

## Codification: the Future of English Consumer Law?

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Member States of the European Union all grapple with the challenge of implementing consumer law into their legal order. For many civil law countries, the exercise has always proven rather more complex than it has historically been in England. Indeed, in countries where law is already codified, each new Directive requires careful analysis as to how it can be best integrated and accord with already established rules. In England, the practice has long been much simpler, the product of a mixture of specialised regulatory rules existing alongside the common law and some ‘copying and pasting’ of EU legislation. However, this resulted in consumer law becoming a strange area of law, not least because it is incredibly complex.<sup>1</sup>

Consumer law is currently undergoing a significant transformation and a new Consumer Rights Bill was introduced in 2013. It *‘is the biggest overhaul of consumer rights for a generation. It sets out a simple, modern framework of consumer rights that will promote growth through confident consumers driving innovation and more competitive markets.’*<sup>2</sup> The Bill<sup>3</sup> is unquestionably ambitious. It pulls together the provisions of numerous pre-existing statutes (most of which are procedural). The main reforms include the consolidation of sales law (including goods, services and hire-purchase), the introduction of rules for digital content; the reform of unfair terms (pulling together the main two pieces of statute governing this area and clarifying the scope of application of the review of unfair terms) and the rationalisation of enforcement rules that were, to this point, governed by over 60 separate pieces of statutes.

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<sup>1</sup> Christian Twigg-Flesner, ‘Some thoughts on Consumer law reform: Consolidation, Codification or a Restatement?’ in Gullifer L and Vogenauer S (eds), *English and European Perspectives on Contract and Commercial Law – Essays in Honour of Hugh Beale* (Hart 2014) 67.

<sup>2</sup> Consumer Rights Bill (Carry-over extension) <<http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm150112/debtext/150112-0003.htm#15011241000001>>

<sup>3</sup> For more on the Bill and its current adoption process, see <<http://services.parliament.uk/bills/2013-14/consumerrights.html>> accessed 26 February 2015. For the text of the most recent Bill <[http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0064/lbill\\_2014-20150064\\_en\\_1.htm](http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0064/lbill_2014-20150064_en_1.htm)> accessed 26 February 2015. Note that provisions applicable to secondary ticketing platforms are still being debated at the time of writing, <<http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0081/15081.1-4.html>> accessed 26 February 2015.

The complex web of legislation that developed across the decades, evolving from the common law to a statutory system strongly inspired by European law, is therefore undergoing significant rationalisation. So much so that one can venture that consumer law, first conceived as an ad hoc and pragmatic system, is slowly moving towards codification. While codification is far from achieved, nor forecasted in the way member states of civil law heritage would perhaps conceptualise it, the process of consolidation into a single piece of statute of some consumer rights marks the start of a more accessible and organised consumer law. It therefore appears timely to reflect on how English consumer law ought to develop in the future and whether the embryonic codification should be pursued, replaced by some other form or abandoned altogether to a return to its judge-made common law roots.

This article starts with clarifying the terminology used and defining codification. It then proceeds with looking at codification in England and demonstrates that it is in fact an idea that is deep in the roots of the common law. Based on this, it discusses the codification of consumer law, charting its evolution. It continues with a discussion of two case studies showing how complex the system has actually become and justifying that full attention is given to reforms and codification. Finally, this article reviews the latest efforts to reform consumer law. It argues that UK consumer law would benefit from fuller codification. While the latest wave of reform falls significantly short, it marks a change in the way consumer law is being thought of in the UK and paves the way for future codification efforts.

## 1. Codification, Consolidation, Restatement: What's in a Name?

What are codification, consolidation, restatements of the law and other mechanical processes by which our laws are being laid out? Codification is by and large the hallmark of civil law systems.<sup>4</sup> It finds its origins in the abandonment of the *ius commune* and the rise of the rule of reason in the 16<sup>th</sup> and 17<sup>th</sup> century.<sup>5</sup> It started to develop in Europe (in its modern form) with the Enlightenment<sup>6</sup>, first in Prussia in 1794, and most notably in France in 1804.<sup>7</sup> Codifica-

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<sup>4</sup> For a detailed exploration of the phenomenon of codification, see Remi Cabrillac, *Les Codifications* (2010 Dalloz).

<sup>5</sup> Jan Peter Schmidt, 'Codification', in Jurgen Basedow, Klaus J. Hopt, Reinhard Zimmermann with Andreas Stier, *The Max Planck Encyclopedia of European Private Law* (Oxford 2012) Vol. I, 222.

