Policy Choices in European Consumer law: Regulation through ‘Targeted Differentiation’

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-Abstract-
This paper addresses the options proposed in the European Commission’s Green Paper on European Contract Law from the viewpoint of law-making in European consumer law. In contrast to general contract law, this field is governed by mandatory, regulatory law rather than non-mandatory, default rules. This implies that the choices to be made differ from those in general contract law. In order to achieve the goals set out in the Green Paper – such as decreasing transaction costs, ensuring greater legal certainty, and enhancing consumer confidence –, it is submitted, policy choices in European consumer law will have to be tailored to this field specifically. Structural characteristics of existing EU consumer regulation can provide guidance for the policy choices that the legislator will have to make in the aftermath of the Green Paper.

1. Introduction
At the presentation of the Green Paper on policy options for European Contract Law in July 2010, EU Justice Commissioner Viviane Reding said:¹

‘I want a Polish, German or Spanish consumer to feel as safe when doing business with an Italian, Finnish or French company online as when they are at home. And I want Europe’s small and medium-sized companies to offer their products and services to consumers in other countries without having to become experts in the national contract law systems of all other 26 EU countries.’

The goal of the Green Paper, therefore, is to pave the way for a new set of rules that can facilitate consumer and business transactions within the EU. This may cut costs and create greater access to the EU market for consumers and businesses.² Even if the EU is currently going through a down spell in its economy, therefore, the Commission emphasizes that now may be the time to make a ‘quantum leap’ towards a more European contract law.³

Undoubtedly, the Commission’s agenda for European contract law is coloured by political aims of integration and unity in the internal market. The reasons put forward for harmonisation at certain points seem to be phrased somewhat too strongly. The suggestion that differences between national laws are the cause for 61% of cross-border consumer sales to be rejected because traders refuse to serve the country of the consumer’s residence, for example, seems tenuous.⁴ Surely other factors – such as delivery

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² This is in accordance with the EU’s overall policy of pursuing market access for private actors; see Hans-W Micklitz, ‘The Visible Hand of European Regulatory Private Law. The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation’ (EUI Working Papers, Law 2008/14).
³ Press release IP/10/872 (n. 1).
costs and payment options – are of even greater practical significance for businesses who consider selling their products to consumers in other Member States.\(^5\)

This paper, however, does not seek to answer the question whether a new European contract law is necessary or desirable. It will be taken as a given that the European Commission intends to introduce a new set of rules for European Contract Law in one of the forms put forward in the Green Paper, most likely that of an ‘optional instrument’ as suggested in paragraph 4.2.2. An optional instrument as envisaged by the Commission would function as a 28\(^{th}\) regime besides the existing national laws of the 27 Member States. Ideally, it would apply in a self-standing manner without the need for recourse to (mandatory) rules of national laws.\(^6\) If and how rules of private international law will support this is another question, but one that the Commission will most likely find a solution for.\(^7\)

The question that remains open is what scope and content the proposed new instrument should have. Commissioner Reding appears to focus on the needs of consumers and small- and medium-sized businesses engaging in cross-border transactions, a narrow scope that I believe can be fruitful (see part 4). Which policy choices the EU legislator can and should make, however, relate to more fundamental aspects of EU regulation. Which rules are made, for whom and at what level – national or EU – of regulation? In order to provide insights not only for the current project but also for future initiatives in the field of European private law and regulation, this paper aims to take a broader perspective on the Green Paper. The questions that it seeks to answer are: what does the architecture of multi-level regulation in European consumer law look like? And which policy choices should the Commission make in order for the proposed new instrument to fit with that regulatory structure, making sure that the instrument responds to the needs and wishes of businesses and consumers in the EU?

I will discuss the position of a new set of rules for European contract law in relation to the regulatory structure of European consumer law. Consumer law, rather than general contract law, is chosen as the focus of the enquiry because of its mandatory nature. Businesses cannot contract out of legal rules meant to secure a minimum level of protection for consumers.\(^8\) Because of this mandatory nature, action taken by the EU legislator will inherently have a greater regulatory impact in consumer law than in general contract law, where the majority of legal rules are default rules and freedom of contract is therefore much greater. In consumer transactions, the EU can have direct influence on what businesses and consumers can and cannot do in terms of contracting. For consumer law, therefore, the creation of a new set of rules is of great significance, and so are the policy choices that the legislator will make with regard to its scope and content. I will discuss these choices in parts 3 and 4, paying particular attention to the scope of the instrument and the standard of consumer protection that the new instrument should adopt.

