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The Hidden Potential of Regulatory Impact Assessments (RIAs) in the Private Law *Acquis*

ESTHER VAN SCHAGEN*

Summary: This article argues that regulatory impact assessments (RIAs) are an important method to improve the private law *acquis* that are currently overlooked. Many problems of unpredictability and inconsistency can be traced to poor regulatory choices in the private law *acquis*, including the overenthusiastic use of blanket clauses and the lack of coordination in the development of the *acquis*. RIAs are a very suitable means to prompt the legislator to reconsider these choices. The use of RIAs however currently shows severe shortcomings. Particularly, RIAs frequently contain doubtful and unsubstantiated assumptions, and they do not neutrally assess the benefits and detriments of all possible ways to develop the *acquis*. These shortcomings should be addressed if RIAs are to contribute to the quality of the private law *acquis*. A more thorough evaluation of past and future measures such as minimum and maximum harmonization, guidance, databases, and self-regulation and more coordination would contribute to the predictability and consistency of the private law *acquis*.

Résumé: Cet article propose que les analyses d'impact sont un moyen important pour améliorer l'acquis de droit privé qui est maintenant négligé. Beaucoup des problèmes d'imprévisibilité et d'inconsistance peuvent être attribués aux mauvais choix politiques, ainsi que le trop enthousiaste emploi des clauses générales et l'absence de coordination dans la formation de l'acquis. Les analyses d'impact sont un moyen apte à inciter le législateur à réviser ces choix. Toutefois, des erreurs graves se présentent dans l'emploi des analyses d'impact, en particulier les hypothèses douteuses et le défaut d'une analyse neutre des bénéfices et des détriments de tous moyens possibles pour développer l'acquis. Si les analyses des impacts pourraient s'améliorer la qualité de l'acquis de droit privé, il faut que ces fautes seront rectifiées.

Zusammenfassung: Dieser Aufsatz legt dar dass Ex-ante-Folgenabschätzungen eine wichtige Methode sind um das privatrechtliche *Acquis* zu verbessern, die jetzt aber unberücksichtigt sind. Viele Problemen der Unvorhersagbarkeit und Inkonsistenz können auf schlechte politische Entscheidungen zurückgeführt werden, wie auch eine allzu begeisterte Verwendung der Generalklauseln. Folgenabschätzungen sind eine sehr geeignete Weise um den Gesetzgeber zu veranlassen diese Entscheidungen aufs Neue zu überdenken. Allerdings sind jetzt schwere Fehler in der Benützung von Folgenabschätzungen zu verspüren, insbesondere zweifelhafte und ununtermauerte Annahmen und die Mangel einer neutrale Analyse der Vor- und Nachteile aller möglichen Weisen um das *Acquis* weiter zu entwickeln. Diese Fehler müssen korrigiert werden, sonst können Folgenabschätzungen die Qualität des privatrechtlichen *Acquis* nicht verbessern.

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1. Introduction

The private law *acquis* generally aims to advance the internal market, as well as consumer protection, in accordance with the European legislator's competence under Article 114 TFEU. Regulatory impact assessments (RIAs) are a relatively recent and important tool in the programme for Better Regulation¹ and should help the private law *acquis* to achieve these aims. RIAs are non-binding reports that precede legislative proposals and action plans and that assess the impacts of these proposals and action plans. Generally, RIAs should outline the benefits and detriments of various policy options and increase informed decision-making. RIAs should also enable interested parties to gain more insight in decision-makers' choices to pursue competing objectives, thereby increasing transparent decision-making.²

RIAs are a relatively new instrument. For the private law *acquis*, RIAs have been introduced since the proposal for a directive on unfair commercial practices.³ Typically, RIAs should assess the impacts of various possible measures for harmonizing private law, indicating whether improving the internal market and consumer protection may conflict and highlighting which measure is best suited to improve the functioning of the internal market or consumer protection. Thus, RIAs may improve transparent decision-making by making clear on which reasoning decisions have been based and outlining the benefits and detriments of proposals and alternatives. Currently, RIAs accompanying proposals in the area of private law typically ensure the reader of the benefits of proposed measures in rather exact numbers.

RIAs have received very little attention in the debate on European private law. Civil lawyers are not generally familiar with the use of RIAs. Possibly, this unfamiliarity with RIAs can be traced to the controversy whether private law, at the national level, pursues a particular policy aim.⁴ Also, academics involved in the development of the *acquis* may be motivated by the interesting discussions on

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- 1 Communication from the Commission, *Action Plan 'Simplifying and improving the regulatory environment'*, COM (2002) 278 final.
 - 2 Communication from the Commission on Impact Assessment, COM (2002) 276 final.
 - 3 SEC (2003) 724 final. Other impact assessment reports are the impact assessment accompanying the proposal for a reformed directive on timeshare and related products, SEC (2007) 743 final; the impact assessment accompanying the proposal for a Directive on consumer rights, available at http://ec.europa.eu/consumers/rights/docs/impact_assessment_report_en.pdf; the impact assessment report on the review of the securities prospectus directive, SEC (2009) 1223; the impact assessment report accompanying the proposal for a directive on mortgage credit, SEC (2011) 356; and the impact assessment report accompanying the proposal for a directive on consumer ADR and a regulation on consumer ODR, SEC (2011) 1409 final.
 - 4 Compare for example T.F.E. TJONG TJIN TAI, 'Twintig jaar Nieuw BW: Bijzondere overeenkomsten', *Ars Aequi* 2012, p. 872, who finds that the instrumentalization of private law is difficult to reconcile with the classic idea of a coherent system of private law striving for justice.

material private law ('When is a contract formed? What common requirements for torts can be discovered throughout the Union?') rather than the question how the functioning of the internal market or consumer protection should be enhanced. Thus, the focus in preparing materials for further developing the private law *acquis* may be on common principles or elements underlying divergent private laws. Consequently, the legal basis for a measure is considered only after a measure has been drafted. This line of reasoning differs from asking whether harmonization will enhance the functioning of the internal market or whether harmonization will improve consumer protection, and in what way these aims can best be achieved. As a result, the potential of RIAs is currently overlooked.

However, even if private lawyers were familiar with the use of RIAs and even if private law was developed differently, problems would remain. Severe shortcomings are visible in the use of RIAs in the private law *acquis*. This paper will argue that if these shortcomings are remedied, RIAs may prove to be an important means to improve the private law *acquis*.

