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The Challenges of EC Consumer Law

Cristina Poncibò

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Abstract

Following the structure defined in the Review of the Consumer Acquis of 2004, the Commission adopted a Green Paper on 8 February 2007 and launched a consultation on some key issues on the future developments of EC consumer law. The Review of the Consumer Acquis (i.e. eight consumer directives) should, accordingly, focus on the level of harmonization of the Consumer Acquis and the relevant instruments. There seems to be a trend the Commission towards the need to shift from minimum to maximum harmonization, and the adoption of a horizontal instrument containing a set of “Principles” of European Consumer Contract Law. In this working paper I briefly discuss some ideas on the governance of EC Consumer Law, i.e. how responsibility for consumer protection is shared between the European Union and its member states, the actors involved in the field (particularly the national courts) and the (formal and informal) instruments of consumer protection. These questions are intimately interlinked, and the answers are of deep significance as they will map the future of European consumer protection policy.

Keywords

European Consumer Law, European Contract Law, Harmonisation, Private Governance

*The Challenges of EC Consumer Law*¹

CRISTINA PONCIBÒ

Max Weber Post-Doctoral Fellow (2006-2007)
European University Institute, Florence, Italy

1. Introduction

The Review of the Consumer Acquis (hereinafter also the “Consumer Acquis”) was launched by the Commission in 2004 with the aim of simplifying and completing the regulatory framework in the field of consumer protection².

On such basis, the Commission adopted a Green Paper on the Review of the Consumer Acquis on 8 February 2007 and launched a consultation on some key issues regarding the future development of EC consumer law³.

The new regulatory environment will be built upon the eight directives being reviewed with the objective of identifying the shortcomings that affect all of them as well as

¹ Max Weber Working Paper (2006/2007) .

In developing the themes of this paper I have benefitted from my participation in the seminar on ‘The Europeanization of Private Law and Economic Law (2006/2007) run by Prof. C. Joerges at the European University Institute, and would like to express my thanks to Prof. Joerges.

Some of the ideas presented in this working paper were discussed at the Forum on the Review of the Consumer Acquis held on the 27 April 2007 at the European University Institute, Law Department.

A preliminary response to the Commission Consultation on the Green Paper on the Review of the Consumer Acquis has been sent by F. Casarosa, L. Gorywoda, A. Janczuk, C. Poncibò, in collaboration with Prof. F. Cafaggi, The European University Institute Law and Economics Working Group response to the Green Paper on the Review of the Consumer Acquis. 15 May 2007. Unpublished document on file with authors.

² The Review project was set up in the Communication on European Contract Law and the revision of the acquis: the way forward, COM (2004) 651 final, OJ C 14, 20.1.2005. The Communication of 2004 was the Commission’s follow-up to the 2003 Action Plan, COM (2003) 68 final.

³ Green Paper on the Review of the Consumer Acquis COM (2006), 744 final, 3.

problems that are specific to each one⁴. The list of issues put up for consultation in the Green Paper is the result of a series of activities, such as a comparative analysis on how the target directives are applied in the Member States;⁵ a series of stakeholder workshops within the context of the Common Framework of Reference on contract law; a number of meetings of a standing working group of experts from the Member States; and an analysis of the consumer and business attitudes towards the existing legal framework in the area of consumer protection and its effects on cross-border trade⁶.

The comparative analysis showed that the target directives are inconsistent on some issues, and ambiguities have hindered both the achievement of a uniform implementation into domestic law and a coherent interpretation by national courts. The analysis also identified areas where the laws of the Member States diverge considerably in the application of the eight directives. The authors of the analysis proposed, therefore, to restructure the Consumer Acquis through a horizontal consumer protection measure with the aim of including those provisions of the directives which are applicable to all B2C contracts. These provisions are mainly present in the Unfair Contract Terms Directive, the Doorstep Selling Directive and the Distance Selling Directive. Another conclusion that flows from the analysis is that there are no plausible arguments against a selective shift to full harmonization in those areas where the use of regulatory options in accordance with minimum harmonization have produced barriers to trade (e.g. pre-contractual information duties and the information about the right of withdrawal).

In the Green Paper, the Commission states that most of the Community's current consumer protection legislation "no longer meets the needs of today's rapidly evolving markets". For example, on-line auctions are not covered by the legislation. Moreover, the existing directives allow Member States to have their own more stringent rules because the Community legislation sets minimum standards ("minimum harmonization"). Because minimum harmonization allows wide variations in consumer protection, consumers cannot be sure that the level of protection that they enjoy in their home Member State will be available if they buy from elsewhere in the European Union⁷. And there are inconsistencies between the directives themselves. The present Community legislation can lead to confusion, litigation and extra compliance costs for producers. These weaknesses discourage cross-border trade and the free movement of goods within the internal market. The goal of the Review is to achieve a "real consumer internal market". This market should be based on "the right balance" between "a high level of consumer protection," and "the competitiveness of enterprises"⁸. Thus, in order to achieve a "real consumer internal market" two necessary conditions must be fulfilled:

⁴ The Doorstep-Selling Directive (Council Directive 85/577/EEC: OJ No. L 372, 31.12.1985,31); the Package Travel Directive (Council Directive 90/314/EEC: OJ No. L 158, 23.6.1990, 59); the Unfair Contract Terms Directive (Council Directive 93/13/EEC: OJ No. L 95, 21.4.1993, 29); the Timeshare Directive (Directive 94/47/EC: OJ No. L 280, 29.10.1994, p.83); the Distance-Selling Directive (Directive 97/7/EC: OJ No. L 144, 4.6.1997, 19); the Price Indication Directive (Directive 98/6/EC: OJ No. L 80, 18.3.1998, 27); the Injunctions Directive (Directive 98/27/EC: OJ No. L 166, 11.6.1998, 51); and the Sale of Consumer Goods Directive (Directive 1999/44/EC: OJ No. L 171, 7.7.1999, 12).