An ancillary problem, running as a golden thread running through this debate, is the question whether one should strive for coherence in the regulation of European contract law (see in more detail part 2). Should it benefit legal certainty, then my answer

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\(^{6}\) Green Paper, Option 4, p. 9.

\(^{7}\) See for a brief discussion p. 11 below.

to this would be in the affirmative. Otherwise, I concur with the literature that argues that the best results for private parties are achieved when a certain degree of choice and dynamic is maintained with regard to the rules that apply to their contracts. A hybrid solution, therefore, needs to be found. In order not to stifle the development of European contract law through unnecessary quests for legal coherence, but still maintain legal certainty, the regulatory approach that I propose for European consumer law is one that I call ‘targeted differentiation’. I will come back to this at the end of part 2. But first, what does multi-level regulation in European private law, and particularly consumer law, look like?

2. The architecture of multi-level regulation in European consumer law

The underlying presumption from which this enquiry starts is that European private law cannot be regarded as separate from regulatory – or so one will, public law – aspects of EU law. Private law is used in the EU mainly as an instrument for the correction of market failures. Micklitz expresses this in his denomination of European regulatory private law as the ‘visible hand’ of the market. This is an allusion to the ‘invisible hand’ of the market which in economic theory is used as a metaphor for those mechanisms that are at work in markets that manage to successfully correct themselves in cases of failure. The body of European private law that has emerged over the past decades is exactly the opposite of this and hence the visible hand: it seeks actively to correct market failures by using legal instruments to pursue particular political and economic purposes. For example, the measures adopted at EU level are often aimed at taking away barriers to trade in the internal market, so as to facilitate cross-border trade and enhance economic welfare for businesses and consumers. They are justified on the ground that they contribute to the functioning or the integration of the internal market, and find their legal basis in art. 114 TFEU (formerly art. 95 EC).

The fact that private law measures in the EU are interwoven with questions of regulation can in the discussion on the Green Paper be a source of guidance for the legislator. That is true for consumer law in particular (part 2a), where I will seek to define some guiding trends for future regulation (part 2b).

a. Multi-level regulation in European consumer law

9 E.g. Wagner (n. 8).


Although the debate on European private law spans much wider than the existing body of EU Directives and Regulations in the field covers – in particular with regard to questions of social justice and the normative values that should be reflected in private law\(^{13}\) – the focus on market goals is prominent in the existing *acquis*. In substance, the new instrument that will result from the Green Paper appears to aspire to similar goals. As stated in the introduction of the document, the Commission ‘want citizens to take full advantage of the internal market’ and ‘[t]he Union must do more to ease cross-border transactions’.\(^{14}\)

These observations are particularly relevant for consumer law, as pointed out in the introduction above. Whereas contracting parties under general contract law have a large degree of autonomy and can fashion their contract almost entirely to fit their own needs and wishes, consumer law imposes restrictions on that freedom. Rules of consumer protection are mostly mandatory, meaning that businesses cannot contract out of them to the detriment of the consumer. Effectively, therefore, the EU legislator can have a more direct and stronger impact on the consumer market than on the business-to-business market. At the same time, however, EU regulation covers areas which directly touch on the consumer field: such as competition law and financial market law.\(^{15}\) The content of a new instrument that applies – at least partly – to business-to-consumer transactions will therefore have to be considered in light of regulation in those broader areas.

An example of the connection between consumer law and a broader field of EU regulation, in this case competition law, can be seen in the Unfair Commercial Practices Directive.\(^{16}\) This Directive aims to protect consumers against unfair practices such as misleading advertising. Its protection, nevertheless, also concerns businesses: unfair marketing or advertising by a competitor can harm a business’ own position in the market and economic interests. Therefore, the Directive also can be regarded as part of EU regulation in competition law. This double aim is reflected in recital 6, albeit with limitations in the event that consumers are not affected by unfair commercial practices:

This Directive therefore approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers’ economic interests and thereby indirectly harm the economic interests of legitimate competitors. In line with the principle of proportionality, this Directive protects consumers from the consequences of such unfair commercial practices where they are material but recognises that in some cases the impact on consumers may be negligible. It neither covers nor affects the national laws on unfair commercial practices which harm only competitors’ economic interests or which relate to a transaction between traders; taking full account of the principle of subsidiarity, Member States will continue to be able to regulate such practices, in conformity with Community law, if they choose to do so.

