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# The Cost of Non-Europe in the Single Market

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V - Consumer *Acquis*

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STUDY

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EPRS | European Parliamentary Research Service

**European Added Value Unit**  
September 2014 – PE 536.357



# **The Cost of Non-Europe in the Single Market (‘Cecchini Revisited’)**

In May 2013 the European Parliament's Committee on Internal Market and Consumer Policy (IMCO) requested a Cost of Non-Europe Report in the field of the European Single Market. Cost of Non-Europe Reports are intended to evaluate the possibilities for economic or other gains and/or the realisation of a ‘public good’ through common action at EU level in specific policy areas and sectors.

In response to IMCO's request, the European Added Value Unit of the European Parliamentary Research Service (EPRS) has produced this Cost of Non-Europe Report, which seeks to analyse the costs for citizens, businesses and relevant stake-holders of remaining gaps and barriers in the Single Market, building on, and updating, the 1988 Cecchini Report which quantified its potential benefits.

In addition to a general paper bringing together the research findings as a whole, the exercise comprises five studies commissioned from outside experts on specific dimensions of the subject and published as separate documents:

## **I Free Movement of Goods**

*Study by RAND Europe*

This study uses an econometric model to estimate the potential benefits of removing existing barriers to foreign direct investment and non-tariff trade barriers within the European Union. The removal of existing trade barriers could boost total intra-EU merchandise exports up to 7 per cent in the long-term. These effects will vary by Member State, and by sector of the internal market.

## **II Single Market for Services**

*Study by CEPS*

This study attempts to take stock of the remaining gaps or deficits in intra-EU market access obligations in services, and the related deficits in the proper functioning of the internal market for services. It also tries to identify the quantitative and qualitative economic gains of overcoming the costs of non-Europe of the remaining fragmentation, insofar as the EU can address such deficits.

### III **Digital Single Market**

*Study by GHK*

This study analyses the gaps in the European digital single market legislation which prevent attaining the benefits of a fully functioning e-commerce single market. It provides a qualitative appreciation of the existing legislation, identifying gaps where further legislative action at European level could be beneficial and quantifying the direct costs of failure to legislate and the potential broader economic impact of closing the gaps.

### IV **Public Procurement and Concessions**

*Study by Europe Economics*

One of the key benefits of the Single Market was expected to arise in the context of public procurement. This study updates the analysis presented in the Cecchini Report, estimates the value of savings to the public purse that have been achieved to date through European legislation on public procurement, and discusses the extent to which future savings might be achieved (in particular following approval of the proposals for new public procurement directives in January 2014).

### V **Consumer Acquis**

*Study by GHK*

This study analyses the gaps in European consumer legislation. It provides a qualitative appreciation of the existing legislation, identifying areas where further EU legislative action could be beneficial, and provides tentative estimates of the costs of failure to legislate. It is not intended as comprehensive quantification, but rather as a 'snap shot' of some benefits which could be attained through completion of the consumer *acquis*.

# The Cost of Non-Europe in the Single Market

- V -

## Consumer *Acquis*

Study  
by GHK

### Abstract

Cost of Non-Europe Reports identify the possibilities for economic or other gains and/or the realisation of a 'public good' through common action at EU level in specific policy areas and sectors. This Cost of Non-Europe Report seeks to analyse the costs for citizens, businesses and relevant stake-holders of remaining gaps and barriers in the European Single Market, building on and updating the 1988 Cecchini Report, which quantified its potential benefits.

This particular study - the fifth in a series - analyses the gaps in European consumer legislation. It provides a qualitative appreciation of the existing legislation, identifying areas where further EU legislative action could be beneficial, and provides tentative estimates of the costs of failure to legislate. It is not intended as comprehensive quantification, but rather as a 'snap shot' of some benefits which could be attained through completion of the consumer *acquis*.

## **AUTHOR**

This study has been written by **Mark Peacock** of GHK Int. (London) at the request of the European Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament.

## **RESPONSIBLE ADMINISTRATOR**

Zsolt Pataki, European Added Value Unit

To contact the Unit, please e-mail [eava-secretariat@ep.europa.eu](mailto:eava-secretariat@ep.europa.eu)

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# Contents

List of tables.....	6
List of abbreviations .....	6
<b>1. Introduction.....</b>	<b>11</b>
1.1 Objectives of the research paper .....	11
1.2 Key concepts and definitions .....	12
1.3 Method of approach .....	16
1.4 Report Structure.....	19
<b>2. The Cost of Non-Europe in the Consumer <i>Acquis</i> .....</b>	<b>20</b>
2.1 Development of the Consumer <i>Acquis</i> .....	20
2.2 Gaps existing in the Consumer <i>Acquis</i> .....	22
<b>3. Development of representative case studies.....</b>	<b>37</b>
3.1 Gaps concerning commercial guarantees.....	37
3.2 Gaps concerning reverse type transactions.....	38
3.3 Gaps concerning consumer to consumer transactions .....	39
3.4 Gaps relating to consumer financial services in the Consumer Rights Directive .....	40
3.5 Gaps in the Consumer Credit Directive .....	41
3.6 Gaps concerning gambling activities .....	43
3.7 Problems concerning the limited scope of the E-commerce Directive .....	44
3.8 Problems relating to digital content.....	45
3.9 Summary findings - Reducing the Cost of Non-Europe .....	46
<b>4. The estimated Costs of Non-Europe - A first scaling of the impacts.....</b>	<b>48</b>
4.1 Costs of Non-Europe in commercial guarantees.....	48
4.2 Costs of Non-Europe in the Consumer Credit Directive (CCD) .....	50
4.3 Costs of Non-Europe in gambling and online gaming.....	54
4.4 The benefits of completing the Consumer <i>Acquis</i> - Costs of Non-Europe in the Consumer Rights Directive.....	56
<b>5. Concluding remarks .....</b>	<b>59</b>
<b>References .....</b>	<b>61</b>

## List of tables

Table 1	Identification of legislative and implementation gaps in the Consumer <i>Acquis</i> .....	23
Table 2	Digital and telephony electrical products sold in the EU 2013.....	49
Table 3	Estimated CoNE from commercial guarantees in selected Member States.....	50
Table 4	Estimated CoNE from lack of convergence in the single market for consumer credit.....	52
Table 5	Estimated Cost of Non-Europe per annum.....	60

## List of abbreviations

<b>CoNE</b>	Cost of Non-Europe
<b>CJEU</b>	Court of Justice of the European Union
<b>EU</b>	European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>TEU</b>	Treaty on European Union
<b>OJ</b>	Official Journal
<b>C2B</b>	Consumer-to-business
<b>B2B</b>	Business-to-business
<b>B2C</b>	Business-to-consumer
<b>C2C</b>	Consumer-to-consumer

## Executive summary

The Cost of Non-Europe (CoNE) Reports intend to evaluate the possibilities for gains and/or the realisation of a 'public good' through common action at EU level in specific policy areas and sectors. This study analyses the costs for citizens, businesses, and other relevant stakeholders of the "gaps" in European consumer legislation (the consumer *acquis*), including its implementation.

Evidence gathered for this assessment came from European Commission and European Parliament publications focused on the consumer *acquis*, in addition to policy and evaluative material produced by external consultants. This included reports, position papers and independent research produced by consumer organisations, industry/trade bodies and academics. The collated evidence was used to complete the following three tasks:

1. the identification of possible gaps in the consumer *acquis* from a mapping of EU legislation;
2. an elaboration of the most significant gaps identified in the consumer *acquis* using practical case studies to highlight how businesses and consumers are affected; and
3. a partial estimation of the CoNE in four case studies to illustrate their potential scale.

The lack of quantitative evidence on the costs imposed on consumers and businesses from gaps in the consumer *acquis* has limited the scope of the third task to only a partial estimation of the CoNE. Nevertheless, the exercise still provides a useful first estimate of the benefits to be realised from a 'complete' single market in the field of EU consumer protection.

A screening of the legislative acts contained within the consumer *acquis* identified many gaps with the potential to adversely affect consumers and businesses in the EU Single Market. Minimum harmonisation was found to contribute to the fragmented implementation of EU law through the 'gold plating' of legal provisions. New technology not foreseen in current EU legislation (specifically in the digital space) is another source of gaps which can lead to uneven consumer protection and limits the consistency and coherence of legislative provisions in the same sectors, or between different sales channels (i.e. online, offline and mobile). Finally, the limited scope of EU consumer legislation in some sectors (e.g. retail financial services) and the absence of the single market in others (e.g. gambling) are also possible sources of significant CoNE.

From the screening analysis, the following gaps unresolved by forthcoming legislation were identified:

- **Gaps concerning commercial guarantees:** in a recent infringement case brought against a computer retailer, consumers were found to have been charged for an additional year's guarantee despite entitlement to this guarantee free of charge under EU law. A fragmented approach to implementation of EU law by the Member States in this case resulted in differences in consumer protection for the consumer

and differences in the severity and timing of any enforcement measures taken. In the meantime, consumers were overcharged for a guarantee to which they were already entitled.

- **Gaps concerning reverse type transactions:** occur when a consumer is the seller of a good or service to a trader, typically involving antiques, items of gold or family heirlooms. The consumer may inadvertently mis-sell an item to a trader at a price below its 'fair' value. The trader may then sell the product for a value closer to its true value at significant profit. The consumer may consider that they have suffered consumer harm by not selling closer to the true value of the item and were misled by the trader. Transactions of this type are currently not covered by consumer protection legislation.
- **Gaps concerning consumer-to-consumer (C2C) transactions:** The Consumer Rights Directive (CRD) ensures that the consumer is protected equally when undertaking a transaction through a website or high street store provided the seller is a professional. However, in the absence of an auctioneer to govern the transaction where the seller is not professional (i.e. on online auctions), C2C transactions are exempt from the CRD, creating a gap in consumer protection where the product is found to be faulty, counterfeit or mis-sold.
- **Gaps in the Consumer Rights Directive (CRD):** while the CRD harmonises many aspects of consumer legislation, there are many areas which are not within scope such as financial services, social services, healthcare and real estate. Fragmented approaches to consumer legislation continue to exist in these areas resulting in an uneven level of consumer protection.
- **Gaps in the Consumer Credit Directive (CCD):** CCD is a flagship piece of EU legislation covering some but not all retail financial services. Optional provisions within the legislation result in fragmented protection. In addition, the limited scope of the CCD to transactions above €200 results in inadequate protection for consumers purchasing low value credit. Many of whom are the most vulnerable in society.
- **Gaps concerning gambling activities:** a single market for gambling and online gaming is not currently established in the EU, leading to significant gaps in consumer protection when gambling transaction occur cross border. The lack of a functioning internal market limits competition amongst domestic providers of gambling and gaming services, resulting in higher than competitive prices for the consumer. Protection for problem gamblers and vulnerable consumers is also fragmented and less effective as a result.
- **Problems concerning the limited scope of the E-commerce Directive:** technological development of Web 2.0 and cloud computing services were not foreseen when the E-commerce legislation was drafted. The gaps which result create legal uncertainty for businesses considering investing in these technologies and limits consumer confidence when considering the use and uptake of new technologies and services.

- **Problems relating to digital content:** consumers may face geographical restrictions on the use of the digital content. For example, consumers may be unable to view digital content purchased cross-border including films and music content. Equally, consumers may be restricted in how they use the product they have purchased cross-border (i.e. software). Limiting the use of the product in this way is considered detrimental to consumer.

Four case study examples were elaborated from above list to provide ‘first estimates’ of the CoNE. Each example illustrates the order of magnitude of the CoNE and the associated benefits which could be achieved by taking EU legislative action. The first three cases estimate the CoNE for consumers in specific markets. The fourth estimate seeks to quantify the benefits from completion of all consumer protection legislation in the *acquis*. Estimates are provided per annum in Table E1.

Estimation of the CoNE includes quantification of the consumer detriment incurred by consumers from purchasing commercial guarantees to which they are already entitled under EU law; the benefits of a more complete CCD resulting in convergence of consumer credit costs towards the EU average for all consumers; plus consumer and social savings from the creation of a gambling and online gaming single market. The latter estimate includes the direct CoNE from lack of competition between gambling providers in EU and the social costs of a fragmented approach to the protection of problem gamblers in the EU.

The fourth example estimates the benefits of expanding the scope of the CRD to all consumer transactions, representative of a ‘complete’ EU Single Market for consumers. Based on US experience of price convergence of a basket of consumer goods, this example assumes the same rate of convergence is replicable in the EU by removing all remaining gaps in the consumer *acquis*. To avoid double counting, the potential benefits are reported separately in Table E1 and are estimated to be in the region of €58 billion per annum. This CoNE can be interpreted as the ‘prize’ which could be realised by consumers and businesses if the remaining gaps in consumer legislation are resolved, allowing each to trade more frequently and confidentially cross border. Although €58 billion is ambitious, if only a small proportion of these benefits are obtainable by resolving a legislative gap in the consumer *acquis*, the absolute benefits are likely to be in the region of many millions of Euros.

**Table E1 Estimated Cost of Non-Europe per annum**

<b>Gap</b>	<b>CoNE (€ million)</b>
Commercial guarantees	36
Limited scope of the Consumer Credit Directive (CCD)	285
Lack of a single market for gambling	5,560
<b>Total</b>	<b>€5,881</b>
<i>Complete EU Single Market - Consumer Rights Directive (CRD) applied to all consumer transactions</i>	<i>58,000</i>

Without a fully functioning single market for gambling and online gaming, it is not unexpected that the potential savings from legislative action are so significant. Nevertheless, the CoNE in the gambling example represents only 9 per cent of the potential benefits of a complete EU Single Market (€58 billion). The remainder is composed of many smaller gaps in the consumer *acquis* and the 'externality' on the whole economy from resolving all or if not the majority of gaps. Some of these smaller gaps are provided in case studies (Section 3), but are not quantified in this report.

In conclusion, this research finds that while many gaps in the consumer *acquis* have been resolved by EU consumer protection legislation such as the CRD, CCD and E-commerce Directive, there is scope to generate further benefits from the completion of the EU Single Market for consumers. The analysis suggests that there is in order of €58 billion per annum worth of benefits obtainable from completing the consumer *acquis*. The establishment of a single market for gambling and online gaming services alone is estimated to account for around 9 per cent (€5.6 billion) of these total benefits.

# 1. Introduction

The “Cost of Non-Europe Report on the Benefits of the Single Market (‘Cecchini Revisited’): Consumer *acquis*” is an assignment undertaken by ICF GHK on behalf of the European Parliament.

The Research Paper was commissioned in response to the report ‘*Better Governance of the Single Market*’ by Mr Andreas Schwab of the Internal Market and Consumer Protection (IMCO) Committee. The purpose of drafting a Cost of Non-Europe (“CoNE”) report on the EU Single Market is to analyse and quantify the costs and benefits of progress in selected sectors of the single market. As such, this paper should be read in conjunction with forthcoming CoNE reports on the digital economy and public procurement in the single market.

This research paper also fits within a much wider body of evidence on the gaps and inconsistencies of single market legislation which contribute to avoidable costs and legal uncertainty. These costs have a negative impact on the workings of the internal market.

It should be remembered that consumer policy is an area of concurring jurisdiction<sup>1</sup> between the EU and the Member States. Historically, some Member States introduced new consumer protection mechanisms, for the EU to then follow by harmonising such mechanisms and introducing them as European standards. In other cases, the EU has led the way in advancing protection mechanisms not present in the Member States. Allowing Member States flexibility to go beyond current provisions to achieve higher levels of consumer protection is therefore as important as achieving full harmonisation of consumer protection. This study considers both trends.