⁵ EC Consumer Law Compendium - Comparative Analysis - Edited by Prof. Dr. Hans Schulte-Nölke in co-operation with Dr. Christian Twigg-Flesner and Dr. Martin Ebers. Version of 12 December 2006 Accessed at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/comp_analysis_en.pdf

⁶ EC Commission Green Paper on the Review of the Consumer Acquis, COM (2006), 744 final, 4.

⁷ See Speech by M. Kuneva, Commissioner for Consumer Protection, given at the Public Hearing on "The Review of the Consumer Acquis Review" held by the European Parliament on 10 April 2007; available at <http://www.europarl.europa.eu/comparl/imco/public_hearings/default_en.htm>.

⁸ Green Paper on the Review of the Consumer Acquis COM (2006), 744 final, 3.

a high level of consumer protection, and competitiveness of enterprises. First, a high level of consumer protection is understood as consumers' confidence in the internal market. Consumers' confidence, in turn, depends on "equivalent rights" and "equivalent remedies" regardless of the place that a transaction was made within the internal market space. Second, competitiveness of enterprises is supposed to be ensured by a "more predictable regulatory environment and simpler EU rules in order to decrease their compliance costs and more generally to allow them to trade more easily across the EU, irrespective of where they are established"⁹.

To deal with similar goals, the Green Paper seeks views on three policy options: do nothing, adopt the "vertical approach", or adopt the "mixed approach". Under the vertical approach, each existing directives would be retained and amended to remove inconsistencies with other directives and to fill gaps caused by changes in technology or market conditions. Under the mixed approach, "The horizontal instrument will have to be complemented by a certain number of vertical actions ... wherever needed". The Green Paper also says that the horizontal legislation could either cover all business-to-consumer transactions within a Member State and across the EU, deal only with cross-border transactions, or cover only "distance" transactions whether domestic or cross-border. A further possibility would be to replace the current minimum harmonization of consumer protection with full harmonization, setting EU-wide standards and removing the discretion now available to Member States to decide their own standards above the Community minimum. Alternatively, there could be a combination of minimum harmonization with a mutual recognition clause. Each Member State would be able to introduce its own stricter standards for products manufactured in its area but would not be entitled to impose those requirements on businesses established in other Member States in a way which would create unjustified restrictions on the freedom to provide services or the free movement of goods.

In this paper I reframe the problems discussed in the Commission Green Paper by addressing the issues of the level of harmonisation, the relevant instruments and, more generally, the balance of power between the EC institution and the Member States in regulating consumer issues.

2. Harmonisation as a pluralistic process

All eight consumer protection directives which are under review are based on a minimum harmonization approach¹⁰. The Green Paper argues that minimum harmonization has led to fragmentation of laws, which results in transaction costs for both consumers and businesses wishing to make transactions across the European Community. It also distorts the conditions for competition in the internal market and, as a result, both consumers and businesses may be deterred from cross-border deals¹¹. Such a situation is said to represent a significant problem for development of the internal market and the Green Paper seeks to remedy it.

Accordingly, two solutions are proposed: either to base the revised directives on full harmonization - complemented, on issues not fully harmonized, with a mutual recognition clause; or to uphold the minimum harmonization approach but combine it with a mutual recognition clause or with the country of origin principle¹².

⁹ Green Paper on the Review of the Consumer Acquis COM (2006), 744 final, 3.

¹⁰ M. Dougan, Minimum Harmonisation and the Internal Market, 37: CMLR, 2000, 853-885.

¹¹ Green Paper, p. 10.

¹² Green Paper, p. 15.

As a preliminary remark, I note that this fragmentation of national laws based on minimum harmonization is, of course, more perceptible when the level of protection in a given directive remains fairly low.

An example of a low level of protection is the Consumer Credit Directive where almost all countries went beyond the level of protection in applying the directive¹³. In contrast: a more coherent application has been achieved when implementing the Sales and Guarantees Directive¹⁴. One could see the level of fragmentation as an indicator of the quality of a community measure.

When the Commission stresses the need for “uniformity of rules” it is probably focusing on the practical and economic needs of enterprises¹⁵. Internal trade would be facilitated and transaction costs would be reduced if enterprises could avail themselves of harmonised rules, for instance, in consumer sales. Therefore, I note that such harmonisation usually does not require fully uniform legislation; if its aim is to create equal conditions of competition, a rough equivalence between the respective national provisions is often sufficient. Variation in legal details is seldom so important from an economic point of view that it would affect the conditions of competition.

It is different when we think about harmonisation as “something” highly symbolic. A common legal order is said to promote a common identity, the feeling of belonging to a community and, thus, it requires mostly identical norms. This case is not fully convincing; although a total harmonization may be justified by the necessity to strengthen the European identity, one may say that the core of such identity exists in recognizing the plurality of languages, social structures and cultures, and the positive value of their interplay.

As to the Green Paper, the legal differentiation in the field of the Consumer Acquis appears to be the major obstacle to cross-border trading¹⁶. If it is true that intervention at the EC level can generate some economies of scale and that some coordination may be needed, since an un-regulated market for legal rules can generate standards which are socially sub-optimal, then from this perspective, the European legislator might be a better innovator than the Member States¹⁷. However, little or no empirical work has been done to substantiate this assumption.

A further assumption is that “consumers avoid buying in another state just because of the fact that they do not know the law”. As one author ironically notes, “This conjures up a vision of a woman from, say, Ruritania, who visits Rome and there, in the Via Condotti, sees a fabulous dress, a dress to die for. She is about to buy it but then caution

¹³ Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ L 042, 12.02.1987, 48 - 53.

¹⁴ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7.7.1999, 12-16.