From this example, I believe lessons can be learnt about the regulatory framework for European consumer law, which can provide guidance for the policy choices that the Commission will make on the basis of the current Green Paper and consultation. The choices that will have to be made should an optional instrument be pursued are for


\(^{14}\) Green Paper (n. 4), 5.


example: should the instrument apply to b2b and b2c transactions or only to one category? If so, which category should be chosen? Should all types of contracts be included or should the instrument be limited, e.g. to sales transactions? Should the instrument apply to cross-border and domestic transactions or should it be restricted to cross-border only? And what should be the level of consumer protection?  

I believe it is useful at this point in the article to give a brief indication of where my argument is heading. Bearing in mind the regulatory structure of European consumer law, it will be submitted that the instrument needs to fulfil the following prerequisites:
- it can address real obstacles to trade in the internal market;
- legal certainty can be ensured or even enhanced by the new instrument;
- an appropriate level of consumer protection can be determined.

I will explore these prerequisites in more detail in the following parts of the paper. Concretely, the outcome that they appear to lead to is that an optional instrument for European consumer contract law can only be useful for a limited range of transactions. The only area in which, for the moment, a real advantage can be obtained for consumer law is that of online sales transactions. In this area, a degree of ‘market failure’ can be observed, in the sense that certain offers are not available to every consumer in one of the EU Member States. According to a study that I mentioned in the introduction of this article, for 61% of cross-border e-commerce offers, consumers were not able to place an order mainly because businesses refused to serve the consumer’s country." The suggestion is that (at least part of) the reason for this is that traders have to take account of minimum protection rules of the country of residence of the consumer (Art. 6 of the Rome-I Regulation). While that may be overstating the matter – since practical issues like delivery costs or payment problems appear to be problematic too – it is likely that differences in law at least contribute to sellers’ hesitance to deliver to consumers in other Member States. An optional instrument could help eliminate that barrier to trade.

In which circumstances an optional instrument will succeed in facilitating online sales transactions requires further consideration. It will be argued here that the existing regulatory structure of European consumer law can provide anchor points for the policy choices that the Commission will have to make with regard to scope and content of an optional instrument for consumer contract law.

b. Regulatory structure and guiding trends

Which anchor points are these? Obviously, policy choices are to a degree flexible, depending on the political backing that an instrument can get at the time of its proposal. Still, trends can be discerned in the regulatory structure of European consumer law – as exemplified by the UCP Directive – that can provide a basis for the choices that need to be made with regard to the scope and content of an optional instrument.

Opinions may differ as to what this structure looks like or should look like. Some may say that no particular structure exists in the regulation of EU consumer or competition law, pointing to the pragmatic and problem-solving nature of EU action in these fields. Others may be more willing to accept an overarching philosophy in EU

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17 See Green Paper, para. 4.2 and 4.3.
18 ‘Mystery shopping evaluation of cross-border e-commerce in the EU’ (n. 5).
19 On the nature of policies in relation to rules and principles, see Ronald Dworkin, *Taking Rights Seriously* (Duckworth, London 1977) 22. Further discussion on the nature of principles in the context of EU private law is relevant but is outside the scope of this article.
20 Sounds to this effect are often heard in relation to the case law of the Court of Justice of the EU; see for an overview Paul Craig and Gráinne de Búrca, *EU Law. Text, Cases and Materials* (3rd edn OUP, Oxford 2003) 87, 100.
regulation, or at least be willing to look for it.\textsuperscript{21} The most realistic approach, in my view, is to find a balance between these two extremes. EU regulatory law is restricted in scope – namely to those areas in which the Union has competence – and has a problem-solving, sometimes pragmatic, nature. It intervenes where the laws of the Member States are unable to correct market failures in the internal market,\textsuperscript{22} covering anything from roaming charges for mobile phones to liability of airlines for delayed and cancelled flights, to misleading or aggressive advertising. At the same time, however, the existing legislation and case law can give clues as to which recurring aspects are deemed important by the legislator and can provide guidance for future regulation. In this context, one can think for example of the standard of the ‘average consumer’ developed in EU free movement regulation and copied in the UCP Directive. Such a standard can serve as a basis for determining the appropriate level of consumer protection to be adopted in new legislation.\textsuperscript{23}

