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Review of the Consumer Acquis – Towards Maximum Harmonisation?

Vanessa Mak*

Recent legislative initiatives from the European Commission, such as the Review of the Consumer Acquis, show an increasing tendency in favour of maximum harmonisation. This is a diversion from previous practice, where the general policy was one of minimum harmonisation, which allowed Member States to divert from the standard set by European legislation if in favour of the consumer. This article makes a critical assessment of the policy of maximum harmonisation and suggests a number of parameters that determine its chance of success. Important factors are the Community’s limited legislative competence, restricted in essence to internal market policy, and the related question of where to strike the balance between business interests and consumer protection. The main concern, however, lies with the elusive nature of the concept of maximum harmonisation – the possibility of alternative legal bases for liability in European and national legislation may undermine the notion of a fully harmonised regime, as can be seen with regard to product liability law. In this light, it is suggested that the success of the current review programme may increase by a redefinition of its scope, taking account of the wider framework set by European and domestic rules of private law.

I. INTRODUCTION

In recent discussions of the project on the Review of the Consumer Acquis currently underway under the aegis of the European Commission, a key term that has emerged is ‘full’ or ‘maximum’ harmonisation. According to the summary of responses to the Green Paper on the review,¹ the majority of the stakeholders ‘call for the adoption of a horizontal legislative instrument applicable to domestic and cross-

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border transactions, based on *full targeted harmonisation*; i.e. targeted to the issues raising substantial barriers to trade for business and/or deterring consumers from buying cross-border’ (emphasis added). In other words, the general preference is for review of the acquis by means of a horizontal instrument that encompasses issues which are common to several directives in the field, and in this context for targeted harmonisation in specific areas – with an eye to achieving full harmonisation. Such a horizontal instrument is envisaged to take the form of a Framework Directive.

A cursory glance at the responses to the Green Paper emphasizes the wideness of scope that the review has. Aspects to be considered range from the geographical scope of the review (i.e. whether it should encompass domestic as well as cross-border transactions), to the method of harmonisation to be adopted (horizontal or vertical?), to the degree of harmonisation to be aimed for (maximum?). Each of these points deserves further exploration. It is the last point however, the question of maximum harmonisation, that signals the centre of the debate and that should be regarded as the starting point for any further discussion on the review of the consumer acquis. Regardless of whether a horizontal method of harmonisation, a vertical method aimed at specific areas, or a combination thereof is adopted, its effect will be determined by the degree of harmonisation that is aimed for. This determines which legislative role remains for the Member States and thus which level of uniformity is reached in European consumer law.

Maximum harmonisation is also on the agenda outside the current review, in the context of wider reforms of European consumer legislation. For example, changes proposed by the Commission in the reform of the Consumer Credit Directive aim at full harmonisation on specific points, including a 14-day right of withdrawal and the right to repay the credit early at any time. With other directives, such as the Unfair Commercial Practices Directive, or as it seems the Product Liability Directive, also steering in this direction, maximum harmonisation is becoming a more and more common standard pursued by European legislation. As stated in the Consumer Policy Strategy (2007-2013), in relation to future legislation as well, it will be the

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3 See the speech made by the Commissioner for Consumer Protection, M. KUNEVA, ‘Stakeholders’ Conference on the “Review of the Consumer Acquis”’ (Brussels, 14 November 2007), p 4; the text of the speech is available at http://ec.europa.eu/commission_barroso/kuneva/speeches/speech_14112007-2_en.pdf. The Green Paper does not state explicitly that the horizontal instrument itself would aim at maximum harmonisation. That it is a possibility, however, may be gleaned from the discussion of the degree of harmonisation which applies ‘[i]ndependently of the option chosen to revise the acquis’; see Green Paper (n. 1), p 10. Compare also KUNEVA, pp 2-3.

4 See further below, text after n. 9 ff.


Commission’s approach to seek full targeted harmonisation of consumer protection rules at an appropriately high level. In this respect, it is necessary also to have regard to the wider project of harmonisation of European contract law, especially the current development of a Common Frame of Reference (CFR).

This article seeks to make a critical assessment of the question of maximum harmonisation in light of the current review programme, seeking to provide guidelines also for future legislative initiatives. Its main tenet will be to emphasize difficulties with the aims set out in the Green Paper and in follow-up documents, not in order to discourage the development of areas of full harmonisation in European private law but in order to determine which parameters should be set to give such projects a chance of success. The aim of maximum harmonisation itself fits well with the view that the creation of uniform rules of European private law will benefit intra-communal trade and that it should therefore be pursued.