<sup>6</sup> The new law codes unified a country's law and abolished the old customs and *ius commune*, but they also meant the demise of the natural law of the Enlightenment itself. See Heirbaut and Storme, 'The Historical evo-

tion also enjoyed renewed interest with the constitution of new states in the second half of the 19<sup>th</sup> century where it was seen as a symbol of political unity.<sup>8</sup> Codifications can be purely technical – although it is rare that the technical rationalisation of the law is the only objective. Political or social endeavours are often attached to the codification exercise.<sup>9</sup>

*‘Codification denominates the legislative technique of stating an entire field of law in a clear, systematic and comprehensive manner.’*<sup>10</sup> While codes were first understood as complete and exhaustive they now take different shapes.<sup>11</sup> There are indeed many styles of ‘codification’. Some are complete creations. Others are re-writes of existing laws. Many are, in fact, a consolidation of existing statutes and case law into one single source.<sup>12</sup> Sometimes codification mixes the old with the new.<sup>13</sup> Codes by and large are no longer as exhaustive as they used to be, but they remain a driving force in establishing and preserving the systematic integrity of a legal system.<sup>14</sup> What distinguishes codification from other forms such as restatements is that a code is sanctioned by the law maker. It is voted on by Parliament and has the status of law. It has to be applied by judges rather than just having persuasive authority. Consolidation is also sanctioned by the legislator but does not tend to be as far reaching as a code may be. For example, it may not contain general principles but simply bring together existing pieces of

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lution of European Private Law’, in Christian Twigg-Flesner, *The Cambridge Companion to European Union Private Law* (Cambridge 2010) 20, 27.

<sup>7</sup> Reinhard Zimmermann, ‘Codification. The Civilian Experience Reconsidered on the Eve of a Common European Sales Law’ (2012) 8(4) ERCL 367–399, 368–374.

<sup>8</sup> Reinhard Zimmermann, ‘Codification. The Civilian Experience Reconsidered on the Eve of a Common European Sales Law’ (2012) 8(4) ERCL 367–399, 368–374. For more on the second and third waves of codification, see Jan Peter Schmidt, ‘Codification’, in Jurgen Basedow, Klaus J. Hopt, Reinhard Zimmermann with Andreas Stier, *The Max Planck Encyclopedia of European Private Law* (Oxford 2012) Vol. I, 223.

<sup>9</sup> Remi Cabrillac, *Les Codifications* (2010 Dalloz) 137.

<sup>10</sup> Jan Peter Schmidt, ‘Codification’, in Jurgen Basedow, Klaus J. Hopt, Reinhard Zimmermann with Andreas Stier, *The Max Planck Encyclopedia of European Private Law* (Oxford 2012) Vol. I, 221.

<sup>11</sup> The second half of the 20th century marks a period of ‘decodification’, where established codes start to lose some of their coherence and unity in favour of piecemeal legislation. However rather than a slow death decodification marks the need for change in the function of codification. See Jan Peter Schmidt, ‘Codification’, in Jurgen Basedow, Klaus J. Hopt, Reinhard Zimmermann with Andreas Stier, *The Max Planck Encyclopedia of European Private Law* (Oxford 2012) Vol. I, 224.

<sup>12</sup> The Sale of Goods Act 1893, 1893, c.71 was the codification of the common law, i.e. case law. Note however, that it stopped short of codifying the general principles of contract law. See, John N. Adams, Hector Macqueen, *Atiyah’s Sale of Goods* (12th ed, Pearson 2010) 5.

<sup>13</sup> This is the case for example of the Code de la Consommation in France, which combined statutes reproduced without changes, modified others and created some new provisions. See Jean Calais-Auloy, *Propositions pour un code de la consommation, rapport de la commission pour la codification du droit de la consommation au Premier ministre* (La Documentation Française 1990) 12.

<sup>14</sup> Jan Peter Schmidt, ‘Codification’, in Jurgen Basedow, Klaus J. Hopt, Reinhard Zimmermann with Andreas Stier, *The Max Planck Encyclopedia of European Private Law* (Oxford 2012) Vol. I, 225.

statutes that are being streamlined in the process to avoid contradictions or repetitions. By contrast, a large number of industry-made rules, often build from scratch and with clear principles in mind, are called codes of practice in England. Others are codes of conduct and normally deal with conflicts of interest in a particular field. Those are mostly private initiatives that coexist with legislation. They are part of the ‘soft law’. Similarly, a restatement does not carry the weight of the Parliament-sponsored code. According to *Twigg-Flesner*, a restatement is concerned with providing an account of the law in its current state, and not to offer any suggestions for law reform or other improvement. It is intended to assist those charged with the task of applying existing law. Although its appearance is not dissimilar to a statute (or even a code), the intention of a restatement is to present the law in such a way as to ‘reflect the flexibility and capacity for development and growth of the common law’.<sup>15</sup>

## 2. Codification: an Idea Deep-rooted in the Common Law

Perhaps talking of codification in the UK may seem strange, but it is neither a novel nor a totally repulsive notion to the common law lawyer. The term “codification” is generally used in the modern technical sense that was coined by *Jeremy Bentham*.<sup>16</sup> Many attempts at codification have in fact already taken place on these shores. One of the earliest attempt was *Bacon’s* plan in 1614, followed by the Anglo-Indian codes in the period spanning 1837 to 1886.<sup>17</sup> *Lord Westbury’s* plans in 1860 made it as far as being announced to Parliament. They aimed at revising statutes, creating a digest of case law to be later combined in a code of the whole English Law.<sup>18</sup> Towards the end of the 19<sup>th</sup> century, English law started to adopt codification for specific branches of the law, especially in the commercial law area. The Bills of Exchange Act 1882, for example, codified the law of negotiable instruments, and the Sale of

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<sup>15</sup> Christian Twigg-Flesner, ‘Some thoughts on Consumer law reform: Consolidation, Codification or a Restatement?’ in Gullifer L and Vogenauer S (eds), *English and European Perspectives on Contract and Commercial Law – Essays in Honour of Hugh Beale* (Hart 2014) 79. Discussing the definition given by the American Law Institute. See American Law Institute, *Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and Those that Review Their Work* (Philadelphia, PA, ALI, 2005) 4, <[www.ali.org/doc/StyleManual.pdf](http://www.ali.org/doc/StyleManual.pdf)> accessed 24 February 2015.