Two points, it is submitted, stand out as particular trends in the EU regulation of competition and consumer law: the importance of legal certainty and the possibility of differentiation of legal norms (e.g. at EU and at national level). These two factors may seem to bite each other – for, does differentiation of standards not lead to uncertainty? – but on closer inspection that does not have to be the case. If balanced appropriately, these factors can provide structural arguments which the Commission can use as a basis for policy choices in the development of a new, optional instrument.

\textit{i. Legal certainty}

In the Green Paper, the Commission emphasizes that it is important for an optional instrument to provide legal certainty:\textsuperscript{24}

By its very nature, an optional instrument could only constitute a sensible solution to the problems stemming from regulatory divergences if it is sufficiently clear to the average user and provides legal certainty. These are preconditions for building the confidence of the contracting parties in the instrument so that it would be chosen as the legal basis of the contract in the first place. In particular, consumers should be reassured when entering into a contract on this basis that their rights will not be compromised.

Broadly speaking, this view corresponds with the underlying philosophy of EU action in the area of justice. On the basis of the Stockholm Programme 2010-2014, which sets out the focus points for EU intervention in the coming years, EU Justice Commissioner Reding has made it one of her priorities to work towards 'building a coherent European contract law' in order to empower citizens and to facilitate cooperation in the Union.\textsuperscript{25} Tools used


\textsuperscript{22}See above, p. 3.


\textsuperscript{24}Green Paper (n. 4), 9.

\textsuperscript{25}See the objectives listed in the ‘my mandate’ section of the Commissioner’s website: http://ec.europa.eu/commission_2010-2014/reding/about/mandate/index_en.htm. Also, Stockholm Programme 2010-2014 (n. 13).
for the implementation of these objectives include the enhancement of mutual trust and
mutual recognition through, for example, the approximation of legislation and the
facilitation of cooperation between authorities. Practically speaking, a large part of the
priorities set out in the Programme concerns action in matters of procedural law, private
international law and access to justice. The existing projects in the field of European
contract and consumer law, however, are part and parcel of the same policy strategy and
since Commissioner Reding explicitly includes them in her plans for the coming years
there is no reason to doubt that similar aims of mutual trust will be pursued in this area.

When it comes to translating objectives like ‘providing legal certainty’ into actual
legislation, another step is required. An abstract concept needs to be given hands and feet
through concrete rules and instruments. The UCP Directive can be used as an example of
how legal certainty can be ensured through concrete norms. It evinces that in the existing
body of regulation in EU consumer law at least three indications can be found for whom
and in which manner legal certainty matters in the internal market.

1. Business-to-consumer transactions: EU action seeks to tackle the uncertainty
casted by differences between national laws that create barriers to trade. According to recital 4 of the UCP Directive ‘[t]he barriers increase the cost to
business of exercising internal market freedoms, in particular when businesses
wish to engage in cross border marketing, advertising campaigns and sales
promotions. Such barriers also make consumers uncertain of their rights and
undermine their confidence in the internal market.’ Recital 12 adds:
‘Harmonisation will considerably increase legal certainty for both consumers
and business. Both consumers and business will be able to rely on a single
regulatory framework based on clearly defined legal concepts regulating all
aspects of unfair commercial practices across the EU. The effect will be to
eliminate the barriers stemming from the fragmentation of the rules on unfair
commercial practices harming consumer economic interests and to enable the
internal market to be achieved in this area.’ Therefore, rules that provide legal
certainty can be of economic benefit both to businesses and to consumers.

2. Business-to-consumer transactions, in which the consumer is ‘vulnerable’: The
same applies as under 1. The vulnerable nature of certain groups of consumers,
however, can be a ground for adopting different – stricter – standards of
protection for these groups. Consequently, the scope for protection can be
cast wider, including a larger number of potentially unfair practices. Legal
certainty can equally be assured by minimum rules but their substantive field
of application can thus differ.

3. Business-to-business relations: Businesses also benefit from legal certainty in
their relation to other businesses. As said earlier, the UCP Directive gives
legitimate traders protection against unfair competition. The certainty that
such protection exists throughout the EU can be a factor in persuading
businesses to enter the cross-border market.

