“Good-Bye Harmonisation by Directives, Hello Cross-Border only Regulation?” – A way forward for EU Consumer Contract Law

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ABSTRACT
This paper considers the shortcomings of the established practice of creating EU Consumer Law through directives which harmonise selected aspects of national law. It is argued that this approach has failed to provide a suitable legal framework to support cross-border consumer transactions. It then goes on to develop an alternative approach. First, the case for choosing regulations rather than directives is made. Secondly, it is argued that EU action should be confined to the cross-border context. The notion of “cross-border” itself is discussed. The analysis is set against the background of the various policy options for EU Contract Law presented in the 2010 Green Paper.

I. Introduction – the 2010 Green Paper and the chance for a full debate
The impetus for this paper has been provided by what the present writer regards as a significant shortcoming in the discussions about the modernisation of EU Consumer Law,1 and that is the failure fully to consider all possible options for future EU action. An opportunity was missed in the 2007 Green Paper on the Review of the Consumer Acquis to have a full debate.2 However, in July 2010, the European Commission published a short Green Paper on Policy Options towards a European Contract Law for Consumers and Businesses (“the Green Paper”),3 in which it sets out the choices for future action in the field of contract law. This could provide the context in which this debate could be had, although indications are that the European Commission has already made up its mind about how to proceed. Nevertheless, it is hoped that this contribution might at least offer a counter-balence to what is at risk of becoming a one-sided debate.

The 2010 Green Paper followed the establishment of an “Expert Group”4 which has been tasked with formulating an official Common Frame of Reference on European Contract Law (CFR) based on the Draft Common Frame of Reference which was prepared by an academic research network and presented to the Commission at the end of 2008.5 The Green Paper presents a total of 7 options (some less realistic than others) ranging from fairly limited EU action to the creation of a full-blown civil code. Thus, whatever the Expert Group produces could become simply a “source of inspiration”6 for European and national legislators as well as becoming the focus of legal education and scholarship, and could over time promote greater convergence (whatever that

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1 For present purposes, “EU Consumer Law” refers only to legislation adopted by the EU in the field of consumer law. The contribution of the free movement provisions to shaping the landscape of EU Consumer Law is not considered here.


might mean\(^7\) on a voluntary basis. Alternatively, the Expert Group text could become an official toolbox for the European legislator by virtue of an inter-institutional agreement. One step up from this, a Commission recommendation could be adopted suggesting that Member States might, over time, either replace existing national contract law rules with an agreed set of European rules, or at least introduce those alongside national rules. Then, there is the suggestion of a Directive on European Contract Law, followed by the option of introducing a regulation on European Contract Law to replace national law, or even a European Civil Code. In-between these, there is – unsurprisingly – the possibility that there might be an “optional instrument” on EU Contract law, to be adopted as a regulation and to operate alongside national laws as an alternative. Any action could be limited to consumer contracts only, or extend to contract law more generally.

With regard to contract law, this *Green Paper* offers a second chance to debate matters not properly discussed in the context of the earlier *Green Paper on the Review of the Consumer Acquis*.\(^8\) The latter was primarily concerned with making the case for maximum harmonisation by directive,\(^9\) subsequently enshrined in the proposal for a Directive on Consumer Rights.\(^10\) In light of the difficulties this proposal has encountered and an apparent change of heart in the Commission now that DG Justice is responsible,\(^11\) this *Green Paper* could be a key turning-point in the evolution of EU Consumer Law (although more recent indications are less promising, with the focus now squarely on the Optional Instrument idea).

The focus of this contribution is to examine the case for a completely different approach to any future action\(^12\) in the field of EU Consumer Law.\(^13\) Among the various options presented in the *Green Paper* is the idea of a regulation on consumer-contract law, limited to cross-border transactions only.\(^14\) It builds on the idea of an “optional instrument”, which is conceived of as a set of contract law rules which could be chosen by the parties as an alternative to national contract laws (p.9). Although the *Green Paper* says little about the limitation of such an optional instrument to consumer contracts, it does raise a number of specific matters which would need to be considered, including the impact of mandatory rules found in national law, and the potential confusion of consumers if they are faced with multiple sets of rules. With regard to a potential limitation to cross-border transactions only, the *Green Paper* again notes the potential risk of confusion (p.12), but also acknowledges that as far as consumers are concerned, for those who

\(^12\) It is assumed that action is necessary. This does not, however, suggest that it is unnecessary to consider what exactly the problem with consumer transactions in the internal market is, and whether this is susceptible to resolution by means of law.
\(^14\) See section 4.1, options 4 and 6, and the discussion at 4.2.1 and 4.2.2 in the *Green Paper*. 
do not want to shop outside their country, the preservation of national levels of protection might be more appropriate.\textsuperscript{15}

Picking up these ideas, this paper develops a two-stage argument for the possible future development of EU Consumer Law. First, it will make the case for abandoning further harmonisation by directive and shift to the use of regulations for any future action. This is a stand-alone argument. Secondly, it will be considered whether the focus of such a Regulation should be restricted to cross-border transactions. Overall, this paper will present the case for a shift from harmonisation of national consumer laws by directives to a regulation focusing on cross-border transactions. In order to develop the case for this, a number of matters are considered. First, the problems with the practice of harmonisation by directives are summarised briefly (section II); then, the case for moving towards using regulations rather than directives will be examined (III), before considering why such a regulation is best limited to cross-border transactions (IV). The overall conclusion (V) will be that further harmonisation by directive is best abandoned, and that any future action ought to take the form of a regulation, with a specific focus on cross-border contracts concluded at a distance. Space precludes a discussion of the substantive matters which such a Regulation should cover, however.

