in the sea of information. The not insignificant amount of information that is provided to consumers actually overwhelms rather than always helping consumers. Not providing consumers with information is not the option but it is not realistic to expect consumers reading all information provided to them. "Consumers have lives to lead and consumption is only part of their daily routine"⁵²¹ as Howells interestingly notes. This renders it unlikely for consumers to spend adequate time to read and evaluate all information to them. This leads to the situations where consumers may blindly bind themselves to contracts which are ignorant of their terms and conditions which may not even accord to their preferences.⁵²² The extension of the list of information requirements

518 Joasia Luzak, 'Passive Consumers vs the New Online Disclosure Rules of the Consumer Rights Directive' Centre for the Study of European Contract Law Working Paper Series 2/2015, 3 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2553877> accessed 18 April 2016.

519 Howells, 'The Potential and Limits of Consumer Empowerment by Information' (n 498) 349.

520 *ibid* 360.

521 *ibid* 356.

522 Martin Fries and Johanna Stark, 'Buttons, Boxes, Ticks and Trust: On the Narrow Limits of Consumer Choice' (2014) 12 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2412541> accessed 18 April 2016.

may prove to be detrimental upon consumers and the lengthy and perhaps unnecessary pieces of information may adversely affect instead of improve the quality of the consumer's final decision.⁵²³ Consumers may feel overwhelmed and instead of spending time to read through all the information provided, they may on the contrary base their decisions on grounds that are not sound.⁵²⁴

Valuable information for example in relation to the withdrawal right which is perhaps the most valuable piece of information that does make the difference for consumer to know runs in this way the risk of being lost within the sea of information.⁵²⁵ The result may be one of a dysfunction as opposed to the desired outcome expected by the provision of information.⁵²⁶ Although this is not to argue that the provision of information is altogether useless, the potential of this policy tool should not be overestimated and its limitations should be acknowledged.⁵²⁷

There is not much clarity as regards the actual status of information requirements in the contract. Although Recital 5 states that they should form an integral part of the contract, it remains unclear as to what status they will have under the contract. This remains an issue for national laws to determine and it will probably lead to differences in approach between national laws.⁵²⁸ Taking a strict interpretation and treating information requirements as *essentialia negotii*, failure to provide such information or failure to provide them in an appropriate means or at the correct time may lead to the contract not being validly concluded. This has onerous

⁵²³ Luzak, 'Online Consumer Contracts' (n 512) 4.

⁵²⁴ Nordhausen Scholes, 'Information Requirements' in Howells and Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (n 516) 214; Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd edn, Hart Publishing 2012) 59.

⁵²⁵ Micklitz and Reich, 'Cronica De Una Muerte Anunciada: The Commission Proposal for a Directive on Consumer Rights' (n 358) 496.

⁵²⁶ Howells, 'The Potential and Limits of Consumer Empowerment by Information' (n 498) 369.

⁵²⁷ Catherine I Garcia Porras and Willem H Van Boom, 'Information disclosure in the EU Consumer Credit Directive: opportunities and limitations' in James Devenney and Mel Kenny, *Consumer Credit, Debt and Investment in Europe* (Cambridge University Press 2012) 22.

⁵²⁸ Nordhausen Scholes, 'Information Requirements' in Howells and Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (n 516) 223.

consequences for the consumer who may be unable to obtain contract law remedies on the ground that there exists no contract. Although the Consumer Rights Directive makes express reference to the fact that it does not affect Member States contract law, it remains uncertain as to whether Recital 5 and the phrase “integral part” indeed accords to this limitation.⁵²⁹ This may some bring uncertainty as to whether failure on the part of the trader to provide such information will have an effect on the validity of contract.

Further on, as regards the consequences for breaching information requirements are nonetheless not individually addressed under the particular article of the Directive. An important improvement for the consumer’s position can be found in Article 6(6). The particular paragraph provides that where the trader fails to inform the consumer as to the price of the goods or any costs that cannot be calculated in advance as well as where the trader fails to inform the consumer prior to the conclusion of the contract that he will have to bear the cost of returning the goods when by their nature they cannot be returned by post, the consumer shall not bear those charges or costs. This can secure some sort of protection for consumers against rogue traders who may attempt to exploit consumers. As regards, the consequences for breaching Article 6 though, there is no explicit reference made under the particular Article. It is accordingly presumed that Article 24 which deals with the penalties for the infringement of the Directive is therefore applicable. Article 24, which will be discussed in greater detail at a later point, leaves it to Member States to adopt rules on penalties for the infringements of the national provisions implementing the Consumer Rights Directive.

Articles 7 and 8 provide for certain formal requirements in relation to off-premises and distance contracts respectively. Amongst others, Article 7 requires the pre-contractual information in off-premises contracts to be provided either on paper or any other durable medium and should be legible and in plain, intelligible language. A copy of the signed contract or the

⁵²⁹ Nordhausen Scholes, ‘Information Requirements’ in Howells and Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (n 516) 223.

confirmation of the contract on paper or any other durable medium is also required and shall be provided to the consumer within a reasonable time. As regards distance contracts, Article 8 requires information to be in intelligible language and to be made available to the consumer in a way appropriate to the means of distance communication used in a given instance. According to Article 8, so far as information is provided on a durable medium, it shall be legible. In addition, what Article 8 provides is that the obligation to pay as well as the means of payment accepted need to be made clear. Doorstep Selling Directive did not contain a relevant provision which renders Article 7 a considerable improvement. Prior to the adoption of the Consumer Rights Directive, the provision governing the particular issue in relation to distance contracts was Article 5 of the Distance Selling Directive which required the provision of a written confirmation or another durable medium to the consumer in good time and at least at the time of delivery. The improvement made under current Article 8 is that the provision of confirmation to the consumer is saved for the consumer at an earlier point of time.

Article 8 dealing with the provision of information in distance contracts has loosened the duty of the trader to inform the consumer into a duty to reach consumers⁵³⁰ Article 8 provides that the traders shall give or *make the information* contained under Article 6(1) *available* to the consumer.⁵³¹ The trader can thus simply make information available and in this way fulfil his obligation and free himself from any further action. This means it will subsequently rest upon the consumer to engage to some kind of activity in order to access the information. This signifies that protection no longer focuses on the passive consumer but rather on the active consumer and which equates to a reduction in the online disclosure standards. Hyperlinks and ticking off boxes that have been so far provided by traders as a way to comply with their disclosure obligations⁵³² have proved insufficient and

⁵³⁰ Luzak, 'Online Consumer Contracts' (n 512) 7; Luzak, 'Passive Consumers vs the New Online Disclosure Rules of the Consumer Rights (n 518) 3.

⁵³¹ Luzak, 'Online Consumer Contracts' (n 512) 7.

⁵³² Fries and Stark, 'Buttons, Boxes, Ticks and Trust: On the Narrow Limits of Consumer Choice' (n 522) 3.

Article 8 will instead of providing an effective solution, will further this.⁵³³ The only type of add-ons that are addressed under the Consumer Rights Directive are contained in Article 22 and relate to those that impose additional payments upon the consumer which require the express consent of the consumer. The trader cannot in those circumstances infer the consumer's acceptance by using default options which the consumer has to reject in order to avoid extra payments. As regards any other type of information imposing extra conditions on consumers, traders may continue to hide them in complex hyperlinks or add-on windows as there is no express reference in relation to them under the Directive. A provision that would at least require the trader to direct the consumer's attention towards such information could perhaps provide some degree of certainty to consumers in this regard.

Right of Withdrawal

The cooling off period in which a consumer, without giving any reasons for this decision, is able, to exercise his right of withdrawal has been under Article 9 extended to 14 days which constitutes a welcome improvement for consumers as the extended length now exceeds not only the length that was provided under the previous legislation but also that provided by most Member States national laws.⁵³⁴ More importantly, Recital 41 clarifies that this refers to calendar days which also improves consumers' position who will in this way have more time in their disposal to change their mind and withdraw from a distance or an off-premises contract. Enabling the withdrawal in distance and off-premises contracts has been rested on the assumption that the consumer is better positioned after having direct experience with the goods ordered in a distance contract to have second thoughts as well as in a less stressful environment away from the seller in an off premises situation. Article 6 of the Distance Selling Directive provided for at least 7 working days in which the consumer could withdraw from a

⁵³³ Luzak, 'Online Consumer Contracts' Centre for the Study of European Contract Law Working Paper Series 8/2014 (n 512) 7.

⁵³⁴ Hans Schulte-Nölke (ed), Christian Twigg-Flesner and Martin Ebers, 'EC Consumer Law Compendium – Comparative Analysis' (2008) <http://ec.europa.eu/consumers/archive/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf> accessed 19 April 2016.

distance contract while Article 5 of the Doorstep Selling Directive provided for a period of not less than 7 days. In both situations, this period could be extended by the national provisions of Member States. The fact that the length of the cooling off period has been extended and what is more that it has been fully harmonised will bring to an end inconsistencies between the differing levels that have prior to the Consumer Rights Directive existed in national regimes and will consequently remove uncertainty for consumers. It is in addition made clear under Article 9(2) of the Directive that it starts to run from the day of the conclusion of the contract in contracts for the sale of services and in sales contracts when the consumer or a third party, other than the carrier, indicated by the consumer, acquires physical possession of the goods. Also Article 9(2) clarifies situations where multiple goods ordered or where a good consisting of multiple lots or pieces is ordered, it starts to run on the day which the last good or the last lot or piece is acquired. It cannot be denied that the right of withdrawal constitutes an effective remedy in cases of asymmetry of information. However the problem with consumers' reluctance to use it should not be disregarded.⁵³⁵

Article 10 which deals with the situation where the trader fails to provide consumer with the information on the right of withdrawal, it is stipulated that the withdrawal period shall expire 12 months from the end of the initial period. However, if the trader has provided the consumer with the information provided within 12 months from the day that the withdrawal period expires, then the withdrawal shall expire 14 days after the day upon which the consumer receives the relevant information. Under Distance and Doorstep Selling Directives, the withdrawal period was extended to 3 months and the fact that the Consumer Rights Directive extended it to 12 months makes it a considerable improvement in terms of consumer protection.

Although there was no express provision in relation to the formalities for the exercise of the right of withdrawal, Article 11 now deals with this issue by providing that the consumer may either use the model withdrawal form - to which Member States shall not add any formal requirements other than

⁵³⁵ Cseres, 'Consumer Protection in the European Union' in Van Den Bergh and Paccès, *Regulation and Economics* (n 497) 182.

those set out- to withdraw from the contract or may make any other unequivocal statement setting out his decision to withdraw from the contract. There is also the possibility for the trader to give the option to the consumer to electronically fill in and submit either the model withdrawal form or any other unequivocal statement on the trader's website. The fact that there is not a single and definite option may lead to some confusion for consumers but more importantly what could be emphasised in relation to the standard withdrawal form is that it will not be a significant contribution for inexperienced consumers who may exercise their right to withdraw from a contract by merely returning the goods to the trader or by exercising their right in a verbal form.⁵³⁶ This again leads back to the position of vulnerable consumers with inexperienced consumers, a special category falling under the umbrella of vulnerable consumers. The question posed is whether the introduction of the withdrawal form, being a limitation, is a necessary step that had to be made⁵³⁷ or whether it constitutes another measure of ensuring greater certainty for traders.

Article 12 refers to the effects of withdrawal and states that the parties are freed from their obligations under the contract or to conclude the contract where an offer was made by the consumer. Renunciation was according to Doorstep Selling Directive to be governed by national laws while Distance Selling Directive made no reference to the issue. One could perhaps argue that this constitutes an unnecessary provision as this constitutes a reasonable and an inevitable consequence. This observation as well as the fact that the right of withdrawal which was prior the Consumer Rights Directive covered by only one provision has now been replaced by a whole section comprising of 8 different provisions signify an evident approach to include every aspect in relation to the right to withdraw under the Directive.

Further on, Article 13 refers to the obligations of the trader in the event of withdrawal. Particularly, the trader has to reimburse all the payments received from the consumer including, if applicable, the costs of delivery, by

⁵³⁶ Reiner Schulze and Jonathan Morgan, 'The Right of Withdrawal' in Gerhard Dannemann and Stefan Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford University Press 2013) 20.

⁵³⁷ *ibid* 20.

using the same means of payment as the consumer used without delay and not later than 14 days from the day on which the trader has been informed of the consumer's decision to withdraw. Although, reimbursement was left by Doorstep Selling Directive to national laws, Article 6 of the Distance Selling Directive required traders to make reimbursement as soon as possible and within 30 days. Accordingly, the fact that the period has been reduced to 14 days means that consumers have the possibility to receive their money back within a shorter period of time. In cases where the consumer has asked for a type of delivery other than the least expensive type of standard delivery offered by the trader, the trader has no obligation to reimburse such supplementary costs. The trader may withhold reimbursement until he has received the goods back or until the consumer has supplied evidence of having sent back the goods.

On the contrary, Article 14 enumerates the obligations of the consumer in the event of withdrawal. The consumer shall send back the goods or hand them over to the trader or to a person authorised by the trader to receive the goods without undue delay and not later than 14 days from the day on which he has communicated his decision to withdraw. When exercising his right of withdrawal, the consumer according to Article 14 shall only bear the cost of returning goods unless the trader has agreed to bear them or the trader failed to inform the consumer that the consumer has to bear them, a provision which does not differ from the relevant provision of Distance Selling Directive, particularly Article 6. The consumer shall only be liable for any diminished value of the goods resulting from the handling of the goods other than what is necessary to establish the nature, characteristics and functioning of the goods but shall not be liable for any diminished value of the goods where the trader has failed to provide notice of the right of withdrawal. This constitutes a newly inserted provision which was not contained under either Distance Selling Directive or Doorstep Selling Directive. The purpose of this provision is twofold, on the one hand to prevent the situation where consumers might indiscriminately make use of their withdrawal right to the detriment of traders and at the same time it evidently protects the interests and position of trader. However, it should not

be disregarded that the task of drawing the line as to the use that is necessary to simply establish the nature of the goods is a difficult one.

In the case of digital content, the consumer shall not bear the cost of supply, either in full or in part, of digital content which is not supplied on a tangible medium where the consumer has not given his prior express consent to the beginning of the performance before the end of the 14 day withdrawal period, the consumer has not acknowledged that he loses his right of withdrawal when giving his consent. Digital content is also covered Recital 19 which provides further clarification in relation to digital content which is finally included within the scope of the Directive and the right of withdrawal. Consumer enjoys the right of withdrawal unless the consumer has consented to the beginning of the performance of the contract during the withdrawal period and has acknowledged that he will consequently lose the right to withdraw from the contract. In addition to general information requirements, the trader should inform the consumer about the functionality and the relevant interoperability of digital content. Although those constitute considerable improvements from the consumer protection perspective, they were nevertheless not included from the early beginning when the proposed version of the Consumer Rights Directive was brought forward.

As regards penalties for failure on the part of the trader or the consumer to fulfil the obligations relating to exercise of the right of withdrawal will according to Recital 48 be determined by national law. Equally to the infringement of information requirements, it is presumed that this is additionally covered by Article 24 which generally deals with the infringements of the Directive.

Article 15 clarifies that any ancillary contracts are terminated once the right of withdrawal is exercised while Article 16 contains a list of exceptions from the right of withdrawal. Although there was no respective under Doorstep Selling Directive in relation to exceptions, Article 3 of the Distance Selling Directive provided for 5 exceptions to the right of withdrawal. However the Consumer Rights Directive has added to this list by including 13 different situations in which the right of withdrawal does not apply. Not all of the exceptions contained under Article 16 will be examined and while some of

them can be regarded as reasonable, a number of them should be questioned from the perspective of consumer protection. For example, according to Article 16, consumers cannot withdraw from contracts for the supply of goods made to the consumer's specifications or clearly personalised. Those goods are not subject to the right to withdraw due to the inability of the trader to resell them. However, regard should in this instance be paid to the fact that especially in distance contracts the consumer acquires actual knowledge of the real nature of a good when he receives it for this reason there may be situations where the good ordered at the consumer's specification may not accord to what has the consumer expected. However, this is not such a straightforward issue as consumers could in this way exploit their right and could withdraw with great ease with such products once they were not fully satisfied with the personalised goods received. In exceptional circumstances where the goods are not in conformity with what has been presented, withdrawal could be allowed. In addition, consumers cannot withdraw from contracts for the supply of sealed audio or sealed video recordings or sealed computer software which were unsealed after delivery as well as from contracts for the supply of digital content which is not supplied on a tangible medium if the performance has begun with the consumer's prior express consent and his acknowledgement that he thereby loses his right of withdrawal.

Other Consumer Rights

Chapter IV dealing with other rights that consumer enjoy in distance and off premises contracts by providing general clarifications as to the scope of the Directive, in relation to delivery, fees for the use of means of payment and any additional payments as well as in relation to communication by telephone between the parties. Article 18 determines that, unless the parties have agreed otherwise, the trader shall deliver the goods by transferring the physical possession or control of the goods to the consumer without undue delay but not later than 30 days from the conclusion of the contract. It is additionally provided that if the trader fails to fulfil his obligation to deliver the goods within the time or agreed or within the 30 days period, the consumer shall call upon him to make the delivery within an additional period of time appropriate to the circumstances. If the trader fails again, the

consumer shall be entitled to terminate the contract and the trader shall without undue delay reimburse all sums paid under the contract. In addition to the termination of the contract, the consumer may also have recourse to other remedies provided for by national law, also referred to in Recital 53, and which together constitute another example where remedies have been left to national law. However, remedies could perhaps have been one of the areas where some uniformity would be advantageous for consumers as what consumers care about after all is what they will get in the end. What could also be highlighted at this point is the fact that there is not automatic termination available provides a second chance for traders to restore their position but at the same time results in undue delay where consumers have to wait long to acquire their goods.

Article 19 provides that Member States shall prohibit traders from charging consumers in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of such means. Further on, Article 20 deals with the passing of risk by clarifying that where the trader dispatches the goods to the consumer, the risk of loss or damage to the goods passed to the consumer when he or a third party indicated by the consumer, other than the carrier, has acquired the physical possession of the goods. However, the risk is passed to the consumer upon delivery to the carrier if the carrier was commissioned by the consumer to carry the goods and this option was not offered by the trader. In addition, Article 21 provides that Member States need to ensure that where the trader operates a telephone line for the purpose of contracting him by telephone in relation to the contract concluded, the consumer is not bound to pay more than the basic rate when contacting the trader. Both Article 20 and 21 contain welcome improvements and while the former clarifies a long-standing uncertainty in relation to the passing of risk, the latter can protect consumers against traders who might have exploited consumers by imposing additional unreasonable charges in the given instance.

General Provisions

Chapter V of the Consumer Rights Directive contains general provisions in relation to enforcement which is provided under Article 23 as well as in

relation to the imperative nature of the Directive under Article 25. As regards penalties, , Article 24 provides Member States shall lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and penalties adopted must be effective, proportionate and dissuasive. However, no further reference is made in the Directive regarding any suitable penalties even for certain infringements of the Directive. The particular Chapter also includes Article 26 which provides that Member States shall take appropriate measures to inform consumers and traders about the national provisions transposing the Directive however it does not make any further reference as to what measures suffice for these purposes. According to Article 28, Member States shall adopt and publish by 13 December 2013 the laws, regulations and administrative provisions necessary to comply with this Directive and they shall apply those measures from 13 June 2014.

The final chapter, Chapter IV, clarifies that the Directive repeals Directive 85/577/EEC on Doorstep Selling and Directive 97/7/EC on Distance Selling while Articles 32 and 33 include certain slight amendments to Directive 93/13/EEC on Unfair Contract Terms and to Directive 1999/44/EC on Consumer Sales and Guarantees.

Discussion of the Consumer Rights Directive approach

The consumer envisaged under EU Consumer policy, is an observant and circumspect consumer, an active information seeker⁵³⁸ who has all required skills and expertise, willingness to shop across border as well as resources and the provision of the appropriate information will enable him to make a right and informed decision.⁵³⁹ This approach is also clearly reflected in the Consumer Rights Directive itself. The provisions of the Directive deal with all issues that actually facilitate the conclusion of distance, and primarily online, purchases. That is too much emphasis has in fact been given on providing consumers firm grounds which will facilitate their decision

⁵³⁸ Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (n 524) 34.

⁵³⁹ Lisa Waddington, 'Vulnerable and Confused: The Protection of "Vulnerable" Consumers under EU Law' (2013) 38(6) *European Law Review* 757, 763.

making.⁵⁴⁰ Not only this approach fails to provide protection to all European consumers but in essence portrays the real focus of European Consumer Law and the wider objectives that are sought.

The argument made in this thesis does not seek to deny the importance of providing consumers with information altogether. There is on the contrary an attempt to draw together a number of concerns in relation to the approach that the Consumer Rights Directive follows which primarily relies on the information paradigm. Concerns in relation to this approach have been repeatedly expressed with Annette Nordhausen Scholes questioning as to whether this is the appropriate approach to improve consumer protection.⁵⁴¹ The answer to this question is that too much reliance on the informational approach does not actually fit within the aim of improving consumer protection and its potential to help all consumers is rather limited.

⁵⁴²

The informational paradigm points towards a change in approach, while consumer protection has been seen as an intervention to deal with power imbalances between the consumer and the trader it has in the context of European law and under the particular directive turned into an intervention aiming to address informational asymmetries. Information imbalances between the consumer and the trader are thus seen as the source of market failures which is actually not the case. Relying on the information paradigm in fact equates to contemplating exogenous factors as being central the aspects of consumer's decision making.⁵⁴³ Nonetheless, as Chapter 5 has shown, there is a range of wider factors that do exert influence on consumer's decision making. Consumer behaviour has thrown light upon the fact that disclosure of information is not a highly valued factor by consumers. Consumers who have lower income are not expected to greatly benefit from the disclosure of information. Due to their limited resources,

⁵⁴⁰ Fries and Stark, 'Buttons, Boxes, Ticks and Trust: On the Narrow Limits of Consumer Choice' (n 522) 2.

⁵⁴¹ Nordhausen Scholes, 'Information Requirements' in Howells and Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (n 516) 214.

⁵⁴² *ibid.*

⁵⁴³ Cseres, 'Consumer Protection in the European Union' in Van Den Bergh and Paccès, *Regulation and Economics* (n 497) 167.

they are likely to confine themselves to pattern of shopping that they feel sure about⁵⁴⁴ as experimenting with new products perhaps available at the internet is not option due to the risks involved.

