Convergence in European Consumer Sales Law

A Comparative and Numerical Approach*

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This is a study about legal convergence in European consumer sales law. It aims to offer a comparative and numerical analysis of the extent to which European directives in this field contribute to convergence. It does so by developing both a comparative and a numerical framework to evaluate the extent to which convergence takes place, as well as the factors on which such convergence is dependent. This analysis aims to fill a clear gap in the existing literature on European harmonization, that until now has avoided to look into the actual convergent effect of EU-legislation.

A. The Substantive Comparison

First, this study intends to make a substantive comparison between five directives from the consumer acquis and their transposition into the national legislation of seven Member States. The comparative analysis is structured on the basis of a number of different criteria:

(i) the goals of harmonization according to the European legislator;

(ii) the role of the Court of Justice as a creator of European consumer law; and

(iii) the similarities and differences between the different transpositions of European consumer rules in national legal systems.

The criteria chosen for the comparative analysis take the shape of questions which are then applied to each of the five directives:

(i) what the rationale and scope of the Directive are;

(ii) what the standard of harmonization set by the European legislator is;

(iii) what the reception of the standard of harmonization by Member States is like; and

(iv) what comparative notes on the transposition can be made.

In addressing these issues, both the European as well as the national level of governance are considered. On the one hand, understanding what exactly the goal of the European legislator was when adopting consumer protection rules, and looking into why the rules are shaped the way they are, is the starting point of this analysis. On the other hand, transposition plays a very important role in the process of harmonization, because it reflects choices made by the

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1 The concept of ‘consumer acquis’ refers to the body of European legal rules adopted in the field of consumer law. Although consumer law as such is much broader, in this book, this concept will only reflect consumer contract law rules that have European origin.
national legislator. To frame this research, two questions have been chosen as the general research questions of the substantive comparison:

1. What are the standards of convergence behind the rules on consumer sales developed by the European legislator and how has the Court of Justice interpreted these standards?

2. How did national legislators implement these rules, and what issues arise from their transposition?

From a methodological point of view, the comparative analysis is carried out through an extensive literature review of policy developments both at European as well as national level. The case law of the Court of Justice serves as guidance for the further interpretation of European consumer contract law, and its role vis-à-vis national legislation is explored. Moreover, national case law is also used selectively, to showcase potential issues that national courts have to deal with in the transposition process. The selection of directives and Member States included in the research will be extensively addressed in Section 4 (Limitations).

B. The Numerical Analysis

To complement the comparative overview of European rules on consumer contract law and their transposition, the second contribution this research aims to bring consists of a numerical analysis of harmonization. For this purpose, a statistically inspired Convergence Index is developed. It must be stressed that apart from the consumer-oriented indicators given by EuroStat (e.g. ‘Consumer prices’, ‘Consumer electronic and household appliances’, etc.), legal harmonization is not, as of yet, reflected in any statistical study attempting to measure it. This being the case, due attention must of course be paid to the reasons behind the lack of such information. Is the lack of harmonization indicators perhaps a sign that they would bring no contribution to the harmonization debate? The very attempt to answer this question is by no means an easy endeavor. Whether turning harmonization into numbers can add any value to the debate on legal convergence depends on how exactly this is done. In making a point about the importance of one of his methods, namely numerical comparative law, Siems quotes Lord Kelvin, according to whom ‘when you can measure what you are speaking about and express it in numbers, you know something about it; but when you cannot measure it, when you cannot express it in numbers, your knowledge is of the meager and unsatisfactory kind’. The Convergence Index aims to build on the increasingly used numerical comparative law methodology.

Once again we face potential terminological confusion. Literature often refers to the process of transposition to mean the same as the process of implementation. However, a distinction must be drawn between the two. While transposition envisages the adoption of national rules to mirror the results of the protection standard determined by a directive, implementation has a wider meaning, including activities that might go well beyond the rules themselves. Implementation can thus refer to administrative rules that are adopted to ensure the effectiveness of the protection standard, but also to the interpretation and application of the protection standard by national courts. The TFEU does not tackle ‘transposition’ or ‘implementation’ in Article 288 regarding the legal acts of the European Union; see also JONATHAN TOMKIN, ‘Implementing Community Legislation into National Law’, 4(2) Judicial Studies Institute Journal 2004, p. 130; OECD, ‘Better Regulation in Europe: An OECD Assessment of Regulatory Capacity in the 15 Original Member States of the EU (Project Glossary)’, p. 6-13, retrieved from http://www.oecd.org/gov/regulatory-policy/44952782.pdf; Ramon Mullerat, ‘How Spain Implements European Law’, Jean Monnet/Robert Schuman Paper Series, Vol. 10, No. 2, March 2010, p. 6.