Paragraph 2 will discuss the criticism of the private law *acquis* and link this criticism to poor regulatory choices that can be reconsidered by RIAs. Paragraph 3 will indicate the shortcomings in the use of RIAs in the private law *acquis*, and paragraph 4 will indicate starting points for improving the use of RIAs. Paragraph 5 will end with a conclusion.

2. Criticism of the Private Law *Acquis*

The quality of the private law *acquis* has rightly been subject to severe criticism.⁵ Paragraph 2.1 will set out the most visible deficiencies currently visible in the private law *acquis*. Paragraph 2.2 will argue that these deficiencies can be traced to poor regulatory choices. Finally, paragraph 2.3 will point out that, without reconsideration, which can be prompted by RIAs, these choices will likely continue.

2.1. Shortcomings in the Private Law *Acquis*

The private law *acquis* has been criticized for its lack of predictability for the inconsistent measures within the private law *acquis* and inconsistencies within national private laws that have become visible after directives have been implemented. Also, problems of accessibility have become visible.

Firstly, unpredictability arises as measures in the private law *acquis* frequently use ambiguous phrases or blanket clauses (*open normen*, *Generalklauseln*) that have to be interpreted autonomously. The meaning and correct interpretation of these terms may be difficult to predict, and the CJEU has

5 See especially J.M. SMITS, 'European Private Law: A Plea for a Spontaneous Legal Order', in D.M. Curtin *et al.* (eds), *European Integration and Law*, Intersentia, Antwerp-Oxford 2006.

interpreted terms in a manner that has surprised practitioners and state actors who may base their expectations on national law. A well-known example of a surprising decision – at least for some Member States – is *Océano*,⁶ in which the CJEU found that judges have an obligation to interpret these terms *ex officio*, which has resulted in resistance at the national level.⁷ Moreover, it may take considerable time before ambiguous terms or blanket clauses are submitted before the CJEU, which increases the period in which a lack of certainty on the correct interpretation of terms is established. As a result, uncertainty on the interpretation of key concepts in directives may persist for a considerable time.⁸

The low frequency with which cases are brought before Dutch courts may further diminish the number of cases that might be brought before the CJEU. As apparent from experience with Regulation 261/2004 on air passenger rights, this lack of contention may be traced to the lack of awareness consumers actually have of their rights.⁹ Also, even if consumers are aware of their rights, it is not always cost-effective to enforce them, as consumers typically have small financial stakes and adjudication is expensive and time-consuming. In The Netherlands, where successful self-regulation has developed,¹⁰ as well as Alternative dispute resolution (ADR),¹¹ consumer organizations have not filed many claims.¹² Claims from consumer organizations may also be decreased if they have to negotiate before they can file a claim, as, for example, required in Article 6:240 paragraph 4 BW.

Secondly, identical concepts in the private law *acquis*, such as ‘unfair’, are interpreted differently. For example, ‘unfairness’ in the sense of Article 3 Directive 93/13 may differ from ‘unfairness’ in the sense of Directive 2005/29. As the unfair contract terms directive pursues minimum harmonization, leaving room for more stringent protection under national law, it has been argued that this standard, implemented in national law, may also be interpreted more strictly

6 CJEU 27 Jun. 2000, joined cases C-240/98 to C-244/98, *Océano Grupo v. Quintero* [2000] ECR 4941.

7 HR 23 Apr. 2010, *NJ (Nederlandse Jurisprudentie)* 2010, p. 454.

8 D. FAIRGRIEVE, G. HOWELLS & M. PILGERSTORFER, ‘The Product Liability Directive: Time to Get Soft?’, 4. *Journal of European Tort Law* 2013, p. 1.

9 See the evaluation of this measure, COM (2011) 174 final.

10 For example, many STCs used by Dutch businesses are the result of collective negotiations between consumer organisations and businesses within the framework of the Sociaal-Economische Raad (SER).

11 See www.degeschillencommissie.nl. Decisions by this committee are not consistently published.

12 C.M.D.S. PAVILLON, *Open normen in het Europees consumentenrecht*, Kluwer, Deventer 2011, at p. 505, points out that, in The Netherlands, individual enforcement is the primary remedy of a breach of collective rights that has not been established. See further on collective redress M.B.M. LOOS & W.H. VAN BOOM, *Collective Enforcement of Consumer Law*, Europa Law Publishing, Groningen 2007.

in favour of the consumer,¹³ and the CJEU has indicated the relevance of national laws for the evaluation of the fairness of terms.¹⁴ Yet national law may not be similarly relevant in assessing whether a commercial practice is unfair in the sense of Directive 2005/29 that pursues maximum harmonization.

Also, the relation between potentially overlapping measures may give rise to unpredictability and inconsistency. For example, questions have arisen on the admissibility of choice of jurisdiction clauses under the unfair contract terms directive and Article 17 Regulation 44/2001.¹⁵ Similarly, the simultaneous applicability of Directive 93/13 and the Montréal Convention has led to conflicts.¹⁶

Thirdly, inconsistency has developed as measures in the private law *acquis* have frequently used terms already used in national law, such as ‘consumer’ or ‘unfair’. Notably, the interpretation of these terms in the *acquis* by the CJEU may differ from the interpretation of these terms in national law by national courts. As a result, identical terms within the same codification can have different meanings.¹⁷ Inconsistency is worsened by the lack of interaction between national courts in some Member States in the interpretation of blanket clauses in the *acquis*.¹⁸

Fourthly, the extent to which harmonization improves the predictability, consistency, and accessibility of private law to foreign parties is overrated. In contrast to the reasoning in directives,¹⁹ the extent to which harmonization, even