Increased reliance on the information paradigm should accordingly be treated with caution⁵⁴⁵ due to its evident limitations that have already been referred to in this Chapter. The possibility of consumers not understanding or perhaps not even reading information it remains, as it has been seen, open.⁵⁴⁶ This is an activity that requires both time and energy and given the busy lives that consumers lead reading through all pieces of information may not be feasible. Consumers have blindly ticked off numerous boxes in their lives in order to complete an online purchase in the rush without any awareness as to what they agree to.⁵⁴⁷ The excessive reliance being placed upon information disclosure by European legislators is indeed worsened by the overburdening of consumers with information and reasonably raises concerns as to the effectiveness of this approach.

The information paradigm constitutes a technique that is in fact directed at certain categories of consumers as information are an important tool in the hands of the rational market participant who is conscious of his needs and who can by making use of the information be the best positioned to satisfy those needs.⁵⁴⁸ This is not the case for all pieces of information that are contained under the Directive. For example, information in relation to the main characteristics of the products as well as details regarding the price and how the price is actually calculated cannot be regarded as information aimed to reach the well informed, observant and circumspect consumer.⁵⁴⁹ Those are rather vital pieces of information which the consumer needs in order to make an informed purchase by knowing what exactly his buying as

⁵⁴⁴ Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (n 524) 102.

⁵⁴⁵ Howells and Wilhelmsson, 'EC Consumer law: has it come of age?' (n 504) 370.

⁵⁴⁶ Luzak, 'Online Consumer Contracts' (n 512) 4; Luzak, 'Passive Consumers vs the New Online Disclosure Rules of the Consumer Rights Directive' (n 518) 3.

⁵⁴⁷ Fries and Stark, 'Buttons, Boxes, Ticks and Trust: On the Narrow Limits of Consumer Choice' (n 522) 3.

⁵⁴⁸ Cseres, 'Consumer Protection in the European Union' in Van Den Bergh and Paccas, *Regulation and Economics* (n 497) 170.

⁵⁴⁹ Nordhausen Scholes, 'Information Requirements' in Howells and Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (n 516) 219.

well as to be in position to make a comparison respectively.⁵⁵⁰ This further confirms the type of consumer upon which the European Commission seems to be focused and the success of such a technique thus may reasonably be questioned in the case of less-alert consumers while it becomes even more problematic in the case of vulnerable consumers where it does not seem to function at all.⁵⁵¹

The information paradigm is proof of the fact that the European Consumer Law has more or less focused on a standard model of consumer, on the average consumer who is presumed to take note of all information provided but more importantly who can rationally process it. Consumers have perhaps been too optimistically conceived as being above the average, well-informed, observant and circumspect. However, the cognitive ability of consumers does differ between them and should not be taken for granted. The mass of consumers is an heterogeneous one which renders it uncertain as to whether the provision of information can be always effective, especially for vulnerable consumers.⁵⁵²

While the Preamble and in particular Recital 34 acknowledges the possibility of some kind of vulnerability in the form of specific needs that a consumer may have because of some mental, physical, psychological infirmity or due to its age or credulity, which the trader has to take into account, the same Recital makes clear that this should not lead to different levels of consumer protection. This is not just a clear recognition that this will not provide further protection, perhaps in the form of lenient obligations or special provisions for vulnerable consumers but at the same time it deprives Member States the opportunity to provide specific legislation and thus provide further protection for vulnerable consumers.⁵⁵³ There has been not even been the slightest attempt to deal with the position of vulnerable consumers by for example

⁵⁵⁰ *ibid.*

⁵⁵¹ Waddington, 'Vulnerable and Confused: The Protection of "Vulnerable" Consumers under EU Law' (n 539) 776.

⁵⁵² Garcia Porras and Van Boom, 'Information disclosure in the EU Consumer Credit Directive: opportunities and limitations' in Devenney and Kenny, *Consumer Credit, Debt and Investment in Europe* (n 527) 21.

⁵⁵³ Waddington, 'Vulnerable and Confused: The Protection of "Vulnerable" Consumers under EU Law' (n 539) 767.

indicating what are the different circumstances giving rise to vulnerability, and not even an attempt to provide minimum special safeguards in the form of targeted responses that have the power to either eliminate or limit to some extent vulnerability.⁵⁵⁴ Failure to distinguish between the various categories of consumers or at least to provide some further guidance regarding the extent and cause of their vulnerability may result in vulnerable consumers being under-protected.⁵⁵⁵ A consumer may for example face difficulties in processing information which subsequently raises the question as to what alternative remedy, given the importance being placed upon the provision of information, can enable vulnerable consumers to make their own informed choices.⁵⁵⁶

Generally under EU law there is minimal reference to specific protection for vulnerable consumers and the protection of the weak and vulnerable consumers has never been high in the Community agenda⁵⁵⁷ and thus a priority for EU legislators. Reference to vulnerable consumers exists, as in the case of the Consumer Rights Directive, only in non-binding preambles⁵⁵⁸ which poses questions to whether such reference is capable to provide additional protection to them. A single reference to vulnerable consumers as in the case of the Consumer Rights Directive is unlikely to be particularly effective in order to provide with adequate safeguards. Full harmonisation would be impaired had greater protection been provided to consumers and had traders been required to differentiate between consumers in order to treat them based on their individual abilities.⁵⁵⁹ Such an approach would automatically mean extra standards for traders to meet when wishing to enter a national market which would undermine the very purpose of the internal market. EU legislation has proved that there is no scope and no

⁵⁵⁴ Waddington, 'Vulnerable and Confused: The Protection of "Vulnerable" Consumers under EU Law' (n 539) 773.

⁵⁵⁵ Cseres, 'Consumer Protection in the European Union' in Van Den Bergh and Paccès, *Regulation and Economics* (n 497) 174.

⁵⁵⁶ *ibid.*

⁵⁵⁷ Howells and Wilhelmsson, 'EC Consumer law: has it come of age?' (n 504) 381.

⁵⁵⁸ Waddington, 'Vulnerable and Confused: The Protection of "Vulnerable" Consumers under EU Law' (n 539) 765.

⁵⁵⁹ *ibid* 767.

willingness to turn into a social regulation⁵⁶⁰ by raising, instead of removing, barriers within the internal market. The needs of vulnerable consumers come in second place with the needs of the market predominating over them. The weakest consumers are not those in need of protection in their internal market and this is due to their inability to aid in its completion while on the other hand it is the confident, well-informed and empowered consumer perfectly fits with the wider and primary objective of having a perfect internal market in place.⁵⁶¹

However, despite the fact that EU takes a superficial approach towards vulnerability, it is important to note that consumers, as human beings, are all to a certain degree vulnerable especially in distance selling. What should also not be disregarded is that vulnerability is not only a consequence of some personal conditions that a consumer may have but more importantly it can arise as a result of someone losing his job or becoming someone else's carer which lead to economic constrains. It is accordingly a "fluid state" as it has been characterised and which may arise in any consumer's life at some point due to certain events.⁵⁶² Although low income and affordability are rather critical issues which cannot be addressed through legislation, the situation of vulnerable consumers being faced with lengthy and complex information and at the same time traders being free of further obligations is an issue that could be addressed through legislation. The task of following an effective approach towards consumer vulnerability nevertheless constitutes a significant challenge for legislators. At the same time, it is of utmost importance given the purpose of protecting consumers' interests at large if they wish to successfully perform their duties as envisaged in legislating within the area of consumer protection.

The average consumer constitutes a central theme under the relevant EU legislative measures. However this one size fits all approach is not effective

⁵⁶⁰ *ibid* 774.

⁵⁶¹ Stephen Weatherill, 'Justifying Limits to Party Autonomy in the Internal Market – EC Legislation in the Field of Consumer Protection' in Stefan Grundmann, Wolfgang Kerber and Stephen Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (de Gruyter 2001) 184

⁵⁶² Waddington, 'Vulnerable and Confused: The Protection of "Vulnerable" Consumers under EU Law' (n 539) 780.

to provide protection for and thus lead to a general increase in consumer confidence. What this means is that the EU measures aim at increasing the confidence of consumers that are already confident while it remains to be seen how the confidence of vulnerable consumers can be boosted. But the European market is need of more above the average consumers and it is questionable as to whether vulnerability will gain considerable ground at the EU level. Information obligations have been considerably elaborated under the Consumer Rights Directive⁵⁶³ and any improvement that has been achieved may be lost as a result of the wide ambit provided. Greater skills and efforts will be required from consumers to deal with all pieces of information provided which is for the time being questionable whether this is a real possibility.

Although the effectiveness and success of information disclosure has not so far been proven⁵⁶⁴ and although it fails to protect all European consumers and especially the weaker ones, this continues to be the preferred approach at the European level. What should also not be regarded is that businesses do have incentives to disclose information as this frees them from any further obligation and possible liability.⁵⁶⁵ The more information the traders provide to consumers prior to the conclusion of a contract, the more protected he is against possible claims of consumers arguing that they have not been sufficiently informed before entering into a particular contract. Information requirements that existed under the different national laws of Member States have been regarded as barriers to trade as traders had to comply with specific national obligations in order to enter a national market.⁵⁶⁶ In this line of argument, it follows that providing maximum harmonisation of information requirements can make cross border trading and generally trading for businesses, particularly those engaged in the online sector, not only more safe but also easier and more predictable. It will

⁵⁶³ Nordhausen Scholes, 'Information Requirements' in Howells and Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (n 516) 213-14.

⁵⁶⁴ Howells and Wilhelmsson, 'EC Consumer law: has it come of age?' (n 504) 370.

⁵⁶⁵ Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (n 524) 100.

⁵⁶⁶ Directorate-General for Internal Policies – Policy Department C: Citizens' Rights and Constitutional Affairs, 'Extent of Harmonisation in Consumer Contract Law' Note (2010) PE 432.728, 23

be far more beneficial for traders to rely on a single standard for trading across the EU who will in this way feel more confident by know that once they have provided all required information, the possibility of consumers bringing claims against them that they have not been provided with certain information will be considerably low. Traders, in an effort to comply with their disclosure obligations, have so far provided for consumers a massive load of terms in small prints and all found under small boxes⁵⁶⁷ which the consumer has to tick as a proof that he has read them.

Conclusion

The current chapter has enumerated the main provisions of the Consumer Rights Directive as well as the approach reflected therein. What could accordingly been argued is that the prevailing techniques used by the European legislators has a limited potential to provide an all embracing and adequate protection for all consumers. What could be maintained is that the Commission has made an attempt to secure the adoption of a piece of legislation touching details in relation to distance and off premises contracts without major changes from a consumer protection perspective. Through information disclosure and the right of withdrawal forming the major rights available to consumers the Commission seems to be focusing on empowering the ideal market participant.⁵⁶⁸ However, as it has been argued, his existence should not be taken for granted and expecting that all consumers will reap the benefits of the internal market is an illusion upon which the Commission has developed the Consumer Rights Directive. In the same line of arguments, the Consumer Rights Directive seems to constitute a piece of legislation that traders and the most powerful consumers can benefit from.

Not only the information requirements provided and the right of withdrawal signify the presence of an ideal consumer but generally the whole idea and aim of increasing consumers' confidence do not in itself envisage vulnerable

⁵⁶⁷ Fries and Stark, 'Buttons, Boxes, Ticks and Trust: On the Narrow Limits of Consumer Choice' (n 522) 4.

⁵⁶⁸ Micklitz, 'What Does Consumer Law Reveal About The Nature Of The EU?' in Jones, Menon and Weatherill (eds), *The Oxford Handbook of the European Union* (n 29), 529.

consumers at all. The primary purpose of the Commission has been to make cross border trading appealing by providing a regime that safeguards traders' interests and provides some basics for the most powerful consumers. However, a piece of legislation aiming at consumer protection should more than that and the Consumer Rights Directive should be a piece of legislation that does not merely update the previous legislation but it should address issues that consumers are really concerned with. Europe has focused on market regulation rather than social regulation, consumers only matter and are important for the role they play in the market.⁵⁶⁹

The eventual approach and techniques contained under the Consumer Rights Directive aiming at helping consumers to make informed choices indicate how consumer is viewed as a "specific market participant" who more particularly has specific needs and interests.⁵⁷⁰ Consumers are thus important only to the extent they contribute towards completing the internal market.⁵⁷¹ Even if the Commission still advocates for the need to provide a high level of consumer protection to consumers, the emphasis has in essence shifted from protecting consumers towards empowering consumers.⁵⁷² The information paradigm, upon which the Consumer Rights Directive is primarily based, is live evidence for this and also portrays how the informed consumer constitutes a central and recurring idea within the EC Consumer policy.⁵⁷³ However this fundamental change in the EU approach raises questions as to how acceptable is that in the particular area which should aim at providing protection for all, even the weakest in the society.⁵⁷⁴

⁵⁶⁹ Micklitz, 'What Does Consumer Law Reveal About The Nature Of The EU?' in Jones, Menon and Weatherill (eds), *The Oxford Handbook of the European Union* (n 29) 529.

⁵⁷⁰ Hartlapp, Metz and Rauh, *Which Policy for Europe? Power and Conflict inside the European Commission* (n 502) 179-80.

⁵⁷¹ Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in Civil Law – A Bittersweet Polemic' (n 501) 3, 7.

⁵⁷² Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in Civil Law – A Bittersweet Polemic' (n 501) 7; Fries and Stark, 'Buttons, Boxes, Ticks and Trust: On the Narrow Limits of Consumer Choice' (n 522).

⁵⁷³ Weatherill, 'Justifying Limits to Party Autonomy in the Internal Market – EC Legislation in the Field of Consumer Protection' in Grundmann, Kerber and Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (n 561) 184.

⁵⁷⁴ Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in Civil Law – A Bittersweet Polemic' (n 501) 1.

The Consumer Rights Directive has accordingly been focused on enabling consumers make an informed choice without providing actual protective rights. This nevertheless forms part of the wider reorientation that European Consumer law has been subjected to.⁵⁷⁵ With consideration to the limitations and concerns of the informational approach in general and its evident little ability to protect consumers that are below the average standard, the question turns to the question whether European consumers need more protective rules in the form of minimum harmonisation to protect as opposed to extensive information requirements.⁵⁷⁶ The ultimate question posed is whether this approach is capable of achieving the aim of improving consumer protection at all. The fact that the focus of the Consumer Rights Directive and of the European Consumer Law in general has shifted on a standard consumer who is empowered, circumspect, omnipotent, is not in line with the needs and abilities of vulnerable consumers at all. The weak and disadvantaged consumer is not the one in need of protection at the EU level as this would go contrary to the objectives of the internal market.⁵⁷⁷ The purpose of completing the internal market cannot be attained with too much focus being put on weak consumers⁵⁷⁸ but it is rather the active, informed and omnipotent that can aid in achieving this purpose.⁵⁷⁹ The overall conclusion arising from considering the Consumer Rights is not to deny the fact that some improvements have indeed been achieved but rather that it should be treated with caution. It is perhaps not the solution that European actors, including the European Consumer Commissioner Meglena Kuneva, have been talking about and its limitations should accordingly be acknowledged.

⁵⁷⁵ Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in Civil Law – A Bittersweet Polemic' (n 501) 7.

⁵⁷⁶ Fries and Stark, 'Buttons, Boxes, Ticks and Trust: On the Narrow Limits of Consumer Choice' (n 522) 13.

⁵⁷⁷ Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in Civil Law – A Bittersweet Polemic' (n 501) 7.

⁵⁷⁸ Waddington, 'Vulnerable and Confused: The Protection of "Vulnerable" Consumers under EU Law' (n 539) 772.

⁵⁷⁹ Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in Civil Law – A Bittersweet Polemic' (n 501) 7.

Chapter 7 – The transposition of the Directive into the UK and Cypriot Regimes

Introduction

This Chapter focuses on the transposition of the Consumer Rights Directive in order to test the main hypothesis of this thesis. This Chapter determines the effect of the directive in practice and what it really achieves through examining its transposition into the domestic regimes of UK and Cyprus by further showing how increasing consumer confidence through providing a high level of consumer protection has been no more than a smokescreen. The comparison between the transposition of the Directive in the two regimes not only provides an opportunity to test whether the concerns already voiced in this thesis as to the real focus of European Consumer Law may be well justified but also sheds light upon the differences in approach between the two Member States and what lessons there are to learn from these.

While the proposed Consumer Rights Directive was ambitiously brought forward to increase consumer's confidence in cross border trade, as this Chapter will show the Directive in its final form failed for two reasons. First of all, despite some improvements, there has been no major increase in consumer protection. This contradicts the ambitious statements made by European actors such as Meglena Kuneva who had been the European Commissioner on Consumer Protection for the period of 2007-2010 has made. In her speech at the French Presidency Conference in Paris⁵⁸⁰, she characterized the Directive as “the most far reaching overhaul of consumer rights in 30 years.” Secondly, the final version of the Consumer Rights

⁵⁸⁰ Meglena Kuneva, 'Proposal for a Directive on Consumer Rights' (French Presidency Conference "What Kind of Protection for European Consumers?", Paris, 5 December 2008) <http://europa.eu/rapid/press-release_SPEECH-08-681_en.htm> accessed 19 April 2016.

Directive has even failed in meeting the Commission's objectives and the breaks that were put on the Commission have resulted in the Directive being a major compromise. It is however important to consider not simply the results of the Directive as adopted but also the sweeping consequences that the proposed Directive would have had in its original form which show how the emphasis was from the beginning wrong or to better put it, "misplaced". The fact that the scope of the Directive was considerably narrowed down has prevented a reduction to the level of consumer protection and also the moral panic created around consumer confidence from taking its full effect. However this does not mean that the Consumer Rights Directive can still be regarded as a success.

The Directive as finally adopted does not of course pose the same problems due to the fact that its scope was considerably narrowed down.⁵⁸¹ However, its transposition into the domestic regimes of UK and Cyprus and particularly paying regard to the method and process involved in relation to each Member State in the first part of this Chapter can help to throw light upon deeper issues involved as well as to draw some further conclusions. As this part will show the directive was easily transposed in the case of Cyprus while this was not the case for the UK regime. Not only a number of concerns emerged in the case of the UK transposition, but in addition the UK Government considered it important to provide their own approach where that was possible in transposing the Directive as will become apparent through assessing the changes achieved. The purpose of the first part of this chapter is to show how the final Directive does not achieve much and fails to bring an overhaul for consumer protection – however honest that objective has been. On the other hand, the second part will examine in what respects the proposed Directive would have affected the UK and Cypriot regime. Although the final version constitutes a major compromise which in no way achieves the Commission's "actual" objective to perhaps provide lenient, or "convenient" standards for traders, the effect of the initial proposal

⁵⁸¹ Aonghus McClafferty, 'Effective Protection for the E-Consumer in light of the Consumer Rights Directive?' (2012) 11 *Hibernian LJ* 85, 111.

which has fortunately been avoided, cannot be disregarded. This provides an opportunity to unveil some further issues emerging from the approaches of the two Member States.

Part One - The transposition Of the Directive

Member States are under no obligation to copy out the exact wording of directives but they need to ensure that national provisions implementing directives achieve the desired result.⁵⁸² The copy out technique, as its name suggest, involves the implementation of a directive by either strictly following or mirroring its wording as closely as possible.⁵⁸³ Although the wording of Directives indeed leaves some scope for national implementation, it is in most instances the case for Member States to use the copy out technique. As Martijn W Hesselink has argued the advantage of the copy out is that it makes the transposed law more visible rather than letting it disappear into national legislation and it can in this way be more easily determined that the result desired by the directive has been achieved.⁵⁸⁴ The reason behind this is because it constitutes the safest route for Members States as it minimises the risks involved in the transposition⁵⁸⁵ such as for example ending up with faulty transposition. Evidently this ensures the avoidance of conflicts with the Directive⁵⁸⁶ that is being transposed. At the same time, it also constitutes an effective way to confine any further “cross-infection” of a Member State’s national legal order by European law.⁵⁸⁷ Member States may prefer to transpose a directive using the copy out technique in order to

⁵⁸² Paula Giliker, ‘The Transposition of the Consumer Rights Directive into UK law: Implementing a maximum harmonisation directive’ (2014) 5

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2523330> accessed 19 April 2016.

⁵⁸³ Cabinet Office, ‘Transposition guide: how to implement European directives effectively’ (March 2005) 15 <<https://www.bipsolutions.com/docstore/pdf/9863.pdf>> accessed 19 April 2016.

⁵⁸⁴ Giliker, ‘The Transposition of the Consumer Rights Directive into UK law: Implementing a maximum harmonisation directive’ (n 582) 5.

⁵⁸⁵ Cabinet Office, ‘Transposition guide: how to implement European directives effectively’ (March 2005) 16 <<https://www.bipsolutions.com/docstore/pdf/9863.pdf>> accessed 19 April 2016.

⁵⁸⁶ Ian McLeod, *Legal Method* (9th edn, Palgrave Macmillan 2013) 300.

⁵⁸⁷ Giliker, ‘The Transposition of the Consumer Rights Directive into UK law: Implementing a maximum harmonisation directive’ (n 582) 8.

prevent the large number of European initiatives from being amalgamated with national legislation which makes it difficult to distinguish but which also has a greater effect for national traditions. Given the legislative hyperactivity of the European Union⁵⁸⁸ in the form of Directives, this becomes even more understandable as implementing directives into national law is a costly and timely process. National Parliaments would otherwise struggle to keep up with the number of European Directives especially when choosing to depart from the copy out technique which requires extra work from national legislators.

Cyprus has employed the copy out technique for the transposition of the Directive by simply reproducing it in the Greek language. Cyprus has simply transposed the Consumer Rights Directive in its domestic law with no actual changes and departures from it. The Consumer Rights Law of 2013 has replaced The Law for Consumer Contracts Concluded Away from Business Premises of 2000 and The Law for the Conclusion of Consumer Distance Contracts of 2000. However, the fact that the Cypriot transposition has followed the copy out technique and the particular approach can hardly be attributed to reasons such as limiting the cross contamination of the Cypriot legal regime by European law or as a way to cope with European initiatives. Cyprus did not show any resentment to European initiatives and has since its accession to the European Union, worked hard to conform to European legislation⁵⁸⁹ and has impliedly accepted the fact that consumer policy at the European level is a necessary adjunct to the internal market.⁵⁹⁰ Cyprus is perhaps among those Member States that have showed their trust in the European approach and which have also exhibited an evident willingness to transpose European legislation.

Cyprus constitutes a monist system and monist systems, contrary to dualist systems, are characterised by a unitary perception which views international

⁵⁸⁸ Gerhard Dannemann and Stefan Vogenauer, *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford University Press 2013) 312.