Legal certainty in European consumer regulation, looking at these examples, hinges upon
a number of factors. It is important for each piece of individual legislation adopted in the
field to decide: who does it seek to protect; which interests are at stake; and how can the

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26 Stockholm Programme (n. 13), 5 and 11 ff.
28 Cf. UCP Directive, recital 19 and art. 5(3).
required degree of certainty best be achieved? Besides limitations in competence – e.g. on the basis of the principles of subsidiarity and proportionality – this requires decisions on the objectives that should be pursued (who needs protection and on what grounds?) and on the appropriateness of potential measures for achieving those objectives. In European consumer regulation, this has resulted in measures which generally aim for a high level of consumer protection as a means of providing legal certainty for consumers. Legal certainty in that context refers to the confidence that consumers can enter into (cross-border) transactions without the fear that their rights may be compromised. That level of protection, and the associated legal certainty, can be adjusted depending on the needs of specific types of consumers (e.g. as in the UCP Directive by distinguishing between ‘average’ and ‘vulnerable’ consumers).

For businesses, on the other hand, it may be less important which degree of protection is adopted. Legal certainty for them means foremost that a clear standard is set, so that businesses know which rules they have to comply with. At the same time, however, it would be unrealistic to think that businesses will accept any degree of protection. What level will be acceptable will depend on an assessment of costs and profits: it is likely that a lower level of protection will decrease costs (e.g. the costs of remedies) and will therefore be more attractive for businesses. Even if legal certainty can be ensured through any standard as long as businesses know which it is, their preference may still be for a low(er) level of protection. An impact assessment can determine whether that is really the case.

ii. Multi-level regulation through ‘targeted differentiation’
Certainty does not mean uniformity, however. The EU documents cited in the previous part of the paper may give prominence to legal certainty as an objective for EU regulation in consumer law. Even so, they do not prescribe that legal certainty can only be achieved through full harmonisation or through the use of rigid, non-flexible standards. To the contrary: the leading theme in EU regulation continues to be that of ‘unity in diversity’.

Translated into factors that can provide guidance for regulation in European consumer law, one element needs further elaboration. If – as seen at the end of the previous section – businesses benefit from having clear rules but different types of consumers have different protection needs, how can legal certainty be achieved for both of them? Does differentiation, i.e. the adoption of different standards of protection for different groups of consumers, not automatically compromise the achievement of legal certainty?

Indeed, it can be the case that differences in protection lead to uncertainty. An overview of the case law in European consumer law shows that the Court of Justice of the EU has in the past not always drawn a straight line in the adjudication of consumer cases. In cases concerning the interpretation of EU Directives in consumer law, generally a pro-consumer approach led the Court to adopt solutions entailing far-reaching protection for consumers. At the same time, the free movements cases saw the Court referring to the protection needed by an average consumer who is ‘reasonably well-informed and reasonably observant and circumspect’.

The standards of protection thus have diverged, which can lead to uncertainty for consumers and businesses. It may not be instantly obvious, for example, why one should require a lower degree of attention from a consumer

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29 This ‘high level of consumer protection’ is reflected also in the competence provisions of the EU Treaties; see art. 114 TFEU (formerly art. 95 EC) and art. 169 TEU (formerly art. 153 EU).
30 See e.g. Stockholm Programme (n. 13), 11.
entering into contractual negotiations than from a consumer reading advertisements in his armchair.\textsuperscript{32}

Nevertheless, as I have suggested in an earlier article,\textsuperscript{33} it is possible to achieve a greater degree of certainty in this area of regulation. A starting point can be to use the ‘average consumer’ of EU free movements regulation as an anchor point on which to hinge the level of protection in future regulation. The default standard of protection which the reference consumer gets is in this event the protection needed by a reasonably well-informed and circumspect consumer.