¹⁵ T. Wilhelmsson, *Is There a European Consumer Law and Should There Be One?*, Presentation at the Centro Studie Ricerche di diritto comparato e straniero, diretto da M.J. Bonell, 2000, at 19-23. Accessed at <http://w3.uniroma1.it/idc/centro/publications/41wilhelmsson.pdf>

¹⁶ S. Weatherill, *EU Consumer Law and Policy*, Edward Elgar, 2005, 79-83. P. Rott, *Minimum Harmonization for the Completion of the Internal Market ? The Example of Consumer Sales Law*, 40 *CMR* 2003, at 1107. M. Dougan, *Minimum Harmonisation and the Internal Market*, 37 *CMLR* 2000, at 853. L. R. Nottage, *Convergence, Divergence, and the Middle Way in Unifying or Harmonising Private Law*. *Annual of German and European Law*, Vol. 1, pp. 166-245, 2004 Available at SSRN: <http://ssrn.com/abstract=837104>

¹⁷ H Muir Watt, *Experiences from Europe: Legal Diversity and the Internal Market*, 39 *Texas International Law Journal*, 2004, 429-459.

prevails: I must not buy this dress because I am not familiar with Italian law”¹⁸. I do not say there is no problem arising from differences in contract laws, because I have not conducted any empirical evidence, but I do think the collection of such evidence is an essential prerequisite. I now explain why the full harmonisation of the Consumer Acquis is not convincing.

a. consumers’ preferences

Full harmonization doesn’t seem to have the capability of satisfying more (divergent) preferences within the Member States. It seems evident that in relation to ‘consumer law sets’, preferences vary across Europe¹⁹. The Commission’s position has been strongly criticized by some authors who believe that not allowing Member States to provide for laws which are more protective of consumers is tantamount to ignoring “rather important differences in expectations between consumers in the different Member States”²⁰.

Minimum rule-making leaves space for upgrading consumer protection via the adoption of stricter local rules. If maximum rules are adopted the national rule-maker loses that competence. The site for law reform is the EC itself, so fixing the scope and content of the EC regime is of crucial importance. The risk from the consumer perspective is that common rules pitched at a maximum level will - at least for some groups of consumers, in some Member States - result in a decline in standards of protection from market failure and/or market inequities.

Moreover, the space for regulatory experimentation is closed off under a model of maximum harmonisation. Still, even if the Commission disagrees with that, it should provide evidence for its claim that consumers (and companies) have, generally, homogenous preferences, for example, for a mandatory regime of guarantee. Uniformization may be an optimal solution only under very strict conditions, i.e. in the presence of a homogenous type of consumer and a perfectly informed standard-setter.

Moreover, even if preferences are homogeneous, they may change over time. It would require another condition to be fulfilled; an immediate reaction by the centralized standard-setter to the change in preferences of its addressees, otherwise inefficiency will arise because of the time-lag problem. As a consequence, what matters is the degree of homogeneity/heterogeneity of preferences on the consumer side and availability of information about the preferences on the standard-setter side²¹. This argument is particularly relevant in this field if we agree that “Consumer law must not be considered an isolated field, but rather as a specific instance of a much larger legal phenomenon, through which law is increasingly striving to recognize and accommodate differences

¹⁸ R. Goode, *Contract and Commercial Law: The Logic and Limits of Harmonisation*, 7.4 *Electronic Journal of Comparative Law*, (November 2003), <<http://www.ejcl.org/ejcl/74/art74-1.html>>

¹⁹ F. Cafaggi and H. Muir Watt, *The Making of European Private Law: Regulation and Governance Design* (2007) *European Governance Papers* (EUROGOV) No. N-07-02, <<http://www.connex-network.org/eurogov/pdf/egp-newgov-N-07-02.pdf>>, accessed 15 April 2007, 5-8.

²⁰ Howells and Wilhelmsson, *EC consumer law: has it come of age*, *EL Rev.*, 2003, 370-388, 372-375.

²¹ S. Weatherill, *EU Consumer Law and Policy*, Edward Elgar, 2005, at 160-161 discussing, in the field of European contract law, the issues of diversity among national contract law regimes and the possibility of different solutions being selected in different jurisdictions, from which one may learn the advantages of competing approaches in fixing the rules of contract law. He also discusses of harmonisation and culture at 164-154.

while at the same time preserving the coherence and unity of the general legal structure”²².

In such perspective it is very interesting the distinction between product-related information and process-related information introduced by an author who stresses the importance of the latter to accommodate the (political and cultural) preferences of consumers²³.

b. reflexive harmonisation

A dynamic consumer law, then, should allow for national experimentation and consequent mutual learning among the national and the Community levels ²⁴. One should not strive for a unified Consumer Acquis detached from national development, but rather let the development of consumer law in Europe gain from continuous experimentation at the national level in a sort of harmonisation from the bottom.

One can cite as examples the English experience concerning consumer credit regulation and the German and Nordic experiences of unfair contract terms regulation.

Diversity in the laws of Member States has survived attempts at harmonisation, making it possible for Member States to experiment in their search for efficient and workable rules of consumer protection. The experimental development and improvement of the kind to be seen in this area - where new ideas not only flow via EC legislation, but also directly between the Member States - would naturally be much more difficult if the field were controlled by a unified European consumer law.

By promoting diversity in this way, reflexive harmonisation performs two important functions: at national or regional level, it allows rules to be matched to local conditions and preferences, while, at the level of the wider, federal system, it increases the potential for innovation by maintaining variety within the ‘pool’ of legal solutions to common regulatory problems²⁵.

The strength of Europe - the opportunity for a continuing exchange of national experience - would not, in such a situation, be efficiently exploited in the area of consumer law²⁶.