The starting point for discussion, however, lies with a fundamental question relating to the scope of maximum harmonisation – or rather to its lack of definition. For when can we say that harmonisation has reached a ‘maximum’ degree? What does the term denote and how does it affect the relation between the European legislature and the individual Member States? To find a satisfactory answer to this question may be half the work done.

II. MAXIMUM HARMONISATION DEFINED

The words ‘maximum’ or ‘full’ harmonisation carry with them a sense of completeness, an implication that where harmonisation is effected to this degree, no further action may (or can even) be taken to bring the laws of the European Member States closer together. Uniformity of laws, nothing less.

To read the term in this manner, however, would be a false interpretation of the degree of harmonisation envisaged by the European Commission and stakeholders. In its proper meaning, according to the Green Paper, what the term maximum harmonisation seeks to denote is ‘that no Member State could apply stricter rules than the ones laid down at Community level’. It is true that this standard carries with it a certain degree of completeness. The term maximum harmonisation should be read in contrast to the well-known concept of minimum harmonisation, which up till now has been the standard commonly set for directives aimed at consumer protection. Where minimum harmonisation allows Member States to keep in place or to enact rules that provide a higher level of consumer protection than the rules laid down at Community level, maximum harmonisation precludes this. It prescribes

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that where rules have been set at European level, no divergence – neither upwards nor downwards – is possible at the level of individual Member States.\footnote{11} The description given by the Commission, however, gives away that maximum harmonisation is not aimed at completeness in the sense of creating an actual uniform law. The reference to rules ‘laid down at Community level’ carries a restriction in it – namely, that the degree of harmonisation can only be seen within the context, or indeed within the scope of regulation set by the directive or other legislative instrument which prescribes it. In other words, the degree of completeness of harmonisation is determined by the width of the rules laid down in a particular legislative measure. This has two implications, the first more obvious than the other. The sting, however, is in the second one.

First, maximum harmonisation may be achieved only with regard to issues expressly prescribed as falling within the scope of a directive or other form of European legislation.\footnote{12} For example, were the Consumer Sales Directive to be made an instrument of maximum harmonisation, it would create a uniform European regime for the availability of repair, replacement, price reduction and termination as remedies for non-conformity in sale of goods cases.\footnote{13} However, Member States would still be free to regulate matters falling outside the scope of the Directive, such as the availability of a remedy in damages. This limitation of scope is reflected also in the term ‘targeted harmonisation’ used by the Commission in its Green Paper and other documents.\footnote{14} In this context, the targets may be of wider application than in case of specific directives, as is the case with proposals made for a Framework Directive, where some horizontal elements have been selected that are common to several directives. However, they will still be limited to selected issues that raise substantial barriers to trade and/or deter consumer from buying cross-border.\footnote{15} Maximum harmonisation will therefore be pursued only within the scope thus set by the Directive.

Secondly, the limited scope of maximum harmonisation implies that it may allow for Member States to enact or to keep in place rules which, though dealing with similar issues, have a different legal basis than the rules prescribed by the European legislature. The success of measures aimed at maximum harmonisation may thus be compromised by national legislation circumventing the scheme laid down in European rules. Thus, it may be that a particular issue is governed by several legal doctrines, which may give rise to overlapping and possibly conflicting legislation in the Member States. The Product Liability Directive may serve as an example here, though unfortunately it has been left outside the current review of the consumer acquis. In this area, liability in tort may coincide with liability in contract. The only area out of bounds for national legislation is where it lays down rules for

\footnote{11} The fact that legislation is exhaustive, however, does not stand in the way of the possibility for it to continue to evolve; compare Advocate-General Bot in ECJ 24 May 2007, Case 84/06 The Netherlands v. Antroposana [2007] ECR I-7609, opinion at [62].
\footnote{12} How wide this scope may be will, of course, depend on the competence of the European legislature; see further below, para. III.1.
\footnote{13} Consumer Sales Directive (n. 1), Art. 3.
\footnote{14} Compare for example the Consumer Policy Strategy (2007-2013) (n. 8), p 7.
\footnote{15} Compare KUNEVA (n. 3), p 2.
product liability that coincide with the strict liability regime imposed by the rules of the Directive - besides this, it is possible for Member States to enact or to keep in place legislation that prescribes the rights of injured parties harmed by products on other legal bases, such as fault or contractual liability.\textsuperscript{16} As a practical result, the alternative legal bases may allow Member States to give similar rights of compensation to consumers and so to diminish the impact of the Directive’s regime of strict liability. The implication is that, while the Directive in form is regarded to be aimed at maximum harmonisation, in substance it does not achieve this degree of approximation.\textsuperscript{17}