Ibid.
On the basis of data visualization, the resulting Convergence Index aims to offer new ways of looking at the harmonization of consumer protection. Studying the law normally entails discussing it in a way that has not changed much from the times of Aristotle, who said about rhetoric:

‘Of the modes of persuasion furnished by the spoken word there are three kinds. The first kind depends on the personal character of the speaker; the second on putting the audience into a certain frame of mind; the third on the proof, or apparent proof, provided by the words of the speech itself.’

Writing about the law largely reflects the act of persuading an audience by bringing proof (arguments) to criticize the law that is (lege lata) and/or support the law that should be (lege ferenda). The vast majority of these arguments are reflective, analytical and/or evaluative to such an extent, that legal thinking becomes a self-standing category of logical reasoning. For some, it might be counterintuitive to consider that the law can stand arguments based on numbers. However, as it is shown later in this study, there is great potential in exploring this perspective. In a world faced with a volume of information that is exponentially increasing, data visualization has some strong benefits: (i) simultaneously showing multiple dimensions of a specific issue; (ii) revealing stories from the gathered information and adding new light on pattern identification; (iii) reconsidering how to communicate information with the surrounding world; (iv) gaining the ‘big picture’, or in other words understanding the complexity and scope of a certain phenomenon. Applying the potential of data visualisation to European consumer law and more specifically the process of legal convergence in this field can bring a novel perspective and contribute to the further understanding of contractual harmonization. In the light of this complementary perspective, it must be again emphasized that extracting data from consumer protection directives and representing them in various shapes does not replace the need to continue investigating developments in consumer law in a qualitative fashion. The numerical analysis thus attempts to answer two main research questions:

3. How can the resulting convergence process be measured?

4. Which policy recommendations follow from this for the European and national legislators, as well as other institutions?

Methodologically speaking, the numerical analysis builds, as mentioned before, on numerical comparative law as coined by Siems, taken together with the OECD Manual on Composite Indicators. The end result is the construction of the Convergence Index, a composite indicator reflecting quantified factors that influence the harmonization process. The name ‘Convergence Index’ has been favored to ‘Harmonization Index’ especially because of the distinction drawn on several occasions already; while harmonization is a policy method, convergence is the result achieved with this method, and the discussion resulting from the findings of the Convergence Index focus on the result more than the method. Furthermore, it is necessary to once again underline that the purpose of working with an index is to offer an innovative perspective to a longstanding discussion over legal convergence in European consumer contract law.

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5 Aristotle, Rhetoric, 1356a.
7 On this topic, see Chapter 1 (‘Why Visualize: From Information to Wisdom) from ALBERTO CAIRO, The Functional Art: An Introduction to Information Graphics and Visualization (Berkeley: New Riders, 2013:).
CHAPTER 3. THE NUMERICAL ANALYSIS

The previous Chapter focused on discussing specific transposition issues regarding the consumer acquis and the national laws of seven Member States: Belgium, France, Germany, Ireland, the Netherlands, Romania and the UK. The central purpose of this comparative analysis, in line with the vast majority of writings covering the topic, was to provide a starting point for the exploration of factors that influence convergence. This Chapter focuses on the following points: in Section 1, the aim of the chapter is presented together with a brief overview of previous work that is of interest for this study. Next, Section 2 explains the methodology leading to the creation of the Convergence Index. On the basis of this methodology, Section 3 focuses on gathering data from the five directives and their transposition in the laws of the Member States as described in Chapter 2. Section 4 uses the aforementioned data to ‘code’ values for the Convergence Index, and Section 5 presents some preliminary conclusions.

1. Aim of the chapter and background in previous work

As comprehensive as descriptive analyses on the harmonization of consumer law are, one perspective of this discussion remains under-represented in literature - the need to empirically measure the said harmonization process. Previous works such as the compilation of the Consumer Law Compendium,9 or directive-oriented implementation studies10 are of tremendous help in understanding how European law is integrated into national legal systems. Accordingly, these studies look at contract law directives in a targeted manner and address legal issues in detail. However, apart from executive summaries and comparative tables, no other tools are used to emphasize the overall findings of these comprehensive studies. The present analysis wishes to fill this gap and contribute to the current framework with a comparative approach that looks at harmonization in a cross-directive/cross-country manner and evaluates the process on the basis of pre-determined factors, in order to measure its effect: legal convergence.