There would however be an additional, second step to determining the level of protection. In those cases where a higher level of protection is required – e.g. because products are complex and consumers will not be able to assess the risks they take on even if they are reasonably well-informed and circumspect – a higher standard of protection can be adopted. In order to ensure certainty, this process can be made transparent by requiring a justification. This is where the next stage – the actual differentiation – comes into effect. In this case, it is possible to pursue a higher level of protection \textit{if sufficient justification can be given for that higher level of protection}. What qualifies as ‘sufficient’ in EU law should be determined according to the free movements regulation, in particular the test laid down in \textit{Cassis de Dijon}. In other words, the aim will be to put into practice the approach that the European Commission had envisaged for positive harmonisation after \textit{Cassis de Dijon}; namely, to focus instruments of positive harmonisation on rules which are admissible under the \textit{Cassis} test.\textsuperscript{34}

### 3. Towards an optional instrument: legal certainty

Bearing in mind the regulatory architecture of European consumer law, which conclusions can we draw for the scope and content of an ‘optional instrument’ for European contract law? It has become obvious that guiding trends in EU regulation are the assurance of legal certainty and, in relation to substantive law, to use the notion of the ‘average consumer’ as an anchor point for better regulation through ‘targeted differentiation’. This approach ensures certainty, whilst enabling differentiation where a higher level of consumer protection is needed than that required by a ‘reasonably well-informed’ and ‘reasonably circumspect’ consumer.

Zooming in first on legal certainty, this seems a good place to recall the statement taken from the Green Paper and put forward earlier, which says that an optional instrument can ‘only constitute a sensible solution to the problems stemming from regulatory divergences if it is sufficiently clear to the average user and provides legal certainty’. If it does not live up to these standards, it is unlikely to ‘be chosen as the legal basis of the contract in the first place’.\textsuperscript{35} Legal certainty, therefore, is regarded as a required factor for the optional instrument to have a chance of success. The question then is, how can it provide the required degree of certainty?


\textsuperscript{35} Green Paper (n. 4), 9. See p. 6 above.
Here we run into a significant problem. The optional instrument is presented as ‘an alternative set of rules’ that parties can choose instead of national law to govern their contract. More choice, it is thought, is good for consumers and businesses. But is this really the case? In particular, is it true for consumer law? Two points, it is submitted, need to be considered.

a. More choice, less certainty

First, whether more choice really leads to better outcomes can be questioned. Research experiments in the field of behavioural studies have shown that the converse may be true: a greater range of options can make it harder for people to achieve an outcome with which they are satisfied. A famous experiment, for instance, tested customers’ buying behaviour where several flavours of jam were on offer. In one version of the experiment six different flavours of jam were available, whilst in the other 24 varieties could be chosen from. Surprisingly, customers were more likely to buy jam in the set-up where only six different flavours were available. In that case, 30% of the customers who passed the display of jams ended up buying a jar, whereas in the set-up with 24 jams only 3% did. Apparently, more choice does not lead to a higher number of purchases or to greater satisfaction amongst consumers. To the contrary: it can result in an impasse in which consumers find themselves unable to make a choice at all.

Extending this reasoning to the introduction of an optional instrument, one can come to a similar conclusion. The fact that this instrument will provide an alternative to existing national laws, and hence create an extra choice of law option, does not mean that it will lead to better outcomes. For consumers and businesses, the availability of an extra instrument can in effect lead to confusion and to uncertainty. In which respects does the instrument differ from national law? Does it offer a higher or rather a lower level of consumer protection than national law? Are there areas which are not covered by the optional instrument and where one needs to refer to provisions of national law after all?

Legal certainty can become problematic, therefore. Unless clarification is provided, it will not be immediately obvious to businesses and consumers whether the optional instrument is an attractive alternative to national law. The risk is then – as happens more often with new legislation – that the instrument is not used in practice.

In order for the optional instrument to become successful, it is important that it is presented in a transparent manner. It needs to be made clear to consumers and businesses – e.g. through flyers or other media – what the instrument contains and how it compares to other sets of rules. This can diminish the uncertainty that a new choice of law option in the form of an ‘optional instrument’ is likely to cause for consumers and businesses. The point made with regard to justifications of consumer protection standards

