European Contract Law Reform and European Consumer Law – Two Related But Distinct Regimes

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I. Two projects?

The development of EU contract law and EU consumer contract law are two related but distinct projects. EU consumer contract law has been subject to a review of eight directives\(^1\) which eventually led to a proposal for a Consumer Rights Directive,\(^2\) which covered information, right of withdrawal, sale and unfair terms. Surprisingly this piece of legal reform provoked an unprecedented response leading to over 2,000 amendments being tabled. This level of concern was generated, because, controversially, it adopted a maximal harmonisation approach\(^3\) whilst even lowering the level of protection in some respects from the minimum rights previously guaranteed by the acquis. This proposal was strongly motivated by a desire to promote intra-state B-2-C trade which was seen to be floundering.\(^4\) However, it seems that opposition to the proposals may cause the Council to jettison the controversial issues of sales law and unfair terms reform. Although the position is still unclear as this paper goes to press as there has not been political agreement by all parts of the European legislative process on the reduced scope of the Directive.

Nevertheless, the Commission seem to be turning their attention to promoting an Optional Instrument. This may well be a backdoor way of \textit{de facto} achieving in practical terms the maximal harmonisation that has been politically rejected in the Consumer

\begin{itemize}
\item \(^1\) COM(2006) 744 final.
\item \(^2\) COM(2008) 614 final
\item \(^3\) Art. 4.
\item \(^4\) \textit{Flash Eurobarometer 224: Business attitudes towards cross-border sales and consumer protection} (2008) showed that whilst 21\% of retailers conduct cross-border transactions this was down from 29\% in 2006 and those that did usually only traded with a few member states. See below.
\end{itemize}
Rights Directive. Tactically it is a helpful strategy for the Commission for whilst consumer groups may still object it has in theory at least no direct impact on national law and so removes from the equation the criticism of national lawyers concerned about the impact of a maximal harmonisation directive on local legal traditions. The Optional Instrument, however, derives also from another strand of policy concerned with the far broader question of European Civil Law reform.

The Commission has promoted the development of principle of European private law through the COPECL network of excellence under Framework 6. This has produced a Draft Common Frame of Reference (DCFR). The ultimate outcome of this project has always been unclear and, given the present Green Paper, presumably is still uncertain. Although one can start to discern the outlines of a possible way forward and most commentators would be surprised if some sort of proposal for an Optional Instrument was not forthcoming. Indeed one might even portray the present consultation as rather cosmetic given the emphasis placed in day to day discussions on the Optional Instrument. Indeed there is a danger that the Commission will not receive as full a range of responses as otherwise might have been the case for many commentators may believe the only realistic option on the Commission’s agenda is the Optional Instrument. Subtly the debate has been manipulated implicitly to assume there will be an Optional Instrument and so the focus debate is on its nature, scope and content and relationship with private international law. It has been raised above being just one of several options as one might assume if one innocently read the Green Paper. Some may not challenge this approach for fear of appearing ludditish or simply because they do not want to waste their efforts when they believe the decision has already been made. Strangely the Optional Instrument

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7 Green Paper on Policy Options for Progress towards a European Contract Law for Consumers and Businesses, COM (2010) 348
appears as the only practical way forward even before the proposal has been properly formulated.

Some are of course sceptical about the whole project of harmonizing private law in Europe. Although some favour a European Civil Code this was never a realistic possibility even if any less grandiose instrument might be viewed by some as a Trojan horse for the eventual development of such a Code. In any event any measure is likely to be limited to contract and sale of goods law. However, the more modest proposal for a “tool box” to be used by legislators, courts and policy-makers is probably currently viewed as too unambitious as the sole output of all the labours to-date. Thus the Optional Instrument is currently in vogue as a 28th regime that parties can choose. Whether this is the right way forward is critiqued below, but it certainly seems to be the favoured solution and the CFR expert group have been tasked to produce a version of the Optional Instrument based on the draft CFR. The earlier proposal that the CFR might be used to inform the development of Community wide standard form contracts seems to be have been sidelined, but this paper will suggest such voluntary organic approaches have a lot of potential not just for in the business context but also for consumer contracting.

8 P. Legrand, (1996) 45 “European Legal; Systems Are Not Converging” ICLQ 52; Against A European Civil Code” (1997) 60 MLR 44; and the personalized criticism in “Antivonbar” (2006) Journal of Comparative Law 13. In my opinion it over states the case to say that civil and common law systems cannot converge. The debate is more about how much convergence there should be and the pace of harmonization.