A first reaction to this idea might lead to the question why developing a method to measure law, especially a process so complex as harmonization, would be of any added value. Recent trends in the study of law show a tendency to promote evidence-based approaches,11 questioning the classical black-letter method,12 or suggesting the creation of unitary legal

9 Supra note 243, HANS SCHULTE-NÖLKE et al. (2008).
Towards a New Global Taxonomy’, information about, among others, legal systems as such, see ‘Turn Law into Numbers’, in: S THE THETIC CONFERENCE OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW

Most, however, is the ‘Courts’ study by Djankov et al. was pivotal for the choice of methodology. In spite of the wave of critique brought to earlier studies conducted by Djankov et al. within

First of all, Siems’ contribution to the ‘Does Law Matter?’ volume, and his theory of numerical comparative law embrace the view that legal science is currently accommodating novel methodologies that can add to a very classical framework of legal understanding. Second, the ‘Courts’ study by Djankov et al. was pivotal for the choice of methodology. In spite of the wave of critique brought to earlier studies conducted by Djankov et al. within the


authors’ participation in World Bank research projects,

the critical observations on this body of work do not have a direct impact on the measurement of harmonization, for the simple reason that the main inspiration source was the very creation of the Formalism Index and not its subsequent econometrical applications.

2. Methodology

By looking at available methods such as the ones indicated above, and thinking about what added value they would bring if applied to the field of European consumer sales law, the choice was made to measure harmonization by putting together a composite indicator, which will be referred to from now on as the Convergence Index. The OECD Composite Indicators Handbook has been chosen as the starting point in terms of index design. According to the OECD, an indicator is ‘a quantitative or a qualitative measure derived from a series of observed facts that can reveal relative positions (e.g. of a country) in a given area’, whereas a composite indicator is understood to form when ‘individual indicators are compiled into a single index on the basis of an underlying model’. I will use the terms ‘composite indicator’ and ‘aggregate index’ interchangeably, since I attach the same meaning to them.

As an aggregate measurement tool, the Convergence Index is the sum of multiple individual indicators. The strength of coding such an index stems from the fact that it has the power to contribute to the country comparison and to help illustrate a complex process like harmonization. The Convergence Index thus offers a model to measure the level of convergence.

In terms of the nature of this index, certain aspects must be clarified. The Convergence Index is based on both legal and statistical considerations, and for this reason it reflects a hybrid legal methodology, characterized by the following features:

(i) the focus mainly lays with the construction of the index, and it will not be subsequently used in econometrical analyses. This is an important point to make because the index is purely illustrative, and does not aim at proving neither correlation nor causation between any of its factors and the resulting effect of convergence in general.

(ii) the creation of the index is an attempt to establish a self-standing alternative method of comparative law - the index is not built as a purely statistical tool, but it borrows statistical considerations and uses them within the legal discipline.

These features reflect the aim of the Convergence Index: to comparatively discuss the factors composing them, to have an overview of directive/country-based results, and in the light of those to make policy recommendations. In addition, by virtue of the alternative methodology,

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22 Supra note 734, DJANKov et al.
24 Ibid. p. 13.
25 Ibid.
it is important that the Convergence Index ignites a discussion on the importance of ‘law and…’ research on the one hand,\(^{27}\) and the need to better understand contract law harmonization through the creation of adequate novel tools on the other hand.

Chapter 2 has made an overview of the transposition of selected European rules in the national laws of seven Member States. This overview has been the starting point in creating the index. The literature survey behind Chapter 2 focused both on the features of the five European directives, as well as the issues faced by Member States in accommodating these rules. This research was valuable in understanding how the index should be built, and what features it should have. The resulting approach has been to try to make a list of the most important such characteristics of both European and national law, and turn these characteristics into factors which would be subsequently coded. In other words, during the time dedicated to compiling Chapter 2, I have been searching for so-called ‘markers’ of harmonization, on the basis of a rather simple question: ‘What affects the process of harmonization at European as well as national level?’ My answer to this question takes the form of a set of factors. These factors reflect multiple dimensions of the harmonization process and several typologies can be set up:

(i) depending on the \textit{level} where harmonization takes place, the factors may have a European or a national scope;

(ii) depending on the \textit{stakeholder} in the harmonization process, the factors may reflect the activity of the European legislator, the national legislator, the CJEU, national courts, or private actors;

(iii) depending on \textit{data availability}, the factors may be either observational, namely reflecting objective features of legislative instruments or judicial decisions, or they may be interpretative, meaning that they will reflect a pre-defined and well-detailed explanation of substantive law;

To add to these classifications, from a statistical perspective, depending on the \textit{measurement unit}, the factors may be either binary, meaning that they can be expressed in terms of ‘Yes’ or ‘No’, or they might be non-binary, meaning they might be expressed in values beyond those corresponding to ‘Yes’ or ‘No’ alone. To a certain extent, this might be problematic for the composition of the Index, and for this reason the non-binary factors will have to be normalized. More details on this procedure are provided in Sections 3 and 4 of this Chapter.