⁵⁸⁹ Chrysthia Papacleovoulou, 'Cyprus Consumer Protection' in Dennis Campbell (ed), *International Consumer Protection* (2nd edn, Juris Publishing 2012)

⁵⁹⁰ As Chrysthia Papacleovoulou, a Cypriot legal academic, supports. Papacleovoulou, 'Cyprus Consumer Protection' in Dennis Campbell (ed), *International Consumer Protection* (n 589) 3.

and national law as being part of the same legal order.⁵⁹¹ International law resources, in the current situation European law, are placed at the same level with or even above their national legislation.⁵⁹² Monist systems may even acknowledge international law as being superior to national law.⁵⁹³ In the case of Cyprus, the Supremacy of EU Law over the Cyprus Law was determined in 2006 with the 5th Amendment of the Constitution Law Number 127(I) 2006. In addition, with the adoption of the European Union (ratifying) Law Number 2003, Cyprus is under an obligation to uphold and implement EU Law. Although all Member States have to presumably conform to European legislation, it could be argued that monist systems do exhibit a greater degree of susceptibility towards sources of international law and that may be one of the reasons the transposition of the Directive gives rise to some differences between the two Member States. EU Law is in Cyprus regarded as supreme and according to Chrysthia Papacleovoulou this influences the field of consumer protection as well. To her view, it comes as no surprise that Cypriot laws in relation to consumer protection are guided by the European approach.⁵⁹⁴ It is accordingly not surprising that Cyprus uses the copy out technique to transpose European directives, including the Consumer Rights Directive. For Cyprus, the copy out technique is perhaps the most suitable approach to transpose European legislation and achieve the best possible result. Their preference to the copy out technique should in no case be regarded as a way to cop out with European legislation.

On the other hand the transposition of the Consumer Rights Directive into the UK regime was achieved through two Regulations. Those are The Consumer Rights (Payment Surcharges) Regulations 2012 which were initially adopted to implement Article 19 of the Directive dealing with fees for

⁵⁹¹ Goerge Slyz, 'International Law in National Courts and International Tribunals' New York University Journal of International Law and Politics 28(1-2) (1995-1996) 65, 67; Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1997) 63.

⁵⁹² Andreas Føllesdal, Ramses A. Wessel, Jan Wouters, *Multilevel Regulation and the EU: The Interplay Between Global, European and National Normative Processes* (Martinus Nijhoff Publishers 2008) 346.

⁵⁹³ Slyz, 'International Law in National Courts and International Tribunals' (n 591) 67; Malanczuk, *Akehurst's Modern Introduction to International Law* (n 591) 63.

⁵⁹⁴ Papacleovoulou, 'Cyprus Consumer Protection' in Campbell (ed), *International Consumer Protection* (n 589) 3.

the use of means of payment and The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 which implemented the remaining provisions of the Directive. At that point, the Consumer Rights Bill which is now the Consumer Rights Act was being debated by the UK Parliament. The Consumer Rights Act deals with some issues found under the Consumer Rights Directive⁵⁹⁵ by thus making the UK transposition of the Directive, “a bolt-on transposition”⁵⁹⁶ and spreading the Directive into three different pieces of legislation. Nonetheless, the Consumer Rights Act does not seek to implement the Directive and in reality covers the areas that were initially contained in the proposed Directive and it interestingly follows a different approach from that of the proposed Directive. It is interesting though that the UK has been particularly categorical against the amendments that were proposed in the two areas which were eventually dropped. The Consumer Rights Act shows the difference between the European and the UK approach in this respect.

Under section 2 of the European Communities Act 1972, EU obligations can be implemented into English Law by the use of either primary or secondary legislation. However, despite the possibility of implementing Directives through primary legislation, there has been a tendency to use secondary legislation under the general power that Ministers enjoy under Section 2(2) of the European Communities Act. While this may be partly attributed to the Parliament’s limited time, the political dimension to it should not be disregarded.⁵⁹⁷ Secondary legislation is of low-visibility⁵⁹⁸ and makes the task of implementing contentious EU measures easier as this does not involve either pressure from the Parliament or the press.⁵⁹⁹

⁵⁹⁵ This refers to Sections 11, 12, 28, 29, 30 36, 37 and which cross refer to the Directive’s provisions in relation to among others, the pre-contractual information, passing of risk and delivery etc.

⁵⁹⁶ This refers to the situation where in addition to the main legislation transposing the Directive into the domestic regime, there are also different bits of the Directive found under other pieces of national legislation.

⁵⁹⁷ Robert Thomas and Gary Lynch-Wood, ‘Transposing European Union Law in the United Kingdom: Administrative Rule-Making, Scrutiny and Better Regulation’ (2008) 14(2) European Public Law 177, 184.

⁵⁹⁸ *ibid.*

⁵⁹⁹ Giliker, ‘The Transposition of the Consumer Rights Directive into UK law: Implementing a maximum harmonisation directive’ (n 582) 3.

UK, like Cyprus, has been also amongst those Member States adhering to the copy out technique. However the motives behind using the copy out technique seem to differ for each Member State. UK constitutes one of those Member States whose motive behind following the copy-out approach is as Ewan McKendrick argues to avoid liability for possible failure to properly implement the Directive.⁶⁰⁰ This was the case with the Consumer Rights Directive as well for the UK.⁶⁰¹ While for Cyprus, this was part of showing their zeal to European initiatives, as regards the UK, resorting to the copy out technique could hardly be regarded as a willingness to implement the directive. On the contrary, as it has been argued the copy out approach represents a rather “cop out” approach.⁶⁰² UK is possibly amongst those Member States which resorted to the copy out technique as a way to avoid State liability while retaining the effect of European law at the possible minimum. This could be considered against the fact that UK constitutes a dualist country and which perhaps additionally shows its relationship with as well as its receptiveness to International and European law. Contrary to monism, the dualist approach regards national and international law, here European law, as two separate sources⁶⁰³ and in no case acknowledges international law as being automatically superior to national law. It could accordingly be said that the dualist approach constitutes a more reserved approach towards sources beyond national law as for example European initiatives.

Despite academics’ concerns that that the copy out technique prevents national Parliaments from taking steps further to improve the quality of a Directive or even to clarify obscure issues contained under a Directive⁶⁰⁴, as this Chapter will show, this has not been the case in the current situation. UK took the opportunity to go beyond the Directive to address local recurring issues provided its own approach in issues where a degree of flexibility

⁶⁰⁰ Ewan McKendrick, ‘Contract Law: Text, Cases, and Materials’ (6th edn, Oxford University Press 2014) 457.

⁶⁰¹ Giliker, ‘The Transposition of the Consumer Rights Directive into UK law: Implementing a maximum harmonisation directive’ (n 582) 9.

⁶⁰² *ibid* 6,

⁶⁰³ Malanczuk, *Akehurst’s Modern Introduction to International Law* (n 591) 63.

⁶⁰⁴ McKendrick, *Contract Law: Text, Cases, and Materials* (n 600) 457.

existed. As this Chapter will show UK made a great effort to increase consumer protection in areas which it is particularly needed and thus achieve a satisfactory level of consumer protection and which in some regards does not resemble the original Consumer Rights Directive.

The Cyprus Approach

It is perhaps easier to begin with examining the transposition of the Directive into the Cypriot regime where it was more easily transposed. The Directive proved to be particularly welcome with no evident concerns or difficulties emerging.⁶⁰⁵ One year after the adoption of the Consumer Rights Law of 2013 which has transposed the Directive in the Cypriot regime, the first anniversary of the Directive's implementation has been marked with particular gratification.⁶⁰⁶ However, the fact that the Directive has been seen as a success in the case of Cyprus should not automatically mean that it is a successful story but rather calls for a need to consider any contextual factors that may play a role in this regard. The process preceding the adoption as well as the way in which the Directive was eventually adopted, show a degree of acquiescence on the part of Cyprus. Nonetheless, it remains to be seen whether this is because of indifference or because of trust in the European approach. This part of the chapter will not only determine the changes that the Directive has brought to the Cypriot regime but also what lessons there are to learn even for the wider development of European Consumer Law.

The task of transposing EU Directives in the Cypriot Legislation is assigned to the different Ministries based on the area involved. The Draft Legislation is then sent to the Law Office which exercises a technical legal control of it to examine whether it achieves the purpose of the Directive by implementing all provisions contained therein into the Cypriot Legal Regime. Following that

⁶⁰⁵ Parliamentary Committee on Trade and Industry Deb, *Consumer Rights Law of 2013* (Parliament of Cyprus, I Parliamentary Period – Session C – 24 October 2013).

⁶⁰⁶ George Markopouliotis, 'EU Consumer Rights' *in-cyprus* (20 June 2016) <<http://in-cyprus.com/eu-consumer-rights/>> accessed 19 April 2016.

stage, the Draft Legislation is sent back to the relevant Ministry which puts the Draft Legislation to the Council of Ministers for approval and subsequently to the Cyprus Parliament for voting.⁶⁰⁷ The Parliamentary Committee on Energy, Trade, Industry and Tourism was the responsible Committee for exercising scrutiny on the draft Consumer Rights Law of 2013 implementing the Consumer Rights Directive in the Cypriot Legal Regime.⁶⁰⁸ The Parliamentary Committee examined the Draft Bill in just two sessions on the 24th of September 2013 and 15th of October 2013 where different stakeholders were called to attend the two Committee Sessions. There were representatives from the Ministry of Energy, Trade, Industry and Tourism, from the Cyprus Employers and Industrialists Federation, from the Cyprus Chamber of Commerce and Industry, from the General Confederation Pancyprian Organization of Professional Craftsmen and Shopkeepers, from the Cyprus Consumers Association as well as from the Cyprus Consumers' Union and Quality of Life. Contrary to the disquiet that the Directive caused in the UK, only two meetings were needed to discuss the implementation of the Directive into a primary legislation and interestingly no particular problems emerged.⁶⁰⁹

Although minutes of the Parliamentary Committees' meeting are not kept in the case of Cyprus, according to the relevant Parliamentary Committee Report, the stakeholders present at the two Committee sessions did not express any particular concern for any of the provision contained under the Consumer Rights Law implementing the Directive. The only concern expressed by the Representatives of the Cyprus Employers and Industrialists Federation and the Cyprus Chamber of Commerce and Industry related to the administrative fines that may be imposed by the Department responsible for the enforcement can impose when the

⁶⁰⁷ Information as to the procedure followed taken from www.law.gov.cy/law/lawoffice.nsf/All/9483C617996ED452C22573E20034D72E?OpenDocument&highlight=%CE%BF%CE%B4%CE%B7%CE%B3%CE%AF%CE%B1 accessed 19 April 2016.

⁶⁰⁸ Parliamentary Committee on Trade and Industry Deb, *Consumer Rights Law of 2013* (Parliament of Cyprus, I Parliamentary Period – Session C – 24 October 2013).

⁶⁰⁹ *ibid.*

provisions of the Consumer Rights Law are infringed.⁶¹⁰ However, the rest of the Representatives present at the two Parliamentary sessions interestingly did not express any disagreement with the scope and purpose of the Bill. The Parliamentary Committee on Energy, Trade, Industry and Tourism then suggested to the Cyprus Parliament to vote on the bill in the form that this was submitted by the Executive power as no actual changes were suggested.⁶¹¹ The Consumer Rights Directive was accordingly transposed with the adoption of the Bill into a legislative act, namely the Consumer Rights Law of 2013 which constitutes a primary legislation, as opposed to the use of secondary legislation which is the case for the UK transposition.

Assessment of changes brought

The Directive has been seen as a success for the Cypriot consumer protection from actors such as Giorgos Markopouliotis, the Head of the European Commission Representation in Cyprus who also characterised European consumer protection policy as one of the Union's success stories.⁶¹² One year after its transposition in the Cypriot regime, Giorgos Markopouliotis talked about the key improvements that the Directive brought.⁶¹³ He not only referred to the clearer information that consumers will now have when buying digital content, but also to the fact that consumers will now have to confirm that they accept any additional payments before those are imposed on them which means no more cost-traps and pre-ticked boxes.⁶¹⁴ Amongst the notable improvements brought by the Directive was that traders cannot charge consumers for using a particular means of payment with fees exceeding the cost for using such means and also that traders operating hotlines for dealing with consumer

⁶¹⁰ Ibid.

⁶¹¹ Parliamentary Committee on Trade and Industry Deb, *Consumer Rights Law of 2013* (Parliament of Cyprus, I Parliamentary Period – Session C – 24 October 2013).

⁶¹² 'EC launches campaign on consumer rights in Cyprus' *Famagusta Gazette* (29 May 2014)

<<http://famagusta-gazette.com/ec-launches-campaign-on-consumer-rights-in-cyprus-p23766-69.htm>> accessed 24 April 2016.

⁶¹³ George Markopouliotis, 'EU Consumer Rights' *in-cyprus* (20 June 2016) <<http://in-cyprus.com/eu-consumer-rights/>> accessed 19 April 2016.

⁶¹⁴ Ibid.

complaints or question cannot impose charges that go beyond the basic rate. For Giorgos Makroupoliotis, amongst the notable improvements that the Directive contains is the extension and harmonisation of the withdrawal period from 7 to 14 days as well as the 14 day period in which the trader has to reimburse any payment to the consumer in the event of cancellation.⁶¹⁵ In determining the changes that the Directive has brought to the Cypriot consumer protection regime, a question that needs to be answered is which parts of the Directive constitute actual improvements and which perceived improvements simply constitute a clarification and harmonisation of what was already in place.

The ambit of the Directive

To begin with, it is important to consider the ambit of the Directive and the effect that this will have on the Cypriot legislation. The list of exceptions to the Consumer Rights Directive has been considerably expanded. As a consequence, the adoption of the Consumer Rights Law of 2013 has greatly extended the list of exceptions that The Law for Consumer Contracts Concluded Away from Business Premises of 2000 and the Law for the Conclusion of Consumer Distance Contracts of 2000 contained. This means there will from now be more areas in which consumers will technically be deprived the protection offered by the Directive. Contracts concluded off premises and which involved the construction and sale of immovable property, the supply of foodstuffs, beverages and other goods that are intended for current consumption were the only areas that were exempted prior to the adoption of the Consumer Rights Law. As regards contracts concluded by means of distance communication, the exempted contracts before the adoption of the Consumer Rights Law were auctions, financial services, contracts concluded by automatic vending machines, construction and sale of immovable property as well as the supply of foodstuffs, beverages and other goods for current consumption. The two lists have now been merged into one under the Consumer Rights Law and the new areas that have been added to the list include social services, healthcare services

⁶¹⁵ George Markopouliotis, 'EU Consumer Rights' *in-cyprus* (20 June 2016) <<http://in-cyprus.com/eu-consumer-rights/>> accessed 19 April 2016.

when those are sold by regulated professionals, timeshare contracts, travel package contracts, the passenger transport services (however, the provisions in relation to additional payments do apply to those contracts), contracts concluded with telecommunication operators through public payphones for example and last but not least off-premises contracts whose value is below €20.

While the reason for extending the list of exceptions to the Directive has been the existence of sector specific legislation at the Union level dealing with the exempted areas, in some respects the eventual approach should be considered with greater caution. As regards healthcare services, when those are purchased from regulated professions who include according to the European Directive 2011/24/EU on patient rights in cross border healthcare, doctors, nurses, dentists, pharmacists, they are exempted from the scope of the Consumer Rights Directive. On the contrary, commercial traders selling healthcare goods and services including for example mobility aids, vitamin supplements, diet and care plans, will be covered by the Directive.⁶¹⁶ A segmented market is accordingly likely to emerge in the area of healthcare services in the case of Cyprus. This means Cypriot consumers will have to distinguish with whom they are contracting when they enter into distance or doorstep contract for the purchase of healthcare services. This is likely to give rise to complexity and uncertainty in an area of particular vulnerability.

Low value off-premises contracts constitute perhaps the only example in which the Cypriot transposition departs from the Directive which provides for a threshold of €50. The Directive has under Article 3(4) provided Member States with discretion to define a lower value in their national legislation and Cyprus has chosen to reduce the threshold to €20. This decision has been more or less informed by local factors such as the economic situation of Cyprus or even the level of average salary which is considerably lower in Cyprus in comparison to Member States such as UK⁶¹⁷, this automatically

⁶¹⁶ BIS, *EU Consumer Rights Directive: Information Requirements and Extension of the Right to Withdraw for Off-premises contracts- Impact Assessment* (August 2012) 13.

⁶¹⁷ 'Average Salary in the European Union' (*Reinis Fischer*, 20 July 2015) <www.reinifischer.com/average-salary-european-union-2015> accessed 24 April 2016.

means that contracts falling between the range of €20 and €50 which are particularly common in off-premises situations will be covered by the protection offered by the Consumer Rights Law implementing the Directive, that is the right to withdraw from the contract, the provision of information as well as the provisions in relation to additional payments and charges. Concerns in relation to the threshold for low value off premises contracts were previously expressed in this thesis. Particularly the view has been that setting the threshold too high poses risks for vulnerable consumers. If one considers the case of an old man in Cyprus receiving a pension fund of €300, having to live with a loss of €40 because of a bad choice made in an off-premises situation, the adverse result that may be caused by setting the threshold perhaps too high can be better understood.

As regards digital content, the provisions of the Consumer Rights Directive may indeed constitute an improvement for the Cypriot regime as prior to the implementation of the Directive under the Consumer Rights Law of 2013, digital content was nowhere addressed under the Cypriot legislation. Not only digital content now falls within the ambit of the relevant Cypriot legislation, but also the definition of digital content is clarified under Article 2(1) of the Consumer Rights Law of 2013 –by following the wording of the Directive- that “digital content means data which are produced and supplied in digital form”. In addition, owing to Article 6 of the Directive containing the information requirements that the trader has to provide to the consumers in distance and off premises situations, the trader now needs to inform the consumer where applicable, as to the functionality of digital content and any technical protection measures as well as, where again that is applicable, any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of. The particular information requirements have been faithfully transposed by Article 5 of the Consumer Rights Law of 2013 by following the exact wording of the Consumer Rights Directive and they may reasonably be regarded as a novelty for the Cypriot regime.

Provision of Information

As it has already been put forward, information requirements have been given particular prominence in European Consumer Law and particularly under the Consumer Rights Directive. The importance that is being placed upon the provision of information as the best way to increase consumer confidence is also evident in the European Consumer Policy Strategy 2007-2013 where one of the objectives stated is to have “better informed and educated consumers”.⁶¹⁸ The provision of information has been regarded as a powerful weapon in the hands of consumers which enables them to protect themselves by thus further diminishing the role of the paternalistic approach in protecting consumers.⁶¹⁹ In the case of Cyprus, prior to the transposition of the Consumer Rights Directive, there were three pieces of information that the trader had to provide to consumers in the case of off-premises contracts while nine different pieces of information were required for distance contracts. With the adoption of the Consumer Rights Law, the list of information requirements has been greatly extended with 20 different pieces of information. For the concerns that have already been put forward in this thesis as to the effectiveness of the information requirements and the problem with the overload of information, the increase of information requirements should not automatically be regarded as novelty that will benefit consumers. The Cypriot transposition has faithfully followed the structure of the Directive both in relation to the provision of information but also in relation to the whole Directive. There has been no attempt to address the problem with the overload of information by perhaps providing a clearer structure which could be easier for consumers to follow or permit important pieces of information, such as the right to withdraw for example, to stand out. In addition, the Consumer Rights Law simply states that information requirements form an integral part of the contract, as the Consumer Rights Directive provides without determining what part they have in distance or off premises consumer contracts, it remains uncertain as to whether they constitute terms of the contract or not.

⁶¹⁸ McClafferty, ‘Effective Protection for the E-Consumer in light of the Consumer Rights Directive?’ (n 581) 100.

⁶¹⁹ *ibid* 98.

Harmonisation of different timeframes

Notably, the Directive harmonises the different timeframes across national legislations such as the period in which a consumer has the right to withdraw, the period in which traders have to fulfil their obligations, that is to perform their duties under the contract, as well as the period to return any money received back to the consumer. As it has already been stated in Chapter 6, the Consumer Rights Directive has increased and harmonised the withdrawal period from 7 days that the Distance and Doorstep Selling Directives to 14 days. However this constitutes the same approach which has been followed under the Cypriot regime prior to the implementation of the Consumer Rights Directive as both the Law for Consumer Contracts Concluded Away from Business Premises of 2000 and the Law for the Conclusion of Consumer Distance Contracts of 2000 provided for a 14 day period in which consumers could withdraw from contracts concluded either at the doorstep or distance.

Nonetheless, concerns as to the limitations of the approach taken have already been voiced in this thesis. Particularly, it has been questioned as to whether simply the existence of the withdrawal period constitutes a change that all consumers can be benefited from and whether it has the potential to bring an overall increase in consumer confidence. This should perhaps be considered against the fact that in Cyprus where cross border online shopping is more prevalent than domestic online shopping⁶²⁰, the geographical position of the island which is one could say in a rather remote area when compared to other central European Member States may dissuade Cypriot consumers from exercising their right to withdraw. The fact that it may prove less easy and not infrequently costly for consumers in Cyprus to return products may make the exercise of the right less likely. While this is in no case an attempt to deny the importance of the right to withdraw for consumers, but it is rather an attempt to set its limitations in context.

⁶²⁰ Flash Eurobarometer 397, 'Consumer Attitudes towards Cross-Border Trade and Consumer Protection' (September 2015) 16.

As regards the provisions in relation to traders' obligations, the Consumer Rights Directive provides for a maximum of 30 days in which the trader has to perform his duties under the contract, although this can be contracted out, as well as a 14 day period in which the trader has to reimburse any payment received back to the consumer. Both provisions constitute improvements to the Distance Selling Directive which provided in both instances for a 30 day period –the Doorstep Selling Directive left both issues to be governed by national laws. However, in both instances the Cypriot approach provided for a period of 14 days in which a trader has to perform his duties as well as in which he has to reimburse any payments received in the event of withdrawal, this mean that the period in which consumer has to wait for the contract to be performed is increased in that regard. However, as it is the case with the withdrawal period, the harmonisation and the reduction of the time in which consumers have to await for reimbursement of their money to be made in the Consumer Rights Directive, does not constitute any improvement for the Cypriot regime as both provisions were already in place before the transposition of the Consumer Rights Directive. Accordingly, one of the perceived improvements made by the Directive, that is to harmonise issues of a rather practical nature such as the different frames, are of limited importance in the case of Cyprus.