<sup>16</sup> Jan Peter Schmidt, ‘Codification’, in Jürgen Basedow, Klaus J. Hopt, Reinhard Zimmermann with Andreas Stier, *The Max Planck Encyclopedia of European Private Law* (Oxford 2012) Vol. I, 221. The term was used to describe a ‘complete body of proposed law’, also called a ‘Pannomion’ in Jeremy Bentham, *Papers relative to Codification and Public Instruction* London Payne and Foss 1817).

<sup>17</sup> Whitley Stokes D.C.L., *Anglo-Indian Codes* (Oxford at the Clarendon Press 1887); For a brief overview of Bacon’s Plans and the Anglo-Indian Codes, see Roscoe Pound, *Jurisprudence* (West Publishing 1959) Vol.3, 19. Codification, 705-708.

<sup>18</sup> Roscoe Pound, *Jurisprudence* (West Publishing 1959) Vol.3, 19. Codification, 716.

Goods Act 1893 came to codify the common law of sales.<sup>19</sup> Many commentators, at the start of the 20<sup>th</sup> century, were in agreement that codification of English law appeared perfectly feasible and to be expected in the near future.<sup>20</sup> This included for example *Garrett*<sup>21</sup> or *Pollock*.<sup>22</sup> While, of course, none of the initiatives led to a civil or commercial code properly so-called, they at least demonstrate an appetite for codification. However, the legislator tended to concentrate on more specific areas of the law to draw together the relevant rules. In the later part of the 20th Century, and testament that the idea of codification is not dead, the Law Commission was formed. Its core mission is the promotion and the reform of the law. Section 3(1) of the Law Commission Act 1965 states: ‘It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, **including in particular the codification of such law**, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law (...)’. The work of the Commission started in earnest with proposals for the codification of the law of contract, landlord and tenants and family law.<sup>23</sup> Codification therefore remains an important part of the work of the Law Commission which believes that ‘the law would be more accessible to the citizen, and easier for the courts to understand and apply, if it were presented as a series of statutory codes.’ It is currently working on a number of projects that aim to simplify aspects of the criminal law as a preliminary step in this direction.<sup>24</sup> Hence, Codification is very much alive in England and more recent efforts of direct interest have included the Companies Act 2006 and, of course, the Consumer Rights Bill, the main subject of this article.

### 3. Rationale for the Codification of UK Consumer Law

This article does not wish to advocate for the codification of the entire private law, or even

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<sup>19</sup> Paul Mitchell, ‘The Development of Quality Obligations in Sale of Goods’ (2001) 117 LQR 645-663.

<sup>20</sup> Roscoe Pound, *Jurisprudence* (West Publishing 1959) Vol.3, 19. Codification, 675.

<sup>21</sup> Samuel Garrett, ‘The Codification of English Law’ (1910) 54 *The Solicitors’ Journal & Weekly Reporter*, 820.

<sup>22</sup> Frederick Pollock, *A First Book of Jurisprudence* (3rd edn, Macmillan 1911) 362. The author comments: ‘For the Commercial part of our unwritten law, codification is already accepted in principle, and has been carried into execution in some important branches. The further extension of the process is, in my opinion, no longer doubtful in principle, but only in time and opportunity.’

<sup>23</sup> Aubrey L. Diamond, ‘The codification of the law of contract’ (1968) 31 *MLR* 4, 361-385.

<sup>24</sup> <<http://lawcommission.justice.gov.uk/about/what-we-do.htm>> accessed 24 February 2015.

the more distinct area of the law of obligations. Those attempts have mostly failed in the past, in favour of more modest initiatives, reforming specific areas of law. It is on this line that one can see the legislator continuing, although it must be acknowledged that the parallel development of a European Civil Code may come to change this stance in the future.<sup>25</sup>

Consumer law is – for four reasons – a prime candidate for codification and not just consolidation or a restatement.<sup>26</sup>

First and foremost, consumer law has developed to form a coherent area of the law. It is the subject of consumer codes or specific codifying laws in a sizeable number of countries<sup>27</sup>, and even in countries already “blessed” with a civil code, there is academic discussion regarding codification of consumer law.<sup>28</sup> Consumer law is taught at universities and it is the subject of textbooks.<sup>29</sup> Most importantly, it has a clear scope: the protection of the weaker party, the consumer, in its relations with businesses (although definitions may vary). For those who see consumer law as part of the private law, it nevertheless retains its identity as a coherent whole. In any event, it could not be, as it currently is in Germany or the Netherlands for example, incorporated into a general civil code<sup>30</sup>, since no such thing currently exists in Eng-