Keeping in mind the classifications addressed above, the factors/individual indicators included in the Convergence Index are:

\textbf{A. European level}

a) Law v policy

b) Type of European instrument (Directive/Regulation)

c) Nature of policy (minimum/maximum harmonization)

d) Reference to self-regulation

e) General clause
f) Black list
g) CJEU case law

B. National level

a) National transposition technique
b) Reception of selected novel concepts
c) Reception of selected open-ended norms
d) Reference to European law in end legislation
e) Timely transposition (date of national legislation)
f) Correct transposition (infringement procedures resulting in CJEU decisions – excluding timely transposition issues)

These factors have been selected in the light of three main limitations described below.

1. The Convergence Index does not include data stemming from national courts

As pointed out above, in drafting the factors, attention was paid to a very important design issue, which has also been the main limitation: data availability. Law is not a dataset-friendly field of research, and the challenge was to construe information that could somehow be quantified from available sources. In doing so, the purpose was to isolate the top-down relationship between the European legislator and the CJEU on the one hand, and the national legislator on the other. No quantifiable reference to national case law was included in the set for very practical reasons, such as information asymmetry. The publication of national case law in databases follows non-transparent patterns, making comparisons difficult and potentially too biased to make a significant contribution to the Convergence Index. For this reason, the Index is only limited to the legislative process and does not express any practical application by national courts. The case law of the Court of Justice is however included in the Index for two reasons: (i) it is retrieved from the same transparent source (www.curia.eu) and (ii) given the interpretative powers of the CJEU, the case law based on the preliminary reference procedure enshrined in Article 267 TFEU is integrated in the obligations stemming from the Directives themselves.

2. The Convergence Index does not include factors influencing harmonization by proxy

The second limitation is related to the fact that harmonization could be affected by factors going well beyond a legislative or judicial process. Examples in this sense include: national legal culture and history (the legal cultural background of a given legal system); consumer empowerment (consumers being aware of their rights); consumer preferences (whether consumers support more or less protection, for more or less expensive goods and services); the number of cases per judge (determining whether case overloads can lead to less awareness of the European nature of a rule, or if it is a sign of resilience to harmonization by private

actors not complying with European standards); judge trainings (judge awareness of European law developments and applicability in own court); the number of lawyers specialized in European law in relation to the total number of lawyers (practitioner awareness regarding European law developments which can be brought before judges in national disputes). As important as these factors might be, the Convergence Index is limited to the legislative process and for this reason it does not look into indicators that might have a social dimension, but rather focuses on the legal and/or technical nature of the selected factors.

3. The Convergence Index does not have predictive value

One aspect already emphasized above is that the Convergence Index is designed as a quantitative analysis tool that will be used to further explain the legal harmonization occurring in European consumer sales law. The aim of the Index is to test the extent to which a numerical comparative perspective makes a contribution to the understanding of this process. This entails that any conclusions this Index shall support are to be interpreted exclusively in the light of its design and more than anything, its aim. For this reason, the methodology it is based on does not have an inherent statistical nature, but it is rather inspired from statistical methods of data analysis. This mention is necessary to understand that the audience envisioned for this research is not the econometric world (including law and economics scholars), but that of legal academics. In the light of this perspective, the Convergence Index is only there to show that legal scholarship can turn to a more numerical evidence-based methodology that adds to the generous amount of classical legal thought.

Having outlined the limitations of the Convergence Index, time has come to look at the actual content of its individual variables (factors influencing the harmonization process. Outlining these variables is essential for the coding of the Index, since for every factor I will make a certain set of presumptions and it is only in the light of these presumptions that the entire analysis is to be taken into account. These presumptions will operate as rules, or in other words the context of the Convergence Index. Outside this context, the conclusions the Index may eventually lead to could be misleading.

A. European level

a) Law v policy

Assumption: mandatory law leads to a higher level of harmonization than policy.

The role of this factor is to determine whether the European contract law instrument is either mandatory or voluntary. One of the features of this distinction is based on the architecture of desired convergence. On the one hand, if an instrument is mandatory, taking the example of a Directive, the national implementation efforts reflect top-down harmonization. On the other hand, if Member States take it upon themselves to draw inspiration from soft law, such as the Draft Common Frame of Reference, or the Open Method of Coordination, the harmonization process is inversed, and it becomes a bottom-up approach.

