Cross-border B2C e-commerce in the EU and the introduction of the Consumer Rights Directive: A cure for fragmentation?

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Much attention has been placed on achieving the internal market. However, until recently, much less attention had been devoted to the development of the online aspect of the internal market, harnessing its huge potential, and eliminating the significant barriers to cross-border e-commerce. The recently enacted Consumer Rights Directive (“CRD”) is the culmination of years of review of the consumer protection acquis, the bulk of which predates the digital revolution. This paper assesses whether the CRD is successful in combating the problem of market fragmentation in the area of cross-border business-to-consumer (“B2C”) online transactions. Its objectives, changing scope, and its type and level of harmonisation are examined. It is ultimately concluded that the CRD is likely to have minimal effect in the quest to decrease the current fragmented regulatory framework, and falls far short of being a cure for this predicament.

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<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
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<td>B2B</td>
<td>Business to Business</td>
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<td>B2C</td>
<td>Business to Consumer</td>
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<td>CESL</td>
<td>Common European Sales Law</td>
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<td>CFR</td>
<td>Common Frame of Reference</td>
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<td>CISG</td>
<td>Convention of International Sales of Goods</td>
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<td>CRD</td>
<td>Consumer Rights Directive</td>
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<td>DCFR</td>
<td>Draft Common Frame of Reference</td>
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<td>DSM</td>
<td>Digital Single Market</td>
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<td>ECC-Net</td>
<td>European Consumer Centres Network</td>
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<td>EESC</td>
<td>European Economic and Social Committee</td>
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<td>EMOTA</td>
<td>European Multi-channel and Online Trade Association</td>
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<tr>
<td>ODR</td>
<td>Online Dispute Resolution</td>
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<tr>
<td>SME</td>
<td>Small and Medium-sized Enterprises</td>
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<td>UEAPME</td>
<td>European Association of Craft, Small and Medium Sized Enterprises</td>
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<td>VAT</td>
<td>Value Added Tax</td>
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1. INTRODUCTION

It has long been a part of the European Union’s goal of achieving a true internal market that consumers be enabled to purchase goods and services without the need to take notice of national borders. This should be the case regardless of the method of purchase. However, in today’s increasingly digital world the trend towards online shopping is proving to be a hiccup in the internal market’s attempted progress towards a state of perpetual near completion. Despite the internet having ‘revolutionised the everyday lives of Europeans in a way comparable to the industrial revolutions of the previous centuries’, online shopping has, up until recently, been neglected by European policymakers, resulting in an underdeveloped and inconsistently regulated sphere of the economy. The potential is, however, clear. Levels of online shopping are growing at a faster rate than other distance sales methods (such as mail order and telephone sales) and have triggered a noticeable stimulation in the amount of cross-border shopping in general. Consumers cannot currently take full advantage of the internal market by remaining in their home Member State and only buying offline: ‘Internet retailing holds the promise of making the retail internal market a reality for consumers hitherto confined within national borders.’

1.1 The concept of the Digital Single Market and its economic significance

In recent times the concept of a Digital Single Market (“DSM”) has emerged alongside a growing recognition of the need to develop e-commerce in the European Union (“EU” or “the Union”). Viviane Reding, Vice-President of the European Commission (“the Commission”) and Commissioner of Directorate-General Justice stated in March 2012 that, ‘As a new digital economy emerges, so does the need to break down new barriers. This is why our Single Market must increasingly become also a digital Single Market.’ Ole Sohn, the Danish EU Presidency Minister for Business and Growth has appealed to the economic benefits by conceding that, ‘A European Digital Single Market – realised to its full potential – is a crucial element on the path out of the crisis.’ Malcolm Harbour, Chairman of the Committee for the Internal Market and Consumer Protection (IMCO) in the European Parliament has even gone as far as to say that ‘a functioning digital Single Market is a prerequisite for the whole Single Market to work.’ A study has shown that fast stimulation of the DSM by 2020 could increase the Union’s GDP by an

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3 Ibid.
4 The terms ‘internal market’ and ‘single market’ are used interchangeably in much of the literature and should thus also be understood as interchangeable in the context of this paper.
5 Viviane Reding, ‘The Common European Sales Law – breaking the mould to help businesses and customers’ (Realising the European Single Market Forum 2012, Brussels, 6 March 2012) 2
estimated four percent, which equates to more than €500 billion,\(^8\) in addition to creating thirty thousand jobs per year.\(^9\) These impressive figures lead Mario Monti, in his 2010 report ‘A New Strategy for the Single Market’ (“the Monti Report”), to conclude that ‘the digital single market alone could have an impact similar to the 1992 internal market programme.’\(^10\) The unrealised potential of the DSM has been described as ‘enormous’\(^11\), and the failure to stimulate the required development of the market by 2020 (not realising the €500 billion potential gain) has been described as the ‘cost of non-digital Europe’.\(^12\)

European consumers have been identified as the means to unlocking this considerable potential, with Health and Consumer Policy Commissioner John Dalli stating in March this year that he is convinced that the key to realising such diverse and demanding objectives lies with European consumers – 500 million individuals – who collectively form one of the most important markets in the world and whose choices and behaviour hold tremendous potential for driving economic recovery.\(^13\)

European consumers themselves stand to reap a myriad of benefits from the development of e-commerce within the Union, with the potential to save time and enjoy increased choice in the availability of products and services. Most importantly consumers can save over €11.7 billion when purchasing goods via e-commerce (not including services),\(^14\) a number which could increase to €204 billion once the obstacles in the way of achieving a true DSM are removed.\(^15\) A mystery shopper study has shown that in a pool of one hundred popular consumer goods, over half the products could have been purchased abroad at a price ten percent cheaper than in the consumer’s domestic market, showing that ‘without proper cross-border competition, consumers would have to buy the product for a higher price at home.’\(^16\) The Commission’s studies have unveiled that even when delivery costs are included, online prices are lower than offline prices in thirteen out of fifteen categories tested.\(^17\) Further to this, where the median price of the hundred consumer goods is €112, each consumer stands to save €745 by buying cross-border online.\(^18\) It has also been calculated that if the obstacles causing fragmentation were removed and all transactions were able to be completed, this figure would jump to a remarkable saving of €1746.\(^19\) Consumers may additionally benefit from an increase in competitive prices in traditional brick and mortar storefronts due to the potential of e-commerce to place competitive pressure on offline retailers.\(^20\)

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\(^9\) Ibid 36.


\(^11\) Commission, ‘A coherent framework’ (n 1) 1.

\(^12\) Copenhagen Economics, ‘The Economic Impact of a European Digital Single Market’ (n 8) 4.


\(^15\) Ibid 15.

\(^16\) Viviane Reding, ‘The Common European Sales Law’ (n 5) 2.

\(^17\) John Dalli, ‘Consumers’ role in achieving economic growth’ (n 13) 11.

\(^18\) Commission, ‘Bringing e-commerce benefits to consumers’ (n 14) 14.

\(^19\) Ibid 15.

\(^20\) Commission, ‘Report on cross-border e-commerce in the EU’ (n 2) 9.
1.2 Why cross-border e-commerce?

Directive 2011/83/EU on consumer rights ("Consumer Rights Directive" or "CRD") covers both face-to-face and distance/off-premises contracts, as well as both cross-border and domestic transactions. The focus of this paper, however, is on cross-border (distance) transactions, as:

It is the cross-border movement of goods and services that allows consumers to search out bargains and innovative products and services and thus ensures that they optimise their consumption decisions. This cross-border demand increases competitive pressure within the internal market and allows for a more efficient and competitively priced supply of goods and services. This virtuous circle can only be achieved if the regulatory framework in place encourages consumers and businesses to engage in cross-border trade.

This focus can be further narrowed down to online cross-border transactions. The aforementioned growing popularity of e-commerce is most evident in a domestic context as compared with cross-border levels which are increasing but at a slower rate (with the percentage of consumers participating in domestic e-commerce growing from twenty-eight to thirty six percent between 2008 – 2010, whilst cross-border e-commerce has registered at just six to seven percent between 2006 and 2008, eight percent in 2009 and nine percent in 2010). This has resulted in a growing gap between the level of domestic and cross-border e-commerce in the EU. It is precisely due to the existence of this gap that cross-border e-commerce is deserving of individual regulatory attention – indeed, this gap (and more specifically, the exceptionally sluggish growth rate of cross-border e-commerce) which illustrates the shortcomings in the current development of e-commerce in the EU. The widening of this gap has been blamed on barriers to online trade, and in particular:

A number of obstacles reduce the capacity of industry in Europe to innovate and generate value added in the digital sphere: the fragmentation of online markets, ill-adapted intellectual property legislation, the lack of trust and interoperability, the lack of high-speed transmission infrastructure and the lack of digital skills. Many of these obstacles point to a simple cause: a lack of a Digital single market.

It is contended that such issues, rightly described as obstacles, are themselves the reason for the lack of a DSM, and not vice versa. The rules governing VAT reporting procedures and national technical regulations (for example differences in electrical plugs and sockets) have also been identified as existing barriers in the way of achieving a true DSM. It is noted that some of the discussion in this paper will apply equally to other kinds of cross-border transactions, such as

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23 Commission, ‘Bringing e-commerce benefits to consumers’ (n 14) 1.


26 Commission, ‘Cross-border business to consumer e-commerce in the EU’ (n 24) 2.

27 Commission, ‘Report on cross-border e-commerce in the EU’ (n 2) 2.

28 Mario Monti, ‘A New Strategy for the Single Market’ (n 10) 44.

29 Commission, ‘Report on cross-border e-commerce in the EU’ (n 2) 3 and 16.
those conducted by consumers while on holiday in another Member State, as well as to telephone and mail orders. European e-commerce, still in its early years of development, displays a greater growth potential than these more established methods of cross-border sales. The related technological advances surround the area in much uncertainty and ensure a fast changing environment in need of individual attention.

1.3 Market fragmentation as the obstacle in focus: its causes and consequences

Market fragmentation is one of the most significant of all of the obstacles in the context of cross-border e-commerce, with Europe having been described as ‘a patchwork of national online markets’. The oft repeated phrase that European e-commerce is ‘fragmented along national lines’ has been attributed to remaining internal market barriers and is illustrative of the state of the current consumer acquis communautaire (“the acquis”). The Commission has insisted that in order to prevent future economic growth being stymied and to stop traders from creating business models which contribute to fragmentation, it is imperative that the relevant obstacles be addressed.

The causes of the fragmentation appear to be twofold: firstly, differences between the national laws of the Member States and, secondly, disparities at the EU level arising out of an inconsistent treatment of issues across a jumbled mess of directives. The consumer contract law acquis ‘has developed very slowly and in a rather piecemeal fashion’, a point which is equally applicable to the consumer protection acquis in general. When dealing with consumer issues the Union has traditionally enacted minimum harmonisation directives. Whilst reducing differences between national laws to a certain extent, this approach has allowed the Member States to preserve or implement more rigorous consumer protection rules in their national laws – a possibility which they have made extensive use of. Despite one of the expected benefits of harmonisation being a simplification of the legal framework, it has been said that the result is instead one of utter complexity. In addition to the national legislatures’ maintenance and adoption of more stringent measures, the judiciaries of the Member States have also contributed to the diversity of national laws through their differing interpretations of the existing acquis. The preliminary reference procedure in Article 267 of the Treaty on the Functioning of the European Union (“TFEU”) has seldom been utilised by national courts, meaning that the Court of Justice has not had many

32 Commission, ‘Report on cross-border e-commerce in the EU’ (n 2) 3.
37 Ibid 14.
opportunities to provide guidance on a uniform interpretation which could help alleviate the discrepancies. 38

The current situation is reflected in the varying levels of e-commerce in each of the Member States. The Commission has reported that there are three main markets within the Union, each reflecting distinct stages of development:

• A mature market in Northern Europe (United Kingdom, Germany and the Nordic countries);
• A growth market (France, Italy and Spain); and
• An emerging market (countries in Eastern Europe). 39

Research has shown that consumers who already shop online are more or less likely to also shop cross-border online depending on which Member State they reside in, with consumers in Malta, Luxembourg, Cyprus, Austria, Ireland and Belgium being the most likely. 40 From this it has been deducted that factors such as market size and geographic location of the country are relevant determinants of the likelihood of online shoppers also purchasing in the cross-border e-commerce context.41

The resulting problems of the fragmented market are numerous. Staffan Nilsson, President of the European Economic and Social Committee (“EESC”), mentioned a demand-side problem when speaking of the financial crisis at a conference earlier this year, noting that ‘this current crisis that we are facing is financial, economic and social. But, by far more dangerous, it is also a crisis of consumer confidence.’ 42 This notion of ‘consumer confidence’ has also been liberally applied in the context of cross-border e-commerce, with the Commission repeatedly stating it as a justification for its need to take action at the European level (a matter which will be revisited in Chapters 2 and 5).

