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Extent of Harmonisation in Consumer Contract Law

Note

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Abstract

This note seeks to offer guidance on the appropriate extent of harmonisation of consumer contract law. It considers the case law of the European Court of Justice and the draft Schwab Report and Wallis Opinion and analyses the justifications for harmonisation. It then applies this to the areas of information and formalities, right of withdrawal, sale of goods and unfair terms.
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LIST OF ABBREVIATIONS

Dir.  Directive
ECJ  Court of Justice of the European Union
pCRD  European Commission Proposal for a Directive on Consumer Rights
EXECUTIVE SUMMARY

The European Court has shown itself sensitive to both minimal and maximal harmonisation approaches and has supervised Member states laws within the appropriate context. In particular, minimal harmonisation has been more comfortably accepted in areas away from direct impact on the internal market in areas such as contract law, but even with minimal harmonisation the Treaty imposes limits on Member states actions and the Court will test the proportionality of measures.

An analysis of the Schwab report and Wallis opinion reveals that key areas for discussion as regards maximal harmonisation are:

(i) information requirements for distance and off-premises contracts, subject to a long list of exceptions;
(ii) formal requirements for distance and off-premises contract;
(iii) exceptions from the right of withdrawal,
(iv) exclusions from the rules relating to distance and off-premises contracts;
(v) delivery in sales contracts;
(vi) conformity with the contract;
(vii) transparency in distance and off-premises contracts;
(viii) general principles for reviewing unfair terms; and
(ix) effects of unfair terms.

Taking as a guide the main justification for harmonisation being the creation of barriers to trade potential areas for maximal harmonisation might be information rules and formalities in respect of distance and off-premises contracts, cancellation rights, any blacklist of unfair terms introduced and consumer guarantees. If one took a broader approach based on indirect effects harmonisation of the conformity standard might be considered desirable.

In any event, the final directive should make clear what approach is taken to the extent of harmonisation in each area.
1. **PLAN AND METHOD OF THE STUDY**

We have been asked to give an opinion to the EP on the harmonisation issue of the proposed Consumer Rights Directive which is now before the EP. While the Commission proposal for a Consumer Rights Directive (pCRD) of 8 October 2008\(^1\) started from a “full harmonisation” approach in Art. 4 with very few exceptions – a policy choice widely criticised including by the undersigned authors\(^2\) - there seems to be a broad agreement in the EP that this approach is too rigid. This is witnessed by two documents, namely:

- The draft report of the Committee on the Internal Market and Consumer Protection submitted by Mr. Andreas Schwab, MEP of 9.6.2010 (in the following: the Schwab report)

- The draft opinion of the Legal Committee submitted by Mrs. Diane Wallis, MEP of 24.8.2010 (the Wallis opinion).

Both documents which still have to be voted by the EP agree that the original Commission proposal should be abandoned and must be by supplemented by a more flexible, which in the Schwab report is called a “targeted full harmonisation” approach, while the Wallis opinion favours the traditional minimum harmonisation approach of the four directives under review, but allows for a limited area of “full harmonisation” for more technical aspects, particularly with regard to the right of withdrawal which the consumer already enjoys in the

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1 COM (2008) 614 final
areas of direct and distance selling and which is to be given common rules in a new move towards “horizontal approach”.

This paper will not be concerned with policy choices per se where the EU legislator according to the consistent case law of the ECJ enjoys a wide margin of discretion\(^3\) nor with questions of competence under Art. 5/114 TFEU\(^4\). It will concentrate on a legal analysis which, in order to allow a reasoned opinion, will look at the two documents in a first stage from two angles:

- An overview of the existing ECJ case law on questions of harmonisation, starting with the earlier case law on minimum harmonisation and coming later to questions of full harmonisation – this part has been prepared by Prof. Reich.

- A detailed comparison of the different approaches proposed by the two Rapporteurs with regard to the extent of full harmonisation resp. minimum harmonisation; where both papers agree there is no need for a more detailed legal analysis – this part was done by Prof. Howells.

The second stage of this paper will draw conclusions for the ongoing legislative process. Both authors agree on their methodological commitment to an objective analysis of the existing documents without in any way aiming to recommend or even prejudice policy choices. They more or less want to explore the EU-constitutional framework in which EU legislation of consumer contract law should find its place. The central question of the analysis is a truly federal one: how far may EU legislation using its broad internal market competence “intrude” into “reserved Member state” prerogatives, for instance with regard to consumer information, contract formation, remedies for non-performance, unfair terms, and in the end enforcement.

The question of harmonisation cannot be solved without an answer to the question of “pre-emption”, or, in the words of the ECJ, preclusion towards

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opposing Member state law. It is obvious that minimum harmonisation and full harmonisation come to different results:

- Minimum harmonisation as it has been used in the past and as it figures under primary law in several policy areas like non-discrimination (Art. 19 TFEU, ex-Art. 13 EC), employment conditions (Art. 153 (4) TFEU, ex-Art. 137 (2) EC), consumer protection with regard to special action under Art. 169 (4) TFEU (ex-Art. 153 (5) EC), and in Art. 193 TFEU (ex-Art. 176 EC) for measures on environmental protection, will restrict conflicting Member state measures only insofar as it is opposed to “lower protection” (or refusal of protection as such), while allowing “better protection” measures respectively “higher protective standards” in the area harmonized, possibly at the cost of uniformity of law in the Member States.

- Full harmonisation pre-empts Member states within the scope of application of a EU legislative act, whether “lowering” or “upgrading” protection, as was very clearly prescribed in Art. 4 of the Commission proposal.