8 Eur. Rev. Private L. 59 (2000). The Commission has, however, said it has no intention to propose a European Civil Code: The Way Forward, COM (2004) 651 final at 8. Even those predisposed to such a Code seem to accept this may be the desired final end point of an evolutionary process, see C. von Bar, O. Lando and S. Swann, “Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code” (2002) 10 European Review of Private Law, 183. But one can understand that why given their views the CFR might be viewed by some as Trojan horse (see n. 10 below)

The prime motivation behind the EU institutions favouring actions promoting further integration is economic: the reduction of transactions costs. However, it is hard to assess the impact of differing private law rules on intra-community trade. Moreover ECJ case law does not support the contention that sale of goods laws can act as a barrier to trade. Nevertheless, undoubtedly if the laws were harmonised life would be simpler. The dangers are that the European solutions might not suit local conditions or preferences and that there would be a loss of regulatory competition between legal orders. This might favour European intervention being limited to areas where without it the barriers to trade would be serious. Moreover there are doubts about the extent to which any harmonisation will in practical terms remove the need for businesses to obtain local legal advice. The development of a commonly interpreted and applied European private law will be hindered by the lack of a system of EU private law courts. Equally there are doubts whether such a scheme will be popular as an alternative to national laws, given the uncertainty surrounding the new laws until jurisprudence develops, as well as the admittedly transitional cost, of becoming familiar with the new rules.

A counter argument is that the European Civil Code is about more than economic integration. It should be a statement about a common European identity. It may well be that along with a currency a common Civil Code might be a real sign that Europe has become closely integrated and developed shared common values. However, it is by no means clear that the Member States of Europe are politically ready to accept that as a

12 See cases cited in n 54 below.
reality. Many wish to retain their traditions. Equally there is no consensus on what the shared values should be. The CFR, whilst more welfarist than the common law (reliance on good faith etc),\(^\text{15}\) is still criticised by those who would want the rules to be more overtly welfarist.\(^\text{16}\) Indeed it is ironic that just as Europe looks likely to favour a private law based on the majority civil law traditions, commercial practice seems to be adopting Anglo-Saxon transaction practices. Therefore the discretion given to the courts in Codes to interfere on grounds such as good faith is less necessary in legal systems where matters are sought to be regulated in advance by detailed contractual agreements.

Moreover it is questionable whether there is a simple connection between the background contract principles and the amount of welfarism in the legal system as a whole. Social justice might more effectively be introduced punctually to address particular concerns.\(^\text{17}\) This consumer protection does not necessarily depend upon a particular form of general contract law.

II. How did the two projects become intertwined?

It is a valid question to ask why the project for a European Contract Law became intertwined with moves to harmonise consumer contract law. There is after all wide gulf in character and purpose between the mainly default rules of general contract law and the mainly mandatory rules of consumer contract law. In part it was due to DG SANCO taking the initiative in supporting academic desires to work towards the development of a


\(^{17}\) See below 00.
set of European Private Law principles. One might equally ask why DG SANCO should have taken on that task? The answer probably lies both in the interests of certain officials in DG SANCO, whom European private law scholars have to thank for responding to their interest in this area, as well as to the reality that the majority of the EU private law acquis concerned consumer protection.

Indeed the Acquis Group whose task was expressly to find principles for a European set of principles from the existing acquis had to look into consumer law as the most obvious sources from which to derive EU inspired rules. It is of course doubtful whether this EU consumer acquis would be the natural choice from which to generate optimal rules if starting with a blank sheet. The EU rules were fashioned by a desire to promote integration as much as consumer protection. Thus ideal consumer rules might look somewhat different from what the EU even had competence to adopt. Indeed as the EU directives normally contained minimum harmonisation rules they were often supplemented by national more protective rules. On the other hand, what is appropriate for the consumer context may not suit the commercial context. There might be a real danger of repeating the mistakes of the nineteenth century in reverse. Instead of forcing a regime designed for merchants on to consumers, a regime fit for consumers might be imposed on traders.

In part this blending of consumer and general contract law has been assisted by the desire of some continental scholars to ensure consistency by having the consumer rules incorporated into the general Civil Code, which also enhances their status in Code based regimes. This seems to be a particularly strongly held belief in Germany where there are not only some of the strongest and most active advocates of a European private law, but also there has been a very positive experience of the impact EU law on German law. Implementation of the Consumer Sales Directive provided the impetus for a far broader modernisation of the Bürgerliches Gesetzbuch (BGB) and assimilation of consumer principles into the Code.\(^{18}\) However, what may be good for Germany might not apply to other jurisdictions which may be more content with the quality of their general

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commercial law and prefer to find even more consumer friendly solutions than is possible if the general and consumer rules are aligned. Here, of course, I am thinking about the United Kingdom!

Another potential reason for blending consumer and general contract law is that, even if consumer contract law has a quasi-regulatory character, it is in any event situated within the framework of general contract law. Thus if EU law imposes obligation connected to the conclusion of the contract the time and place of conclusion has to be determined by national contract law. EU law can assist; for example, in the context of e-commerce it requires that the procedure for concluding a contract be laid down. However, many rules of general contract law may be applicable e.g. mistake, misrepresentation, frustration, remedies. This problem will be reduced, but not eradicated by the Optional Instrument for one problem, noted below, will be to define the scope of any proposed Optional Instrument. It is likely that several national law rules will continue to apply even to transactions covered by the Optional Instrument. Nevertheless, it should be considered whether consumers will suffer by the continued application of such “technical” rules of the general law of contract.

III. Should consumer and general contract law be aligned and integrated?

It has already been suggested that applying consumer acquis principles to all commercial transactions may be problematic. This is fairly obvious and even in texts that integrate consumer and commercial principles there will have to be recognition that the consumer context requires different rules in some situations. On the other hand it could be argued that the general rules of contract need to be modified for consumers as many of the traditional principles are inimical to consumer protection.