Another problem arising from the current state of affairs is lack of access. Not all European consumers have the same ability to take advantage of offers from other Member States, with shoppers from Belgium, Bulgaria, Latvia, Malta and Romania encountering the biggest difficulties in finding foreign traders who are willing to accept an order. 43 A 2009 study revealed that sixty percent of cross-border internet transactions attempted by consumers failed because of the seller’s refusal to post the product to the consumer’s Member State or because the seller did not offer adequate payment methods for cross-border transactions.44 The Commission has recognised that this ‘inability or reluctance of distributors to serve unsolicited customers from another country (so called ‘passive selling’) appears to be one of the factors holding back cross-border e-commerce.’45 Of particular relevance in this context is Article 20(2) of Directive 123/2006/EC on services in the internal market (“Services Directive”), which prohibits conditions of access to a service discriminating against consumers based on their nationality or place of residence unless this can be justified by objective criteria. In 2009 the Commission

38 Ibid 14 and 20.
39 Commission, ‘Report on cross-border e-commerce in the EU’ (n 2) 5.
40 Commission, ‘Bringing e-commerce benefits to consumers’ (n 14) 7.
41 Ibid.
43 Commission, ‘Cross-border business to consumer e-commerce in the EU’ (n 24) 5-6.
44 Commission, ‘Consumers: 60% of cross border internet shopping orders are refused, says new EU study’ (Press release, IP/09/1564, 22 October 2009) 1.
45 Commission, ‘Report on cross-border e-commerce in the EU’ (n 20) 14.
stated that it expected this provision to ‘substantially ease the problems faced by consumers being discriminated on a geographical basis when seeking to buy goods and services on the internet’.46

Whilst it is agreed that the provision, properly transposed, should ease the problems faced by purchasers of cross-border services online, it is somewhat peculiar that the Commission included goods in this statement (due to the nature of the Services Directive only covering the free movement of services in the internal market). By late 2010 the European Parliament announced its regrets that the Services Directive had still not been fully transposed in some Member States,47 despite the deadline for transposition having already passed on 28 December 2009.48 The most recent official assessment of the degree of implementation in the Member States indicated that full transposition had still not been attained by late 2010,49 and in November 2011 the Commission referred Germany, Austria and Greece to the European Court of Justice (‘Court of Justice” or “ECJ”) for reason of incomplete transposition.50 The permissible objective criteria for justifying this type of discrimination have been said to include additional costs incurred due to the distance involved,51 and possibly even regulatory barriers in certain cases.52 Viviane Reding has conceded that: ‘It is a huge disappointment that more than 20 years after the European single act many citizens are denied access to the Single Market.’53

High compliance costs deter businesses from selling cross-border and therefore constitute a further problem arising out of the fragmented e-commerce market. The costs are said to ‘considerably diminish the appeal or feasibility of cross-border expansion’.54 The reality is that, despite fifty one percent of EU retailers conducting online sales, only twenty one percent sell online to customers in other Member States.55 Of those who do sell cross-border, most sell to just one or two other Member States, with a mere four percent trading with ten or more countries in the EU.56

For retailers in Europe, the main regulatory barriers to cross-border e-commerce originate in the fragmentation of consumers protection rules and other rules on VAT, recycling fees and levies. The way in which these rules are implemented differs markedly from one MS to another, giving rise to a business environment that is complex, costly and unpredictable for those businesses considering selling cross-border.57

The reason that differing consumer protection rules pose a problem for businesses is that cross-border transactions often result in a conflict of laws between laws of the trader’s Member State

46 Ibid 19.
49 Commission, ‘State of Implementation of the Services Directive’ (Information Note to the Competitiveness Council, 17470/10, 10 December 2010).
52 Commission, ‘Cross-Border Business to Consumer e-Commerce in the EU’ (n 24) 8.
54 Commission, ‘Report on cross-border e-commerce in the EU’ (n 20) 3.
55 Commission, ‘Cross-border business to consumer e-commerce in the EU’ (n 24) 3.
56 Ibid.
57 Commission, ‘Cross-border business to consumer e-commerce in the EU’ (n 24) 7.
and those of the consumer’s. As a basic rule, Article 6 of Regulation 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (“Rome I Regulation” or “Rome I”) stipulates that the applicable law will be that of the consumer’s habitual residence. Although the parties remain free to choose an alternative applicable law pursuant to Article 3 of Rome I, whenever the trader directs its activity to the consumer’s Member State the mandatory rules of that state cannot be displaced and therefore remain applicable: Article 6(2) Rome I (which is of particular relevance wherever said rules provide a higher level of consumer protection). In practice this entails a need for businesses to be aware of the particular laws governing their transactions in each of the Member States they sell to. The administrative costs involved with offering a business’s goods or services to all twenty-seven Member States is estimated at being €70,526.58 Surveys have shown that ‘retailers would be much more willing to engage in cross-border selling if the risks of failing to comply with various national regulations could be eliminated by establishing EU level rules.’59 In 2011 a third of all retailers surveyed held this opinion.60 The Commission has recognised that traders involved in e-commerce transactions face additional costs due to the need to make alterations to their website in order to conform to the legal requirements of the legal systems in the Member States they intend to trade with.61

It is evident that there are both demand (consumer) and supply (business) side problems with the current state of fragmentation in the e-commerce market. The market is exceptionally underdeveloped and its true potential is far from being harnessed. It is in response to this state of affairs, in conjunction with a more general review of the consumer acquis, that the Commission proposed the enactment of the Consumer Rights Directive in 2008. The Commission stated that the main objective of the CRD is to enhance consumer confidence and reduce business reluctance, and that ‘this overall objective should be attained by decreasing fragmentation.’62

1.4 Questions posed in this paper

As the deadline for implementation of the Consumer Rights Directive has not yet been reached,63 nor does it apply to contracts concluded prior to 13 June 2014,64 it is not yet possible to construct definitive conclusions about the Directive’s effects on the European e-commerce market. It is, however, the purpose of this paper to make predictions about the effect the CRD may have once fully implemented and operational in the laws of the Member States.65 The main question to be answered is thus: is the CRD likely to achieve its goal of reducing fragmentation of laws concerning cross-border B2C online transactions (as part of its broader goal of enhancing consumer confidence and reducing business reluctance), thereby unlocking the potential of e-

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58 Commission, ‘Report on cross-border e-commerce in the EU’ (n 2) 15. The Member States must implement the Directive into their national laws by 13 December 2013: Article 28 CRD.
59 Ibid.
60 Commission, ‘Retailers’ attitudes towards cross-border trade and consumer protection: Summary’ (Flash Eurobarometer, 2011) 5.
63 Member States have until 13 December 2013 to transpose the CRD into their national system: Article 28 CRD.
64 Article 28 CRD.
65 The fact that this paper has been written during the transposition period of the CRD (it having entered in force on 13 December 2011: Art. 34 CRD) creates a semantic difficulty when selecting a tense to refer to the position prior to the CRD, as this state of affairs still exists in most cases. However, for the sake of clarity and consistency, all situations prior to the CRD will be referred to in the past tense.
commerce in the internal market? And the sub-questions which then arise are: (1) is the level of harmonisation adopted in the CRD (and the harmonisation trend of consumer protection law in general) suitable for achieving reduced fragmentation? (2) does the final scope of the CRD successfully simplify the EU consumer protection acquis and contribute to the defragmentation of national consumer protection laws? Or does it instead detract from the aim of defragmentation? And finally, (3) is the CRD a step in the right direction or is it a failed effort?
2. THE POSITION PRIOR TO THE CONSUMER RIGHTS DIRECTIVE

In 2004 the Commission initiated a review of the EU contract law acquis,\(^\text{66}\) followed by a Green Paper more specifically on the consumer acquis, published in February 2007.\(^\text{67}\) The acquis largely predated the trend towards online shopping and so there was not only a need to combat fragmentation but also to more sufficiently cover the new challenges presented by digital transactions. This need was recognised in the Consumer Policy Strategy 2007 – 2013,\(^\text{68}\) which highlighted the necessity of implementing measures aimed at eliminating barriers to cross-border online transactions with a special focus on the development of digital services.

Initially the scope of the review was to include eight consumer directives\(^\text{69}\) considered to be the main consumer legislation in need of reassessment. The transposition of these directives into the national legal systems of the Member States was analysed in the EC Consumer Law Compendium and Database.\(^\text{70}\) This study confirmed there were large differences in the way Member States had transposed the directives, even in harmonised areas. Although reflective of the position prior to the CRD, the fragmentation evident between the four directives\(^\text{71}\) which were ultimately amended or repealed by the CRD will be covered in Chapter 3, where they can be compared to the post-CRD position.

2.1 E-Commerce Directive 2000/31/EU

Directive 2000/31/EU on certain legal aspects of information society services, in particular electronic commerce, in the internal market (“the E-Commerce Directive”) set the framework for the provision of online services in the internal market and attempted to remove obstacles thereto. It was not included in the review of the consumer acquis and hence was also not incorporated into the CRD. It is still important, however, to include a brief overview here in order to understand the pre-existing framework governing cross-border e-commerce prior to the enactment of the CRD (whilst duly noting that the E-Commerce Directive continues to be in force).

Although a core principle of the E-Commerce Directive is that the laws of the country of origin constitute the applicable law (Article 3), it is important to note that contractual obligations concerning consumer contracts form a derogation from this principle: Article 3(3), Annex.\(^\text{72}\) This


\(^\text{70}\) Available at http://www.eu-consumer-law.org/.


\(^\text{72}\) Martine Wubben, Bart W. Schermer, Deniece Teterissa, ‘Legal Aspects of the Digital Single Market: Current framework, barriers and developments’ (Commissioned research by Considerati at the request of the Netherlands
is in line with Article 6 of the Rome I Regulation which stipulates that it is the law of the consumer’s Member State of habitual residence which applies where no agreement has been made to the contrary. The provisions of the E-Commerce Directive deal with the obligations of traders who provide services over the internet. Article 9 established that Member States are to permit electronic means as a method of concluding contracts, whilst Article 5 harmonised basic information requirements. The E-Commerce Directive is to undergo review as part of the Digital Agenda flagship within the Europe 2020 Strategy, discussed further in Chapter 9.

2.2 Commission theory behind the need for a Consumer Rights Directive

It is integral in any evaluation of the likely prospects of the CRD to consider the Commission’s intentions, motivations and objectives. These will shed light on the situation existing prior to the CRD and also provide the basis for reflecting on the extent to which the justifications are valid. Susanne Czech, Secretary General of the European Multi-channel and Online Trade Association (“EMOTA”), has managed to nicely summarise the Commission’s initial objectives, saying the goal

was to achieve a real business-to-consumer Internal Market, striking the right balance between a high level of consumer protection and the competitiveness of enterprises. And at the same time…cross-border distance sales were to be encouraged by reducing legal fragmentation within the European Union via full harmonisation.73

Another of the Commission’s main objectives in enacting the CRD was to improve consumer confidence.74 In many of its references to this concept the Commission assumes a direct link between consumer confidence and the full utilisation of the internal market:

Consumers who lack confidence in the functioning of the market and the protection of their interests at home and abroad will be even more reluctant to make major purchases outside their own country. Consequently the full force of competition will not be felt either at national level or in the retail Internal Market – thus reducing the competitive potential of the European Union’s Internal Market.75

Another direct link between consumer confidence and the internal market is asserted in Recital 6 of the final CRD, which goes a step further by linking the problem of consumer confidence in the internal market to ‘disproportionate fragmentation’. The Commission has also repeatedly highlighted the heightened need for confident consumers in the specific context of e-commerce:

The confidence of consumers is an essential ingredient for any market to flourish and thrive – be it national or cross-border off-line or on-line. But in a market where consumers and suppliers may be separated by distance, language or tradition, nurturing confidence is all the more important.76

76 David Byrne, ‘Consumer Confidence in the Online Marketplace – Boosting Competitiveness’ (SPEECH/04/130, European Consumer Day Conference, Dublin, 15 March 2004) 2
Whilst the Commission has recognised that ‘Confidence cannot be imposed by law’, it still maintains that ‘a proper regulatory framework is an essential element of consumer confidence.’

The consumer confidence justification has received criticism from Thomas Wilhelmsson, Rector of the University of Helsinki, Finland, who has argued that it has been overused and abused. He has claimed that the substantive harmonisation measures which have been justified in the past by reference to consumer confidence are only relevant to the actual creation of such confidence to a very limited extent. Others have also queried this justification, stating that ‘the protection of the confident consumer may have a very weak and unreliable basis in Community law’. The merits of this justification will be revisited in Chapter 5 in the context of the justification for the level of harmonisation. It is sufficient to state here that whilst the level of consumer confidence does affect the overall level of B2C e-commerce in the Union, the justification is being used in a hollow and misleading manner. This is because the real focus of the Commission is on encouraging businesses with the consequential effects on consumers being almost taken for granted as an expected flow-on effect without proper funding or focus being placed on substantive measures aimed at building consumer confidence, such as education campaigns.

Another of the Commission’s main stated objectives is to encourage businesses to embrace cross-border online sales and to expand their business to a larger number of Member States. The Commission based its theory on an open consultation it published in 2004 on legal barriers in e-business, in which it found that forty percent of surveyed businesses considered uncertainties present in the legal framework to ‘constitute either a very important or an important barrier to making sales via the internet’. The justification of the need to encourage businesses has not been without dissent, whereby it has been said that: ‘The Commission seems to be abusing the image of the under confident businessman just as much as it abused the image of the confident consumer.’ On the contrary, it is contended that the justification of business encouragement is the more honest illustration of the Commission’s concerns – the idea being that should businesses embrace the DSM and broaden their sale channels within the Union, the level of cross-border e-commerce will rise by itself.