It should however not be forgotten that the differentiation between full harmonisation vs. minimum harmonisation refers to ideal types which in practice may be much more complex as we will show later. The decisive question will be one of the “right mixture” which first of all has to be decided by the EU legislator. The legal question must therefore be narrowed down to defining the outer EU constitutional limits of the broad legislative discretion in adopting measures which should respect the following regulatory triangle:

- Optimise the functioning of the internal market against restrictions on the free movement of goods and services and make sure that the competitive conditions are not distorted by costly and grossly diverging regulations on consumer protection and fair trading;
- Allow the consumer to participate actively in the internal market as a citizen with certain basic rights which are not limited to state borders;
- Respect Member state autonomy in areas which traditionally and legitimately have been left to their competence, particularly in contract law.

It will be shown in the following analysis that the ECJ in its case law on harmonisation has used a very flexible, some say “pragmatic” approach to solve this “constitutional puzzle”, as one may be inclined to say.
2. CASE LAW OF THE ECJ ON MINIMUM HARMONISATION

The early, quite well known and often cited cases *Buet* and *di Pinto* were handed down under the minimum harmonisation clause of the so called doorstep-directive 85/577/EEC which, this should be remembered, already contained a proviso that Member States could extend protection only insofar as it was compatible with the Treaty. This proviso - which was said to be satisfied in the above mentioned cases - was hypothetically directed, as could be imagined, as a “long stop” against Member states provisions, in implementing the directive, by trying to discriminate against EU nationals, products or services, or vice versa introduce rules on “preferential treatment” for national consumers or consumption items - national rules which would be directed at the very heart of the than common, now internal market. One might therefore argue that minimum harmonisation was more than “minimum”; it could be called perhaps “*responsible minimum harmonisation*”.

Later cases continued this approach like in *Karner* and *A-Punkt Schmuckhandel*. AG Trstenjak in her opinions in *Quelle* and *Ausbanc* vigorously defended this approach both with regard to internal market and consumer protection aspects as being legitimate objectives of EU legislation. In her *Quelle* opinion of 15.11.2007 she wrote:

“In the context of consumer protection, the specific purpose of Directive 1999/44 is to ensure a minimum level of harmonisation of the provisions relating to sale of consumer goods and associated guarantees. The requirement of a minimum level of harmonisation is clear not only from the 24th recital in the preamble to the Directive, but also from Article 8(2) thereof, which state 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…. In addition, it should be noted that Directive 1999/44 guarantees mandatory standards for consumer rights and that the parties to a contract are not permitted to agree a lower level of consumer protection in accordance with which the replacement of goods would no longer be free of charge. Furthermore, it is clear

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8 Case C-71/02, *Herbert Karner Industrie-Auktionen/Troostwijk GmbH*, [2004} ECR I-3025, paras. 33-34  
10 Case C- 404/06 [2008] ECR I-2685  
from the second, fourth and fifth recitals in the preamble to Directive 1999/44 that the ultimate aim of the attempt to achieve a high level of consumer protection is the smooth functioning of the internal market, which allows consumers to obtain consumer goods in other Member States freely. On that basis, a higher level of consumer protection can promote what is known as ‘passive’ free movement of goods and freedom to provide services, in terms of which consumers purchase goods or receive services in other Member States. 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, including the conditions relating to the ‘free of charge’ requirement attaching to the replacement of goods (paras 52-53).”

The Court only briefly mentioned this question in its Quelle judgment of 14.7.2008 at para 32 which seemed to agree with the opinion of the AG:

“As follows from Article 8(2) of the Directive, the protection provided by it is minimal and, although Member States may adopt more stringent provisions, they may not undermine the guarantees laid down by the Community legislature.”

It was taken up in more detail it up in its very recent Ausbanc judgment of 3.6.2010 concerning the question on whether the exclusion of so-called core terms in Art. 4 (2) of the unfair terms directive 93/13/EEC\textsuperscript{12} which had not been implemented in Spanish legislation prevented Member states to allow an unfairness test to be used against price and similar clauses despite its minimum harmonisation approach, for instance by being opposed to the liberalising principles of EU internal market law. The Court did not find such a violation even though the control of core terms which was possible under Spanish law, but for instance not in the UK\textsuperscript{13}, eg on pricing, might create obstacles to free movement, eg by discouraging British companies to offer financial services on the Spanish market. The Court wrote:

“(A)ccording to settled case-law, the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of

\textsuperscript{12} [1993] OJ L 95/29
\textsuperscript{13} See the judgment of the UK Supreme Court (former House of Lords) of 25 November 2009, [2009] UKSC 6 (on appeal from [2009] EWCA Civ 116), referring to its earlier case Director General of Fair Trading v First National Bank [2001] UKHL 52; [2002] 1 AC 481; for a critical analysis see Micklitz, European Rev. of Contract Law (ERCL) 2006, 471; same ZEuP 2003, 865.
knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms (para 27).”

Neither the Court nor the AG therefore took up the argument of the Spanish bank that the “rounding clause” in its banking contracts with consumers should be exempted from control as its “core terms” under its Art. 4 (2).

A last question is concerned with the concept of consumer used in EC directives. It defines the personal scope of application of consumer contract law, starting from the general idea that the consumer as the less experienced and economically weaker part on the market needs special protection.14 Member states have been free to extend this definition under the minimum protection clause. The ECJ was asked in Idealservice15 whether the definition of the consumer could be extended to legal persons which it flatly denied without making reference to the minimum harmonisation concept. However, that was in the context of an Italian law that stuck to the wording of the Directive and so did not address the situation of a Members state deliberately granting greater protection.

3. CASE LAW AND RECENT LEGISLATION ON FULL HARMONISATION

Two seemingly unassociated areas of consumer law, namely product liability under the “old acquaintance” of Dir. 85/374/EEC16, and unfair commercial practices under the “new package” of Dir. 2005/29/EC17 have seen the Court quite outspokenly in favour of a full harmonisation approach, to be enforced against seemingly “better Member state law”. Again we must make a long story very short and limit ourselves to the results of this debate.