Does general contract law need to extol consumer welfarist values? Clearly if it does not there is a risk that some consumers may suffer. It may also be true that debates about the

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20 For example with regard to controls on unfair terms.
technical rules have a role to play in broader debates about the type of society we want.\textsuperscript{21} Therefore the argument might go society would benefit from more welfarist contract law and certainly if the general law of contract was more welfarist this would assist in legitimising the special protection afforded consumers. That is, however, a political choice. It could still be possible to have a hard nosed general contract law and a welfarist approach to consumer protection. The move to blend consumer and general contract law is strongest in Germany where its incorporation is justified so as to underline the broader development of the “social task of private law”.\textsuperscript{22} Possibly in codification countries keeping consumer law outside the Code may also put its practical application in jeopardy or send a signal that the punctual consumer protection rules should not be the basis for broader “materialisation” of contract law.

However, this is not the only political choice open to states concerned to afford a high level of consumer protection can make. Given the broad scope of modern consumer protection rules in countries like the United Kingdom and the range of agencies to protect consumers it might be doubted how often the fair resolution of consumer problems would be thwarted by application of hard nosed general contract law rules. It might be unrealistic to have two complete contract codes drawn up dealing with B-2-B and B-2-C contracts respectively, but in practice this exists in English common law. At least certain rules of the common law are modified formally when being applied to consumers and one might speculate many judges take care to see the general rules are applied as sympathetically as possible in consumer.\textsuperscript{23} Moreover in important areas like credit, the unfair relationship rules give broad discretion to intervene even if the common law does not. Ombudsmen schemes also allow decisions to be taken on the basis of what is fair and reasonable. The UK Law Commission is currently considering modifying the rules on misrepresentation and duress for consumers in manner that could not be contemplated for

\begin{itemize}
  \item \textsuperscript{22} Zimmermann, n 18 above, 225
  \item \textsuperscript{23} Admittedly there is a danger in relying on judicial discretion, especially when it may require deviation for the letter of the law: on the willingness of judges in small claims to depart for the law to achieve justice see J. Baldwin, Small Claims in the County Court in England and Wales, (Oxford: OUP, 1997)
\end{itemize}
B-2-B contracts.\textsuperscript{24} Equally the UK government is looking into modernising consumer sales law, simplifying the rules and putting them into simpler language.\textsuperscript{25} These positive developments might be jeopardised by a European instrument that sought to straightjacket commercial and consumer contracting into one form. This seems unnecessary for in any event distinctions would have to be made between the two regimes even if the rules were located within one law. Consumer and general contract law is still differentiated even in Codes that try to incorporate consumer law into general contract law such as the German BGB and the DCFR.

Of course these concerns about the dangers of conflating consumer contract law with general contract law are based on the EU instrument being one of positive law instrument. If the instrument was merely a toolbox then there would be less concern. Common terminology is desirable\textsuperscript{26} and the principles could be an inspiration for courts and legislators that could take note of the solutions proposed and the context in which they were developed.

**IV. The unravelling and the stitching up**

The extensive involvement of DG SANCO in general contract law was noticed by Commissioner Kyprianou and under his term there was a refocusing of priorities with stakeholder meetings concentrating on matters impacting on the consumer acquis. The Commission has now relocated the European private law project to DG Justice where it more appropriately belongs. Many of the same personnel that were working on it in DG SANCO have also been transferred and perhaps more contentiously so have the files on consumer contract law. This demonstrates that the Commission at least recognises the


\textsuperscript{25} See Consolidation and Simplification of ULK Consumer Law, G. Howells and C. Twigg-Flesner (Eds) (2010, BIS).

\textsuperscript{26} G. Ajani and M. Ebers (eds), *Uniform Terminology for European Contract Law*, (Berlin: Nomos, 2005).
two fields are related, but there is a danger that they are treated as one and the same project.

Ironically when DG SANCO had the opportunity to make use of the DCFR when drafting the proposal for a Consumer Rights Directive, the Commission almost totally ignored the work it had ploughed substantial sums of money into. Its basic terminology was not even used and key innovative concepts like the “contract negotiated away from business premises” were not taken up thereby continuing the need for a dual system of doorstep and distance selling contracts.27

The proposal for a Consumer Rights Directive therefore seemed to be separating from the CFR project. Its main debating point was the maximal harmonisation principle. But just as the argument on maximal harmonisation for sale and unfair terms looked like being lost the two projects (consumer and general contract law) seem to have been reconnected under the guise of the Optional Instrument. Such an instrument seems indeed to have been foreseen by Recital 14 to the Rome I Regulation28 which provides “Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.”

V. Optional Instrument

The Optional Instrument sounds relatively unintrusive. After all it is optional. A 28th regime29 could be made available for the parties. Most likely it will be achieved though a Regulation making its rules part of national law for cross border transaction that parties can chose to apply to their contract. Indeed I have no objection to this in principle. It

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29 Obviously there are in fact more than 27 legal systems in the 27 Member States.
could prevent the need for channel tunnel contract being based on the laws common to England and France. It might prevent one side having to feel disadvantaged in a cross-border contract. It might be especially useful for SMEs, assuming of course they could persuade the larger enterprise to forgo any advantage and agree to this “neutral” regime rather than the laws they would normally prefer. Of course jurisdiction issues might still be decisive.