\textbf{II. The problems with harmonisation by directives}

Space precludes a full account of the process of harmonisation to date,\textsuperscript{16} but a few general observations need to be made to explain why the time has come to think about doing things differently.\textsuperscript{17} It is therefore necessary first to recap on how the EU Consumer Law has evolved thus far. It is well-known that consumer policy is a shared competence between the EU and its Member States,\textsuperscript{18} and the EU therefore only has limited powers to act. Although Art.169 TFEU (ex Art.153 EC) provides a legal basis for consumer law measures, this is limited to “measures which support, supplement and monitor the policy pursued by the Member States”.\textsuperscript{19} The main reason for adopting consumer law measures at the European level has therefore been in the context of the internal market,\textsuperscript{20} a point emphasised in Art.169(2)(a) TFEU which refers to Art.114 TFEU. This may be for historic reasons more than anything else, because when consumer policy started to evolve at the European level, there was no legal basis in the Treaties at all (the precursor to the current Art.169 TFEU only appeared after the Maastricht Treaty in 1992). The only available legal basis was the then Art.100 (subsequently Art.94 EC, now Art.115 TFEU), but once the Single European Act became law, the new Art.100a (subsequently Art.95 EC, now Art.114 TFEU) was used as the legal basis for consumer law measures. The purpose of Art.114 TFEU is the adoption of measures approximating national rules which have the object of the establishment and functioning of the internal market. There is an initial threshold that legislation adopted on the basis of Art. 114 has to have a link to the operation of

\textsuperscript{15} P.12.
\textsuperscript{16} See e.g., H.Micklitz, N.Reich and P. Rott, \textit{Understanding European Consumer Law} (Antwerp: Intersentia, 2008) for a more detailed discussion.
\textsuperscript{17} For a more general discussion, see H.Rösl, “Europeanisation of Private Law through Directives – determining factors and modalities of implementation” (2010) \textit{11 European Journal of Law Reform} 305-322.
\textsuperscript{18} Art.4(2)(f) TFEU.
\textsuperscript{19} Art.169(2)(b) TFEU.
\textsuperscript{20} Another area of shared competence: Art.4(2)(a) TFEU.
the internal market,21 but once this is crossed, action taken is not limited to harmonisation at a low level – with regard to consumer protection (among others), a high level of protection should be pursued.22 The utilisation of what were Arts.100/100a and the maintenance of this approach even after 1992 meant that EU consumer law would invariably follow the model of harmonising (approximating) national laws, rather than creating free-standing EU rules.

But why was harmonisation thought to be necessary? There are two key arguments deployed frequently. The first is an argument used more generally to justify the need for harmonisation: whenever a contract (domestic or cross-border/transnational) is concluded, it will be subject to one national law. However, as soon as a transaction is no longer domestic, at least two national laws (those of the consumer and the trader) compete for being the law applicable to that transaction. It is therefore necessary to determine (through the choice of the parties or default rules) the law which will govern that transaction, the choice generally being between the laws of the trader’s and consumer’s jurisdiction respectively. A complicating factor is that consumer law is usually regarded as “mandatory law”, i.e., it will apply irrespective of the terms of the specific contract, and it cannot be displaced by choosing a law from another jurisdiction as applicable to the transaction. So whenever a consumer seeks to contract with a trader from another Member State, whichever law is chosen, the mandatory rules of the consumer’s jurisdiction continue to apply. In order to minimise the risk that traders might find themselves exposed to unexpected mandatory rules, it was deemed necessary to harmonise at least key elements of consumer law to promote the use of the internal market.

Related to this is the so-called “consumer confidence” argument. This assumes that consumers do not shop across borders because of the differences in national consumer laws, which means that consumers are not sufficiently confident that they will be adequately protected when buying goods or services abroad. Harmonised laws therefore produce more confident consumers and more cross-border transactions for the benefit of the internal market. Not everyone is convinced by the persuasiveness of this argument,23 not least because other factors of a more practical kind (language and transport, for example) more immediately explain the reluctance of consumers to shop abroad – but these factors cannot be tackled as easily through legislative intervention.

The bulk of EU Consumer Law comprises several directives adopted between 1985 and 2002 dealing with doorstep selling (85/577/EEC), package travel (90/314/EEC), unfair terms (93/13/EEC), timeshare (94/47/EC; since replaced), distance selling (97/7/EC), sale of consumer goods and guarantees (99/44/EC), and the distance marketing of financial services (2002/65/EC). With the exception of the Distance Marketing of Financial Services Directive, all these directives are based on a minimum harmonisation standard, allowing Member States to adopt or retain rules which are more favourable to consumers. It is trite law that directives are not directly applicable but only take effect once transposed into national law by each Member State. Transposition does not require a verbatim, or “copy-out,” reproduction of a directive in national law,24 and Member States have some leeway in deciding how to achieve the outcomes required.