Additional charges

Under Article 18 of the Consumer Rights Law as this transposes Article 19 of the Directive, traders are now forbidden from charging consumers fees for the use of particular means of payment that exceeds the actual costs borne by them. In addition, Article 21 of the Consumer Rights Law now requires the express consent of the consumers before any additional payments going beyond what has been agreed upon for the trader's main contractual obligation.⁶²¹ Pre-ticked boxes that consumers have to untick will no longer be permissible and consumers will be entitled to reimbursement of those additional payments. However, while both changes constitute improvements for the Cypriot level of consumer protection, some concerns exist due to their limited applicability. While both provisions are applicable under the

⁶²¹ This transposes Article 22 of the Directive.

original wording of the Directive to the passenger transport sector and therefore the same approach is followed under the Consumer Rights Law of 2013 implementing it, none of those provisions applies to the package travel sector which might give rise to a gap in the legislation. This may leave a number of consumers purchasing travel packages, especially unprotected from fees for the use of certain means of payment.⁶²²

This is unfortunate if one considers the fact that the transport sector constitutes the most common sector which Cypriot consumers use the internet for. In 2014, 47% of the complaints received by the European Consumer Centre in Cyprus related to the transport sector. Although there is no actual indication as to the number of package travel bookings that were made, the number of complaints show how generally the travel sector is an area of particular concern for Cypriot consumers and also not unlikely for Cypriot consumers to be purchasing travel packages when traveling. A separate directive in the particular area exists since 1990 while in May 2015 agreement was reached for the adoption of a new Package Travel Directive which was eventually published in autumn 2015 in the EU's Official Journal and will be transposed into national laws within the next two years. While the Directive was not even agreed at the point of transposing the Consumer Rights Directive, it is important to note that neither the original directive nor its revised version of 2005 deal with fees for the use of means of payment so as to prevent dip pricing⁶²³ for travel package contracts by thus creating a gap in the legislation.

Nonetheless, a new requirement that has been brought by the Directive is found in Article 21 which is transposed by Article 20 of the relevant Cypriot legislation and which provides that consumers are not bound to pay more than the basic rate when contacting the trader regarding the contract through the telephone line operated by the trader. As regards telephone charges, the position before under the relevant Cypriot regime in relation to distance

⁶²² The Package Travel Directive of 1990 which was in force both at the time of the adoption of the Consumer Rights Directive as well as its transposition in the Cypriot regime did not refer to this issue.

⁶²³ Dip pricing refers to those situations where consumers after filling their details on a number of webpages during their purchase, added charges were imposed on them.

contracts provided for an obligation on the part of the trader to inform the consumer when the rate for the use of a means of distance communication, which telephone calls are part of, is other than the basic rate. However the Directive perhaps made a slight improvement by making more powerful a provision that was already there by making a step forward and clarifying that consumers will not bear those additional costs.

The UK approach

While Cyprus has faithfully followed the Directive, even the exact structure of it, the UK has been more creative in transposing the Directive and made an effort to address certain issues by following their own approach. Interestingly, the comparison between the transposition of the Consumer Rights Directive in the domestic regimes of UK and Cyprus shows how the maximum harmonisation provided in most parts of the Directive did not prevent the UK from exhibiting a degree of legal creativity and go beyond the approach followed at the European Level. This was actually the case for those areas where there was a degree of flexibility or some possible loophole left open which the UK did not hesitate to provide a different approach. The task of transposing the Consumer Rights Directive was assigned to the Department for Business Innovation and Skills (BIS) which led to the two sets of Regulations implementing the Directive. The BIS consultation process proved how the transposition of the Directive was not easy and straightforward for the UK government at all. There were certain options with regard to its implementation that had to be carefully considered. The BIS wanted to gather the various stakeholders' views as to the possible options available and as to whether further clarity was required in order to achieve a good piece of legislation.⁶²⁴ Some of those views are referred to below in relation to the choices made in transposing the Directive.

⁶²⁴ BIS, *EU Consumer Rights Directive: Information Requirements and Extension of the Right to Withdraw for Off-premises contracts – Impact Assessment* (August 2012); BIS, *EU Consumer Rights Directive: Information Requirements and the Right to withdraw for Distance Contracts - Impact Assessment* (August 2012); BIS, *EU Consumer Rights Directive: Provisions on Delivery, Passing of Risk, Communication by Telephone and*

Assessment of changes brought

The ambit of the Directive

Low value off-premises contracts

Off premises contracts whose value is below €50, equivalent to £42, are exempted from the provision of information as well as the right to withdraw provided by the Directive. Member States have accordingly the option not to maintain or introduce corresponding provisions for off premises contracts which do not exceed the threshold of €50 which according to Recital 28 seeks to ensure that insignificant purchases of sufficiently low value are excluded. Although Article 3(4) provided Member States with discretion to define a lower value in their national legislation, the UK has not resorted to this option but rather opted for the value of £42 which is the equivalent of €50 provided under the Directive. This constitutes a diminishing of the level of protection that was prior to the implementation of the Consumer Rights Directive as the relevant threshold was £35. This decision is of course informed by arguments supporting that traders and especially small traders, should not be overburdened in low value contracts.⁶²⁵ The BIS also expressed that there was no evidence that removing the threshold or maintaining at £35 would benefit consumers⁶²⁶.

Removing the information requirements in low value off premises contracts was not seen as particularly problematic from consumers and consumer groups that participated in the BIS consultation process.⁶²⁷ However, reservations were expressed for depriving consumers of the right to

Consent for Additional Payments – Impact Assessment (August 2012) ; BIS, *Stakeholders Responses to the implementation of the Consumer Rights Directive through the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013*(2013); BIS, *Implementation of the EU Consumer Rights Directive (2011/83/EU) - Impact Assessment: Final* (August 2013); BIS, *Enhancing Consumer Confidence by Harmonising Consumer Law – Consultation on the implementation of the Consumer Rights Directive 2011/83/EU* (August 2012).

⁶²⁵ BIS, *Enhancing Consumer Confidence by Modernising Consumer Law – Consultation on the implementation of the Consumer Rights Directive 2011/83/EU* (August 2012) 42.

⁶²⁶ *ibid.*

⁶²⁷ BIS, *Document summarising the government response to the recommendations of the Law Commission and Scottish Law Commission on misleading and aggressive commercial practices and the response to the BIS consultation on implementing the Consumer Rights Directive* (August 2013) 25.

withdraw in the relevant situations.⁶²⁸ Nonetheless, it should not be disregarded that it is not rare for house bound people, especially old people who are more prone to this type of selling as the preceding part has shown, to come across sellers at their doorstep for the purchase of example a household or kitchen appliance whose value may range from £30 to £40 and who will in this way be deprived of the protection offered by the Directive. This may leave vulnerable and in most of the times house bound people, especially elderly people, having to live with a product they have purchased but regretted afterwards. The Consumer Rights Directive could prevent the creation of this gap by not allowing the exception of low value off-premises contracts or by not reducing the threshold themselves. This could ensure that least contracts, for example in relation to the purchase of household and kitchen appliances, which has always been a common phenomenon in off-premises situations, are covered by the directive.

The UK has in addition decided to apply Regulations 40 and 41 of the 2013 Regulations dealing with additional payments under a contract and additional help-line charges to low value off-premises contracts below £42.⁶²⁹ Although this step was made in an effort to align this situation with the respective requirements of distance selling where no such exemption applies, it is particularly important for transparency which is vital for consumers irrespective of the value of the contract in question. Closing this loophole constitutes a choice of great significance as otherwise hidden costs imposed by traders would increase the price that consumers would have to eventually pay.⁶³⁰ This means unscrupulous traders will be prevented from offering goods or services at a considerably low price in order to avoid the relevant protection offered by the Consumer Rights Directive to consumers in those instances but subsequently adds high costs by way of additional

⁶²⁸ *ibid.*

⁶²⁹ Giliker, 'The Transposition of the Consumer Rights Directive into UK law: Implementing a maximum harmonisation directive' (n 582) 13.

⁶³⁰ BIS, *EU Consumer Rights Directive: Provisions on Delivery, Passing of Risk, Communication by Telephone and Consent for Additional Payments – Impact Assessment* (August 2012) 12.

payments.⁶³¹ Applying the rules regarding additional telephone charges will help to ensure that consumers, even those in the most remote areas, will be able to exercise their rights and contact traders at a reasonable cost. As it has already been put forward, consumers who make off-premises purchases and particularly a doorstep purchase are those who are more likely to be home bound and thus the ones that will accordingly use telephone as a means to contact traders once such a need arises. Therefore, ensuring that consumers can legitimately exercise their rights even for low value off premises contracts is but a step to increase the confidence of this category of consumers.

Social and Healthcare Services sold off-premises or at distance

The UK Government decided to include social and healthcare services where those are sold either off-premises or at distance by regulated professionals to consumers as well as by non-professionals (which means normal traders that are obviously already covered in the Directive) under the ambit of the 2013 Regulations.⁶³² Information and cancellation provisions found under Regulations 7 to 27 as well as Regulations 40 and 41 of The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 dealing with additional payments under a contract and additional help-line charges accordingly apply to social care services and healthcare services sold either off-premises or at a distance will thus apply to those instances.⁶³³ To the view of the BIS, the provisions of the Consumer Rights Directive should apply in the relevant sector when goods and services are sold off-premises or at a distance by regulated professionals.⁶³⁴ As it was stipulated in the BIS Impact Assessment of

⁶³¹ BIS, *Implementation of the EU Consumer Rights Directive (2011/11/83EU) Impact Assessment: Final* (August 2013) 11.

⁶³² BIS, *EU Consumer Rights Directive: Provisions on Delivery, Passing of Risk, Communication by Telephone and Consent for Additional Payments – Impact Assessment* (August 2012) 11. As expressly stated: "...by extending coverage of the CRD, we, therefore, aim to cover goods and services provided by qualified professionals (those sold by non-professionals being already covered)."

⁶³³ Giliker, 'The Transposition of the Consumer Rights Directive into UK law: Implementing a maximum harmonisation directive' (n 582) 13.

⁶³⁴ BIS, *Enhancing Consumer Confidence by Modernising Consumer Law – Consultation on the implementation of the Consumer Rights Directive 2011/83/EU* (August 2012) 22, 23.

2012⁶³⁵, “extending the provisions to all sellers of healthcare will help ensure clarity and consistency”.⁶³⁶ Regulated professionals which include according to the European Directive 2011/24/EU on patient rights in cross border healthcare doctors, nurses, dentists, pharmacists, are exempted from the scope of the Directive while commercial traders selling healthcare goods and services including for example mobility aids, vitamin supplements, diet and care plans, are covered by the Directive.⁶³⁷ Had the Regulations been not extended to cover healthcare and social services provided by professionals, a complex and confusing regime would thus be put in place. This would require consumers to be careful with whom they are contracting as they would have otherwise different rights for identical services depending on who they have purchased them from.⁶³⁸ Consumers would have to understand the distinction between the supply of a good or service by a healthcare professional and the supply of a good or service by a business which might also include professionals.⁶³⁹

To the BIS view, those constitute areas of particular vulnerability⁶⁴⁰ and exempting the two sectors from the application of the 2013 Regulations would deprive consumers their information and cancellation rights that have been provided by the Off-premises Regulations⁶⁴¹ as well as the cancellation right that the Distance Selling Regulations have provided.⁶⁴² This would not only lead to a reduction of the existing level of consumer protection but at the same time it would provide consumers with greater protection when purchasing a vacuum cleaner than when making important purchases such

⁶³⁵ BIS, *EU Consumer Rights Directive: Provisions on Delivery, Passing of Risk, Communication by Telephone and Consent for Additional Payments – Impact Assessment* (August 2012) 11.

⁶³⁶ *ibid.*

⁶³⁷ BIS, *EU Consumer Rights Directive: Information Requirements and Extension of the Right to Withdraw for Off-premises contracts – Impact Assessment* (August 2012) 13.

⁶³⁸ BIS, *Enhancing Consumer Confidence by Modernising Consumer Law – Consultation on the implementation of the Consumer Rights Directive 2011/83/EU* (August 2012) 32.

⁶³⁹ BIS, *EU Consumer Rights Directive: Information Requirements & Right to withdraw for Distance Contracts – Impact Assessment* (August 2012) 16.

⁶⁴⁰ BIS, *Enhancing Consumer Confidence by Modernising Consumer Law – Consultation on the implementation of the Consumer Rights Directive 2011/83/EU* (August 2012), 31.

⁶⁴¹ The Cancellation of Contracts made in a Consumer’s Home or Place of Work Regulations 2008, SI 2008/1816.

⁶⁴² The Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334.

as a long term care plan in off premises situations.⁶⁴³ The Consumer Rights Directive had in essence excluded the two areas from its scope in order to allow Member States the opportunity to provide for a higher level protection than what the maximum harmonisation Directive provides⁶⁴⁴ but the BIS was however not willing to see the particular exemption being used as a loophole. While there is under UK law, the Health and Social Care Act of 2012⁶⁴⁵, the particular piece of legislation does not deal with the issue of how contracts are concluded but simply with the quality of care that customers receive.⁶⁴⁶ Consequently this is likely to lead to a reduction of consumer protection in the UK in an area of particular consumer vulnerability.⁶⁴⁷

The situation would indeed be worsened with consideration to the fact that there is no alternative relevant protection in the particular areas to protect consumers “who may well be vulnerable”.⁶⁴⁸ As regards off premises situations and particularly doorstep selling, the BIS has acknowledged that the consumer involved is more vulnerable than the average consumer and it is in most instances people who are unable to use any other method for their purchases.⁶⁴⁹ A sound example is old people who are dependent on doorstep selling and thus susceptible to detriment.⁶⁵⁰ According to a GHK report of 2004 for the Office of Fair Trading 44% of consumers above the age of 70 did not have access to any alternative type of purchasing⁶⁵¹

⁶⁴³ BIS, *EU Consumer Rights Directive: Information Requirements and Extension of the Right to Withdraw for Off-premises contracts – Impact Assessment* (August 2012) 4.

⁶⁴⁴ BIS, *Implementation of the EU Consumer Rights Directive (2011/11/83EU) Impact Assessment: Final* (August 2013) 10.

⁶⁴⁵ Health and Social Care Act 2012

⁶⁴⁶ BIS, *EU Consumer Rights Directive: Information Requirements and Extension of the Right to Withdraw for Off-premises contracts – Impact Assessment* (August 2012) 18.

⁶⁴⁷ BIS, *EU Consumer Rights Directive: Information Requirements and Extension of the Right to Withdraw for Off-premises contracts – Impact Assessment* (August 2012) 18; BIS, *Enhancing Consumer Confidence by Modernising Consumer Law – Consultation on the implementation of the Consumer Rights Directive 2011/83/EU* (August 2012) 31, 33.

⁶⁴⁸ BIS, *Enhancing Consumer Confidence by Modernising Consumer Law – Consultation on the implementation of the Consumer Rights Directive 2011/83/EU* (August 2012) 31.

⁶⁴⁹ BIS, *EU Consumer Rights Directive: Information Requirements and Extension of the Right to Withdraw for Off-premises contracts – Impact Assessment* (August 2012) 11.

⁶⁵⁰ *Ibid.*

⁶⁵¹ The BIS refers to the GHK report for the OFT entitled: ‘Evaluating the impact of the 2004 OFT market study into doorstep selling’ (unpublished).

although the numbers may have changed with the passing of years. It suffices to state at this point that for people of the particular age range, the most common purchases involved either home services or the purchase of mobility aids.⁶⁵² Accordingly, in considering the extension of the information requirements and the right to withdraw to off premises contracts in the areas of social and healthcare services, the BIS has expressly acknowledged the fact that it is the older, disabled and generally more vulnerable people are those who are in most of the times the targets of off-premises selling⁶⁵³ and the decision to cover healthcare and social services becomes important to ensure that protection is provided in those situations where it is particularly needed. There are of course other measures prohibiting material misleading statements or omissions as well as aggressive selling practices.⁶⁵⁴ Nonetheless, the important right of withdrawal would disappear by depriving vulnerable and old people the opportunity to withdraw from a contract which eventually they do not want in an off-premises scenario.

It is in addition interesting to note that from the 9141 queries that Consumer Direct⁶⁵⁵ had received in the 2011-2012 financial year in relation to medical goods and services, 31% of the queries were related to the distance sale of medical goods and services.⁶⁵⁶ Although, there is no distinction made between those goods or services sold by regulated professionals and those by commercial traders, the high number of queries received nevertheless shows how the distance selling of those goods and services also constitutes subject of frequent consumer concern.⁶⁵⁷ The sale of such goods and services by means of distance communication is nowadays more and more prevalent, not only optician services are now provided online but also local care workers that provide care to those in need can now be booked online.

⁶⁵² BIS, *EU Consumer Rights Directive: Information Requirements and Extension of the Right to Withdraw for Off-premises contracts – Impact Assessment* (August 2012) 18.

⁶⁵³ *ibid* 4.

⁶⁵⁴ BIS, *Enhancing Consumer Confidence by Modernising Consumer Law – Consultation on the implementation of the Consumer Rights Directive 2011/83/EU* (August 2012) 32.

⁶⁵⁵ Consumer Direct had been the body providing consumer advice at that time before it handed its role to the Citizens Advice in 2012.

⁶⁵⁶ BIS, *EU Consumer Rights Directive: Information Requirements & Right to withdraw for Distance Contracts – Impact Assessment* (August 2012) 16.

⁶⁵⁷ *ibid*.

More importantly, in remote access instances the relatives of an aged person can for example arrange the home care of their parent or relative by means of distance communication.⁶⁵⁸

The valuable protection thus offered by the current Regulations would accordingly go away at a point when there is a need to expand the ambit legislation due to the fact that way people pay for their care and support services evolves⁶⁵⁹ with an increase in care and support services providers offering their services directly to the individual as well as online.⁶⁶⁰ According to an Alzheimer's Society Report, 62% of carers who participated in the research expressed how the person they care for had been approached by doorstep sales people who offered them care while 70% of them reported that the person they care for was approached through a phone call and was offered care.⁶⁶¹ The distance and off premises selling of healthcare and social care services directly to the consumer is also expected according to the BIS, to increase because of the way people now pay for care and support services. UK Government provides as it has already been stated a personal budget to individuals who can then exercise their independent choice about the services they would like to have.⁶⁶² Accordingly, providing both the information and cancellation rights in those circumstances is of utmost important to provide clarity and transparency and it is an area of particular vulnerability which the UK does not fail to address in implementing the Consumer Rights Directive. This is of course likely to become more of a problem as the population gets older and in the case of the UK as the Later Life in the United Kingdom survey of 2016⁶⁶³ has showed the average age of population has evidently increased which leads

⁶⁵⁸ BIS, *EU Consumer Rights Directive: Information Requirements & Right to withdraw for Distance Contracts – Impact Assessment* (August 2012) 16.

⁶⁵⁹ BIS, *Implementation of the EU Consumer Rights Directive (2011/11/83EU) Impact Assessment: Final* (August 2013) 10.

⁶⁶⁰ BIS, *Enhancing Consumer Confidence by Modernising Consumer Law – Consultation on the implementation of the Consumer Rights Directive 2011/83/EU* (August 2012) 31, 21.

⁶⁶¹ BIS, *Implementation of the EU Consumer Rights Directive (2011/11/83EU) Impact Assessment: Final* (August 2013) 10.

⁶⁶² BIS, *EU Consumer Rights Directive: Information Requirements & Right to withdraw for Distance Contracts – Impact Assessment* (August 2012) 16.

⁶⁶³ 'Later Life in the United Kingdom' (February 2016)

<http://www.ageuk.org.uk/Documents/EN-GB/Factsheets/Later_Life_UK_factsheet.pdf?dtrk=true> accessed 2 February 2016.

to an ever increasing need to ensure that adequate protection exists in place for the aging population.

The choice to also extend the provision preventing excessive fees for the use of means of payment and hidden costs from being imposed on consumers in the particular sector is of equal importance. It will in this way be ensured that those who are more likely to be considered as vulnerable purchasing their health and social care services at home will enjoy the same level of protection especially against excessive call charges or any other hidden costs that may be imposed on them. In concluding a distance purchase, the existence of pre-ticked boxes or implied consent formulations may be puzzling for them and for this reason they opt out to telephone contact with the trader.⁶⁶⁴ Consumers need not, according to the BIS, pay more than the basic rate telephone charge when contacting the trader after their contract is concluded.⁶⁶⁵ Ensuring that consumers in those circumstances who are also likely to be house bound or elderly people and thus reliant on using telephone as a means of contact will not have to incur additional charges for it.⁶⁶⁶ More importantly, this choice aims at bringing clarity and certainty as the hidden costs can be prevalent in the relevant areas.⁶⁶⁷

Provision of Information Requirements

The provision of information has attracted some concerns in the case of UK with the House of Lords European Union Committee expressing their reservations about the increased reliance on the information paradigm. In

⁶⁶⁴ BIS, *Enhancing Consumer Confidence by Modernising Consumer Law – Consultation on the implementation of the Consumer Rights Directive 2011/83/EU* (August 2012) 36; BIS, *Implementation of the EU Consumer Rights Directive (2011/11/83EU) Impact Assessment: Final* (August 2013) 10.

⁶⁶⁵ BIS, *EU Consumer Rights Directive: Provisions on Delivery, Passing of Risk, Communication by Telephone and Consent for Additional Payments – Impact Assessment* (August 2012) paras 123-25.

⁶⁶⁶ BIS, *Enhancing Consumer Confidence by Modernising Consumer Law – Consultation on the implementation of the Consumer Rights Directive 2011/83/EU* (August 2012) 36; BIS, *Implementation of the EU Consumer Rights Directive (2011/11/83EU) Impact Assessment: Final* (August 2013) 10.

⁶⁶⁷ BIS, *EU Consumer Rights Directive: Provisions on Delivery, Passing of Risk, Communication by Telephone and Consent for Additional Payments – Impact Assessment* (August 2012) 3.

particular, there was acknowledgement of the long standing concern with the overload of information as well as reference to problems such as the lack of guidance for traders on how to best arrange information or the lack of a deterrent for traders who fail to comply with information duties.⁶⁶⁸ As regards the layout of information, the Office of Fair Trading has in addition referred to the importance of providing information in a way that will enable consumers to benefit from them rather than being bombarded with information that they cannot really digest. Consumer Focus suggested the use of summary boxes as a way to enable consumers get the most important pieces of information in a quick and easy manner without getting lost in the lengthy legal language.⁶⁶⁹ The final version of the Directive addresses neither the issue of how information could be best provided to the consumer nor does it provide any deterrent for traders. However, the UK, in transposing the relevant Articles, made some structural changes to the information requirements by separating the two types of transacting, namely distance and off-premises contracts, which are under the Directive covered by the same Article, which provides a better opportunity to address their individual peculiarities. Part of this is the important decision to adopt criminal sanctions in off-premises situations where the traders fail to inform consumers for the existence of the right to withdraw.

