Summary

1. Reasons and goal of this research

The main goal of this research is to examine the consequences of the implementation of a recently launched proposal for a directive with respect to the review of the "acquis communautaire" in the field of consumer contract law. The research also examined the consequences of the so-called "Draft Common Frame of Reference (DCFR)" for consumer contract law in the Netherlands.

The focus of this research was mainly on the following topics:

- Definition of consumer and businessman;
- The role and meaning of the concept of good faith;
- Information duties;
- The requirement of conformity;
- Regulation concerning unfair contract terms;
- The consequences of the contract.

Since this proposal for a directive was launched on 8 October 2008, the most pressing issue is the examination of the consequences of this proposed directive. Hence the research mainly pays attention to the consequences of this proposal for a directive and less to the DCFR. However, the DCFR has also been described in detail, has been analysed and has been compared with the proposal for a directive.

2. Structure of the research and of the report

The report follows the structure in which the research has been executed. The first chapter sketches the reasons for the research as well as the objectives and the structure of the report. Chapter 2 provides an overview of the existing "acquis communautaire" as far as consumer contract law is concerned. Chapter 3 explains how the four directives the European Commission currently proposes to review have been implemented in Dutch law. Next, chapter 4 outlines the proposal for a directive and all other documents preceding this proposal. The central issue in chapter 5 is the Draft Common Frame of Reference. This chapter not only discusses the provisions concerning consumer contract law, but also provides a critical evaluation of the DCFR on the basis of legal doctrine and especially literature addressing the

DCFR from a law and economics perspective. Chapter 6 pays detailed attention to the consequences for Dutch law of both the proposal of the European Commission of 8 October 2008 as well as the DCFR. Chapter 7 provides a fundamental and critical law and economics perspective with respect to the question of whether a total harmonisation of consumer contract law (as proposed by the European Commission) is necessary and desirable. Concluding remarks and recommendations are provided in chapter 8.

3. Consequences for Dutch law

3.1 Maximum harmonisation, maximum protection?

The main conclusion of the research is that the maximum harmonisation as incorporated in the proposal for a directive has the consequence that Member States have to align their legislation to this directive. Member States that have further-going protection for consumers than is incorporated in the directive, will therefore have to reduce their level of protection. On the other hand, those Member States that have a lower level of protection than is contained in the draft proposal will be required to increase the level of protection.

The research analysis in detail whether the proposal would, as far as Dutch consumer contract law is concerned, lead to an increased level of consumer protection and concludes that it probably would not. Nevertheless implementation of this proposal would have serious consequences for Dutch law, as it would to some extent lead to a decrease of the level of consumer protection. In addition, it would require many changes of a more legal-technical character.

The basic problem with the proposal is that what was considered as a minimum protection in previous directives will now be considered as maximum protection. For a few Member States this may lead to an increase in the level of consumer protection. However, this is not the case for the Netherlands, where it will mainly result in a decrease of consumer protection.

3.2 Kinds of recommendations and implementation strategies

The researchers have formulated concluding remarks and recommendations of various kinds. First they have formulated recommendations that the Dutch negotiators could use in the European negotiation process. These recommendations assume that it would be possible for

the Netherlands to influence the negotiation process. There have also been suggestions regarding the implementation strategy that could be followed, assuming that an adaptation of the current proposal would not be possible and that consequently it would have to be implemented in Dutch law in its current form.

The researchers indicate that as far as implementation strategies are concerned two different approaches can be followed. A first modest approach includes a “minimum” implementation respecting as much as possible the contents, terminology and structure of current Dutch private law. The main advantages of such a strategy from a national legal perspective are that unity and consistency are protected and hence legal certainty is safeguarded as well. The danger of this approach is, however, that for specific aspects implementation may not always be in conformity with the requirements of the directive. A second approach would hence opt for a more generous implementation whereby the national legislator would almost literally follow the provisions of the directive. It may be clear that by following this strategy there is less danger that the implementation would not completely follow the requirements of the directive. On the other hand, the danger of this type of implementation strategy is that it may disturb the unity within current Dutch private law. The choice of strategy is a political one that is to be made by others.