It might be stated that the Open Method of Coordination might lead to more convergence because it does not require political consensus in the Parliament and it does not have to undergo a long transition from policy to practice. The Open Method of Coordination was first defined by the European Council as ‘the means of spreading best practice and achieving
greater convergence towards the main EU goals.\textsuperscript{29} This method is meant ‘to help Member States to progressively develop their own policies’,\textsuperscript{30} but it is however not designed to pursue harmonization in the same manner indicated in Article 114 TFEU, the general legal basis of Directives on consumer contract law.\textsuperscript{31} Moreover, Radaelli states that the results of the Open-Method of Coordination have been rather modest since they do not fulfill the purpose of the method, namely to achieve bottom-up learning: ‘[...] the poor results in terms of learning reflect the lack of bottom-up participation, the underestimation of the peculiarities of learning in a political context, and the limitations in the current use of benchmarking.’\textsuperscript{32} While the importance of this Method for legal convergence is acknowledged, it is not a policy applied to European private law.\textsuperscript{33}

b) Type of European instrument

\textit{Assumption:} some EU instruments envisioned by Article 288 TFEU (Regulations and decisions) lead to a higher level of harmonization than others (directives, recommendations and opinions).

This factor focuses on types of legislative acts. When dealing with consumer sales law, the main legislative acts are directives (e.g. Unfair Contract Terms, Unfair Commercial Practices, etc.), but attention must be paid to the fact that in recent years the proposal for a Common European Sales Law (CESL) has been shaping the future existence of a consumer contract law regulation. However, the CESL has been to date withdrawn by the Commission.

Out of the five different types of instruments, only regulations and directives will be taken into account for two reasons: (i) recommendations and opinions have no binding force and would not fall within the ambit of this variable; and (ii) decisions are legal acts undertaken by the Commission or the Council in areas other than contract law, so of little relevance for the Convergence Index.

Going back to directives and regulations, I consider regulations to have a higher value for harmonization for the reason that they achieve uniformity in the content of the obligations placed on Member States, since the text stays the same. Directives, however, require


\textsuperscript{31} See for instance fields when the Open Method of Coordination has been used: European employment strategy (Articles 129-130 TFEU; Broad Economic Policy Guidelines (Article 99 TFEU); Pensions (Article 140 TFEU); or Taxation (no TFEU basis); for more research on the Coordination Method see Claudio M. Radaelli, ‘The Open Method of Coordination: A new governance architecture for the European Union?’, Swedish Institute for European Policy Studies, Report nr 1 March/2003, p. 33; for pitfalls of the Open Method of Coordination such as the ‘lemming effect’ (following wrong policy as good practice) or the ‘lamp-post syndrome’ (focusing on easy-to-measure fields as opposed to fields where indicators are scarce), see Manuel Souto-Otero et al., ‘Filling in the gaps: European governance, the open method of coordination and the European Commission’, 23(3) \textit{Journal of Education Policy} 2008, p. 231 at 245.

\textsuperscript{32} Ibid., p. 9.

\textsuperscript{33} Walter van Gerven uses the Open Method of Coordination to propose the creation of an Open Method of Convergence, see WALTER VAN GERVEN, ‘The Open Method of Convergence’, 15 \textit{Juridica International} 2008, p. 32 at 34; another policy-based convergence suggestion was made by Colombi Ciacchi in terms of case-law convergence – however, even if points of confluence can be determined prima facie by comparing national case law, the process remains unchartered – see AURELIA COLOMBI CIACCHI, Non-Legislative Harmonisation of Private Law under the European Constitution: The Case of Unfair Suretyships’, 13(3) \textit{European Review of Private Law} 2005, p. 285 at 296.
implementation through national legislation that must only follow the purpose of the instrument. As I have shown in the previous chapter, this mechanism is sometimes detrimental to harmonization.\(^{34}\)

c) Nature of policy (minimum/maximum harmonization)

**Assumption:** maximum harmonization leads to more harmonization than minimum harmonization.

As we have seen in the previous chapter, when it comes to consumer contract law, the policy objectives set out by the European legislator aimed at a specific degree of harmonization. While in the days of the Doorstep Selling Directive or even of the Unfair Contract Terms Directive this degree was minimum, in other words only establishing a level playing field from which Member States could increase protection, in recent years a shift towards maximum harmonization has emerged.\(^{35}\) This shift undoubtedly affects the way in which national jurisdictions accommodate European law. Moreover, this shift marks a presumption that by not being able to derogate from the common pre-set standards,\(^{36}\) national regimes will resemble each other more. For the purposes of the Convergence Indicator, this variable reflects a difference between the Unfair Commercial Practices Directive - the only maximum harmonization directive in this study - and the rest of the directives.

d) Reference to self-regulation

**Assumption:** explicit reference to forms of self-regulation in the Directive (e.g. codes of conduct) leads to more harmonization.