While 2013 Regulations implementing the information requirements found under Article 6 do not depart from its wording, they nonetheless differ in structure. Regulation 10 provides that before the consumer is bound by an off-premises contract, the trader must give the consumer the pieces of information that are contained under Schedule 2 in a clear and comprehensible manner and if the right to cancel exists, the trader must also give the consumer a cancellation form as set out in Schedule 3. What is interesting is that the information in relation to the existence of the right to cancel and the cancellation form stand out from the long list of information requirements in the case of UK transposition. The Directive could have drawn a distinguishing line between those pieces of information that bear

⁶⁶⁸ European Union Committee, *EU Consumer Rights Directive: getting it right* (HL 2008-09, 126-I) para 119.

⁶⁶⁹ *ibid* para 120.

more importance and those which simply provide further details to the consumer but it has not. For this reason, the decision on the part of the UK may be regarded as an attempt to prevent the right to withdraw from being lost in the sea of information requirements. The same approach was also followed by the UK transposition with regard to the information requirements in relation to distance contracts with Regulation 13 cross referring to the information requirements contained in Schedule 2 while it specifically refers to the right to cancel and the cancellation form in the main body of the Regulations. Under paragraph 4 of the Regulation, there is an attempt to ensure that the most important information relating to the main characteristics of the goods, the identity of the trader, the total price inclusive of taxes, delivery, the total costs of each billing period when a contract is of indeterminate period, the conditions, time limit and procedures for exercising the right to cancel as well as the duration of the contract will definitely be displayed to the consumer despite the limited space and time involved in the particular type of contracting through means of distance communication. Another important clarification brought is that information required under those Regulations will be treated as terms of the contract which will bring an end to concerns, also expressed in Chapter 6 of this thesis, as to the place of information requirements in the contract.

Relevant here is Regulation 19 which makes a trader's failure to inform the consumer of his right to cancel in off-premises contracts an offence. The possible factors behind this decision may be not only the desire to include a deterrent for traders who do not comply with their information requirements under the Directive, and particularly the right to withdraw but also the implicit recognition of the general degree of vulnerability of consumers in off-premises situations. Accordingly in transposing Article 24 dealing with penalties, the UK government seems to have made an attempt to take benefit of the areas in which Member States enjoyed a degree of flexibility. Accordingly Regulation 19 of the 2013 Regulations determines that the trader is under those circumstances guilty of an offence and is liable on summary conviction to a fine. Regulation 21 and 22 of the 2013 Regulations provide for the liability of a person other than the principal offender as well as for offences committed by bodies of persons respectively. Not only is this

choice consistent with the desire to provide a deterrent for traders but at the same time shows the unwillingness on the part of the UK to allow unscrupulous traders to trap consumers in off-premises contracts where consumers are particularly more likely to be old and vulnerable. The choice to impose criminal sanctions in off-premises situations of course leaves consumers entering into a distance contract and who find themselves in an analogous situation at a less favourable situation but it may be regarded as an acknowledgment of the greater degree of vulnerability.

Certain acts or omissions cannot simply be categorized as criminal per se but rather it is their harmful effect and their interference with an individual's private rights that leads to their categorization as such. It is upon this premise that the UK Parliament has accordingly chosen to criminalize any attempt on the part of the trader to withhold the existence of the right to withdraw from the consumer in an off-premise scenario. As in an ordinary criminal proceeding, claims under Regulation 19 will also be enforced by the State in the form of prosecution. This may be seen as an indication of the fact that the protection of the rights of consumers is taken seriously at the national level. Cyprus has on the other hand been limited to the extension of the withdrawal period to 12 months as the Directive provides without employing any further measures that will act as deterrents for doorstep sellers who attempt to trap consumers in off premises contracts. This should be considered against the fact that doorstep selling has been particularly common in Cyprus especially in rural areas where old people residing in villages were often visited by doorstep sellers for the sale of goods. While under the EU approach information requirements are seen as the best way forward in addressing the inequality of position between the trader and the consumer, for the UK simply providing information to consumers is as it has been seen not enough. The fact that criminal sanctions were used as a means to provide further protection could be regarded as a manifestation of the enhanced approach taken by the UK to provide consumers with protective measures that are more likely to work in practice.

Harmonisation of different timeframes

As regards the harmonisation of the different timeframes achieved by the Consumer Rights Directive, an increase to the period in which consumers can exercise their right to withdraw can be noted for the UK regime. Both the Cancellation of Contracts made in a Consumer's Home or Place of Work Regulations 2008 and the Consumer Protection (Distance Selling) Regulations 2000 provided for 7 day period in which consumers could withdraw from both distance and doorstep contracts. By implementing the Consumer Rights Directive, a 14 day period is now in place under Regulation 30 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 and it obviously constitutes an improvement. As regards the period in which the trader has to perform his obligations under the contract, Article of the 2013 Regulations provides that the trader has to deliver the goods within 30 days which is the same position that was provided under the UK regime prior to the transposition of the Directive. Improvement can nonetheless be noted in harmonising and shortening the period in which the trader has to reimburse any payments received back to the consumer in the event of withdrawal within, according to Article 13 of the Directive, 14 days. This led to Regulation 34 of the 2013 Regulations shortening the 30 day period in which the trader had to return any money received back to the consumer under the 2000 Regulations to 14 days which is likely to reduce waiting time for reimbursement to consumers when exercising their right to withdraw.

Additional Charges

It is important to note at this point that while all Articles found under the Consumer Rights Directive were transposed by the 2013 Regulations, Article 19 has been an exception. This was in fact transposed in the UK law by a whole set of Regulations, The Consumer Rights (Payment Surcharges) Regulations 2012 which contain ten Regulations along with one schedule. One the one hand this constitutes a manifestation of the common style of English secondary legislation, they are systematic, they contain detailed provisions while the existence of the Schedule, contributes in clarifying the

key terms involved.⁶⁷⁰ But on the other hand the early transposition of Article 19 may from others be regarded as willingness on the part of the UK to cooperate and implement the Directive earlier. Nonetheless, this has formed part of combating the local long-standing problem of excessive charges imposed on consumers and accordingly to avoid further consumer detriment. Accordingly the early transposition of Article 19 constituted a reaction to a current concern and a rather local political motivation.

UK government went beyond its own Guiding Principles which deal with the implementation of EU law, according to which any implementing measure shall come into force on the transposition deadline and not earlier than that. Earlier implementation is reserved for those circumstances where there is a reason for doing so. In the current situation, the debit and credit card surcharges that were imposed on consumers, especially from travel companies, has been a major issue that went under the microscope of the Office of Fair Trading.⁶⁷¹ The evidence gathered showed that in the passenger transport sector, companies were engaging in “dip pricing” which as it has been explained earlier refers to practices by which consumers after filling their details on a number of webpages during their purchase, they faced added charges.⁶⁷² Based on this evidence, the Office of Fair Trading asked for action to be taken and the early implementation of Article 19 was the way to address this problem.

The Office of Fair Trading had rightly argued that the payment surcharges that were being imposed on consumers not only lacked transparency but more importantly they resulted in evident consumer detriment. Consumers were found in a deadlock where they could not practically avoid the surcharge from being imposed on them. Jo Swinson, the Minister of Consumer Affairs, had also referred to the excessive payment surcharges by saying that this had been a problem that was in essence defrauding

⁶⁷⁰ Giliker, ‘The Transposition of the Consumer Rights Directive into UK law: Implementing a maximum harmonisation directive’ (n 582) 10.

⁶⁷¹ BIS, ‘Crackdown on rip-off card charges’ (6 April 2013) <<https://www.gov.uk/government/news/crackdown-on-rip-off-card-charges-begins>> accessed 24 April 2016.

⁶⁷² Mark King, ‘Debit and credit card surcharges under OFT microscope’ *The Guardian* (28 June 2011) <www.theguardian.com/money/2011/jun/28/debit-credit-card-surcharges-oft> accessed 24 April 2016.

consumers for quite a long time.⁶⁷³ Accordingly, the whole scenery behind surcharges brings to light the deeper issues that have been involved in the early implementation of Article 19.

Jo Swinson expressed her satisfaction that the Regulations will bring an end to add-on fees which provided an opportunity for traders to cash in while they are not at all a true reflection of the costs involved in processing a payment.⁶⁷⁴ For this reason, the early transposition of Article 19 should not be regarded as a sign on the part of the UK to cooperate but it should rather be taken as indication of the fact that UK government makes attempts through implementing EU law to address local issues arising. At a time when the EU law is primarily focused on increasing cross border trader, the UK has its own agenda which involves a desire to act immediately when that is required to prevent further consumer detriment by providing specific solutions to individual problems that really burden UK consumers.

The use of pre-ticked boxes as well as premium rate call lines has been a widespread issue in the UK. A survey conducted by Which? has showed that 20% of 200 participating travel companies were using automatic opt-ins, whether those related to insurance, car hire or an upgrade, while 53% of them were using 087 or 084 numbers which are premium rate telephone numbers.⁶⁷⁵ In addition, according to a research that has been carried out by the Office of Fair Trading, airline companies were in particular using pre-ticked boxes as a way to impose additional charges to consumers. This will no longer be possible as the express consent of consumer will from now on be required. The rules on additional charges will accordingly address the long standing problem of businesses gaining revenue as a result of opacity in the process but also by manipulating consumer's inertia.⁶⁷⁶ Those

⁶⁷³ BIS, 'Crackdown on rip-off card charges' (6 April 2013) <<https://www.gov.uk/government/news/crackdown-on-rip-off-card-charges-begins>> accessed 24 April 2016.

⁶⁷⁴ *ibid.*

⁶⁷⁵ BIS, *EU Consumer Rights Directive: Provisions on Delivery, Passing of Risk, Communication by Telephone and Consent for Additional Payments – Impact Assessment* (August 2012) 15.

⁶⁷⁶ BIS, *EU Consumer Rights Directive: Provisions on Delivery, Passing of Risk, Communication by Telephone and Consent on Additional Payments – Impact Assessment* (August 2012) 13.

businesses have been using pre-tick boxes which consumers had to untick in order to avoid paying for a good or service which would not have otherwise chosen to purchase.⁶⁷⁷ The rules will accordingly prevent those instances where consumers either did not pay attention to the box or they may have forgotten to untick that box and they subsequently found themselves bound to pay for a good or service that they did not want or actually need. In this regard, the provisions on charges can of course be regarded as perhaps the most important improvement that the Directive has brought.

While the protection of Article 19 clearly applies to passenger transport contracts⁶⁷⁸, there has been a degree of uncertainty as to whether the provisions also cover the package travel sector as technically the package travel sector is generally excluded from the scope of the Directive. It is important to note at this point that there exists a separate directive in the particular area since 1990 but in May 2015 agreement was reached for the adoption of a new Package Travel Directive which was eventually published in autumn 2015 in the EU's Official Journal and will be transposed into national laws within the next two years. While the Directive was not even agreed at the point of transposing the Consumer Rights Directive, neither the original directive nor its revised version of 2005 deal with fees for the use of means of payment so as to prevent dip pricing for travel package contracts by thus creating a gap in the legislation. This is possibly one of the grounds why the European Union Committee of the House of Lords referred to the scope of the Directive as being confusing and narrow in some respects.⁶⁷⁹ The decision to exclude the package travel sector from the scope of the Directive was not particularly welcome for UK and as Malcolm Harbour expressed having in place a directive which covers a targeted

⁶⁷⁷ *ibid* 15.

⁶⁷⁸ *ibid* 16; BIS, *Enhancing Consumer Confidence by Modernising Consumer Law – Consultation on the implementation of the Consumer Rights Directive 2011/83/EU* (August 2012) 37.

⁶⁷⁹ European Union Committee, *EU Consumer Rights Directive: getting it right* (HL 2008-09, 126-I) paras 75-76.

segment of the market would not be logical.⁶⁸⁰ In reality, the method used to conclude both types of contract is the same, both constitute online sales and therefore the same rationale applies. Above all, it could be considerably confusing to apply different rules to the same contract based on whether it has been sold separately or as a part of a package.⁶⁸¹

Part Two - Proposal for a Consumer Rights Directive

The initial proposal for the Directive that was brought forward in 2008 is perhaps the most explicit example of the manipulation of European Consumer Law and this part of the Chapter discusses what the original proposal for a Consumer Rights Directive would have meant for both the UK and Cypriot regime. This seeks to further support the main argument that is put forward in this thesis questioning the primary objectives behind legislating in the area of European Consumer Law as increasing consumer protection does not seem to be the actual driving force. The purpose is not to examine in detail the changes that the proposed Directive would bring to the areas of Unfair Contract Terms and the Consumer Sales themselves but rather to appose the most striking regards in which the proposal would lead to a reduction of consumer protection. This leaves us with an evident question as to how consumer confidence could really increase with a measure whose adoption would simply result in a reduction of consumer protection and it is of course a further ground underpinning the concern that this thesis has formulated.

The wide ambit of the originally proposed Directive and the changes that it particularly contained in the areas of Unfair Contract Terms and Consumer Sales combined with the principle of maximum harmonisation would have rather sweeping consequences. While the initial ambitious proposal resulted in a considerable narrow piece of legislation with the most controversial

⁶⁸⁰ European Union Committee, *EU Consumer Rights Directive: getting it right* (HL 2008-09, 126-I) para 79.

⁶⁸¹ BIS, *EU Consumer Rights Directive: Provisions on Delivery, Passing of Risk, Communication by Telephone and Consent on Additional Payments – Impact Assessment* (August 2012) 16 ; BIS, *Enhancing Consumer Confidence by Modernising Consumer Law – Consultation on the implementation of the Consumer Rights Directive 2011/83/EU* (August 2012) 37.

aspects of it having been removed, it is, as it has already been explained important for the purposes of this study, to consider the effect of the proposed version of the Directive as well. This part of the chapter considers the effect that the proposal would have in practice but also explains how any effort on the domestic level to increase consumer protection in the areas that the Directive would initially cover would indeed be impossible. This would be an unfortunate situation for Member States with more sophisticated consumer protection regimes in place such as the United Kingdom. For this reason, the Consumer Rights Bill which was already making its way to the UK Parliament at the time when the Consumer Rights Directive was proposed and was being negotiated, could not be absent from this consideration.

However, before assessing the effect that the proposal would have for both domestic regimes, it is interesting to note that the extent of the concern caused around the proposal for a Consumer Rights Directive in the two Member States greatly differs. The Cyprus Government and the responsible bodies involved, including the Ministry of Energy, Trade, Industry and Tourism as well as the Parliamentary Committee on Energy, Trade, Industry and Tourism, have remained silent in relation to the proposal for a Consumer Rights Directive by not putting forward any particular views or concerns. Contrary to that, the proposal has been highly criticized and not particularly welcome by the UK Government. The lack of any actual opinion stemming from the Cypriot Government is a limitation of this study as it deprives the opportunity to reach a more conclusive picture of how the particular Member States receive contested EU measures such as the Consumer Rights Directive. The fact that the Cyprus did not express any disagreement does not mean that the proposed Directive would not have a negative impact on the Cypriot consumer protection regime. The failure on the part of Cyprus to provide any disagreement in the particular case could be considered as an indication of their general approach towards European initiatives and their receptiveness of European Law.

On the other hand, in the UK the Directive did not go unnoticed. The UK Government was particularly concerned with the diminishing of the level of consumer protection that would accrue had the Proposal been adopted. The

European Union Committee of the House of Lords which prepared a report in relation to the proposed Consumer Rights Directive, considered that it was of utmost important that the level of protection provided to consumers should not be reduced⁶⁸², this view was shared by the Citizens Advice as well which expressed how “existing consumer protections must not be lost in a harmonised Directive”.⁶⁸³ To the Which? View, “the proposal was not drafted with consumers as its heart”.⁶⁸⁴ More importantly, the European Union Committee of the House of Lords was not convinced by the very underpinning of the European Commission’s argument and the need to bring maximum harmonisation as a way to increase consumer confidence in cross border which indeed asked for better statistics on cross-border trade.⁶⁸⁵ Not only greater research is required as to the extent to which legal harmonisation can indeed lead to an increased use of the internal market by consumers but also greater research as to the actual level of desire and demand for cross-border shopping.⁶⁸⁶ UK has been amongst the Member States that withheld their agreement with the proposed Directive and perhaps amongst the most influential actors that prevented the moral panic around consumer confidence and its misplaced connection with maximum harmonisation from taking full effect.

Major points of disagreement in the proposed Consumer Rights Directive

Consumer Remedies for Faulty Goods

Under the Consumer Sales Directive there was again a two tier system of remedies in place with repair and replacement found under the first tier and price reduction and rescission under the second tier. Under the Consumer Sales Directive, the consumer shall begin first by asking one of the remedies found under the first tier while the trader could provide an alternative if one is impossible or disproportionate. Consumer can then move to the second tier

⁶⁸² European Union Committee, *EU Consumer Rights Directive: getting it right* (HL 2008-09, 126-I) para 41.

⁶⁸³ *ibid* para 36.

⁶⁸⁴ *ibid* para 40.

⁶⁸⁵ *ibid* 198.

⁶⁸⁶ *ibid* 199.

remedies if the trader has failed to carry out the repair or replacement within a reasonable time⁶⁸⁷, without actual indication of what a reasonable period of time really is. While the proposed Consumer Rights Directive retained the two tier system of remedies, it shifted the choice from the consumer to the trader which would in practice make the consumers move from the first tier remedies to the second tier remedies particularly difficult. Consumers would thus experience the “fear of becoming locked in a cycle of failed repairs” as the Law Commission has rightly argued.⁶⁸⁸

Under UK law, there have however been two sets of remedies available for consumers. There have on the one hand been the European Consumer Law remedies as provided by the Consumer Sales Directive which the Sale of Goods Act 1979 was in 2002 amended to include as well as the UK traditional common law sales remedies. Under the traditional sales remedies, UK consumers have enjoyed the right to reject non-conforming, faulty goods, without having to move from the first to the second tier remedies as the Sale of Goods Act remedies have provided. The common law right to reject has been available when one of the implied terms contained under sections 13-15 of the Sale of Goods of Act is breached and unless the consumer is deemed to have accepted the good under section 35 of the Sales of Goods Act as the right to reject is in this way lost. However, with the adoption of the proposed Directive the traditional remedies would have to be repealed given the maximum harmonisation character of the Directive. Accordingly, UK consumers, despite the fact that they had the option to ask the seller to attempt to repair goods, they were under no obligation to do so before exercising their right to reject goods following the UK traditional sales remedies.⁶⁸⁹ The Law Commission Consultation Paper on Consumer Remedies for Faulty Goods which dealt with proposal for the Consumer Rights Directive, has showed widespread support for the right to reject. In particular, 89% of the consumers participating stated that the right to reject should be retained while 94% of them regarded the right to a refund as important. The proposed Consumer Rights Directive would accordingly

⁶⁸⁷ Law Commission, *Consumer Remedies for Faulty Goods* (Law Com No 317, 2009) viii.

⁶⁸⁸ *ibid* xii.

⁶⁸⁹ BIS, *Consolidation and Simplification of UK Consumer Law* (November 2010) 72.

remove a fundamental component of the UK regime, a long-established remedy⁶⁹⁰ which in countries such as Germany such a right is not provided but it is on the contrary viewed it as “a rejection too far”.⁶⁹¹

In addition, under the Commission’s proposal, minor defects were totally excluded from the right to reject. This would accordingly have far-reaching consequences for UK consumers who would lose not only an important remedy provided under UK law but also the opportunity, even when moving to the second tier of remedies, to reject goods which have minor defects. Accordingly, where the trader was unable to either repair or replace the goods in question, consumers would have but to merely accept a reduction in price in cases where there is a minor defect.⁶⁹² The Law Commission has interestingly expressed that consumers do care to a great extent about the appearance of new goods and spend considerable time selecting goods for their appearance. It is also not rare for consumers to pay extra in order for their goods to have a specific appearance.⁶⁹³ Under the changes that the proposal would have brought, not only consumers would have price reduction as the only remedy for which traders are bound by no clear rules as to how price reduction should be calculated but there would also be the risk of traders arguing that a defect in the product is minor so as to totally deprive consumers from their right to rescind the contract⁶⁹⁴, even if it is generally the remedy of last resort.

As regards the Cypriot regime, the Consumer Sales Directive has been implemented with The Certain Aspects of the Sale of Consumer Goods and Associated Guarantees Law of 2000⁶⁹⁵ and Article 5 of the particular law contained the two tier remedy that the Directive has provided. Nonetheless, prior to the implementation of the Consumer Sales Directive in Cyprus,

⁶⁹⁰ Law Commission, *Consumer Remedies for Faulty Goods* (Law Com No 317, 2009) 6, 22.

⁶⁹¹ European Union Committee, *EU Consumer Rights Directive: getting it right* (HL 2008-09, 126-I) para 162.

⁶⁹² Law Commission, *Consumer Remedies for Faulty Goods* (Law Com No 317, 2009) xi.

⁶⁹³ *ibid* x.

⁶⁹⁴ *ibid* x.

⁶⁹⁵ The Certain Aspects of the Sale of Consumer Goods and Associated Guarantees Law of 2000 N. 7(I)/2000.

under The Sale of Goods Law of 1994⁶⁹⁶, Cypriot consumers could reject goods that were not in conformity with what has been agreed. Nonetheless, under the Certain Aspects of the Sale of Consumer Goods and Associated Guarantees Law of 2000 was provided that the Sale of Goods Law of 1994 would continue to apply unless there is disagreement between the two where the former applies. This means that the two tier remedies provided under the Certain Aspects of the Sale of Consumer Goods and Associated Guarantees Law of 2000 would apply by in this way removing the automatic right of consumers to reject goods that do not conform to what has been promised. Contrary to UK which retained the right to reject under the traditional remedies, the Cyprus approach has since the transposition of the Consumer Sales Directive in their national regime in 2000 have surrendered the automatic right to reject by thus leaving to the disposal of consumers the European remedies. While the right to reject was not anymore available in the case of Cyprus, the fact that the choice would unevenly be shifted on the trader and given the maximum harmonisation character of the proposal, any opportunity to retain the status quo would be lost by thus causing a reduction to the level of consumer protection but to a lesser extent than in the case of the UK.