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22 Art.95(3) EC; Art.114(3) TFEU.
by a Directive, using suitable legal concepts and terminology. A feature common to all of the directives mentioned is that they only deal with some aspects of consumer law, and therefore provisions based on a directive need to be slotted into existing national law and even depend on national rules to address matters not specifically regulated in a directive, but required for its effectiveness. Moreover, with minimum harmonisation directives, the national legislation (either pre-existing or adopted to transpose a Directive) deemed to be giving effect to the directive can go further; indeed, minimum harmonisation has made it possible for Member States to retain existing national law without major change if that already matched, or exceeded, the minimum standard demanded by a Directive.

The impact of the harmonisation programme to date therefore has not been the creation of a single, consistent and coherent body of consumer law common to all the EU Member States; instead, there are now 27 national rules on doorstep selling, distance selling and so on. One common feature of all national consumer laws is that they are a mix of “pointillist” EU-derived rules and existing national law (either general contract law, or rules specifically aimed at consumer protection). Admittedly, the practice pursued to date has achieved greater approximation of national laws and a reduction of differences, but to some extent, it has only really shifted the degree of diversity between the national laws. It seems that the legal situation post-harmonisation is no less complicated than it was before; if anything, consumer law appears to have become more complex. The Commission’s Acquis Review sought to investigate the state of EU Consumer Law and consider how to move forward. A key component was an academic study, the EC Consumer Law Compendium and Database (the Compendium project), which analysed the transposition of 8 consumer law directives into the national laws of the 27 EU Member States. This project included the creation of a database which details how each provision from a directive has been transposed into the laws of each of the 27 Member States, and a comparative analysis which identified continuing discrepancies in areas already harmonised. Three main reasons were identified as causing the continuing diversity: (i) incoherence and ambiguity within the existing acquis, including inconsistencies between the different language versions of particular directives; (ii) regulatory gaps in the Directives tackled in differently by the Member States; and (iii) reliance on minimum harmonisation clauses by the Member States. Following this project, the Commission issued its Green Paper on the Review of the Consumer Acquis in 2007. Although it appeared to invite comments on a range of possible future approaches (e.g., limiting future legislation to cross-border transactions or even distance contracts only, or whether there should be a shift to maximum harmonisation), it was fairly

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27 It has also raised the level of consumer protection at least in some respects in almost every Member State.
28 Those on Doorstep-Selling (85/577/EEC), Distance Selling (97/7/EC), Sales (99/44/EC), Unfair Terms (93/13/EEC), Package Travel (90/314/EEC), Timeshare (94/47/EC), Unit Pricing (98/6/EC) and Injunctions (98/27/EC).
29 Available at http://www.eu-consumer-law.org/
30 Published as H.Schulte-Nölke, C.Twigg-Flesner and M.Ebers (Eds.), EC Consumer Law Compendium (Munich: Sellier, 2008).
obvious that the *Green Paper* came with a bias in favour of particular options.\textsuperscript{33} The proposal for a Directive on Consumer Rights,\textsuperscript{34} which followed the *Green Paper* and proposed maximum harmonisation of the areas covered by the existing directives on doorstep selling, distance selling, consumer sales and unfair terms, with some additional provisions and broadening of scope, therefore did not come as a major surprise. However, the fact that this proposal has progressed only slowly and may yet result in a much more limited revision than anticipated initially might be the precursor to a more significant change of attitude at the European level.

III. The case for choosing (a) Regulation(s)

The experience with the consumer *acquis* to date shows that the practice of harmonising national laws does not necessarily create a better legal framework for consumer transactions in the internal market. Although national laws have become approximated in substance, there are continuing problems of accurate implementation, as well as the subsequent interpretation of the law by national courts. Key issues remain purely for national law, such as the availability of damages and the determination of what might be recovered.

At a purely practical level, if a dispute were to arise between a consumer and a trader in a cross-border setting, it would still be necessary to identify the law applicable to the contract – both the national law to be applied and the specific legal provisions of national law which would be relevant. So ultimately knowledge of national laws continues to be relevant for the resolution of cross-border disputes.\textsuperscript{35} Whilst approximation by directive has removed some of the more immediate variations between national laws, it certainly has not created a clear and coherent single legal framework for consumer transactions in the internal market.

It is submitted that this is primarily the result of the use of directives for the approximation of national laws, rather than of regulations, which could be directly applicable and would provide one single legal framework applicable throughout the EU. It would obviate the need to seek out the provisions of national law which would govern a particular dispute.

The problem with directives is that the process of transposition gives considerable leeway to the Member States because directives need not be implemented verbatim - the form and method is left to the Member States (Article 288 TFEU (ex Article 249 EC)). There is no obligation to create one single national measure (whether a “consumer code” or a special section in existing codifications, where they exist) where all the consumer provisions are located; piece-meal transposition (as is the practice in the United Kingdom, for example) is perfectly acceptable. Although this might would “allow a smoother implementation of the Community Law into the existing national contract laws or consumer codes”,\textsuperscript{36} it also means that Member States can maintain existing provisions which already meet the requirements of the Directive. The possibility of transposing directives by utilising legal language or concepts that fit with national law is both an advantage and disadvantage at once - national law may be more coherent, but the transposed provisions may blend into national law to such an extent that they become difficult to


\textsuperscript{35} Directives cannot be relied on directly before the national courts, because this would amount to what is known as horizontal direct effect.