There will be competition over the content of any Optional Instrument. Many assume that it would be more consumer welfarist than nineteenth century codes or the anglo-saxon common law. But there is no guarantee for some fear it may undermine continental values and import common law principles into continental form.\(^{30}\) Whatever the final content there can surely be no objection to such a Code competing alongside national regimes in the commercial context.

Would it be used? There are of course already Unidroit principles that can be chosen and arguably an Optional Instrument will simply be trying to cover similar ground as Unidroit.\(^{31}\) In any event the take up for the Unidroit Principles is not high. Equally the Vienna Convention on International Sales is often excluded.\(^{32}\) This indicates lawyers frequently prefer the certainty of a system they are familiar with. Even if a European

\(^{30}\) Mattei, op. cit.


\(^{32}\) L. Spagnolo, “A Glimpse through the Kaleidoscope; Choices of Law and the CISG (Kaliedoscope Part 1)” (2009) 13 Vindobono Journal of International Commercial Law & Arbitration 135 found opt out rates as high as 71% in US in Germany around 45% and 55% in Austria. Smits, n 11 above, similarly notes that it is excluded in the general conditions of organisations such as FOSFA (Federation of Oils, Seeds and Fats) and GAFTA (Grain and Feed Trade Association) and by large Dutch companies. One of the reasons cited is the use by CISG of open-ended terms such as reasonableness sand impediment – that may be significant given that one criticism from prominent critics of the DCFR on which the Optional Instrument is likely to be based is its widespread use of blanket provisions using indeterminate terminology: see Eidenmüller et al (2008), n 15 above, 674-677.
private law may be beneficial in the long term there is a serious risk that the transition costs of uncertainty and training lawyers will prevent it developing.

VI. Objections to optional instrument

There can be no objection to the Optional Instrument trying to win its spurs in the market place for legal systems in the B-2-B context where adoption of the Instrument will be more truly optional. My objection is to the imposition of such an Optional Instrument on cross border consumer transaction, because it will not be truly optional for consumers. Their choice will most likely be to contract by pressing the “blue button” or not contract. An interesting issue will arise as to the duty to warn consumers that by opting for the Optional Instrument they may be accepting less protection than guaranteed by national law. This seems to be required by art 7 of the Unfair Commercial Practices Directive.

There are various concerns about the procedure by which we have arrived at where we are to-date. These will not be gone into in detail, save to say that there are legitimate questions to be asked about stakeholder involvement and a CFR Expert Group reviewing the CFR being comprised of many of those who did such sterling work in producing the CFR in the first place. Consumers have a particular gripe that for cross border sales there appears to be an attempt at backdoor maximum harmonisation at the very moment that policy seemed to have been resounding rejected by the political process. But we are where we are and the real question is whether consumers should put at risk domestic law

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33 In similar vein see J. Cartwright, “‘Choice is Good.’ Really?” in this volume. Behavioural economics would suggest that if use of the Optional Instrument is to be promoted parties should have to opt-out of it, thus one can understand those who favour its adoption advocating the opt-out model: O. Lando, “The Options of the Green Paper: An ‘Opt-Out’ Model” in this volume. However, the opt-out choice is likely to be made by the business when deciding which terms to offer. This emphasises the lack of practical choice consumers will have. Businesses might offer two sets of contractual terms with differentiated prices, but this is unlikely to happen both because it makes contracting more complicated and businesses would not want to alert consumers to the risks of the lower priced contractual terms.


in return for greater overall consumer welfare brought about by a better functioning internal market. The procedural background has some relevance for it may explain a lack of trust in the Commission as protector of consumer rights for it has clearly prioritised the internal market over consumer protection.

VII. Promoting interstate trade by consumers.

To understand the Commission’s perspective on the need to fully harmonise consumer rights one should read the Eurobarometer 2008 survey on *Business attitudes towards cross-border sales and consumer protection*\(^{36}\) The perceived cost of the insecurity of transactions (potential fraud or non-payment) was viewed as the main obstacle to cross-border trade with 65% of retailers considering these costs to be a *fairly important* or *very important* obstacle. However, the perceived cost of complying with different national laws regulating consumer transactions scored 60% and the perceived cost of the difficulty in resolving cross-border complaints and conflicts 59%. Crucially from the Commission’s perspective 46% of retailers agreed that if the provisions of the laws regulating consumer transactions were harmonised throughout the EU, their cross-border sales would increase. The most spectacular difference was said to be that instead of the 75% who do not currently sell cross-border, only 41% said that they would continue not to do so if regulations were harmonised. For those charged with the mission to achieve greater intra-state trade it is easy to understand why establishing full harmonization would viewed be as a prize worth striving for.