This argument follows the idea of regulatory competition theory presented by Scharpf upon which a process whereby legal rules are selected and de-selected through competition between decentralized rule-making entities, which could be nation states or other political units such as regions or localities²⁷. In so far as it avoids the imposition of rules by a centralized ‘monopoly’ regulator, it promotes diversity and experimentation in the search for effective laws. In addition, by providing mechanisms for the preferences of the different users of laws to be expressed and for alternative solutions to common problems to be compared, it enhances the flow of information on what works

²² L. Antonioli, Consumer Law as an instance of the law of diversity, 30 *Vt. L. Rev.*, 2006, 855-882.

²³ D. A. Kysar, Preferences for processes: the process/product distinction and the regulation of consumer choice, 118:2 *Harvard Law Review*, 2006, 525-642.

²⁴ T. Wilhelmsson, Is There a European Consumer Law and Should There Be One ?, Presentation at the Centro Studie Ricerche di diritto comparato e straniero, diretto da M.J. Bonell, 2000, 19-23. Accessed at <http://w3.uniroma1.it/idc/centro/publications/41wilhelmsson.pdf>

²⁵ S. Deakin, Two types of regulatory competition: competitive federalism versus reflexive harmonisation. A law and economics perspective on Centros, 1 *CYELS*, Hart Publishing, 1999, 231-260.

²⁶ *Regulatory Competition and Economic Integration: Comparative Perspectives*, Edited by Daniel C. Esty and Damien Gérardin, Oxford University Press, 2001.

²⁷ F. Scharpf, *Governing in Europe. Effective and Democratic?*, Oxford: Oxford University Press, 1999.

in practice. This analysis suggests a normative conclusion, i.e. that one of the most important tasks is to reach a proper division of competencies in the national and the supranational decision-making arenas and, thus, the major concern is the degree to which decision-making should be de-centralised.

c. the narrow scope of this approach

By focusing on full harmonisation by a normative instrument the Green Paper reveals a narrow understanding of the multiple actors (e.g. courts, lawyers) and the various mechanisms (e.g. informal instruments) that are involved in such dynamic and complex process²⁸.

In the European context, there is not only one harmonizer (the European Commission) and there is not an object of harmonization (the diverse national laws on consumer protection) which must undergo a process of change or transformation to reduce or eliminate their differences: this should be understood as a multi-stakeholder process (involving judges, practitioners, professors and consumer organizations) based on different (formal and informal) devices²⁹.

2.2. Consumer Protection and the New Modes of Governance

The questions posed by the Green Paper may seem rhetorical, given that the Commission generally favors a so-called “mixed approach” of comprehensive (not piecemeal) regulation laid down in a horizontal instrument, supplemented by targeted directives where necessary, and leaving room for “formal stakeholder participation in the regulatory process”.

Community Law was conceived as a process of “unification” by legislation, and it seems that this approach is consistent with historical European concepts of national legislative unity and is, to a certain extent, necessary. Therefore, there are indications that measures of positive harmonisation may not be as prominent in the EU as they have historically been at the level of nation-states.

The trend of the EC Commission for full harmonisation by formal instruments is occurring in tandem with a reliance on increasingly de-formalized instruments such as: soft law devices, good practices, guidelines, self-regulation, codes of conduct, standards and target settings and their use as a substitute for the material legal intervention.

The emerging New Modes of Governance are also relevant in the field of consumer protection. They depart from the community method of legislating through the use of regulations and directives³⁰.

The ‘new governance’ in consumer protection have some key-elements.

The first may consist in the establishment of new sites for interaction and implementation of programs among multiple stake-holders, the second in the enhanced role of consumer participation in the decision making-process. The Directive on General

²⁸ L. Niglia, Taking comparative law seriously - Europe’s Private law and the Poverty of the Orthodoxy, 54 Am. J. Comp. L., 2006, 401-426., at 401: “Rather than understanding Europeanization as both law-in-action and law-in-context, in line with classical comparative law teachings, comparatists who specialize in private law Europeanization focus on aspects of lesser importance, such as rule-centered narratives”.

²⁹ M. Dougan, National remedies before the Court of Justice: issues of harmonization and differentiation, Oxford, Hart, 2004, ff. 3.

³⁰ F. Cafaggi and H. Muir Watt, at ft. 19.

Product Safety assigns, for instance, a central role to self-regulation and standardising bodies in defining product safety and consumer organizations are active to represent and defend the interests of consumers in the process of standardization and certification³¹.

Also relevant is the interest for 'alternative' systems of dispute resolution with the aim to move towards new types of redress, to reduce the costs of litigation and to improve consumer protection outcome. The Distance Selling Directive provides for example that: "Member States may provide for voluntary supervision by self-regulatory bodies of compliance with the provisions of this Directive and recourse to such bodies for the settlement of disputes to be added to the means which Member States must provided to ensure compliance with the provisions of this Directive" (article 11.4)³².

The four (and more relevant) innovation concerns the introduction of new regulatory 'tools' such as the 'open method of coordination'. This concept originated in the European Employment Strategy as laid down in the Amsterdam Treaty (1997). The Lisbon European Council (2000) coined the expression and defined the contours of the 'open method', and the Portuguese Presidency called for its general implementation³³. It seeks to initiate an iterative process of mutual learning on the basis of diverse national experiences with reform experiments. While there are fixed guidelines and timetables for achieving goals at the EU level policies and specific targets are spelled out on the national level.

The former Advocate-General of the European Court of Justice follows a similar path when he discusses the use of a sort of "open method of convergence" for contract-law coordination as part of a larger project of convergence in private law³⁴.

This convergence is already under way in several directions: vertical spill-over effect of certain areas regulated by Community law into other areas left to exclusive member state competence; horizontal spill-over of European Law into non-member countries, and mutual learning between different national or supra-national jurisdictions..

He proposes to "create a transparent and openly organized policy-making process. Its objective is not in the first place to issue binding legislative acts but rather to fix targets, guidelines and timetables for achieving the goals set"³⁵.