\textsuperscript{36} Explanatory Memorandum on the proposal for a Directive on Consumer Rights, p. 8.
identify. So the suggestion that “the implementation of a Directive may give rise to a single and coherent set of law at national level which would be simpler to apply and interpret by traders,” might be true from a purely national perspective, but surely does not greatly alter the difficulties encountered by traders operating in a cross-border setting.

There is an alternative provided in EU Law: regulations. The key difference to directives is that regulations are directly applicable, which means that their effectiveness does not depend on transposition by the Member States (although changes to national law would be required to avoid a conflict with an EU Regulation). Although much of the harmonisation programme is based on directives, the Commission has indicated that “replacing directives with regulations can, when legally possible and politically acceptable, offer simplification as they enable immediate application and can be directly invoked before courts by interested parties.” And more recently, Professor Monti made the case for a shift to regulations in his report *A New Strategy for the Single Market*, where he says that

> “Currently, 80% of the single market rules are set out through directives. These have the advantage of allowing for an adjustment of rules to local preferences and situations. The downsides are the time-lag between adoption at EU level and implementation on the ground and the risks of non implementation or goldplating at national level. ... There is thus a growing case for choosing regulations rather than directives as the preferred legal technique for regulating the single market. Regulation brings the advantages of clarity, predictability and effectiveness. It establishes a level playing field for citizens and business and carries a greater potential for private enforcement. However, the use of regulation is not a panacea. Regulations are appropriate instruments only when determined legal and substantial preconditions are satisfied. ...”

He then goes on to say that

> “Harmonisation through regulations can be most appropriate when regulating new sectors from scratch and easier when the areas concerned allow for limited interaction between EU rules and national systems. In other instances, where upfront harmonisation is not the solution, it is worthwhile exploring the idea of a 28th regime, a EU framework alternative to but not replacing national rules. The advantage of the 28th regime is to expand options for business and citizens operating in the single market: if the single market is their main horizon, they can opt for a standard and single legal framework valid across Member

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41 P.93.
States; if they move in a predominantly national setting, they will remain under the national regime...”

This certainly strengthens the case for utilising a Regulation for the future development of EU Consumer Law. Although Monti talks about new sectors which might become the focus of EU regulation, there is no obvious reason why this approach could not also be used for improving the quality of legislation in existing fields of EU law where existing practice has not produced all of the results intended.

The Commission noted “legal impossibility” and “political unacceptability” as the two constraining factors with regard to a switch to regulations. It seems unlikely that the use of a Regulation for future EU Consumer measures would be legally impossible. Assuming that Art.114 TFEU continues as the legal basis for EU Consumer Law, there is no limitation by this Article to action based on directives only - national rules can be “approximated” through a Regulation, although this would then require the repeal of national laws falling within its scope. The difficulties which the transposition of directives has created would largely fall away - there would be one measure rather than 27 (or more) national measures, and all national provisions within the scope of such a Regulation would be superseded by it. It is much more likely to produce a single and coherent set of law, and both traders and consumers would know the legal framework applicable to their transaction, without having to identify national transposition measures.

Of course, choosing a Regulation would create its own challenges: it would adopt terminology and concepts distinct from any national law, and Member States could not utilise more appropriate national legal terminology as they can when transposing a directive. But then it is a well-established principle that national legislation giving effect to a Directive has to be interpreted in line with the corresponding European law. Indeed, that obligation might be made easier to comply with for national courts if a Regulation is chosen, because there would be no doubt that the relevant law is European.

It has to be acknowledged that a Regulation could create legal difficulties particularly for jurisdictions with a civil code which integrates consumer law into the code, because this would make it more complicated to accommodate a Regulation in the specific domestic context. On the other hand, if a Regulation was the better tool at the European level to solve the problem the EU is seeking to tackle, then that should override such national concerns. A desire at national level to preserve the coherence of civil codes in some jurisdictions would not seem to amount to legal impossibility as far as the choice of a Regulation is concerned.

To some extent, a shift towards a regulation would bring legal practice more into line with the practical reality in that directives often seem to be *de facto* Regulations already: the text of consumer law directives has become increasingly detailed, with complex terminology and intense debate during the legislative stages about the wording of particular provisions. Rather than stating broad outcomes to be achieved in national law, directives contain detailed and sometimes quite technical rules. This makes it more difficult for Member States to deviate from the text of a directive when transposing it into national law, and it has been argued

42 P.93.
convincingly that the level of detail now found in directives would be more appropriate to regulations in any event. So not only would the use of a regulation be legally possible, it would also be acknowledging the practical reality that detailed directives are akin to regulations in any event.