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- 13 Comp. H. HEINRICHS, ‘Das Gesetz zur Änderung des AGB-Gesetzes Umsetzung der EG-Richtlinie über mißbräuchliche Klauseln in Verbraucherverträgen durch den Bundesgesetzgeber’, *NJW (Neue Juristische Wochenschrift)* 1996, p. 2196.
 - 14 CJEU 14 Mar. 2013, C-415/11 *Aziz v. Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* [2013] ECR 0.
 - 15 M.W. KNIGGE, ‘Tegenstrijdige Europese regelgeving? De verhouding tussen de EEX-verordening en de Richtlijn oneerlijke bedingen’, *MvV (Maandblad van Vermogensrecht)* 2012, p. 95.
 - 16 At first sight, clauses in accordance with the Montréal Convention should be permitted in accordance with Art. 1 para. 2 Directive 93/13, but BGH 5 Dec. 2006, *NJW* 2007, p. 997, found a clause in accordance with Art. 17 Convention unfair.
 - 17 W.-H. ROTH, ‘Transposing “Pointillist” EC Guidelines into Systemic National Codes – Problems and Consequences’, *ERPL* 2002, p. 774.
 - 18 Thus, Kantonrechter Tiel 15 Jun. 2005, *Prg. (Praktijkgids)* 2005, p. 143, upheld a clause automatically renewing a subscription trial and interpreted Arts 6:236 and 237 BW – establishing a list of respectively black and grey clauses partially overlapping with the model list under Art. 3 para. 3 Directive 93/13, a contrario, holding that clauses that do not fall under these articles are not unfair. This incorrect decision limits the evaluation of clauses under Art. 6:233 sub a BW, which implements Art. 3 para. 1 Directive 93/13, and it is fortunately contradicted by later decisions, see Kantonrechter Hoorn 10 Apr. 2006, *NJF (Nederlandse Jurisprudentie Feitenrechtspraak)* 2007, p. 252 and Kantonrechter Rotterdam 2 Aug. 2007, *Prg.* 2008, p. 37.
 - 19 For example, consideration 4 in the preamble to Directive 2005/29 asserts that the lack of certainty arising from divergence throughout the Union undermines consumer confidence and poses barriers to the internal market.

maximum harmonization, currently improves the predictability of private law throughout the Union is limited as concepts such as ‘unfairness’ in maximum harmonization directives, such as Directive 2005/29 on unfair commercial practices, are still interpreted divergently throughout the Union.²⁰ The fragmented approach of the *acquis* and the use of directives, which entails that parties that want to do businesses in another Member State will have to access legislation and case law adopted and developed in that Member State, further aggravates the lack of predictability, accessibility, and consistency of harmonized law. Accordingly, if, for example, a French business that wants to do business with Dutch consumers assesses its legal position under harmonized law, it will have to access Dutch legislation transposing directives in the consumer law *acquis* as well as Dutch case law applying Dutch implementation law and other non-harmonized Dutch provisions that will also be applicable.

These problems of unpredictability, inaccessibility, and inconsistency may well undermine the extent to which the private law *acquis* is capable of furthering the internal market and consumer protection. Difficulties with enforcement as well as problems with the lack of predictability and consistency have however not been considered in the Draft Common Frame of Reference (DCFR) or in the attempted reform of measures, such as Directive 93/13 on unfair contract terms.²¹ If Member States persist in their preference for as little reform as possible (which, at first sight, benefits the predictable development of the *acquis*),²² difficulties will not be addressed: directives will continue to be used, and they will include blanket clauses, which necessitates knowledge of national implementation law and case law. It is unlikely that the continuing use of blanket clauses in directives, even if maximum harmonization is introduced, will lessen the resistance of national courts, leading to a more consistent interpretation throughout the Union or even within Member States.

Regrettably, ways to address these problems remain unused. Particularly, clarifying the obligation of national courts to refer questions to the CJEU may be helpful. In addition, consistently publishing ADR decisions – an obligation not imposed by Directive 2013/11 on ADR – may provide more insight in potentially incorrect decisions that currently remain unchallenged.²³ Moreover, national

20 See extensively C.M.D.S. PAVILLON, *Open normen in het Europees consumentenrecht*, Kluwer, Deventer 2011.

21 See the proposal for a directive on consumer rights, COM (2008) 614.

22 See the response of the BMJ to the Green Paper on the review of the consumer *acquis*, COM (2006) 744, pp. 4, 16, 17, 18, available at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/responses/ms_bundesministerium.pdf.

23 For example, Decision of 29 Sep. 2009, No. 31530, at <http://www.degeschillencommissie.nl/klacht-indienen/eerdere-uitspraken/31530/afwezigheid-van-7-maanden>, as well as Decision of 26 Jul. 2006, No. 32021, at <http://www.degeschillencommissie.nl/klacht-indienen/eerdere-uitspraken/32021/artikel-6-237-onder-k-bw-niet-van-toepassing>. Similarly, Ch.E. BETHLEM, ‘Beslechting

reforms may also benefit consistency and predictability. Accordingly, in Dutch law, the introduction of a national prejudicial procedure²⁴ may generate more decisions from the Hoge Raad and, possibly, the CJEU, if the Hoge Raad refers more questions to the CJEU, and increase consistency.

2.2. *Poor Regulatory Choices*

Arguably, poor regulatory choices and the lack of coordination between existing and planned measures have contributed to the shortcomings visible in the private law *acquis*.

Firstly, part of the lack of predictability visible in the *acquis* can be traced to the use of ambiguous phrases and blanket clauses. The introduction of blanket clauses was not preceded by a careful assessment of the benefits and detriments of using such clauses in the *acquis*. Rather, the use of blanket clauses has been based on the widespread use of such clauses at the national level.²⁵ As detriments were not adequately foreseen, measures to compensate for potential unpredictability have not been developed consistently, such as the use of databases or guidelines for the interpretation of blanket clauses. Moreover, even though European decision-makers have detected consumers' lack of awareness,²⁶ this has not induced them to reconsider methods to increase consumers' awareness.²⁷ In addition, disagreement on the future development of European contract law has undermined solutions that could have strengthened the predictability of this area of law. Accordingly, the DCFR could have contributed to the predictability and consistency of the private law *acquis* by indicating in which way ambiguous

van consumentengeschillen: Hoe alternatief zijn de alternatieven?', *Tijdschrift voor Consumentenrecht* (2006), p. 1, pointed out that inconsistencies between the decisions of ADR committees and judicial decisions are visible, as well as inconsistencies between the judicial decisions within the same court and between different courts.

24 See further M.M. STOLP & J.F. DE GROOT, 'Een nieuwe procesvorm: Het stellen van prejudiciële vragen aan de Hoge Raad (Art. 392-394 nieuw Rv)', *MvV* 2012, p. 165.