The open method of coordination has been touted as the 'third way' in European governance, to be used when "harmonization is unworkable but mutual recognition and

³¹ Directive 2001/95/EC of the European Parliament and the Council of 3 December 2001 on general product safety, OJ L 11, 15.01.2002, art. 11.4.

³² Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6.1997, 19-27.

See also Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the implementation of Directive 1997/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in respect of Distance Contracts, COM/2006/0514 final.

³³ The Open Method of Coordination, as outlined by the Portuguese Presidency, is composed of four elements: 1) fixed guidelines set for the Union, with short-, medium-, and long-term goals; 2) quantitative and qualitative indicators and benchmarks; 3) European guidelines translated into national and regional policies and targets; and 4) periodic monitoring, evaluation and peer review, organized as a mutual learning process".

³⁴ W. Van Gerven, *Bringing (Private) Laws Closer to Each Other at the European level*, *The Institutional Framework of European Private Law*, F. Cafaggi (editor), Oxford University Press, 2006, 37-78.

S. Deakin, *Legal Diversity and Regulatory Competition: Which Model for Europe?*, 12:4 *European Law Journal*, 2006, 440-454.

³⁵ W. Van Gerven at ft. 35.

the resulting regulatory competition may be too risky”³⁶. It avoids strict regulatory requirements and allows experiments that are adapted to local circumstances, while fostering policy improvement, and possibly policy convergence, through institutionalized mutual learning processes. This sounds like a very attractive escape route from the idea of the uniformity of rules - but is it relevant and effective ?

As a largely voluntary exercise, it lacks the bite of real sanctions, especially when it comes to implementing broadly defined targets. Participants might only be ‘willing’ to learn from others and adopt ‘best practice’ if there is a credible ‘shadow of hierarchy’³⁷. Anyway, reflecting such considerations, it is clear that the process of harmonization does not necessarily all have to take place by means of legislative instrument but by the increasing process of “informal harmonization” and “social learning through conflict management and contestation”³⁸.

The major question concerns how the New Modes of Governance can be reconciled with the need for binding rules in EC consumer protection. It is an open question whether it is possible to balance an open learning process with attempts to convert the underlying performance standards or the rolling best practice rules into regulatory standards.

Only future research will be able to shed more light on the actual patterns of interaction between ‘old governance’ and ‘new governance’ to explore whether these will be patterns of substitution, transition, competition or complementarity.

2.3. The Puzzle of the National Judicial Interpretation

The Green Paper assumes that the fragmentation of the Consumer Acquis is a consequence of judicial discretion in the interpretation of the rules contained in the eight consumer directives as implemented in national laws in the Member States³⁹.

As one author notes: “(...) although the Court of Justice has been accused of being 'activist' in the development of Community law, it has been able to be so only because national courts have provided it with the material for activism”⁴⁰.

National courts have been primary actors in the task of European integration and the reasons for such intense cooperation with the European cause have been deeply investigated in both legal and socio-political terms: compliance with EC law has been, for national judges, an experience of empowerment within their own institutional arenas.

³⁶ Trubek, David M./Mosher, James S., 2001: *New Governance, EU Employment Policy, and the European Social Model*, New York University School of Law: Jean Monnet Chair Working Paper 15/01 <<http://www.jeanmonnetprogram.org/papers/01/011501.html>>

³⁷ Mosher, James, 2000: *Open Method of Coordination: Functional and Political Origins*, in: *ECSA Review* 13, 3

³⁸ C. Joerges, *The challenges of Europeanization in the realm of private law: a plea for a new legal discipline*, 14 *Duke J. of Comp. & Intern. Law*, 2004, 149-194, at 194.

³⁹ F. Cafaggi and H. Muir Watt, at 5-8.

⁴⁰ D. Edward, *National Courts - the Powerhouse of Community Law*, *The Mackenzie-Stuart Lecture*, 18 October 2002.

Available at <http://www.law.du.edu/david_edward/publications/pdf/CD/'National%20Courts%20-%20the%20Powerhouse%20of%20Community%20Law'%20the%20MAck.pdf> at 3.

In the realm of private law adjudication, however, courts do not seem to feel bound to endorse the project of harmonization, and often take a less deferential posture towards EU mandates⁴¹.

This means that the possible uniformity of the legal rules within the Consumer Acquis cannot just be created by the imposition of rules in a centralist way.

An example is the “legal irritant” from Teubner’s analysis of the effect of the Unfair Contract Terms Directive on English law⁴². He shows how the directive has instituted a wider process of change, the result of which is not harmonisation but the development of English law on its own conditions.

Consequently, the mere drafting and enacting of a normative instrument concerning the ‘Principles’ of European Consumer (Contract) Law implicitly addressed by the Green Paper does not in itself necessarily lead to the desired level of uniformity. The current approach seems to underestimate the ‘puzzle’ of judicial interpretation⁴³.

One possible option would be to limit judicial discretion, but this proposal is not realistic because it is deemed essential to maintain a certain level of flexibility within the jurisprudential shadow of the European Court of Justice and the Court of First Instance⁴⁴. Another way is to improve the coordination among the national courts and the Commission⁴⁵.

More important, it is not clear whether the national courts are producing “fragmentation” within the national legal systems or, in resolving the individual case, they are responsible for the identification of some “principles” in consumer protection and thus they are promoting convergence⁴⁶.

European judges are aware of their increasing role in the process of European market integration; their meetings are multiplying under the sponsorship of European institutions. This emerging dialogue through national judges may go far beyond the bounds of official cooperation and open the way to new practices for courts.

The former Advocate-General stresses the importance of the “ongoing process of cross-fertilization” and “the dialectical interaction” between national laws and Community Law⁴⁷ by quoting, as an example of judicial approximation, the case law of the Community courts concerning liability for compensation by Community institutions and Member State authorities for breaches of Community law causing damage to individuals⁴⁸.