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<sup>25</sup> There are indeed a number of initiatives pushing towards a codification of contract law principles worthy of notice and a plethora of scholarly pieces discussing their merits. See for example, Mary Keyes, Therese Wilson (eds.), *Codifying Contract Law* (Ashgate 2014); Christian Twigg-Flesner, *The Europeanisation of Contract Law* (2nd ed., Routledge 2013); Hugh Collins, *The European Civil Code* (Cambridge 2008); Christian von Bar, Eric Clive and Hans Schulte-Nölke and others (eds.), *Draft Common Frame of Reference* (Sellier 2009); Reiner Schulze, Jules Stuck, *Towards a European Contract Law* (Sellier 2011); Horst Eidenmüller, Florian Faust, Hans Christoph Grigoleit, Nils Jansen, Gerhard Wagner and Reinhard Zimmermann, ‘The Common Frame of Reference for European Private Law—Policy Choices and Codification Problems’ (2008) 28(4) *Oxford Journal of Legal Studies*, 659–708.

<sup>26</sup> See in favour of a Restatement, Christian Twigg-Flesner, ‘Some thoughts on Consumer law reform: Consolidation, Codification or a Restatement?’ in Gullifer L and Vogenauer S (eds), *English and European Perspectives on Contract and Commercial Law – Essays in Honour of Hugh Beale* (Hart 2014) 67-83.

<sup>27</sup> This is the case for example in France (1993), Italy (1998), Luxembourg (2011). Portugal (2012), Spain (2012).

<sup>28</sup> There are discussions amongst academics for a reform in Germany for a stand-alone code. See on this topic Hannes Rösler, *Europäisches Konsumentenvertragsrecht/ Grundkonzeption, Prinzipien und Fortentwicklung* (Beck 2004); Hans-W Micklitz, ‘Do Consumers and Businesses Need a New Architecture of Consumer Law - A thought Provoking Impulse’ (2013) 32 *Yearbook of European Law* 266; For a view against such codification, see Ewoud Hondius, ‘Against a New Architecture of Consumer Law - A Traditional View’, in Kay Purnhagen, Peter Rott (eds.), *Varieties of European Economic Law and Regulation, Liber Americium for Hans Micklitz* (Springer 2014) 599-

<sup>29</sup> Woodroffe & Lowe, *Consumer Law and Practice* (98th edn Sweet & Maxwell 2013); Iain Ramsay, *Consumer Law & Policy, Text and Materials on Regulating Consumer Markets* (3rd ed. Hart Publishing 2012); Geraint Howells and Stephen Weatherhill, *Consumer Protection Law* (2<sup>nd</sup> ed, Ashgate 2005). Similar textbooks exist in the area of European Consumer Law. See for example, Norbert Reich, Hans-W Micklitz, Peter Rott and Klaus Tonner, *European Consumer Law* (2nd edn, Intersentia 2014); Hans-W Micklitz, Jules Stuyck, Evelyne Terry, *Cases, Materials and Texts on Consumer Law* (Hart 2010).

<sup>30</sup> In Germany, consumer law is part of the BGB. However, see calls for a stand-alone code, *ibid* fn 28. In the Netherlands, consumer law is integrated in the New Civil Code. For more details, see Martijn W. Hesselink,

land. Stand-alone is thus far the only option. Stand alone, in any event, seems to be a more satisfactory solution than including consumer law in a wider reform of commercial or civil law.<sup>31</sup> This is because it enables the grouping of all aspects of consumer protection (including product liability, product safety, unfair commercial practices, consumer credit, travel protection, as well as enforcement aspects such as private and public actions and so on) and not only those relating to sales or the law of obligations. Moreover, it would focus the attention on the subject matter, rather than seeing it lost amongst the wider commercial or private law field. A Consumer Code would have the advantage of visibility by the public and help raise awareness of consumer rights.

Secondly, in the UK, consumer law is now largely influenced by European law. One of the possible advantages of the codification of laws in England rests in facilitating harmonisation with continental systems.<sup>32</sup> A code would therefore have advantages at home, but also in the wider context of building the Common Market.

Thirdly, consumer law is also a relatively new creation and, because of this, it is not as anchored in the common law as other subject areas may be. In any event, the European influence means that consumer law has lost most of its common law identity. It is true that contract law or tort law remain deeply entrenched areas of the common law, but those common law elements that may have caused problems have by and large already been ironed out. The Sale of Goods Act for example, consolidates the common law into a single piece of statute. European law has also been integrated into the Sale of Goods Act 1979<sup>33</sup> (albeit sometimes clumsily<sup>34</sup>). Further, many of the key notions of English law pertaining to the conclusion of the contract no longer matter because they are superseded by European regulation affecting the pre- and post-contract stages.<sup>35</sup> Therefore, the law of contract that most concerns consumer transactions is already laid out in a way compatible with codification.

Fourthly, consumer law is overly complex and in urgent need of clarification. A code would

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‘The ideal of codification and the dynamics of Europeanisation: The Dutch Experience’ (2006) 12(3) *European Law Journal* 279-305.