25 Thus, the inclusion of Art. 3 Directive 93/13 was based on the widespread use of blanket clauses throughout the Union, see the German criticism on the proposal for a Directive on unfair contract terms, COM (90) 322 final, that took successful German law as a starting point, see Decision of the Bundesrat 1 Mar. 1991, BR-Drucks. 611/90, as well as the recommendation of the committees of 1 Mar. 1991, BR-Drucks. 611/90, the amended draft COM (93) 11 final, and the common position of the European Council on the draft, *JCP* 1992, p. 475.

26 See, for example, the RIA accompanying the proposal for amending Regulation 261/2004 on passenger rights, SWD (2013) 62 final.

27 Accordingly, the proposal to reform Regulation 261/2004 on passenger rights, COM (2013) 130 final, does not focus on increasing consumers' awareness, but on strengthening enforcement by national enforcement bodies - that however rely on consumer complaints. Moreover, clarifying provisions in the Regulation and introducing information duties may be useful, but the question remains, how effective these amendments will be if consumers are not aware that they have rights.

phrases or blanket clauses should be interpreted, by providing materials relevant to the interpretation of terms in future conflicts, and by providing decision-makers with terms that could be used throughout the development of the *acquis*. However, the definition of blanket clauses in the DCFR, such as ‘unfair’, diverges from the definition of the correspondent terms of directives (such as ‘unfairness’ in Directive 93/13). This difference might be seen in the light of the function of the DCFR to serve as a blueprint for a future contract code, as well as a blueprint for the draft Common European Sales Law (CESL). Such blueprints may well include improvements or new suggestions that do not strictly reflect existing law. However, as a result, the European legislator has not consistently used the DCFR in revising the *acquis* and developing new measures, and it may therefore also be less likely that the DCFR, notwithstanding its value as a source of comparative legal research, will function as a source that can be relied on for the interpretation of ambiguous phrases or blanket clauses in the CESL and other measures relevant for private law.

The lack of a careful assessment of the benefits and detriments of particular measures is more generally visible in the development of the private law *acquis*. Accordingly, the choice for minimum, maximum, and optional harmonization is not based on a thorough analysis of the strengths and weaknesses of the various degrees of harmonization, which increases the chance that identical concepts in minimum harmonization measures and maximum harmonization measures have to be interpreted differently. Moreover, the choice for maximum harmonization overlooks that this degree of harmonization may severely complicate the adoption of new measures and the revision of existing ones. As the length of the legislative process increases, the chance that a measure becomes outdated increases, which severely diminishes the extent to which these measures facilitate the internal market or enhance consumer protection, especially as it becomes easier to circumvent outdated measures. Problems of this nature were and are particularly visible in the timeshare directive, even when it aimed for minimum harmonization.²⁸ Maximum harmonization will aggravate, not mitigate this problem.

Secondly, the development of the *acquis* is hardly based on a carefully coordinated, predictable programme, which has further diminished the predictability and consistency of the *acquis*. There is little clarity on the legislative programme, which may moreover be subjected to considerable changes. Accordingly, more than a decennium after the Commission’s 2001 initiative to revise European contract law,²⁹ the success of this initiative can be doubted: the initial proposal to reform eight measures³⁰ has been reduced to

28 See the evaluation of this measure, SEC (1999) 1795 final.

29 COM (2001) 398 final.

30 See further the EC consumer law compendium, available at <http://www.eu-consumer-law.org/>.

two,³¹ while overlapping measures have been reformed simultaneously.³² The closed process and seemingly arbitrary choices in the review and further development of the private law *acquis* moreover indicate more structural shortcomings in the legislative process.³³

As a result of this complicated programme, various measures in the private law *acquis* are currently reviewed alongside one another, but sufficient coordination is absent. This is already visible in the inconsistent use of minimum, maximum, and optional harmonization.³⁴ One major project, the development of a Regulation on a Common European Sales Law, is based on the DCFR. Simultaneously, two central measures for the private law *acquis*, Directive 93/13 and Directive 99/44 on consumer sales, may be revised in the future.³⁵ These directives partly use identical concepts ('consumer' or 'contract'), and if the review of their texts is not sufficiently coordinated, this significantly increases the chance that these measures will contradict one another. In addition, to avoid inconsistency, future revision will have to ensure that concepts used in revised measures will also not clash with other measures, such as Directive 2005/29. This is difficult, as both the Directive 2011/83 on consumer rights and the CESL already diverge from the DCFR,³⁶ which may leave a smaller role for the DCFR in future reform projects. Regrettably, it is not yet clear whether concepts in existing directives, as well as the DCFR and the CESL, if passed, will play a role in the revision of these measures. This complicated net of revisions is not likely to improve the predictability of central measures such as Directive 93/13 or Directive 99/44. Yet if Member States and other participants in the reform process insist on amending these directives as little as possible,³⁷ this may leave room for inconsistencies currently visible between measures.

Against this maze of overlapping reform projects, it is surprising that the European legislator, rather than finishing and coordinating the revision of

31 Directive 85/577 on doorstep selling and Directive 97/7 on distance sales have been reformed through Directive 2011/83 on consumer rights.

32 This has resulted in the adoption of Directive 2008/48 on consumer credit and Directive 2008/122 on timeshare.

33 W. DORALT, 'Strukturelle Schwächen in der Europäisierung des Privatrechts', *RebelsZ* 2011, p. 260.

34 N. REICH, 'Von der Minimal- zur Voll- zur "Halbharmonisierung"- Ein europäisches Privatrechtsdrama in fünf Akten', *ZEuP* 2010, p. 7.

35 See consideration 62 in the preamble to Directive 2011/83 on consumer rights.

36 See, for divergence between the DCFR and the proposed consumer rights directive, M.W. HESSELINK, 'The CFR and the Consumer Rights Directive - Two Worlds Apart?', *ERCL* 2009, p. 290. The proposal for a CESL similarly deviates from the DCFR, for example, with regard to the unfairness of terms (Art. II- 9:403 DCFR, Art. 83 proposed CESL), which makes it less likely that the DCFR standard will be adopted if Directive 93/13 is revised.