This factor is designed to test whether there is any self-regulation reference in a given European instrument and whether that instrument promotes it. Simply because the European legislator enacts rules on contract law, it does not necessarily mean that private actors will not create their own standards (e.g. trustmarks, codes of conduct, etc.).\(^{37}\) Acknowledging the activity of the private sector may lead to the creation of public-private structures that can overview this activity and make sure it does not fall short of the European standards it is supposed to fulfill. This has been called the ‘carrot approach’, meant to grant public approval and endorsement to codes of conduct.\(^{38}\) For instance, this could be observed in the Consumer Codes Approval Scheme (CCAS) that had been governed until April 2013 by the Office of Fair Trading in the United Kingdom.\(^{39}\) Upon the closing of the Office of Fair Trading, this procedure was taken over by the Trading Standards Institute (TSI). This independent institution now manages the approval of consumer codes, which is in other words a neutral

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\(^{34}\) See also supra note 438, **TWIGG-FLESNER** (2011), p. 238.

\(^{35}\) Supra note 136, **DE VRIES** (2012) at 917.


\(^{38}\) Supra note 626, **PAVILLON** (2012), at 272.

(former state-affiliated) business endorsement, designed to enhance consumer protection as well as business reputation. When looking at the criteria required for code approval, most of it taken over from the previous format, it becomes clear that the TSI actually uses standards that are common to the rules set up by different consumer directives. One example is Criterion 3l, according to which ‘[t]he code shall address the additional effort/help to be provided to vulnerable consumers as appropriate to the sector’. This requirement, as general as it may sound given that it must cover a wide ambit of business activities, still echoes the very specific category of consumers referred to in Article 5(3) of the Unfair Commercial Practices Directive, namely that of vulnerable consumers, who should benefit from even better protection. What this example wants to show is the existence of a possible ‘European creep’ in self-regulation. Whether it is the result of institutional design (e.g. the Office of Fair Trading was a state-affiliated institution that was itself held to respect the European rules), or the mere spontaneous standardization of a higher consumer protection business target, such accreditation schemes prove that self-regulation is indeed affected by European law-making, and it can itself become a vessel of further harmonization.

As beneficial as self-regulation might be for harmonization, it also poses certain dangers. One of the more prolific situations is the case when too much self-regulation leads to fragmentation rather than harmonization. This is very much the case of trust-marks, whose rapid proliferation might leave users confused, consumer and businesses alike. However, the centralization of such practices by means of a public-private partnership can minimize the effect of a spontaneous trustmark overload. This is exactly what Article 10 of the Unfair Commercial Practices Directive stands for – the recognition of private actor activity and its subsequent tuning to state mechanisms designed to protect consumer interests.

e) General clause

Assumption: instruments establishing general clauses lead to less harmonization than those not using such clauses.

To understand what this factor refers to, the concept of ‘general clauses’ must first be defined. There are many references in legal literature to ‘general clauses’. Sometimes these references are made in relation to the principle of good faith. However, in the context of the Convergence Index, a general clause is to be understood as a provision in the body of the Directive that uses a general test in order to determine whether the professional has fulfilled a specific legal standard. The general test is set up to include several generic conditions that might make reference to open-ended norms. I consider open-ended norms to be behavioral and moral standards that parties are held to respect in a given contractual situation, which are characterized by the feature that their content is circumstantial and determined on a case-by-case basis.

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41 Article 10 makes reference to Article 11 in terms of acknowledging the intertwining of enforcement mechanisms.
In Ramsay’s words, general clauses ‘pose questions rather than provide answers’. The main issue with general clauses is that they leave a lot of leeway for their interpretation, and thus the views of national courts may diverge when the general clause is applied.

f) Black list

**Assumption:** instruments that annex a black list of practices lead to more harmonization.

This variable is determined by the fact that if the European legislator sets out examples of practices which national courts are required to follow, then it is more likely to consider that legal systems will harmonize more, since the list has a unifying role in relation to practice. This is the example of the so-called ‘black list’, found for example in the Unfair Commercial Practices Directive. This factor has the potential to go way beyond directives that work with actual lists and may equally include directives that make use of practical examples to relate to some of the more abstract obligations they impose. However, apart from the Unfair Commercial Practices Directive and the Unfair Contract Terms Directive, there are no other directives in this study that have such exemplificatory lists.

Another important distinction to be made is the difference between black and grey lists. While black lists have the unifying effect mentioned before, the same cannot be said for grey lists. Normally such lists will only include examples of practices that must still be tested against circumstantial facts.

g) CJEU case law

**Assumption:** the more judgments are issued by the CJEU on a specific directive, the more it is unclear for national judges to interpret national European law and the less harmonization this leads to.

This factor wishes to emphasize that apart from discussing CJEU case law in case-specific details, it is equally necessary to understand what trends are created with the overall number of cases. For this reason, all the existing preliminary reference cases on each of the five directives will be looked at, with a view to establishing consumer law trends created by the legislative interpretation of the Court of Justice. This factor is supposed to shed light on whether the total numbers of preliminary reference procedures per directive are somewhat similar, or whether there are any outliers - for example directives that have a very high number of preliminary reference questions.