<sup>31</sup> Also see Micklitz who argues that consumer law should be kept separate from the German Civil Code and understood as a distinct legal order governed by its own rationality and its own values (Hans-W Micklitz, ‘Do Consumers and Business need a New Architecture for Consumer Law? A Thought Provoking Impulse’ (2013) 32(1) *Yearbook of European Law*, 266-367.

<sup>32</sup> The Law Commission, *Second Annual Report (1966-67)* L8 W Corn. No.12, para. 29.

<sup>33</sup> 1979, c.54.

<sup>34</sup> See for example on the integration of the new remedies implementing the Directive 99/44/EC on sales and associated guarantees, alongside a right to reject as covered in Robert Bradgate, Christian Twigg-Flesner, *Blackstone’s Guide to Consumer Sales and Associated Guarantees* (Oxford 2003) 115.

<sup>35</sup> Hans-W. Micklitz, ‘Codification Mania and the Changing Nation State: A European Perspective’ in Mary Keyes, Therese Wilson (eds.), *Codifying Contract Law* (Ashgate 2014) 96-97.

enable a clear structure and precise enunciation of the rights and obligations of all stakeholders. This is the main leitmotiv of the latest wave of reforms and this point will be revisited further on.

#### 4. The Seeds for Codification: Origins and Development of Consumer Law

Turning to the evolution of consumer law: The protection of consumers in the UK has evolved into a largely statute based area of the law. Here lies one key argument in favour of codification. Judge-made law has already made the leap to be primarily guided by the legislator, leaving judges to apply it. *'In the Development of consumer law and policy, statute law has had a larger part to play than case law'*.<sup>36</sup> While England is traditionally a common law country, consumer law is notorious for having made little advances towards a strong protection of consumers relying on judges alone. Indeed, in the 1960s and 1970s where most of the advances were made, 'the common law did not contribute very much'.<sup>37</sup> This is easily explained starting with the fact that, for the common law to take shape, judges must be presented with cases. Yet, in the sphere of consumer problems, consumers rarely take the step of going to court. Secondly, 'caveat emptor', the contract law principle according to which the buyer should beware, has reigned supreme for many years. Very few judges have been prepared to challenge the application of this principle and, as a result, protect the weaker party where necessary.

Back in the early 1950s, 'caveat emptor' was also a maxim practiced by government. Little actions were taken by way of enforcement of some of the laws already in place to protect consumers.<sup>38</sup> Yet, gradual changes led to more enforcement action and the setup of a Committee on Consumer Protection in 1959, chaired by *Molony*, which was charged to consider and report what changes needed to be made to protect consumers. The report was intended to

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<sup>36</sup> Sir Gordon Borrie, 'The Development of Consumer Law and Policy – Bold Spirits and Timorous Souls', Hamlyn Lecture 1984 (Stevens & Sons 1984) 1.

<sup>37</sup> Sir Gordon Borrie, 'The Development of Consumer Law and Policy – Bold Spirits and Timorous Souls', Hamlyn Lecture 1984 (Stevens & Sons 1984) 7.

There are, however, a few exceptions and areas where judge and the common law have helped consumer law grow. Before statutes took hold, judges in England were able to strengthen the position of consumers. See for example, the creation of a duty of care in *Donoghue v Stevenson* [1932] A.C. 562 and the use of the doctrine of incorporation of terms to protect against unfair terms (*Thornton v Shoe Lane Parking* 1971] 2 QB 163; *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1988] 2 WLR 615).

<sup>38</sup> <<http://hansard.millbanksystems.com/lords/1962/nov/14/the-molony-report-on-consumer-protection>> accessed 18 May 2014.

provide a foundation for policy making and is at the origin of modern legislative changes in consumer law. The general philosophy of the *Molony Committee* was that competition and market forces were the best protection for consumer interests. The final report<sup>39</sup> nevertheless highlighted some important characteristics to take into account in policy making in the field of consumer law, such as the inherent imbalance between consumers and suppliers. Although the Committee was not looking at codification – far from it –, it made some recommendations for amendments of existing laws such as the Sale of Goods Act 1893 and in particular the introduction of a definition of consumer sales. The report also advocated changes to the law relating to product liability and the extension of the Hire Purchase Act to consumer transactions. The Committee however rejected any major recasting of the law of hire-purchase.<sup>40</sup> By contrast, it also suggested changes to the Merchandise Acts (1887 to 1953) and that those acts be consolidated and simplified. It is the precursor to the adoption of the Trade Descriptions Act and a first step towards seeing value in consolidating laws in the area of consumer protection. The absence of any real discussion concerning ‘codification’ or deeper consolidation, may be due to a lack of knowledge of practices abroad. *Diamond* regretted the insularity of the Commission and the fact that the US Uniform Commercial Code was not even mentioned.<sup>41</sup> The Committee also had a different remit and may not have wanted to overstep the mark.