In relation to this, an issue that remains unsettled is how the notion of maximum harmonisation through European legislation affects pre-existing legislation of the Member States which amounts to more than overlapping rules grounded on other legal bases. For example, does Article 13 of the Product Liability Directive preclude Member States from keeping in place a general system of product liability different from that provided for in the Directive? The judgment of the European Court of Justice (ECJ) in Commission v France\textsuperscript{18} prescribes maximum harmonisation, thereby prohibiting Member States from enacting legislation contrary to the Directive after the time of its notification. Apart from adopting the notion that the Directive is aimed at ‘complete harmonisation’, however, the judgment may be read as to suggest that Member States are under an obligation to ensure compliance with the Directive’s regime not just for future legislation but also with regard to pre-existing legislation, at least where a general regime of product liability is concerned. The Court states that ‘Article 13 of the Directive cannot be interpreted as giving the Member States the possibility of maintaining a general system of product liability different from that provided for in the Directive’ (emphasis added).\textsuperscript{19} Maximum harmonisation would thus apply also to pre-existing legislation, precluding national laws from diverting from the Directive’s regime. Such a restriction, however, is problematic for French law – though the system is generally recognised as a special liability system, it is in fact nothing more than an accumulation of contractual and non-contractual rules, which would seem to be valid under Article 13.\textsuperscript{20} If the suggestion to reinterpret the rules in light of the Directive is followed through, however, there is a real likelihood that the level of consumer protection in French law will be adjusted to a lower standard, as it is commonly accepted that the French system of tortious and contractual liability surpasses the level of protection provided by the Directive.\textsuperscript{21}


\textsuperscript{18} Commission v. France (n. 16).

\textsuperscript{19} Commission v. France (n. 16), at [21].


The result is that where the scope of the legislation is unclear and where its application may blur into the application of overlapping rules at national level, any project aimed at maximum harmonisation has significant barriers to overcome if it is to be successful. Where in case of minimum harmonisation leeway is given to the Member States to regulate outside the Community rules, at least where this is for the benefit of consumers, the concept of maximum harmonisation does not leave room for this possibility. Therefore, in order to give support to the Commission’s proposals of ‘full targeted harmonisation’, it is vital that the scope of the areas at which harmonisation is targeted is clearly defined. The case of product liability demonstrates that this is unlikely to be an easy task.

III. PARAMETERS FOR MAXIMUM HARMONISATION

Apart from problems of definition, projects of maximum harmonisation in the review of the European consumer acquis or in other consumer legislation are likely to encounter a few other obstacles. The main problem areas demanding attention appear to relate to (i) the legislative competence of the EU in relation to consumer law; (ii) the standard of consumer protection set by European legislation; (iii) fragmentation of laws; (iv) enforcement of consumer law in the Member States. This list is not intended to be exhaustive. Nevertheless, while it may well be possible to define other issues that may in one way or another influence the scope and content of the review, it is thought that these four points – together with the question of definition – are the main factors that determine the potential success of the review project currently envisaged by the European Commission. They set the parameters within which the Commission is able to work towards maximum harmonisation of, at least for now, targeted areas of consumer law.\(^{22}\) They apply in a similar manner to legislation aimed at maximum harmonisation which is outside the review project.

Regard must in this respect also be had to the development of a CFR, a project carried out in parallel to the review of the consumer acquis. The CFR finds its origins in two Communications from the European Commission, namely its Action Plan of 2003 and the communication entitled ‘The Way Forward’ of 2004.\(^{23}\) The review of the consumer acquis was mentioned in the latter of the two Communications as an example of what the CFR might contain,\(^{24}\) and so provided a starting point for the development of such an instrument. While otherwise the substance and purpose of the CFR remained a subject of speculation throughout further meetings and

\(^{22}\) It may be assumed that some of these factors, such as points (i) and (iv), have an impact on the question of maximum harmonisation in general, i.e. also outside the context of consumer law. Space does not allow for a wider discussion here and the argument proposed, apart from occasional references made in relation to the CFR, does not seek to address the issue outside the context of consumer law.


\(^{24}\) See The Way Forward (n. 23), pp 3-4.
consultations, the first steps towards a substantive set of rules have been made through the combination of several academic research groups in the so-called CoPECL network. The network combines, amongst others, the research projects carried out by the Study Group on a European Civil Code (von Bar Group), the Research Group on EC Private Law (Acquis Group) and the Trento Common Core of European Private Law Project (Common Core Group). Recently, a first draft of ‘principles, definitions and model rules of European private law’ was published. While this Draft Common Frame of Reference (DCFR) has the nature of an academic project, it may form a basis for a political CFR as envisaged by the European Commission in its Communications.