There are several ways in which the number of cases before the Court of Justice may be interpreted. First, one could argue that the more judgments there are the more convergence this leads to, since national courts can subsequently rely on more guidance from the European court. This interpretation is plausible in so far as it can be said that courts are under an obligation to take into account CJEU judgments and they acknowledge this obligation for all of the cases before them. However, the very existence of Article 99 of the Rules and Procedure of the Court of Justice places doubt on the plausibility of this interpretation. According to it, ‘where the answer to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, after

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hearing the Advocate General, give its decision by reasoned order’. The fact that the Court still issues its reasoned opinion in spite of existing case law that might guide the national judge to a result beyond doubt adds up to the amount of case law tackled by the Court of Justice but does not reflect more clarity. To the contrary, this situation might reflect that national courts are either not responding to existing case law, or that there might be other reasons behind the use of the preliminary reference procedure (e.g. de-cluttering national courts, etc.).

Another interpretation of the number of cases before the Court is that the more case are brought, the more problems are posed by the legal instrument at the core of the proceedings. This is the interpretation preferred for the purposes of explaining the present factor. Let us consider the example of internet contracts. Given the prevalence of this means of concluding contracts in contemporary times, it could be argued that it is a statistical reality that consumers encounter issues in the course of their transactions. In turn, these transactions might lead to claims before national courts, fueling preliminary references. However, since 1997 when the Distance Selling Directive was introduced and until 2013 when it was repealed, it has only led to a number of 5 cases. In other words, for 16 years the Court of Justice has barely ruled on matters dealing with online contracts, which might seem rather shocking. Still, it has ruled over as many as 19 cases on Unfair Commercial Practices, and over more than 45 cases on Unfair Contract Terms. In the light of these numbers compared, it seems feasible to consider that a higher number of cases might point the finger to a specific directive, the implementation of which did not suffice to make national courts understand how to apply the European rules.

Furthermore, it can be noticed that with respect to the Unfair Contract Terms Directive, between 2010 and 2015 the Court started issuing orders based on Article 99 of the Rules of Procedure of the Court, according to which it can do so when a question sent for a preliminary ruling is identical to a question the Court already rules on. A number of seven such orders can be consulted below in Section 3.3 of this Chapter. It thus follows that the Romanian, Spanish, Hungarian and Slovak courts behind these specific preliminary references have asked questions that the Court had addressed before. This stands to show that even in spite of the growing body of case law on the Unfair Contract Terms Directive, national courts continue to look at the Court of Justice for interpreting Article 3 of the directive and its interaction with national provisions These occurrences are less likely to exist when national courts rely on their own interpretation.

B. National level

a) National transposition technique

Assumption: the implementation of a directive through satellite laws or specialized codes leads to more harmonization than its implementation through civil codes.

See for instance Case C-342/13, Katalin Sebestyén v Zsolt Csaba Kővári, OTP Bank, OTP Faktoring Követeléskezelő Zrt, Raiffeisen Bank Zrt [2014].
This variable entails that if a national legislator chooses to implement European legislation by means of a specialized code or satellite law, the rules are likely to retain their European identity. On the contrary, if new consumer rules derived from the European level are taken over into the national web of the civil code, it is likely that they will have to fit the existing framework and thus the harmonization force might be weaker. One argument supporting this view is that when integrated into a civil code, rules on consumer protection must follow the terminological pattern already provided by the civil code. This danger is lessened in the case of specialized codes, given their focus on special law, such as that covering consumer protection. In the case of satellite laws terminology is not necessarily an issue, since as it has been shown in Chapter 2, national legislators using satellite laws to implement European law have a tendency to use a copy-paste approach to the content of the obligations. This factor has been inspired, among others, by the Consumer Law Compendium analysis, which thoroughly assessed how consumer directives were transposed by Member States in their national legislation.

b) Reception of selected novel concepts

_Assumption:_ incorporating European legal concepts into national legislation correctly leads to a higher level of harmonization.

European terminology is an essential aspect of a unified European legal order. To start with, it can be held that any term used in a European context adds to this supranational terminology. However this factor focuses on a defined selection of so-called ‘novel concepts’. Novel concepts are understood to mean notions that give rise to legal rights or obligations, independent from any similar rights or obligations existing at national level. The reason why this factor is part of the Convergence Index is because it can be easily coded on the basis of the theoretical analysis already covered in Chapter 2.