37 *Supra* n. 2.

measures, has initiated new projects, without drawing on definitions and model rules provided by the DCFR.³⁸

2.3. *The Need to Reconsider Regulatory Choices through RIAs*

The European Commission has recognized the need for a reform of the private law *acquis*.³⁹ However, there are no indications that regulatory choices shall be reconsidered, and problems signalled above are therefore more likely to remain. RIAs can help improve the private law *acquis* by prompting reconsideration of regulatory choices and providing an impetus for improving the legislative process.

Firstly, RIAs should help decision-makers to prevent repeating poor regulatory choices. This means that techniques that were unsuccessful in the past should not be re-used without assessing why they were not or not sufficiently successful. In some cases, however, it is not likely that regulatory choices will be reconsidered, even if a lack of predictability and consistency has become apparent. Accordingly, blanket clauses will continue to be used. The use of blanket clauses is difficult to avoid, but the lack of predictability accompanying the use of such clauses will likely persist if databases collecting national and European case law are not established.⁴⁰ Unpredictability will also remain if databases such as the CLABB database⁴¹ on Directive 93/13, the database on

38 Thus, the DCFR, para. 76, p. 37, expressly states that it does not provide rules for consumer credit contracts as it concerns projects adopted at a time when the work on the DCFR had already reached a final phase. Nevertheless, model rules for loan contracts have been established, and concepts of 'lenders' and 'borrowers' and their obligations have been established. The comments to Art. IV.F - 1:101 DCFR, pp. 2456-2457, expressly state that these model rules do not apply to consumer credit contracts or mortgage credit. The concepts in the DCFR differ from Art. 3 Directive 2008/48 and Art. 3, the proposal for a directive on mortgage credit that refer to consumers and creditors. Both directives define the concept of consumer more narrowly than the DCFR that refers to persons acting *primarily* for purposes not related to their trade, business, or profession.

39 COM (2001) 398 final.

40 So far, databases have been established for Directive 93/13 on unfair contract terms. Unfortunately, this database has subsequently been deleted. Similarly, a database on Directive 2005/29 on unfair commercial practices has been established. Directive 2011/83 on consumer rights does not consider a database, despite the role of the EU consumer law *acquis* database in the reform of Directives 85/577 on doorstep selling and 97/7 on distance selling. Other measures, such as the proposal for a directive reforming Directive 90/314 on package travel, Directive 2008/48 on consumer credit, Directive 2008/12 on timeshare, or the proposal for a directive on mortgage credit, COM (2011) 142 final, also do not establish databases.

41 The CLABB database is no longer available.

Directive 2005/29,⁴² and the EU consumer law database⁴³ are established, but not sufficiently used.⁴⁴ Similarly, guidelines⁴⁵ are not widely used.⁴⁶

Currently, it is not clear in which cases these databases will contribute to the predictable and accessible development of the *acquis*. Therefore, new initiatives should not uncritically establish databases to improve the predictable and consistent interpretation of blanket clauses throughout the Union. Accordingly, the proposal to collect data on national decisions on the CESL in Article 14 in the regulation establishing the CESL should carefully consider these prior experiences. Conversely, if the regulation successfully motivates judges and legislators to make use of databases collecting national decisions, the use of databases should be considered more widely and also introduced for other measures, such as Directive 2011/83 on consumer rights.⁴⁷

Equally, if Guidance from the Commission is hardly used⁴⁸ and does not effectively contribute to the predictable and consistent interpretation of blanket clauses, the use of Guidance should not be continued. Instead, the use of Guidance should be critically evaluated. Particularly, an evaluation should look at the possibility that the use of guidance meets with important objections at the national level: will the use of Guidance lead to inconsistencies between national private law and national administrative law? Possibly, such objections may stand in the way of the use of the Guidance at the national level. The use of this instrument should only be continued and introduced for other measures, if it is more consistently and widely used.

The use of self-regulation to reduce unpredictability arising from blanket clauses has been less prominent. Yet the use of well-established national self-regulation may be useful in this respect, as acknowledged in Article 6

42 Available at <https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.home.show>.

43 Available at <http://www.eu-consumer-law.org/>.

44 Thus, neither German nor Dutch decisions on either Directive 93/13 or Directive 2005/29 mention foreign decisions or the database.

45 Commission Guidance on the interpretation of Directive 2005/29, SEC (2009) 1666, available at http://ec.europa.eu/consumers/rights/docs/Guidance_UCP_Directive_en.pdf.

46 Although national courts have not referred to the guidance, CJEU 12 May 2011, C-122/10 *Konsumentombudsmannen v. Ving Sverige AB* [2011] ECR 3903, para. 67, does refer to it. The report on the application of Directive 2005/29, COM (2013) 139 final, p. 8, gives a different impression. This somewhat optimistic impression unfortunately remains unsubstantiated, save for a referral to a single CJEU decision. Other decisions referred to in footnote 13 of the report do not refer to the Guidance.

47 For example, no database collecting decisions on Directive 2011/83 or laws transposing this Directive, even though the EU consumer law database played a role in reform of directives on distance selling and doorstep selling. This possibility seems to have been overlooked. The report the application on Directive 2005/29, SEC (2009) 139 final, pp. 8-9, suggests merging the EU consumer law *acquis* and the database on unfair commercial practices.

48 *Supra* n. 47.

Directive 2005/29. Unfortunately, national codes are typically not easily accessible throughout the Union. European-wide codes may be more accessible, but it may be doubted whether the development of European self-regulation can be used to increase predictability. Arguably, RIAs could and should prompt European decision-makers, who have played a prominent role in the development of European ‘self’-regulation such as the new EU code for online consumer rights,⁴⁹ to reconsider the development of European self-regulation alongside European measures as a means to improve predictability and consistency. Previous initiatives, particularly the e-Confidence project,⁵⁰ a scheme on European trustmark requirements, based on negotiations between the Bureau Européen des Unions de Consommateurs (BEUC) and Union of Industrial and Employers’ Confederations of Europe (UNICE), have not been successful. Regrettably, the new initiative does not consider the lack of success of its predecessor, but it is not clear why this initiative will be more successful than the previous one. Theoretically, an important reason for the lack of success of such initiatives may be that consumers prefer national well-established trustmarks and more detailed codes of conduct they are already familiar with. The new European code does not however look at these successful national schemes.⁵¹

Meanwhile, other opportunities to improve the predictable and consistent development of measures in the private law *acquis* are overlooked. For instance, opportunities to make judges more aware of relevant decisions through national training programmes or often-read publications well circulated at the national level remain unexplored. Similarly, the possibility for CJEU to set more of an example by referring to databases or indicate the relevance of foreign decisions for the interpretation of blanket clauses in the *acquis* should also be considered. Also, RIAs could prompt an interesting assessment of the success of regulations, such as Regulation 261/2004. For example, can the use of regulations inhibit consumer awareness in Member States where most of private law is found in codes? And if not, why have problems arisen with regard to consumers’ awareness in the use of regulations? Should these measures therefore be accompanied by means that help ensure that consumers are sufficiently aware of their rights?