## 1.1 Objectives of the research paper

This report principally deals with the question of gaps in European consumer legislation and implementation, the reasons behind them, and the cost to administrations, citizens and businesses of not filling them. This report aims to analyse the existing legislation, identify concrete gaps where EU legislation could be introduced to resolve the gaps, and to quantify the costs incurred by stakeholders from not legislating. The CoNE will address, inter alia, the following questions:

1. What is the current state of play of European consumer legislation, and what gaps can be identified?
2. What are the economic costs incurred due to gaps in European consumer legislation, for the different stakeholders: EU citizens, employees, economic operators, SMEs, EU Institutions, Member State authorities (and other stakeholders)?

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<sup>1</sup> Exists where two or more courts from different systems simultaneously have jurisdiction over a specific case (i.e. Member State and EU).

3. What benefits can be expected from the completion of the EU Single Market in the field of consumer protection? In particular, what cost reduction for citizens, employees and businesses (in particular SMEs) could be expected?
4. What benefits can be expected from the completion of the Single Market in the field of consumer protection for Member States?

Quantification of the CoNE is inherently challenging due to the limited availability of market relevant data and studies. Using the limited evidence available, the study has attempted to produce 'first estimates' of the impacts from gaps in the consumer *acquis*. These estimates are not intended to be the final word in quantifying the CoNE. Rather, they are intended to be illustrative of the magnitude of impacts, highlighting the deficiencies in the evidence which would benefit from further research.

## 1.2 Key concepts and definitions

### 1.2.1 Consumer Legislation

Consumer legislation encompasses a body of law which ensures consumers are adequately protected prior to, during, and following the conclusion of business to consumer contracts (B2C), and in some specific cases includes business to business (B2B) contracts. By protecting consumers who are often vulnerable or unfamiliar with relevant contracting practices, legislation provides the protection needed to ensure consumers have the confidence to participate in the EU Single Market and realise its benefits. Should things go wrong, consumer legislation also ensures consumers have the means to seek redress and justice by public and private means. Consumer legislation also ensures that businesses placing products on the EU market compete on a level playing field. A level playing field encourages businesses to trade cross-border; opening up domestic markets to greater competition, and provides the right incentives for business to innovate. Establishing a single market for consumers therefore has an important role to play in the achievement of the Europe 2020 Strategy for growth and jobs<sup>2</sup>.

Legislation in other areas also supports consumers. This includes EU antitrust legislation which prohibits behaviour that distorts competition. Antitrust legislation is enshrined in the EU Treaty law together with general conditions governing the creation of a single market, namely the free movement of goods and services in the internal market. Other general legislation is aimed at protecting consumers against dangerous products, regulating the use of certain types of products and services, and providing for a high level of data privacy for EU citizens.

Chronologically, with respect to transactions, the legal provisions found within consumer legislation can be categorised as follows:

- **Commercial communication/advertising:** covers measures introduced to protect minors and other groups from harmful information such as alcohol and gambling advertising, and ensures that any claims made in adverts are not misleading and that

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<sup>2</sup> COM(2010) 2020 final - A strategy for smart, sustainable and inclusive growth, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF>.

product claims are substantiated. This is important to protect consumers and ensure they are correctly informed. Provisions to regulate and/or restrict unsolicited commercial mails are also included here.

- **Informational requirements:** ensures consumers can make informed decisions, are aware of their rights, and know how to enforce them. Legal provisions can include obligations on businesses to provide certain information to the consumer pre-contract (i.e. price, product characteristics), details of who to contact should a dispute arise (i.e. details of the regulator, address of the trader, compliant handling), and accurate information on the product itself (i.e. function and performance).
- **Contractual issues:** consumers should be made aware of the terms of the contract and their responsibilities under it. To protect consumers, legislation can include a cooling off period to enable a consumer to exit a contract should they change their mind or discover a fault or defect with the product. Cooling off periods can prevent high pressure and/or deceptive sales practices which may be targeted at vulnerable or ill-informed consumers. Other legislation is targeted at unfair contractual clauses in mass contracting, where the consumer does not have bargaining power.
- **Rights to complain and redress:** enables consumers to assert their rights, obligations and establishes procedures for consumers to complain in legislation. This includes the setting of maximum time frames within which a response should be provided by the trader to the consumer. For Member States, legislation can include the obligation to establish a competent body/authority for the purpose of dealing with complaints and consumer issues. Mechanisms to help consumers obtain compensation or redress may also be included in legislation (i.e. Alternative Dispute Resolution, Ombudsmen, etc.).
- **Access to justice:** to assert their rights, consumers require access to justice (i.e. to take civil action).
- **Sanctioning and collective action:** obliges Member States to provide for effective sanctioning by a competent body or authority to take action against certain market behaviour and to enable certain types of collective action by consumer organisations on behalf of consumer interests. This provides a further mechanism for cross-border action, either by such organisations individually or through cross-border cooperation between bodies, authorities and consumer organisations.

The accumulated legislation, legal acts, and court decisions which constitute the body of EU law in this area, is commonly referred to as the consumer *acquis*. The scope of this study is assumed to remain within the consumer *acquis*, excluding those provisions of legislation which relate to B2B interactions. Care is taken to clearly identify where there is overlap between the consumer *acquis* and other aspects of Single Market legislation such as services and digital economy to avoid double counting between forthcoming CoNE studies. Consideration is also given to gaps resulting from differences in the implementation of the consumer *acquis*.

What remains outside the scope of this study are those aspects of law which remain a national competency. While the EU adopts the consumer *acquis* and Member States

implement the relevant provisions of legislation, the monitoring and enforcement of the law is the responsibility of national legal systems which differ widely between Member States. For example, the institutional framework can be different, as can the powers of competent authorities, and the type and level of sanctions applied to businesses found to infringe relevant EU laws. Whilst these differences can generate barriers in the internal market through ineffective enforcement or the generation of legal uncertainty among businesses and consumers, the costs arising from the absence of common European law is not the purpose of this study. Enforcement is outside the scope of this study. Problems of implementation are included within scope, as they can be resolved through amending or clarifying current EU legislative provisions.

### **1.2.2 Definition of ‘consumer’ and ‘vulnerable consumer’**

Within this scope, a ‘consumer’ is defined in the Consumer Rights Directive as *‘any natural person who [...] is acting for purposes which are outside his trade, business, craft or profession’*.

The concept of *‘vulnerable consumer’* is *‘based on the notion of vulnerability as endogenous, and targets a heterogeneous group comprised of persons who, on a permanent basis, are considered as such because of their mental, physical or psychological disability, age, credulity or gender’*. As provided for in the Irigoyen Report<sup>3</sup>, the concept *‘should also include consumers in a situation of vulnerability, meaning consumers who are placed in a state of temporary powerlessness resulting from a gap between their individual state and characteristics on the one hand, and their external environment on the other hand, taking into account criteria such as education, social and financial situation (for example over-indebtedness), and access to the internet’*.

### **1.2.3 Cost of Non-Europe**

The CoNE refers to the costs (economic, social, incomplete protection of citizen’s rights) presently incurred by EU citizens, consumers, businesses, public authorities and other stakeholders due to gaps in EU legislation or its implementation. These costs represent the benefits forgone of a more complete consumer *acquis* and Single Market for businesses and consumers.

### **1.2.4 ‘Gaps in Consumer Legislation’**

As a starting point, a ‘gap’ in consumer legislation can be observed where levels of consumer protection are less than desirable, which leaves the question as to how such desirability could be defined, and by whom. In its current state, after around 40 years of active European consumer protection policy<sup>4</sup>, one can already assume a high level of consumer protection within the EU. Accordingly, a ‘gap’ in European consumer legislation is assumed to take one of three forms:

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<sup>3</sup> Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2012-0155&language=EN>.

<sup>4</sup> Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy (OJ 1975 C 92/1)

- The first relates to the absence of consumer protection when a consumer purchases a particular product, enters a contract or engages with a vendor, where the level of protection differs from that offered to the consumer if making a similar transaction by other means. This can often occur as technological advances create new products, models of contract and opportunities to trade (i.e. online trading platforms), in which gaps in the existing consumer *acquis* can emerge, as these innovations were not foreseen. In some cases, traders may have developed new practices circumventing prior existing consumer protection mechanisms. Gaps of this nature can also emerge as EU legislation is implemented differently in the Member States or implemented at different times.
- The second relates to the approach taken to legislate in the consumer *acquis*. In many consumer directives, minimum harmonisation is adopted to provide flexibility to Member States to go beyond minimum provisions. However, when trading cross-border, differences in cooling off periods, powers of authorities, levels of compensation and required information provisions undermine consumer and business confidence in the internal market, by generating legal uncertainty.
- The third relates to the need of adjustments and fine-tuning of existing legal instruments due to learning effects, the practical experience in the operation of such instruments, and to the desire of advancement and modernisation in the field of consumer protection. This can occur as technological advances make certain protection mechanisms possible or more viable, such a computer-assisted cross-border cooperation of consumer protection authorities, or electronic filing of court claims. But this can also occur in the form of socio-legal advances such as the development of a European form of collective action where Member States request it to ensure harmonised consumer protection and enforcement.

Many of these arguments are reflected in the Commission's Green Paper on 'policy options for progress towards a European contract law for consumers and businesses',<sup>5</sup> highlighting that the internal market is built on numerous contracts governed by different national contract laws. Differences between the contract laws can lead to additional transaction costs and legal uncertainty for businesses as well as a lack of consumer confidence in the internal market.

Going beyond simple 'gaps' in consumer legislation which are one source of the CoNE, it is important to consider that consumer legislation and therefore protection differs significantly between industry sector(s) where separate sector-specific legislation exists for goods and services which may seem similar. The level of consumer protection can therefore become uneven. For example, the Single Market has developed more in some sectors than others. In general, the Single Market for goods has evolved the most when compared to services. It is therefore worth considering a scenario where consumer protection and the functioning of the internal market in services is equivalent to that which exists for consumer goods creating a 'complete' Single Market for all consumer transactions.

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<sup>5</sup> COM (2010) 348 final: Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0348:FIN:en:PDF>.

## 1.3 Method of approach

The research is composed of three tasks outlined in the following subsections.

### 1.3.1 Task 1 Identification of gaps in the consumer *acquis*

This task involved building an inventory of secondary evidence on the potential gaps in the consumer *acquis*, gathered from European Parliament, European Commission, consumer association, and legal and academic research sources. The compiled evidence included articles, position papers, communications, reports and presentations.

Based on the gathered evidence, a screening of the consumer *acquis* was undertaken using the categories of gaps defined as follows:

1. **material gaps /scope** - areas or issues of consumer law or private international law (PIL) with special consumer relevance not covered by EU law to date;
2. **procedural issues and differences** - differences in burden of proof, procedural rights of investigating bodies, statutory limitation periods, costs and other obstacles for consumers who wish to pursue their rights, duration of procedures, consumer access to justice and redress;
3. **inconsistencies, issues not updated to developments in real economy** - gaps and overlaps in legislation caused by technological change (such as digital content and mobile payments);
4. **transposition issues** - refers to delays, differences in interpretation and language issues which result in Member State non-compliance or problems in resolving cross-border infringements;
5. **minimum harmonisation** - permits the 'gold plating' of legislative provisions in Member States beyond the minimum established in EU legislation and thus distorts a level playing field and protection for consumers and businesses in the internal market;
6. **gaps and problems of cooperation between Member States / cross-border issues** - differences in anti-spam/cold-call rules, lack of protection for consumers residing in Member States other than the one from which the spam originates, especially when one Member State has Robinson lists<sup>6</sup> while the other has a no-consent rule;
7. **gaps in enforcement, sanctions, penalties not sufficient** - since only 1 out of 20 passengers with compensation rights will go to court (w.r.t. passengers rights Regulations<sup>7</sup>), airlines increasingly dodge their obligations or wait to be sued. Enforcement is less effective as a consequence.

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<sup>6</sup> A Robinson list or Mail Preference Service (MPS) list is an opt-out list of people who do not wish to receive marketing transmissions either by postal mail, email, telephone or fax. Contacts are typically blacklisted to prevent the person receiving spam or junk mail of this type.

<sup>7</sup> Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91;

The consumer *acquis* was systematically reviewed to identify the presence of one or more of the above gaps. Gaps falling outside of the scope of the study and those anticipated to be resolved by forthcoming legislation were then eliminated from further consideration. A succinct list of gaps remained which became the focus for the rest of this study.

### **Legal Basis for EU Action**

The legal basis for EU Action was examined in depth when finalising the list of gaps which could be resolved by EU legislation.

Article 4(2) TFEU provides that competence shall be shared between the Union and the Member States in the area of consumer protection. The importance of consumer protection is highlighted in Article 12 since *“consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities”*. In addition, Article 114(3) sets a requirement on the Commission, in relation to the approximation of laws, to take as a base a high level of protection with regard to consumer protection, taking into account any new developments based on scientific facts.

In addition to the provisions ensuring a high level of consumer protection, the provisions of the TFEU relating to free movement were examined. The principles of the internal market are set out in Article 26 which provides that *“the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties”*. In relation to consumers and the right to benefit of services across the EU Member States, Article 56 *“prohibits any restrictions on freedom to provide services in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended”*.

The core legal basis for consumer legislation is Article 169, with paragraph 1 providing that *“In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information”*. In order to contribute to fulfilling these objectives, Article 169(2) places an obligation on the Union to adopt: (a) measures pursuant to Article 114 in the context of the completion of the internal market; and (b) measures which support, supplement and monitor the policy pursued by the Member States. For the purposes of this Research Paper, it is important to note that Article 169(4) provides that Member States are not prevented from *“maintaining or introducing more stringent protective measures”* as long as they are compatible with the Treaties. This provision needs to be taken into account when examining minimum harmonisation of consumer legislation.

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Regulation 1177/2010 is concerning rights of passengers when travelling by sea and inland waterway; Regulation 181/2011 concerning the rights of passengers in bus and coach transport; and Regulation 1371/2007 on Rail Passengers' Rights and Obligations.

### 1.3.2 Task 2: Selection of representative case studies

Following the identification of the gaps in consumer legislation, further analysis was undertaken in this task to operationalise each problem, omitting those which were found to be more 'theoretic' in nature, with little if any impact on consumers and businesses. Case studies were then developed for the remaining gaps to dimension each, referencing a real world or hypothetical example of the gap and the problems it creates for consumers and/or businesses. The scale of the impacts on those stakeholders affected was then inferred, helping to initiate Task 3. In order to dimension these costs, a broad typology of costs was followed. This included costs relating to legal uncertainty (e.g. costs of litigation and legal advice), costs of delays and higher prices paid by consumers due to lack of competition and the functioning of the internal market. Of those case studies developed, four have been taken forward to Task 3 as representative of the CoNE in the consumer *acquis*.

### 1.3.3 Task 3 : Quantification of the scale of CoNE

The first step in quantification required the consultants to identify which (individuals, household and businesses) and how each stakeholder is affected by the relevant gap in EU legislation. The case studies compiled in Task 2 informed this process by considering the practical implications of each gap (i.e. the population affected and/or the magnitude of unit costs anticipated).