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77 Ibid 3.
78 Ibid.
80 Ibid 318.
83 Ibid 3.
3. The Scope of the Consumer Rights Directive

The prospects for success of any regulatory measure are often strongly influenced by its scope of application. The Consumer Rights Directive is no exception. Three years in the making (not including the time spent by the Commission creating the proposal), the CRD attracted considerable controversy causing its scope to undergo significant changes before reaching final approval. Attention will now be turned to these changes, as well as their impact on the outlook of the CRD and in particular on significant substantive features of the final version of the directive.

3.1 The changing scope

Although the review of the consumer acquis had originally concerned the eight consumer directives mentioned above,85 the proposal for a Consumer Rights Directive put forward on 8 October 2008 included only four of those directives in its scope of review.86 This move to decrease the scope of the CRD was criticised as counterproductive in reaching the Commission’s objective of simplifying the consumer acquis, while coherence between the existing Directives was, as a consequence, described as an increasingly ‘elusive goal’.87 Commentators proposed a widening to cover other directives (namely those which had been included in the Green Paper on the review of the Consumer Acquis but left out of the CRD proposal) and also called for consideration of the Draft Common Frame of Reference (“DCFR”).88 The European Parliament also called for an extension of the scope of the proposal to include warranty claims and the content of the Directives on Distance Selling and E-Commerce.89

Instead the proposal was whittled down further: on 10 December 2010 ‘the Belgian EU Presidency angered consumer groups by deleting the most contentious parts of the draft CRD, including chapters on unfair contract terms and legal guarantees for consumers in the event that a trader breaches a contract,’ a move supposedly taken ‘in order to secure a deal on the law before the end of its term at the EU helm.’90 The European consumers’ organisation BEUC criticised the Commission for being ‘too willing to accept controversial compromises in its desire to see the legislation adopted as soon as possible.’91 The deleted chapters of the CRD proposal included a black list of unfair contract terms and a ‘grey list’ of terms which were to be deemed unfair.

85 See (n 69).
88 Ibid 4.
89 Parliament, ‘Completing the Internal market for e-commerce’ (Resolution) [2012] OJ C50 E/1, Recital 80.
unless the seller could prove the contrary,\textsuperscript{92} as well as a standardisation of consumer guarantees and remedies for faulty products.\textsuperscript{93}

Despite this significant reduction in the scope of the CRD, some feedback from the initial proposal was eventually incorporated into the final version, widening the scope in specific areas. In the United Kingdom, the European Union Committee of the House of Lords published a report in response to the proposal for a CRD, recommending that it be expanded to cover digital products.\textsuperscript{94} This change was incorporated into the final CRD and is covered in more detail in Subsection 3.2.4 below.

The scope of both the preliminary and final CRD proposals also focussed exclusively on business-to-consumer (“B2C”) contracts, to the exclusion of their business-to-business (“B2B”) counterparts. This element of the CRD is also not without criticism, with some academics including Professor Martijn Hesselink, University of Amsterdam, questioning whether a rigid, categorical distinction between the rules governing B2B and B2C contracts is desirable.\textsuperscript{95} Hesselink claims that the CRD’s limited scope ‘will lead to a different fragmentation, namely that of a European retail into two different end user markets (i.e. consumers and businesses).’\textsuperscript{96} It is not within the scope of this paper to make conclusions on such issues, but suffice to say that it is a difficult task due to the inconsistent definitions of ‘consumer’ existing in the acquis.

3.2 Significant features of the Consumer Rights Directive

Once the CRD was finally adopted on 10 October 2011, the Commission issued a Memorandum outlining the ‘top 10 benefits for consumers’ arising out of the new directive, including:

- The elimination of hidden charges and costs;
- Improved transparency of prices;
- A ban on traders using pre-ticked boxes on their websites;
- An EU-wide cooling-off period of 14 calendar days;
- Improved rights to a refund;
- Inclusion of a model form for consumers to use when exercising their right of withdrawal;
- The elimination of surcharges when paying with credit cards;
- Improved clarity regarding the obligation to pay for returned goods;
- Protection for consumers who purchase digital products; and
- Indirect benefits through businesses’ ability to use common rules to expand their trade across the EU.\textsuperscript{97}

In this section attention will be given to what are deemed to be the more contentious aspects of the CRD, with special focus on the fragmentation currently existing in the field and the likely prospects of the relevant CRD provisions of decreasing or eliminating the inconsistencies either at the EU level or as between the laws of the Member States. The feature given most attention in

\textsuperscript{93} Ibid, Articles 24-29 of CRD proposal.
\textsuperscript{96} Ibid 72.
\textsuperscript{97} Commission, ‘New EU rules on consumer rights to enter into force’ (MEMO/11/675, 10 October 2011).
the CRD is that of the right of withdrawal, closely followed by information requirements. Both are considered below, in addition to changes relating to delivery failure and passing of risk, as well as online auctions and digital content.

3.2.1 Right of Withdrawal

The right of withdrawal is a type of self-help remedy available to the consumer whereby they can withdraw from the contract within a certain period of time, usually without giving any reason. A highly touted aspect of the CRD is the harmonisation of the cooling-off period for the right of withdrawal to 14 calendar days.\(^98\) The right of withdrawal in general has long been a fragmented area of consumer law, with:

\[\text{Latent inconsistencies in the way the ‘right of withdrawal’ is regulated in different Directives: different terminology is used to denominate the right, cooling-off periods are calculated in different ways, the notice of the right of withdrawal differs (both as to content and timing of formal requirements), a failure to inform the consumer of his right of withdrawal is sanctioned in different ways, etc. At national level, the situation is often even worse. These inconsistencies have made it very difficult to fit such a right into general contract law.}\(^99\)

Whilst the harmonisation of the length of the cooling-off period is a welcome improvement to what was previously a very fragmented field of consumer law,\(^100\) the limited scope of the CRD means that some inconsistencies remain with respect to certain conditions of the right of withdrawal as between the Directives not covered by the CRD, as well as some differences regarding the start of the running time. The following tables illustrate the comparison of the fragmentary nature of cooling-off periods before and after the enactment of the CRD, by reference to other relevant directives from the consumer acquis.

\(^98\) Article 9, CRD.
\(^100\) Cooling off periods ranged from 7 calendar days in Directive 85/577/EEC on doorstep selling to 30 calendar days in the case of life assurance contracts, pursuant to Directive 2002/83/EC.
<table>
<thead>
<tr>
<th>Directive</th>
<th>Cooling-off period</th>
<th>Start of running time</th>
<th>Conditions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Doorstep Selling* 85/577/EEC</td>
<td>Not less than 7 calendar days: Art. 5(1)</td>
<td>When the consumer receives notice from the trader of the consumer’s right of cancellation as required in Art. 4: Art. 5(1)</td>
<td>Sufficient for the consumer’s notice to be dispatched before the end of the 7 day period – it need not arrive before the end of the period: Art. 5(1)</td>
</tr>
<tr>
<td>Distance Selling* 97/7/EC</td>
<td>At least 7 working days: Art. 6(1)</td>
<td>Art. 6(1): Provided that the information requirements have been fulfilled: <em>Goods</em>: from the day of receipt <em>Services</em>: from the day of conclusion of the contract, or from the day the information requirements were fulfilled, whichever is later.</td>
<td>Without penalty: Art. 6(1) Without reason: Art. 6(1) Extended period in case of failure to fulfil information obligations: 3 months: Art. 6(1) Reimbursement = 30 days: Art. 6(2)</td>
</tr>
<tr>
<td>Distance marketing of financial services 2002/65/EC</td>
<td>14 calendar days: Art. 6(1)</td>
<td>From the day of conclusion of the contract or from the day the consumer received the terms, conditions and information whichever is later: Art. 6(1).</td>
<td>Without penalty: Art. 6(1) (but may have to pay for service actually provided: Art. 7(1)) Without reason: Art. 6(1)</td>
</tr>
<tr>
<td>Consumer Credit 2008/48/EC</td>
<td>14 calendar days: Art. 14(1)</td>
<td>From the day of conclusion of the contract or from the day the consumer received the terms, conditions and information, whichever is later: Art. 14(1).</td>
<td>Without reason: Art. 14(1). Sufficient for the consumer’s notice to be dispatched before the end of the 7 day period – it need not arrive before the end of the period: Art. 14(3)(a).</td>
</tr>
<tr>
<td>Life Assurance 2002/83/EC</td>
<td>Between 14 and 30 calendar days: Art. 35(1)</td>
<td>Determined by applicable law: Art. 32.</td>
<td>Determined by applicable law: Art. 32.</td>
</tr>
<tr>
<td>Timeshare 2008/122/EC</td>
<td>14 calendar days: Art. 6(1)</td>
<td>From the day of conclusion of the contract or from the day the consumer receives the contract, whichever is later: Art. 6(2).</td>
<td>Without reason: Art. 6(1). Extended period in case of failure to fulfil information obligations = 3 months and 14 calendar days: Art. 6(3)(b). Extended period in case of failure to provide a filled-in separate standard withdrawal form to the consumer on a durable medium: 1 year and 14 calendar days: Article 6(3)(a).</td>
</tr>
</tbody>
</table>

* Reviewed in the Consumer Rights Directive
<table>
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<tr>
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</thead>
<tbody>
<tr>
<td>Consumer Rights Directive 2011/83/EU</td>
<td>14 calendar days:</td>
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<td></td>
</tr>
<tr>
<td></td>
<td>Art. 9(1)</td>
<td><strong>Goods</strong>: from the day of receipt of the goods: Art. 9(2)(b).</td>
<td>Without costs other than those provided for in Art. 13(2) and Art. 14.</td>
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<td><strong>Services</strong>: from the day of conclusion of the contract: Art. 9(2)(a).</td>
<td>Without reason: Art. 9(1).</td>
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<td></td>
<td>If information requirements are fulfilled after these dates but before the expiration of 1 year from said dates, the withdrawal period will be 14 days from the receipt of that information: Art. 10(2).</td>
<td>Sufficient for the consumer’s communication of withdrawal to be sent before the end of the 14 day period – it need not arrive before the end of the period: Art. 11(2).</td>
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<td></td>
<td></td>
<td></td>
<td>Extended period in case of failure to fulfil information obligations: 1 year: Art. 10(1).</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>Extended period in case of failure to provide a filled-in separate standard withdrawal form to the consumer on a durable medium: 1 year and 14 calendar days: Art. 6(3)(a).</td>
</tr>
</tbody>
</table>

It is evident from Table 1 that much fragmentation existed with regards the right of withdrawal as between the directives in the consumer acquis prior to the enactment of the Consumer Rights...
Directive. In particular, the differing lengths of the cooling-off period were said to cause legal uncertainty in situations covered simultaneously by two directives with differing provisions, for example the doorstep selling of a timeshare, in which case there was a conflict between the seven calendar day cooling-off period and the fourteen calendar day period, respectively. This issue has been overcome by the CRD repealing Directive 85/577/EEC on protecting the consumer in respect of contracts negotiated away from business premises (“Doorstep Selling Directive”), and aligning its own cooling-off period with that of Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (“Timeshare Directive”). It is important to note that the harmonised rules on the right of withdrawal in the CRD, by reason of appearing in Chapter III of the Directive, only apply to distance or off-premises contracts. In any case the uncertainty arising through the simultaneous application has been resolved, at least in this example.

There was also evidence of fragmentation at the national level, with the tradition of minimum harmonisation in the consumer acquis resulting in the length of the cooling-off period differing from one Member State to the next. For example, the standard withdrawal period for consumer contracts in the Netherlands was seven working days whilst consumers in Germany already enjoyed a fourteen day period of withdrawal akin to that encapsulated in the CRD. In Hungary it was eight working days and in Malta fifteen calendar days. Although space precludes examination of the extent of variation of the other conditions surrounding the right of withdrawal at the Member State level, it is pertinent to note that such segmentation also existed.

The annex to the CRD includes a model notice form for use by the consumer when exercising their withdrawal right. This has been described as the most important innovation with regards the exercise of the consumer’s right of withdrawal.

Questions have, however, been raised as to whether the right of withdrawal should be harmonised at all, with the European Association of Craft, Small and Medium Sized Enterprises (“UEAPME”) voicing concerns about ‘withdrawal-linked reimbursement rights, which can now take place even before the consumer has actually returned the goods to the trader’. Here UEAPME is referring to Article 13(1) CRD, which requires the trader to reimburse all payments received from the consumer not later than 14 days from the day the trader was informed of the consumer’s decision to withdraw from the contract. There is no stipulation for the goods to be received before reimbursement is required.

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Criticism has also been made as to the different starting times for the cooling-off period, depending on whether the purchase involved a good or a service (a feature taken from Directive 97/7/EC on the protection of consumers in respect of distance contracts - “Distance Selling Directive”). Professor Marco Loos of the University of Amsterdam claims that there is ‘no objective justification’ for such a distinction, and questions why consumers of goods are given the chance to evaluate the products after receipt but consumers of services are limited to assessing their purchase prior to trader performance. 107 He also draws attention to the fact that in other consumer contracts (outside the scope of the CRD) the cooling-off period instead begins to run at the conclusion of the contract,108 which is evidence of fragmentation in the consumer acquis persisting post-CRD. This point is illustrated in Table 1.