Secondly, shortcomings in the *acquis* have been traced to the lack of coordination between overlapping measures. RIAs can also strengthen the private law *acquis* in this regard, by providing a better basis for evidence-based

49 See <https://ec.europa.eu/digital-agenda/en/code-eu-online-rights>.

50 See http://ec.europa.eu/consumers/cons_int/e-commerce/e-conf_working_annexe.pdf.

51 For Dutch law, successful schemes are the Thuiswinkel Waarborg, see <http://www.thuiswinkel.org/consumenten/>, and Stichting Webshop Keurmerk, see <http://biedmeerwebwinkels.nl/Page309/Webshop-Keurmerk.html>. The EU code does refer to the EHI trustmark, see <http://www.shopinfo.net/>, but it does not refer to other German initiatives approved by the D21 initiative, see <http://internet-guetesiegel.de/qualitaetskriterien>.

discussion, thereby improving the legislative process, and by including potential future reform in sketching the existing legal framework. In turn, more openness and debate should prompt the legislator to indicate and discuss future plans, which should lead to more coordination.

3. Shortcomings in the Use of RIAs

RIAs provide a means to help the legislator and other actors in reconsidering choices that have so far been made in the private law *acquis*. However, it is difficult to recognize the potential of RIAs because of the shortcomings in the use of this instrument.⁵²

An important shortcoming that stands in the way of the added value of RIAs is the lack of a neutral assessment of the benefits and detriments of a particular course of action. Thus, costs and benefits of a particular approach are frequently not evaluated objectively. For example, in the reform of Directive 94/47 on timeshare, the consultation led to suggestions from experienced Member States for a licensing system. The RIA⁵³ accompanying the proposal does not assess this option, because the Commission found that introducing licensing systems would impose too much administrative costs on Member States, which are better reserved for legislative action. Thus, this option, which has proved successful at the national level and is suggested by instances currently carrying the costs of licensing systems, is discarded without properly assessing the costs and especially the benefits, in terms of consumer protection. However, comparing the costs and benefits of introducing a licensing system to legislative action – in the form of revision of the Directive – is difficult as the RIA provides only a very basic estimation of the costs (of business stakeholders) and benefits. The estimates are based on figures from stakeholders and ‘the Commission’s expert judgment’, and the benefits of the ‘vertical legislative reform’ are expressed in ‘+’s rather than exact numbers.⁵⁴ Possible benefits of licensing systems for the internal market, for example, the potential successful suppression of malpractices and the potential increase in consumer confidence in the internal market, are also not considered.

52 One of the few contributions in this area is W.H. VAN BOOM, ‘The Draft Directive on Consumer Rights: Choices Made and Arguments Used’, *Journal of Contemporary European Research* 2009, p. 452. See on proposal for a Common European Sales Law E.A.G. VAN SCHAGEN, ‘The Proposal for a Common European Sales Law: How Its Drafting Process Might Affect the Optional Instrument’s Added Value for Contract Parties and Its Success’, in A.L.M. Keirse & M.B.M. Loos (eds), *Alternative Ways to a ius commune*, Intersentia, Antwerp, 2012.

53 SEC (2007) 743, p. 36.

54 SEC (2007) 743, pp. 55, 58.

Similarly, Micklitz and Reich⁵⁵ have criticized the one-sided evaluation of the detriments of minimum harmonization in the RIA accompanying the proposal for the revision of the consumer credit directive. The one-sided evaluation of minimum harmonization is also visible in other RIAs⁵⁶ and draws attention to the preference for maximum harmonization characterizing the more recent private law *acquis*. Particularly, the report on the application of Directive 2005/29 on unfair commercial practices assumes, rather than assesses, that full harmonization successfully enhances the internal market.⁵⁷ If RIAs continue to assume that minimum harmonization is detrimental and full harmonization is beneficial, it can be doubted whether the evaluation of Directives 93/13 on unfair contract terms and Directive 99/44 on consumer sales, which will specifically target minimum harmonization,⁵⁸ will entail a balanced evaluation of the benefits and detriments of minimum harmonization, and it seems highly unlikely that any other ‘cure’ for these detriments than maximum harmonization will be suggested in the ‘evaluation’ of these directives.

Because of the above-exemplified lack of neutrality of the RIAs, valuable suggestions may currently be overlooked and the discussion on the future development of the *acquis* may be inhibited. The biased approach in RIAs prevents the critical evaluation of the use of certain techniques. Consequently, lessons that could be drawn from problems in the past have been overlooked. For example, the use of databases, the use of guidance for the interpretation of blanket clauses, and the development of self-regulation at the European level have not been particularly successful, but they are introduced in new measures regardless.

That does not mean that the use of databases and guidance is necessarily useless; they may be especially important guidelines for administrative bodies designated to enforce directives containing blanket clauses. Yet for private law, important limitations to their use should be recognized more clearly. While databases and guidance may contribute to the predictable and consistent interpretation of blanket clauses in European measures, blanket clauses such as Article 3 Directive 93/13 have also been established to allow courts to take into account parties’ bargaining positions, considerations of reasonableness, and the

55 H.-W. MICKLITZ & N. REICH, ‘Der Kommissionsvorschlag vom 8. 10. 2008 für eine Richtlinie über “Rechte der Verbraucher”, oder: “der Beginn des Endes einer Ära ...”’, *EuZW (Europäische Zeitschrift für Wirtschaftsrecht)* 2009, p. 280.

56 See the impact assessment form to the proposal to revise Directive 87/102 on consumer credit, COM (2002) 443 final, pp. 82-83, and the impact assessment report accompanying the proposal to revise Directive 94/47 on timeshare, SEC (2007) 743, pp. 9-10.