The following typologies of costs were considered in this process:

- The **direct economic impacts** on both businesses and consumers, either resulting from changes to the operation and conduct of business (i.e. transaction costs or menu costs from the need to change information on a website to be compliant with national law in another EU Member State), or from the direct consumer detriment incurred by individuals who pay a higher price for goods and services than would otherwise be charged if the gap was resolved and the single market was complete.
- **Indirect impacts** on businesses and consumers where the CoNE result in businesses becoming less innovative or competitive from the lack of an internal market which encourages competition, the exchange of knowledge, and realisation of scale economies. This could include a lack of choice for consumers as traders are discouraged from trading cross-border.
- The **administrative costs** incurred by businesses and consumers engaged in the single market which would otherwise be removed in a better-functioning internal market. This can include the costs of registering and licensing of businesses wishing to trade cross border.
- **Legal costs** incurred by businesses and consumers where the gaps in consumer legislation result in generating legal uncertainty. This can include the costs of seeking external legal advice to validate cross-border contracts or mediate in cross-border disputes.
- **Social impacts** on stakeholders and society more generally, including the emotional costs of mis-sold products and the consumer detriment incurred by society from gaps in consumer protection.

- **Wider economic impacts** include the aggregate impacts on employment and GDP resulting from the direct costs and legal uncertainty described above. This category of impact captures to some degree the ‘deterrent’ impact of not having gaps in consumer legislation and the ‘externality’ impact of consumers and traders lacking confidence in the single market.

Due to the wide variety of the gaps identified in consumer legislation and the sectors affected, the approach to quantification is tailored to each case study based on the evidence available from literature sources including Eurostat statistics, European Commission and Parliament research papers, policy documents and evaluations on the topics and sectors of concern. In addition, the consultants have sourced a large body of available industry information (positions papers, newsletters and statistical briefs) to help quantify current activity and the unit CoNE.

Any assumptions used in the analysis are reported and referenced. However, in some cases we have been unable to find evidence of the number of consumers or businesses affected by a specific gap and as such it has been difficult to attribute relevant CoNE. For illustrative purposes, a marginal change has been assumed (typical 0.5-1 per cent) to provide the reader with a conservative indication of the minimum possible scale of costs if only a small proportion of the population are affected by the gaps in legislation. This approach is consistent with that employed by the UK Office of Fair Trading (OFT), now the Competition and Markets Authority (CMA), in evaluations on the effects of consumer market interventions. In the absence of data, the most conservative of assumptions are used, so that the end estimate is considered a lower bound of potential impacts.

Top-down and bottom-up approaches have been applied depending on data availability. Typically the unit CoNE have been quantified before scaling up to Member State and European level based on activity data or failing that GDP and population figures obtained from Eurostat. In other cases, European total costs have been calculated which can be apportioned to Member States based on GDP or population. Given the nature of the quantification and the mixture of approaches used, the estimates are very much intended as an indicative ‘snap-shot’ of the CoNE.

Simple Microsoft Excel spreadsheets were used for each defined gap in the consumer *acquis*. When scaling the CoNE on the basis of unit costs obtained from Member States outside the Eurozone, an exchange rate of £1=€1.2 has been applied and figures inflated to 2012 values where appropriate. When calculating administrative costs, they are calculated using the EU’s Standard Cost Model based on a 35 hour working week and using average wage costs relevant to the context of the legislative gap.

## 1.4 Report Structure

The remainder of the report has the following structure:

- Section 2: The Cost of Non-Europe in the consumer *acquis*;
- Section 3: Development of representative case studies;
- Section 4: Quantification of the CoNE; and
- Section 5: Concluding remarks.

## 2. The Cost of Non-Europe in the Consumer Acquis

To identify gaps in the Consumer *Acquis* which might generate CoNE, the legislative instruments of the Consumer *Acquis* have been mapped in this section. A number of studies undertaken on behalf of the European Commission and European Parliament documenting the progress of consumer legislation have been used to inform this analysis. Recognising that revisions to the consumer *acquis* are on-going, the scope of this exercise is limited to legislation transposed by 31 December 2013.

Prior to reviewing the legislation, the development of the Consumer *Acquis* is presented as an introduction to how gaps have been identified and resolved by current legislation.

### 2.1 Development of the Consumer Acquis

#### 2.1.1 A shift from a vertical to horizontal approach for Consumer Protection

Prior to the adoption of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (known as the 'Unfair Commercial Practices Directive'),<sup>8</sup> consumer protection legislation was mostly based on a vertical approach, with different legislative instruments adopted to provide specific solutions to particular problems. The vertical approach led to legislative fragmentation as the relationship between different instruments was often unclear and relevant provisions were uncoordinated across instruments.

#### 2.1.2 The Unfair Commercial Practices Directive

The Unfair Commercial Practices Directive ('UCPD') created a separate comprehensive legal framework protecting consumers against all forms of unfair commercial practices, before, during and after a commercial transaction. The Directive is applicable to advertising practices which harm the economic interests of consumers, irrespective of whether it affects the interests of a competitor.

The aim of the Directive is to ensure that consumers were not exposed or misled by marketing practices considered to be aggressive. It also aims to ensure that all claims made by traders within the EU are clear, substantiated and accurate. By fulfilling this objective, consumers should be able to make informed choices. The UCPD adopted a horizontal approach, with the instrument covering all B2C online and offline transactions for both goods and services.

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<sup>8</sup> Directive 2005/29/EC of the European Parliament and of the council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:en:PDF>.

### 2.1.3 The Consumer Rights Directive

Directive 2011/83/EC on Consumer Rights<sup>9</sup> also adopted a horizontal approach. The Consumer Rights Directive (CRD) replaced Directive 97/7/EC on the protection of consumers in respect of distance contracts and Directive 85/577/EC protecting consumers in respect of contracts negotiated away from business premises (the so-called 'Doorstep Selling Directive'). The CRD provides common definitions for use in consumer legislation such as the 'consumer' and 'trader'. Article 3 of the CRD relating to the scope provides that the Directive shall not apply to contracts in a number of different areas, including: social services; healthcare; gambling; financial services; and real estate. Chapter II of the CRD contains provisions relating to information to be provided to consumers by traders prior to the conclusion of all contracts. Chapter III outlines provisions for specific information requirements for distance and off-premises contracts. Rules of delivery and passing of risk are provided for in Chapter IV, with these rules applicable to contracts for the sale of goods as well as for services contracts. Enforcement provisions are outlined in Chapter V, with Article 23 providing an obligation on Member States to ensure that '*adequate and effective means exist to ensure compliance with the Directive*'.

With regard to cooling off (right of withdrawal) periods, the CRD extended the period under which consumers can withdraw from a sales contract from seven to fourteen days. This provides consumers with additional time to return goods if for whatever reason they change their mind. The CRD also extended this right of withdrawal to online auctions, such as eBay, though the goods bought in auctions can only be returned when bought from a professional seller.

The CRD also has a positive impact on consumer rights much wider than the Directive itself. For example, with regard to passenger contracts, transparency for passengers is increased when entering into contracts online such as the purchase of tickets due to the CRD. The Directive explicitly bans pre-ticked boxes as well as internet cost traps and any additional charges which passengers were not informed of before entering into the contract. The CRD also prohibits traders to charge fees for the use of means of payment, for example credit cards, that exceed the cost borne by the trader for the use of these means.<sup>10</sup>

The CRD significantly increased harmonisation of the most important elements of consumer contracts, particularly relating to online contracts which are now considered most important sales channel for cross-border contracts. In repealing Council Directive 85/577/EC and Directive 97/7/EC, the Commission wished to '*lay down standard rules for the common aspects of distance and off-premises contracts, moving away from the minimum harmonisation approach in the former Directives whilst allowing Member States to maintain or*

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<sup>9</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:01:EN:HTML>.

<sup>10</sup> Article 19 of CRD.

*adopt national rules in relation to certain aspects*'.<sup>11</sup> Member States are only allowed to diverge from these rules in certain exceptional circumstances.

## **2.2 Gaps existing in the Consumer Acquis**

The different instruments of the Consumer *Acquis* are now examined in turn.

Table 1 in the next page provides an overview of the legislative instruments, the gaps identified and the reasoning behind discarding or selecting for further examination of each gap.

By examining studies and literature, issues common to a number of Consumer *Acquis* instruments were identified:

- Concepts such as 'consumer', 'professional', 'trader';
- The length of cooling off periods; and
- Modalities for the exercise of the right of withdrawal.

It is understood that the CRD addresses many of these issues of relevance to all instruments, with definitions provided for different concepts, and modalities set out relating to the right of withdrawal. However, differences still exist where consumers enter contracts outside the scope of the CRD.

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<sup>11</sup> Recital 2 of CRD.

**Table 1 Identification of legislative and implementation gaps in the Consumer *Acquis***

Legislative Instrument	Identified Gaps	Reason for Discarding/Retaining
<i>Horizontal Instruments</i>		
Directive 85/577/EC on Doorstep Selling	<p>A fragmented approach existed in the Member States, with some extending the scope of application of the Directive to their national doorstep selling laws and broadening the protection provided by the Directive to other persons or situations:</p> <ul style="list-style-type: none"> <li>• Addition of other situations than those covered by Article 3 or prohibiting doorstep selling of specific goods in general such as contracts concluded in public places, at fairs and exhibitions</li> <li>• Not making use of restrictive options/exemptions provided in the Directive.</li> </ul> <p>The Consumer Law Compendium<sup>12</sup> also identified a gap in the definition of ‘consumer’. The definition of ‘consumer’ does not relate to legal persons. Some Member States extended the notion of consumer to certain legal persons (AT, BE, EL, ES). This creates fragmentation in who is considered to be a consumer.</p> <p>Impact: This fragmentation had led to unequal protection for consumers due to the extension of the definition of consumer to certain legal persons.</p>	<p>The problem of divergent definitions and the gaps in coverage of the instrument have been discarded due to the CRD repealing Council Directive 85/577/EC with full harmonisation introduced, with some limited exceptions of minimum harmonisation remaining. For example, Article 6(7), allows Member States to maintain or introduce requirements in their national law concerning contractual information in order to ensure that information is understood easily by the consumer. In addition, Article 9(3) relating to the right of withdrawal enables Member States to ‘maintain existing national legislation prohibiting the trader from collecting the payment from the consumer during the given period after the conclusion of the contract’.<sup>13</sup> This exceptional minimum harmonisation can lead to new divergences in consumer protection since Member States can go beyond the provisions of the CRD. This can therefore lead to imbalanced protection from one Member State to another.</p>
Directive 93/13/EC on Unfair Contract Terms	<p>Many Member States maintain a broad scope of application of their national laws on reviewing contract terms by:</p>	<p>The problem of divergent national legislation and hence obstacles to cross-border trade remains due to considerable</p>

<sup>12</sup> Available at [http://ec.europa.eu/consumers/rights/docs/consumer\\_law\\_compendium\\_comparative\\_analysis\\_en\\_final.pdf](http://ec.europa.eu/consumers/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf).

<sup>13</sup> Article 7(4) of the CRD also provides flexibility to Member States, with no obligation placed on them to apply the provisions of the paragraph relating to the provision of information by the trader to the consumer.

Legislative Instrument	Identified Gaps	Reason for Discarding/Retaining
Directive 97/7/EC on Distance Selling	<ul style="list-style-type: none"> <li>• Broadening the notion of consumer;</li> <li>• Monitoring contractual terms which reflect mandatory provisions; and</li> <li>• Monitoring individually negotiated terms.</li> </ul> <p>Member States have developed a huge body of law with definitions and notions of unfair contract terms in consumer and also in business to business transactions before the EU began legislating in this area, intertwined and related to the law in general and to society and culture. There is no full agreement in Europe on what is considered fair, or unfair, both in contracts and otherwise.</p> <p>Impact: Reduced legal certainty for the consumer due to fragmentation leading to higher legal costs.</p>	<p>opposition against further harmonisation in this area.</p> <p>The original Commission's CRD proposal was to encompass Directive 93/13/EC on Unfair Contract Terms, with a complete overhaul of the provisions and repealing this Directive.</p> <p>The CRD has amended Directive 93/13/EC imposing an obligation on Member States to inform the Commission when they have made changes such as extending the unfairness assessment to individually negotiated contract terms and the listing of contractual terms which are considered as unfair. The aim of this is to monitor possible convergence on the matter and to eventually consider a new proposal for further harmonisation in this area.</p>
	<p>The Consumer Law Compendium identified a gap in relation to the definition of auction. It was highlighted that a new definition of auction should be included in order to clarify whether eBay auctions fall under the exception provided in the Directive or not.</p> <p>Member States currently take a fragmented approach in relation to the scope of the 'auction' definition, thus leading to fragmented protection of consumers when entering into distance selling contracts through this mode of sale. This therefore leads to unequal protection for consumers.</p>	<p>Though the CRD includes a definition of 'public auction'<sup>14</sup>, the CRD does not seem to cover online auctions. This can provide limited protection to consumers entering into contracts through online auctions.</p> <p>The Directive was repealed and replaced by the CRD. Some limitations remain, however. For example, Article 9(3) relating to the right of withdrawal enables Member States to 'maintain existing national legislation prohibiting the trader from collecting</p>

<sup>14</sup> The CRD defines a public auction, in Article 2(13) as a 'method of sale where goods or services are offered by the trader to consumers, who attend or are given the possibility to attend the auction in person, through a transparent, competitive bidding procedure run by an auctioneer and where the successful bidder is bound to purchase the goods or services'.

Legislative Instrument	Identified Gaps	Reason for Discarding/Retaining
Directive 98/6 on Price Indication	No gaps identified.	<p>the payment from the consumer during the given period after the conclusion of the contract'.<sup>15</sup> This exceptional minimum harmonisation can lead to new divergences in consumer protection since Member States can go beyond the provisions of the CRD (i.e. 'gold plating'). This can therefore lead to imbalanced protection from one Member State to another.</p> <p>This gap will be further examined.</p>
Directive 98/27 on Injunctions	No significant gaps identified.	
Directive 99/44/EC on Consumer Sales	<p>Transposition issues were identified by the Commission in its 2007 Implementation Report.</p> <p>The purpose of this Directive is to ensure a minimum level of harmonisation of the provisions relating to the sale of consumer goods and associated guarantees (Recital 24).</p> <p>Article 8(2) provides that Member States are free to adopt or maintain in force more stringent provisions than those provided for by the Directive in order to ensure a higher level of consumer protection.</p> <p>In order to ensure free movement of goods and freedom to provide services, the conditions applied to consumers in relation to the purchase of goods and the receipt of services must be as uniform as possible.</p> <p>Gaps identified are:</p>	<p>This gap is retained for further examination.</p> <p>The Directive was amended by the CRD with a requirement placed on Member States to inform the Commission about the adoption of specific national provisions in certain areas. A minimum level of harmonisation still exists. The original Directive was not repealed by the CRD due to opposition from Member States.</p> <p>The proposal for a Common European Sales Law regulation (CESL) was adopted by the European Commission in October 2011. This would introduce a 28th regime of law covering B2C contracts. The proposal consists of a set of rules which co-exist alongside national law and which can be 'chosen' by the parties as the legal basis for the contract. The proposal would set aside</p>

<sup>15</sup> Article 7(4) of the CRD also provides flexibility to Member States, with no obligation placed on them to apply the provisions of the paragraph relating to the provision of information by the trader to the consumer.