Unlike in case of the review of the consumer acquis, what must be noted is that the proposed rules are non-binding in nature. Also with regard to a political CFR, the status of the instrument remains to be determined. Nevertheless, there are good reasons to seek a stronger symbiosis of the two projects where it is possible. In the context of the argument made with regard to maximum harmonisation, it is proposed that a widening of the material scope of the review of the consumer acquis (i.e. to take account of rules outside the current review of eight directives only), to coincide with areas considered for the CFR, may be beneficial to the success of the project.

Now, the following observations may be made with regard to the four factors that, in the review of European consumer legislation, set the parameters for maximum or full harmonisation in targeted areas.

1. Legislative competence of the EU

The legislative competence of the EU in the field of consumer law rests on two provisions of the EC Treaty: articles 95 and 153(3). The grounds for competence, however, differ for each of these provisions, with the former being based in internal market policy whilst the latter is expressly aimed at consumer protection. It is important to notice this difference since, as it is the premise on which harmonising legislation is based, it will have a substantial impact on the contents of such legislation. This becomes particularly obvious in relation to legislation aimed at maximum harmonisation.

With regard to the competence of the EU to lay down rules of maximum harmonisation, the legal bases provided in the Treaty prescribe that this can only be done in the context of the internal market policy. After all, it is article 95 EC that gives exclusive competence to the Community to legislate where it is necessary for

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25 Suggestions of a codification of European contract law soon died down, while the subsequent suggestion of the CFR merely as a ‘toolbox’ for future legislation then represented a swing to the other end of the spectrum. Compare The Way Forward (n. 23), p 3.
26 For further details, see www.copecl.org.
28 ibid., [4], [6], [67] ff.
29 An optional instrument seems a likely possibility; see text after n. 34.
the approximation of the laws of the Member States ‘which have as their object the establishing and functioning of the internal market’.30 This explains also why the plan of full targeted harmonisation expressed in the report following the Green Paper on the review of the consumer acquis is aimed at ‘issues raising substantial barriers to trade for business and/or deterring consumers from buying cross-border’.31 Only if these preconditions are fulfilled does the Community have exclusive power to legislate and is it clear, therefore, that it may put in place legislation with a character of maximum harmonisation.

It is not said that legislation with this degree of harmonisation may not be laid down in areas outside the Community’s competence under article 95 EC. For example, it may also be possible in relation to measures based on article 153 EC, aimed at consumer protection. However, it is likely to be much more difficult, if not practically impossible, to achieve maximum harmonisation in such cases as the competence there is shared with the Member States. Article 153(3) EC provides that ‘[i]n order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests’ (emphasis added). This shared competence means that the Member States retain the main responsibility for consumer protection legislation. In order to base harmonising rules on article 153 EC, it will be necessary to reach agreement between the Member States, without the possibility of a ‘qualified majority vote’ as applicable in case of article 95 EC.32 With 27 Member States and growing, the likelihood of achieving such unanimity is however highly unlikely. As such, the usefulness of article 153 as a basis for legislation aimed at maximum harmonisation appears very limited.

The significance of this for the review of the consumer acquis, lies in the fact that measures proposed in the follow-up to the Green Paper are most likely to be based on grounds of internal market policy rather than on consumer protection. This is the area where the Community has competence to put in place instruments of maximum harmonisation. Unlike previous measures aimed at minimum harmonisation, then, the internal market policy will continue to take a primary role over the policy of consumer protection. Moreover, while the ECJ in its case law may give greater importance to consumer interests, it is bound to operate within the boundaries set by European legislation.33 Its influence, therefore, is limited and the task of shaping the underlying framework of EU consumer policy remains with the legislator.

32 Compare WEATHERILL (n. 30), p 18.
The scope of the EU’s competence to legislate, moreover, will be relevant for the status to be accorded to rules contained in the CFR. As a set of uniform rules, for it to have binding force the same considerations apply as with maximum harmonisation in relation to targeted areas. Thus, competence is limited to areas in which barriers to trade exist and where harmonising rules would therefore be of benefit to the completion of the internal market. Seeing that the CFR is much wider in scope than the areas targeted by the consumer review, including other areas of contract law and - if the DCFR is used as a model for a political CFR – potentially extending also to rules of non-contractual liability or rules relating to property, it is unlikely that this test will be passed by all rules contained in the instrument. The consequence must therefore be that, if taken as a whole, an instrument such as the CFR can only be of a non-mandatory nature, possibly taking the form of an optional instrument. Such an optional instrument could exist alongside the domestic contract laws of the Member States and have the function of a 28th legal system, and so an alternative system for parties to select as the governing law of their contract. It is yet too early to say whether such an instrument will come into being and if so, what its content will be. Nevertheless, account must be taken of competence issues if future developments take European contract law in the direction of the adoption of an optional instrument.