57 COM (2013) 139 final, pp. 29-30. The assertion also appears to overlook the possibility for Member States to retain more stringent provisions on consumer protection for a period of six years until June 2013, under Art. 3 para. 3 Directive.

58 As announced in consideration 62 of the preamble to Directive 2011/83 on consumer rights.

overall evaluation of parties' interests. As these bargaining positions, considerations and interests may differ throughout the Union, courts' evaluations of these circumstances will continue to differ throughout the Union, and foreign decisions and Guidance may not be decisive for courts evaluating these circumstances. Initiatives to establish databases and Guidance should allow for these differences, which also means that, notwithstanding the use of databases and Guidance, some differences will remain.

The lack of a neutral assessment also diminishes the meaning of RIAs and increases the chance that they are reduced to a formality. This risk is apparent in the RIA accompanying the proposal for a draft CESL. Thus, before the draft CESL was proposed, the Expert Group preparing the proposal was already working on an optional instrument, apparently regardless of the outcome of the RIA. The Commission also presented the adoption of the CESL as a future plan in other policy documents, before the benefits and detriment of this option had been assessed.⁵⁹ Thus, regardless of consultations and RIAs, the means for improving the functioning of the internal market and consumer protection have already been established.

A more general point of criticism is the lack of openness on RIAs. Despite the role of the Impact Assessment Board (IAB) in evaluating RIAs,⁶⁰ it is not transparent in what way the independence of actors conducting RIAs is guaranteed, which is especially interesting in the light of the lack of an impartial assessment of the benefits and detriments in RIAs in the private law *acquis*. Also, could and should the Commission or other institutions requiring the use of (additional) RIAs be held accountable for improving the use of currently visible shortcomings in RIAs? Such accountability may be difficult to reconcile with the Commission's discretion in initiating measures, but the Commission may nevertheless choose to complement its own RIAs.⁶¹ In what cases will the Commission do so? It is also not clear how much time should typically be involved in conducting RIAs and how the period needed for RIAs influences the length of the drafting process of European measures. It is not apparent whether and in what way proposals and RIAs in the private law *acquis* may mutually influence one another, if at all.⁶² Additionally, there is little clarity on the

59 Thus, the Digital Agenda, COM (2010) 245, p. 13, named the proposal for an optional instrument on contract law as a policy aim, before the consultation was closed and the benefits and detriments of this option had been assessed, see SEC (2011) 1165 final.

60 See http://ec.europa.eu/governance/impact/iab/iab_en.htm

61 Inter-institutional Common Approach to Impact Assessment, 2005, available at http://ec.europa.eu/governance/impact/ia_in_other/docs/ii_common_approach_to_ia_en.pdf, para. 12.

62 See generally the House of Lords, European Union Committee, Impact Assessments in the EU: Room for Improvement?, Report 2009-2010, available at <http://www.publications.parliament.uk/pa/ld200910/ldselect/ldcom/61/6102.htm>, paras 62-66. Proposals, for example, the proposal for a regulation establishing a Common European Sales Law, COM (2011) 635 final,

question whether stakeholders or experts may influence RIAs or whether RIAs can sufficiently benefit from practical insights, in accordance with the Commission's guidelines.⁶³

4. Starting Points for Improving RIAs and the Private Law *Acquis*

RIAs could form a valuable starting point for the improvement of the private law *acquis*. However, the shortcomings in these instruments make it difficult to clearly see their potential. As it may take considerable time to draft RIAs,⁶⁴ they may currently delay the legislative process while their added value is not clear. Unfortunately, because there is very little attention for RIAs and possibly also because they currently do not add to the quality of the private law *acquis*, there are few instigations for improving these instruments. Rather, the European Parliament has positively evaluated the RIA accompanying the proposal for a CESL,⁶⁵ remarking that the Commission seems to have followed its own guidelines,⁶⁶ despite criticism from the IAB.⁶⁷

How can actors, particularly the European Commission, improve RIAs and improve the private law *acquis*? Clearly, more attention for assessing the impact of proposed measures is necessary. Particularly, RIAs should be more visible, and they should be conducted more transparently. It should be clearer what instances are responsible for conducting RIAs, and they should draw more attention by discussing and questioning regulatory choices that have remained implicit in the private law *acquis*.

Moreover, participants in the debate on European private law should pay attention to impact assessment reports accompanying new measures and their shortcomings. Member States have argued for more critical and thorough RIAs,⁶⁸

indicate that the RIA supports the proposal but do not make clear how the RIA has affected the choice for a particular policy option, if at all. Comp. A.C.M. MEUWESE, *Impact Assessment in EU Lawmaking*, Kluwer Law International, Alphen aan den Rijn 2011, at p. 92, who remarks that it is 'strange' to make proposals and RIA's public without indicating 'how one relates to another'.

63 As indicated in the IIA, *supra* n. 44, para. 10, and in the Commission's Impact Assessment Guidelines, SEC (2009) 92, p. 19, referring to the minimum standards for consultation, COM (2002) 704 final. There are separate standards for collecting data, see COM (2002) 713 final.

64 For example, the RIA accompanying the proposal for the CESL started in May 2010 and a report was submitted to the IAB in July 2011, see SEC (2011) 1165, pp. 4, 7. The Impact Assessment Guidelines, SEC (2009) 92, p. 8, indicate that conducting an RIA 'normally takes more than 12 months'.

65 *Common European Sales Law, Detailed Appraisal by the EP Impact Assessment Unit of the European Commission's Impact Assessment*, January 2013.

66 European Commission, Impact Assessment Guidelines, SEC (2009) 92.

67 See the opinion of the IAB on the RIA, SEC (2011) 1167.

68 See, for example, the response of the Dutch government to the Green Paper on policy options for progress toward a European contract law, COM (2010) 348 final, at <http://ec.europa>.

without going in much further detail, but these arguments do not suffice. Instead, participants in the European legislative process should provide constructive criticism. National Parliaments have already made use of the possibility to lodge complaints on the subsidiarity of proposals, and they could look to reports from the IAB criticizing the assessment of subsidiarity – as well as proportionality – in proposals.⁶⁹ Meetings between representatives of national parliaments and the European Parliament⁷⁰ could perhaps provide a forum for questions on these issues. More attention for the Impact Assessment Guidelines would further draw attention to the one-sided evaluation of minimum harmonization. Notably, current evaluations of measures that also seek to enhance consumer protection are not in accordance with the requirement that RIAs should also assess social impacts – for example, in terms of consumer protection.⁷¹ Also, the guidelines indicate that more attention should be paid to the use of co- and self-regulation.⁷² Looking at possibilities to make well-established self-regulation at the national level more accessible to parties located in other Member States may be an especially interesting option to increase consumers’ confidence in the internal market. Generally, a more critical perspective on regulatory choices would be welcome.