Professor Loos has also highlighted the fact that in designing the provisions of the CRD, the Commission ignored the practice of starting the running time only when all information requirements have been met, as evident in the three most recent consumer directives awarding a cooling-off period (the Distance Marketing of Financial Services Directive109 from 2002, the Consumer Credit Directive110 and the new Timeshare Directive, both of 2008).111 Pursuant to Article 10 CRD the cooling-off period is only extended in circumstances where the trader fails to inform the consumer of his or her right of withdrawal (and not for a breach of other information obligations, as in the Distance Selling Directive). Professor Loos considers that ‘this is clearly a step back in the protection of consumers’,112 and concludes that overall ‘one can only conclude that the harmonisation of rights of withdrawal has failed.’113

### 3.2.2 Information requirements

The importance of the provision of information in distance transactions is based on the more vulnerable position consumers are in when purchasing an item without face-to-face contact with the seller or the ability to examine the goods in person. It has been reported that the information available on traders’ websites is ‘frequently partial and sometimes misleading and incorrect’.114 Prior to the CRD, information requirements were previously harmonised in Article 5 of the E-Commerce Directive,115 requiring online service providers to supply their contact details (such as name, both their email and geographical addresses, as well as any relevant registration number).116 These, however, were enacted as minimum standards and Member States were free to enforce the provision of additional information requirements on traders through national legislation. With respect to its rules on information provision, the CRD ‘completes Article 5 of the [E-Commerce Directive] by fully harmonising the information requirements for B2C distance contracts.’117 Beyond the general information requirements in Chapter II CRD, Chapter III details the specific requirements for contracts concluded at a distance or off premises. In addition to the

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111 Marco Loos ‘Rights of Withdrawal’ (n 101) 27.
112 Ibid.
113 Ibid 29.
117 Ibid.
usual name and address type requirements, Article 6 of Chapter III puts a further burden on the trader to ensure supply of information regarding the main characteristics of the goods or services: Article 6(a), the total price: Article 6(e), arrangements for payment, delivery and performance: Article 6(g), the conditions, applicable time limits and procedure for exercising the consumer’s right of withdrawal where it exists: Article 6(h), the functionality and interoperability of digital content: Article 6(r) and (s), among other information duties. UEAPME has again voiced its concerns, saying that the information requirements imposed on traders have been ‘radically increased and will put SMEs at a competitive disadvantage.’

Importantly, the information supplied under Article 6(1) CRD is to be supplied on paper or, with the consumer’s consent, on another ‘durable medium’: Article 7(1) CRD. This term has very recently been interpreted by Advocate General Mengozzi in his opinion in the undecided case of Content Services Ltd v Bundesarbeitskammer, specifically with regards the meaning of the term in the context of the Distance Selling Directive and targeted to the question of whether a website could constitute a durable medium. Noting that the ECJ is yet to have an opportunity to give guidance on the meaning of durable medium, AG Mengozzi adopted the reasoning of an earlier EFTA judgment, agreeing that a website should be seen to constitute a durable medium where three cumulative requirements are satisfied:

Firstly, the site must allow the consumer to store the information received. Secondly, that storage must be guaranteed for a sufficiently long period…Finally, for the user’s protection, it must not be possible for the person who provided the information to change it.

It is contended that these conditions will rarely be satisfied in practice due to the nature of websites remaining subject to change. This will have extensive consequences for all online traders attempting to satisfy information requirements by displaying the relevant information on their website during the check-out process. Indeed, whilst AG Mengozzi did not find it inconceivable that a website could in some circumstances be considered a durable medium, he ultimately considered that it was not satisfied in that case. Interestingly, the definition ‘durable medium’ in Article 2(10) CRD is not referred to, despite it predating the quoted EFTA judgment and its incorporation of the same three conditions AG Mengozzi adopted in his opinion. Whilst provision of the information via email may be an easier way to satisfy the requirements, the extent to which information displayed on a website will do so remains unclear and certain aspects of the definition of durable medium may need clarification by the ECJ – for example, what criteria are to be considered when determining whether the information has remained accessible and unchanged over the relevant period of time?

Further to this, the CRD does not cover remedies for breaches of the information requirements, instead leaving this to the Member States to regulate in their national laws. The omission of remedies in the CRD has been described as a ‘missed opportunity’, with the lack of clearly

118 UEAPME (n 106).
119 C-49/11 Content Services Ltd v Bundesarbeitskammer (opinion of Advocate General Mengozzi delivered on 6 March 2012)
120 E-4/09 Inconsult Anstalt v Finanzmarktaufsicht (27 January 2010, EFTA Court Report 2009-2010, 86)
121 C-49/11 Content Services Ltd (n 119), para 39.
122 Ibid, para 41.
123 Ibid, para 47.
defined remedies in the consumer acquis in general being a ‘long-standing problem’. This is therefore an additional area in which fragmentation will persist.

3.2.3 Delivery failure and passing of risk
The passing of risk was not regulated at EU level prior to the enactment of the CRD. The rules in this area were consequently segmented along national borders. Article 20 of the CRD provides that the risk of loss or damage to the goods passes to the consumer upon he or she (or a third party indicated by him or her) acquiring physical possession of the goods. This is in line with the pre-CRD position in Germany, where consumers were not liable for loss or damage occurring during transport. It provides more protection for consumers than was the case in Italy, where risk passed at the time of conclusion of the contract (meaning consumers did not bear the risk for any loss or damage to the goods occurring at any point afterwards, including during delivery). In France the risk passed when the goods were handed to the consumer, except in cases of force majeure. The CRD will require France to remove the force majeure exception, rendering the trader liable for loss or damage during transport even where that loss or damage is due to unavoidable accidents. It is argued that this harmonisation of the passing of risk to the moment of delivery is capable of achieving a significant decrease in the fragmentation which existed in this area pre-CRD.

The Commission has acknowledged that the place and modality of delivery are not harmonised in the CRD and are instead left to the discretion of the purchaser (within the confines of the options provided by the trader). The CRD also does not apply to delivery clauses which require the consumer to collect the goods or arrange for a courier service. These facts reflect the limited scope of application of the final Directive.

3.2.4 Digital content
Due to the need for the CRD to incorporate recent developments in the market which were not dealt with (or dealt with insufficiently) in past Directives, it would not have been unreasonable to expect a decent effort be made in the area of digital content. Surprisingly, however, the original CRD proposal did not even include digital content within its scope. The consequential lack of rights in the proposal for purchasers of non-tangible digital content was an issue raised by György Morvay at the 2011 European Consumer Day conference, prior to the adoption of the final version of the Directive:

It may well be that this exclusion did not present a problem in 1999 [referring to the Directive on the sale of consumer goods], but in 2011, when the new Directive aims to regulate distance selling (e-commerce) for the years to come, such an

127 Ibid, 11.
128 Ibid.
129 Ibid.
130 Ibid.
131 Commission, ‘Online services, including e-commerce, in the Single Market’ (n 116) 91.
132 Ibid.
important and rapidly growing area may not be left out from the scope of the Directive.\textsuperscript{131}

Between publishing the proposal for the CRD and creating the final version, the Commission released a Working Document which recognised the results of a study showing that during 2008 half of all purchases of films, music, books, magazines, e-learning material and computer software (including video games) were received online in an intangible format.\textsuperscript{134} Digital content was included within the scope of the final version of the CRD, encompassing both tangible and intangible formats.\textsuperscript{135} The term ‘digital content’ is defined in the Directive as ‘data which are produced and supplied in digital form’,\textsuperscript{136} with Recital 19 clarifying that where it is provided on a tangible medium (with CDs and DVDs given as examples) it must be treated as ‘goods’ within the meaning of the Directive, yet contracts for intangible digital content are to be considered as neither sales contracts or service contracts.\textsuperscript{137} This is understandable in light of the fact that digital content is often of a hybrid nature: ‘The purchase of digital content can encompass both a physical copy of the software, an online update service, and a real-time (re-mote) software service. Therefore, digital content can be considered both a service and a good.’\textsuperscript{138}

3.2.5 Online Auctions

There is also much regulatory fragmentation with respect to auctions, both at the EU level within the consumer acquis and also as between the different legal systems of the Member States. Prior to the CRD, Article 3(1) of the (now repealed) Distance Selling Directive excluded contracts concluded at auctions from its scope but failed to define the term ‘auction’, resulting in ‘much legal uncertainty and fragmentation among the Member States.’\textsuperscript{139} As a result, consumers in France and Luxembourg who purchased from online auctions attracted protection but those who made purchases at public auctions did not.\textsuperscript{140} The German judiciary considered that traditional auctions had to feature a ‘fall of the hammer’, and consequently, other types of auctions such as those conducted online were not excluded from protection and were therefore covered by the provisions of the Distance Selling Directive.\textsuperscript{141} Belgium and Greece did not implement the provisions of the Directive which excluded contracts concluded at auction and as a result online auctions were subject to the rules on distance selling in these countries.\textsuperscript{142} Auctions were included within the scope of the Estonian laws on distance selling but did not attract the right of withdrawal.\textsuperscript{143}

\textsuperscript{132} Commission, ‘Report on cross-border e-commerce in the EU’ (n 115) 5-6.
\textsuperscript{133} Recital 19 CRD.
\textsuperscript{134} Article 2(11), CRD.
\textsuperscript{135} Recital 19, CRD.
\textsuperscript{138} Ibid.
\textsuperscript{139} Ibid.
\textsuperscript{140} Ibid.
\textsuperscript{141} Ibid 178-179.
The Consumer Rights Directive has brought some clarification to this issue by providing a definition of ‘public auction’, stipulating that the consumer either attend or is at least given the possibility of attending the auction in person. Recital 24 of the CRD further states that ‘the use of online platforms for auction purposes’ is to be excluded from the meaning of public auction for the purposes of the Directive. Despite clarifying this distinction, the CRD has caused more confusion in the area by failing to make it clear that online auctions are included within the scope of the Directive. The only other mention of auctions in the Directive (aside from an information stipulation in Article 6(3)) can be found in Article 16(k), where public auctions are listed as an express exclusion to the right of withdrawal. The aforementioned Memorandum issued by the Commission on the date of final endorsement of the CRD elaborates on the right of withdrawal, saying that it ‘is extended to online auctions, such as eBay – though goods bought in auctions can only be returned when bought from a professional seller’. The Commission’s summary website page on the CRD also states that it ‘updates and modernises existing consumer rights, bringing them in line with technological change (m-commerce, online auctions)’. It appears that the Commission, by excluding online auctions from the definition of ‘public auction’, and then excluding public auctions from the provisions on the right of withdrawal, was by implication including online auctions within the scope of the CRD. Confusion ensued. In February 2012 the European Parliament stated that:

‘[T]he rules governing distance contracts should also cover contracts concluded between consumers and professional traders in online auctions and [the Parliament] calls on the Commission to further examine and assess the rules governing specific distance contracts…in order to increase the liability of online auctions to better protect consumer rights.’

The text of the CRD could have been more clearly drafted with regards the treatment of online auctions. The Directive does not state that goods purchased through online auctions can only be returned where sold by a professional seller, despite this being claimed in the Memorandum, as quoted above. Further to this, the term ‘trader’, as defined in Article 2(2), does not require the party to be acting in a professional capacity. It is therefore worthy of questioning how the Commission can justify adding this stipulation through a Memorandum and not the actual text of the Directive. Questions also remain as to which traders will constitute professional sellers – a distinction which can admittedly be difficult to draw on leading auction websites such as eBay.

Interestingly, the proposed CRD initially contained a definition not only of ‘public auction’ (as in the final CRD), but also of ‘auction’, which arguably includes online auctions by absence of the requirement that the consumer either be physically present or given the opportunity to be, instead allowing for the used of ‘means of distance communication’. Dr Christine Reifá, Professor at Brunel University in London and a prolific author on the topic of the legal treatment of auctions, stated her approval of this attempt in the initial proposal, asserting that ‘the introduction of

144 Article 2(13) CRD. See also: Recital 24 CRD.
145 Commission, ‘New EU rules on consumer rights’ (n 97).
146 Europa, ‘Proposal for a directive on consumer rights’ <http://ec.europa.eu/consumers/rights/cons_acquis_en.htm> accessed 12 April 2012. The term ‘m-commerce’ represents a new form of distance shopping whereby consumers use their mobile phones to purchase items over the internet. One new form of m-commerce has arisen recently, with supermarket chains such as Delhaize displaying pictures of products in public advertisements, including corresponding barcodes for consumers to scan with their smart phones to make an order for pick-up or delivery. It remains to be seen whether this emerging trend will present unique regulatory challenges in the future.
147 Parliament, ‘Completing the Internal market for e-commerce’ (n 89) Recital 56.
definitions and in particular a distinction between auctions and public auctions, is a welcomed initiative in trying to alleviate fragmentation.\textsuperscript{149} However, Article 19(1)(h) of the initial CRD proposal listed ‘contracts concluded at an auction’ as an express exception from the right of withdrawal, thereby excluding contracts concluded at online auctions. This cause for concern was eliminated in the final version of the CRD, which instead excludes public auctions from the right of withdrawal. Missing altogether from the final version, however, is the definition of ‘auction’ used in the initial proposal. The way in which the Directive implies the inclusion of all non-public auctions within the right of withdrawal is understandably confusing. This is by no means ideal in the quest for simplicity, transparency and the need for consistent transposition in the Member States in order to reduce market fragmentation in the area of e-commerce.