On the basis of the articles indicated for every directive, I will make a selection of novel concepts. Although this selection might seem rather subjective, it is by no means arbitrary and it reflects the essential features of each directive, equally discussed in Chapter 2.

c) Reception of selected open-ended norms

_Assumption:_ incorporating open-ended norms into national legislation correctly leads to a higher level of harmonization.

As indicated above, in my understanding open-ended norms are behavioral and moral standards that parties are held to respect in a given contractual situation, which are characterized by the feature that their content is circumstantial and thus determined on a case-by-case basis. This factor is partially connected to terminology, just like the novel concepts variable. Similarly to the latter, a selection of open-ended norms will be made on the basis of directive-based characteristics.

The contribution this factor makes from a convergence perspective lays in the fact that Member States transplanting European open-norms into their national legal framework indirectly ‘download’ the separate European terminology. What is also important to mention is that this terminology comes with a separate content, which should ideally be treated independently from whatever equivalents might exist in national law.
This indicator is a flexible indicator, meaning that it goes beyond a terminological match, and it takes into account functional equivalents of the open-ended norms mentioned in the European instrument.47

d) Reference to European law in end legislation

Assumption: reference to the European instrument made in transposing legislation leads to more convergence.

This factor focuses on European law awareness and it entails that explicit reference to the European instrument can signal the source of the rules. Being aware that specific consumer rules stem from the European legislators might help practitioners to interpret them in the light of European law, instead of hiding this identity behind a national framework. In the light of the assumption this factor entails, it is not necessary to focus on the official publication journals, but to select generally-accepted trustworthy online databases which practitioners normally use on a day-to-day basis.

e) Timely transposition (date of national legislation)

Assumption: transposing a directive within the time frame established by the European legislator leads to more harmonization.

This is a variable that has two dimensions; an objective one, given how it can be considered by looking at the dates when Member States enacted laws to implement the Directives on contract law; but also a subjective one, reflecting one of two situations – the national legislator was either unable or unwilling to follow the implementation obligations. Regardless of which situation a Member State may be in, untimely transposition can be considered to hinder harmonization. As such it has been said that failure to implement the Directive by a specified date will entail that national courts need to interpret national law in the light of the purpose of the Directive, as mandated by direct effect.48 However, sometimes it might prove difficult for national courts to do just that. In such a case, the consumer is only left with having to take recourse against the Member State, which might have a deterring effect. Although untimely transposition may also make the subject of infringement procedures, many applications started in this sense may be removed from the Registry of the Court because the Member States in question have, in the meantime, enacted implementing legislation. So in order to avoid the bias of overlooking these cases, only the dates of initial implementation will be taken into account instead. Similarly to the ‘Transposition techniques’ factor, choosing timely transposition as a variable was equally inspired by the analysis included in the Consumer Law Compendium, where timely transposition was also discussed for the directives under scrutiny.

f) Infringement procedures

Assumption: transposing a directive correctly leads to more harmonization.

Similarly to timely transposition, infringement procedures are one way of looking at Member State behavior when assessing willingness to engage in harmonization efforts. Infringement

47 Supra note 162, De Vries (2011).
procedures may be taken against a Member State pursuant to Article 258 TFEU for the failure to fulfill an obligation under the Treaties, be it regarding the untimely adoption of implementing measures, or issues regarding the conformity and correct application of these measures. However, this last factor only takes into account resilience to harmonization, manifested in the incorrect transposition of European law. To avoid any overlap with timely transposition, only those infringement procedures resulting in CJEU decisions on incorrect transposition will be taken into account. I acknowledge there might be a bias in what concerns infringement procedures, since it is not always clear how the Commission chooses the Member States it wants to bring before the Court. However, infringement procedures are still relevant to the Convergence Index in spite of this issue. Regardless of how they are selected, infringement procedures for incorrect transposition can still be interpreted to show that the Member State in question has not complied with the desired harmonization outcome.

I have so far listed a total of 13 variables: seven belong to the European level and six to the national level. The two levels are also the two main dimensions of the Convergence Index, designed to not only facilitate cross-Member State, but also cross-directive comparison. This means that once computed, the Convergence Index will have values compiled on the basis of each directive (five in total) and each Member State (seven in total). The Convergence Index will have a minimal value of 0 (no convergence) and a maximal value of 13 (maximum convergence). The Index is coded in the next Chapter; however until then it is important to investigate how individual variables perform when applied to concrete examples. What follows now is a descriptive application of the variables to the directives and Member States in question.

To sum up, this Section focused on making the reader familiar with the components of the Convergence Index. These components – or as they have been referred to above, factors - are basically features of the harmonization process of European consumer contract law, taken into account at multiple levels of governance (European and national). In Section 3, these factors will be used in order to gather data from the five directives and their respective transposition into the national laws of the Member States.