That would leave “political unacceptability” as the other obstacle. From a European perspective, the use of a Regulation would make it obvious to consumers and traders that there is a coherent European framework in place which might encourage cross-border transactions. National Parliaments might conceivably be less keen on this approach. Every consumer transaction would be obviously governed by European law, rather than domestic law (even if chunks of domestic law are already effectively European law), and there might be a need to justify why even the purchase of a newspaper in a small country village would be subject to EU Law. It would also take away the opportunity for national governments to use the European route to modernise national law where this would otherwise not be a priority because of the pressures on Parliamentary time. There may be a political benefit in using the occasion of the adoption of the national transposition measure as demonstrating a commitment to consumer protection which would not be available if EU Law were based on Regulations. Although one might speculate to as to the strength of potential political objections in this regard, it might in any event be the case that if a Regulation were limited to dealing with cross-border transactions, it would become politically much more acceptable.

Overall, therefore, it would seem that if there was a real desire to have at least a basic set of common rules on consumer contracts across the EU, the appropriate legal vehicle for this should be a regulation rather than a directive because experience now shows that whilst directives might give more freedom to national legislators to absorb the provisions of a directive, this practice does not make consumer law any more accessible to consumers and traders willing to engage in cross-border shopping.

IV. Limitation to cross-border transactions

Having made the case for abandoning the use of directives in favour of regulations, it will now be considered whether the scope of a Regulation on consumer contracts should be limited to cross-border transactions only. Such a shift would effectively bring to an end the practice of harmonising national laws, leaving it to national Parliaments to regulate domestic consumer transactions whereas cross-border transactions would be subject to EU law.

To many, limiting EU action to cross-border transactions might sound counter-intuitive. Indeed, the Commission itself was rather sceptical about this possibility in its *Review of the Consumer Acquis*. There are a number of challenges such an approach would raise, including (i) how to define “cross-border”, (ii) the creation of two separate legal regimes with varying degrees of consumer protection, one for domestic transactions and the other for cross-border ones; and (iii) how to deal with the private international law issues such an approach would create. However, none of these seems to be fatal to a shift towards a regulation applicable to cross-border transactions only. Indeed, it will be suggested that from a constitutional

perspective, the case for a comprehensive cross-border regulation is stronger than for harmonisation.

1. Defining “cross-border”

It is, of course, easy to suggest that EU Law should concern itself with cross-border transactions and domestic law with everything else, but that begs one key question: what should be the definition of “cross-border”, or, put normatively, what should be the types of transactions properly within the scope of EU Law?

To answer this question, it is necessary to consider a number of possible scenarios. For the moment, the word “based” will be used to denote the connection of consumer and trader with a specific jurisdiction.

(1) Consumer and trader are based in the same jurisdiction.

(2) Consumer and trader are based in separate jurisdictions and the contract is concluded at a distance (on-line).

(3) Consumer and trader are based in separate jurisdictions but in a border region and the consumer travels into the neighbouring country to conclude a contract face-to-face.

(4) A variant on (3), but the consumer is on holiday in another country and concludes a contract face-to-face.

(5) Consumer and trader are based in separate jurisdictions, but the trader visits the consumer and concludes a contract (e.g., door-step selling; markets; exhibitions).

With the exception of (1), all the other scenarios appear to raise cross-border issues. But should all of these be regarded as “cross-border transactions” for the purposes of EU legislation?

Guidance as to what might properly be regarded as a cross-border transaction can be sought from the field of Transnational Commercial Law. A number of conventions have been adopted to regulate transnational commercial transactions, and in order to determine their scope of application, a criterion for identifying transnational/international contracts had to be found. The obvious example to consider is the UN Convention on the International Sale of Goods 1980 (CISG) which applies where the (commercial) parties to a contract for the sale of goods have their place of business in different states (Art.1(1) CISG). The transnationality element therefore is the location of the respective places of business (rather than the fact that goods cross borders, for example).

How would this basic criterion work in helping to define a cross-border consumer contract? Consumers obviously do not have a place of business, but one can perhaps develop an analogous criterion based on the consumer’s habitual residence/domicile. On that basis, a contract concluded in one Member State where both the consumer resides and the trader has his place of business (1) would be a domestic transaction. On the other hand, a transaction concluded between a consumer residing in one Member State, and the trader having his place of business in another, would be a cross-border contract (2-5).

Would it be practicable to treat all of scenarios 2-5 as cross-border transactions, though? The most uncontroversial scenario is (2) - the consumer places his order through distance means, i.e.,

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46 The fact that consumer and trader may have different nationalities does not give rise to a cross-border element of itself.
via on-line shopping. The order would be placed from the consumer’s residence in one Member State and received at the trader’s place of business in another Member State.

The situation becomes rather more complicated if a consumer residing in one Member State is physically present in the trader’s Member State. The two obvious instances are scenarios (3) and (4) – contracts entered into in border regions and on holiday. Applying the CISG approach by analogy would suggest that all of these are cross-border contracts, but that might be too crude a way of looking at the situation. On the one hand, the consumer is from one country, and the trader from another, but on the other, both consumer and trader will be present in the same Member State when the contract is made. As far as the trader is concerned, he may not know that the particular consumer actually resides in another Member State and that therefore the particular contract could potentially be regarded as a cross-border transaction. The trader would surely expect – reasonably so, one might add – that this contract would be subject to the local law. From the consumer’s perspective, it would seem plausible that a consumer buying an item in another country would assume that the local law applies to the transaction. One could consider that disclosure by the consumer that he is based in another jurisdiction might “activate” the cross-border rules, but that might provoke the trader into refusing to sell to the consumer. It would seem impractical to admit such a possibility.