VIII. Reasons to be sceptical

However, there are reasons to be sceptical about the true impact legal harmonisation will have on intra-state trade. First, many of the non-consumer law barriers remain – remember the main risk was fraud and the second highest instance was dealing with fiscal rules (60%) whilst problems with delivery (57%), providing an after-sales service (55%)

and language (45%) also ranked high. Thus even if one barrier is removed many more will remain and it may be optimistic to assume that removal of legal differences, even if achievable in practice, will in fact translate into dramatic increases in cross-border trade. The Commission is rightly concerned that even those companies that do trade across borders do so selectively with only 4% trading with 10 or more Member States. One might anticipate legal harmonisation might assist trade to those countries in the traditional core of Europe where the risk of fraud remains relatively low and the languages spoken are mainstream. Smaller newer Member States might still continue to be disproportionately excluded. The Eurobarometer survey found that only 16% of businesses said they would be interested in making cross border sales to ten or more member states. Moreover it may be doubted whether making it easier to comply with laws is enough as businesses will still have the risk of being sued overseas with all the inconvenience and expense that will involve. It is may well be the case that it is not the uncertainty about what laws exist in Member States that concerns businesses, but rather the certainty that there are laws that they may have to face is overseas fora. That is why the proposal below for a Truly Optional Instrument is linked to alternative (online) dispute resolution.

It would in any event be optimistic to believe that laws will be equalised even through a full harmonisation measure. Concepts may be applied in the light of local traditions, expectations and legal rules. That is the lesson from Freiburger and exemplified by First National Bank, where the House of Lords’ decision upholding the fairness of a term imposing post-judgment interest had to read in the light of the statutory restrictions on the courts powers to award interest. One might anticipate distinct differences in the application of the rules between Member States. As one respondent to the Clifford Chance survey stated “basically, in some countries we have to change our trading

patterns because of their interpretation/understanding of directives.” There is no certainty that similar differences will not emerge in the interpretation of the Optional Instrument.

If maximal harmonisation is adopted then the risk of Member States laws surprising traders is reduced, but the effect of private international law requiring the continued use of national law cannot be ruled out. There may be – and in fact almost certainly will be - contractual issues outside the scope of the fully harmonised rules. This might of course be a strong argument for a more comprehensive EU contract law co-ordination. However, it is likely that any foreseeable Optional Instrument will not cover all rules. It is equally unlikely that it can simply be assumed that there is no applicable national law on matters not expressly dealt with in the Optional Instrument. Say, for instance, the Optional Instrument says nothing on substantive control of the price, but it is part of a legal system that does control the price, then the implication should surely be that such controls apply. At least this is a possible analysis. In practical terms problems might also concern the civil law consequences of unfair commercial practices – in some states these might give rise to tortious damages, in others contract claims and in others only regulatory responses. Moreover the arguments against the adoption of a community regime for B-2-B contracts regarding the transaction costs and the legal uncertainty of any new regime apply also in the consumer context. It seems unlikely that businesses will want to operate under different laws and hence procedures for different categories of transactions: domestic, cross-border and internet. This is all the more so if they are being asked to adopt an Optional Instrument in the face of criticism from consumer organisations.

It must not be forgotten that it takes two to tango and consumers need also to have confidence to shop across borders. It is easy to see how a minimum floor of rights may

40 By analogy it can be noted that the residual role of national law even where CISG would apply is given as a reason why some parties are unwilling to use it: see Smits, n. 11 above.
provide the necessary confidence and hard to see how making that maximal can assist except perhaps to the extent that the law is simplified and therefore easier to inform consumers about. Issues like language, delivery, additional costs, after sales service and dispute resolution are likely to figure far higher in consumer concerns than minor difference between the laws given the existing acquis is already quite extensive and protective.41

IX. Towards an Optional Instrument?

The idea of a “blue button” indicating to consumers that they are entering into a contract that because of its cross-border character will be governed by European rules has a simple appeal.42 It identifies the contract with European values and should alert the consumer to the fact they are entering a contract with particular rules justified by the cross-border dimension. The notion of an Optional Instrument standing aside from and not interfering with national contract law is also appealing and will take out of the equation one source of opposition to the current proposals, national lawyers concerned with the sanctity of their existing regime. Thus, particularly if restricted to the B-2-C context, the Commission will only have to worry about opposition from consumer groups, who might fear that for consumers it would not be truly optional and be offered on a take it or leave it basis. The Commission will probably hope to characterise these consumer concerns as paranoid given their objective is to produce an Optional Instrument providing for a high level of consumer protection. Equally it will doubtless suggest there is a failure to take sufficiently into account the greater consumer welfare gained by increased trade, particularly in new Member States to which some companies currently

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refuse to trade with their consumers by the internet across borders. However, the consumer groups concerns are legitimate because for consumers this will in practice not be a truly optional instrument. Most likely it will indeed be offered on a “take it or leave it” basis. Therefore unless its level of protection is so high that it affords every consumer in every Member State the same rights they currently enjoy it will by the backdoor achieve de facto the very maximum harmonisation that seems to be being politically rejected during the process of adopted the Consumer Rights Directive.