The preclusionary effects of Dir. 85/374 were first developed in a series of cases brought by the Commission against France18 and Greece19 and the Spanish

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14 For a recent account see case C-243/08 Pannon [2009] ECR I-4713 at para 22
16 [1985] OJ L 210, 29
18 Case C-52/00 Commission v. France [2002] ECR I-3827
19 Case C-154/00 Commission v Greece [2002] 1-3879
Gonzales reference\textsuperscript{20}, prepared by very strong opinions of AG Gelhoed based on the protracted legislative history of the directive, which found much criticism in literature\textsuperscript{21}, including the authors of this paper. Despite this criticism, the Court defended its view later in the Skov-case\textsuperscript{22} which ruled that Dir. 85/374 precludes a national rule under which the supplier - who under the directive is only subsidiarily liable if the producer cannot be located - is answerable without restriction for the producer’s no fault-liability. Even though the directive did not have a full harmonisation clause as it is used today, it put restrictions on Member states concerning an extension of liability in its Art. 13 and provided for special procedural mechanisms if Member states wanted to extend liability in certain areas in Art. 15 of Dir. 85/374, but allowed them to maintain their existing systems of tort and contract liability. Therefore, according to the ECJ suppliers may be still sued under a fault based scheme, even if it results in a “better” protection of victims than Dir. 85/374. How far the judgment also precludes tendencies in liability law in the jurisdictions of Member states, for instance, Germany, France, and Belgium, to merge strict and fault based liability systems if organisations are regarded as wrongdoers (so called “Organisationshaftung”)\textsuperscript{23}, has remained unclear. This raises very clearly the question of the scope of the full harmonisation principle – indeed a central area of the coming debate to which we will turn under sec. 4 (b).

The recent Somer case\textsuperscript{24} was concerned with the scope of Dir. 85/374 concerning property damage. The Court came to the following result:

“Directive 85/374 must be interpreted to mean that it does not preclude the interpretation of domestic law or the application of settled domestic case-law according to which an injured person can seek compensation for damage to an item of property intended for professional use and employed for that purpose, where the injured person simply proves the damage, the defect in the product and the causal link between that defect and the damage” (para 33).

3.2. Dir. 2005/29/EC on Unfair Commercial Practices

The later Dir. 2005/29 contains a full harmonisation (though limited in scope in Art. 3, particularly with regard to contract law)\textsuperscript{25} clause which served as a model

\textsuperscript{20} Case C-183/00 González Sánchez/Medicina Asturia, [2002] ECR I-3901
\textsuperscript{22} Case C-402/03 Skov v Bilka Laurprisvarehus and Bilka Laurprisvarehus v Jette Mikkelsen et al [2005] ECR I-199
\textsuperscript{23} See the overview by G. Brüggemeier, Haftungsrecht, 2006, at pp. 117-174.
for the Commission proposal of 8 Oct. 2008. It takes a “three level approach” at combating unfair practices, the first level being the “big general clause” forbidding unfair practices in Art. 5, the second containing “small” general clauses on misleading actions (Art. 6) and misleading omissions (Art. 7) as well as on aggressive practices (Art. 8) and harassment (Art. 9). The third level is represented by Annex I to the Directive according to which 31 individually listed misleading and aggressive trading practices are unfair *per se*. According to the EU legislator, there are commercial practices in the Union which do not need to be individually assessed. However, the legal character of such a “black list” was not clear at the time of adoption of the directive: does it only contain examples of incriminated practices, or does it pre-empt Member state law to add their own black (or grey) lists for practices which they regard as unfair within their territory vis-à-vis consumers?

The *VTB* case\(^{26}\) concerned a Belgium law prohibiting combined offers to consumers (with some exceptions) which were not blacklisted in the Annex of the UCPD. *Plus*\(^{27}\) challenged a German prohibition on the participation of consumers in a lottery depending on the purchase of goods or services in § 4 Nr. 6 of the recently reformed “Gesetz zur Regelung des Rechts des unlauteren Wettbewerbs” (UWG) of 29.9.2009 also not contained in the Annex. The recent *Mediaprint* case is pending upon reference of the Austrian Oberster Gerichtshof; it is concerned with the Austrian prohibition to offer gifts and similar “Zugaben” in the marketing of print media\(^{28}\) - a prohibition with a double objective, namely protecting consumers against gifts which deter them from rational purchasing decisions, and protecting small media business against practices which eventually might put them out of the market because they cannot match them. Both the Advocate General and the Court defended the full harmonisation principle of the Annex with strong words. AG Trstenjak wrote in *VTB*:

"Unlike the Belgian Law, the Directive presupposes that commercial practices are fair as long as the precisely defined legal conditions for a prohibition are not fulfilled. It thus follows an opposite approach, in favour of the trader’s\(^{25}\)


\(^{27}\) Case C-304/08 *Zentrale zur Bekämpfung des unlauteren Wettbewerbs v Plus Warenhandelsgesellschaft* [2010] ECR 1-(10.1.2010); supporting comment St. Leible, Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2010, 186.

\(^{28}\) C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag v Österreich-Zeitungsverlag*; opinion of AG Trstenjak of 24.3.2010 (in German only).
entrepreneurial freedom, which accords essentially with the legal concept of ‘in dubio pro libertate’ (para 81).”

The Court more or less followed suit. In VTB it wrote:

“Annex I to the Directive also establishes an exhaustive list of 31 commercial practices which, in accordance with Article 5(5) of the Directive, are regarded as unfair ‘in all circumstances’. Consequently, as recital 17 in the preamble to the Directive expressly states, these are the only commercial practices which can be deemed to be unfair without a case-by-case assessment under the provisions of Articles 5 to 9 of the Directive. Finally, it should be noted that combined offers are not included in the practices listed in Annex I to the Directive. ... In that regard, clearly, by establishing a presumption of unlawfulness of combined offers, national legislation such as that at issue in the main proceedings does not meet the requirements of the Directive (paras 56-59).”