In the early 1960s momentum for stronger consumer law started to take shape in England and a move towards a heavier statute based regulation emerged. This increased interest for regulation coincides with a significant change in consumer society, that the common law was ill-fitted to deal with. It also came in the midst of important political declarations such as the *Kennedy* speech<sup>42</sup> in the USA in 1962 and the publication of the *Molony* report in 1962. This is also the time at which the Law Commission was created in the UK with the mission to look at ways to improve the law, codification being one of the tools to consider.<sup>43</sup> The impetus

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<sup>39</sup> Final Report of the Committee on Consumer Protection, Cmnd. 1781, July 1962 (H.M.S.O., 18s.).

<sup>40</sup> Aubrey L. Diamond, Reports of Committees, The Molony Committee, Final report of the Committee on Consumer Protection, <<http://onlinelibrary.wiley.com/store/10.1111/j.1468-2230.1963.tb00699.x/asset/j.1468-2230.1963.tb00699.x.pdf;jsessionid=7034F47CB95F62934A1400B072BDA65C.f01t03?v=1&t=i6jn4mve&s=614946ddf7af2f762f2612ad03c57ebaed9499d9>> 73 accessed 24 February 2015.

<sup>41</sup> Aubrey L. Diamond, Reports of Committees, The Molony Committee, Final report of the Committee on Consumer Protection, <<http://onlinelibrary.wiley.com/store/10.1111/j.1468-2230.1963.tb00699.x/asset/j.1468-2230.1963.tb00699.x.pdf;jsessionid=7034F47CB95F62934A1400B072BDA65C.f01t03?v=1&t=i6jn4mve&s=614946ddf7af2f762f2612ad03c57ebaed9499d9>> 75 accessed 24 February 2015.

<sup>42</sup> John F. Kennedy, Special Message to Congress on protecting the consumer interest, March 15, 1962, online: <http://www.presidency.ucsb.edu/ws/index.php?pid=9108> accessed 09 March 2015.

<sup>43</sup> Section 3(1) Law Commission Act 1965, 1965, c.22.

given by the *Molony* reforms came to fruition in the 1970s in the fields of hire purchase<sup>44</sup>, consumer credit<sup>45</sup> and the sale of goods.<sup>46</sup> While all texts are separate and do not form part of a code, one may see in those the symbolism of codification. In a country of common law heritage, the legislator was at the forefront of a major development. The statutes adopted show a willingness to bring together principles and rules of law to govern particular areas, some of which were until recently the stronghold of the common law.

The 30 year-period that follows is little focussed on the idea of codification<sup>47</sup>, but the adoption of numerous pieces of statutes directly contributed to the growing complexity of the consumer law as well as its recognition as a stand-alone discipline.

In 1999, following a change of government the White paper on *‘Modern markets: confident consumers’*<sup>48</sup> gave the tone to a wave of modernisation. The emphasis was put on ‘rejuvenating’ consumer policy<sup>49</sup> through most notably the control of unfair trading practices, improved enforcement mechanisms<sup>50</sup> and the continuing protection against unsafe products. The discourse focussed on empowering consumers by way of information and education. At this juncture, consumer law may not be thought of as an area to codify, but for consumers to be able to understand the law and be truly empowered, the idea of codification cannot be too remote. It is accessibility that enables empowerment. And indeed, in 2008, the call for evidence in the consumer law review sought the opinion of stakeholders on the consolidation and simplification of the law or a restatement of the law.<sup>51</sup> While it falls short of talking of codification, it clearly expressed the will to move away from the status quo and into a better

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<sup>44</sup> Hire Purchase Act 1964, 1964, c. 53 and the Supply of Goods (Implied Terms) Act 1973, 1973, c.13.

<sup>45</sup> Consumer Credit Act 1974, 1974, c. 39.

<sup>46</sup> Sale of Goods Act 1979, 1979, c. 54.

<sup>47</sup> Key developments in this period focus on redressing the imbalance of power ‘imbalance of power between producers and consumers through the introduction of public regulation and the subsidisation of consumer organisations’ (Iain Ramsay, *Consumer Law and Policy, Text and Materials on Regulating Consumer Markets* (2<sup>nd</sup> ed., Hart Publishing 2007) 5). They include the birth of the Office of Fair Trading and small claims procedures as well as new powers for the criminal courts to award compensation for loss caused to victims of offences under the Trade Descriptions Act 1968. From 1979, under the Conservative government, marks a push towards less state involvement but did not mark the demise of consumer protection. It is, for example, at that time that the Consumer Protection Act 1987 was adopted controlling price indications, product liability and consumer safety. The reform was partly a product of European harmonisation implementing Directive 85/374 on product liability.

<sup>48</sup> Cm 4410 (1999).

<sup>49</sup> Iain Ramsay, *Consumer Law and Policy, Text and Materials on Regulating Consumer Markets* (2<sup>nd</sup> ed., Hart Publishing 2007) 9.

<sup>50</sup> Through the introduction of the Enterprise Act 2002, 2002, c. 40.

<sup>51</sup> BERR, Consumer Law Review: Call for evidence, May 2008 <<http://webarchive.nationalarchives.gov.uk/20090609003228/http://www.berr.gov.uk/files/file45196.pdf>>, 15 accessed 25 February 2015.

system, more akin to codification.