This might suggest that, despite the attractiveness of adopting a CISG-style test, a more refined criterion would need to be established. If one tries to find a solution to this problem by considering which law consumer and trader could reasonably expect to be applicable to the transaction in face-to-face circumstances, then one might conclude that such transactions should be subject to the trader’s local law. Conversely, one would expect a contract to be subject to the consumer’s local law if the trader was present in the consumer’s country of residence and the contract was concluded there. It seems very doubtful that a consumer in this situation would seriously be deterred by the potential variations in the respective national consumer laws from entering into a contract.47

What this analysis suggests is that the only situation which should properly be regarded as giving rise to a cross-border situation would be scenario (2). Whilst there is a cross-border element to (3)-(5), it seems likely that treating these as cross-border transactions for regulatory purposes would conflict with the reasonable expectations of both trader and consumer.

2. Why limit EU Action to cross-border transactions?

a) General Considerations
Some further consideration of the case for limiting EU action to cross-border transactions is necessary, especially if the notion of “cross-border” is drawn narrowly, as suggested above. The driving force behind EU action is the desire to make the internal market work better for both consumers and traders – not least because of the legal basis available for adopting legislation. However, putting into place a legal framework that does not distinguish between domestic and

cross-border transactions seems to assume that all consumer transactions raise the same issues, but that is not necessarily the case. Working from the ideal of the fully-integrated internal market, one might think that it should not matter whether a transaction is domestic or cross-border, but the realities will always be different. For example, a consumer who buys goods in a local store will always find it easier to deal with any problems than a consumer who bought goods from a trader in another country, and different legal rules might be needed to assist consumers engaged in cross-border shopping which might not be needed for domestic transactions. For example, whilst there may not be a great need for direct producer liability in a domestic context, the case for its introduction for cross-border transactions seems much stronger.

Although the opportunities for cross-border shopping have increased greatly with the popularity of on-line shopping, it seems highly unlikely that this development will displace domestic transactions to a significant degree (even if these, too, might shift to the on-line environment). It seems that the vast majority of transactions will therefore continue to be domestic, and there is no obvious reason why these should be subject to harmonised European laws. Rather, for those transactions which do involve a cross-border element, a suitable legal framework needs to be put into place, but there is no obvious reason why those consumers not interested in cross-border shopping should have to become familiar with a new legal framework.

When it put forward its proposal for a Consumer Rights Directive, the Commission tried to make a strong case for maximum harmonisation. The basic argument is well-rehearsed: the differences in national consumer laws pose an obstacle to trade, and to increase cross-border trade, one coherent legal framework is needed. However, full harmonisation would change the legal framework for all consumer transactions, driven by the desire to increase the number of cross-border transactions. But from a domestic perspective, this could have a negative effect as there is a risk that the fully harmonised European rule might actually lower consumer protection in the domestic context. The advantage of a cross-border-only Regulation would be that this would set a standard for cross-border transactions, but Member States would be free to create a legal framework to suit the needs of consumers within their jurisdiction. This point is acknowledged in the Green Paper:

“An instrument applicable to cross-border and domestic consumer contracts would further simplify the regulatory environment, but would impact on consumers who may not wish to venture into the internal market and prefer to preserve national levels of protection.”

So the competing factors here are on the one hand the desire to have a simplified regulatory environment whilst on the other the fact that consumers might prefer to “stay at home” and continue to benefit from whatever level of protection current domestic law provides. Deciding which factor should gain the upper hand first necessitates consideration of whether it is possible

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48 Ignoring, for the moment, the fact that for some consumers, a “local” transaction can be cross-border if they live in a border region.
50 Although Article 114 (3) TFEU (ex Art.95(3) EC) stipulates a “high” level of consumer protection, but it is not clear just “high” it needs to be to satisfy the requirement of this provision.
51 P.12.
to come up with a criterion for distinguishing between cross-border and domestic transactions respectively.