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36 See also, in Dutch, Vanessa Mak, ‘Hoe meer keus, hoe beter?’, in: Martijn Hesselink c.s., Groenboek Europees contractenrecht: naar een optioneel instrument? (forthcoming).
37 This point is also addressed by Ruth Sefton-Green in her contribution ‘More choice: less certainty. How questions do not give us the answers’ (Secola conference paper 2011).
38 On this point, see also John Cartwright, “Choice is good.” Really? (Secola conference paper 2011).
40 ibid, 997.
41 For example, the 1980 UN Convention on Contracts for the International Sale of Goods (CISG) initially received such a lukewarm welcome. The Convention applies to international sales contracts (as defined in Art. 1) but it is possible to opt out of most of its provisions (Art. 6). The opt-out possibility was often used in practice. However, the mass of case law and arbitral awards currently available from CISG databases suggests that the Convention has gained in popularity and is applied more often than it used to be.
in European consumer regulation – i.e. that it is important that they are provided so as to enhance transparency and legal certainty – therefore applies with equal force in this context. Legal certainty, at least in the sense of knowing what ones rights are, can so be secured. For consumers, moreover, it is also important to know that they are ensured of a high level of consumer protection (see further part 4).

b. Legal certainty, for whom?
The second point concerns Article 6 of the Rome-I Regulation. This provision ensures that consumers always have the protection of the mandatory laws of the Member State in which they reside, also where a choice of law has been made for e.g. the law of the seller’s country of residence. Now, the optional instrument as envisaged by the European Commission would sidestep this provision. It would apply as a self-standing regime in which there is no need to refer to provisions of national law, even if they are mandatory. In consequence, national consumer protection rules would be left aside.

Whether the Commission has the competence to introduce an optional instrument of this nature is a bone of contention. The Regulation, after all, only recognizes State law as the governing law of a contract (Article 3 and recital 13). The Commission itself appears to rely on recital 14 of the Regulation, which states: ‘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.’ Although the wording of the recital is somewhat foggy, it appears to leave open the possibility of introducing a self-standing instrument of European contract law. That would still be at odds with the overall ration of the Regulation, as reflected in recital 13, Article 3 and also Article 6. Nevertheless, it could provide an easy route for the Commission to proceed with the ‘optional instrument’ project without facing the (unwanted) problem of changing the Rome-I Regulation.

Leaving aside the competence issue, the problem that arises for consumers is that they are at risk of losing out on the mandatory protection that should be guaranteed by Article 6 of the Regulation. This, of course, depends on the level of protection that the optional instrument provides. If that is equal to, or higher than national law protection, there should be no problems for consumers. Legal certainty, in the sense that they can be sure that their rights will not be compromised wherever they shop in the EU, is then ensured. However, whether an instrument with such a high level of protection is an attractive option for businesses remains to be seen. With regard to consumer law a lot depends, therefore, on the level of consumer protection that the optional instrument seeks to provide. This will influence in which circumstances it can be an appealing alternative to national laws.

4. Towards an optional instrument: level of consumer protection
I come back now to the suggestion that I made in part 2 of this article, that an optional instrument for consumer contract law should be restricted – at least for now – to online sales transactions. The main reason for this restriction is that there is a risk that this new instrument, instead of benefiting consumers, will diminish consumer protection.

To clarify this point, I need to return to the question of choice. Above, I considered the risk of having more choice in the sense of having a larger number of options for the applicable law. A different question is who gets to make the choice for the applicable law. In practice, in consumer contracts the applicable law will often be part of standard terms determined by the seller. For the consumer, therefore, one cannot really speak of a choice.
Rather, the consumer finds himself in a 'take it or leave it' situation, where he either accepts the terms or discards the offer.

Practically, the choice for the optional instrument as the applicable law of the contract will therefore lie with the seller, rather than with the consumer. Even if the consumer gets the possibility to choose on a seller's website whether to buy under e.g. English law or under a European regime laid down in the optional instrument, a choice will have preceded that. Namely, the seller will have decided to use both regimes as applicable law options for the marketing of his products. The real question therefore is under which circumstances sellers will be inclined to choose the optional instrument. Several scenarios present themselves.

First, as indicated in the discussion of legal certainty above, sellers may prefer an optional instrument with a lower level of protection if this reduces e.g. the cost of remedies. The question of course is: will anyone buy them if protection is at a lower level? The answer to that does not have to be in the negative. There can be situations where consumers simply do not care too much about the protection they receive, as long as the deal they get out of it is good enough. For example, if a business uses the new European terms and conditions to put new products in the market, the increased range of products can attract more consumers. There could well be a lot of interest from consumers for products that were otherwise not available. The fact that a business only offers these products against lower protection practically means that consumers trade in some of the protection that they would have under stricter (national) consumer law. Availability of products, in other words, is paid by consumers through the concession of part of their protection.