2. The standard of consumer protection

A second concern relates to the standard of consumer protection envisaged by the Commission in projects aimed at maximum harmonisation. It has been said already that the competence of the EU under the EC Treaty steers towards an internal market based approach to legislation aimed at full harmonisation, rather than an approach that takes consumer protection policy as its lead. This bears a certain risk with it in relation to the level of consumer protection set by European legislation. It may be that considerations of economic efficiency, facilitation of cross-border trade, or other factors relating to the elimination of trade barriers get to take the upper hand over consumer interests. A tension between these policies can be seen in a number of the directives under review. Whilst, because of their nature of minimum harmonisation, these leave room for Member States to ensure a higher level of consumer protection than that set by the rules of the directive, this possibility will however not be available where maximum harmonisation is imposed. It is important, therefore, to determine which standard of consumer protection may be secured by European legislation if the proposed route for review is followed.

Taking the directives subject to the review as a starting point, it can be seen that their objectives (as found in the recitals) reflect the EC’s market regulation policy, with the majority making explicit reference to the objective of approximating the

34 It may be possible to cherry-pick certain areas for harmonisation, but whether this is advisable in light of consistency and preventing fragmentation is another matter. Compare also DCFR (n. 27), [75].
laws of the Member States in order to remove barriers to trade.\textsuperscript{36} The directives also highlight consumer protection as a goal to be pursued, though always in light of the internal market policy, with the majority finding their legal basis in article 95 EC.\textsuperscript{37} These objectives emphasize that the directives, whilst presented as legislation aimed at consumer protection, must be seen in the wider context of European market regulation. Consumers are but one group of players in the market, and legislation is geared not just toward this group but also to other stakeholders such as sellers, service providers and other businesses. Consumer law, therefore, is part of and subject to the general rules of private law.\textsuperscript{38}

The aim of these directives, nevertheless, is strongly oriented towards consumer protection. Not only is it listed expressly as a goal in the recitals, their minimum harmonisation character also means that Member States are entitled to lay down rules which offer greater protection to consumers than the directives prescribe. It is possible, therefore, to adapt the level of consumer protection to the specific needs felt by market players in individual Member States. Hence, while the minimum rules laid down by European directives ensure a level playing field which may be beneficial for competition between businesses as well as enhance consumer confidence, consumer protection is given an additional boost by the possibility to enact rules more favourable to consumers than those of the directive.

To what extent legislation aimed at maximum harmonisation can achieve a similarly satisfactory balance between the interests of all parties, however, may be doubted. The nature of maximum harmonisation implies that divergence from European rules at the level of the Member States is precluded. Therefore, the possibility of enacting rules which offer greater protection to consumers is ruled out. This may of course benefit consumer confidence in the sense that it gives consumers the security not just that a minimum level of rules will apply wherever goods are bought, but that the same set of rules applies throughout Europe. One of the concerns that consumers may have with regard to buying across borders is thereby taken away.\textsuperscript{39} What is even more strongly implied with maximum harmonisation, however, is that it ensures businesses that the same rules apply throughout the EU. With much greater interests at stake, the benefits that businesses may derive from this are likely to go well beyond the benefits that individual consumers may experience. It means that products may be marketed much more easily in different Member States, with the level of protection set by mandatory rules of consumer protection (e.g. with regard to unfair terms, cooling-off periods or remedies for non-conformity) being the same in each country. Business will therefore be able to operate with the same set of standard terms in each of the Member States and may furthermore save transaction costs on negotiations in individual cases, for example with regard to remedies if goods turn out to be defective. There is, therefore, a clear economic benefit (for individual businesses but also for intra-communal trade in

\textsuperscript{36} Compare, for example, Consumer Sales Directive (n. 1), recital 2; Unfair Terms Directive (n. 1), recital 6; Distance Selling Directive (n. 1), recital 3; Doorstep Selling Directive (n. 1), recital 1; Package Travel Directive (n. 1), recitals 1-5.

\textsuperscript{37} Above, text before n. 30.