The Commission needs to take these consumer concerns seriously. For any Optional Instrument to be successful it needs the support of both consumers and business. Consumer consent to using the Optional Instrument may be coerced if their only practical choice is to press the blue button. Coerced consent to an adhesion contract runs counter to the whole philosophy of modern consumer law. Moreover, there is always the possibility that consumer group might mount campaigns, especially in countries where rights will be reduced, to warn their consumers against hastily pressing the blue button. The EU would not want itself to be associated with poor consumer protection.

An Optional Instrument without the active support and promotion of consumers would not be attractive to businesses. Business, which may in any event have concerns about the costs and uncertainty of the new regime, will certainly be more put off by the risk of having their contracting practices pilloried by consumers angry at a loss of rights compared to national law. This is exacerbated by the potential challenges to the Optional Instrument both in terms of competence and private international law potentially allowing the continued use of national law.

X. Private international law

A problem that the Commission will not be able to overcome without amending Rome I Regulation is that even with the Optional Instrument there is at least uncertainty as to whether national courts will allow consumers still to rely in some circumstances on more
protective national mandatory laws. The Commission may try to dance around this problem, but any solution it comes up with is at best subject to challenge.

It seems – although it is strange to be discussing the form of the Optional Instrument when we are still consulting on the way forward – the intention is that the Optional Instrument will be a Regulation making its rules if chosen mandatory law for cross-border sales as part of the applicable law of member states. Even this terminology makes one realise one is on shifting sands. As Wolfgang Kereber puts it so well “A puzzling problem is the following: if private parties can choose between mandatory regulations, then the latter have somehow lost their characteristic feature as mandatory regulations.”

An optional choice will apply mandatory law that could undermine existing national mandatory law. Thus the argument goes even if the Rome 1 Regulation (art. 6(1)) points to the consumer’s national law this will include the Optional Instrument that will replace existing national mandatory law on the topics it covers. Parties may choose another applicable law even in situations covered by art. 6(1), but what they cannot thereby do is deprive the consumer of the protection that absence choice could not have been derogated from by agreement under the otherwise applicable law.

The logic must be that the Optional Instrument Regulation affects the national law by derogating the rights of consumers from higher standards under national law in the case of cross border transactions where the Optional Instrument has been selected. Again it sounds strange that by opting for the Optional Instrument the consumer is allowed to opt-out of rights which otherwise he would not have been allowed to under national law. Of course there is a certain logic to this for the difference is that the derogation in the case of the Optional Instrument has been sanctioned by the national legislator indirectly by agreeing to the Optional Instrument Regulation. Nevertheless it would be important for EU legislators to appreciate that they would be adopting a measure which runs counter to the philosophy of both the Rome I Regulations and the spirit behind the rejection of a broad maximal harmonisation approach in the Consumer Rights Directive.

43 Kerber, n 11 above, 82.
44 Art. 6(2).
The level of protection afforded by the Optional Instrument will determine the extent to which it may undermine traditional national forms of protection.\textsuperscript{45} However, it might be postulated that the Optional Instrument will only be popular with businesses if it is lower than some existing national legal systems.\textsuperscript{46} If the prevailing political opinion is that this trade off between consumer protection and internal market should be made then this should be written clearly onto the face of the Regulation or else there is a risk that some national courts might find that the higher national laws could not be derogated from.

In truth the situations when internet contracting will in fact lead to the application of national laws under art.6 are unclear. The recent decision in Peter Pammer v Reederei Karl Schlüter GmbH & Co\textsuperscript{47} may assist legal advisors of businesses to determine whether they will be deemed to be directing their activities at consumers in particular states, but it will be difficult for the average consumer to make that assessment. This may diminish the practical value of Art 6 and to that extent make the Optional Instrument more acceptable.

But making the Optional Instrument the prevailing mandatory national rules is not quite the perfect solution from the Commission’s perspective, for the national law may well also include national laws beyond the scope of the Optional Instrument. Indeed as the Optional Instrument will not be a self-standing legal system there will always be the need to ascertain additional legal rules under the applicable law, reducing the desired certainty the Optional Instrument was intended to offer.

However, the joker in the pack regarding Rome I Regulation is art. 9 concerning overriding mandatory provisions. It is understood that the sort of national controls which are seen as most likely to be threatened by the Optional Instrument are those controlling the substance of the agreement. Yet it is such rules that go to the heart of the contractual balance that might qualify as overriding mandatory provisions “regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic

\textsuperscript{45} J. Rutgers, “An Optional Instrument and Social Dumping” (2006) 2 European Review of Contract Law 199
\textsuperscript{46} See J. Rutgers “An Optional Instrument and Social Dumping Revisited” in this volume
\textsuperscript{47} Case C-585/08.
organisation.” This argument probably would not ultimately succeed for most contractual rules, but the possibility of the argument being raised creates uncertainty.

**XI. Legal Base**

Of course the Optional Instrument may also find problems in establishing a legal basis. The provisions dealing with justice in Title V of the Treaty on the Functioning of the European Union seem to be too narrowly based to support an Optional Instrument. Art. 67(4) relates to facilitating justice and art. 81 judicial cooperation in civil matters. But art. 81 is expressly limited to mutual recognition of judgments and decisions in extrajudicial cases and that policy is also emphasised for art. 67. The special consumer provision (art 169, ex art 153) is limited to “measures which support, supplement and monitor the policy pursued by the Member States” or measures based on art 114. A legal basis most likely will have to be found in either of the mutually exclusive internal market (art. 114, ex 95) or catch-all art 352 (ex 308) provisions. Of those two Treaty articles, art. 352 seems the most appropriate for a measure which does not so much seek to approximate national laws, but rather add a European inspired alternative. Comparison might be made with the Regulation introducing a European Co-operative Society (SCE) where because an institution was being added ex art 308 was deemed the proper legal basis.