⁴¹ Consumer Law Database - Case Law. Available http://www.eu-consumer-law.org/casedetails1_en.cfm
The Database presented here is an output of a research project called “EC Consumer Law Compendium”, which is being conducted by an international research group on behalf of the European Commission.

⁴² G. Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, *Modern Law Review* 1998, 11-32.

⁴³ B. Hofstötter, *Non-Compliance of National Courts Remedies in European Community Law and Beyond*, CUP, 2005.

⁴⁴ A. Stone Sweet, *The judicial construction of Europe*, Oxford University Press, 2004.

⁴⁵ Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ, C 101, 27.04.2004.

⁴⁶ F. Cafaggi and H. Muir Watt, at 8.

⁴⁷ Van Gerven, ft. 35.

⁴⁸ Van Gerven, ft. 30.

Harmonisation does not necessarily have to be the fruit of a deliberate legislative effort, as it can also be the consequence of incremental development of consumer law through case law⁴⁹.

4. The ‘Principles’ of European Consumer (Contract) Law

Consumer protection law is a mixture of civil, particularly contract law, tort, criminal, and administrative law so that one can indicate three major “areas” of intervention: contract law, tort law and unfair competition law. Among these areas, only the first may seem less harmonized, given that the Unfair Commercial Practice Directive is a maximum harmonisation measure.

The Green Paper focuses on the contractual field: “There are a number of issues which are common to all directives forming part of the Consumer Acquis. Definitions of basic notions such as consumer and professional, the length of cooling off periods and the modalities for the exercise of the right of withdrawal are examples of issues that are of relevance in the context of several directives. These common issues could be extracted from the existing directives and regulated in a systematic fashion in a horizontal instrument (...) This approach would simplify and rationalize the Consumer Acquis in line with Better Regulation principles. It would repeal ... the existing consumer directives fully or in part, and so reduce the volume of the acquis”⁵⁰.

The Consumer Law Compendium suggests that the ‘principles’ may include: definition of consumer; definition of business; some technical definitions like “in writing” or “durable medium”; some basic information duties common to the contract law directives; general rules on the withdrawal period, the exercise of the withdrawal and its effect; a rule making consumer rights generally mandatory; consumer rights in case of choice of law clauses⁵¹.

In the words of one of the authors, “European Consumer Contract Law rules seen altogether form a relatively close body of rules which mirror the major policy problems of the last two decades [and are of a nature] to identify elements of [a] new paradigm in contract law theory...which is not bound [to cover] consumer law alone”⁵².

But how are the “Principles” derived ?

The Review covers the Consumer Acquis, i.e. the eight directives selected by the Commission. The Green Paper justifies its choice in the following manner: “it is important to note that what is commonly referred to as the ‘Consumer Acquis’ does not cover all consumer protection legislation in the European Union. The recently adopted Directive on Unfair Commercial Practices falls outside the scope of the Review for instance. In addition, many provisions aiming at protecting consumers can be found in sector-specific EU legislation, such as legislation in the field of e-commerce and financial services.”⁵³

⁴⁹ M. Dougan, *National remedies before the Court of justice: issues of harmonisation and differentiation*, Oxford, Hart, 2004.

⁵⁰ Green Paper on the Review of the Consumer Acquis COM (2006), 744 final, 3.

⁵¹ EC Consumer Law Compendium - Comparative Analysis - Edited by Prof. Dr. Hans Schulte-Nölke in co-operation with Dr. Christian Twigg-Flesner and Dr. Martin Ebers. Version of 12 December 2006 Accessed at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/comp_analysis_en.pdf at 746.

⁵² H. W. Micklitz, *Competitive Contract Law - An emerging Concept in European Contract Law ?* at 6. Paper quoted by W. Van Gerven.

⁵³ Green Paper, Fn 3, 3.

This approach is the outcome of the Commission's "reprioritization", shifting the primary objective from the drafting of the Common Frame of Reference, a set of common definitions and principles compiled in a legally non-binding text based on research projects like the Lando-Principles⁵⁴ and designed to guide future legislation, to the Revision of the Consumer Acquis. This choice shifts the focal point from general contract law to a more limited field, a selected number of consumer directives⁵⁵.

Consumer contract law is important for the European Contract Law in some aspects. The first aspect concerns the sources of the Common Frame of Reference. It has already been stated previously that the existing acquis is one of the obvious sources of the Common Frame of Reference. In this context it would not be possible to neglect the existing consumer contract law acquis which forms the largest coherent part of the whole EC contract law acquis. In particular, such central legal acts as the Sale of Consumer Goods Directive and the Unfair Contract Terms Directive are of essential importance for the whole of European contract law⁵⁶.

Another aspect concerns the purpose of the Common Frame of Reference. As already mentioned, one of its essential purposes is to improve the existing EC acquis. In its Communication on Consumer Policy Strategy for 2002-2006⁵⁷, the Commission had emphasized the need for greater convergence in EU consumer law, which would, notably, imply a review of existing consumer contract law in order to remove existing inconsistencies, to fill in gaps, and to simplify legislation. Therefore consumer contract law could be one of the first candidates for the actual use of the Common Frame of Reference⁵⁸. Dealing with European contract law from the perspective of consumer protection is not merely a hypothetical exercise⁵⁹. Since the mid-1980s, the European Community has enacted a series of directives which have affected parts of the law relating to contracts concluded by consumers. The Consumer Acquis directives cover not only many different types of transactions, such as doorstep sales, consumer credit, distance sales, package tours and time-sharing rights, but also include two important horizontal directives, namely the Unfair Terms Directive and the Consumer Sales Directive - which are sometimes called a "basic law for contracts" in Europe.

Also, as private law theorists and the German legislator in the 2002 reform of the law of contracts - which integrated all the major consumer contract law instruments into the Bürgerliches Gesetzbuch - have plausibly shown, a "marriage of convenience" of consumer law and general contract law is possible⁶⁰.