\textsuperscript{39} Compare Green Paper (n. 1), p 7.
general) to maximum harmonisation of consumer legislation. The danger for consumers, however, lies in the fact that such economic benefits may be even greater where the level of consumer protection is set at a lower standard. If businesses have less mandatory rules to comply with, they have greater leeway to market goods to consumers under terms which may lead to higher profits but which may at the same time offer a lesser deal to consumers. For example, remedies for non-conformity may be offered which are cheap to provide but which, depending on the case, do not ensure that the consumer gets what he initially contracted for.

The risk that maximum harmonisation may be detrimental to the interests of consumers is not taken away by the competence provisions of the EC Treaty. Article 95 EC, which is most likely to provide the legal basis for legislation aimed at maximum harmonisation, 40 provides in its third paragraph that ‘the Commission, in its proposals … concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection’ (emphasis added). What is meant by a ‘high level’ of protection, however, is a matter of speculation. It provides a certain safeguard, at least to ensure that consumer interests are taken into account and to emphasize that consumer policy is necessary as a counterweight to a market policy oriented only at economic interests. 41 At the same time, though, it is not unlikely for protection offered by European legislation in the field of consumer law to stay well below standards set by national laws. 42

An alternative solution would be to set the standard of protection at the ‘highest level’ of consumer protection. While this would ensure that European legislation, even when seeking to achieve maximum harmonisation, would give due notice to consumer interests, it might nevertheless not be a very favourable alternative. The risk with setting the standard at this level is that it would impose a level of protection that might stifle the development of trade and commerce within Europe. Businesses confronted with a large range of mandatory provisions to comply with may choose to (or may practically be forced to) give up on a market altogether. Moreover, as the Commissioner for Consumer Protection, Meglena Kuneva, has stated, ‘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’. 43

There is, in short, no easy answer to the question of how to determine the standard of consumer protection to be set by European legislation. In the context of the Commission’s review of the consumer acquis, however, it is an important point that should at some stage be subjected to serious scrutiny. What could provide a starting point is a comparison of the level of consumer protection resulting from the implementation in the Member States of the eight directives currently under review. The standards applying in the Member States may be used as a model for initiatives aimed at maximum harmonisation. In this context, it is worth to keep in mind the EC

40 Above, para. III.1.
42 See the example of the Product Liability Directive below, para. IV.2. Compare also WEATHERILL (n. 30), p 66.
43 KUNEVA (n. 3), p 3.
Treaty’s standard of a high level of protection, at least to prevent a so-called ‘race to the bottom’, where standards are set at the lowest level which can be agreed on.44

3. Fragmentation of laws

Thirdly, the likelihood of success of maximum harmonisation must be assessed in light of the European Commission’s initiatives towards Better Regulation. As the Green Paper emphasizes, the review of the consumer acquis was launched as part of the Commission’s programme for simplification and completion of the existing regulatory framework.45 An issue that it seeks to address in this context is fragmentation of laws, exemplified in two ways in the current acquis: first, minimum harmonisation has made that different levels of consumer protection exist at the level of national laws, since Member States are entitled to adopt more stringent rules than those prescribed by the Community; secondly, many issues are either not covered or are regulated inconsistently between directives.46 It is suggested that maximum harmonisation might address these issues and thus make for a more coherent and simplified regulatory framework, which would moreover diminish or take away barriers to cross-border trade in Europe.47

As an idea, this is not a bad point to start from. Statistical evidence shows that especially businesses feel the divergence of laws within the European market and are sometimes deterred from entering the markets of other Member States because of extra costs related to the compliance with different national laws.48 A similar point may be made with regard to consumer confidence and how differentiations between national laws may discourage consumers from entering into cross-border transactions. Nevertheless, to regard maximum harmonisation as a cure for such problems may, at least for the moment, be a rather too optimistic view.

The fact is that if maximum harmonisation is achieved in targeted areas only, problems remain that are similar to the current situation with legislation based on minimum harmonisation. Since harmonisation will be focused on particular areas, different levels of consumer protection are likely still to be encountered in legislation applying to cross-border transactions. After all, as set out above, maximum

44 ibid.
47 Green Paper (n. 1), pp 6, 10-11. An instrument encompassing domestic as well as cross-border transactions would seem the best option to counter further fragmentation; for a more detailed discussion, see the Green Paper at p. 9.
harmonisation is a concept that escapes easy definition.\textsuperscript{49} Where the scope of harmonising legislation allows for concurrent legislation at national level to operate alongside European rules, it is not unlikely for particular issues to be governed by different sets of rules. Product liability may again be used as an example, as tort liability may coincide with liability in contract. Especially where a claim is brought against a supplier rather than a producer, the contractual route will generally enable a claimant to obtain damages, which may thus concur with (strict) liability in tort under the regime of the Product Liability Directive. Though allowed under Article 13, it exemplifies a divergence from the Directive and a way to circumvent its regime. What is curious in the light of the review of the consumer acquis, is that this overlap has not been taken as a lead for harmonisation of the rules of the Consumer Sales Directive with those of the Product Liability Directive. Though the Consumer Sales Directive does not contain rules on damages, the implementation of its rules on other remedies (i.e. repair, replacement, price reduction and termination) has a direct relation to the availability of damages for non-conformity under national laws. If the aim for future European legislation is to achieve maximum harmonisation in this area, an assessment of the two Directives together would make it possible for this issue to be addressed.\textsuperscript{50}