In April 2011, the Government launched a strategy to empower consumers by giving them access to information and expertise necessary to exercise choice effectively.<sup>52</sup> This empowerment is to happen via changes on three main pillars: competitive markets, a strong and simple framework of consumer law and effective enforcement.<sup>53</sup> In order to realise the empowerment of consumers, one main obstacle however needed to be removed: complexity.

## 5. The Need for Codification: Complexity of the Main Regulations

### 5.1. Complexity: a by-product of European harmonisation

The regulations currently operating in the UK (prior to the enactment of the Consumer Rights Act) are strongly influenced by European law. Indeed, most UK legislation in the last 25 years derives from EU Directives.<sup>54</sup> As English law was broadly unfamiliar with making statutes in this area, most European Directives, at least in the early stages, were implemented in the UK by way of a ‘copy and paste technique’ with Directives being implemented into English unchanged. This is a technique strongly criticised, although it may be justified in areas where it does not conflict with pre-existing legislation.<sup>55</sup> Gaps were also plugged without any holistic view of how the system of consumer protection ought to operate in practice. Much of the consumer law statutes adopted were on such an ad hoc basis. This is not surprising since the common law is often described as pragmatic, coming to fix problems where they occur. But the piecemeal regulatory framework, juggling common law heritage, statute and European harmonisation led to a confusing system. This may not have been solely the doing of the English legislator. Indeed, European consumer law itself is known for being incoherent and complex.<sup>56</sup> In 2006, the *Davidson* report analysed the transposition of Direc-

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<sup>52</sup> See ‘Consumer Empowerment Strategy; Better Choices: Better Deals. Consumers Powering Growth’, 13 April 2011, <<http://www.bis.gov.uk/feeds/~media/673F5899B57148D29E077E8B7ECF1D7F.ashx>> accessed 21 May 2014. This coincides with strengthening the role of Citizens Advice Bureaux, in particular for the most vulnerable.

<sup>53</sup> BIS, *Enhancing Consumer Confidence by Clarifying Consumer Law* (July 2012) 15, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31350/12-937-enhancing-consumer-consultation-supply-of-goods-services-digital.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31350/12-937-enhancing-consumer-consultation-supply-of-goods-services-digital.pdf) > accessed 21 May 2014.

<sup>54</sup> Woodroffe and Lowe’s, *Consumer Law and Practice* (8<sup>th</sup> edn, Sweet & Maxwell 2010) 3.

<sup>55</sup> One such critic is Beale who calls it an ‘institutional failure’. See Hugh Beale, ‘English Law Reform and the Impact of European Private Law’, in Stefan Vogenauer and Stephen Weatherill, *The Harmonisation of European Contract Law* (Hart Publishing 2006) 31.

<sup>56</sup> Hans Schulte-Nolke, ‘The Way Forward in European Consumer Contract Law: Optional Instrument Instead of Further Deconstruction of National Private Laws’, in Christian Twigg-Flesner (ed.), *The Cambridge Companion to European Union Private Law* (Cambridge 2010) 130, 131.

tives into national law, concluding that additional complexity was caused by the overlaying of EU consumer law on top of existing domestic legislation.<sup>57</sup>

The ad hoc development of consumer laws therefore means that the system of protection in England is essentially convoluted, with a number of instruments often being juxtaposed or overlapping. This has created complexity for consumers and practitioners alike. The body of law that can be deemed to contribute either directly or indirectly to the protection of consumers is too vast to be fully covered in this article.<sup>58</sup> Two examples (sale of goods and unfair terms) will suffice to give a flavour of the necessity for reform and the difficulty of the exercise. Such rationalisation efforts however are, as the current reform demonstrates, not impossible.

## **5.2. Case studies on the complex nature of consumer law and rationalisation efforts**

### **5.2.1. Complexity permeating all areas**

Whilst I selected Sales and Unfair terms as case studies (see below), it is important to note that similar complexity plagues product liability and product safety and would require similar efforts prior to or at the time they could be brought in to a consumer code. In the area of unfair commercial practice however, a large amount of complexity has already been ironed out. The Consumer Protection from Unfair Trading Regulations 2008<sup>59</sup> implemented Directive 2005/29/EC<sup>60</sup> and repealed some provisions in as many as 23 different laws (including the Consumer protection Act 1987<sup>61</sup>, part III on misleading price indications and most of the Trade Description Act 1968<sup>62</sup>). Private enforcement is now possible via the Consumer Pro-

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<sup>57</sup> HM Treasury, Davidson Review, final report (November 2006).

<sup>58</sup> The reader will find information on a broader range of topics by consulting the following resources: Iain Ramsay, *Consumer Law and Policy, Text and Materials on Regulating Consumer Markets* (2<sup>nd</sup> ed., Hart Publishing 2007); Geraint Howells and Stephen Weatherhill, *Consumer Protection Law* (2<sup>nd</sup> ed, Ashgate 2005); Michael Furmston and Jason Chuah, *Commercial and Consumer Law* (Pearson 2010).

<sup>59</sup> SI 2008/1277.

<sup>60</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') [2005] OJ L149/22.

<sup>61</sup> 1987 c. 43.