Art 352 is more broadly drawn than art 308, but still requires action to be necessary to attain one of the objectives set out in Treaty. Therefore for either art 352 or 114 to apply it will have to be shown that the Optional Instrument is necessary for internal market concerns. For this to be the case it will have to be shown different private law rules either act as barriers to trade or distort competition. But as Rutgers states: “With respect to rules of private law and more particularly to contact law, it follows from ECJ case law

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48 Art. 9.
that an obstacle to trade is hard to detect with respect to typical rules of private law.”

Case law had found private law rules that discriminated against non-nationals could impede trade, but where they applied equally then there was no scope for European law to strike down national rules. The decision in Keck would seem to support that logic.

Indeed to the extent that private law rules are default rules and non-mandatory it is hard to see how they can be barriers to trade as parties exercising the fundamental value of freedom of contract can renegotiate them. Indeed few differences are likely in any event to distort competition. Ironically as consumer protection law are normally mandatory rules there may be a stronger case for an Optional Instrument for B-2-C than B-2-B contracts. This runs counter to the preferred policy outcome favoured in this work, whereby an Optional Instrument in the form envisaged by the Commission would only be available for B-2-B contracts, where it would be truly optional. One may, however, find European consumers having a bad deal forced upon them as EU policy is driven by a political desire to do something in this area based on its limited competence.

It is of course possible that, even if national laws are immune from attack under European free movement rules, the EU may nevertheless have competence to legislate if the EU laws would promote the internal market. There is some evidence that harmonisation of contract law, through an Optional Instrument would enhance the internal market. Thus the Clifford Chance study showed that 83% of businesses viewed contract law harmonisation favourably, 82% of companies believed they would be likely to use it at some future date although only 20% would like it to be mandatory for all cross-border transactions. Several comments could be made about the methodology of the study and

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52 Rutgers (forthcoming), n. 49 above.
indeed the authors themselves highlight salient points, but it is worth noting the focus was on the needs of business, but no distinction was drawn between B-2-B and B-2-C contracts. Moreover, one might expect business to favour a harmonised law offering relatively low protection, but that does not mean this should be EU policy. This would rather indicate the Commission are on the right lines in promoting an Optional Instrument for B-2-B contracts, but leaves the B-2-C debate more open.

In the consumer context we have already noted the Commission is clearly influenced by Eurobarometer 2008 survey on Business attitudes towards cross-border sales and consumer protection. The Optional Instrument is clearly a response to the finding that 60% (up from 55% in 2006) perceived an obstacle to be the cost of complying with different national consumer laws. Yet it has already been noted that this was just one of several significant obstacles. It is of course impossible to know whether the respondents had thought through the extent to which harmonisation would in fact make their life easier. There would of course be at least transitional uncertainty about the interpretation of the Optional Instrument and of course some matters will continue to fall outside its scope. There is a more overtly political question in the consumer context: namely whether the gains from potential increased trade justify reducing protection in the cross border, especially given that it is unrealistic to view it as truly optional for consumers.

**XII. Towards a Truly Optional Instrument**

Fundamentally the Commission is at least on uncertain legal terrain as regards competence and private international law concerns remain. Thus a solution that is truly voluntary, arrived at by a process of social dialogue that produces a “blue button” approach offering a Truly Optional Instrument should find favour all round. One reason why soft law solutions are often hailed as superior to regulation is that the participants have more commitment to them. That is certainly a great advantage in this context for any regulatory solution surely runs a serious risk of remaining a white elephant, looking

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57 For a similar call for social dialogue see H. Collins, “Governance Implications of the Changing Character of Private Law” in Cafaggi and Muir-Watt, n.11 above.
marvellous but never actually used. It may be viewed as a short term political success if the Commission can impose on consumer groups a regulatory Optional Instrument, but ultimately risks being judged a failure if consumers do not accept it.

It is suggested that the way forward is to promote a Truly Optional Instrument. If the terminology did not sound so old fashioned one might call it a European Guarantee. This is informed by two fundamental beliefs: (i) that the vast majority of consumer disputes will centre on relatively straightforward problems, and (ii) that the main barrier to cross-border B-2-C contracting is not the presence of varying laws, but rather traders knowledge that there are some laws and the fears of both traders and consumers of having to resolve disputes in another state and language. Moreover as the idea is to kick start intra-community trade the proposal is limited to the simple contract for the sale of goods. If this works similar devices for other sectors – services and digital services can be considered, but it is best to start with the simplest context. It is primarily intended for internet sales, but given its additional voluntary character could be used in any context. It might appeal to traders who wanted a common contract for all markets. However, for most domestic transactions (including transactions when consumers actively go to another Member State) or even cross-border transactions near borders where access to justice is less of a problem traditional national legal principles could apply. It might find application in places like airports where there is a transient population and traders may want to give their customers the confidence of a standard form contract offering the Truly Optional Instrument.