Similarly, RIAs assertions should be scrutinized much more closely. For example, the RIA accompanying the proposal for a directive on consumer rights⁷³ asserts that harmonization of the rules on distance selling and doorstep selling will induce almost half of 75% of traders who use distance communication but who do not currently trade across borders. The RIA then states that if 31% of these traders will start trading across borders, the impact of the Directive will be very significant. If, in accordance with Article 30 Directive 2011/83, the Commission evaluates the Directive, it would be interesting to see whether the

eu/justice/news/consulting_public/0052/contributions/258_nl.pdf (as well as the responses of other Member States, including the United Kingdom and Hungary, repeated in the Dutch response to the Feasibility Study, COM (2011) at http://ec.europa.eu/justice/contract/expert-group/index_en.htm, and the response to of The Netherlands to the Green Paper on the review of the consumer *acquis*, COM (2006) 744 final, at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/responses/ms_netherlands.pdf, as well as the response of the United Kingdom that took a similar approach in its response to the 2003 Green Paper, at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/stakeholders/1-11.pdf).

69 For example, also the opinion of the IAB on the proposal for a directive on mortgage credit, SEC (2011) 354, at p. 2, and the opinion on the proposals on ADR and ODR, SEC (2011) 1410, at pp. 1-2.

70 For example, the meeting on the CESL, see <http://www.europarl.europa.eu/webnp/cms/pid/1856>.

71 SEC (2009) 92, pp. 31 *et seq.*

72 SEC (2009) 92, p. 16.

73 Impact assessment report, pp. 38-39, available at http://ec.europa.eu/consumers/rights/docs/impact_assessment_report_en.pdf.

full harmonization approach in the Directive has in fact prompted almost half of the businesses that indicated they would be motivated to engage in cross-border trade to actually do so. The outcome of such an evaluation would moreover be interesting in the light of the evaluation of Directives 93/13 and Directive 99/44, which is to target the question whether minimum harmonization has resulted in barriers to the internal market. If a RIA contains more general assertions, evaluating the success of measures on the basis of these assertions will be much more complicated. For example, if a RIA states that full harmonization, instead of minimum harmonization, will lead to greater choice for consumers, evaluating the success of this measure is much more difficult. Specifically, evaluating whether a lack of greater consumer choice can be attributed to a lack of full harmonization or whether a lack of more consumer choice can be traced to fierce competition that has driven smaller businesses across the Union out of business or to the lack of consumers' interest in new products from all businesses across the Union will be difficult. Possibly, more closely scrutinizing predictions in RIAs in the evaluations of measures will make these assertions much less informal. Instead, more scrutiny may motivate actors drafting RIAs to substantiate their assumptions and make their predictions more specific.

Moreover, perhaps, if interested parties are aware of future plans for harmonization, they can outline whether barriers for the internal market arise and in which way this could be fixed. Such constructive criticism however not only presupposes a thorough knowledge of comparative law, but also familiarity with national, cross-border, and European practice.⁷⁴ Currently, however, specialists in national private law and practitioners hardly participate in the European debate on the development of the private law *acquis*, especially when compared to participation in legislative chances at the national level. Possibly, these actors may be motivated to participate if they have a clear, direct interest in doing so, which currently may not always be the case. The wording of projects – a ‘Feasibility Study’ or a ‘Draft Common Frame of Reference’ – obscures the potential impact of these projects on national private law and national and cross-border practice. The closed process and the lack of openness on future action may further inhibit national actors from participating. In other words, initiatives for advancing the internal market should be based on more bottom-up participation. Member States are well placed to prompt more attention to both European consultations and RIAs by initiating additional consultations and RIAs at the national level.

In itself, these developments would already be a significant improvement that would increase the extent to which the *acquis* reflects national and cross-border practices. These views and the options suggested by national actors

74 Interestingly, successful measures such as Directive 2002/47 on financial collateral arrangements have been preceded by considerable involvement from (a) stakeholder(s). See the evaluation of this measures, COM (2006) 833 final.

could, in turn, provide a starting point for RIAs. If actors perceive that their options are approved or discarded by RIAs, this may be a point of interest for them. Yet although wider participation may be beneficial and prompt considerable improvement, actors should also be motivated to consider RIAs. If RIAs are performed at a national level and predict the impact of future measures in more detail, this may prompt more detailed reactions. The use of national materials is moreover indicated by Commission guidelines.⁷⁵ It may also be helpful if consultations enquire after practitioners' and stakeholders' experiences and success stories in enhancing consumer confidence and encouraging trade. Questions should also be asked on the experiences of traders so far - have they encountered a lack of predictability, do courts and practitioners make use of the database established by a measure, and are consumers sufficiently aware of their rights? This may be an opportunity for stakeholders, experts, and practitioners to express (dis)satisfaction and an opportunity to propose alternatives. National practitioners and experts may also be better placed to draw attention to the use of national success stories that may enhance consumer confidence in cross-border situations.

5. Conclusion

RIAs could be an important means for addressing the unpredictability, inconsistency, and inaccessibility in the private law *acquis*. Particularly, RIAs could draw attention to implicit regulatory choices and sketch alternative or additional measures that may limit unpredictability arising from the use of blanket clauses as well as provide a basis for a more consistent use of either minimum, maximum, optional, or another degree of harmonization and enhance the coordination between measures in the private law *acquis*. However, these improvements require that shortcomings in RIAs are addressed and the use of RIAs in the private law *acquis* needs to be drastically improved. Unfortunately, the main difficulty lies in prompting the instances responsible for RIAs to improve the use of RIAs. Particularly, prompting relevant parties to respond may be difficult - it may require a rather radical change in the approach adopted in the *acquis* so far. However, these difficulties are well worth it, considering the potential for improvement in the private law *acquis*.

75 SEC (2009) 92, at p. 18.