Given the fact that the aim behind the proposal for the Consumer Rights Directive has been to increase consumer confidence in cross border, it is perhaps unfortunate that a tool which has the potential to increase consumer's confidence would have been made practically unavailable. It accordingly remains doubtful as to how a reduction in consumer protection in the particular area was compatible with the wider aims sought to be achieved. The decision in the proposed Consumer Rights Directive to shift the choice on the trader not only makes the right more difficult for the consumer to exercise but it also shows how emphasis has shifted on traders. Traders would in this way be in a position to decide and act in the way that better serves their interests in each situation where they had to decide as to the remedy that they would provide to a consumer. This would indeed provide traders more certainty as consumers would no longer reject

⁶⁹⁶ The Sale of Goods Law of 1994 N. 10(I)/94.

goods indiscriminately, especially in situations of minor defects. Traders could accordingly have control in which situations consumers could reject goods. Accordingly, it is fortunate that those amendments were eventually withdrawn.

Unfair Contract Terms

The area of unfair contract terms was under the original proposal dealt with under Chapter V of the Directive. The proposal sought, among others, to fully harmonise both the grey and the black list which exist under the Directive on Unfair Contract Terms on the basis of minimum harmonisation. Member States could no longer be able to complement or update the grey list, that is the list containing those unfair contract terms that are not in all situations unfair but they could well be unfair in another situation. This would accordingly remove the power from Member States to adapt it⁶⁹⁷ to the national setting and thus address local issues arising. In addition, there have been Member States which had provided for more extensive, than those provided in the proposal, black and grey lists in their national legal regimes which could neither maintain nor they could add to the lists contained in the Directive owing to the maximum harmonisation principle.⁶⁹⁸ Accordingly, the abrogation of national lists that long existed under national regimes could lead to deterioration of consumer protection in many Member States in an effort to comply with the Directive.⁶⁹⁹ This automatically does not leave room for national specificities to be taken into account.⁷⁰⁰

Maximum harmonisation would negatively affect the level of consumer protection offered under many national laws and the efforts through maximum harmonisation to achieve complete uniformity would accordingly undermine, as Howells has argued, familiar national instruments of

⁶⁹⁷ Consumer Rights Bill Deb 6 March 2014, col 481.

⁶⁹⁸ Loos, 'Full Harmonisation as a regulatory concept and its consequences for the national legal orders - The example of the Consumer Rights Directive' (n 348) 23.

⁶⁹⁹ *ibid.*

⁷⁰⁰ *ibid* 30.

consumer protection⁷⁰¹ as well as national instruments that provide greater protection to consumers. The maximum harmonisation of the aforementioned lists entails an automatic advantage for traders in terms of certainty. Traders could in this way access the exact list of those terms that may be deemed as unfair in all Member States across the Union and thus avoid liability by being cautious when using those terms. An update of the black and grey lists harmonised, although minimum, at a high, satisfactory level could be a welcome change in terms of consumer protection but there is no strong reason why Member States should be prevented from increasing national consumer protection.

UK has not been particular content for further intervention and has exhibited their preference towards a degree of discretion that will allow them to update parts of the legislation and provide their own approach. On the other hand, the Cypriot approach which have under the Unfair Terms in Consumer Contracts Law of 1996⁷⁰² faithfully reproduced the Directive, will continue to be in force after the proposed amendments in the particular area were dropped. No opinions were expressed in relation to the consequences that would follow from the proposal nor any willingness to change the status quo. This is the approach primarily followed by the Cypriot Government which has been made evident both in relation to the various European Directives that have so far been adopted in the area of consumer law.

In addition, the rules on unfair contract terms under the proposed Consumer Rights Directive contained a total exclusion of negotiated terms. This would mean that both Member States would be debarred from including negotiated terms in their relevant national regime had they wish so. Despite the fact that the majority of consumer contracts have and still are based on standard form contracts, for the UK, totally excluding negotiated terms in all circumstances was seen as problematic and as a rejection too far. As the Law Society has rightly argued this would leave UK consumers with no protection in those where a slight attempt to negotiate has taken place. As Which? has interestingly noted, even in those cases where negotiation

⁷⁰¹ Howells, 'The Rise of European Consumer Law – Whither National Consumer Law?' (n 35) 71.

⁷⁰² The Unfair Terms in Consumer Contracts Law of 1996, N.93(I)/96

indeed took place between the trader and the consumer, their bargaining positions still hardly be regarded as equal.⁷⁰³ Excluding negotiated terms would accordingly be a step to the advantage of traders as fraudulent traders might in this way be incited to create some negotiation in order to avoid a term being assessed as to its fairness.

Consumer Rights Act

While the preceding part has showed the most striking examples in which the proposed Directive would affect the existing level of protection offered to consumers, there is another aspect to consider. The amendments that the proposed Directive would bring and their maximum harmonisation character would make impossible any attempt at the national level to increase consumer protection. The UK has been particularly categorical against the inclusion of the changes to the areas of Consumer Sales Remedies and Unfair Contract Terms. In both areas, the UK was undergoing its own review as part of the wider aim to reform UK Consumer Law. The Consumer Rights Bill which is now the Consumer Rights Act, was making its way to the UK Parliament at the same time when the Consumer Rights Directive was already being negotiated. The purpose at this point is not to examine the changes achieved that were brought by the Consumer Rights Act in general as it does not seek to implement the Directive and this would go beyond the purposes of this study. It is relevant in this part due to the changes that the UK Government was able to make in those areas that the proposed version of the Directive would cover. The fact that the amendments to both areas were eventually abandoned provided UK the opportunity to provide its own amendments with the adoption of the Consumer Rights Act. While the Consumer Rights Act shows the evident willingness on the part of UK to provide its own approach and which in no case was ready to accept a diminishing of the existing level of protection, it is important to understand the negative consequences that the contested amendments combined with the maximum harmonisation principle would have on Member States such as UK with a more sophisticated consumer protection regime in place.

⁷⁰³ European Union Committee, *EU Consumer Rights Directive: getting it right* (HL 2008-09, 126-I) para 181.

The long-standing remedy to reject faulty goods which would otherwise be lost was eventually retained under the Consumer Rights Act.⁷⁰⁴ The right to reject formed part of the analysis and review that Howells and Twigg Flesner have made to UK Consumer Law prior to the adoption the Consumer Rights Act. In the document “Consolidation and Simplification of UK Consumer Law” summarizing their findings, both Howells and Twigg-Flesner stated that it constitutes a key remedy under the traditional sales law.⁷⁰⁵ While with the right to reject the trader might thus be deprived of the opportunity to cure the breach when consumer confidence in him has been lost⁷⁰⁶, giving the option to the trader to choose between remedies raises cannot guarantee that consumers will be well protected. The fact that the fate of the consumer’s refund would be left to the trader could lead to uncertain and disadvantageous consequences for consumers. In addition, the Law Commission has rightly argued the right to reject is important as “a short-term remedy of first instance”⁷⁰⁷ for consumers as it constitutes “a simple, easy-to-use remedy which inspires consumer confidence”⁷⁰⁸ but it also strengthens consumer’s bargaining position.⁷⁰⁹ This provides consumers the assurance that they can receive their money back if the goods do not conform to what has been promised.⁷¹⁰ Interestingly, the Law Commission expressed how the right to reject goods is also a way to make consumers more prepared to try brands and retailers that are unknown to them and this also conflicts with the choice of the European Commission to render the particular remedy as a last resort option with the choice being shifted to the trader which would technically make the remedy inaccessible.

In addition, UK was particularly categorical against the harmonisation of the grey list.⁷¹¹ The maximum harmonisation of the area of unfair contract terms would indeed have been a negative consequence for the UK Government

⁷⁰⁴ Consumer Rights Act 2015, s 19.

⁷⁰⁵ BIS, Consolidation and Simplification of UK Consumer Law (November 2010) 72

⁷⁰⁶ *Ibid.*

⁷⁰⁷ Law Commission, *Consumer Remedies for Faulty Goods* (Law Com No 317, 2009) ix.

⁷⁰⁸ *Ibid.*

⁷⁰⁹ *Ibid.*

⁷¹⁰ *Ibid.*

⁷¹¹ Explanatory Notes to the Consumer Rights Act, para 68.

whose desire to make amendments in the relevant area goes back to 2001. Eventually, the efforts to update the law in the particular areas have found their road in the Consumer Rights Act. Not only the grey list remained as an indicative and non-exhaustive list as Section 63 of the Consumer Rights Act stipulates but in addition three insertions were made under paragraphs 5,12 and 14⁷¹², none of these options would be feasible had the proposal been adopted with the maximum harmonisation principle. To the House of Commons Public Committee, whenever a change is made there is a need to ensure that consumers will be benefited and the grey list constitutes a vital aspect of the relevant consumer legislation and it is of utmost importance to get it right, for this reason there was a need on the part of the UK to provide its own approach in relation to the list.⁷¹³ A degree of flexibility that allows the possibility to make changes at a later point and thus adapt it over time is also important. This will provide an opportunity, as the Public Bill Committee of the House of Commons have noted to make additions to the list when “general issue with types of terms that have significant potential to disadvantage consumers” emerges.⁷¹⁴

The Law Commission had in its Report on Unfair Terms in Contracts expressed how their recommendation is to have in place legislation that will allow consumers to challenge any term of the contract that is not a core term irrespective of whether or not the term was negotiated.⁷¹⁵ This recommendation that was eventually adopted under the Consumer Rights Act aimed at bringing clarity to the two UK pieces of legislation in the area, the Unfair Contract Terms Act 1997 and the Unfair Terms in Consumer Contracts Regulations 1999, implementing the European Directive on Unfair Terms in Consumer Contracts. The former has primarily contained exemption clauses for contracts between businesses and consumers, between one business and another and, to a limited extent to “private” contracts where neither party is acting for business purposes. Most terms that purport to exclude or restrict liability are subjected to the Act while the

⁷¹² Consumer Rights Act, sch 2.

⁷¹³ Consumer Rights Bill Deb 6 March 2014, cols 481,521.

⁷¹⁴ *ibid* 481.

⁷¹⁵ Law Commission, *Unfair Terms in Contracts* (Law Com No 292, 2005) 11.

Regulations have contained the controls applicable to a range of contract terms but only those included in consumer contracts. In addition the former covered negotiated terms while the latter did not by thus causing complexity and uncertainty. The Consumer Rights Act nowhere refers to negotiated terms as being excluded by increasing protection offered to consumers and thus addressing situations where traders attempt to create some negotiation in relation to a particular term in order to make it non assessable for fairness. This opportunity would nonetheless be lost had the Consumer Rights Directive been adopted in its proposed form.

What lessons to learn?

The above part has discussed those areas in which the proposed Consumer Rights Directive would improve trader's position by deciding about consumer remedies as well as by perhaps providing greater certainty for traders in relation to unfair contract terms. Such concerns are particularly intensified because of the maximum harmonisation character that the proposal provided. The consequences of course would have been far more onerous for Member States with a strong tradition in consumer protection, such as the United Kingdom which are always willing to make steps beyond the European approach. There have been real concerns in relation to the proposed Directive for the UK Government and the adoption of the Consumer Rights Act has simply reconfirmed that those amendments were in no case in conformity with the UK legal tradition. The UK Government eventually, and fortunately one would say, made use of the power that was left to them to provide their own amendments to the areas that the Consumer Rights Directive did not in the end include. The UK by taking the freedom to do things differently in those areas which involved too "trader-centric" amendments prevented a downgrading of consumer protection.

The fact that the scope was in the end condensed has prevented not only a significant reduction to the level of consumer protection and at the same time prevented a major shift to the benefit of traders in the respects referred to above. It remains doubtful as to how consumer confidence could really be increased with having such provisions in place. Accordingly, the fact that the

onerous consequences that the proposal would have for the level of protection offered in both Member States have in the end been prevented constitutes a positive step from a consumer's perspective. The moral panic which has accordingly been created around the consumer confidence and the need for maximum harmonisation failed to take its full effect due to the narrowing down of the scope of the Directive. For this reason, the Consumer Rights Directive may reasonably be regarded as a moral panic which did not take its full effect. While it is still doubtful as to how the Consumer Rights Directive for the reasons explained in Chapter 5 and 6 can really increase consumer confidence, its compromised version and its instrumental character is perhaps a safer approach but that neither adds much to consumer protection nor it involves the reduction that the proposed version would have.

Conclusion

While it would be unsound to deny that some improvements were indeed brought as for example the increase of the withdrawal period, as well as the provisions in relation to additional charges, it should not be disregarded that the instrumental character of the Directive is simply reconfirmed in Chapter 7. Despite the fuss that has been created around its adoption, what the Consumer Rights Directive merely does is to consolidate existing legislation by updating and harmonising the Distance Selling and Doorstep Selling Directive. Accordingly, the Directive has put under a single piece of legislation the provisions that mainly harmonise information requirements, the right to withdraw and a number of provisions preventing additional charges. This turns the directive into a means of consumers to make informed choices but the limitations of the approach taken have been already addressed in Chapter 5 and 6 of this thesis. This Chapter has dealt with the most important changes that the Directive has brought and what they mean for the UK and Cypriot regimes. In most of areas due to the maximum harmonisation principle in place, national provisions do mirror what the Directive provides and that is a reason why there has been no

reference to every single provision as transposed and also in those respects the Directive constitutes an update of what has been provided under the prior regime.⁷¹⁶

The consideration of the proposed Directive with the contested changes that it contained show how, even if the final version of the Directive does not do much in terms of bringing the overhaul in consumer rights that has been promised, it is fortunate that a downgrade on consumer protection was prevented. Even if the Consumer Rights Directive as adopted has an instrumental character, which as Chapters 5 and 6 have showed will only benefit the most circumspect and well-informed consumer, it is perhaps a safer but not the best approach. This equates to say that although the eventual approach does not do much, it at the same time does not reduce consumer protection. This shows how the Commission has failed on the one hand to increase consumer protection and on the other hand to achieve its hidden objective of putting in place a regime that will provide greater certainty for traders through the maximum harmonisation. The fact that the scope of the Directive was narrowed down of course prevented the focus of the Directive from unevenly being shifted on traders but nonetheless, as Chapter 5 and 6 have showed, the traders still gain from the resulting approach.

UK has exhibited some degree of creativity in transposing the Directive. Some evident steps beyond what the Directive provides as well as some improvements in an effort to achieve a more consistent regime or even to address local issues where this seemed required to minimise the risk for consumer detriment, were made. Cyprus on the other hand, has been limited to the wording and structure of the Directive without any actual departure, apart from lowering the threshold of low value off premises contracts for which the Directive expressly provided an opportunity for. Sector specific initiatives in the area of consumer protection have in Cyprus been developed over the last decade through European initiatives. The fundamental trigger for this development has actually been the accession of

⁷¹⁶ The actual changes that the Directive has brought were considered in Chapter 6.

Cyprus to the European Union in 2004.⁷¹⁷ Although there have been some areas which were already subject to special regulations, this was not the case for doorstep and distance selling up to 2004 at a time when distance and doorstep selling were already dominant. The only protection available for doorstep and distance selling contracts was, prior to the accession of Cyprus to the European Union, that provided for contracts in general and for contracts for the sale of goods.⁷¹⁸ This constitutes the most pre-dominant explanation for the fact that Cyprus has in no case made an attempt to provide its own approach when transposing the Directive. It could have perhaps been easier to affect Member States such as Cyprus which blindly trust the European approach rather than Member States such as the United Kingdom with a long tradition in consumer protection as any measure that makes an attempt to provide less to consumers can hardly be welcome.

Nonetheless as James Devenney and Mel Kenny have rightly characterised the proposal on the Consumer Rights Directive as not only the most controversial step in the Commission's shift to full harmonisation but also as the more ambitious one.⁷¹⁹ The ambitious journey of the proposal led to a Consumer Rights Directive, which was not eventually a fully successful moral panic provided at least an opportunity to see the actual objective behind legislating in the area of European Consumer Law. Although Consumer Law has always been a market bound policy at the European level, the fact that the internal market objectives have made consumer protection a by-product should alarm us as to the whether this is the case for other areas of European legislation as well. At the same time, the lesson learned from the UK approach is that for some Member States the European approach is not the preferred way forward and there would always be desire to do things their own way, provided that European intervention is kept at the minimum. It should thus not surprise us that at a point when the UK was

⁷¹⁷ Papacleovoulou, 'Cyprus Consumer Protection' in Campbell, *International Consumer Protection* (n 589).

⁷¹⁸ Hans Schulte-Nölke (ed), Christian Twigg-Flesner and Martin Ebers, 'EC Consumer Law Compendium – Comparative Analysis' (2008) 56
<http://ec.europa.eu/consumers/archive/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf> accessed 19 April 2016.

⁷¹⁹ James Devenney and Mel Kenny, *European consumer protection : theory and practice* (Cambridge University Press 2014) 3.

categorical against the proposed Consumer Rights Directive and the areas that it included, the Consumer Rights Bill was already making its way to the UK Parliament simply to confirm the willingness on the part of UK to provide their own approach and of course prevent the downgrading of consumer protection that would otherwise be witnessed.

Chapter 8 - Conclusions

Introduction

While originally consumer protection did not fall in the areas that European Union could legislate in, with gradual changes through Treaty revisions⁷²⁰, the European Commission not only acquired competence but it has more importantly become a key player in legislating in the particular area. However, European Consumer Law never stood on its own. Reference to the internal market has since its development been and does remain integral to it. Accordingly, any measure adopted in the area unavoidably needs to contribute to the completion of the internal market. The current thesis has showed how the balance between completing the internal market and providing a high level of consumer protection, as Article 169 of the TFEU⁷²¹ providing the legislative basis for the particular area stipulates, has unevenly been shifted on the former consideration. Benefiting the internal market has, as this thesis has argued, been the actual driving force behind the adoption of the Consumer Rights Directive by thus turning consumer protection into a secondary consideration and at the same time a by-product of European Consumer Law.

The aim of this thesis has been to show the manipulation of European Consumer Law for the purposes of the internal market. Arguments supporting that consumer policy is gradually turning into an internal market policy are not new. Nonetheless, this thesis has made a step beyond existing argument by unveiling the process in which the European Commission has achieved this. The application of the moral panic theory in the area of European Consumer Law accordingly contributes in evidencing the central proposition from a new angle. The examination of the approach followed by the European Commission has thrown light upon the uneven balance between the two objectives to be achieved. In addition, this thesis

⁷²⁰ The whole process is described in Chapter 2 of this thesis.

⁷²¹ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/01, art 169.

provides a comparison between the transposition of the Consumer Rights Directive in the domestic regimes of UK and Cyprus. The Consumer Rights Directive has formed the example against which the hypothesis regarding the European Commission's objectives was tested. Despite the fact that five years have passed since its adoption and already two and half years since the lapse of the transposition period, the implementation of the Consumer Rights Directive in both Member States, especially in the case of Cyprus, has not been the subject of research.⁷²² Therefore, the examination of the transposition contributes to the existing literature by drawing upon the moral panic which has been formed around the consumer confidence, the effect of the Directive in practice and more importantly provides lessons for the approach followed by each Member State and what this means for the European Commission and its attempts aiming to benefit the internal market.

Three pertinent issues arise with regard to the Commission's approach. The consumer confidence justification which the European Commission has used for the shift to maximum harmonisation is not more than a moral panic and a smokescreen which enabled the European Commission to pursue its objective of benefiting the internal market. The second issue arising has been the debate between minimum and maximum harmonisation. The shift to maximum harmonisation has provided further evidence for the fact that the consumer confidence justification has been hijacked for the purposes of the internal market. There has been an effort in this thesis to show the weak connection between maximum harmonisation and the aim of increasing consumer confidence and at the same time the fact that the European Commission focuses on a single standard of consumer which can hardly be the case in reality. The third pertinent issue is the Consumer Rights Directive itself which, although in a rather compromised form due to the objections by Member States, the European Parliament and the Council, has comprised the example for testing the main hypothesis of this thesis. Not

⁷²² As regards the UK transposition, two academic articles have so far focused on this issue. The first one is Cristian Twigg-Flesner, 'Some Thoughts on Consumer Law Reform – Consolidation, Codification, or a Restatement?' (2014) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2686683> accessed 25 April 2016. The other academic who has focused on the transposition of the Directive in the UK regime is Paula Giliker which has been considered in this thesis.

only the eventual approach followed in the Directive is consistent with the internal market objectives but it also constitutes further evidence for the single standard of consumer on which the European Commission focuses on. Last but not least, the transposition of the Directive has not only provided an opportunity to examine its effect in practice but provided some important lessons emerging from the differences in approach between the two Member States and what this means for the European Commission's objectives.

The consumer confidence justification – An emerging moral panic?

The need to increase consumer confidence has served as the justification for legislating in the area of consumer protection through the years in the form of minimum harmonisation directives as well as the shift to maximum harmonisation in 2008 in the Consumer Rights Directive. The increased concern around consumer confidence and the shift to maximum harmonisation have constituted the trigger for examining the driving force behind European Consumer Law. The ability of maximum harmonisation to increase consumer confidence has already been the subject of concern and criticism put forward by various academics. Thomas Wilhelmsson has been amongst those who have argued that maximum harmonization relates only minimally to the actual creation of consumer confidence.⁷²³ Nonetheless, this thesis has made a step further by arguing that the increased concern around the low levels of consumer confidence in cross border trading is in reality a rather constructed problem. The moral panic theory has in this case been used to examine the supposed efforts of the European Commission to increase consumer confidence.

Moral panics may arise in situations where influential people, politicians, legislators as it is the case being examined here, create concern around a given problem, whether real, exaggerated or even constructed, which enables them to intervene in order to address and combat that perceived

⁷²³ Wilhelmsson, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' (n 4) 318.

social problem through for example a change in legal or social policy.⁷²⁴ By applying the moral panic theory in the current case, the purpose has been to show how the consumer confidence justification has been hijacked for the purposes of the internal market with a moral panic thus emerging. The consideration of the individual characteristics of moral panics has contributed towards better examining the consumer confidence argument and thus proving the argument that it constitutes an example of a moral panic.

The constant reference to the need to increase consumer confidence has heightened the concern around the issue and led to its conceptualisation as a social problem that needs to be addressed. At the same time, this also turned the particular argument into a convincing justification for the shift to maximum harmonisation. In moral panic situations, the concern created is disproportionate to the actual magnitude of the problem and this constitutes a process by which the real objectives to be achieved can be hidden behind. Equally, there was an effort to create a “bitter feeling” towards the discrepancies that are found amongst the various national regimes across the Union which have accordingly been “blamed” for the low levels of consumer confidence. Maximum harmonisation was accordingly presented as the way to address the problem. However, this called for an examination of the the weak connection between maximum harmonisation and consumer confidence which further unveils the misrepresentation of the real objectives that were sought as well as the actual driving force behind the Commission’s approach. The Consumer Rights Directive was used to test the main hypothesis of this thesis and eventually determine whether the current moral panic has in the end been successful or not.