\textsuperscript{149} Christine Reifa, ‘Recommended changes to the definitions of “Auction” and “Public Auction” in the Proposal for a Directive on Consumer Rights’ in Kenny M and Devenney J (eds) European consumer protection: theory and practice (Cambridge University Press, 2012) 378, 379. Note however that this article was written in 2010 before the final version of the CRD was published.
4. UNION COMPETENCE

Before turning to an assessment of the level and method of harmonisation employed in the CRD it is necessary to examine the competence of the Union to legislate with respect to consumer protection and the internal market. This involves an inspection of the attribution of EU competence, including the principles of subsidiarity and proportionality.

4.1 Attribution of competence

Article 5 of the Treaty on the European Union ("TEU") states that the competence of the Union is limited to what is conferred upon it by the Member States. It should be read in conjunction with Article 4(1) TEU which permits the Member States to retain all competences not conferred upon the Union. Pursuant to Article 4(2)(f) of the Treaty on the Functioning of the European Union ("TFEU"), consumer protection is an area in which the Union holds shared competence with the Member States. In general, Union policies and activities must take into account consumer protection issues due to the cross-cutting nature of these concerns, as stated in Article 12 TFEU and reiterated recently by Staffan Nilsson, president of the EESC: ‘The European consumers must be at the heart of our actions and we always need to keep them in mind when we take any initiative.’

In addition, the TFEU deals specifically with consumer protection in Title XV, Article 169. This provision aims to ensure ‘a high level of consumer protection’ and states that ‘the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests’ (emphasis added). Article 169 TFEU provides for the two bases on which the Union may legislate with respect to consumer protection:

- Article 114 TFEU where the measure is adopted in the context of completion of the internal market; and
- Article 169(2)(b) TFEU, for measures which ‘support, supplement and monitor the policy pursued by the Member States’.

Measures adopted under Article 169(2)(b) TFEU must still allow for the Member States to maintain or introduce measures which offer a higher level of protection. This provision has rarely been used as a basis for regulating consumer protection, with Article 114 TFEU having been employed for each consumer law directive since the Single European Act. The consequence of this is that the measure must have as its core concern the establishment and functioning of the internal market, though a high level of consumer protection is still required for measures taken under this provision.

The legal basis used for the CRD was Article 114 TFEU (ex. Art. 95 EC). An issue arose with this legal basis back when the proposal for the CRD was based on maximum harmonisation, which will be discussed below in Chapter 5.

151 Article 169(4), TFEU.
153 Ibid 11.
154 Article 114(1) and (3) TFEU.
As per Article 5(1) TEU, the exercise of Union competence is subject to the doctrines of subsidiarity and proportionality.

4.2 Subsidiarity

Article 5(3) TEU stipulates that the Union shall only act if and to the extent that the objectives cannot be sufficiently achieved at the level of the Member States, and on the condition that they can be better achieved Union level. In its 2008 proposal for the CRD the Commission gave the following reasons why it perceived that action could not be sufficiently taken by the Member States:

The legal fragmentation problem cannot be solved by the Member States individually since it is this different implementation by the Member States of the minimum harmonisation clauses contained in the existing Directives that is at the root of the problem. Likewise, addressing new market developments, regulatory gaps and inconsistencies in Community consumer laws in an uncoordinated manner generates more fragmentation and exacerbates the problem.156

The Commission concluded by saying that ‘only a coordinated Community intervention’ could solve the current problems and thereby make a real contribution to the completion of the internal market.157 More recently, the Commission has also pointed out that consumers cannot find help from their Member State if something goes wrong in a cross-border transaction; rather it is a European initiative – the European Consumer Centres Network (“ECC network”) – which can inform consumers of their rights when cross-border shopping, as well as helping them seek redress with a trade in another EU Member State (as well as in Iceland and Norway).158

4.3 Proportionality

Article 5(4) TEU requires that the measure taken by the Union does not go beyond what is needed to realise the objectives of the treaties. In this respect the Commission has stated that the CRD only regulates the ‘key aspects of consumer contract law’, without covering other more general concepts of contract law.159 The scope of inclusion of the CRD, insofar as it also covers domestic contracts, has been defended as being proportionate to the objective of simplification of the Community regulatory framework, since it avoids a dual regime which would have created further fragmentation and distortions of competition between businesses trading only domestically and those trading both domestically and cross-border.160

This concept of a dual system is explored during the analysis of the choice of instrument in Chapter 6, where it is conversely argued that a cross-border only measure would be more in line with the principles of subsidiarity and proportionality. The Commission does not, however, attempt to justify the proportionality of taking action via enacting the CRD by reference to the

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156 Ibid.
157 Ibid.
160 Ibid 8.
establishment and functioning of the internal market – an express objective of the Treaties (Article 3(3) TEU) and the legal basis for employment of Article 114 TFEU.
5. Harmonisation

The level of harmonisation in the Consumer Rights Directive was not only a highly controversial subject during the time between the proposal in 2008 and the adoption of the final version in 2011, but is also of particular relevance in assessing the prospective merits of the Directive and its chances of making a meaningful contribution to the objective of decreasing market fragmentation. Two relevant considerations when discussing harmonisation include both the method (vertical, horizontal or a mixture) and degree (minimum, maximum or a mixture).

5.1 Method of harmonisation

The 2007 Commission Green Paper on the Review of the Consumer Acquis tabled three options for the method of harmonisation in the CRD: a vertical approach, a mixed horizontal and vertical approach, or no legislative action.161 The vertical method of harmonisation would have involved a revision of the existing directives in the consumer acquis, with each of them undergoing separate amendments where necessary.162 This, of course, would not only take much more time but would also not offer much in the way of simplification as it is the vertical approach which has to a large extent caused the current fragmentation in the EU consumer acquis. Importantly, as a result of the vertical approach, ‘The relation between the different instruments is sometimes unclear as the legal terminology, as well as the relevant provisions, is not sufficiently coordinated.’163

The horizontal approach was to involve the adoption of a new instrument to regulate the common features of the acquis, ‘underpinned wherever necessary by sectoral rules’.164 This new instrument was to cover the common features of the acquis such as the length of the cooling-off periods and the exercise of the right of withdrawal.165 A second part of this instrument could, by inclusion of Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees (“Consumer Sales Directive”), regulate the broader aspects of the contract for sale.166 This approach was said to have the ability to reduce the volume of the acquis through a mixture of amendments and repeals.167 This mainly horizontal instrument was referred to as the ‘mixed approach’ due to the recognition that certain vertical actions (such as the revision of the Timeshare Directive) would be necessary complementary processes.168 This mixed approach was ultimately the chosen method of harmonisation in the CRD.

5.2 Degree of harmonisation

Of more intense debate was the degree of harmonisation to be used in the CRD. The most relevant issues to consider when assessing the appropriate degree of harmonisation are: the Union’s limited legislative competence in consumer protection matters and where to strike a

162 Ibid 8.
163 Ibid.
164 Ibid 7.
165 Ibid 8.
166 Ibid.
168 Ibid.
balance between business interests and those of the consumers. Consumer protection has historically been regulated in the EU using a minimum degree of harmonisation, which has allowed the Member States to maintain or implement stricter legislation and therefore differing (and higher) levels of consumer protection in certain areas. The Commission has stated that ‘This approach was entirely valid at a time when consumer rights were very different between the Member States and e-commerce was non-existent.’ One noticeable exception is Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (“Product Liability Directive”) which has been interpreted by the Court of Justice as having employed a form of maximum harmonisation. Maximum harmonisation, according to the Commission, occurs when ‘no Member State could apply stricter rules than the ones laid down at Community level.’ Over the last decade a more express strategic move towards maximum harmonisation has been evidenced. The 2005 Directive on Unfair Commercial Practices ‘marked a fundamental change in consumer policy’ and has been ‘lauded for its successful adoption of maximal harmonisation’. This policy shift towards maximum harmonisation in the consumer acquis has been attributed in part to ‘the doubts which may have been cast on the constitutionality of minimum harmonisation by the case law of the ECJ (Tobacco Advertising).’ This reference to Federal Republic of Germany v European Parliament and Council of the European Union (“Tobacco Advertising”) will be dealt with further in Subsection 5.2.2.

5.2.1 Options for the degree of harmonisation in the CRD

As well as tabling three options for the method of harmonisation in the CRD, the 2007 Green Paper also suggested three options for the degree of harmonisation. The first option was for maximum harmonisation, which would, the Commission suggested, remedy the problem of consumers being unsure of the level of protection to expect when shopping cross-border. The second suggestion was to employ minimum harmonisation but with a mutual recognition clause. The Commission stated that this option would permit the Member States to maintain the ability to impose higher consumer protection at the national level, but without allowing them to compel such laws on businesses established in other Member States ‘in a way which would create unjustified restrictions to the free movement of goods or to the freedom to provide services.’ Thirdly the Commission proposed a minimum harmonisation approach combined with the country of origin principle, which would still allow Member States to impose stricter protection

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170 Commission, 'Review of the Consumer Acquis' (n 161) 7.
171 Hans W. Micklitz and others, Cases, Materials and Text on Consumer Law (Hart Publishing 2010), 58.
172 Ibid 10.
176 Ibid 60.
179 Ibid.
180 Ibid.
but businesses would need only comply with the rules in their own Member State.\textsuperscript{181} Academics have argued that the latter option would pose an ‘obvious danger’ involving ‘a dilution of standards’.

Despite the purpose of a Green Paper being to stimulate debate on a topic, the Commission made its opinion clear that the second two options were inferior to the first, as they would allow for variations between national laws to persist, whilst the first option of maximum harmonisation was the only one which could simplify the regulatory environment and in doing so have a chance at achieving some level of uniformity of laws across the EU.\textsuperscript{183} It is contended that the second two options would not tackle the problem of consumer confidence, used as the prime justification by the Commission for the need to legislate, as discussed in Chapter 2. This also provides an insight as to why the Commission made clear its preference for the first option.

As Viviane Reding noted on European Consumer Day in 2010, ‘The current status quo of minimum harmonisation in the existing consumer protection directives does not come close to establishing a real Single Market for businesses and consumers.’\textsuperscript{184} It is not surprising then, in light of the discussed opinions, that the Commission ultimately opted for maximum harmonisation in its proposal for the CRD. This decision has been directly linked to the problem of the negative effects of fragmentation.\textsuperscript{185}

\textbf{5.2.2 Criticism over the maximum harmonisation proposal}

Despite the occasional supporter,\textsuperscript{186} it should be noted that the decision to harmonise to the fullest degree was met with extensive criticism – from consumer rights organisations to academics and Members of the European Parliament. A common fear was that the level of protection in some Member States would need to be lowered in order to comply with the CRD, due to harmonising the rules ‘at the lowest common denominator.’\textsuperscript{187} This concern over a possible decrease in the level of consumer protection has also been attributed to the fact that ‘the Directive elevates four directives that were originally aimed at minimum harmonisation to a standard of maximum harmonisation.’\textsuperscript{188} The EESC even argued that where the effects of maximum harmonisation are detrimental to consumer rights, such an approach would be in contravention of Article 169

\textsuperscript{181} Ibid 10 – 11.
\textsuperscript{183} Ibid 11.
TFEU. The Court of Justice has rightly pointed out, however, that ‘no provision of the Treaty obliges the Community legislature to adopt the highest level of protection which can be found in a particular Member State.’

Associate Professor Vanessa Mak, of Tilburg University Law School in the Netherlands, argued that the Union’s previous experiences with maximum harmonisation in the consumer protection field, that is – Directive 2005/29/EC on Unfair Commercial Practices and the Product Liability Directive – illustrate ‘that it is a policy with significant limitations’. Mak identifies the two most significant limitations as being that ‘maximum harmonisation is limited to the scope of regulation set by the Directive’ (emphasis in original) and that this may result in Member States retaining the ability to implement or maintain divergent rules using different legal bases than that used by the CRD. Mak’s colleague, Tilburg University Professor Jan Smits, agreed that the different legal basis limitation would mean that maximum harmonisation would not necessarily lead to a decrease in fragmentation, stating that the Commission had been ‘too optimistic’ in this regard. He added that whilst this was not a denial of the ability of maximum harmonisation to lead to real uniformity, it did limit the areas in which it is a feasible possibility. Meglena Kuneva, the Commissioner for Consumer Protection at the time, replied to these fears by stating that ‘a small loss in respect of certain aspects of national consumer law could be more than compensated by an increase in cross-border offers and in the overall EU level of protection.’