Legislative Instrument	Identified Gaps	Reason for Discarding/Retaining
	<ul style="list-style-type: none"> <li>• Definition of ‘goods’ particularly regarding software and other digital products;</li> <li>• Consideration relating to direct producer liability;</li> <li>• Legal and commercial guarantees for digital products do not fall under the scope of the Consumer Sales Directive; and</li> <li>• Remedies in relation to damages/software/spare parts and after-sales service/cross border enforcement.</li> </ul> <p>Impact: Consumers face legal uncertainty and a lack of protection when entering into sales relating to digital products.</p>	<p>Private International Law (i.e. Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I)<sup>16</sup>) and would circumvent the application of the relevant national mandatory consumer protection provisions. The European Parliament’s Research Paper on the Economic Aspects of the European Commission’s Impact Assessment<sup>17</sup> examined the methodology used by the Commission for calculating the costs originating from the differences in contract law. Though it welcomed the Commission’s work, it highlighted that other transaction costs, such as transportation costs, language and cultural differences, distance, differences in purchasing power, problems in enforcing legislation should have been taken into account.</p> <p>Consumer organisations consider that the proposal would not provide added value. It would introduce a parallel system of EU legislation which would lead to consumers and businesses being faced with diverging EU rules and standards of protection for the same products or digital contents. The consumer organisations believe that this would:</p> <ul style="list-style-type: none"> <li>• Increase legal complexity;</li> <li>• Introduce greater legal uncertainty;</li> <li>• Undermine existing rules on private international law; and</li> <li>• Undermine consumer protection standards in a number of countries.</li> </ul>

<sup>16</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0006:en:PDF>

<sup>17</sup> Available at <http://www.europarl.europa.eu/committees/en/juri/studies.html?action=1&tab=last>

Legislative Instrument	Identified Gaps	Reason for Discarding/Retaining
Directive 2005/29/EC Unfair Commercial Practices Directive	<p>A full harmonisation clause is provided in Article 3 though it is limited in scope with regard to contract law.</p> <p>The Directive does not harmonise enforcement systems. Article 11 provides that Member States are free to choose the enforcement mechanisms which best suit their legal tradition as long as they ensure adequate and effective means that exist to prevent unfair commercial practices.</p> <p>Article 3(9) provides that in relation to ‘financial services’ and immovable property, Member States may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates.</p> <p>Gaps therefore exist only in relation to financial services and immovable property.</p>	<p>The proposal could also generate significant compliance and implementation costs because in order to make an informed decision, businesses and consumers would need to understand both Common European Sales Law and national rules. They will need to determine the appropriate basis for each given transaction.</p> <p>The gaps existing in the Directive will be examined in depth.</p> <p>With regard to consumer to business transactions, national enforcers have signaled cases where consumers were the victims of unfair commercial practices while selling products to traders.</p> <p>Cases have been reported where consumers have sold their antiques and jewelry to traders and have been misled by the representations made by the traders in relation to the characteristics and/or value of the items.</p> <p>This reduces confidence in the internal market and provides legal uncertainty for consumers.</p> <p>Member States are prevented in their national legislation from prohibiting commercial practices that are not listed in the Directive’s annex. The CJEU has highlighted this problem in case law. This reduces consumer protection, creating legal uncertainty for consumers.</p> <p>Businesses and consumers have been affected as confidence in the internal market is lost and cross-border cases become</p>

Legislative Instrument	Identified Gaps	Reason for Discarding/Retaining
Directive on copyright and society	<p data-bbox="383 1023 517 1078">2001/29/EC information</p> <p data-bbox="539 1023 1346 1078">It is not sufficiently adapted to the digital reality. It is considered that the principles of copyright are too engrained in the offline world.</p> <p data-bbox="539 1098 1346 1182">The current rules impede the distribution of protected works and confront users, both businesses and consumers, with a list of ambiguities and exceptions that do not take into account the daily reality. The Commission</p>	<p data-bbox="1368 355 1805 379">protracted, with high costs to authorities.</p> <p data-bbox="1368 400 2067 663">The Commission Communication on the application of the Unfair Commercial Practices Directive<sup>18</sup> will need to be taken into account. The results of the stakeholder consultation undertaken by the Commission show that the vast majority of Member States and stakeholders do not support the extension of the Directive to include B2B, C2C or C2B transactions. The Commission considers that there currently is no support for such extension. Key priorities for further action were identified relating to:</p> <ul data-bbox="1368 687 2067 983" style="list-style-type: none"> <li data-bbox="1368 687 2067 743">• Ensuring the full conformity of national laws with the Directive;</li> <li data-bbox="1368 762 2067 903">• Ensuring uniform and adequate application of the Directive in the Member States - this includes the further development of a guidance document in response to the input received from national enforcers and other stakeholders; and</li> <li data-bbox="1368 927 2067 983">• Enhancing enforcement and administrative cooperation between Member States.</li> </ul>

<sup>18</sup> COM(2013) 138 final, available at: [http://ec.europa.eu/justice/consumer-marketing/files/ucpd\\_communication\\_en.pdf](http://ec.europa.eu/justice/consumer-marketing/files/ucpd_communication_en.pdf)

Legislative Instrument	Identified Gaps	Reason for Discarding/Retaining
	believes that a fundamental reform of copyright legislation has become necessary. <sup>19</sup>	its links with international treaties.
<i>Vertical instruments - Travel</i>		
Directive 90/314 on Package Travel	<p>The Directive is not considered to be in line with the developments in the digital age, with many consumers now purchasing package travel in means other than travel agencies.</p> <p>The scope is restrictive, with a need for inclusion of tailor-made packages offered by travel agencies.</p> <p>The scope is considered to be too narrow with not enough protection rights for consumers.</p> <p>Impact: Consumers are not adequately protected with legal uncertainty due to the restricted scope of the current Directive which does not address modern trends.</p>	<p>The problems identified will likely be addressed by the co-legislators revising the Package Travel Directive.</p> <p>The Commission published a Communication in 2013<sup>20</sup> relating to 'bringing the EU package travel rules into the digital age'. The Commission identified the need to respond to widespread calls from industry, consumers and legislators to keep the Directive up to date and fit for the digital age.</p> <p>The proposed new Directive<sup>21</sup> clarifies the provisions of the existing Directive and modernises it with legal and market developments. The proposal aims to widen the scope and includes new commonly used combined travel arrangements. The proposal also provides for new cancellation rights for passengers as well as clearer remedies and a better system of redress. The insolvency protection rule is also clarified by the proposal. The proposal enhances consumer protection at a reasonable cost to industry while leaving businesses and</p>

<sup>19</sup> European Commission Memo 5 December 2012 'Commission agrees way forward for modernising copyright in the digital economy', available at [http://europa.eu/rapid/press-release\\_MEMO-12-950\\_en.htm](http://europa.eu/rapid/press-release_MEMO-12-950_en.htm).

<sup>20</sup> COM(2013) 513 final.

<sup>21</sup> COM(2013) 512 final Proposal for a Directive of the European Parliament and of the Council on package travel and assisted travel arrangements, amending Regulation (EC) No 2006/2004, Directive 2011/83/EU and repealing Council Directive 90/314/EC, available at [http://ec.europa.eu/justice/consumer-marketing/files/com\\_2013\\_512\\_en.pdf](http://ec.europa.eu/justice/consumer-marketing/files/com_2013_512_en.pdf)

Legislative Instrument	Identified Gaps	Reason for Discarding/Retaining
		consumers free to choose what they wish to buy and sell.
Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts	<p>The Timeshare Directive was amended in 2008 in order to:</p> <ul style="list-style-type: none"> <li>• Impose an obligation to provide information to consumers;</li> <li>• Increase the cooling off period; and</li> <li>• Extend the scope of the Directive to new products.</li> </ul>	<p>This gap should be discarded.</p> <p>The Commission is in the process of reviewing the implementation of the 2008 Directive with a report to be submitted to the European Parliament and the Council in February 2014. Gaps may be identified following an evaluation report to be undertaken over the following months though currently the Directive has been transposed correctly by all Member States.</p>
<i>Vertical instruments - Transport</i>		
<p>Regulations 261/2004 and 2027/97 on Air Passenger Rights<sup>22</sup></p> <p>Regulation 1371/2007 on Rail Passenger Rights</p> <p>Regulation 1177/2010 on Maritime and Inland Waterway Passenger Rights</p> <p>Regulation 181/2011 on bus and coach passenger rights</p>	<p>There is a lack of uniform enforcement throughout the EU.</p> <p>Divergences in national legal frameworks, administrative systems and judicial procedures increase costs and legal uncertainty for both the aviation industry and passengers.</p> <p>The Regulation does not provide a definition of complaint handling nor does it identify a specific competent national enforcement body for complaint handling.</p> <p>The Commission considered that there are three areas where measures are still necessary to improve the application of the Air Passenger Regulation. This includes the effective harmonised enforcement of EU rights.<sup>23</sup></p> <p>The Commission in March 2013 proposed a revision to Regulation</p>	<p>The industries and passengers for the different transport modes are distinct. Though the precise content of the Regulations vary, the typology of rights guaranteed by the existing regulations are considered to be comparable:</p> <ul style="list-style-type: none"> <li>• Right to information;</li> <li>• Right to reimbursement;</li> <li>• Re-routing;</li> <li>• Assistance while waiting to travel; and</li> <li>• Compensation under certain conditions.</li> </ul> <p>The problems arising with these Regulations relate more to the</p>

<sup>22</sup> Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91.

<sup>23</sup> COM(2011) 174 final - Communication from the Commission to the European Parliament and the Council on the application of Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

Legislative Instrument	Identified Gaps	Reason for Discarding/Retaining
	261/2004. The aim of the proposal is to promote air passengers' interests through guaranteeing that a high level of protection for passengers is respected by air carriers.	lack of enforcement throughout the EU since, in many Member States, enforcement is not effective, proportionate and dissuasive enough to provide carriers with an economic incentive to comply with the Regulation.
<i>Vertical instruments - E-commerce and communication</i>		
Directive 2000/31/EC on e-commerce	<p>In contrast to the Consumer Sales Directive, the UCPD fully covers contracts for the supply of cloud computing services. It is uncertain, however, how these rules should apply in the digital environment. Consumers are confronted with disclaimers, contractual terms and mentions which are difficult to understand.</p> <p>These contracts often include unfair clauses such as terms excluding the trader's liability in case of damages or lack of conformity of the service with the contract terms, allowing unilateral changes of terms, conditions or the characteristics of the product at the supplier's entire discretion, within their jurisdiction and/or with mandatory arbitration clauses.</p> <p>Gaps relate to:</p> <ul style="list-style-type: none"> <li>• There are no harmonised notice-and-takedown procedures which results in legal uncertainty for online intermediaries and practical difficulties for right holders to take down illegal material;</li> <li>• Special liability regime for online intermediaries is focused too much on Web 1.0 services which leaves an entire list of new service models such as Web 2.0 and cloud computing services unprotected; and</li> </ul>	<p>The gaps existing in relation to the scope of the Directive will be examined due to the emphasis placed on modernising legislation in this area and the high consumer costs associated with the gaps.</p> <p>The European Commission's Action Plan adopted in 2012 for e-Commerce<sup>24</sup> identified the key areas where action is needed. Issues that are still missing in the e-Commerce Action Plan are the promotion of multi-territorial licensing, the adoption of forward-looking copyright exceptions and limitations as well as reforming copyright levies systems.</p>

<sup>24</sup> COM(2011) 942 final - Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - A coherent framework for building trust in the Digital Single Market for e-commerce and online services available at: [http://ec.europa.eu/internal\\_market/e-commerce/docs/communication2012/COM2011\\_942\\_en.pdf](http://ec.europa.eu/internal_market/e-commerce/docs/communication2012/COM2011_942_en.pdf).

Legislative Instrument	Identified Gaps	Reason for Discarding/Retaining
	<ul style="list-style-type: none"> <li>No injunction protection of online intermediaries.</li> </ul> <p>Impact: High compliance costs and low consumer protection. High legal costs.</p>	
Directive ePrivacy	2002/58/EC The scope of the Directive is fairly limited. It relates mainly to telecoms confidentiality and protection against unsolicited messages/spam. Unequal protection therefore currently exists.  The Directive has a limited scope which does not cover all types of unsolicited messages e.g. instant messaging and spam through Bluetooth.	The use (and sale) of private data has become an important economic factor for business enterprises, with the same level of data protection being a factor for a level playing field.  Data privacy is fundamentally important for consumers, considered to be a necessary 'part of the deal' in modern transactions and important for consumer decisions. However, the issue of data privacy and data protection encompasses all aspects of the EU <i>acquis</i> and not simply that relating to consumer protection. It is therefore proposed to discard the gap for the purposes of the Research Paper since it is necessary to limit the examination of gaps specifically associated with the consumer <i>acquis</i> .
Directive eInvoicing Directive	2006/112/EC Suffers from a lack of harmonisation, a lack of legal clarity, and unnecessary discrimination between electronic and paper invoices.	The proposal for a new eInvoicing Directive (COM (2009) 21 final) addresses these issues by providing for an equal treatment of paper and electronic invoices.
Directive eMoney Directive	2009/110/EC A few ambiguities still exist.  Legal treatment of electronic money services (platform payment and mobile payment systems) is unclear.  Waiver regime not applicable at European level.	The new Directive 2009/110/EC applies a neutral definition of electronic money, therefore avoiding differences in protection due to future technological developments. For this reason, legal treatment should be the same. Article 16 of the Directive specifically prohibits Member States introducing provisions which differ to that of the Directive for its key provisions. Any

Legislative Instrument	Identified Gaps	Reason for Discarding/Retaining
<i>Vertical instruments – financial services</i>		
Directive 2008/48/EC on credit agreements for consumers	<p>The Directive provides that a comprehensible set of information should be given to consumers in good time before a contract is concluded and also as part of the credit agreement.</p> <p>The Directive is not applicable to credit agreements that are:</p> <ul style="list-style-type: none"> <li>• Secured by a mortgage;</li> <li>• Concluded for the purchase of land or immovable property;</li> <li>• Whose total amount is less than €200 or more than €75 000;</li> <li>• Relating to lease or hire where there is no obligation to purchase;</li> <li>• Granted free of interest without other charges or in the form of an overdraft facility;</li> <li>• Concluded with an investment company;</li> <li>• The result of a judicial ruling;</li> <li>• Linked to the payment or to the surety of a debt; and</li> <li>• Linked to loans granted to a limited group of the public.</li> </ul> <p>In the areas and/or for aspects not covered by this Directive, the UCPD applies and completes the framework by filling the gaps. However, the UCPD applies minimum harmonisation only in relation to financial services and to</p>	<p>gaps would appear minor from this casual observation. Further, the majority of the Directive’s provisions relate to e-money institutions and “electronic money issues’ and not consumers.</p> <p>Credit agreements relating to residential immovable property were debated by the European Parliament and the Council due to the proposal for a Directive on credit agreements relating to residential property. The Directive was adopted on 10 December 2013 by the European Parliament. It will therefore not be covered in the scope of the report.<sup>26</sup></p> <p>Credit agreements in the area of financial services, such as those concluded with an investment company will, however, be covered since they can significantly impact the protection of a consumer moving across borders.</p>

<sup>26</sup> Information available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-341>.