Secondly, the optional instrument can be designed to ensure a high level of consumer protection. In that event, it may be less attractive for businesses from a costs perspective. Of course, this depends on other factors as well: the instrument could for example be used as a marketing tool ('buy under European law, optimum protection of consumer rights!') and so attract more consumers. If the increase in purchases supersedes the additional costs derived from the added protection provided by the instrument, this could be a lucrative solution for businesses. Whether such an outcome can be achieved, however, and which level of protection would best fit this scenario, are questions that legal research cannot answer. An impact assessment or insights from economics can be used to predict the behaviour of businesses and consumers in this context.

Looking at this, it is not hard to conclude that if businesses get their way they may well prefer a lower level of protection. That option is the most likely to guarantee additional profits. The optional instrument, if used in this manner, puts at risk the protection that consumers get under existing national laws and EU Directives and – in the worst case scenario – could induce a 'race to the bottom'.

The solution can be to stick to a very limited scope for the optional instrument in the field of consumer contract law, at least for now. In online sales, if scenario 1 plays out as one would think, it could open up new possibilities for consumer sales between traders and consumers in different Member States. The problem of online offers being refused to consumers in some Member States would so be addressed.

Effectively, therefore, the choice to limit the scope of the optional instrument would entail a differentiation between online sales to consumers and other types of

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43 See p. 8 above.
consumer sales. The differentiation in this case, however, is clearly based on economic considerations. Whether the level of protection corresponds with the protection given to the ‘average consumer’ of EU law or whether – and on what grounds – a differentiation to a higher level of protection can be justified remains somewhat outside this enquiry. That is regrettable from the perspective of regulatory development of European consumer law as discussed in part 2 of this article. It seems that if an optional instrument is adopted for online consumer sales contracts, concerns of consumer protection are very much pushed to the background. The basis on which the majority of the existing Directives in the field is grounded – i.e. laying down a minimum level of consumer protection throughout the EU – is left aside, in this case, simply because of the new format of an ‘optional instrument’. Therefore, although an optional instrument can open up parts of the EU market that have remained closed until now, it comes at the price of some of the harmonisation achieved by EU Directives so far. With that in mind, it seems advisable to keep the scope of the instrument in consumer contract law limited for the time-being.

5. Conclusion

In response to the Green Paper, therefore, the suggestion put forward in this article is to choose a limited scope for the optional instrument’s application to consumer contract law. For now, online sales transactions seem to hold the best cards for inclusion in this new instrument. In addition, the possibility exists to extend the instrument to business contracts too, which is an option not further explored in this article.

Taking a wider perspective on consumer law in the EU, the article proposes that the following points should be taken as guidelines for the policy choices that are to be made in future European consumer contract law:

1. Consumer law should be considered separately from general contract law. Although rules may overlap, it is important to pay heed to the mandatory nature of consumer law and, consequently, the stronger regulatory impact in this field.

2. In order to ensure a coherent approach in law-making in EU consumer law, a clear connection should be made between consumer law and the regulatory fields of EU law within which it operates, such as competition law.

3. As an alternative to the proposed ‘toolbox’, legal certainty in European private law can be achieved through the use of benchmark concepts which can serve as anchor points for future regulation. The prime example is the notion of the ‘average consumer’ in EU law.

4. Regulation should be tailored to the level at which it operates (e.g. national or cross-border). The approach suggested by points 3 and 4 can be characterized as ‘targeted differentiation’.

A law-making approach in EU consumer law that takes account of these considerations can help ensure legal certainty, whilst allowing differentiation where this is appropriate for specific types of consumers or types of transactions.

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64 This format practically achieves what the Commission has sought to do in the revision of the Consumer Rights Directive: namely to pursue uniformity in European consumer law. In the case of the Consumer Rights Directive, which is expected to come through the legislative process in the course of 2011, this uniformity is pursued through ‘maximum’ or ‘full’ harmonization. See e.g. Geraint Howells and Reiner Schulze (eds.), *Modernising and Harmonising Consumer Contract Law* (Sellier, 2009); Vanessa Mak, ‘Review of the Consumer Acquis – Towards Maximum Harmonisation?’ (2009) 17 *European Review of Private Law* 55; Geraint Howells (Secola paper 2011).