As an alternative to other ways in which the acquis may be reformed, however, maximum harmonisation appears to have better odds to – at least in the long run – achieve greater coherency in consumer regulation. Other suggestions made in the Green Paper look at a combination of maximum harmonisation with a mutual recognition clause, or at minimum harmonisation eventually combined with a country of origin approach.\textsuperscript{51} In the first option, Member States would have the possibility to enact stricter rules of consumer protection but would be unable to impose those 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. In the second alternative, Member States would also be entitled to introduce stricter consumer protection rules in their national laws, but businesses established in other Member States would only have to comply with the rules applicable in their home country. As can be seen, both options allow for differences between national laws to continue to exist and, therefore, do not help to simplify or rationalise the regulatory environment. Maximum harmonisation has an advantage over these approaches in that it contains the possibility of, at some point in the future, achieving uniformity of laws without the possibility of divergence by the Member States. The only point in question there remains how wide the scope of this uniformity will be, i.e. which areas of law will be encompassed in future legislation.

On a final note, while the Commission’s initiative of full targeted harmonisation may (at the moment) not provide a full antidote to problems of fragmentation, the creation of a horizontal instrument also mentioned in the Green Paper may go some way towards achieving greater coherence of regulation. Where there is overlap between definitions and content of directives, it may be beneficial to try and

\textsuperscript{49} See above, para. II.
\textsuperscript{50} See also below, text before n. 63.
\textsuperscript{51} Green Paper (n. 1), p 10.
streamline these in a horizontal instrument. If this instrument also has the nature of maximum harmonisation, it may achieve uniformity of European consumer law at least on the points that it encompasses. What is unclear from the current proposals, however, is what will (and what should) be included in such an instrument. The Green Paper, for example, mentions the length of cooling-off periods and the modalities for the exercise of the right of withdrawal – but are these issues in need of harmonisation? Perhaps there are good reasons for differentiating between directives on these points.

At this place, it may also be worth noting that the limited scope of the review (which extends to eight directives only) means that some directives in the field of consumer law will be missed out from the creation of a horizontal instrument. The Product Liability Directive, the Consumer Credit Directive and the Unfair Commercial Practices Directive, for example, are not part of the review project. This raises the question of how a Framework Directive created as part of the review of the acquis would relate to directives not taken into account in that review. It may be that these directives are included in a later review and would then have to comply with definitions laid down in the overarching horizontal instrument. But perhaps it would have been better, seeing that the consumer acquis is wider than the eight directives selected for the review project, to take account of the wider field of legislation in the first place. At this stage, it may not be too late to extend the scope of the review to other directives, such as the ones mentioned here. It may be possible even to use the DCFR as a model for this – it has a wider scope than the review but the rules and definitions that it proposes, like the review, find their origin in existing rules of European law.

4. Enforcement

Fourthly, a few words on enforcement. While maximum harmonisation of laws may achieve a certain level of uniformity, by itself it will not succeed in taking away barriers to trade in Europe. What is equally important is to ensure that rights embedded in the legislation are supported by means of enforcement and by mechanisms for redress when things go wrong. It seems that this may be problematic in relation to European consumer law. For example, it has been said in relation to the Product Liability Directive that the level of uniformity it achieves is at risk of being upset by ‘developments in more general areas, such as access to justice, [52] Compare Green Paper (n. 1), p 8.

[53] Above, n. 3.


[56] See also below, para. IV.

[57] At least for a large part. Regard must be had to the fact that the DCFR seeks to propose ‘best solutions’ and that, therefore, not all rules and definitions are directly based on existing acquis. See DCFR (n. 27), [63].

procedural reforms and perceived changes in the “claim culture”.\(^59\) Such differences in national procedural laws are likely to influence other areas of consumer law as well.