Legislative Instrument	Identified Gaps	Reason for Discarding/Retaining
	immovable property. Member States therefore may go beyond the UCPD requirements and impose requirements that are more restrictive or prescriptive in the areas and/or for aspects not covered by the CCD. <sup>25</sup>	
<i>Vertical Instruments – Media, gambling and online gaming</i>		
Directive 2010/13/EU Audiovisual Media Services (AVMS) Directive	EU countries can restrict the transmission of unsuitable audiovisual content. However, what content is restricted can vary by Member State. Consequently, a consumer can purchase audiovisual content in a Member State other than their own which cannot be retransmitted or viewed in their own Member State or any other. As the country of origin principle applies, the gap is that consumers (particularly minors) are not equally protected.	As this gap relates to differences in national law governing what is decent and suitable for minors and vulnerable groups, this gap is outside the scope of this study.
Gambling	<p>A diverse regulatory framework for gambling currently exists in the EU. In some Member States, a public or private operator has an exclusive right to regulate the industry. In other Member States, licensing systems exist for more than one operator.</p> <p>It is estimated that about 7 million Europeans gamble online.<sup>27</sup> It is also estimated that almost 2 per cent of the European population suffers from gambling addiction.<sup>28</sup></p> <p>Consumers can exploit the different forms of gambling services offered across Europe through the use of the Internet. This, however, can expose them to</p>	<p>There is currently no EU legislation on online gambling. The Commission, in its current work in this area, is not proposing EU-wide legislation on online gambling. Instead, it is proposing a set of common actions and principles on protection.</p> <p>Due to the significant impacts the lack of EU regulation can have on consumers, particularly vulnerable consumers including minors, the existing gaps will be examined since the CoNE could be high if further regulation was introduced.</p>

<sup>25</sup> SWD(2012) 128 final - Guidelines on the application of Directive 2008/48/EC (Consumer Credit Directive) in relation to costs and the Annual Percentage Rate of charge.

<sup>27</sup> Barnier, M. (2012): "Online Betting and Gambling in Europe: from Consultation to Action" Speech given at the European Parliament conference "How to Regulate Betting and Gambling in Europe – Track record and future perspectives", Brussels 27 June 2012.

<sup>28</sup> Griffiths, M. (2010): Problem gambling in Europe: What do we know? *Casino and Gaming International*, 6(2), 81-84, available at: [http://www.academia.edu/429429/Griffiths\\_M.D.\\_2010\\_.Problem\\_gambling\\_in\\_Europe\\_What\\_do\\_we\\_know\\_Casino\\_and\\_Gaming\\_International\\_6\\_2\\_81-84](http://www.academia.edu/429429/Griffiths_M.D._2010_.Problem_gambling_in_Europe_What_do_we_know_Casino_and_Gaming_International_6_2_81-84), Presentation to European Parliament available at: [http://ec.europa.eu/internal\\_market/gambling/docs/conference-101012/griffiths\\_en.pdf](http://ec.europa.eu/internal_market/gambling/docs/conference-101012/griffiths_en.pdf).

Legislative Instrument	Identified Gaps	Reason for Discarding/Retaining
	<p>risks such as fraud.</p> <p>The Commission's work in this area has highlighted that children and other vulnerable groups require protection from online gambling. Member States are currently free to set the objectives of their policies on online gambling though are obliged to ensure their compliance with the provisions of the TFEU.</p> <p>Excluding gambling contracts from the CRD can expose consumers to situations where some contracts are unregulated.</p> <p>No clear rules exist either in relation to responsible advertising.</p>	

### 2.2.1 Gaps remaining in the Consumer Rights Directive

Once the CRD is fully operational, there will be a few remaining elements of consumer contract law that require further harmonisation and/or modernisation at EU level. It is proposed that each is taken forward for further analysis.

In summary, these gaps are:

- Commercial Guarantees for Digital Products – the current situation of legal uncertainty around digital products is causing detriment to consumers particularly relating to unfair contract terms. More legal certainty and modern consumer protection is needed at EU level;
- Consumer to Business (C2B) transactions in the UCPD Directive;
- Consumer to Consumer (C2C) transactions, specifically in relation to online auctions;
- Limited scope of the eCommerce Directive, specifically gaps in relation to cloud computing and Web 2.0 services; and
- Digital Content, specifically regarding consumer sales legislation.

In addition to the gaps that exist, a number of areas were excluded entirely from the scope of the CRD. The table above identifies a number of key areas such as financial services, passenger contracts and gambling. The scope of the CRD also does not cover real estate, health and social services.

### 2.2.2 Problems relating to Minimum Harmonisation

In addition to the main gaps identified above, many areas of the consumer *acquis* apply minimum harmonisation rules. A fragmented approach to legislation by not adopting full harmonisation introduces uncertainty for consumers considering to trade cross-border. Consumers are therefore discouraged from making purchases in a Member State other than their own and forego the benefits of the single market.

The absence of full harmonisation for traders, means that a trader wishing to offer goods and services to consumers in a Member State other than their own would be obliged to research the legislation in force in other Member States in order to ensure legal compliance. Legal uncertainty of this type would result in costs. Distortions of competition could also exist since traders in one country are subject to stricter rules than traders in another.

Although full harmonisation occurred in some provisions of the CRD, minimum harmonisation still exists in a number of instances. The provisions on ‘off premises’ and ‘distance contracts’ have been fully harmonised by the new Directive, but the old Directives 93/13 and 99/44 are left almost intact. These Directives continue to be based on the minimal harmonisation principle.

### 3. Development of representative case studies

This section of the report elaborates on eight of the identified gaps in consumer *acquis* from the previous section. Each case study presents a real world and/or hypothetical example of the gap and its impact on stakeholders.

#### 3.1 Gaps concerning commercial guarantees

Recent cases brought before national competent authorities suggest that there exists a high degree of legal uncertainty regarding commercial guarantees. One of the highest profile cases relates to the actions taken against Apple in Italy (see box below). Following this case, a formal notice was issued by the European Consumers' Organisation requesting that the company no longer sells products with a one-year warranty, requesting Member States to enforce the two year minimum guarantee as provided in EU legislation. However little was done as "*approaches to enforcement turned out to be very diversified and inconsistent at a national level*"<sup>29</sup>. A consumer website suggested only five of the requested eleven Member States took action against Apple in 2012 following the case originally brought by consumer authorities in Italy<sup>30</sup>. Consequently, consumers in the Member States are not afforded the same level of protection throughout the EU. This is a significant gap in the implementation of the consumer *acquis*, as unlike competition law, the EU does not have the right to take enforcement action on behalf of consumers.

##### Example

In December 2011, the Italian Competition Authority fined Apple for misleading practices and information regarding the guarantee on its hardware products. The matter concerned two aspects of Apple's commercial strategy:

1. The advertising of a 1 year limited 'manufacturer's warranty' which was found to mislead consumers about their benefits from the EU-wide minimum 2 year legal guarantee established by Directive 99/44/EC on consumer sales;
2. The promotion of the extension of the 1 year limited 'manufacturer's warranty' through the sale of the AppleCare Protection Plan. Consumers pay a considerable amount of money for this protection plan for protection they would have already under law.

The national authority fined the three incumbents confirming the misleading nature of the company's commercial strategy.

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<sup>29</sup> Reding, V. (2013): Towards a more coherent enforcement of EU consumer Rules, speech available at: [http://europa.eu/rapid/press-release\\_SPEECH-13-237\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-237_en.htm).

<sup>30</sup> Whittaker, Z. (2012): "Apple warranty ads should be examined, says EU justice chief", writing for Between the Lines, October 1, 2012, available at: <http://www.zdnet.com/apple-warranty-ads-should-be-examined-says-eu-justice-chief-7000005028/>.

### 3.2 Gaps concerning reverse type transactions

Various provisions in a number of EU legislative acts contain the notion that the consumer is naturally at the receiving end of a sale of goods or provision of services. However, there may be reverse type transactions where the consumer is actually selling or supplying a product, or providing a service – other than labour – to a business. Examples include the sale of artefacts, antiques and craft items to a trader, or testing products such as computer software in exchange for benefits, rebates or even a fee.

Entering sales infrequently and being unfamiliar with the market in which the good is to be sold, the consumer's knowledge of the value of the item is often limited, relying on their own intuition and the professionalism of the trader to get a fair price for the goods in question. National enforcers have signalled cases where consumers were the victims of unfair commercial practices while selling products to traders. However, it is unclear when interpreting EU provisions, whether these provisions apply to reverse type transactions.

Legal uncertainty in this respect may limit consumer's trust in traders, with the unforeseen consequence that the most vulnerable consumers may approach unregulated loan providers when in need of cash, rather than using more legitimate traders to sell used goods. Examples of this situation are provided in the box below.

**Example:**

Mary sells a gold necklace she inherited following her Grandmother's death to an antique trader. He informs her that the necklace is worth €1,000. Though Mary believed it to be worth more following comments made by her Grandmother before her death, she sells the necklace to the trader. She realises that she is misled by the representations made by the trader following the sale. Due to consumer protection legislation in her Member State, she is not provided with protection relating to this unfair commercial practice.

**Example:**

An auctioneer priced a rug at €900 and then auctioned it for €19,700. A few months later the same rug reached €7.2 million at an international auction.

In reverse type transactions, the consumer is not obliged to sell the good in question and can choose to whom to sell the good to. Unlike B2C transactions where the consumer may have little choice with whom to trade and is unable to influence the conditions of the transaction, the consumer has much greater freedom to contract in reverse type situations. The rationale for legislative protection is far less clear in such cases as in theory a gap should not exist (i.e. the consumer is not disadvantaged).

The value of any good offered for sale in a reverse type transaction is determined solely by what a trader is willing to pay and consumer is willing to accept at a point in time.

For a trader who purchases from the consumer and then resells the good to another trader, there is a risk that the amount the trader initially paid for the good is higher than what they are able to sell the item for. Like the consumer, the trader can also find that the item is worth much more than they sold it for. In such situations, should the trader also be compensated if the price was not 'fair'? Determining what is fair and what should be compensated is difficult in these types of transaction.

### 3.3 Gaps concerning consumer to consumer transactions

Gaps in the consumer *acquis* concerning consumer to consumer transactions, specifically relate to online auctions.

Online auctions involve the display of goods for sale on a website where the goods are generally sold to the highest bidder at a certain point in time. There may be a reserve price set for the goods, in which case they will not be sold unless the reserve is met. Some online auctions make use of a "buy now" option which allows a buyer to purchase goods at a specified price immediately. Such purchases are not "by auction".

Online auctions are conducted by the buyers and sellers themselves and there is no independent third party controlling the auction process. This makes it distinct from a standard auction, where an appointed auctioneer controls the process. Online, websites only provide a venue for the auction to take place. As a consequence, two gaps in consumer protection are apparent:

- **Distance sales:** Intermediaries (the website host for the auction) are not considered auctioneers and are therefore excluded from provisions relating to Distance Selling in the CRD. Goods purchased from professional sellers on online auctions are covered however, leaving a gap for consumer to consumer transactions. Rights to cancel are therefore not applicable, making it difficult for faulty or fake goods to be returned and refunds received by the buyer.
- **Liability:** The e-Commerce Directive limits the liability of intermediaries hosting third party content, compared to sales made through online retail stores. Consequently, Online Auction Intermediaries (AOI) face limited liability for the protection of Intellectual Property (IP) and the sale of fake or hazardous goods, which may discourage their resilience and limit efforts to eradicate the sale of such goods to consumers.

In the latter case, the Court of Justice of the European Union published its decision concerning the case of L'Oreal against eBay (CJEU Case C-324/09), which follows decisions made in relation to Google (joined cases C-236/08 and C-238/08). A much more restrictive interpretation of Article 14 of the E-commerce Directive in favour of Intellectual Property Rights owners was adopted<sup>31</sup>. This is of benefit to consumers, since tighter controls mean greater piece of mind when making purchases online. For

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<sup>31</sup> Stalla-Bourdillon, S. (2012): 'Liability Exemptions Wanted! Internet Intermediaries' Liability under UK Law'; Journal of International Commercial Law and Technology. Vol. 7, Issue 4(2012).

businesses, it protects IP and ensures a level playing field exists within the internal market.

With regard to the CRD, there still exist a potentially significant number of consumers who receive goods different to what they ordered, which can be faulty or fake who find it difficult to seek redress from consumers in C2C transactions and may also be deterred from making transactions online in the future. As the CRD applies to professional sellers, this gap only concerns consumer sellers as shown by the box below.

#### **Example**

Gemma, an Android phone enthusiast, searches the Internet to find the best deals for the newest version of the Raspberry phone. Through her search, she falls upon an offer of a Raspberry 5 on an online auction website, eBay. Although initially surprised by the low price offered for the phone by Jeremy, another Android enthusiast, Gemma makes a bid and is entitled to buy the phone at 50 per cent of its value. One week later, after receiving the phone in the post, she finds that the phone is in fact a shop replica of the Raspberry 5. Angry and frustrated, she attempts to seek redress from eBay who inform her that they are not responsible for the transaction between her and Jeremy.

Affecting only consumer sellers, this is considered a population which is difficult to quantify as data is not readily available on the number of consumer who have made purchases through online auctions, have faced difficulties and where the transaction was with another consumer opposed to a professional seller. Consequently, this gap has not been taken forward in Section 4 quantification of the CoNE.

### **3.4 Gaps relating to consumer financial services in the Consumer Rights Directive**

Alluded to in Section 1, there are many situations where consumers find themselves entering C2B transactions where the harmonised provisions of the CRD do not apply and therefore the level of consumer protection can be fragmented across the EU Member States, resulting in gaps. Examples include transactions conducted in financial services, healthcare, real estate, social services and passenger travel contracts.

While it is beyond the scope of this study to consider all the potential gaps, financial services provide an illustration of the issues facing consumers.

Only limited provisions of the CRD relate to financial services which are defined as any service of a banking, credit, insurance, personal pension, investment or payment nature (Article 2(13)). According to this definition, the CRD covers types of financial services not yet regulated at the EU level<sup>32</sup>, which could create gaps in consumer protection and

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<sup>32</sup> European Parliament (2010): The relationship between the Consumer Rights Directive proposal and the area of financial services, available at: <http://www.europarl.europa.eu/document/activities/cont/201108/20110825ATT25290/20110825ATT25290EN.pdf>.

uncertainty where overlaps in EU law exist. In addition, only certain provisions relate to financial services. Provisions relating to off-premises contracts, and unfair contract terms do apply, but general information obligations for financial services are excluded (typically they are outlined in sector-specific legislation) as are rules on distance contracts, consumer goods and guarantees which only apply to tangible products. Rights to withdrawal also do not explicitly cover financial services, although some Member States have adopted this provision for some consumer products like insurance.

Overall, this has resulted in some harmonised provisions of the CRD applying to financial services in some Member States, but not applying in others, creating gaps in consumer protection if trading cross-border. A recent Eurobarometer survey<sup>33</sup> on retail financial services highlights that 94 per cent of consumers have never bought a financial product outside their home country and only one per cent of have obtained credit cards, shares or bonds, or other insurance products outside their own country, while negligible numbers of people have purchased a mortgage, a personal loan, an investment fund or life insurance. The potential of the single market is clear as consumers could shop around and find the best deal. The box below provides a practical example of how consumers are affected by this gap.