This proposal is based on the notion that most consumer problems are relatively straightforward. They are likely to include non-delivery of goods, damaged goods, poor quality or unsafe goods and goods not complying with their description or not being fit for the particular purpose requested. Providing rights in these circumstances is relatively unproblematic as the acquis already provides them as part of its minimum guaranteed level of protection. Moreover, the information obligations and rights of withdrawal are

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58 See Green Paper on Guarantees for Consumer Goods and After Sales Service COM(93) 509 final, 98
likely to be fully harmonised in any event by the Consumer Rights Directive. Many
distance contracts actually provide for 30 days right of withdrawal and this could be
incorporated into a voluntary agreement in a way that would not be possible in a
regulation. The right to reject is less of an issue in distance sales as consumers already
have a 14-30 day cooling-off period. The controversial issue of the remedies for failing to
comply with the information rules should not apply as the model terms would of course
be drafted so as to fully comply and in any event national rules of the applicable law
would provide default rules. To the extent matters are not addressed in the acquis the
existing contractual practices could be examined to inform good practice. Unfair terms
should also not arise in a contract agreed by consumer organisations and some
presumptive safe harbour rule from challenge under the unfair terms directive might be
considered. Of course the rules on unfair terms would apply to any additional terms
added by the trader. The principles of the Unfair Commercial Practices Directive should
also inform the model contract i.e. misrepresentation and undue influence/aggressive
practices should give the right to damages or avoidance of the contract. Damages under
the Truly Optional Instrument should be limited to the costs of the goods and direct
charges i.e. postage; any further damages e.g. personal injury damages being left to
national law. This should give business confidence in the limits of their liability under the
Truly Optional Instrument and yet still resolve most consumer problems.

The vast bulk of consumer claims will be readily settled on the basis of the Truly
Optional Instrument often by the parties themselves negotiating. What frightens both
parties is the problem of communicating and finding themselves potentially in
disproportionately costly litigation in a foreign jurisdiction. The key to resolving this
problem is cost effective ADR (mostly likely online - ODR) that complies with the EU
Recommendation for such procedures. Use can also be made of the consumer complaint
form. Most likely the contract will specify an organisation to undertake the ODR. In
developing such bodies the EEJ-NET may be useful.

Also key to such a procedure is that it should follow the UK Ombudsman model of being
binding only on the trader. This means that ADR schemes could side-step the legality
requirement of the Recommendation that requires consumers not to be deprived of mandatory law provisions as these would still be available to consumers that eventually turned to the courts for redress. However, as the ADR would not prevent consumers taking their case to court it should not be an unfair term to first require consumers to utilise this ADR scheme in the first instance. It might also follow the UK Ombudsman model in allowing decisions to be based on what is fair and reasonable or in continental parlance adopt the language of good faith.

Why would traders accept such a system? The use of such a scheme would truly promote consumer confidence especially if backed by consumer groups and the Commission. Remember developing standard form contracts was one of the original aspirations of the Commission. Moreover, as the vast majority of consumer complaints are fairly straightforward this provides a means through which almost every case can be settled on the basis of agreed law and without having to take part in costly proceedings in foreign courts. The instances when consumers should need to resort to national law would be extremely rare and the facts would have to be extreme for national courts to intervene in situations beyond the coverage of the Truly Optional Instrument. This is not really a very novel solution. It has long been recognised that, whilst business parties cannot obtain complete autonomy from national law due the state’s ultimate monopoly on law enforcement, they can effectively opt out for most practical purposes by creating their own private arrangements.\(^{59}\) Indeed in 1993 the Commission commented that “Companies have taken a great interest in the idea of creating a European guarantee, which would be valid throughout the Single Market, and to which they would be free to subscribe.”\(^ {60}\) It is shame that more was not done to promote this and that currently the Commission feels the need to trade off national consumer rights to achieve this outcome. The Commission may be confident that their Optional Instrument will offer such a high level of protection that consumers will in reality be losing little. If that is the case those promoting it have done a very bad job at inspiring consumer organizations and giving them the confidence that the Commission has a good understanding of what is a high

\(^{59}\) Collins (2008), n. 57 above, 281.

\(^{60}\) Green Paper (1993), n. 58 above, 5.
level of consumer protection. Moreover, the argument about the minimal loss of protection cuts both ways. If little is being lost, businesses should have little to fear from consumers retaining additional national rights so long as they do not create barriers to trade.

The Truly Optional Instrument is a “win-win” option for consumers and businesses wanting to offer their consumer real and effective protection. It also has a greater chance of success if traders and consumers have voluntarily agreed to it. It avoids competence issues and does not affect Rome I or national legal systems. Only those tied to old fashioned regulatory techniques for their own sake would want the anguish of imposing a regulatory Optional Instrument against the wishes of the consumer movement without first giving this Truly Optional Instrument a chance. The Commission’s regulatory Optional Instrument can cut its teeth in the commercial world where to-date EU law has had woefully little impact.