The EU’s Consumer Policy Strategy (2007-2013) recognises these problems and proposes to improve systems of redress by means of tailored dispute resolution mechanisms that provide prompt and cost-effective consumer redress.\(^60\) Moreover, the Commissioner for Consumer Protection has announced plans for reform in this area, starting with data collection at national level on small claims, court cases and alternative dispute resolution cases, and looking into the problems consumers face in obtaining redress and the economic consequences.\(^61\) How quickly these developments will take shape is hard to say, partly because the competence of the Community in the area of procedural law is limited,\(^62\) partly because it is unclear whether – and at what speed – natural convergence between the laws and procedures of the Member States may occur. It is a positive sign, nevertheless, that the matter is on the Commission’s agenda and that it is being looked into as part of an overall review aimed at strengthening consumer rights in Europe. If greater uniformity is achieved with regard to procedural rules, this will help give practical force to the Commission’s initiatives relating to maximum harmonisation of consumer legislation.

IV. WHICH WAY FROM HERE?

The achievement of maximum harmonisation in European consumer law, as may be gleaned from the foregoing, appears an illusory goal – at least for the time-being. Due to the Community’s limited legislative competence, restricted in essence to internal market policy, in combination with fragmentation resulting from an overlap of national legislation with the scope of Directives, uniformity has been achieved only to a limited extent. It remains to be seen whether initiatives aimed at maximum harmonisation are able to go beyond the scope of current legislation and thus address such issues. An additional concern is that the level of consumer protection, which in legislation proposed under a scheme of minimum harmonisation could be set at a higher standard by individual Member States, may be brought down if maximum harmonisation is imposed by European legislation.

Maximum harmonisation may still be a goal worth pursuing, however, in search of further integration of the European consumer market. The parameters defined above may give some guidance as to the feasibility of such projects, and the factors to be taken into account in future attempts at harmonisation. For the current review programme, including the Commission’s review of the consumer acquis but


\(^{61}\) KUNEVA (n. 58), p 4.

\(^{62}\) Again, the basis for competence will have to be sought in obstacles to the internal market or distortions of competition; compare KUNEVA (n. 58), p 5.
also projects outside this (e.g. in relation to directives not included in the review), it is suggested that the success of the programme may increase through a redefinition of its scope in at least two respects.

First, it is thought that a greater number of directives should be taken into account. As the example of product liability makes clear, there are areas in which several European directives operate which, however, are not attuned to each other. The Product Liability Directive and the Consumer Sales Directive both have effects on a consumer’s right to claim damages for defective products, on grounds which in practice often overlap – products causing harm often also fulfil the criteria for non-conformity. It is unclear, therefore, why the Product Liability Directive is not included in the review of the consumer acquis whilst the Consumer Sales Directive is. The argument that the review is limited to contractual issues, thus excluding the tort-based regime of product liability, is hard to uphold when it is considered that tort and contract related claims may overlap so as significantly to compromise the practical effect of the Product Liability Directive. Suppliers may, for example, in contract be held liable for wider categories of loss than they would be under the Directive (e.g. for pure economic loss or any economic loss which is consequential upon the basis of economic loss). Such overlaps should be addressed in a review encompassing more directives than the eight currently selected. These concerns are expressed also by stakeholders and by the European Economic and Social Committee (EESC), which considers that the review of the consumer acquis should cover in the future at least the 22 directives set out on the list drawn up by the Commission in May 2003.

Secondly, the review of the consumer acquis should be considered in light of the harmonisation of European contract law in general. Consumer law does not exist in 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 (or partly also tort, as seen in case of product liability law). In this context, the principle of freedom of contract forms the main guideline, as long as it is ensured that both parties’ rights of self-determination are reflected in their contract. In the development of legislation on consumer law, regard should therefore be had of the wider legal framework within these rules operate. It seems that such an approach is in line with the original plans envisaged by the Commission, where the review of the consumer acquis was presented as part of the project of developing a CFR. With the first draft of a possible CFR now published in the form of the DCFR, it is important to determine how the review of consumer law fits in with the proposed rules. Whilst the DCFR is not a binding instrument, the directives which are part of the review are,

65 See also European Parliament resolution of 12 December on European contract law, [8].
67 Compare The Way Forward (n. 23), pp 3-4.
and through maximum harmonisation may become of even greater significance for the approximation of European private law than they have been till now. As such, the review of the consumer acquis could be a foundation on which to build future rules of harmonisation – a function that will be best performed if current reforms of consumer law are made with the bigger picture of contract law, or even the wider field of private law, in mind.

A widening of the scope of the review in these two respects would address some of the main concerns expressed above. In particular, it would help overcome the problem of the limited scope of maximum harmonisation as exemplified by its operation in relation to the Product Liability Directive. The greater the field covered by the review, the larger the possibility that harmonisation will be full, not just in form but also in substance.