#### **Example**

Carlos, a well-travelled Spanish resident living in the UK takes out an insurance policy with a Spanish provider whom his family have dealt with in the past and signs a contract which he considers is equally covered by EU law as a UK insurance policy. Having discovered within 14 days of signing the contract that he could get a better deal with another insurance provider in the UK, Carlos decides to withdraw from his contract assuming that the contract is covered by the Consumer Right Directive as in the UK (i.e. 14 days). However, after finding out that the relevant provisions of CRD are not applied to this particular insurance product in Spain and that sector-specific legislation in Spain only gives 10 days withdrawal, Carlos (it is day 11) is unable to shop around for the best deal and pays more for insurance than he otherwise need to. Further, Carlos is confused by his rights cross-border after investigating how they differ across Member States for different retail financial products. He is further discouraged to shop cross border in the future.

### **3.5 Gaps in the Consumer Credit Directive**

The aims of the CCD adopted in 2008 are to facilitate cross-border loans and to foster the internal market in financial services by bringing national legislation in to line. As a flagship piece of consumer protection legislation it is worth considering what gaps may remain which generate costs for consumers in the single market.

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<sup>33</sup> Eurobarometer (2012): Retail financial services: Special Eurobarometer report 373, March 2012, available at: [http://ec.europa.eu/internal\\_market/finservices-retail/docs/policy/eb\\_special\\_373-report\\_en.pdf](http://ec.europa.eu/internal_market/finservices-retail/docs/policy/eb_special_373-report_en.pdf).

The CCD does much to improve consumer protection and promote the internal market by fully harmonising:

- Pre-contractual information duties (Articles 5 and 6);
- Information to be include in credit agreements (Article 10);
- The right to withdrawal (Article 14);
- The right of early repayment (Article 16); and
- The fixed calculation method of the annual percentage rate of charge (Article 19).

The European Parliament's resolution on the implementation of the Consumer Credit Directive<sup>34</sup> highlights issues with the transposition of the legislation by Member States which should be a priority to resolve. Many thresholds and regulatory options listed in Article 27 of the Directive implemented by Member States are not harmonised and thus may create gaps for consumers when accessing credit cross border. Examples of gaps include:

- Consumer credit below the threshold value of €200, presently outside the scope of the Directive, but increasingly provided on short-term basis and through the internet (i.e. unsecured loans);
- Modalities of implementation allowing flexibility in how Member States implement penalties and remedies, which may create difficulties for cross border enforcement. Where a consumer's right is infringed in his/her own Member State by the credit provider, the sanction could be difficult to enforce if the provider is from a different Member State due to different enforcement powers of the relevant authority in the provider's Member State. Consequently enforcement can be inefficient and ineffective as the authority in the Member State of the credit provider finds it difficult to implement the same sanction as requested by the Member State of the consumer;
- Extension of the scope of the Directive expands harmonisation efforts to other consumer credit products. Potential exists to ensure an equal level of consumer protection across all consumer credit products including hiring and leasing agreements, and other credit agreements set out in Article 2(2). However, since Member States are free to apply the Directive to credits that are outside of the instrument's scope, consumer protection is still fragmented for many financial services used by consumers.

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<sup>34</sup> European Parliament resolution of 20 November 2012 on the implementation of the Consumer Credit Directive 2008/48/EC (2012/2037) available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0418+0+DOC+XML+V0//EN>.

### Example

Martin, an English national, inherits money from his German-born mother. Following the execution of her will, he decides to invest his money in Germany and in the United Kingdom. He enters into a credit agreement with investment companies in both countries in order to increase his assets to buy land. The information he is provided by the investment companies differs significantly, with Martin getting different levels of information on the terms and conditions of his investment. The information might be difficult to compare and costly to understand discouraging investing in both Member States.

## 3.6 Gaps concerning gambling activities

Due to its specific nature and in application of the principle of subsidiarity, the supply of online gambling services is not subject to sector-specific regulation. The CJEU has confirmed in case law that ‘the provisions of games of chance or gambling is an economic activity of a special nature, where restrictions may be justified for reasons of overriding general interest such as consumer protection’. Gambling is therefore currently excluded from the scope of the CRD. Article 3 (3)(c) provides that the Directive shall not apply to contracts ‘for gambling which involves wagering a stake with pecuniary value in games of chance, including lotteries, casino games and betting transactions’. Member States are therefore able to adopt other, more stringent, consumer protection measures in relation to these activities. However, specific aspects of the activity are covered by EU Directives such as the Distance Selling Directive, the UCPD and instruments relating to data protection. Moreover, all EU licensed and regulated gaming operators are subject to harmonised rules and regulations for EU companies as laid down in EU company law.

Though measures implemented by Member States can diminish the social costs and harmful effects of gambling activities if gambling services are regulated as fair and legal in the Member States<sup>35</sup>, the European Parliament called for operators to be obliged to display clear, prominent and explicit warnings to minors stating that it is illegal for them to engage in online gambling.

There is a need for common standards to address the rights and obligations of both the service provider and the consumer in order to ensure a high level of protection for citizens and consumers, particularly minors and other vulnerable persons, and the prevention of misleading and excessive advertisements. Services which combine distinguishing features of the gambling sector must fall under appropriate gambling legislation and fully respect age and identity verification mechanisms. However, problems arise in relation to the cross-border marketing of operators who are not

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<sup>35</sup> European Parliament (2013): Report on online gambling in the internal market (2012/2322(INI), report of the IMOC committee of the European Parliament available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0218+0+DOC+PDF+V0//EN>.

licensed in the country of residence of the consumers. Disclaimers on these websites can vary which therefore vary the protection for consumers, particularly minors and vulnerable consumers. Moreover, different preventive measures currently exist in the Member States such as the implementation of strict deposit limits and loss limits set by the players themselves. Finally, no ban currently exists on misleading advertising for online gambling services aimed at minors and other vulnerable persons.

#### **Example**

Baptiste, a 16 year old Belgian national, is browsing the internet one day. While streaming a film, he falls upon an advertisement for online gambling. Though Baptiste previously attempted to sign up to an online gambling website in Belgium, a disclaimer was automatically advertised when he clicked onto the Belgian website which informed him that gambling was illegal for individuals less than 18 years of age. Though aware of this, Baptiste decides to click on the new advertisement. He falls upon an online gambling site in Malta which does not provide any disclaimer concerning the legal age to gamble. Believing that his actions are therefore legitimate, Baptiste registers to the website, using his father's credit card and begins playing online poker. From watching his 20 year old brother play online poker in Belgium, Baptiste believes that he will be requested to set a loss limit while playing the game. However, he is never requested to input this information in the Maltese site and within an hour, Baptiste has lost €500.

### **3.7 Problems concerning the limited scope of the E-commerce Directive**

The special liability regime for online intermediaries is currently too focused on Web 1.0 services which leaves an entire list of new service models such as Web 2.0 and cloud computing services unprotected.

Web 2.0 services, which are characterised by massive user participation, has led to the development of large online communities. This has boosted the power of the individual by allowing the individuals to reach the entire online community.

Cloud Computing has enabled consumers to increasingly place their data and computing with remote services away from their own devices. Consumers benefit from larger storage capacities, more convenience and more access to their data and preferred services. Cloud computing comes with numerous risks, however. When a consumer subscribes to complex cloud contracts, they can be exposed to unbalanced contract terms and loss of control over personal data without sufficient information on their rights in case their data is misused or their access to the cloud computing is not of the quality that they would expect.

Cloud computing providers currently use complex contracts or service level agreements with extensive disclaimers. This can result in unfair contract terms being imposed on consumers which can lead to a lack of confidence in the use of the services.

B2C contracts in cloud computing include terms which do not comply with data protection legislation or unfairly reduce the rights of the consumer. For example, terms that authorise the processing of more data than is necessary for the provision of the service or disclosure to third parties without further information.<sup>36</sup>

#### **Example**

After undertaking a tour of the world, and with no fixed computer at home, Guillaume wishes to store his photos and videos of his adventures online. After doing a search of cloud computing services, Guillaume wishes to sign up to Dreamclouds, a cloud computing operator. Though he is confused by the lengthy terms and conditions, Guillaume signs up to the contract with Dreamclouds, with no time to search for different cloud computing services online. He uploads all of his photos and videos. Two months later, he sees a photo he took of a lion in Africa used as an advertisement for a Travel Agent. Guillaume contacts Dreamclouds and is informed that they are not liable for the misuse of data he has uploaded.

### **3.8 Problems relating to digital content**

The CRD provides some improvements relating to digital content products with the inclusion of provisions on pre-contractual information requirements.

Traders are required to provide information to consumers on the application of technical protection measures that affect the functionality of digital content and the interoperability between hardware and software.

Unfair contract terms have not yet been adapted to digital content products. This leads to legal uncertainty and consumer detriment<sup>37</sup>. Consumer detriment has been found in the use of contractual restrictions which support and justify the application of Technical Protection Measures. This prevents consumers from exercising their privileges granted under copyright law.

The most frequent restrictions include:

- the restriction of 'personal use' which prevents consumers from acting out any other use, copy or communication;
- the prevention from making private copies of the content;
- restrictions related to the playability of the content on certain devices (interoperability);
- territorial restrictions; and
- bundling clauses requiring the consumer to purchase additional content or hardware as a condition to the purchase of content.

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<sup>36</sup> BEUC (2013): BEUC position paper on EU Cloud Computing Strategy, March 2013. Available at: <http://www.beuc.eu/publications/2013-00143-01-e.pdf>

<sup>37</sup> European Parliament (2012): Unfair contract terms in business-to-consumer contracts in the proposed common European Sales Law: BEUC's viewpoint, note produced by the Directorate-General for internal policies of the European Parliament, available at: <http://www.europarl.europa.eu/document/activities/cont/201205/20120530ATT46064/20120530ATT46064EN.pdf>.

**Example:**

Samantha, a UK national, buys a Romantic Comedy online via a trusted media store. She watches half of the film one evening while packing to move to France on Erasmus. Following her arrival in Reims, she begins unpacking her belongings and wishes to watch the remainder of the film. Due to territorial restrictions, however, Samantha is unable to watch the film in France and therefore feels that she has not benefitted from the €9.99 she paid for the film. It is only upon her return to the UK at Christmas that she is able to watch the remaining part.

### 3.9 Summary findings - Reducing the Cost of Non-Europe

Demonstrated in the practical case studies, there exist a significant number of gaps in the consumer *acquis* which are having a detrimental impact on the functioning of the EU Single Market, resulting in additional costs for consumers and businesses when trading cross-border. The leading sources of these costs relate to:

- Limited scope of legislation such as the CCD and CRD which can make consumers unsure of whether they are protected when purchasing similar retail financial products;
- Minimum harmonisation measures still apply to many provisions found within consumer legislation. Where Member States undertake 'gold plating' of these provisions and fragmented level of protection can often emerge, generating costs when trading cross-border; and
- Technological advances have created gaps in coverage or overlapping protection which creates confusion for consumers and businesses. This relates specifically to new digital products and services affecting E-commerce, E-privacy and intellectual property laws.

To avoid duplication when estimating the CoNE in the digital economy (covered in a forthcoming parallel study). E-commerce issues are not considered further, beyond the practical examples provided in this section.

Reducing the gaps in the consumer *acquis* is likely to require legislative action. In the absence of legislation and accompanying enforcement by Member States, consumer protection would likely remain fragmented. Three options are therefore considered in the Commission's Green Paper on the Review of the Consumer *Acquis*<sup>38</sup>:

- a vertical approach;
- a mixed approach (horizontal instruments combined where necessary with vertical actions); and
- a horizontal approach.

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<sup>38</sup> COM(2006) 744 final- Green Paper on the Review of the Consumer *Acquis*, available at: [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/acquis/green-paper\\_cons\\_acquis\\_en.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/green-paper_cons_acquis_en.pdf).

A vertical approach would allow for the specificity of each area to be taken into account in providing a consistent level of consumer protection across Europe. Financial services and gambling legislation are best suited to this approach amending legislation separately to adapt to technological and market developments.

Horizontal rules could apply across all contracts as in the UCPD and CRD covered by the legislation. Alternatively, horizontal rules could apply exclusively to cross-border contracts to resolve the identified gaps in the consumer *acquis*. The notion of a cross border contract would then need to be defined and in so doing create possible legal fragmentation as consumers and businesses would need to agree whether a transaction is domestic or cross-border before entering a contract. Adopting a mixed approach consequently looks the most likely and would be consistent with better regulation principles.

## 4. The estimated Costs of Non-Europe - A first scaling of the impacts

This section of the report provides a first estimation of the CoNE based on a selection of the case studies developed from the previous section. The paucity of available literature estimating the CoNE has limited this task to three case study examples which partially estimate the CoNE in specific sectors, and a fourth example illustrative of the potential of a 'complete' single market, estimating the benefits if all gaps in consumer protection are resolved. By considering the benefits of a 'complete' single market, the fourth case study captures in its estimation the 'public good' from collective resolution of implementation and legislative gaps.

Due to the incompleteness of the evidence available, each estimate of the CoNE is intended as tentative scaling of the potential impacts, rather than the 'final word' in estimation of the impacts. Further research and primary data gathering outside the scope of this study is recommended to provide more robust answers.

### 4.1 Costs of Non-Europe in commercial guarantees

When purchasing a new domestic electrical appliance or similar electronic product, the consumer is entitled to a two year guarantee free of charge by EU law. The purpose of the guarantee is to provide free maintenance and repair should the product fail to work during the first two years of its intended use. However, due to the implementation gap in EU law (see Section 3.1), some consumers have paid for an extended warranty of one year to which they were already entitled for some electrical products. The consumer detriment can be measured by estimating the additional costs involved for these consumers.

Guarantees of this type are typically purchased with white, brown and grey domestic electrical appliances, digital and telephony electrical products. Finaccord<sup>39</sup> estimates the total European extended warranty market to be worth some €7.12bn in 2014. Of this, 61 per cent (€4.35bn) relates to digital and telephony goods including computers, laptops, and mobile phones. The remaining 39 per cent (€2.76bn) relates to white, grey and brown domestic appliances such as vacuum cleaners, washing machines, dishwashers, coffee makers, etc.

The extended warranty market in the UK was recently investigated by the Office of Fair Trading (OFT). The report on the OFT's investigation<sup>40</sup> found that the costs of a warranty do not differ significantly between the UK and similar sized European

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<sup>39</sup> Finaccord (2011): Extended warranties and insurance for mobile and non-mobile consumer products in Europe – press releases 22/07/2011, available at: [http://www.finaccord.com/press-release\\_2011\\_extended-warranties-and-insurance-for-mobile-and-non-mobile-consumer-products-in-europe.htm](http://www.finaccord.com/press-release_2011_extended-warranties-and-insurance-for-mobile-and-non-mobile-consumer-products-in-europe.htm).

<sup>40</sup> OFT (2012): Extended Warranties on Domestic Electrical Goods - An OFT market study and notice of the OFT's intention to accept Undertakings in Lieu of a Market Investigation Reference, OFT 1403, available at: [http://www.of.gov.uk/shared\\_of/markets-work/OFT1403.pdf](http://www.of.gov.uk/shared_of/markets-work/OFT1403.pdf).

countries. Further, it was found that the average cost of a warrant for a year is around 10 per cent of the original selling price of the electrical product concerned.

Based on Gartner data (See Table 2), approximately 288 million digital and telephony electrical devices are sold in the EU. Assuming that 18 per cent are sold with an extended warranty (based on the OFT's own consumer research)<sup>41</sup> and knowing the EU extended warranty market for digital and telephony products is valued at €4.35 billion, the estimated average price of a one year warranty per product is around €80<sup>42</sup>.