b) The Constitutional Dimension
The limitation to cross-border transactions might also follow from the constitutional context. It has already been noted that the legal basis for consumer law is Art.114 TFEU. However, that Article does, of course, not provide an all-encompassing power to regulate the internal market. The consumer-specific provision in Art.169 TFEU limits EU action to a supporting and supplementary role, which might well point towards the cross-border context, too. Moreover, further restrictions on EU action are set by the principles of conferral, proportionality and subsidiarity (Art.5 TEU). The principle of subsidiarity is intended to determine how to allocate responsibility for action between the European and national levels. According to Art.5(3) TEU, the EU “shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”. Member States are perfectly capable of legislating for consumer matters at domestic level, but what they cannot do individually is to adopt legislation on transactions in other Member States, or for cross-border transactions. Those kinds of contracts are properly within the competence of the EU level. The Commission has made much of the fact that only harmonisation of national laws will encourage consumers to participate in the internal market, but surely an argument can be sustained that the EU should concentrate on cross-border issues as it is at that point that internal market questions become relevant. EU legislation dealing only with cross-border transactions would be in accordance with subsidiarity, because individual Member States cannot create a legal framework to regulate cross-border transactions that would be applicable in all the other Member States. Furthermore, the proportionality principle requires that the “content and form of Union action” does not exceed what is necessary to achieve the particular objective. It seems plausible to argue that harmonisation of national laws is both intrusive and disruptive to national legal systems and therefore in conflict with the proportionality principle. In that respect, it should be noted that the ECJ has held that the EU legislature has “broad discretion in areas which involve political, economic and social choices on its part”, meaning that only a “measure [which] is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue” would be regarded as disproportionate. Whilst the ECJ’s rulings on this issue do not preclude harmonisation of national law, the EU’s competence seems to be stronger for the cross-border dimension which might enable it to adopt more comprehensive legislation if limited to that context.

2. Challenges of a cross-border only approach
As discussed, the kinds of cross-border transactions which would be subject to the new EU Regulation advocated in this paper would be concerned with distance contracts, primarily e-
commerce based. The upshot of all this is to suggest that the proper focus for future EU action should therefore be on the creation of a legal framework suitable for cross-border distance transactions. This would create a number of challenges, considered in this section.

a) Practical Difficulties – determining locations
The focus on on-line transactions raises the immediate question of how one can determine where a trader has his place of business in the on-line environment (and the consumer his residence). This concern arises from the fact that in cyberspace, it is quite difficult to determine where exactly a consumer or trader is based (“de-localisation”). Once again, Transnational Commercial Law might offer an answer: the UN Convention on Use of Electronic Communications in International Contracts 2005 has attempted to deal with this problem. Article 6(1) states that a person’s place of business is the location indicated by that person (and, in the case of a natural person, its habitual residence\textsuperscript{55}). The location of the technical equipment used by a party is not determinative,\textsuperscript{56} nor is the fact that the domain name or e-mail address used is linked to a particular country.\textsuperscript{57}

Consumers, as individuals, will have their residence, so that would be the determining factor. Traders will similarly have some sort of registered business address. And whilst cyberspace does offer rogue traders an opportunity to hide behind the complexities of the World Wide Web, one should not let this create too much concern – genuine traders will want to comply with the relevant law and are unlikely to hide deliberately behind the cyberspace smokescreen, so they will state their place of business. It might be necessary to introduce a positive duty on businesses to disclose their place of business on their website, which would have to be of general application and not be limited to cross-border circumstances.\textsuperscript{58}

b) Private International Law Issues
Space precludes a detailed discussion of the private international law issues which would arise with a cross-border regulation, especially if this were to take the form of an optional instrument. A few short observations are nonetheless necessary here.

If there is to be a Regulation dealing with cross-border consumer contracts only, then there would be a number of private international law issues to be considered. There are two primary concerns here: (i) how to deal with national mandatory rules; and (ii) which national law would act as “background law” to deal with any matters not addressed in the Regulation. With regard to the first issue, the provisions in the Rome-I Regulation (593/2008/EC) would need to be amended in order to provide that national mandatory rules within the scope of the cross-border Regulation are not applicable at all. This is essential to ensure that in the areas covered by the Regulation, only its provisions apply.

There will, of course, be concern that domestic law and the EU Regulation would compete with one another, particularly if there was a significant difference in the level of consumer protection between the two areas. If domestic law and the Regulation provide similar levels of protection, it

\textsuperscript{55} Art.6(3).
\textsuperscript{56} Art.6(4).
\textsuperscript{57} Art.6(5).
\textsuperscript{58} The Convention does not include such a positive duty because of the difficulty in determining what should happen if such a duty is not complied with – see UN, \textit{Convention on the Use of Electronic Communications in International Contracts} (Vienna, 2005), p.42.
seems unlikely that minor variations would have a significant effect on consumers in deciding whether to buy at home or abroad, and the displacement of national mandatory rules would probably not be of practical concern. The situation might be different if either national law or the Regulation offered significantly higher levels of consumer protection. In the former case, consumers might prefer to contract under national law, i.e., domestic contracts, whereas in the latter situation, traders might be less willing to engage in cross-border transactions. However, it seems doubtful that this would become a real issue in practice because on the key issues of concern to consumers, national consumer laws are not that far apart now.\textsuperscript{59}

As for the second, there may still be a role for a domestic law but this would depend on how wide a scope the Regulation would have. To the extent that recourse to a domestic law becomes necessary, the rules of Private International Law in the Rome-I Regulation would have to be deployed to identify the national law which would act as a “gap-filler”.

c) Parallel regimes
The key objection advanced against one regime for cross-border transactions, and another one for domestic ones, is that this would result in the existence of two parallel regimes with different levels of protection. This could confuse consumers who engage in cross-border shopping, or might at least deter some from doing so. On the other hand, it might be possible to lessen the likelihood of confusion through appropriate consumer education.