⁵⁴ Principles of European Contract Law, Ole Lando & Hugh Beale eds., 2000.

⁵⁵ EC Commission, Report First Annual Progress Report on European Contract Law and the Acquis Review Brussels, 23.9.2005, COM(2005) 456 final.

D. Staudenmayer, The Place of Consumer Contract Law Within the Process on European Contract Law, 27: 3 Journal of Consumer Policy, 2004, 269-287.

⁵⁶ L. Antonioli Deflorian, Consumer Protection, Fair Dealing in Marketing Contracts and European Contract Law - A Uniform Law ?, 2:2 Global Jurist Frontiers, 2002. Available at: <http://www.bepress.com/gj/frontiers/vol2/iss2/art4>

⁵⁷ Communication from the Commission of 7 May 2002 to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Consumer Policy Strategy 2000-2006. COM (2002) 208 final, OJ C137/2 08.06.2002.

⁵⁸ D. Staudenmayer, The Place of Consumer Contract Law Within the Process on European Contract Law, 27: 3 Journal of Consumer Policy 2004, 269-287.

⁵⁹ M. W. Hesselink, European Contract Law: A Matter of Consumer Protection, Citizenship, Or Justice? Centre for the Study of European Contract Law Working Paper Series. September 2006. Available at SSRN: <http://ssrn.com/abstract=946727>

⁶⁰ See at 61.

On such a basis, one could consider this revision and the horizontal instrument as only an intermediary step towards a common frame of reference in the near future, towards an optional regime in the mid-term, and a European civil code in the long run⁶¹. But would a more coherent rewriting and possibly a complementing of the *acquis* really qualify as the basis for a new European contract law?⁶²

On the one hand, this perspective is wrong because other ways of looking at contractual relations - citizenship and fundamental rights, social justice - would risk being overshadowed and marginalised⁶³. Obviously, the main characteristic of rules inspired by the policy of consumer protection is that they are protective. This means that the rules of contract law aim at the protection of the consumer against the other party to the contract (the professional).

On the other hand, the conception of the Consumer *Acquis* is not the correct perspective of the problem because it represents a narrow understanding of the various dimensions of consumer protection and, particularly, of the fact that consumer law is an “autonomous legal discipline” based on the particular role of the “consumer” in the process of production, trade and consumption⁶⁴.

It is necessary to have a wider understanding of the goals and the present problems in consumer protection in order not to limit the process of review to the boundaries of European Contract Law⁶⁵. The consumer protection approach to EC Contract Law would be rejected because it is reductive.

Moreover, the revision of the Consumer *Acquis* should not be “constrained” within the development of European contract law. One author notes that once accepted, modern private law systems must be understood as subdivided into categories such as consumer contracts and employment contracts, according to predominant policy objectives in each field - there is no reason to try to make controversial generalizations⁶⁶.

Moreover, if the Review is going to provide a set of common principles of European Consumer Contract Law, one cannot exclude the possibility of “effects” in the fields not covered by the Review. This was the case in Germany where “consumer protection has assumed the role of a catalyst for a sweeping reform of German contract law of the EU member countries comprising *both* consumer and general contracts”⁶⁷.

⁶¹ D. Staudenmayer, *The Place of Consumer Contract Law Within the Process on European Contract Law*, in 27:3 *Journal of Consumer Policy*, 2005, 269-287.

⁶² G. P. Calliess, *Coherence and Consistency in European Consumer Contract Law: a Progress Report The European Commission’s Action Plan COM(2003) 68 final and the Green Paper on the Modernisation of the 1980 Rome Convention*, http://www.germanlawjournal.com/pdf/Vol04No04/PDF_Vol_04_No_04_333-372_Private_Calliess.pdf

⁶³ J. Q. Whitman, *Consumerism versus Producerism: On the Global Menace of "Consumerism" and the Mission of Comparative Law* (August 22, 2006). Yale Law School. Yale Law School Faculty Scholarship Series. Paper 6. <<http://lsr.nellco.org/yale/fss/papers/6>>. Accessed 15 May 2007.

M. W. Hesselink, *European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?* (September 8, 2006). Centre for the Study of European Contract Law Working Paper Series Available at SSRN: <http://ssrn.com/abstract=946727>

⁶⁴ C. U. Schmid, *The Instrumentalist Conception of the *Acquis Communautaire* in Consumer Law and its Implications on a European Contract Law Code*, 2 *ERCL*, 2006, 211-227.

⁶⁵ M. Everson and C. Joerges, *Consumer Citizenship in Postnational Constellations?*, *EUI Law Working Paper n. 47/2006*. Available at SSRN: <<http://ssrn.com/abstract=964187>>

⁶⁶ H. Collins, *The Alchemy of Deriving General Principles of Contract Law from European Legislation: In Search of the Philosopher’s Stone*, 2 *ERCL* 2006, at 215.

⁶⁷ K.P. Berger, *Harmonisation of European Contract Law the Influence of Comparative Law*, 4 *International and Comparative Law Quarterly*, 2001, 877-900, at 896.

In particular, one may wonder if - and to what extent - the Consumer Acquis will influence general EC Contract Law by introducing elements of “welfarism” into it⁶⁸.

I think, in particular, to the politics of the ‘third way’ advocated by Giddens⁶⁹. As to the author, consumer policies might play a key-role within a model of ‘positive welfare’, which would include a mix of preventive and regulatory measures. Consumer law is seen as one part of a programme of welfare which might empower and redistribute and represents, in such vision, a hybrid form of law that does not fit precisely into private or public, private or social.

4. The de-centralized system of consumer protection in the United States

The multi-level structure of European governance creates special problems for the creation of an effective consumer law and the obvious question posed by the Green Paper is how to allocate regulatory competence between the European level and that of the Member States⁷⁰.