**Table 2 Digital and telephony electrical products sold in the EU 2013**

Electrical device	Total world device shipments 2013 (million units)	EU shipments as a percentage of total	Estimate of digital and telephony electrical products sold in the EU (million units)
PC	303	25% <sup>43</sup>	76
Ultramobile (laptop)	19	25% <sup>43</sup>	5
Tablet	184	14% <sup>44</sup>	26
Mobile phone	1,810	10% <sup>45</sup>	181
<b>EU Total</b>			<b>288</b>

Source: Gartner (2013)

The proportion of extended warranties purchased inadvertently by consumers due to the identified gap in implementation is unknown without conducting additional primary research. With no secondary evidence available on which to base this assumption, the consultants have assumed conservatively that 0.5 per cent of consumers purchase an extended warranty by error for one additional year (assuming as in the case study that a one year warranty is provided free of charge). Although a highly conservative estimate, it is useful in considering the scale of potential CoNE if only a small proportion of the market is affected.

Based on this assumption, 260,000 consumers<sup>46</sup> are overcharged when purchasing digital and telephony goods at a total costs of €22 million<sup>47</sup>. This estimate does not include other electrical appliances (white, grey and brown electrical goods) which account for 39 per cent of the extend warrantee market. Scaling up the costs by 39 per cent to account for all extended warranties for all electrical products, the total CoNE is

<sup>41</sup> Ibid.

<sup>42</sup> €4,350 million / (288 million x 18%) = €83.91.

<sup>43</sup> Gartner (2012): Per cent of computers sold to Europe, available at: <http://www.statisticbrain.com/computer-sales-statistics/>.

<sup>44</sup> Based on EU share of world of smartphone shipments (Q1 2013) taken from Gartner (2013). i.e. (31,600,000 / 225,326,200 = 14%).

<sup>45</sup> Based on EU share of world of mobile phone shipments (Q1 2013) taken from Gartner (2013). i.e. (43,600,000 / 435,158,400 = 10%).

<sup>46</sup> 0.5% x 288,000,000 = 260,000.

<sup>47</sup> 260,000 x €83 = €21.6 million.

estimated as €35.6 million per annum, the entirety of which could be avoided by closing the identified gap in implementation of consumer law.

The costs are likely to vary by Member State as the extended warrantee market is more developed in some markets more than others. The UK market is recognised by Finaccord<sup>48</sup> and the OFT as Europe's largest warrant market (30% of EU total), followed by France (17%) and Germany (13%). Other major markets identified by Finaccord are Italy and Ireland; however data is not available on their share of the EU market. The CoNE for the above mentioned Member States are provided in Table 3.

**Table 3 Estimated CoNE from commercial guarantees in selected Member States**

Member State	Estimated CoNE (€million)	Percentage of total CoNE <sup>49</sup>
United Kingdom	10.7	30%
France	6.1	17%
Germany	4.6	13%
Rest of the EU	14.2	40%
<b>Total CoNE</b>	<b>€35.6 million</b>	

Source: ICF GHK

A caveat to this analysis is that while mis-sold extended warrantees are a cost to consumers, they are a source of revenue and profit for businesses. Assuming that the profits earned by businesses from mis-selling are held in cash reserves and not re-invested, it is anticipated that by resolving this gap in consumer protection will have a positive net impact on the wider economy, as these profits would be more productively spent by consumers than businesses, creating additional jobs and growth.

## 4.2 Costs of Non-Europe in the Consumer Credit Directive (CCD)

The CCD aims to foster the internal market in financial services by bringing national consumer protection provisions closer together in the expectation that through less fragmentation, consumers and credit providers will be encouraged to increase cross-border trade. A better functioning internal market would help reduce the costs of credit for consumers and expose providers to greater competition and innovation.

<sup>48</sup> Finaccord (2013): Extended warranties and insurance for mobile and non-mobile consumer products – worldwide series, press release 18/03/2013, available at: [http://www.finaccord.com/press-release\\_2013\\_extended-warranties-and-insurance-for-mobile-and-non\\_mobile-consumer-products\\_global.htm](http://www.finaccord.com/press-release_2013_extended-warranties-and-insurance-for-mobile-and-non_mobile-consumer-products_global.htm).

<sup>49</sup> Based on Finaccord (2013): Extended warranties and insurance for mobile and non-mobile consumer products – worldwide series, press release 18/03/2013, available at: [http://www.finaccord.com/press-release\\_2013\\_extended-warranties-and-insurance-for-mobile-and-non\\_mobile-consumer-products\\_global.htm](http://www.finaccord.com/press-release_2013_extended-warranties-and-insurance-for-mobile-and-non_mobile-consumer-products_global.htm).

At present, consumer credit purchased cross-border accounts for only 2 per cent of the total market and 20 per cent of loans provided online (the most likely channel for cross border transactions)<sup>50</sup>.

The European consumer credit market is characterised by a high level of fragmentation between Member State national markets<sup>51</sup>. For example, many of the differences identified in Section 3.4 as gaps in the Consumer Credit Directive (CCD) contribute to uncertainty for consumers and credit providers when considering to buy or sell financial products cross border. By not trading cross border, consumers and businesses do not benefit from lower credit prices and the greater choice available in other Member States. Equally, providers are not exposed to competition from cross border rivals, so there is less competitive pressure to reduce prices and improve quality. In short, the CoNE is the additional cost consumers pay for credit in a fragmented market above that which they would pay in a more integrated and better functioning internal market.

To quantify this gap, the difference between what consumers currently and could pay for consumer credit in different Member States is estimated. This assumes that in a more integrated market, all else being equal, the price of credit will converge. Price convergence occurs as consumers seek out the lowest prices and highest quality providers in the internal market. Competitive pressure is placed on more expensive providers to lower prices towards the EU average. Meanwhile, lower cost providers responding to the increase in demand will increase prices towards the EU average over time.

In reality, price convergence is rarely complete and the rate of convergence can differ widely in different markets. For example, differences in the range of products offered to consumers in Member States may exist for many different reasons as the demands of consumers are different and consequently prices are likely to differ. Nevertheless, using this approach provides a useful insight in to the potential scale of the CoNE and the benefits which could be obtained from a more complete single market for retail financial services.

Using data from the European Central Bank (ECB) on the amount of consumer credit (excluding property related loans) outstanding in each Member State and the typically Annual Equivalent Rate (AER) of interest charged for credit cards loans, a study by GHK for the European Commission<sup>52</sup> benchmarked consumer loan loans and interest

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<sup>50</sup> European Parliament (2012): Report on the implementation of the Consumer Credit Directive 2008/48/EC, Committee on the Internal Market and consumer Protection, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bREPORT%2bA7-2012-0343%2b0%2bDOC%2bPDF%2bV0%2f%2fEN>.

<sup>51</sup> ECRI (2011): ECRI Industry Survey on credit reporting in Europe, European Credit Research Institute (ECRI), newsletter No.38, Winter 2010/11, available at: [http://www.ecri.eu/new/system/files/ECRI\\_News\\_Winter\\_2010-11.pdf](http://www.ecri.eu/new/system/files/ECRI_News_Winter_2010-11.pdf).

<sup>52</sup> EC(2009): Establishment of a Benchmark on the Economic Impact of the Consumer Credit Directive on the Functioning of the Internal Market in this Sector and on the Level of Consumer Protection, by GHK Consulting for the European Commission DG SANCO, available at: [http://ec.europa.eu/consumers/rights/docs/ccd\\_benchmarking\\_study\\_en.pdf](http://ec.europa.eu/consumers/rights/docs/ccd_benchmarking_study_en.pdf).

charges for 14 Member States (reproduced in Table 4). Assuming that all outstanding consumer credit is loaned on credit cards and that, for illustrative purposes, the consumer only pays interest on the total credit amount outstanding per annum (i.e. consumers do not repay the loan amount), then the cost of credit is calculated for each of the 14 Member States for which data is available. The difference between the cost of credit in each Member State and the EU average costs of credit (calculated as 15.8% typical AER for the 14 Member State) is then estimated.

The net differences in what consumers are paying for credit and what they could be paying if the internal market was more 'complete' is estimated at around €262 million per annum for the 14 Member States. Scaling this figure to the entire EU-27 based on GDP<sup>53</sup>, the CoNE equals approximately €285 million per annum.

**Table 4 Estimated CoNE from lack of convergence in the single market for consumer credit**

Member State	Consumer credit outstanding (€ billions)	Average interest rates on new lending over 1 and up to 5 years (AER)	Cost of credit - 1 year (€ billion)	Credit saving from convergence (€ million)
AT	24.8	14.0%	3.5	-447
BE	9.2	16.0%	1.5	18
DE	173.3	13.0%	22.5	-4,852
DK	19.4	18.0%	3.5	427
EL	28.3	16.0%	4.5	57
ES	102.5	22.0%	22.5	6,352
FI	12.1	12.0%	1.4	-459
FR	156.3	14.0%	21.9	-2,814
IE	21.9	15.0%	3.3	-176
IT	54.7	15.0%	8.2	-438
NL	25.2	16.0%	4.0	50
PT	24.5	21.0%	5.2	1,275
SE	13.1	12.0%	1.6	-505
UK	147.6	17.0%	25.1	1,771
<b>Total</b>			<b>€129</b>	<b>€262</b>

Source: EC (2009) and ICF GHK calculations

This illustrative example highlights that while the convergence generates savings for some consumers it will result in higher costs for others, despite an overall net benefit for EU consumers overall. The countries included in the estimation are also representative of the EU-15 Member States. Interest rates on consumer credit are likely to be higher in

<sup>53</sup> The 14 Member States account for 92% of EU-27 GDP (Eurostat, 2012), hence €262 million/ 92% = €285 million.

the newer Member States due to less developed credit markets and lower per capita incomes. The CoNE might therefore be expected to increase if the EU-12 Member States were included in the sample. For this reason, the estimated CoNE is considered a conservative underestimate the savings potential from a completion of the single market for consumer credit.

Older research such as the Cecchini report<sup>54</sup> and work by the European Credit Research Institute<sup>55</sup> indicate that price convergence in financial services was expected from the single market, however this has not materialised to date, highlighting that price divergence is as high as 200 times the price for the same financial service in another Member States in 2002. More recent evidence from CEPS<sup>56</sup> shows that per capita and debt-to-income levels of consumers in EU countries have converged. While convergence is occurring, the evidence supports the view that there is significant scope for improvement by improving the functioning of the internal market.

The challenges which remain are evident in the findings of the Commission's market study on retail financial services<sup>57</sup> and monitoring of consumer market reports, which find that:

- Austria , France, Italy and Spain score poorly on transparency and are among the most expensive countries for banking services in the EU, whereas Bulgaria, the Netherlands, Belgium and Portugal rank much lower in terms of prices for banking services, highlighting significant divergence in prices and information available to consumers<sup>58</sup>;
- The Market Performance Indicators (MPI)<sup>59</sup> show that in the market for loans and credit cards, consumer switching has decreased between 2011 and 2012, while the number of complaints, problems, and consumer's perceived comparability and trust in the market have improved only marginally over the same period. Consumer switching is an indicator of contestability in the market and should be significant in a flourishing cross-border and competitive market.

In the absence of data on the extent to which convergence has already happened and is benefiting consumers it is only possible to speculate what the true CoNE are in consumer credit sector. Considering the size of the consumer credit sector even marginal changes to the cost of credit could be generate substantial savings for

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<sup>54</sup> EC (1988), Summary of the Cecchini report - SEC (88) 524 final, 13 April 1988.

<sup>55</sup> ECRI (2002) Consumer Credit Rates in the Eurozone – Evidence on the emergence of a single retail banking market, ECRI Research Report 2, available at: <http://aei.pitt.edu/9433/2/9433.pdf>.

<sup>56</sup> CEPS (2013): Household Debt and the European Crisis – Research Report 13, available at: <http://www.ceps.eu/category/book-series/ecri-research-reports>.

<sup>57</sup> [http://ec.europa.eu/internal\\_market/finservices-retail/docs/policy/eb\\_special\\_373-report\\_en.pdf](http://ec.europa.eu/internal_market/finservices-retail/docs/policy/eb_special_373-report_en.pdf)

<sup>58</sup> EC (2009): Data collection for prices of current accounts provided to consumers, by VDMC for DG SANCO, available at:

[http://ec.europa.eu/consumers/archive/strategy/docs/prices\\_current\\_accounts\\_report\\_en.pdf](http://ec.europa.eu/consumers/archive/strategy/docs/prices_current_accounts_report_en.pdf).

<sup>59</sup> EC (2012): Monitoring consumer markets in the European Union, 20 November 2012, available at:

[http://ec.europa.eu/consumers/consumer\\_research/editions/docs/monitoring\\_consumer\\_markets\\_eu\\_2012\\_en.pdf](http://ec.europa.eu/consumers/consumer_research/editions/docs/monitoring_consumer_markets_eu_2012_en.pdf).

consumers, hence, legislative action to remove some gaps in the CCD are likely to generate significant benefits, as indicated by the example provided.

### 4.3 Costs of Non-Europe in gambling and online gaming

The case study presented in Section 3.6 identified that a significant gap in the consumer *acquis* exists in relation to gambling and online gaming. Two impacts from the absence of a single market in gambling and online gaming are estimated in the following example:

- The financial CoNE for consumers from a lack of competition; and
- The social CoNE due to gaps in the protection of vulnerable consumers and problem gamblers.

The lack of a functioning single market for gambling and online gaming limits competition largely to within national borders. Due to limited competition from cross-border rivals and the presence of monopolistic providers in some Member States (run by either private or public operators) the result is that consumers may not receive the best price (i.e. odds) for a given gambled amount (i.e. stake).

In a single market, gambling and online gaming providers compete by offering the best 'odds' to consumers. The better the odds, the higher the expected winnings for the successful gambler. It follows that average winnings in a well-functioning single market should be higher than in a less competitive and/or closed national market. By comparing the average winnings in more open and competitive gambling markets, with those of more heavily regulated gambling markets it is possible to quantify the CoNE for consumers.

In a recent study, 'The Case for a Single European Gambling Market'<sup>60</sup> expected winnings from a €100 bet were calculated for the UK, Italy, Sweden and Netherlands. The study estimated that winnings amounted to 89 per cent, 88 per cent, 81 per cent and 77 per cent of the bet respectively in each of the four Member States. In a single market in which consumers are free to make bets cross-border (typically online) it is expected that consumers will choose those providers in the Member State offering the best winnings. As rival providers compete, so the winnings will converge on the best available odds and expected winnings. The difference between current winnings and what is possible in the single market if all consumers could achieve the best odds available to them is the estimated CoNE.

Annual turnover of the EU gambling market was €84.9 billion in 2011<sup>61</sup>. If placed as a single bet in the UK, the expected winnings would be €75.5 billion based on the outcomes of the Europe Economics study<sup>62</sup>. In the Netherlands, the expected winnings

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<sup>60</sup> Europe Economics (2004), The Case for a Single European Gambling Market, available at: <http://www.europe-economics.com/download/easingmark.pdf>.

<sup>61</sup> European Parliament (2013): Report on online gambling in the internal market <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0348+0+DOC+XML+V0//EN>.