A similar approach was chosen in Plus and will probably be followed in Mediaprint where the opinion of AG Trstenjak of 24.3.2010 already points in this direction.

As a result of this case law, it can be shown that the Court is very outspoken with regard to the effects of the full harmonisation principle on Member state law.

3.3. The special case of the Brussels Convention/Regulation 44/2001

The definition of the concept of consumer was before the Court several times in its case law concerning the Brussels Convention/now Regulation 44/2001.

In Gruber29 the Court ruled:

“a person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade or profession may not rely on the special rules of jurisdiction laid down in Articles 13 to 15 of the Convention, unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect (para 54).”

This narrow definition is however only of importance for the Brussels instruments because of their specific purpose in delimiting jurisdiction. It does not have any importance on the discussion on “full” vs. “minimum” harmonisation, as the Court said in para 32 of Gruber, referring to its earlier case law:

“According to settled case-law, the concepts used in the Brussels Convention – which include, in particular, that of ‘consumer’ for the purposes of Articles 13 to 15 of that Convention – must be interpreted independently, by reference principally to the scheme and purpose of the Convention, in order to ensure that it is uniformly applied in all the Contracting States.”

4. LIMITS OF HARMONISATION

The conflict over Community competences was highlighted in the Court’s tobacco advertising judgment of 5.10.2000.30 One of the critical points of the Court was the so called minimum clause of the annulled Dir. 98/43/EC31- which is the only aspect of the judgment of interest in our context - where it wrote:

“Under Article 5 of the Directive, Member States retain the right to lay down, in accordance with the Treaty, such stricter requirements concerning the advertising or sponsorship of tobacco products as they deem necessary to guarantee the health protection of individuals. Furthermore, the Directive contains no provision ensuring the free movement of products which conform to its provisions, in contrast to other directives allowing Member States to adopt stricter measures for the protection of a general interest.... In those circumstances, it must be held that the Community legislature cannot rely on the need to eliminate obstacles to the free movement of advertising media and the freedom to provide services in order to adopt the Directive on the basis of Articles 100a, 57(2) and 66 of Treaty.”

The tobacco advertising judgment was remedied in later EU legislation on tobacco advertising which did not contain a minimum clause and allowed free movement of tobacco products and marketing tel quel, thus finding the support of the Court32.

With regard to the Member states’ approach to minimum harmonisation where this was expressly allowed in a Directive, a more nuanced analysis under primary law aspects was first undertaken by the ECJ in Gysbrechts33. It concerned a Belgian regulation, made possible under the minimum harmonisation concept of the distance selling Dir. 97/7/EC34 forbidding the internet provider to ask for advance payments and to request the credit card number of the consumer before

32 Case C-380/03 Germany v EP and Council [2006] ECR I-11573 referring to case C-491/01 The Queen v Secretary of State for Health ex parte: British American Tobacco (Investments) Ltd. et al. [2002] ECR I-11453
the withdrawal period had lapsed. Since criminal action was brought against the
Belgian internet provider who had violated this rule it first had to be decided
whether the prohibition on measures having an equivalent effect as export
restrictions under Art. 29 EC (now Art. 35 TFEU) applied to the case, which was
confirmed according to the broad interpretation given to fundamental freedoms,
but not to be further discussed here. The entire debate turned then around the
justification under proportionate consumer policy arguments. AG Trstenjak in her
opinion of 17.7.2008 condemned the Belgian regulation for not attaining a fair
balance between the supplier and the consumer concerning advance payments;
“absolute consumer protection” resulted in “summum ius – summa iniuria”. The
Court found “that Article 29 EC does not preclude national rules which prohibit a
supplier, in cross-border distance selling, from requiring an advance or any
payment from a consumer before expiry of the withdrawal period, but Article 29
EC does preclude a prohibition, under those rules, on requesting, before expiry of
that period, the number of the consumer’s payment card.” (para 60).

The first was regarded as being “necessary”, the second not – a reasoning which
may be doubted but which is not part of our argument. The judgment basically
leads to the conclusion that under minimum protection clauses Member states
still have to respect the proportionality criteria when their additional consumer
protection provisions have an effect on free movement, even in a more “remote”
regulation like security for advance delivery by the trader during the withdrawal
period.

Both judgments lead to the conclusion that the Court will scrutinise minimum
protection clauses under internal market and proportionality aspects, but it would
be going too far to argue that the Court is generally against them. This latter
argument certainly does not go conform with the recent Quelle and Ausbanc
judgments which defended minimum harmonisation in sales and unfair terms law
as a necessary element of consumer protection!

5. LIMITS TO FULL HARMONISATION

With regard to full harmonisation, the ECJ insists that this principle is limited by
the very scope of the Directive and therefore leads in our above mentioned
examples based on Dir. 85/374 and 2005/29 to two consequences

35 Micklitz/Reich, Verbraucher und Recht (VuR) 2008, 349-351; for a thorough critique see Micklitz,
VTB v. Sanoma – Vollharmonisierung im Lauterkeitsrecht, Verbraucher und Recht (VuR) 2010, 110, in
particular on the scope of the UCPD which also affects B2B practices which only have an indirect effect
on consumers. Contrary to Dir. 2005/29, the new Dir. 2006/114/EC [2006] OJ L 376/21 concerns
deceptive practices in B2B relations and contains only a minimum clause; comment G. Busseuil,
• In product liability law, the Directive does not pre-empt national fault based liability systems, even when they come close to strict liability, nor case law concerning strict liability with regard to property damage.

• In determining the unfairness of commercial practices, even if they are not listed in the annex, they can still be caught by the general clauses on unfair, misleading or aggressive practices based on a case-by-case approach which can be supported by state rules on evidence, based on their “procedural autonomy” and on the requirement written into the directive itself to provide for effective remedies\textsuperscript{36}.