3.3 Reduce protection?

Dutch consumer law comprises a number of rules that offer the consumer a higher level of protection than provided by the proposal. Implementation will thus require a reduction of the level of protection. This is the case for:

- The rules concerning general conditions. The current regulation of article 6:233 al. b in combination with article 6:234 of the civil code with respect to information duties will have to be changed, but more importantly: the so called black and grey lists (of unfair contract terms) in Dutch law will have to be revised;
- The rules concerning consumer sales. The problem arises especially with regard to the period within which a non-conformity of a sold products will have to manifest itself in order to give rise to liability of the seller for delivering a non-conforming product. The draft directive proposes to limit this period to two years which may constitute a problem especially for products having a long “life expectancy”. The proposal further

provides for a more stringent and formalistic duty to complain on the part of the consumer, sanctioned by a loss of rights.

In addition, implementation of the proposal will require many changes of a more textual and legal-technical nature. To some extent these adaptations can undoubtedly be qualified as an improvement. This may for example be the case for the right of withdrawal, which will probably be more consistently and uniformly regulated after implementation of the directive.

3.4 Reparation via principles?

The report further addresses in detail whether the protection that would be lost after implementation of the directive could be regained through the application of general principles, such as reasonableness and equity. However, as the proposal strives for a maximum harmonisation, it does not seem to allow the member states to use general principles to elevate the level of consumer protection above that of the directive.

Implementation of the proposal will also have consequences outside of the direct scope of application of the proposal. This may especially be the case where the consumer rules align with general rules of contract law. A reduction of the level of consumer protection following from the proposal may then lead to an adaptation of more general rules of Dutch private law. One reason to do so may be to prevent that a consumer (as a consequence of the implementation of the directive) would eventually receive less protection than non-consumers engaging in a similar transaction. In the case of a consumer sale, the defect in the goods would, after implementation of the proposal, have to become apparent within two years from the time the risk passed to the consumer, in order to give rise to liability on the part of the seller, while the general rule on the matter only requires the defects to appear within the normal life span of the goods.

The researchers point out that the preamble to the proposal for a directive indicates that the proposal does not influence general concepts of the law of obligations. This could (but it is uncertain) imply that some of the apparently required changes of the current Dutch law, for example concerning remedies in case of breach by the seller of his duty to deliver goods that conform to the contract, could be prevented. This could hence prevent the directive to reach

further (e.g. in the general law of sales) than is strictly necessary and it might also prevent the disruption of the general unity and consistency of our contract law.

4. Proposal for a directive on weak foundations

One of the main conclusions of the research is that the argument of the European Commission that a maximum harmonisation is necessary to promote interstate trade raises serious doubts. It is also questionable whether this directive can be based on article 95 EC.

The Commission argues that it wishes to abandon the tradition of minimum harmonisation as this has led to differing regimes in the various Member States, resulting, according to the Commission, in a subdesirable level of transboundary purchasing by consumers. Only a full and maximum harmonisation of consumer contract law could, according to the Commission, eliminate all differences between Member States and hence promote the functioning of the internal market.

A critical assessment, however, shows that the Commission's arguments do not provide a solid basis for harmonisation of consumer contract law. Economic analysis shows that harmonisation of law is not necessary in order to stimulate transboundary transport e.g. of consumer products or services. Such a harmonisation may have no effect at all since it is not differences in legal rules, but rather other factors that restrict transboundary trade. Hence the proposal for a directive cannot be based on the argument that this directive will improve the functioning of the internal market. That is, however, the argument the Commission uses to base the directive on article 95 EC Treaty.

The researchers conclude that the Netherlands should not only discuss the contents of the proposed directive, but also the principle of maximum harmonisation itself. This is especially the case as the legal foundations for this directive seem weak.