National institutions must have substantial legal powers to regulate market transactions and, at the same time, their power must be limited so that their laws and regulations do not impede free trade in the common market or excessively impair legal uniformity. Where European institutions are acting to overcome a lack of uniformity, they must have the power and the capacity to do so.

Within this context, our major assumption is that the full harmonization of the Consumer Acquis and the consequent reduction of decentralized law-making in this field are justified if a centralized approach produces results more effective for the protection of consumers.

In other words, it is necessary to ascertain if the national level can provide a system of government that responds more effectively to internal market goals than would the European level.

A central issue is thus to sift out regulatory and enforcement duties between the two levels to achieve or, at least, to establish the most effective allocation of governing duties. The goal is to ensure and develop consumer protection in the EU through effective “coordination” between Community institutions and the Member States.

Such an idea is based also upon the US experience where both federal and state governments regulate in the consumer law area. Some degree of diversity is allowed and the state may intervene on behalf of consumers in many areas⁷¹.

A clear example of this is the Uniform Commercial Code, which in several provisions distinguishes between merchants and consumers and applies the unconscionability doctrine to commercial transactions⁷². This guarantees consumers greater protection in comparison to common law rules.

⁶⁸ T. Wilhelmsson, Varieties of Welfarism in European Contract Law, 10:6 European Law Journal, 2004, 712-733.

⁶⁹ A. Giddens, *Beyond Left and Right: the Future of Radical Politics*, Cambridge: Polity Press, 1994.

I. Ramsay, Consumer redress and access to justice, *International perspectives on consumers’ access to justice*, C.E.F. Rickett, T. G. W. Telfer (eds.), Cambridge University Press, 2003, 25.

⁷⁰ S. Weatherill, *EU Consumer Law and Policy*, Edward Elgar, 2005, at 72.

⁷¹ *Consumer Law, Common Markets and Federalism in Europe and the United States*, D. M. Trubek, T. Bourgogne (eds.), Walter de Gruyter, 1986.

⁷² J. Braucher, Foreword: Consumer Protection and the Uniform Commercial Code, 75 WASH. U. L.Q., 1997, 1, 2-3.

The Federal Trade Commission is charged with promoting competition and protecting consumer welfare by enforcing anti-trust and consumer protection laws. On the Consumer protection side, the Commission has made a major effort to refocus its resources on stopping fraud and other practices that have caused the most harm to consumers. In 1973, the Congress had amended the FTC Act to empower the Commission to file lawsuits in federal district court seeking strong preliminary and permanent injunctive relief-including redress⁷³.

The regulatory intervention of the Federal Trade Commission has some parallels in EC law. For instance, FTC regulations require a mandatory cooling-off period for in-home-solicitation sales during which the consumer can freely cancel the contract. State laws, which can provide more protective rules in these cases, are similar to the minimum harmonization requirements of EC Law.

Specific requirements also are set for mail and telephone sales, which include Internet sales. Moreover, the Federal Trade Commission is responsible for the control of deceptive advertising because the definition of unfair or deceptive acts or practices also covers false advertising.

As for state law, several states have general consumer-protection acts, which cover a variety of aspects. A few states have modeled their laws on the Uniform Consumer Sales Practices Act or have drawn inspiration from it, but on the whole it can be said that uniform laws have not been very successful in the area of consumer law⁷⁴.

As a result, the United States have a complex system of federal and state consumer laws and many areas are concurrently regulated by both levels, while others remain at just one level. It is interesting to note that there is no precise plan to set out the areas that should be regulated by federal government or by the states, and that the system is still changing and evolving over time. American states vary in the extent to which they protect consumers and in many cases the federal government has accepted, even promoted, this diversity. Only in certain cases has intervention been promoted at the central level to provide uniform solutions and to protect the common market in the United States.

It is a paradox that while the actual situation in Europe requires even more of a participatory approach than the United States, the main focus of "legal integration" is to build up a centralized model for the full harmonization of EC consumer law.

This divergence can be partly explained by the predominance of a market-oriented approach in the United States, which favors deregulation and local regulation in order to adjust to the needs of economic actors.

In contrast, the European situation, in spite of a growing emphasis on market mechanisms, is characterized by a long tradition of strong regulatory market control typical of welfare states.

Nevertheless, ideological differences are only one of the factors at play; the kinds of organizations that are involved in the lawmaking and law-applying processes (i.e., in the United States, the federal government, states, private lawmaking bodies, and federal and state courts; and in Europe, the European Community lawmaking institutions, European Court of Justice, Member States' parliaments, governments, courts, and consumer and business associations) and their mutual interaction are crucial in determining the actual outcomes in the field of consumer law.

⁷³ D. Platt Majoras, *The Federal Trade Commission: Learning from history as we confront today's consumer challenges*, *UMKC L. Rev.*, 2006, 115-135, at 126.

⁷⁴ Uniform Consumer Sales Practice Act (amended 1971), 7A U.L.A. 69 (1970).

5. Conclusions

The current trend in the United States shows an increasing shift from federal regulation toward state and local government regulation; this trend is in contrast both with the original federalizing ideology of the 1960s and 1970s in the United States and with the growing involvement of the European Community in consumer law matters in Europe⁷⁵. The US shows that “legal integration” does not necessarily require adherence to a centralized model for the construction of European consumer law⁷⁶.

The analysis of US consumer law reveals an interesting and important pattern of interplay among different sources of law - federal laws, federal regulations, uniform laws, and state laws - which shows that a widespread and complex problem such as consumer protection requires a combination of different legal techniques, and the coordination of a plurality of lawmaking levels in order to be effective.

⁷⁵ L. Antonioli, Consumer Law as an instance of the law of diversity, 30 *Vt. L. Rev.*, 2006, 855-882.

⁷⁶ G. Howells & T. Wilhelmsson, EC consumer law - Has it come of age ? 28 *European Law Review*, 2003, at 378.