• It remains to be seen whether the definition of consumer represents the limit of any full harmonisation effects leaving Member states freedom to provide even higher levels of protection to non-consumers (see section 10)

6. SOME TENTATIVE CONCLUSIONS ON ECJ CASE LAW

This overview which by no means claims to be exhaustive, especially with regard to the ongoing discussion in legal writing to which the authors have contributed, allows some first conclusions:

• The Court will usually pay respect to the harmonisation approach chosen by the EU legislator, whether it be minimum, full or a differentiated approach. With regard to finding the right solution in the above mentioned regulatory triangle – internal market, consumer protection, and Member states’ autonomy –, the Court will usually support the choice of the EU legislator, perhaps with a certain “bias” in direction of the internal market (see \textit{Gysbrechts}).

• As a Union Court, the ECJ takes great care to scrutinize the correct fulfillment of the Member states’ obligations and restrictions under the relevant directive, whether minimum or full harmonisation is on the agenda. The pre-emptive effect of directives is highly respected and further developed by the ECJ, in whatever direction, whether towards “more” (\textit{Quelle}) or “less” protection (\textit{Skov}).

• The Court will only set the outer limits in particular of minimum harmonisation: This will happen when it can be shown that minimum harmonisation has a clearly negative effect on free movement like in the \textit{tobacco advertising} case and, to a minor extent, in \textit{Gysbrechts}. Most important, Member State powers under minimum harmonisation do not escape a proportionality control. This mechanism

\textsuperscript{36} For details see Reich, Procedural autonomy of Member states v. effective legal protection in recent Court practice – On the way to a “Procedural plurality”, in: Festschrift Mikelenas, 2009, 271
obviously can only work in minimum, not in full harmonisation. The EU legislator is well advised to respect this approach of the ECJ also when legislating in consumer matters, particularly with regard to provisions relating to the definition and contents of a certain product or service which is supposed to circulate freely in the internal market, including its marketing, which will be dealt with later in the second part of this paper.

- The “further away” a certain EU provision is its impact on free movement, especially contract law provisions like in *Quelle* and *Ausbanc*, the more welcoming seems to be the approach of the ECJ towards minimum harmonisation. This is particularly important for “horizontal directives” covering broad areas of contract law.

The following lines will try to develop some guidelines to the EU legislator respecting the approach of the ECJ to be on the “safe side”. Reich has called this approach “half harmonisation” which could be used by the EP in its coming deliberations without in any way wanting to prejudice political choices. The present authors do not necessarily agree on all points which simply means that the decision will – of course in a democratic context – and should be given back the legislator. Whether it will help to “unlock” the “lock-in” between the two documents (the *Schwab report* and the *Wallis opinion*) will have to be decided by those concerned themselves.

### 7. WHERE WE ARE TO-DAY – CURRENT ACQUIS, MEMBER STATES LAW, PCRD, SCHWAB REPORT AND WALLIS OPINION

The proposal for a Consumer Rights Directive proposed a move to full harmonisation in most respects. This contrasts with minimal harmonisation approach of the four directives which it was seeking to harmonise: doorstep selling, distance selling, unfair terms and consumer sales. The study by Schulte-Nölke, Twigg-Flessner and Ebers (eds), *EC Consumer Law Compendium*, shows that in several areas Member states had taken advantage of the minimal harmonisation clause.

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37 Supra note 2.
43 (Sellier, 2008)
However, political agreement has been difficult to achieve on full harmonisation to the extent proposed by the Commission due to fears that it might reduce consumer protection and affect national legal traditions. Both the legal affairs and internal market committees have published drafts that to differing degrees move away from the full harmonisations standard, whilst trying to target the principle on areas where the internal market can be promoted by full harmonisation without unduly threatening consumer protection. The aim of this paper is to find grounds for the two committees to develop a common position. We have resisted commenting on the substantive rules.

First, however, the extent of differences on the full harmonisation principle between the two drafts and in comparison with the Proposal needs to be ascertained. The following table illustrates the position. Red colouring indicates full harmonisation and green minimal. Orange indicates where the rule is so strict in consumer’s favour that it does not make sense to view it as being increased by national law.