Based on the foregoing analysis, one further area where there might be concern is with regard to on-line traders operating both domestically and across borders. It was suggested that the focus of EU legislation should be on distance cross-border transactions. This might mean that an on-line trader would potentially have to deal with two sets of legal rules, one for domestic transactions, and one for cross-border transactions. This might make it unattractive for such a trader to operate in a cross-border context if there was a significant substantive difference between the two, unless it was possible to use one law for all types of transactions.

It might therefore be suggested that EU action should focus on making it easier for “e-shops” to trade in the internal market by giving traders the opportunity to offer to contract with a consumer on the basis of a European set of rules irrespective of whether the transaction is domestic or cross-border (the “blue button” idea).\textsuperscript{60} Indeed, this is one possible instantiation of the “optional instrument”, but it would result in the availability of two parallel regimes for e-shops – the domestic law applicable according to the Rome-I Regulation or the “blue button” optional instrument.\textsuperscript{61} With this in mind it remains to be seen whether the “blue button” would really be optional – one might suspect that, given the choice, traders will want to use one set of rules only, which would be the optional instrument. This raises issues which cannot be discussed here, but the point to be taken is that unless we have one comprehensive Regulation applicable to all consumer transactions, cross-border and domestic (something which is unlikely to be acceptable to national governments), there will be parallel legal frameworks in place.

\textsuperscript{59} See the \textit{EC Consumer Law Compendium} and accompanying database. Lawyers can always spot differences, but these may well not be of concern for most every-day consumer transactions.


\textsuperscript{61} The situation is of course more complicated still, because it seems likely that any optional instrument will have to leave some matters to national law, and so there might still have to be the choice of a national law. Indeed, why should it not be possible for a consumer and/or trader to opt for the Optional Instrument combined with any one of the national jurisdictions?
The crucial question is whether on-line traders should be subject to two separate regimes, one for dealing with consumers from “their” jurisdiction, and one for cross-border transactions. It seems that compliance with two regimes might be much less burdensome than potential compliance with 28 schemes,\(^{62}\) which would seem to be the case under the “blue button” idea (hence the assumption that far from being “optional”, the “blue button” would be the \textit{de facto} law applicable to e-shop transactions). It seems vital, therefore, that there are no more than two potentially applicable regimes in place, i.e., one framework for domestic transactions (consumer and trader both based in the same jurisdiction), and another for cross-border transactions (defined as discussed earlier).

d) Automatic application or “optional instrument”?  
A final major issue would be whether there should be a choice to offer a contract under EU law or the relevant national law, or whether the Regulation should apply automatically to all cross-border consumer contracts. As noted in the previous paragraph, there is unlikely to be much choice in practice anyway and if the Optional Instrument were to be limited to cross-border transactions, then it seems likely that traders would, in practice, always opt for the Optional Instrument. Moreover, an optional status could cause difficulties in respect of any pre-contractual obligations, which might vary depending on whether national law or the Regulation would apply. Of course, it is still plausible that pre-contractual information duties would be subject to maximum harmonisation by what might be left of the proposal for a Consumer Rights Directive, which would again solve this difficulty. However, if the Regulation applied automatically whenever the transaction is of the cross-border kind, then this difficulty might be less of an issue, because it would be clear much earlier which legal framework applied, because it could be established at an early stage of the contracting process whether this is a domestic or cross-border situation.
It would therefore make more sense to take the position that whenever a cross-border situation arises, the Regulation becomes \textit{automatically} applicable.

V. Conclusions  
Assuming that one of the intentions behind the \textit{Green Paper} is a genuine desire to consider how best to shape future EU action in the field of consumer contract law, it is welcome for putting a broad range of options on the agenda. It was argued in this paper that the way forward should be to abandon further harmonisation by directive because the lessons that can be drawn from past practice are that harmonisation does not necessarily create sufficient approximation of national laws, and that it remains necessary to understand national law in case a dispute arises. So if there is a need for EU consumer law, then the way forward has to be to switch to regulations as the legal vehicle for future action. Then question then arises whether such action should be limited to cross-border contracts only, or cover all transactions. It has been argued that the proper focus ought to be on cross-border contracts, although thought will have to be given as to which types of transactions are to be treated as such. It seems that distance contracts where the consumer is based in one Member State and the trader in another are the obvious candidates, although there are other types of transactions which might also qualify. It is then proposed that whenever a

\(^{62}\) The number “28” of course being inaccurate in itself, but used as a shorthand to denote the add-on nature of the “optional instrument”.  

\[16\]
transaction is of the cross-border kind, EU Law should be applicable *automatically*, rather than having an optional instrument of the blue-button variety. This would produce a clearer set of alternatives rather than the somewhat elusive idea that there is some sort of choice with the blue button. However, any development along these lines would raise issues of private international law which need to be investigated further. There are further issues that would need to be considered which are beyond the scope of this paper, including the substantive scope of such a Regulation. This paper considers only the case for the general approach which should be adopted.

One final thought: cross-border consumer transactions are not limited to within the EU. The EU can concern itself solely with the internal market and come up with legislation that works best in that context. However, it could also endeavour to take a leadership role by creating a legal framework which could be utilised globally. A coherent cross-border framework might just be a model for a global response.