<sup>62</sup> €84.9 billion x 89%.

would be €65.5 billion (77% of the bet). The difference between the best and worst expected winnings in this limited sample is €10 billion per annum. With such a limited sample and without the data to weight the results based on the gambling turnover of each Member State (the UK is known to be the largest gambling market); the consultants consider this to be an overestimate of the CoNE. On the basis that the average winnings in Italy and Sweden are higher than in the Netherlands, the €10 billion must therefore be an overestimate. In the absence of better data on the EU gambling market, the consultants assume half the above estimate is a more realistic (€5 billion) estimate of the CoNE for consumers. To put the €5 billion per annum potential saving in perspective, this represents 5.8 per cent of total gambling revenues in the EU, a plausible amount considering some national markets could gain substantially from the opening up of monopolistic markets.

The analysis now considers the social costs of gambling. Around 2 per cent of the EU population suffers from gambling addiction (10 million citizens)<sup>61</sup>. At present, the absence of a single market results in unequal protection of consumers (specifically vulnerable persons and minors). For example, differences in the age at which persons can gamble may result in minors in one Member State evading protection by gambling cross border or online. Equally, advertising and marketing restrictions may differ between Member States, targeting the most vulnerable groups in society.

Studies quantifying the social costs of gambling have considered the costs of crime resulting from problem gambling, the business and employment costs of lost productivity from worker absence due to gambling, the bankruptcy costs on society and the costs of suicide (i.e. emotional cost on families and society), illness (i.e. stress, sickness brought on by gambling), social service costs (treatment, unemployment), direct regulatory costs for government and family costs (divorce, separation, neglect related to gambling disorders). On average, studies estimate the annual social costs per pathological gambler to be around \$10,000 (€8,000) in 2011<sup>63</sup>. Other values found in the literature range from a social cost as low as €1,200 (€900)<sup>64</sup>, to high estimates of \$30,000 (€22,000) per annum<sup>65</sup>. Based on the average of social cost of gambling reported in the literature, the total costs of gambling in the EU are estimated in the region of €80 billion per annum to society<sup>66</sup>.

To quantify the CoNE it is necessary to know what proportion of this social cost is due to the absence of a single market and therefore to what extent policy action could achieve possible benefits for society (i.e. by reducing the number of problem gamblers).

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<sup>63</sup> Grinols, E, L.(2011): The hidden social costs of gambling, Baylor University  
<http://www.baylor.edu/content/services/document.php/144584.pdf>.

<sup>64</sup> Georgia Department of Behavioural Health and Developmental Disabilities (2011): Social Costs of Problem Gambling, available at:  
[http://dbhdd.georgia.gov/sites/dbhdd.georgia.gov/files/imported/DBHDD/AD/Gambling/economic\\_09\\_11.pdf](http://dbhdd.georgia.gov/sites/dbhdd.georgia.gov/files/imported/DBHDD/AD/Gambling/economic_09_11.pdf).

<sup>65</sup> Walker D,M. (2007): Challenges that Confront Researchers on Estimating the Social Costs of Gambling, American Gaming Association, available at:  
[http://www.americangaming.org/sites/default/files/uploads/docs/whitepapers/social\\_costs\\_white\\_paper\\_final.pdf](http://www.americangaming.org/sites/default/files/uploads/docs/whitepapers/social_costs_white_paper_final.pdf).

<sup>66</sup> €8,000 x 10,000,000 = €80 billion.

This information is absent in the literature, hence a proxy is used. Measures to remove ATMs in or close to gambling venues in Victoria, Australia were found to reduce the amount spent by problem gamblers by seven per cent<sup>67</sup>, in short by reducing their access to a ready supply of cash. Assuming that the number of problem gamblers are reduced proportionally from this measure and assuming that the single market is only 10 per cent as effective at reducing problem gambling (i.e. the single market improves coordination between gambling authorities and the level of consumer protection, but does not affect gambler access to cash), the CoNE are estimated to be in the region of €560 million per annum<sup>68</sup>. Given the large number of assumptions made by the consultant, this estimate is subject to a high degree of uncertainty and should be interpreted as only indicative of the potential scale of the CoNE.

The other major CoNE to consider is tax revenue from gambling activities. This includes taxes on gambling, taxes on the profits of gambling businesses, and the profits received when lotteries and betting providers are publically owned. In a fragmented market, it is common for many private providers to locate in low tax and less regulated countries, thus reducing their total tax bill. Equally, with different rules across Europe, it is easier to evade tax, particularly for online gambling providers where the website is located outside the EU. As in goods markets, a single market for services would enable better monitoring and enforcement through collective action to reduce tax evasion. Although the consultant is unable to quantify the CoNE tax effects due to an absence of data, it is clear that some Member States would benefit while others may lose from a single market for gambling and online gaming (i.e. for some Member States a large proportion of tax revenue comes from the profits of gambling made in other Member States).

Finally, corruption and match-fixing are social costs from gambling which could also be reduced from a better functioning single market, as gambling controls would be more difficult to evade and cross-border monitoring improves.

Overall, the CoNE from the absence of a single market in gambling and online gaming is estimated to be in the region of €5,560 million per annum, which is composed of €5 billion in potential savings for consumers from the introduction of cross-border competition and €560 million in social costs from inadequate protection of problem gamblers.

#### **4.4 The benefits of completing the Consumer Acquis – Costs of Non-Europe in the Consumer Rights Directive**

The final example considers the potential benefits of resolving all gaps in the consumer *acquis* by expanding the scope of the CRD to cover all consumer transactions. Consumers would therefore be equally protected and entitled to the same rights regardless of the product purchased or from where the product is purchased.

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<sup>67</sup> Department of Justice Victoria (2013): Evaluation of the removal of ATMs from Victorian gaming venues, available at: <https://assets.justice.vic.gov.au/justice/resources/f4dc0ec8-3940-4099-8d0d-0b01616470b6/atmevaluationreport.pdf>.

<sup>68</sup> €80 billion x 7% x 10% = €560 million.

In practice this would require expanding the scope of the CRD to cover financial services, healthcare, passenger travel and real estate. A useful analogy is that of the United States where regardless of the state in which the consumer is resident, the level of consumer protection should be the same. In this scenario, the level of consumer protection is also the same across all products. The result, as commonly reported is that US GDP has increased at 4.2 times the rate of EU GDP from the implementation of a single market for services<sup>69</sup>. This case study is an attempt to scale the potential of the EU Single Market to achieve similar increases in GDP by removing all the remaining gaps in the consumer *acquis*. While the previous case studies have focussed on individual gaps, this example seeks to quantify the collective 'externality' benefits of removing all gaps in consumer legislation.

A number of benefits are associated with a complete EU Single Market:

- Increased competition cross-border which has a downward pressure on prices, increases the incentives to innovate and improves quality and choice for the consumer; and
- An adjustment over time in prices and wages of less developed regions towards those in more developed regions as the less developed initially enjoy a comparative cost advantage and greater returns to capital than more developed regions.

These two factors lead to what is termed the Law of One Price as prices converge within the EU Single Market not only for consumer goods and services, but also labour and capital. The CoNE in this respect can be estimated by quantifying the potential benefits if convergence was achieved to an average EU price for all goods and services. Measured in terms of GDP, a study for the Institute for International Economics<sup>70</sup> has speculated what could be achieved by price convergence using a simple partial equilibrium model of the EU economy. Based on US experience of convergence as a benchmark, the study estimates the benefits of converging at the same rate as the US, to what is termed the Broad World Price Band (BWPB) for a narrowly defined group of 157 consumer goods for which reliable data over a 20 year period is available from national accounts (to measure the extent and rate of price convergence). High tax items which distort the results and items which account for a small proportion of trade are excluded from the sample (i.e. tobacco and alcohol). The results indicate that convergence of the EU-11 for which data was available could bring benefits of 0.76 per cent of GDP at market prices and 0.59 per cent at purchasing power parity (PPP) per annum, the latter figure accounting for differences in income and fluctuations in exchange rates. In the absence of a comparable study which includes the remaining Member States, we consider this approach an under estimation of the potential benefits, as we would expect divergence between the EU-28 Member States to be greater than

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<sup>69</sup> BIS (2011): The economic consequences for the UK and the EU of completing the Single Market, BIS Economics Paper NO. 11, February 2011, available at: <http://www.bis.gov.uk/assets/biscore/economics-and-statistics/docs/e/11-517-economic-consequences-of-completing-single-market>.

<sup>70</sup> International Economics (2002): The Benefits of Price Convergence: Speculative Calculations, by Warren, Tony & Gary Clyde Hufbauer & Erika Wada. Peterson Institute Press.

across the EU-11 used in this study (which includes the larger and older Member States of Germany, France, UK, Italy and Spain).

A 0.59 per cent increase in EU GDP<sup>71</sup> per annum would equate to around €74.6 billion of benefits per annum. However, the European Commission has already estimated that the Single Market has achieved benefits between 1992 and 2002 of nearly €164.5 billion<sup>72</sup>, or €16.5 billion annually. An indicative measure of the CoNE which remains and could be reduced by additional policy action equates to around €58 billion per annum<sup>73</sup>, as a very simple approximation. What is important to realise is that these benefits are not additional to the others estimated in this section, but rather reflect the overall benefits attainable from a 'complete' EU Single Market by filling all the gaps outlined in this research paper. Indicators of the need to do more to ensure completeness of the EU Single Market also includes statistics on business and consumer cross border trade reported in the Commission's Consumer Conditions Scoreboard 2013<sup>74</sup>, which identifies that:

- only 25 per cent of retailers surveyed sell to at least one EU country other than their own;
- compliance costs linked to different consumer protection rules and contract terms are identified as the main obstacle to cross border trade by over 40 per cent of retailers;
- of those retailers who do not trade cross border, 67 per cent do not plan to do so in the next 12 months;
- only 26 per cent of consumers when asked were prepared to purchase goods and services cross border in the next 12 months; and
- e-commerce uptake remains uneven across the Member States with on average only 45 per cent of consumers purchasing goods and services over the Internet in the past 12 months.

The indicators show that no single legislative action is likely to resolve all CoNE, suggesting that a multitude of measures will be needed to ensure completeness of the consumer *acquis*. This includes investment in broadband access in less developed e-commerce economies, further harmonisation of consumer protection rules (i.e. widening the scope of the CRD), and measures to improve consumer confidence in the EU Single Market (i.e. simplified dispute resolution procedures).

Despite obstacles like language and culture which may prevent cross border trade, this example demonstrates that the scope and scale of potential improvement are substantial and can be achieved, at least in part, by legislative action.

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<sup>71</sup> €12,637 billion in 2012 (Eurostat).

<sup>72</sup>

[http://ec.europa.eu/internal\\_market/top\\_layer/historical\\_overview/docs/workingdoc\\_en.pdf](http://ec.europa.eu/internal_market/top_layer/historical_overview/docs/workingdoc_en.pdf).

<sup>73</sup> €74.6 billion – €16.5 billion = €58.1 billion.

<sup>74</sup> EC (2013): The Consumer Conditions Scoreboard, 9<sup>th</sup> Edition, available at:

[http://ec.europa.eu/consumers/consumer\\_research/editions/docs/9th\\_edition\\_scoreboard\\_en.pdf](http://ec.europa.eu/consumers/consumer_research/editions/docs/9th_edition_scoreboard_en.pdf).

## 5. Concluding remarks

The aims of this report were to: identify potential gaps in the consumer *acquis*; elaborate the most significant gaps for consumers; and provide a first monetary estimate of the CoNE in a sample of cases to evaluate the possible gains from further common action at EU level. The analysis considered both legislative and implementation gaps relevant to the consumer *acquis*.

Based on a thorough review of the available evaluative, policy, and academic literature the study uncovered many gaps in the consumer *acquis* including:

- Gaps concerning commercial guarantees;
- Gaps concerning reverse type transactions;
- Gaps concerning consumer-to-consumer (C2C) transactions;
- Gaps in the Consumer Rights Directive (CRD);
- Gaps in the Consumer Credit Directive (CCD);
- Gaps concerning gambling activities;
- Problems concerning the limited scope of the E-commerce Directive; and
- Problems relating to digital content.

The lack of available evidence on the costs that these gaps impose on consumers, businesses, and other stakeholders limited the quantification of CoNE to three case studies based on a sample of above, and a fourth case study based on the potential of a 'complete' single market for consumers if all gaps are resolved. Only a partial estimation of the CoNE was possible in each case study due to the paucity of available evidence in the literature. Nevertheless, each case study is useful in thinking about the potential scale of impacts from gaps in legislation affecting consumers. However, it is clear that further research is required, outside the scope of this study, before more robust CoNE estimates can be provided.

Table 5 provides an overview of the total CoNE estimated in relation to the three identified gaps in consumer legislation taken forward for analysis, which amounts to approximately €5.9 billion per annum, largely driven by the lack of a single market for gambling and online gaming. These gambling related costs result from large divergences in current consumer protection, and expected winnings for consumers.

The three cases studies only provide a snapshot of the CoNE. To attempt to quantify the CoNE across all goods and services a consumer might purchase, the fourth case study estimates the benefits of expanding the scope of the Consumer Rights Directive to all consumer transactions. The potential of the EU Single Market for consumers in this case study is estimated to generate benefits of €58 billion per annum. This benefit, which is currently not realised, is the 'prize', which could be attained if the remaining gaps in consumer legislation are resolved so that consumers and businesses trade more frequently and confidentially cross border.

**Table 5 Estimated Cost of Non-Europe per annum**

Gap	CoNE (€ million)
Commercial guarantees	36
Limited scope of the Consumer Credit Directive (CCD)	285
Lack of a single market for gambling	5,560
<b>Total</b>	<b>€5,881</b>
<i>Complete Single Market - Consumer Rights Directive (CRD) applied to all consumer transactions</i>	
	<b>58,000</b>

Source: ICF GHK

In the absence of a single market for gambling and online gaming, it is not surprising that the CoNE (the potential benefits from legislative action) are so high. However, the gambling example represents less than 9 per cent of the potential benefits of a complete EU Single Market (€58 billion). The remainder is composed of many smaller gaps in the consumer *acquis* illustrated by some of the other case studies, which benefit from an 'externality' if all or the majority of gaps are resolved. In the case of commercial guarantees, the analysis indicates that action to harmonise the implementation of existing provisions in EU law could generate substantial benefits in the region of €36 million per annum.

In conclusion, while many gaps in the consumer *acquis* have been resolved through recent legislative action, most notably the Consumer Rights Directive, this paper shows that many gaps remain which if resolved could generate significant benefits for EU consumers and businesses. Further analysis is recommended beyond the scope of this study to investigate the CoNE in this area as the figures presented are tentative first estimates, and are subject to a high degree of uncertainty. They nevertheless provide a starting point for thinking about the benefits from the EU Single Market, which are still not realised.

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Cost of Non-Europe Reports identify the possibilities for economic or other gains and/or the realisation of a 'public good' through common action at EU level in specific policy areas and sectors. This Cost of Non-Europe Report seeks to analyse the costs for citizens, businesses and relevant stake-holders of remaining gaps and barriers in the European Single Market, building on and updating the 1988 Cecchini Report, which quantified its potential benefits.

This particular study - the fifth in a series - analyses the gaps in European consumer legislation. It provides a qualitative appreciation of the existing legislation, identifying areas where further EU legislative action could be beneficial, and provides tentative estimates of the costs of failure to legislate. It is not intended as comprehensive quantification, but rather as a 'snap shot' of some benefits which could be attained through completion of the consumer *acquis*.

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