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<td>Art. 5 General information</td>
<td>Minimal</td>
<td>Maximal but only covers distance and off-premises contracts. Even within that scope does not apply to immovable property rights, transport, financial, healthcare and welfare services. Does not apply to contracts within scope of package holidays, timeshare, distance marketing of financial services and life assurance directives. EU lex specialis overrides rules. Member states remain free to impose addition requirements on service providers established within their</td>
</tr>
<tr>
<td>Article</td>
<td>Minimal</td>
<td>Maximal</td>
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<tr>
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</tr>
<tr>
<td>Art. 6 Consequences for failure to provide information – subject to national laws</td>
<td>Minimal</td>
<td>Minimal</td>
</tr>
<tr>
<td>Art. 7 Intermediary information requirements</td>
<td>Minimal</td>
<td>Deleted</td>
</tr>
<tr>
<td>Art. 9 Information requirements for distance and off-premises contracts</td>
<td>Minimal</td>
<td>Deleted</td>
</tr>
<tr>
<td>Art. 10 Formal requirements for off-premises contracts</td>
<td>Minimal</td>
<td>Maximal</td>
</tr>
<tr>
<td>Art. 11 Formal requirements for distance contracts</td>
<td>Minimal</td>
<td>Maximal</td>
</tr>
<tr>
<td>Art. 12 Length and starting period of withdrawal period</td>
<td>Maximal</td>
<td>Maximal</td>
</tr>
<tr>
<td>Art. 13 Omission of information on the right of withdrawal</td>
<td>Maximal</td>
<td>Maximal</td>
</tr>
<tr>
<td>Art. 14 Exercise of right of withdrawal</td>
<td>Maximal (but does not require written form)</td>
<td>Maximal</td>
</tr>
<tr>
<td>Art. 15 Effects of right of withdrawal</td>
<td>Maximal</td>
<td>Maximal</td>
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<tr>
<td>Art. 16 Obligation of trader on withdrawal</td>
<td>Maximal</td>
<td>Maximal</td>
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<tr>
<td>Art. 17 Obligations of consumer</td>
<td>Maximal</td>
<td>Maximal</td>
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<tr>
<td>Art. 18 Effects on ancillary contracts</td>
<td>Changes to linked contracts</td>
<td>Changes to linked contracts</td>
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<td>Art. 19 Exceptions from right of withdrawal</td>
<td>Minimal</td>
<td>Maximal</td>
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<tr>
<td>Art. 20 Excluded distance</td>
<td>Minimal</td>
<td>Maximal</td>
</tr>
<tr>
<td>and off-premises contracts</td>
<td>Art. 21 Scope</td>
<td>Minimal</td>
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<td>----------------------------</td>
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</tr>
<tr>
<td>Art. 22 Delivery</td>
<td>Minimal</td>
<td>Maximal</td>
</tr>
<tr>
<td>Art. 23 Passing of risk</td>
<td>Difficult to see how it could be more protective.</td>
<td>Difficult to see how it could be more protective</td>
</tr>
<tr>
<td>Art. 24 Conformity with contract</td>
<td>Minimal</td>
<td>Maximal</td>
</tr>
<tr>
<td>Art. 26 Remedies for lack of conformity</td>
<td>Minimal</td>
<td>Maximal (so long as remedy in art. 26(1)i.e. does not include damages)</td>
</tr>
<tr>
<td>Art. 27 Costs and damages</td>
<td>Difficult to see how it could be more protective</td>
<td>Difficult to see how it could be more protective</td>
</tr>
<tr>
<td>Art. 28 Time limits and burden of proof</td>
<td>Minimal</td>
<td>Minimal</td>
</tr>
<tr>
<td>Art. 29 Commercial guarantees</td>
<td>Minimal</td>
<td>Maximal except for excluded contracts. Freedom for member states to act outside scope unaffected i.e. negotiated terms</td>
</tr>
<tr>
<td>Art. 30 Unfair terms scope</td>
<td>Minimal</td>
<td>Maximal</td>
</tr>
<tr>
<td>Art. 31 Transparency</td>
<td>Minimal?</td>
<td>Maximal for distance and off-premises contracts</td>
</tr>
<tr>
<td>Art. 32 General principles</td>
<td>Minimal</td>
<td>Maximal</td>
</tr>
<tr>
<td>Art. 33 Burden of proof</td>
<td>Difficult to see how it could be more protective</td>
<td>Difficult to see how it could be more protective</td>
</tr>
<tr>
<td>Art. 34 (Annex II)Terms considered unfair in all circumstances</td>
<td>Minimal</td>
<td>Minimal</td>
</tr>
<tr>
<td>Art. 35 (Annex III) Terms</td>
<td>Minimal</td>
<td>Minimal</td>
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</tbody>
</table>
In most respects the pCRD adopts a full (maximal) harmonisation approach, except as regards consequences for failing to fulfil information duties. The Wallis Opinion approach is to favour minimal harmonisation except in the specific area of right of withdrawal. The Schwab Report starts out from the opposite position of favouring targeted full harmonisation and only making exceptions, but as the table shows above taking into account areas where there is little scope for offering more protection.

The areas of divergence between the Schwab Report and Wallis Opinion can be distilled down to whether the CRD should maximal requirements for:

1. information requirements for distance and off-premises contracts, subject to a long list of exceptions;
2. formal requirements for distance and off-premises contract;
3. exceptions from the right of withdrawal,
4. exclusions from the rules relating to distance and off-premises contracts;
5. delivery in sales contracts;
6. conformity with the contract;
7. transparency in distance and off-premises contracts;
8. general principles for reviewing unfair terms; and
9. effects of unfair terms.

In evaluating the options for these areas account will be taken of the policy reasons justifying harmonisation and consumer protection discussed below and the extent to which those are reflected in the jurisprudence of the European Court of Justice as discussed above. In making this assessment account will be taken of
the extent to which national law currently provide for higher protection than set out in the pCRD. Naturally to the extent that current levels of protection are higher there will be potential consumer concern, although this will require an assessment of the actual value of that additional protection compared to the gains offered by full harmonisation. Equally the fact that no national state currently offers higher protection should not conclusively determine that they should lose the right to improve on the current law for all time.

8. PRINCIPLES JUSTIFYING FULL HARMONISATION IN EU MARKET

Traditionally harmonisation based on internal market concerns has been justified to remove potential barriers to trade and distortions in competition. In consumer contract law we see the former as being the most persuasive reasons since the combination of the already reasonably high minimal level of harmonisation and the small value of most consumer contract claims means that rarely will the impact of rules be such as to significantly distort competition. What is important is that there are no rules that unnecessarily impose restrictions on the way goods and services can be marketed across borders and that where possible businesses (and consumers) are not surprised by strict peculiarities of national law.