Despite the Commission’s insistence of the necessity of a maximum harmonisation approach, the criticism continued to flow. There were claims that such a method in ‘a badly delineated territory is ill-advised’, and that ‘one can predict that the goal of simply being able to follow one set of rules and then happily marketing in all states will be illusory.’ Of particular concern for many was the Union’s competence (or lack thereof) to legislate in this manner. Smits alleged that the maximum harmonisation proposal suggested that the Commission considers that consumer law should be an almost exclusively European competence.

The problem alluded to in the previous Chapter on EU Competence surrounded the concept of an ‘additional rationale’. In the case of Tobacco Advertising, the ECJ held that ‘a mere finding of disparities between national rules’ is not enough to permit the use of Article 114 TFEU (ex Art. 95 EC) as a legal basis for consumer protection rules, and that an additional rationale is needed. The rationale given by the Commission for the CRD was the concept of consumer

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190 Hans W Micklitz, Norbert Reich and Peter Rott, Understanding EU Consumer Law (Intersentia 2009), 17.
191 Vanessa Mak, ‘The degree of harmonisation in the proposed Consumer Rights Directive’ (n 188) 5.
192 Ibid.
194 Ibid 10.
196 Willem H. van Boom, (n 174) 452.
198 Jan Smits, ‘Full Harmonisation of Consumer Law?’ (n 193) 5.
199 C-376/98 Tobacco Advertising (n 177).
confidence. Wilhelmsson, the main opponent to the justification of consumer confidence identified in Chapter 2 as a stated objective, also finds trouble with the use of the consumer confidence justification in the specific context of it being employed as the additional rationale to justify maximum harmonisation, saying that the trend towards total harmonisation ‘most certainly cannot be justified in this way.’\textsuperscript{201} He points to the fact that this trend favours business needs over consumer rights, and admits that whilst the resulting increase in competition could indirectly benefit consumers, the overall justification for maximum harmonisation should not be rooted in notions of consumer confidence, especially as this was the reasoning used to defend the minimum harmonisation approach in the past.\textsuperscript{202} Wilhelmsson also criticises the Commission’s use of the confident consumer concept to connect internal market reasoning with consumer protection: what he terms ‘the two sides of the Janus face’.\textsuperscript{203}

5.2.3 The final version of the CRD: a ‘targeted harmonisation’ approach

After taking over responsibility of the proposal in the new Commission in 2010 (the Barroso II Commission), Viviane Reding announced that the significant opposition had forced the Commission to accept that undifferentiated maximum harmonisation was no longer possible.\textsuperscript{204} After much difficulty finding approval for the proposed CRD from the Council and Parliament, an inter-institutional agreement was reached on the updated proposal featuring a targeted approach, the text of which was approved by the Parliament’s Internal Market and Consumer Protection Committee on 16 June 2011.\textsuperscript{205} The targeted harmonisation approach in the final version of the CRD generates a distinction between direct transactions (typically ‘face-to-face’), which are not fully harmonised, and off-premises and distance transactions (including online sales), which remain covered by maximum harmonisation. The degree of harmonisation of the targeted areas was said to depend on perceived benefit to consumers.\textsuperscript{206}

5.2.4 Criticism over the final approach in the CRD

The level of harmonisation in the CRD continued to attract criticism even after the quest for pure maximum harmonisation was abandoned.

The ‘targeted’ approach followed by the Commission, in which harmonisation measures are limited to specific issues that raise substantial barriers to trade and/or deter consumers from buying cross-border, results in narrowly defined sets of rules that mostly do not cover more than a slice of the wider legal framework operating at national level.\textsuperscript{207}

This targeted approach also has the potential to cause confusion as to which areas within the scope of the CRD are fully harmonised and which other areas permit the Member States to

\textsuperscript{202} Ibid 333.
\textsuperscript{203} Ibid 323. Janus is a God in Roman mythology with two faces.
\textsuperscript{206} Ibid.
\textsuperscript{207} Vanessa Mak, ‘The degree of harmonisation in the proposed Consumer Rights Directive’ (n 188) 4.
impose additional obligations or higher levels of protection. The changing degree of harmonisation in the CRD and its final mix of minimum and maximum harmonisation has already caused incorrect interpretations of the law, with Advocate General Trstenjak referring to the CRD as constituting a maximum harmonisation Directive as recently as 14 February 2012.208

In light of the fact that the main opponents to maximum harmonisation were academics and consumer protection organisations, it is not surprising that the new targeted approach met with criticism from business groups. Xavier Duriea, Secretary-General of EuroCommerce, described the move as ‘disastrous’ and argued that:

The mixed minimum and full harmonised approach as adopted today will not provide more confidence in the internal market: it will increase legal fragmentation, creating more market barriers and extra compliance costs, and so undermining business activities across Europe and especially e-business.209

He was supported by Arnaldo Abruzzini, Secretary-General of EuroChambres, who stated that ‘members of the European Parliament have lost sight of one of the key objectives of the Consumer Rights Directive, which was to cut legal costs for businesses wishing to sell cross-border.’210 An official EuroChambres press release added that ‘The move away from maximum harmonisation undermines the whole rationale underpinning the Commission’s original proposal and has the potential even to increase market fragmentation.’211

On 6 March 2012, during a speech on the Common European Sales Law (to be revisited in Chapter 7, below), Commissioner Reding reflected on the whole saga, stating that:

The negotiations on the Consumer Rights Directive showed the limits to harmonisation as we knew it. The traditional way of harmonisation may not be always the best solution in facilitating cross-border trade….Each Member State has its own tradition of protecting consumers. But is this a reason to accept a second-class Single Market?’212

It is contended that the targeted approach consisting of a mixture of minimum and maximum harmonisation is a contributing factor in the failure of the CRD to achieve a substantial decrease in the level of fragmentation in currently blocking the achievement of a true DSM. This is true so far as the Directive is likely to cause confusion and possibly incorrect transposition in the Member States. Although the maximum harmonisation of the provisions concerning distance and off-premises contracts is a positive step in the fight against segmentation, it will be explained in Chapter 8 why fragmentation would have persisted even if the original pure maximum harmonisation proposal had been kept.

210 Ibid.
In light of the fragmented consumer law landscape with which the EU is now faced, it would not be misplaced to question the suitability of continuing to employ directives as the instrument of choice when harmonising in the field of consumer law. It has been said that ‘the directives in this field tend to complicate matters, adding different layers of (often contradictory) legislation to an already densely thicketed regulatory maze.’ Dr. Christian Twigg-Flesner, Professor at the University of Hull in the UK, is a proponent of finding a new approach to regulating EU consumer law. He argues that ‘the process of harmonisation by directives has failed to achieve its stated objective’ and that ‘the real outcome after this era of harmonisation is that the degree of diversity between the national laws of the Member States has been reshuffled rather than reduced.’ Twigg-Flesner advocates for the move to a cross-border-only Regulation – what he terms the ‘European Consumer Transactions Regulation’ or ‘EUCTR’. He argues that there are convincing reasons for confining Union action in this area to cross-border activity in view of the principles of proportionality and subsidiarity. Further to this, he asserts that the Treaties equip the Union with more scope to legislate with respect to transactions that are purely cross-border in nature than it does to conduct general harmonisation affecting all types of consumer transactions. Twigg-Flesner also appeals to the reality of current practice, saying that the increasing detail of many directives lends itself to the move to regulations. This is reflected in the statistics – at the time of its first reading in Parliament the CRD had already undergone 1596 amendments, 36 months of work and 65 Council meetings.

In defending his proposal, Twigg-Flesner refers to the explanatory memorandum in the Commission’s proposal for the CRD, in which the Commission defends its choice of instrument by stating that, as opposed to a regulation, ‘the implementation of a directive may give rise to a single and coherent set of law at national level which would be simpler to apply and interpret by

217 Ibid 15.
218 Ibid 40.
219 Ibid ix.
220 Ibid 23.
Twigg-Flesner argues the falsity of this statement in light of the ability of Member States to choose the method of achieving the required effect of a directive, concluding that the ‘end result may well be anything but a single set of law’.  It is contended that this point is rightly argued. Not only did the Commission fail to convincingly defend its choice of instrument when presenting the proposal for the CRD, the Green Paper on the review of the consumer acquis did not even include the issue as a point of discussion.

Twigg-Flesner does admit to certain downfalls which could be encountered in the move from directives to regulations. In doing so he repeats the warning in the Monti Report that such a move would not be a ‘panacea for all the woes of harmonisation by directive’.  Twigg-Flesner admits that creating separate rules for cross-border and domestic transactions would be a type of fragmentation in itself, but claims that this would still be ‘a considerable improvement over the current situation and with clearer dividing lines between the domestic and cross-border spheres.’  He also concedes that a big hurdle would be creating a satisfactory distinction between cross-border and domestic transactions, but reasons by analogy to the CISG and ultimately proposes that cross-border transactions include ‘distance and online transactions where the consumer has his place of residence and the trader his place of business in different jurisdictions’, where the word jurisdiction is used to represent Member States.  Despite the challenges of developing a cross-border-only approach, Twigg-Flesner is not alone in contemplating its benefits, with the government of the Netherlands also questioning whether it would be more in line with the principle of subsidiarity.

Although space precludes a thorough analysis of the feasibility of either the CRD having been formed into a regulation instead of a directive, or the wider discussion of the desirability of a general move to regulations in the field of EU consumer law, it can at least be said that regulations are instruments better suited to the quest of curing fragmentation. Perhaps their greatest contribution in this respect is their ability to avoid the problems associated with transposing directives into the national laws of the Member States. And, as Twigg-Flesner states, regulations would ultimately be more capable of achieving ‘the “single and coherent” set of legal rules which the Commission is seeking to create.’ Finally, it is contended that the fragmentation which would arise as between cross-border and domestic transactions (should such a regulation be limited to the cross-border context) is much less troublesome than the current two-pronged fragmentation between the sea of directives at the EU level and between the disparate laws of the Member States at the national level.

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223 Ibid.
224 Ibid 23.
225 Ibid 30.
226 Ibid 2.
229 Christian Twigg-Flesner, A Cross-Border-Only Regulation for Consumer Transactions (n 216) 22.
7. Interaction With Contract Law

Any discussion on the potential impact of the Consumer Rights Directive, which deals directly with various aspects of consumer contracts, would not be complete without considering broader developments within European contract law.

Consumer law does not exist in a vacuum but is part of the general rules of private law and should be conceptualised in this way. While mandatory rules may be imposed in order to safeguard consumer interests, the framework for such rules is set by the general law of contract.\(^{230}\)

The divergences between the contract law regimes in the Member States are perceived by traders with an interest in selling cross-border as among the main barriers to doing so.\(^{231}\) Having a uniform European contract law is, in theory, attractive to businesses with this interest, forty percent of which have indicated that they would increase their cross-border operations as a result and eighty-one percent stating that it would enable them sell to a larger number of Member States.\(^{232}\) The Draft Common Frame of Reference and the proposal for a Common European Sales Law will be explored in turn.

7.1 Draft Common Frame of Reference

In 2001 the Commission initiated a consultation on the issues surrounding contract law at the European level by publishing a Communication on European Contract Law,\(^{233}\) followed by an Action Plan in 2003.\(^{234}\) It became clear that the quality and consistency of the contract law acquis needed improving, which lead to the idea to create a Common Frame of Reference (“CFR”).\(^{235}\) The CFR was intended to form a ‘toolbox’ to be used during the revision of the contract law acquis,\(^{236}\) putting forward common principles and definitions of contract terminology in order to achieve better clarity and consistency. This began with the creation of the draft CFR (“DCFR”) by a group of legal scholars which was published in 2008,\(^{237}\) and was eventually crafted into the CFR by an Expert Group in the Commission in 2010.\(^{238}\) Critics have questioned why, when the DCFR was presented to the Commission almost one year before the CRD was proposed, the latter not only makes no reference to the former in either its recitals or explanatory memorandum,
but also contains diverging rules and principles. On one hand, the Commission can hardly abandon the CFR after investing this much time and research, but on the other hand, employing it as a toolbox for future measures will lead to divergences (and further fragmentation) between said measures and the CRD. Not only does this pose issues for the consistency of EU consumer law, but also threatens to perpetuate the segmentation of European contract law in general.

7.2 The Proposal for a Common European Sales Law

The proposed Common European Sales Law (“CESL”) published on 11 October 2011 has particular relevance in the context of this paper, having been referred to as the ‘sister legislation’ of the CRD by Ken Ducatel, Head of Unit of the Digital Agenda Policy Coordination of the Commission’s Information Society Directorate General. An optional instrument which gives traders the choice to utilise a single set of contractual terms when making contracts with consumers located in other EU Member States, the CESL is intended to ‘cover the full life cycle of a contract’, containing uniform rules on pre-contractual information duties, the modalities for delivery (including the passing of risk), the right of withdrawal, unfair contract terms, remedies and other aspects of the life of a contract. It essentially creates a second contract law regime within each Member State, existing alongside the national rules as an optional alternative. Although broader than the CRD in its potential application to both B2B and B2C contracts, the CESL shares common goals with the CRD in aiming to ‘provide consumers with an incentive to enter into cross-border contracts’, and to improve consumer and business confidence as well as the general levels of cross-border trade in Europe, with a special focus on online contracts. As in the CRD, the CESL expressly mentions the problem of fragmentation when asserting compliance with the principle of subsidiarity.