⁷²⁴ Hall, Critcher, Jefferson, Clarke and Roberts, *Policing the Crisis: Mugging, the State and Law and Order* (n 21) 5.

Maximum harmonisation and the aim of increasing consumer confidence – A reality?

The level of harmonisation has been the most contentious issue with regard to the Consumer Rights Directive. The debate between minimum and maximum harmonisation has evidently attracted the attention of various academics who have expressed their concerns in relation to the shift to maximum harmonisation and the adverse consequences that this would have for European consumers.⁷²⁵ The role of the European Parliament and the Council has as this thesis has showed proved to be valuable in the process of the Consumer Rights Directive. Both European institutions were not satisfied with the Commission's proposed Directive and particularly with the fact that maximum harmonisation would lead to a reduction of the existing level of consumer protection, especially in the areas of unfair contract terms and consumer remedies. The whole process that preceded the adoption of the Directive has accordingly led to a trimming down of its ambit and thus a reduction of the effect of maximum harmonisation. The most onerous consequences that would result in the areas of unfair contract terms and consumer remedies, particularly due to their maximum harmonisation character, were eventually not included in the final version of the Directive.

While the level of harmonisation that has prevailed is supposedly targeted full harmonisation, the default position is still maximum harmonisation with the exception of some limited issues that have already referred to in which Member States can go beyond the Directive. The final Consumer Rights Directive primarily provides for the maximum harmonisation of information requirements and the right to withdraw. Nonetheless, this thesis has argued that there are still doubts as to whether maximum harmonisation, as it has prevailed in the Consumer Rights Directive, is really connected with the desire to increase consumer confidence as the European Commission has advocated.

⁷²⁵ There is a discussion on the debate between maximum and minimum harmonisation in Chapter 5 of this thesis.

By going beyond a simple comparison between the two levels of harmonisation, this thesis has showed the presumed, ill-conceived connection between maximum harmonisation and the objective of increasing consumer confidence. The misplaced character of the consumer confidence justification was firstly considered against the wide array of issues that affect consumers' attitudes and decision to buy. Consumer's decision making is evidently affected by factors that go beyond a simple consideration of the legislation that is in place. Increasing consumer confidence does not evidently depend on the extent to which legislation is harmonised, therefore the examination of factors affecting consumers from a consumer behaviour perspectives has led to the conclusion that increasing consumer confidence can hardly be as straightforward as presumed with a shift to maximum harmonisation. Consumers' confidence does not for example depend upon their own views but can also be affected by external factors accruing from their wider environment. To add to this, consumers exhibit a degree of bias and predisposition to their habits in order to avoid possible risks⁷²⁶ and positive first-hand experience can possibly increase their confidence⁷²⁷ in a product or way of purchasing, as for example distance shopping. The wide array of factors involved not only show how the maximum harmonisation of legislation cannot guarantee a definite increase consumer confidence but they also constitute a possible explanation why cross-border trading has not greatly increased.

The resulting approach in the Consumer Rights Directive with the shift to maximum harmonisation has in addition provided an interesting lesson regarding the standard consumer that is to be protected at the European level. The connection between maximum harmonisation and a definite increase of consumer confidence in cross border shopping has given rise to a single standard of consumer who once all consumer protection rules are harmonised, the European consumer envisaged will be ready and confident to engage into cross border trading. The consumer to be protected at the European level is above the average consumer by being perceived as

⁷²⁶ De Groot, Antonides, Read and van Raaij, 'The effects of direct experience on consumer product evaluation' (n 406) 510.

⁷²⁷ *ibid.*

reasonably well-informed, observant and circumspect. The way European consumer is perceived does not correspond to the reality as consumers are not in all situations well-informed or observant. With the approach followed, the consumer who is in the focus of the Consumer Rights Directive constitutes an active market participant willing to engage in cross border trade. However, there is a further aspect to this which should not be disregarded. The definition of consumer accruing simply provides further indication of the increased regard being paid to the internal market. In order to benefit the internal market, it is of course consequential to focus on active market participants whose economic activity is vital for the smooth functioning of the internal market.

In essence, the various information requirements as well as the right to withdraw are tools which aim at facilitating the conclusion of consumer contracts. This constitutes a shift away from a protective policy to a policy that seeks to empower consumers. Empowering consumers is nonetheless not an end in itself. The rather instrumentalist character of the Consumer Rights Directive purports at inciting an increase in cross border consumer activity which brings evident advantages for the internal market. Accordingly, the focus is on consumers who are willing to play the game of the Commission and engage in cross border shopping. With the resulting approach, not only certain skills are presumed to be in the possession of consumers which further confirms that the European consumer envisaged is in no case the weak consumer in need of protection but on a consumer who has the willingness, and of course the resources, to engage into cross border trading. The examination of the approach followed in the Consumer Rights Directive has added to the debated around the definition of consumer as accruing from the shift to maximum harmonisation and the European Commission's focus and also to what Hans-W Micklitz has rightly supported. European consumer is presumed to possess some standard skills while he is at the same time considered as an "omnipotent multinational market actor".⁷²⁸

⁷²⁸ Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in Civil Law – A Bittersweet Polemic' (n 501) 2.

The Consumer Rights Directive – A successful moral panic or not?

The Consumer Rights Directive has been the example used to test the main hypothesis of this thesis. The transposition of the Directive in the two domestic regimes has showed how what was achieved was not more than a simple update and harmonisation of what was already in place. Consumer protection has not really increased contrary to what the legislative basis in the area under Article 169 TFEU provides and which expressly mentions the objective to achieve a high level of consumer protection. However, this is even more striking with consideration to the fact that the initial proposal would even reduce the level of protection that was already offered and thus negatively affect the domestic regimes of the two Member States. This leads to an initial conclusion, that the Commission has partly failed to achieve its real objectives as the Directive constitutes a major compromise. Accordingly, the fact that the sweeping consequences that the Commission's initial proposal would bring have in the end been avoided⁷²⁹ suggests that the emerging moral panic did not take its full effect. The fact that the level of consumer protection would have negatively been affected simply constitutes evidence of the fact that the objectives behind the Consumer Rights Directive were from the very beginning misplaced.

The main argument developed throughout this thesis was further underpinned by examining the effect of the Consumer Rights Directive in practice and what it really means for national regimes. Its transposition has

⁷²⁹ Of course, it is interesting that the Commission, four years after its "defeat" with the Consumer Rights Directive and failing to put through the amendments in relation to the Consumer Sales Directive has made new proposal. The proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods brought forward in May 2015, brings back the changes to the list of remedies for lack of conformity and once again based on maximum harmonisation provides the two-tier hierarchy of remedies that the UK Government was particularly concerned with. Perhaps this is an indication of the fact that defeat is not an option and the Commission makes a second attempt to make the right to reject as a last resort remedy in all Member States irrespectively.

provided evidence that consumer protection has not really increased with the overhaul in consumer rights that Meglena Kuneva has promised for the 500 million European consumers when talking about the Proposal for the Consumer Rights Directive⁷³⁰ hardly being the case. Although some improvement and clarification has in some points been achieved and the onerous consequences that the proposed version of the Directive would have for both Member States were prevented, this does not automatically make the Directive a success. In spite of that, the comparison of the transposition of the Directive in the two domestic regimes has thrown light upon important differences in approach between the two Member States and what lessons there are to learn from them.

The transposition of the Directive in the Cyprus regime was achieved with The Consumer Rights Law of 2013, in the form of primary legislation, while in the UK the Directive was transposed through two pieces of Regulations, The Consumer Rights (Payment Surcharges) Regulations of 2012 and The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. The Directive was in the case of Cyprus easily transposed without giving rise to any evident concerns or difficulties. Available options left by the Directive were not really considered and one year after its transposition, the Directive has been characterised as a success for the Cypriot regime and its implementation was praised with content. On the other hand, for the UK, the transposition of the Directive did not prove as easy and straightforward. Different available options with regard to its implementation had to be carefully considered and balanced against their advantages and disadvantages. While in both situations, a consultation process took place, in the case of UK the various stakeholders expressed their concerns in relation to the Directive contrary to the case of Cyprus in which, interestingly, no particular concerns were put forward regarding any of the provisions of the Directive. This is an indication of the

⁷³⁰ Meglena Kuneva, 'Proposal for a Directive on Consumer Rights' (French Presidency Conference "What Kind of Protection for European Consumers?", Paris, 5 December 2008) <http://europa.eu/rapid/press-release_SPEECH-08-681_en.htm> accessed 19 April 2016.

receptiveness in the case of Cyprus towards the European legislation and their evident trust towards the European paradigm.

Both Member States have employed the copy out technique for the transposition of the directive. However their decision was perhaps informed by different reasons in each case. For Cyprus, which has since its accession to the European Union, worked hard to comply with EU legislation, this was the way to ensure the best possible results in transposing the Directive. On the contrary, for the UK, this was a way to prevent the Directive from being amalgamated in national legislation and thus make it more difficult to be identified. The comparison between the two Member States has interestingly showed how Cyprus has faithfully followed the Directive, even the structure and wording, while the UK has exhibited some degree of creativity. The UK Government identified parts of the Directive that contained ambiguities and possible loopholes for which there was a respectful attempt to address and thus avoid the creation of gaps in the legislation. There was accordingly an attempt on the part of the UK to increase the level of protection by in some respects going beyond the Directive where that was of course possible. While some limited improvements have been achieved for both domestic regimes, the Directive did not do much beyond clarifying and harmonising what was already in place.

The comparison made in relation to the transposition of the Directive and the differences in approach between the two Member States have raised some questions as to what may lie behind their stance. UK constitutes one of the biggest and most powerful Member States of the European Union with interestingly a strong tradition in consumer protection while Cyprus is on the other hand a small Member State which has entered the European Union, much later than the UK. Sector specific consumer protection has in the case of Cyprus been developed through European initiatives and has therefore been influenced by the European paradigm. After its accession to the European Union, the Cyprus Government has worked with great devotion to comply with European legislation. Perhaps, those evident contextual factors, provide justifications for the emerging differences between the two approaches. The approach followed on the part of UK exhibits an

unwillingness to compromise with any less than what is already provided to consumers and the UK government has made an effort to provide their own approach where that was possible. On the other hand Cyprus, without any disagreement towards any part of the Directive, has blindly followed the European paradigm by failing to identify any flaws or points of where improvement could be made. The fact that Cyprus consumer protection has in the particular area developed through the transposition of European directives has led the Cyprus Government to look up to European legislation as the best approach. Unwillingness to compromise is not unlikely to be expressed from other Member States who, as the UK, provide for a high level of consumer protection. At the same time, it is not unlikely for Member States in the same position as Cyprus, to accept contentious EU legislative measures which leave room for improvement without any effort to go beyond what is provided. Of course, the latter situation makes the job of the European Commission easier to achieve its objectives, if in the end successful.

The real driving force – Final Remarks

Maximum harmonisation as it has prevailed in the Consumer Rights Directive still constitutes evidence of the Commission's focus and desire to benefit the internal market. The eventual approach seeks to empower consumers who are omnipotent, well-observant and finally willing to be active in the internal market. Consumers who are below the standard envisaged by the European Commission cannot really help in the internal market project. European Consumer Law and the Consumer Rights Directive in more particular does not have a social character but it rather seeks to ensure that economic activity in the internal market is flowing. Ultimately, this approach aims at increasing cross border trade within the internal market. However, it is not only vital to empower the standard consumer on whom the European Commission focuses, but it becomes of utmost importance to provide legislative incentives for traders too. Increasing cross border trade can only be materialised with first of all willingness on the part of traders to expand their activity beyond their national borders.

The proposal for Consumer Rights Directive indeed provided such incentives for traders and had unevenly shifted the focus on traders. As it has been seen, it would for example give traders the opportunity to choose between consumers' remedies in relation to faulty goods while at the same time it would bring more clarity for traders had the list of unfair contract terms been adopted on the basis of maximum harmonisation. With the risk of reducing the level of protection in relation to unfair contract terms in a number of Member States, traders would have in this way been automatically aware of the list of terms that are considered unfair in all circumstances as well as rules that should be deemed to be unfair in all Member States without thus running the risk of being surprised by the various national legislations. Although those two areas were not included in the final Consumer Rights Directive, maximum harmonisation which has prevailed in relation to information requirements and the right to withdraw is also important from the traders' perspective. To some degree this approach also provides a legislative incentive for traders, as the Commission has from the very beginning hoped to achieve. There is nothing to deny that traders will in this way avoid costs from having to obtain legal advice or the costs accruing from the need to update their websites in order to comply with the national regime of a Member State they would like to start trading in. Knowing that the same information requirements as well as the same withdrawal period exists across the Union also provides legal certainty to traders and removes legislative surprises for traders who would otherwise be reluctant to face. Therefore, the importance of the maximum harmonisation of the two issues and the benefit that this can have for traders and consequently for the internal market as it ultimately aims at inciting cross border activity cannot be disregarded.

The question turns as to what will in this way be achieved. Why has the European Commission shifted its focus on cross border trading within the internal market? Is cross border shopping what consumers really care about? As this thesis has argued, consumers simply seek to satisfy their need, stick to their habits and more importantly avoid risks. On the other hand, it should not be disregarded that cross border trading is, undoubtedly, particularly beneficial for the smooth functioning of the internal market and

can bring positive advantages to the economy of the European Union as a whole. At the same time, it should not be disregarded that cross border trade provides a great opportunity for highly industrialised Member States to benefit their economies. However, for this to become a reality, the willingness of traders to expand their trading beyond their national borders is highly important and a way to incite such a willingness is through providing incentives to traders. This has perhaps been the ultimate concern behind the Consumer Rights Directive, a concern which has interestingly displaced consumer protection considerations. Nonetheless, the process preceding the adoption of the Consumer Rights Directive has indeed showed that the road to its adoption has not been a smooth one. The concerns of Member States and the dissenting positions of the European Parliament and the Council is what has, perhaps fortunately, prevented the adoption of a legislative instrument that would harm consumer protection. This leads to argue that the moral panic which the European Commission fired around the consumer confidence justification did not eventually take its full effect, the consequences of this moral panic could have been worse.

Benefiting the internal market has accordingly formed the driving force behind the Consumer Rights Directive, the question is nonetheless whether this is the case with any measure adopted in the area of European Consumer Law. Although measures adopted in the context of consumer protection needed from the very beginning to contribute to the internal market, is it really acceptable for internal market considerations to override consumer protection considerations? While both objectives stand side to side since the development of consumer policy at the European level, this gives rise to another question, had the internal market not existed, would the European Commission care about consumer protection? Would European Consumer Law exist independent from the internal market project? As the whole process of the Consumer Rights Directive has showed, European Consumer law has a reason for its development and existence which goes beyond simply providing consumer protection.

Bibliography

Primary Sources

EU

Directives

Council Directive (EEC) 85/577 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372

Council Directive (EEC) 90/314 on package travel, package holidays and package tours [1990] OJ L158

Council Directive (EEC) 93/13 on unfair terms in consumer contracts [1993] OJ L95

Directive (EC) 1999/44 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171

Directive (EC) 2005/29 concerning unfair commercial practices in the internal market [2005] OJ L149/22

Directive (EC) 97/7 on the protection of consumers in respect of distance contracts [1997] OJ L144/19

Directive (EU) 2011/24 on the application of patients' rights in cross-border healthcare OJ L88

Directive (EU) 2011/83 on consumer rights [2011] OJ L304/64

Directive (EU) 2015/2302 on package travel and linked travel arrangements [2015] OJ L326

Resolutions

Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy [1975] OJ C92.

Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy [1981] OJ C133/1

Council Resolution of 15 December 1986 on the integration of consumer policy in the other common policies [1986] OJ C003

Council Resolution of 9 November 1989 on future priorities for relaunching consumer protection policy [1989] OJ C294

Annex to the Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy [1975] OJ C92

Treaties

Consolidated Version of the Treaty Establishing the European Community [2002] OJ C325/33

Consolidated Version of the Treaty on the Functioning of the European Union [20120] OJ C326/01

Treaty establishing the European Coal and Steel Community (Treaty of Paris) [1951]

Treaty establishing the European Economic Community (Treaty of Rome) [1957]

The Single European Act [1986] OJ L169

Treaty on European Union (Maastricht Treaty) [1992] OJ C191

Treaty of Amsterdam [1997] OJ C340

Treaty of Lisbon [2007] OJ C306

UK

Acts

Consumer Rights Act 2015

European Communities Act 1972

Health and Social Care Act of 2012

Sale of Goods Act 1979

Explanatory Notes to the Consumer Rights Act

Regulations

The Cancellation of Contracts made in a Consumer's Home or Place of Work Regulations 2008, SI 2008/1816

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, SI 2013/3134

The Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334

The Consumer Rights (Payment Surcharges) Regulations 2012, SI 2012/3110

Cyprus

The Certain Aspects of the Sale of Consumer Goods and Associated Guarantees Law of 2000, L.7(I)/2000

The Consumer Rights Law of 2013, N.133(I)/2013

The European Union (ratifying) Law of 2003

The Fifth Amendment of the Constitution Law of 2006, N.127(I)/2006

The Law for Consumer Contracts Concluded Away from Business Premises of 2000, L.13(I)/2000

The Law for the Conclusion of Consumer Distance Contracts of 2000, L.14(I)/2000

The Sale of Goods Law of 1994, N.10(I)/1994

The Unfair Terms in Consumer Contracts Law of 1996, N.93(I)/96

Secondary Sources

Books

Acuña R M, *Comparative Law from Below – The construction of a critical project in Comparative Legal Studies* (Lambert Academic Publishing 2012)

Cini M and Pérez – Solórzano Borragan N, *European Union Politics* (4th edn, Oxford University Press 2013)

Cohen S, *Folk Devils and Moral Panics: The creation of the Mods and Rockers* (3rd edn, Routledge 2002)

Cseres K J, *Competition Law and Consumer Protection* (Kluwer Law International 2005)

Dannemann G and Vogenauer S, *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford University Press 2013)

Davies K, *Understanding European Union Law* (5th edn, Routledge 2013)

De Cruz P, *Comparative Law in a Changing World* (3rd edn, Routledge – Cavendish 2007)

Dedman M J, *The Origins and Development of the European Union 1945-2008 – A History of European Integration* (2nd edn, Routledge 2010)

Devenney J and Kenny M, *European consumer protection: theory and practice* (Cambridge University Press 2014)

Føllesdal A, Wessel R A, Wouters j, *Multilevel Regulation and the EU: The Interplay Between Global, European and National Normative Processes* (Martinus Nijhoff Publishers 2008)

Goode E and Ben-Yehuda N, *Moral Panics: The Social Construction of Deviance* (2nd edn, Wiley-Blackwell 2009)

Hall S, Critcher C, Jefferson T, Clarke J and Roberts B, *Policing the Crisis: Mugging, the State and Law and Order* (Macmillan 1978)

Hartlapp M, Metz J and Rauh C, *Which Policy for Europe? Power and Conflict inside the European Commission* (Oxford University Publishing 2014)

- Horspool M and Humphreys M, *European Union Law* (Oxford University Press 2006)
- Hoyer W D, MacInnis D J and Pieters R, *Consumer Behavior* (6th edn, Cengage Learning 2013)
- Howells G G and Weatherill S, *Consumer Protection Law* (2nd edn, Ashgate 2005)
- Krinsky C, *The Ashgate Research Companion to Moral Panics* (Ashgate 2013)
- Lee M J, *The Consumer Society Reader* (Blackwell Publishers 2000)
- Lemmings D and Walker C, *Moral panics, the Media and the Law in Early Modern England* (Palgrave Macmillan 2009)
- Malanczuk P, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1997)
- McConville M and Chui W H, *Research Methods for Law* (Edinburgh University Press, 2007)
- McKendrick E, 'Contract Law: Text, Cases, and Materials' (6th edn, Oxford University Press 2014)
- McLeod I, *Legal Method* (9th edn, Palgrave Macmillan 2013)
- Ramsay I, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd edn, Hart Publishing 2012)
- Reimann M and Zimmermann R, *The Oxford Handbook of Comparative Law* (Oxford University Press 2006)
- Schiffman L G and Kanuk L L, *Consumer Behaviour*, (8th edn, Pearson Prentice Hall 2004)
- Solomon M R, Bamossy G, Askegaard S and Hogg M K, *Consumer Behaviour – A European Perspective* (4th edn, Pearson Education 2010)
- Thompson K, *Moral Panics* (Routledge 1998)
- Vogel D, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (2nd edn, Harvard University Press 1997)

Weatherill S, *EU Consumer Law and Policy* (Elgar European Law 2005)

Weiler J, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" And Other Essays on European Integration* (Cambridge University Press 1999)

Zweigert K and Kötz H, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Oxford University Press 1998)

Contributions to edited books

Cseres K J, 'Consumer Protection in the European Union' in Van Den Bergh R J and Paces A M, *Regulation and Economics* (2nd edn, Edward Elgar Publishing 2012)

Garcia Porras C I and Van Boom W H, 'Information disclosure in the EU Consumer Credit Directive: opportunities and limitations' in James Devenney and Mel Kenny, *Consumer Credit, Debt and Investment in Europe* (Cambridge University Press 2012)

Fligstein N, 'Markets and Firms' in Adrian Favell and Virginie Guiraudon (eds), *Sociology of the European Union* (Palgrave Macmillan 2011)

Guo Y M, 'Online Shopping Experience: A conceptualization and Preliminary Results' in Khosrow Pour M (ed) *The Social and Cognitive Impacts of E-Commerce on Modern Organizations* (Idea Group Publishing 2004)

Howells G and Schulze R, 'Overview of the Proposed Consumer Rights Directive' in *Modernising and Harmonising Consumer Contract Law*, Howells G and Schulze R (eds) (Sellier European Law Publishers, 2009)

Micklitz H-W, 'What Does Consumer Law Reveal About The Nature Of The EU?' in Jones E, Menon A and Weatherill S (eds), *The Oxford Handbook of the European Union* (Oxford University Press 2012)

Micklitz H-W, 'The Targeted Full Harmonisation Approach: Looking Behind the Curtain' in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Sellier European Law Publishers, 2009)

Nordhausen Scholes A, 'Information Requirements' in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Sellier European Law Publishers, 2009)