The details in relation to the four areas of information, cancellation, sale and unfair terms – are considered below; here we just set this into a broad context of the extent to which full harmonisation could be seen as necessary and justified under EU constitutional law. National information requirements can act as barriers to trade by imposing precise obligations that have to be met to enter a national market (the problem with harmonising them fully is that information obligations in fact cover a wide variety of circumstances and full harmonisation may be hard to achieve without reducing vital consumer protection). By extension the same arguments could be applied to other formalities for entering contracts. Similarly it is understandable that business might want to rely on the same standard terms and conditions throughout the EU. Any rule banning a term in all circumstances in a particular Member state might threaten this and so if a “black list” was included in CRD it could be argued this ought to be fully harmonised. Although in practice as the general clause will be applied in the context of local laws and traditions it will be hard to ensure the security of standard terms particular if control of “core terms” is left outside the scope of harmonisation. Cancellation rights are a

44 See e.g. C-376/98 Germany v Parliament and Council [2000] ECR I-8419
modern creation in response to various consumer concerns and have often been influenced by European law. The harmonisation of the circumstances in which such a right is generated and the length of the period and when it runs from seem apt to be fully harmonised to prevent businesses being surprised by laws of the state into which they are trading. The extent to which all other aspects of the right of withdrawal (such as how consumers exercise the right and its consequences) need to be harmonised is open to debate. As regards sales law there can be an argument for harmonising any rules on the content of the consumer guarantees as like information rules and standard form terms this will assist in allowing common documentation to be used across Europe. Common rules on conformity are not needed in the same way, but as differing levels may indirectly affect the way products are designed there is an arguable case that the internal market could benefit from common rules. This may be relatively easy to achieve in most states as the national rules are fairly equivalent to those found in the current acquis (although that might equally be an argument for not needing to fully harmonise). The real debate in sales law is about remedies where states have different traditions. Disturbing national autonomy on remedies would threaten current level of consumer protection in some states. Granting member states freedom as to the precise remedies, so long as they are effective, is in any event in keeping with EU traditions. Different remedies would not affect the requirements for marketing goods or services in different member states. The fact that occasionally a consumer may have a slightly better remedy available under national law than under the CRD is unlikely seriously to impede trade.

Thus, the main areas justifying harmonisation would be information and formalities, cancellation rights and if introduced, the blacklist of unfair terms and consumer guarantees. If one extended the scope beyond those where the justifications in terms of barriers to trade were pressing to situations where it could be desirable because of the indirect effects, harmonisation of the conformity standard would be the prime candidate.

9. **APPLYING PRINCIPLES TO SUBSTANTIVE AREAS OF CRD**

9.1. **Information and formalities**

The Wallis opinion maintains a general information obligation, but as a minimal obligation whereas the Schwab Report keeps the information rules as maximal but restricts them to distance and off-premises contracts. The Schulte-Nölke,
Twigg-Flessner and Ebers’ *EC Consumer Law Compendium* demonstrates that in both doorstep and distance selling contexts Member states had taken advantage of the minimal harmonisation clause to include additional rights. This also blends in with the formality rules in arts 10/11 of the pCRD for often these rules also concern the form in which the information has to be provided or the type of withdrawal form that has to be used. Once again the Wallis opinion opts for a minimal approach to harmonising formalities and the Schwab report adopts a maximum approach.

It is possible that the divergence between the Schwab report and Wallis opinion arises because they are seeing different problems that do indeed justify different approaches to full harmonisation. A maximal full harmonisation approach when applied to general information duty is potentially too sweeping, for it places at risk consumer protection rules not contemplated by the pCRD (for example, in the area of health and safety and instructions for use, or imposed under national good faith clauses or protected by art 22(5) of the Services Directive). On the other hand it would seem sensible in the field of distance and off-premises contracts to come up with an agreed list and format of information obligations that Member states could not depart from (there being a procedure to update the list or amend the format should experience justify such reforms). Thus the Schwab report approach of focusing on distance and off-premises contracts has much to commend it, but should be limited to those information and formality rules that derive from the use of that selling means. In other words if goods or services had specific information or form requirements (e.g. medicines) these should not be disapplied just because they were sold at a distance or off-premises. Maximal harmonisation is justified for the information requirements generated by the choice of particular methods of selling and the rules on this have in many states been derived from the EU legislation in any event.

For similar reasons it seems sensible to maintain the maximal rule for transparency as set out in art 31(4), but to limit it to distance and off-premises contracts as done in the Schwab report. The Wallis position is less clear as the original clause seems to be maintained, but is not said to be an exception to the maximal harmonisation approach.

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45 At 95-97 and 327-336.
9.2. Withdrawal

The Schwab report and Wallis opinion agree that many of the rules of the right of withdrawal should be fully harmonised. As there is political agreement on this point we do not dwell upon it and neither do we comment on the content, save to welcome the clarification in Schwab report that for goods contracts the withdrawal period only starts running when the consumer obtains material possession of the goods. The extension of the withdrawal period in both the Schwab report and Wallis opinion by one year when information on the right of withdrawal is not supplied is to be welcomed. However, a curious exception from the full harmonisation principle in the pCRD was leaving to national law the consequences of failing to provide other information (art. 6(2)). This may be because of the difficult policy choice: the present position whereby in distance selling contracts failing to provide even minor information might prolong the withdrawal period seems unfair to traders, but on the other hand it may be unfair to consumers to allow traders without consequence to keep negative information back until the withdrawal period has expired. If one is concerned about preventing traders having nasty surprises when trading in other states then one might consider legislating to prevent a trader facing a long term right of withdrawal for failing to provide a technical detail, but determining which is significant and insignificant information for this purpose may be a complex matter. However, it is open that the legislator is best placed to determine.

The major difference between the Schwab report and Wallis opinion as regards the right of withdrawal concerns the approach to the exceptions to certain distance and off-premises contracts. It again sees the Schwab report adopting a maximal approach and Wallis opinion a minimal approach. This is mirrored in the more general exclusions of contracts from the entire chapter III of pCRD which also includes consumer information. It is clear from the Schulte-Nölke, Twigg-Flesner and Ebers’ EC Consumer Law Compendium that some member states have extended the scope of the rules to cover more situations in which consumers have the right of withdrawal and by having a shorter list of exclusions.46 It is hard to find a principled solution to this dilemma, for clearly the internal market would be assisted by common exemptions and exclusions, but equally some Member states clearly see the current acquis as not providing sufficient protection. This is a prime example of where democratic politicians has to weigh the competing claims.