Despite the intended cross-border application of the CESL, Member States are free to permit its extension to purely domestic contracts for the benefit of traders who wish to use one standard contract for all their cross-border and domestic transactions. In the absence of such extension, traders employing CESL will need at least two sets of contractual provisions – one for their cross-border transactions and another for their domestic sales. This is an interesting development in light of the concerns over Twigg-Flesner’s proposal for a cross-border-only Regulation, considering that the CESL would not only produce the envisaged dual system fragmentation (domestic vs. cross-border – at least in the Member States which choose not to extend CESL’s

239 Timothy Q. de Booy (n 236).
240 Commission, ‘Proposal for a Regulation on a Common European Sales Law’ (n 231).
241 Ken Ducatel, ‘Comparing business environments in Europe, the US and Asia: The digital economy’ (Day One, Seminar Two, EU Studies Fair, Brussels, 10 February 2012).
245 Ibid Recital 9.
246 Ibid Article 7 of the Regulation.
247 Ibid Recital 11.
249 Commission, ‘Proposal for a Regulation on a Common European Sales Law’ (n 231) 9.
250 Ibid Article 13 of the Regulation. See also: Recital 15. Note the distinction between references to articles of the Regulation and articles of the proposed CESL text itself, both contained within the same document.
scope of application) but also consequently attempts to define a cross-border transaction. Article 4(3) of the Regulation deems a B2C contract to be cross-border in nature where:

(a) either the address indicated by the consumer, the delivery address for goods or the billing address are located in a country other than the country of the trader’s habitual residence; and

(b) at least one of these countries is a Member State.

This is a very broad definition, covering the situation where a consumer with their habitual residence in the same Member State as the trader makes a domestic purchase and instructs the product to be sent to another Member State as a gift, as well as extending to transactions where either the consumer or trader is outside the EU. This extends further than the definition of cross-border proposed by Twigg-Flesner for use in a possible EUCfR-type measure. The desirability of such a broad-reaching definition of cross-border, at least insofar as the CESL definition may be employed in future measures, is questionable. However, it is true that the larger the possible application of the CESL, the closer it comes to truly being a common sales law.

The CESL has been described as ‘a new form of harmonisation’, and as such has the potential to fill in certain regulatory gaps left by the CRD – namely, those areas of general contract law which fall outside the scope of the directive. This means that to the extent CESL is actually employed it has the capacity to reduce the problems of divergences between national contract law systems. There is, however, some doubt as to how often traders are going to choose to employ CESL. Article 4(1) of the CESL text stipulates that it is to be interpreted autonomously, implying that established case law interpretations of similar provisions in national contract law systems of the Member States cannot be employed in determining the correct interpretation of the CESL. The obvious consequence of this is that there will be legal uncertainty as to the meaning of the provisions in the CESL until guidance is given through new European case law, which will undoubtedly act as a deterrent for businesses considering whether or not to use CESL.

The ability of CESL to decrease fragmentation is limited due to its scope being restricted in a number of ways. It is not to be used for mixed-purpose contracts, which is not further defined beyond contracts not containing ‘elements other than the sales of goods, the supply of digital content and the provision of related services’: Article 6 of the CESL Regulation. An applicable law will still apply for all aspects which the CESL does not cover – meaning that the problems elucidated earlier in this paper regarding the default rule in Article 6 of the Rome I Regulation (as to the laws of the consumer’s Member State being applicable), and also of the Article 6(2) stipulation of the inability to displace the mandatory provisions in the consumer’s Member State (whenever the trader directs its activities to that Member State) will remain a problem for traders. Therefore, despite the Commission claiming that the CESL ‘would eliminate the need for research of different national laws’, it is contended that this would not be the case in practice. The CESL’s scope is further limited by only covering services to the extent that they are ‘related’ to the supply of goods or digital content: Article 2(m) CESL Regulation. This will not aid the decrease of fragmentation considering that the most popular category of online shopping is a service: booking travel and holiday accommodation.

The Commission includes in the proposal an acknowledgement of the ‘increasing importance of the digital economy’ as well as admitting that this area is ‘still surrounded by a considerable

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251 Ibid 4.
252 Ibid 11.
254 Commission, ‘Proposal for a Regulation on a Common European Sales Law’ (n 231) Recital 17.
255 Ibid Article 8(1) CESL Regulation.
256 Ibid Article 8(2) CESL Regulation.
consequence by the Commission due to the particular wording chosen. It would be important for the sake of decreasing fragmentation that the wording conversely be interpreted to mean the pre-existing national legislation prior to the creation of the particular contract in question.

The divergent paths that consumer contract law and general contract law are taking at the EU level are concerning. Very little effort has been made to ensure that the two develop in tandem. Even to the extent that the CESL in theory could aid the quest for elimination of fragmentation of consumer contract law, much doubt remains as to the extent that it will be utilised by traders, who will surely harbour concerns about the autonomous interpretation of the measure. Further to this, where the scope of application is not extended by the Member States to the domestic level, use of the CESL will result in a dual system of fragmentation (domestic vs. cross-border). Its restricted coverage of services to the extent they are related to the provision of goods or digital content, and the inability of the proposal to remove the need for businesses to research the laws in other Member States are further contributing factors in the concluding contention that the CESL will not succeed in contributing to the aim of combating fragmentation.
8. Why Fragmentation Will Persist

Despite the good intentions behind the enactment of the CRD, as well as the benefits which it stands to produce by bringing disparate provisions between directives in the consumer acquis together (and thereby also harmonising some specific aspects of consumer contracts in the national laws of the Member States), it is contended that it only makes a very small contribution to the multilayered problem of fragmentation getting in the way of achieving a true DSM.

The reduced level of harmonisation in the CRD is an clear example. Even the Commission has recognised this, admitting that ‘difference between the contract laws of the Member States will remain a reality even after the adoption of the Directive and businesses wishing to sell cross-border will have to comply with them.’\textsuperscript{257} The problem in light of the specific level of harmonisation is well articulated by Vanessa Mak:

> The fact is that if maximum harmonisation is achieved in \emph{targeted} areas only, problems remain that are similar to the current situation with legislation based on minimum harmonisation. Since harmonisation will be focussed on particular areas, different levels of consumer protection are likely still to be encountered in legislation applying to cross-border transactions.\textsuperscript{258} (emphasis in original)

The Commission’s Roadmap for the next European Consumer Agenda also acknowledges this shortfall of the CRD, stating that ‘where rules are based on minimum harmonisation, an important degree of regulatory fragmentation remains.’\textsuperscript{259} However, it is imperative to note that even if the CRD had retained a maximum level of harmonisation, this would still have left room for the problem of fragmentation to continue to exist, due in part to the ability of the Member States to legislate on a different legal basis,\textsuperscript{260} and also due to the limited scope of the directive.

The difference between full and minimum harmonisation should not be exaggerated. Even full harmonisation is relative. Despite the control by the ECJ, divergent applications and interpretations in the Member States are inevitable.\textsuperscript{261}

In this respect, Recital 13 of the CRD explicitly states that Member States retain the ability to legislate with respect to issues not covered by the scope of the directive, such as rules relating to the delivery of goods.

This notion of the CRD’s limited scope forms another reason for the continuation of the state of fragmentation in the consumer acquis. The Commission has repeatedly referred to the idea of the CRD establishing a ‘single set of rules’,\textsuperscript{262} yet the narrow coverage of the final version means this is simply not the outcome. This has been attributed to the removal of provisions dealing with


\textsuperscript{261} Hans W. Micklitz and others, \emph{Cases, Materials and Text on Consumer Law} (Hart Publishing 2010) 61.

unfair contract terms and consumer guarantees during the whittling down of the original proposal, a point which the Commission has also admitted alongside a concession that fragmentation will remain in areas of consumer contract law outside the directive – such as validity, termination and enforceability. Recital 13 of the CRD states that Member States remain competent to extend the application of the CRD to areas not covered within its scope, and gives the example of extending the notion of ‘consumer’ to include other legal or natural persons such as SME.

Beyond this, other types of fragmentation will remain, aside from that forming the focus of this paper (stemming from the consumer acquis and from divergences between national consumer contract laws). Differences in tax rates and VAT reporting, inconsistencies in the transposition of EU law on electronic waste disposal, variations in the territorial treatment of copyright of online services, and language barriers, will remain among other factors, rendering it ‘unlikely the harmonisation of private law will result in a (substantive) increase in cross-border contracts’. The Commission has argued that language barriers should not be overstated in light of a loss of relevance ‘in an increasingly multicultural and diverse Europe’. Eurobarometer statistics are supportive of this assertion, with thirty-three percent of consumers showing willingness to carry out transactions in more than one language in 2009, increasing to almost four in every ten consumers (thirty-nine percent) in 2011.

Studies also show that consumers are more concerned about their rights of redress than about substantive differences in contract law when shopping online from traders located in other Member States. This is therefore a barrier to cross-border e-commerce and contributes to the retention of the 27 segmented markets as opposed to supporting a move towards a true DSM. Despite the way this statistic is worded, rights of redress are not, in essence, a separate consideration to contract law. It does, however, retain relevance: although the right of withdrawal is dealt with in the CRD, remedies for breach of contract are left to be determined by the national laws of the Member States. The Commission is taking action in this field, including the formation of a proposal for Online Dispute Resolution (“ODR”) within the Digital Agenda, discussed under 9.1 below. In any case, the CRD does not help to remedy this cause of fragmentation.

267 Commission, ‘Report on cross-border e-commerce in the EU’ (n 265) 12.
268 Ibid.
9. LOOKING FORWARD

Of corollary interest to the questions posed in this paper are current EU plans aimed at overcoming the fragmentation where the CRD is not likely to make more than a meagre dent. In 2011 the Commission issued a Communication announcing its intention to undertake twelve projects in order to ‘relaunch the Single Market for 2012’. The seventh project concerns the DSM, with a focus on boosting confidence through improvements in security and privacy, and contemplates the revision of Directive 1999/93/EC on a Community framework for electronic signatures, an Action Plan for e-commerce as well as Guidelines to remove unjustified discrimination relating to the implementation of Article 20 of the Services Directive. The accompanying press release states that ‘Boosting confidence in electronic transactions is a *sine qua non* for the development of a Digital Single Market that will fully benefit citizens, businesses and authorities.’ Two further initiatives of significance are the Digital Agenda flagship within the Europe 2020 Strategy and the Consumer Programme 2014 – 2020, which will be explored in turn.

9.1 Digital Agenda

The first flagship to be adopted under the Europe 2020 Strategy was that of the Digital Agenda. It is of particular relevance as it ‘aims at delivering sustainable economic and social benefits from a digital market by eliminating legal fragmentation.’ It was the Digital Agenda which proposed ‘an optional contract law instrument complementing the Consumer Rights Directive to overcome the fragmentation of contract law, in particular as regards the on-line environment’, which lead to the creation of the CESL. This was achieved under Action 13: ‘Complementing the Consumer Rights Directive’, one of many actions under Pillar 1: the Digital Single Market. Other Actions deal with the protection of intellectual property rights online (Action 6), payment methods and e-signatures (Actions 7 and 8, respectively), the implementation of laws supporting the creation of a DSM by the Member States (Action 10) and a code of EU online rights for consumers (Action 16). The Commission published a Communication in January this year as part of work being taken under Action 9 – updating the E-Commerce Directive, announcing sixteen actions aimed at doubling the amount of e-commerce in the EU by 2015, as well as aiming to have fifty percent of consumers participating in online shopping and twenty percent of those in cross-border e-commerce. It is in the Communication on the Digital Agenda that the Commission unequivocally states that ‘It is time for a new single market to deliver the benefits of the digital era.’