Papacleovoulou C, 'Cyprus Consumer Protection' in Dennis Campbell, *International Consumer Protection* (2nd edn, Juris Publishing 2012)

Schulze R and Morgan J, 'The Right of Withdrawal' in Gerhard Dannemann and Stefan Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford University Press 2013)

Sorce P, Perotti V and Widrick S, 'Online Shopping for Positive and Negative Reinforcement Products' in Khosrow Pour M (ed) *The Social and Cognitive Impacts of E-Commerce on Modern Organizations* (Idea Group Publishing 2004)

Vogenauer S and Weatherill S, 'The European Community's Competence to pursue the Harmonisation of Contract Law – an Empirical Contribution to the Debate' in Stefan Vogenauer and Stephen Weatherill (eds), *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and the Legal Practice* (Hart Publishing 2006)

Weatherill S, 'Justifying Limits to Party Autonomy in the Internal Market – EC Legislation in the Field of Consumer Protection' in Stefan Grundmann, Wolfgang Kerber and Stephen Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (de Gruyter 2001)

Journal Articles and Online Journals

Amato C, 'The Europeanisation of Contract Law and the Role of Comparative Law: The Case of the Directive on Consumer Rights' (2012) 1 Op J 1

Azzopardi A, 'The Contribution of EU Directives to the Objective of Consumer Protection' (2012) Edition II, *Elsa Malta Law Review* 41

Baldock J, 'On being a Welfare Consumer in a Consumer Society' (2003) 2 *Social Policy & Society* 65

- Burns C and Harrison E, 'Setting strategies for a new Europe' (2010) 10(1) Consumer Policy Review 25
- Costello R and Thomson R, 'The policy impact of leadership in committees: Rapporteurs' influence on the European Parliament's opinions (2010) 11(2) European Union Politics 219
- De Groot M, Antonides G, Read D and van Raaij W F, 'The effects of direct experience on consumer product evaluation' (2009) 38 The Journal of Socio-Economics 509
- Eberle E J, 'The Method and Role of Comparative Law' (2009) 8(3) Washington University Global Studies Law Review 451
- Edgar S, 'Cross-border B2C e-commerce in the EU and the introduction of the Consumer Rights Directive: A cure for fragmentation?' (2012) <http://lib.ugent.be/fulltxt/RUG01/001/892/204/RUG01-001892204_2012_0001_AC.pdf> accessed 17 April 2016
- Eichengreen B and Boltho A, 'The Economic Impact of European Integration' (2007) International Macroeconomics and Economic History 6820 <http://eml.berkeley.edu/~eichengr/econ_impact_euro_integ.pdf> accessed 15 April 2014
- Faure M, 'Towards a Maximum Harmonization of Consumer Contract Law?!?' (2008) 15 Maastricht J Eur & Comp L 433
- Fries M and Stark J, 'Buttons, Boxes, Ticks and Trust: On the Narrow Limits of Consumer Choice' (2014) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2412541> accessed 18 April 2016
- Garland D, 'On the concept of moral panic' (2008) 4 Crime Media Culture 9
- Giliker P, 'The Transposition of the Consumer Rights Directive into UK law: Implementing a maximum harmonisation directive' (2014) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2523330> accessed 19 April 2016
- Gomez F, 'An Economic Analysis of Harmonization Regimes: Full Harmonization, Minimum Harmonization or Optional Instrument?' (2011) 7(2) European Review of Contract Law 275

- Goode E, 'Marijuana and the Politics of Reality' (1969) 10(2) Journal of Health and Social Behavior 83
- Goode E and Ben-Yehuda N, 'Moral Panics: Culture, Politics and Social Construction' (1994) 20 Annu Rev Sociol 149
- Hattwick R E, Jefferson W J and Houston M 'Toward a Behavioral Theory of Consumer Choice' (1972) 1(1) Journal of Behavioral Economics 53
- Hermann C, 'Neoliberalism in the European Union' (2007) 79 Studies in Political Economy 61
- Howells G, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32(3) Journal of Law and Society 349
- Howells G G, 'The Rise of European Consumer Law – Whither National Consumer Law?' (2006) 28 Sydney Law Review 63
- Howells G and Wilhelmsson T, 'EC Consumer law: has it come of age?' (2003) 28(3) European Law Review 370
- Hutchinson T and Duncan N, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 1
- Loos M B M, 'Full Harmonisation as a regulatory concept and its consequences for the national legal orders - The example of the Consumer Rights Directive' Centre for the Study of European Contract Law Working Paper Series No 2010/03
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1639436> accessed 17 April 2016
- Luzak J, 'Online Consumer Contracts' Centre for the Study of European Contract Law Working Paper Series 8/2014 <
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487222> accessed 18 April 2016
- Luzak J, 'Passive Consumers vs the New Online Disclosure Rules of the Consumer Rights Directive' Centre for the Study of European Contract Law Working Paper Series 2/2015
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2553877> accessed 18 April 2016

Mak V, 'Review of the Consumer Acquis – Towards Maximum Harmonisation?' Tilburg Institute of Comparative and Transnational Law Working Paper 6/2008

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1237011> accessed 17 April 2016

Mak V, 'Two Levels, One Standard? The Multi-level Regulation of Consumer Protection in Europe' (2010) TISCO Working Paper Series on Banking, Finance and Services 01/2010

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1585786> accessed 24 April 2016

McClafferty A, 'Effective Protection for the E-Consumer in light of the Consumer Rights Directive?' (2012) 11 Hibernian LJ 85

McDonald F, 'Consumer Protection policy in the European Union' (2000) 12(1) European Business Journal 39

McRobbie A and Thornton S, 'Rethinking 'Moral Panic' for Multi-Mediated Social Worlds' (1995) 46(4) The British Journal of Sociology 559

Micklitz H-W, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in Civil Law – A Bittersweet Polemic' EUI Working Papers 3/2012 <
[http://cadmus.eui.eu/bitstream/handle/1814/20374/LAW_2012_03_Micklitz.p
df?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/20374/LAW_2012_03_Micklitz.pdf?sequence=1)> accessed 18 April 2016

Micklitz H-W and Reich N, 'Cronica De Una Muerte Anunciada: The Commission Proposal for a Directive on Consumer Rights' (2009) 46 Common Market Law Review 471

Micklitz H-W and Weatherill S, 'Consumer Policy in the European Community: Before and After Maastricht' (1993) 16(3-4) Journal of Consumer Policy 285

Minor J, 'Consumer Protection in the EU: Searching for the Real Consumer' (2012) 13 European Business Organization Law Review 163

Naidoo A, 'Consumer remedies following the sale of faulty goods' (2011) Journal of Business Law 805

O'Hara O'Connor E, 'The limits of contract law harmonisation' (2012) 33 Eur J Law Econ 505

Pollack M A, 'The End of Creeping Competence? EU Policy-Making Since Maastricht' (2000) 38(3) Journal of Common Market Studies 519

Poncibo C, 'Some Thoughts on the Methodological Approach to EC Consumer Law Reform' 21(3) Loyola Consumer Law Review 353

Razak A A, 'Understanding Legal Research' (2009) 4 Integration & Dissemination

<<http://econ.upm.edu.my/researchbulletin/artikel/Vol%204%20March%202009/19-24%20Adilah.pdf>> accessed at 26 July 2013.

Rohloff A and Wright S, 'Moral Panic and Social Theory: Beyond the Heuristic' (2010) 58(3) Current Sociology 403

Rott P, 'Minimum Harmonization for the Completion of the Internal Market? The Example of Consumer Sales Law' (2003) 40 Common Market Law Review 1107

Rutgers J W and Sefton-Green R, 'Revising the Consumer Acquis: (Half) Opening the Doors of the Trojan Horse' (2008) 3 European Review of Private Law 427

Singhal A K and Malik I, 'Doctrinal and socio-legal methods of research: merits and demerits' (2012) 2(7) Educational Research Journal 252

Slyz G, 'International Law in National Courts and International Tribunals' New York University Journal of International Law and Politics 28(1-2) (1995-1996) 65

Smits J M, 'Introduction to special issue: Harmonisation of contract law: an economic and behavioural perspective' (2012) 33 Eur J Law Econ 473

Spolaore E, 'What is European Integration Really About? A Political Guide for Economists' Tufts University and NBER (June 2013)

<<http://sites.tufts.edu/enricospolaore/files/2012/08/Euro-June-2013.pdf>> accessed 17 April 2016.

Thomas R and Lynch-Wood G, 'Transposing European Union Law in the United Kingdom: Administrative Rule-Making, Scrutiny and Better Regulation' (2008) 14(2) European Public Law 177

Twigg-Flesner C, "'Good-Bye Harmonisation by Directives, Hello Cross-Border only Regulation?' A way forward for EU Consumer Contract Law' (2011) 7(2) European Review of Contract Law 235

Twigg-Flesner C, "'Time to do job properly" – The case for a new approach to EU consumer legislation' (2010) 4 Journal of Consumer Policy 33

Van Kersbergen K and Verbeek B, 'The Politics of Subsidiarity in the European Union' (1994) 32(2) Journal of Common Market Studies 215

Veugelers R (ed), 'Manufacturing Europe's Future' (Policy Paper) (2013) 21 Bruegel Blueprint Series XXI

Waddington L, 'Vulnerable and Confused: The Protection of "Vulnerable" Consumers under EU Law' (2013) 38(6) European Law Review 757

Weatherill S, 'The Consumer Rights Directive: How and Why a Quest for "Coherence" has (largely) failed' (2012) 49 Common Market Law Review 1279

Whan P C and Parker L V, 'Familiarity and Its Impact on Consumer Decision Biases and Heuristics' (1981) 8 Journal of Consumer Research 223

Whytock C A, 'Legal Origins, Functionalism and the Future of Comparative Law' (2009) Brigham Young University Law Review 1879

Wilhelmsson T, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' (2004) 27 Journal of Consumer Policy 317

Parliamentary Reports

EU

European Parliament Deb 23 March 2011, CRE 23/03/2011 – 20

UK

Consumer Rights Bill Deb 6 March 2014

European Union Committee, *EU Consumer Rights Directive: getting it right* (HL 2008-09, 126-I)

Cyprus

Minutes of the Parliament of Cyprus, I Parliamentary Period – Session C – Parliamentary Meeting of 24th of October 2013 - Report by the Parliamentary Committee on Trade and Industry in relation to the Consumer Rights Law of 2013

Other Secondary Sources

EU

European Commission Documents

Commission, 'A Digital Agenda for Europe' (Communication) COM (2010) 245

Commission, 'Bringing e-commerce benefits to consumers' (Working Paper) SEC 2011/1640

Commission, 'Consumer Policy. Placing the single market at the service of European consumers, Second Commission three-year action plan 1993-1995' COM (93) 378 final

Commission, 'Consumer Policy Strategy 2000-2006' COM (2002) 208 final - OJ C137/2.

Commission, 'Consumer Rights: 10 ways the new EU Consumer Rights Directive will give people stronger rights when they shop online' (MEMO) 450 (Brussels, 23 June 2011).

Commission, 'EC Consumer Policy Strategy 2007-2013 – Empowering consumers, enhancing their welfare, effectively protecting them' COM (2007) 99 final

Commission, 'Priorities for Consumer Policy 1996-1998' (Communication) COM(95) 519 final

Commission, 'Proposal for a Directive of the European Parliament and of the Council on Consumer Rights' COM(2008) 614 final.

Commission, 'Report on cross-border e-commerce in the EU' (Staff Working Document) SEC(2009) 283 final

Commission, 'Review of the Consumer Acquis' (Green Paper) COM (2006) 744 final

Commission, 'Three year action plan of consumer policy in the EEC (1990-1992)' COM (90) 98 final

Commission Directorate-General for Health & Consumers 'The Consumer Markets Scoreboard' (2010) 3rd edn <
http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/3_edition/docs/cms_3_en.pdf> accessed 15 April 2016

Commission Directorate-General for Internal Policies – Policy Department C: Citizens' Rights and Constitutional Affairs, 'Extent of Harmonisation in Consumer Contract Law' Note (2010) PE 432.728

Council of the European Union Documents

Council of the European Union, 'Competitiveness (Internal Market, Industry and Research)' (Press Release) (3-4 December 2009) 9.

Council of the European Union, 'Proposal for a Directive of the European Parliament and of the Council on consumer rights – General Approach' 2008/0196 (COD) 5

Eurobarometers

Flash Eurobarometer 128, 'Public Opinion in Europe: Views on Business-to-Consumer cross-border trade' (November 2002)

<http://ec.europa.eu/public_opinion/archives/ebs/ebs_175_fl128_en.pdf>
 accessed 26 April 2016

Flash Eurobarometer 299, 'Consumer Attitudes towards Cross-Border Trade and Consumer Protection' (March 2011)

<http://ec.europa.eu/public_opinion/flash/fl_299_en.pdf> accessed 26 April 2016

Flash Eurobarometer 358, 'Consumer Attitudes towards Cross-Border Trade and Consumer Protection' (June 2013)

<http://ec.europa.eu/public_opinion/flash/fl_358_en.pdf> accessed 26 April 2016

Flash Eurobarometer 397, 'Consumer Attitudes towards Cross-Border Trade and Consumer Protection' (September 2015)

Special Eurobarometer 193, 'Consumer Protection in the EU' (November 2003) <http://ec.europa.eu/consumers/archive/topics/eb_59-2_en.pdf> accessed 26 April 2016

Special Eurobarometer 252, 'Consumer Protection in the Internal Market' (September 2006)

<http://ec.europa.eu/public_opinion/archives/ebs/ebs252_en.pdf> accessed 26 April 2016

Special Eurobarometer 298, 'Consumer Protection in the Internal Market' (October 2008)

<http://ec.europa.eu/public_opinion/archives/ebs/ebs_298_en.pdf> accessed 26 April 2016.

Flash Eurobarometer 332, 'Consumers' Attitudes Towards Cross-Border Trade and Consumer Protection' (May 2012)

<http://ec.europa.eu/public_opinion/flash/fl_332_en.pdf> accessed 26 April 2016

Special Eurobarometer 342, 'Consumer Empowerment' (April 2011)

<http://ec.europa.eu/public_opinion/archives/ebs/ebs_342_en.pdf> accessed 27 April 2016

Other

Centre for Public Scrutiny, 'Rapporteurs in the European Parliament' Research Report No 4 (2006) 3

Hans Schulte-Nölke (ed), Christian Twigg-Flesner and Martin Ebers, 'EC Consumer Law Compendium – Comparative Analysis' (2008)

<http://ec.europa.eu/consumers/archive/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf> accessed 19 April 2016

UK

BIS Documents

BIS, 'Crackdown on rip-off card charges' (6 April 2013)

<<https://www.gov.uk/government/news/crackdown-on-rip-off-card-charges-begins>> accessed 24 April 2016.

BIS, *Document summarising the government response to the recommendations of the Law Commission and Scottish Law Commission on misleading and aggressive commercial practices and the response to the BIS consultation on implementing the Consumer Rights Directive* (August 2013)

BIS, *Enhancing Consumer Confidence by Harmonising Consumer Law – Consultation on the implementation of the Consumer Rights Directive 2011/83/EU* (August 2012)

BIS, *EU Consumer Rights Directive: Information Requirements and Extension of the Right to Withdraw for Off-premises contracts- Impact Assessment* (August 2012)

BIS, *EU Consumer Rights Directive: Information Requirements and the Right to withdraw for Distance Contracts - Impact Assessment* (August 2012)

BIS, *EU Consumer Rights Directive: Provisions on Delivery, Passing of Risk, Communication by Telephone and Consent for Additional Payments – Impact Assessment* (August 2012)

BIS, *Implementation of the EU Consumer Rights Directive (2011/83/EU) - Impact Assessment: Final* (August 2013)

BIS, *Stakeholders Responses to the implementation of the Consumer Rights Directive through the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013*(2013)

Law Commission Documents

Law Commission, *Consumer Remedies for Faulty Goods* (Law Com No 317, 2009)

Law Commission, *Unfair Terms in Contracts* (Law Com No 292, 2005)

Other

Cabinet Office, 'Transposition guide: how to implement European directives effectively' (March 2005) 15

<<https://www.bipsolutions.com/docstore/pdf/9863.pdf>> accessed 19 April 2016

UK Government Response to the EU Commission Green Paper on the Review of the Consumer Acquis

<http://ec.europa.eu/consumers/archive/cons_int/safe_shop/acquis/responses/ms_uk.pdf> accessed 24 April 2016

Cyprus

Cyprus Government Response to the EU Commission Green Paper on the Review of the Consumer Acquis

<http://ec.europa.eu/consumers/archive/cons_int/safe_shop/acquis/responses/ms_cyprus.pdf> accessed 24 April 2016

Conference Papers and Speeches

Kuneva M, 'Proposal for a Directive on Consumer Rights' (French Presidency Conference "What Kind of Protection for European Consumers?", Paris, 5 December 2008) <http://europa.eu/rapid/press-release_SPEECH-08-681_en.htm> accessed 19 April 2016

Meetings of the Heads of State or Government, 'The First Summit Conference of the Enlarged Community Conclusion of the Preparatory Work' (Paris 19-21 October 1972) Bull EC 10-1972

Nilsson S, 'Sustainable consumption in a time of crisis' (European Consumer Day, Copenhagen, 15 March 2012)

<<http://www.eesc.europa.eu/?i=portal.en.former-eesc-presidents-staffan-nilsson-speeches.22675>> accessed 16 April 2016.

Reding V, 'An ambitious Consumer Rights Directive: boosting consumers' protection and helping businesses' (European Consumer Day, Madrid 15

March 2010) <http://europa.eu/rapid/press-release_SPEECH-10-91_en.htm> accessed 16 April 2016

Reding V, 'The Common European Sales Law – breaking the mould to help businesses and customers'

(Realising the European Single Market Forum, Brussels, 6 March 2012) 2

<<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/164&format=HTML&aged=0&language=EN&guiLanguage=en>> accessed 14 November 2014

Websites and blogs

Alemanno A, 'The EU needs to embrace behavioural insights in the design of its policies' (2012) <<http://blogs.lse.ac.uk/euoppblog/2012/06/26/eu-behavioural-insights-policies/>> accessed 30 July 2013

BDA Die Arbeitgeber (Confederation of German Employers), 'Germany's export strength – bad for Europe?'

<[www.arbeitgeber.de/www%5Carbeitgeber.nsf/res/DtExportstaerke_eng.pdf/\\$file/DtExportstaerke_eng.pdf](http://www.arbeitgeber.de/www%5Carbeitgeber.nsf/res/DtExportstaerke_eng.pdf/$file/DtExportstaerke_eng.pdf)> accessed 16 September 2014

TheCityUK, 'Legal Services' (Report) (January 2014)

<www.barcouncil.org.uk/media/278588/legal-services-2014.pdf> accessed 24 April 2016

'Average Salary in the European Union' (*Reinis Fischer*, 20 July 2015)

<www.reinischfischer.com/average-salary-european-union-2015> accessed 24 April 2016

'Council Conclusions and Resolutions'

<www.consilium.europa.eu/en/council-eu/conclusions-resolutions/> accessed 20 April 2016

'EU Parliament: What is a Rapporteur?'

<www.europeanlawmonitor.org/what-is-guide-to-key-eu-terms/eu-parliament-what-is-a-rapporteur.htm> accessed 17 April 2016

'European Union: Continued UK Resistance to More Qualified Majority

Voting' (1996) <<http://www.europolitics.info/european-union-continued-uk->

[resistance-to-more-qualified-majority-voting-artr170328-32.html](#)> accessed 11 September 2013

'Facts about Germany' <[www.tatsachen-ueber-deutschland.de/en/economy/main-content-06/strong-economic-hub-in-the-global-market.html](#)> accessed 16 September 2014

'Later Life in the United Kingdom' (February 2016)
<[http://www.ageuk.org.uk/Documents/EN-GB/Factsheets/Later_Life_UK_factsheet.pdf?dtrk=true](#)> accessed 2 February 2016

<[http://ec.europa.eu/consumers/archive/behavioural_economics/index_en.htm](#)> accessed 18 April 2016

<[http://ec.europa.eu/consumers/consumer_rights/consumer_rights_awareness_campaign/index_en.htm](#)> accessed 17 April 2016

<[www.eppgroup.eu/](#)> accessed 17 April 2016

<[www.europarl.europa.eu/aboutparliament/en/20150201PVL00004/Legislative-powers](#)> accessed 17 April 2016

<[www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20060725STO09938&language=EN](#)> accessed 17 April 2016

<[www.euractiv.com/consumers/battle-eu-consumer-rights-links dossier-504087?display=normal](#)> accessed 15 January 2014

<[www.law.gov.cy/law/lawoffice.nsf/All/9483C617996ED452C22573E20034D72E?OpenDocument&highlight=%CE%BF%CE%B4%CE%B7%CE%B3%CE%AF%CE%B1](#)> accessed 19 April 2016

<[www.socialistsanddemocrats.eu/](#)> accessed 17 April 2016

Newspaper articles

Mark King, 'Debit and credit card surcharges under OFT microscope' *The Guardian* (28 June 2011) <www.theguardian.com/money/2011/jun/28/debit-credit-card-surcharges-oft> accessed 24 April 2016.

Markopouliotis G, 'EU Consumer Rights' *in-cyprus* (20 June 2016) <<http://in-cyprus.com/eu-consumer-rights/>> accessed 19 April 2016

'EC launches campaign on consumer rights in Cyprus' *Famagusta Gazette* (29 May 2014)
<<http://famagusta-gazette.com/ec-launches-campaign-on-consumer-rights-in-cyprus-p23766-69.htm>> accessed 24 April 2016

'Germany country profile full overview' *BBC NEWS* (15 January 2016)
<www.bbc.co.uk/news/world-europe-17300915> accessed 16 April 2016

'Tories leaving Europe's EPP Group' *BBC NEWS* (11 March 2009)
<http://news.bbc.co.uk/1/hi/uk_politics/7938482.stm> accessed 17 April 2016

List of Abbreviations

ALDE Group - Group of the Alliance of Liberals and Democrats for Europe

BIS - The Department for Business Innovation and Skills

ECR Group - European Conservatives and Reformists Group

EFD Group - Europe of Freedom and Democracy Group

Greens/EFA Group - Group of the Greens/European Free Alliance

GUE/NGL Group - Confederal Group of the European United Left – Nordic Green Left

IMCO - Internal Market and Consumer Protection Committee

MEP – Members of the European Parliament

OFT – Office of Fair Trading

PPE - The European Parliament People's Party

S&D - The Progressive Alliance of Socialists and Democrats in the European Parliament