46 At 93-94. and 322-327 and 340—344.
9.3. Sales law and consumer guarantees

Concerning the provisions on sales law and guarantees, the Schwab report and the Wallis opinion agree with regard to minimal harmonisation of remedies, time limits and seemingly guarantees (with more detailed formulations in the Wallis report subject to political agreement). The divergence concerns the scope, delivery, and the concept of conformity. While we do not see any problems with full harmonisation regarding scope and delivery, problems may arise with regard to the concept of conformity, particularly concerning French law which in the recent adoption of Art. L-211-13 of the Code de la consommation d’après l’Ord. 2005-136 du 17 févr. 2005 (confirmée par la Loi 2006-406 du 5 fév. 2006) has provided: "Les dispositions de la présente section ne privent pas l’acheteur du droit d’exercer l’action des vices rédhibitories telle qu’elle résulte des articles 1641-1649 du code civil ou de toute autre action de nature contractuelle ou extracontractuelle qui lui est reconnue par la loi". This "parallelism" of French law would have to be abandoned in case the concept of conformity is fully harmonised. Art. 3 of the Ord. 2005-136 has extended the “bref délai” to a “délai de deux ans à compter de la découverte du vice.”

An argument for full harmonisation would be that the concept of “conformity”, which first was used in Art. 35 of the UN Convention of the Law of International Sales of 1980 (CISG) has won great acceptance in the EU (with the exception of the UK, Ireland and Portugal. In precisely defining the scope of the obligations of the professional seller uniformly in the EU, it seems justified to have a full harmonisation approach under control of the ECJ. The standard of consumer protection is sufficiently high to allow the abandonment of non-conforming national standards like the traditional French law of “vices cachés”.

On the other hand, the Quelle litigation confirms the view taken by both reporters that remedies should not be subject to full harmonisation. By excluding a claim of the seller for compensation of a defective good the ECJ has already guaranteed a relatively high standard of consumer protection valid within the entire EU.

9.4. Unfair terms

With regard to unfair terms both reporters agree that the black and grey lists should be subject only to minimal harmonisation which seems in our opinion to be justified regarding their only very “distant effects” to distorting competition in the internal market. Such view has recently also been confirmed by the adoption of
Reg. (EC) No. 593/2008 (Rome I)\textsuperscript{47} which in its consumer provision of Art. 6 allows national contract law to provide for different levels of protection. The only disagreement concerns Art. 32 – the extent of harmonisation in Art. 37 concerning the effects of an unfair clause does in our opinion not make any difference in legal practice of Member states - about the general principles of control. Both proposals repeat the “old” Art. 4 (2) of Dir. 93/13 which was subject to the above mentioned Ausbanc litigation\textsuperscript{48}, which the Schwab report would submit to full harmonisation, thereby indirectly “overruling” the ECJ judgment, while the minimal harmonisation approach of the Wallis opinion would conform to the existing state of the law. It remains of course a matter of policy priority how the EP will decide, but we submit that the argument on whether a control of “core terms” would be contrary to the internal market regime was widely debated both in the opinion of AG Trstenjak and of the Court and in the end rejected, despite the prior Gysbrechts judgment\textsuperscript{49}. Why should the EP be more restrictive? Why not leave Member states discretion how they decide on a control of core terms which may be much closer to the real problems of consumers than the EU legislator?

\section*{10. NEED OF CLARITY ABOUT THE NATURE OF HARMONISATION}

The case law of the ECJ amply demonstrates the need for clarity about the scope of harmonisation. It is one thing to lose a debate about the scope of harmonisation during the political process and quite another to find that the scope was different from what one thought had been agreed. This latter scenario was certainly the case for the Danish as regards supplier’s liability for product liability\textsuperscript{50} and arguable was the case for the Belgium’s law on sales promotion.\textsuperscript{51} One advantage of the pCRD’s full harmonisation position is that it is at least clear. The rule is full harmonisation with only limited and fairly clearly specified exceptions. However, this solution fails adequately to address the complex range of competing interests.

A distinctive difference between the Schwab report and Wallis opinion is that Schwab sticks closer to the spirit of full harmonisation by renaming art. 4 “Targeted full harmonisation” and clearly delimiting the fields in which Member

\textsuperscript{48} See note 11.
\textsuperscript{49} Supra note 33.
\textsuperscript{50} Case C-402/03 Skov AEG v Bilka Lauprisvarenhus A/S, [2005] ECR I-199 (supra note 22).
states may go higher. Wallis does the exact opposite, referring to “Degree of harmonisation”, setting minimum harmonisation as the norm and then specifying where maximum harmonisation applies. Both the Schwab and Wallis documents have understood the need for clarity and the choice of terminology and approach may have something to do with political “mood music”. However, moving forward in such a contentious debate the rather sterile maximal versus minimum debate might be side-stepped and the debate moved on to more concrete terrain by deleting any general clause on the extent of harmonisation. The political tone might be set by the recitals and the matter expressed explicitly within each chapter. Particularly if the approach indicated above (that would lead to a differentiated approach within some chapters) is adopted a case by case approach to clearly setting out the degree of harmonisation is to be recommended.

One of the problems with the full harmonisation approach is knowing just what its scope is. This is well illustrated by the debate about the definition of “consumer” alluded to above. Is it meaningful to talk about maximal harmonisation of the term “consumer”, if all that means is that anyone outside (e.g., legal persons or mixed purpose supplies) can be subject to national regulation without the restriction of any full harmonisation terms? It might be thought that implicitly the consumer contract would set a ceiling on the level of protection in any contractual situation including those “near” to the consumer position but being regarded as not deserving protection as consumers. However, it is hard legally to conclude the measure affects contracts in general outside its scope. Whilst few states would positively seek to provide businesses with better protection than consumers, it may well be that they will continue to apply existing rules that might be more protective than any ceiling the EU might place on consumer protection.52

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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CITIZENS’ RIGHTS AND CONSTITUTIONAL AFFAIRS

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