277 Ibid.
278 Ibid.
280 Commission, ‘A Digital Agenda for Europe’ (n 274) 7.
In order to ensure the ease of conducting online cross-border transactions, the Commission has undertaken to implement a Single Euro Payment Area (“SEPA”) and to revise Directive 1999/93/EC on a Community framework for electronic signatures, among other measures.\textsuperscript{281} It also restates the importance of the Member States transposing the VAT Directive by 2013 in the interests of allowing e-Invoicing for businesses.\textsuperscript{282} It has also been discussed, under the umbrella of the Digital Agenda, whether to develop a European trust mark in order to improve consumer confidence when shopping online across borders,\textsuperscript{283} though it has not been possible to achieve an EU-wide trust mark thus far.\textsuperscript{284}

In the EESC opinion on the Digital Agenda it suggests the introduction of online identification for every citizen (an ‘e-ID’) as well as ‘e-trader’ certification, stating that such measures would help to remedy fragmentation.\textsuperscript{285} The EESC drew on the situation in the Netherlands, where e-trader certification is already in place, including a code of conduct, a standard consumer contract and dispute resolution procedures.\textsuperscript{286} It is said that eighty-three percent of consumers recognise the certification.\textsuperscript{287}

\textbf{9.2 Consumer Programme 2014 – 2020}

In November 2011 the Commission adopted the next proposal in its series of recurring five-year consumer policy plans, the Consumer Programme 2014 – 2020,\textsuperscript{288} (the successor to the EU Consumer Policy Strategy 2007-2013).\textsuperscript{289} The stated objective of the programme is to place ‘the empowered consumer at the centre of the Single Market’, its priorities being ‘Safety, Information and education, Rights and redress, and Enforcement’, known as ‘SIRE’.\textsuperscript{290} It is encouraging to note that the importance of consumer rights in both the online and cross-border contexts is immediately addressed in the proposal, as early as Recital 1, which emphasises the need to improve consumers’ ‘ability and confidence to buy goods and services cross-border, in particular on-line.’\textsuperscript{291} The proposal also draws attention to the statistic that fifty-six percent of EU GDP is accounted for by consumer spending, reinforcing the importance of taking consumer interests into account when designing all Union policies, in accordance with Article 12 TFEU.\textsuperscript{292}

Of particular significance to the subject of this paper is the programme’s recognition, under the third objective of rights and redress, of the need to strengthen the use of Alternative Dispute Resolution (“ADR”) and, more specifically with relation to e-commerce, Online Dispute Resolution (“ODR”). To reach this goal, on 29 November 2011 the Commission revealed plans

\begin{footnotes}
\item[281] Ibid 11.
\item[282] Ibid.
\item[283] Ibid 13.
\item[286] Ibid.
\item[287] Ibid.
\item[291] Ibid 9.
\item[292] Ibid 2 and 9.
\end{footnotes}
to enact an ADR Directive and an ODR Regulation, the latter of which will enable consumers and traders to settle their disputes ‘entirely online within 30 days’. It has been observed that:

The goal of the Commission is to tackle the issue of fragmentation and ensure that EU consumers can solve their problems without going to court, regardless of the kind of product or service that the contractual dispute is about and regardless of where they bought it in the Single Market.

This is a most welcome development. However it should be noted that the ODR system is not due to become active until early 2015. This is perhaps where the Consumer Programme 2014 – 2020 and the Digital Agenda fail to properly align their goals, with the latter’s aim of doubling e-commerce by 2015 seeming quite ambitious in light of the fact that dispute resolution (one of the foremost consumer concerns) will not be adequately addressed until that time.

The EESC has been openly critical of the policy plans, stating that ‘The five-year strategic programmes, which are moreover usually influenced by purely economic factors, are also inadequate unless they form part of a policy with a more wide-ranging vision.’ It has directed specific criticism at the 2014 – 2020 Programme, accusing it of containing ‘nothing new, despite the impact of new technologies on market conditions.’ With respect to the €175 million budget assigned to the programme, the EESC regrets that the funding granted for the Europe 2020 strategy falls distinctly short of the stated intention. In relation to the 500 million consumers making up the EU-27, the amount allocated per consumer per year stands at 5 euro cents. This amount is even lower than the figure for the 2007 – 2013 programme.

Although inclusive of plans which would offer substantive contributions to combating fragmentation, it remains to be seen whether the Consumer Programme 2014 – 2020 will deliver results soon enough, in light of the constantly evolving nature of the internet and the immediacy of the issue of the growing gap between domestic and cross-border e-commerce.

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296 Ibid.
297 Ibid.
9.3 European Consumer Agenda

The Commission is also at present due to release a European Consumer Agenda with a close relationship to the Consumer Programme 2014 – 2020, sharing the four SIRE pillars and the corresponding aim of consumer empowerment.303 John Dalli, Commissioner for Health and Consumer Policy, spoke in March this year of the link between consumer policy and the Digital Agenda, insisting that ‘Today’s 18-year-olds belong to a generation that has never known a world without the internet. Tomorrow’s consumers are “digital natives”, for whom the distinction between the offline and the online world is no longer relevant.”304 The Roadmap for the Agenda recognises that ‘an important degree of regulatory fragmentation remains’.305

9.4 The need for a global perspective

The Commission has noted that not only is Europe lagging far behind other more advanced e-commerce markets such as in the United States,306 but that ‘Europeans often find it easier to conduct a cross-border transaction with a US business than with one from another European country.’307 The European Parliament has likewise noted that

-European consumers often do not differentiate between European or third States when buying and selling online…there is therefore a need to also involve third countries in efforts to make e-commerce more transparent, reliable and accountable.308

The proposed CESL may apply so long as at least one party to the contract has their delivery or billing address in a Member State,309 meaning that the optional instrument may also be used in contracts where one of the parties is located outside of the Union. The focus of this paper has been on cross-border B2C e-commerce conducted entirely within the EU. It is duly noted that future initiatives in this field should ideally include a global perspective in recognition of the global and borderless nature of the internet. A ‘Global E-Commerce Summit’ is being held in June 2012, the purpose of which is to discuss the impending developments in this context.310 It is true, however, that ‘any kind of binding international instrument remains little more than a far-off dream.’311

303 John Dalli, ‘Consumers’ role in achieving economic growth and the digital agenda’ (Keynote Speech, European Competition and Consumer Day, Copenhagen, 8 March 2012) 4

304 Ibid 9.

305 Commission, ‘European Consumer Agenda’ (Roadmap, October 2011)

306 Commission, ‘A Digital Agenda for Europe’ (n 274) 7.

307 Ibid 10.

308 Parliament, ‘Completing the internal market for e-commerce’ (Resolution) [2012] OJ C50 E/5, Resolution R.


310 Information available at: <http://www.e-commercesummit.com/home>

10. CONCLUSION

With the deadline for transposition still one year and seven months away, and the date from which the laws will apply to contracts still over two years away, it is accepted that the ability to which an accurate impact assessment of the Consumer Rights Directive can be made is limited. It has, however, been the purpose of this paper to make educated predictions about the likely effects of the CRD in light of the Commission’s intentions as well as the Directive’s objectives, scope of application and method of harmonisation. It is indeed true that:

The way in which Member States…transpose the new rules into their national laws will be key to the directive’s success in terms of unleashing the cross-border potential of distance selling on and offline.312

It is argued, however, that despite the differing effects of varying methods of transposition between the Member States, even perfect implementation would not necessarily render the CRD a success. This is in part due to its targeted level of harmonisation, linking back to the first sub-question of this paper regarding the suitability of the targeted harmonisation approach for both the CRD and EU consumer law in general, in light of the goal of eliminating fragmentation. Although the provisions regarding distance and off-premises contracts attract maximum harmonisation (these being the relevant provisions of the CRD when speaking of the cross-border B2C e-commerce market), two points ought to be noted: firstly, the targeted/mixed approach is liable to cause confusion and incorrect transposition in the Member States, and secondly, even the pure maximum harmonisation standard in the initial CRD proposal would not have cured the fragmentation of the European e-commerce market. The question then becomes: is maximum harmonisation, or indeed, this hybrid ‘targeted’ approach found in the CRD, both a desirable and feasible strategy for the future of regulating EU consumer law? It is contended that it is not.

It has been said that ‘the technological and cross-border characteristics of the Internet have driven searches for regulatory innovation.’313 Will the Commission embrace the suggestions to move towards the use of Regulations as the new instrument of choice when legislating with respect to consumer protection in the EU? Will there be the requisite political will? It is true that in the specific field of cross-border e-commerce, technology and consumer trends progress faster than the European legislator can keep up with. However, the traditional benefit of Directives saving time becomes immaterial the longer and more complex a process it becomes to enact them, as learned with the CRD.

The second sub-question considered the impact of the final scope of the CRD. Although reducing the volume of the consumer acquis, it is argued that the scope is not sufficient to make any real impact in the quest for simplification and consistency at both the EU level and once transposed into the national laws of the Member States. Speaking of the draft CRD, commentators have rightly alleged that ‘one can hardly uphold the assertion that this Draft offers a single instrument by any standard.’314

The third sub-question enquired as to whether the CRD could be said to be a step in the right direction or a failed effort. Much was expected of the CRD, a measure ‘intended to be the climax of the work on the revision of the consumer acquis.’\textsuperscript{315} Although it can be expected that the Commission would blow its own trumpet to gather support for upcoming initiatives, Commissioner Reding went quite far by saying not only that ‘This legislation needs to be the cornerstone for consumer protection in the Single Market in the coming years’, but also that ‘A Consumer Rights Directive must be worthy of its name.’\textsuperscript{316} However, even one of the few supporters of the initial proposal for the CRD implicitly admitted the inadequacy of the initiative by stating that ‘it is also possible to see the present proposal as a pilot study with the possibility of taking on other directives in a later phase.’\textsuperscript{317} Ultimately it is argued that the CRD is a failed effort – and indeed, a far cry from an antidote to the persisting fragmentation of the cross-border B2C e-commerce market in the EU. The Commission will need to take its proposed actions under the related initiatives, in particular the Digital Agenda, very seriously if it wishes to achieve anything near the kind of results it is aiming for. It is clear that the timelines which have been set are not likely to be met. In this respect, the EU Consumer Policy Strategy 2007-2013, like the CRD, had high hopes:

\begin{quote}
The EU will know if it has succeeded if by 2013 it can credibly demonstrate to all EU citizens that they can shop from anywhere in the EU, from corner-shop to website, confident they are equally effectively protected…and to be able to demonstrate to all retailers, but especially SMEs, that they can sell anywhere on the basis of a single, simple set of rules.\textsuperscript{318}
\end{quote}

These goals, however, are simply not going to be met – at least not by 2013. Commissioner Dalli also admitted in March this year that ‘In 2011 only 9% of European consumers bought something online from another EU country – a far cry from the 20% Digital Agenda target for 2015.’\textsuperscript{319}

The main question which this paper has explored is whether the Consumer Rights Directive is likely to succeed in unlocking the potential of e-commerce in the internal market by achieving a reduction in fragmentation of consumer protection laws concerning cross-border B2C online transactions, as part of its wider objective of enhancing consumer confidence and reducing business reluctance. It is abundantly clear from the topics explored in this paper that the Consumer Rights Directive will certainly fail to unlock the potential of the European e-commerce market. Although it has the potential to reduce some of the fragmentation as between the directives in the consumer acquis and as between the national laws of the Member States, this will not have any substantial effect due to the limited scope of the CRD and the incorrect transposition which is contended will arise from the confusing mixed harmonisation approach employed within. Further to this, if the Commission insists on continuing to use the concept of consumer confidence as its additional rationale for the use of Article 114 TFEU as a legal basis for regulating consumer protection, and if it does so with sincerity, then it needs to be realistic in


attaining this confidence and understand the importance of providing sufficient boosts to consumer education.

It is not an exaggeration to state that the credibility of the internal market as a whole is at stake when facing the challenges presented by technological advancements. The creation of a Digital Single Market is seen as ‘particularly important for Europe’s younger generations, who will rightly question the achievements of the Single Market if they cannot see that it is a reality in the digital environment.’\textsuperscript{320} The Consumer Rights Directive is ultimately but one of a myriad of poorly coordinated measures whose prospects of curing the fragmentation of the European e-commerce market are not promising.

**BOOKS AND CHAPTERS**


**JOURNAL ARTICLES**


CASES

C-618/10 Banco Español de Crédito, SA v Joaquín Calderón Camino (Opinion of Advocate General Trstenjak delivered 14 February 2012)

C-49/11 Content Services Ltd v Bundesarbeitskammer (opinion of Advocate General Mengozzi delivered on 6 March 2012)


E-4/09 Inconsult Anstalt v Finanzmarktaufsicht (27 January 2010, EFTA Court Report 2009-2010, 86)

STATUTORY MATERIAL


Directive 2000/31/EU on certain legal aspects of information society services, in particular electronic commerce, in the internal market [2000] OJ L178/1


INSTITUTION AND COMMITTEE DOCUMENTS

Commission, ‘A coherent framework for building trust in the Digital Single Market for e-commerce and online services’ (Communication) COM (2011) 942 final


Commission, ‘Consumer attitudes towards cross-border trade and consumer protection: Analytical Report’ (Flash Eurobarometer 299, 2011)


Commission, ‘Consumers: 60% of cross border internet shopping orders are refused, says new EU study’ (Press release, IP/09/1564, 22 October 2009)

Commission, ‘Cross-border business to consumer e-commerce in the EU’ (Communication) COM (2009) 557 final


Commission, ‘New EU rules on consumer rights to enter into force’ (MEMO/11/675, 10 October 2011)


55


Commission, ‘Retailers’ attitudes towards cross-border trade and consumer protection: Summary’ (Flash Eurobarometer, 2011)


Commission, ‘State of Implementation of the Services Directive’ (Information Note to the Competitiveness Council, 17470/10, 10 December 2010)


European Economic and Social Committee, ‘Opinion of the European Economic and Social Committee on “Consumers and cross-border possibilities within the Single Market”’ OJ C132/3, 3 May 2011


Parliament, ‘Completing the Internal market for e-commerce’ (Resolution) [2012] OJ C50 E/1


**SPEECHES**


Ducatel K, ‘Comparing business environments in Europe, the US and Asia: The digital economy’ (Day One, Seminar Two, EU Studies Fair, Brussels, 10 February 2012)


Paulis E, ‘The Internal Market of the 21st Century: Stakes and Challenges’ (Speech as part of the ‘Europees recht: Moderne Interne Markt voor de praktijkjurist’ Conference, Ghent, 19 April 2012)


WEB RESOURCES