<sup>62</sup> 1968 c. 29.

tection (Amendment) Regulations 2014<sup>63</sup> which amends the 2008 regulations and insert Part 4A on consumers' right to redress and grants a right to 'unwind', a right to a discount and a right to damages.<sup>64</sup> The reforms were completed with the remedy. Complexity is not, however, completely eradicated, in particular because advertising laws in the UK are controlled via codes of practice as well as legislation. Thus, with regards to codification, further work would also be required in this area.

### 5.2.2. Sale of goods and services

Sale of goods and services are coming under the remit of both the common law and a number of statutes, making this area particularly convoluted to navigate. The various regimes revolve around the main quality standards that can be expected by consumers. The Sale of Goods Act 1979 (SOGA)<sup>65</sup> applies to contracts for the sale of goods only and requires that the goods must be as described, of satisfactory quality and fit for their particular purposes. Those are known as implied terms.<sup>66</sup> Until recently, there were no statutory rights available to consumers for breach of those implied terms and consumers were forced to rely on the common law and a remedy only given at a court's discretion.<sup>67</sup> Further, the Supply of Goods and Services Act 1982<sup>68</sup> governs contracts for services and for the sale of work and materials such as central heating or double glazing.<sup>69</sup> It imposes a quality standard based on care and skill.<sup>70</sup> While the need for a clear distinction between the scope of both Acts has been reduced, since quality standards for contracts for works and materials are regulated, the distinction still remain relevant for other aspects such as the *nemo dat* rules on ownership and title.<sup>71</sup> Quality standards similar to those laid out in the SOGA for goods bought on hire purchase agreements come under the Supply of Goods (Implied Terms) Act 1973.<sup>72</sup> In addition, for contracts that

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<sup>63</sup> SI 2014/870.

<sup>64</sup> Research from 2009 showed that almost two-thirds of the population had fallen victim to a misleading or aggressive practice, causing an estimated consumer detriment of £3.3 billion a year, <[http://lawcommission.justice.gov.uk/areas/consumer\\_rights.htm](http://lawcommission.justice.gov.uk/areas/consumer_rights.htm)> accessed 21 May 2014.

<sup>65</sup> 1979 c. 54.

<sup>66</sup> Sections 13 and 14.

<sup>67</sup> On the right to reject, see Section 35. New remedies are available under sections 48A to 48F, following the implementation of Directive 1999/44/EC on sales and associated guarantees [1999] OJ L171/12

<sup>68</sup> 1982 c. 29.

<sup>69</sup> Section 1.

<sup>70</sup> Section 13.

<sup>71</sup> For more on those rules, see Woodroffe and Lowe's, *Consumer law and Practice* (8<sup>th</sup> edn, Sweet & Maxwell 2010) 9-13.

<sup>72</sup> 1973 c. 13, Section 10.

do not fit into any of the prescribed categories covered by Statute, common law obligations may still apply. If this was not intricate enough, the Sale of Goods Act 1979, in particular, was reformed to incorporate European law prompting some amendments<sup>73</sup> in the definition of quality (the assessment used to rely on merchantable quality, but is now focussed on satisfactory quality) and offer a variety of remedies to consumers. Under the Sale of Goods Act, the main remedy is rejection whereby the buyer can, if it has not accepted the goods, reject them to obtain a full refund.<sup>74</sup> Since the implementation of Directive 1999/44/EC<sup>75</sup> on certain aspects of the sale of goods and associated guarantees via the Sale and Supply of Goods to Consumers Regulations 2002<sup>76</sup>, consumer buyers can opt for a series of hierarchical remedies which include repair or replacement, price reduction and rescission.<sup>77</sup> Those new remedies coexist with the preexisting right to reject<sup>78</sup> but it is unclear at what point the consumer loses the right to reject faulty goods and receive a full refund or how many repair or replacements can be attempted before consumers can move to other remedies.<sup>79</sup> Ambiguity also exists with regards to how quickly consumers have to exercise their right to reject<sup>80</sup>. Those points are addressed by Part I of the Consumer Rights Bill, although not necessarily in a way that will iron out all problems.<sup>81</sup> The Bill proposes to move away from a system of implied terms, which was the common law solution, to a statute setting out the minimum requirements to be met by the goods supplied. It also clarifies the sequence of rights, granting consumers a right to reject, or opt for a repair or replacement for a period of 30 days. Repair or replacement would also be limited to one opportunity, leaving the consumer free to opt for a reduction in price or a final right to reject.<sup>82</sup> For services, the Bill also lays out some clear remedies for services that fail to be carried out with reasonable care and skills. Those include a right to

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<sup>73</sup> Further changes are detailed in Chris Willett, Martin Morgan-Taylor and Andre Naidoo, 'The Sale and Supply of Goods to Consumers Regulations' (2004) JBL 94-120.

<sup>74</sup> Section 35 SOGA.

<sup>75</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, [1999] OJ L171/12.

<sup>76</sup> SI 2002/3045.

<sup>77</sup> Under Section 48 SOGA.

<sup>78</sup> Chris Willett, Martin Morgan-Taylor and Andre Naidoo, 'The Sale and Supply of Goods to Consumers Regulations' (2004) JBL 94.

<sup>79</sup> BIS, Consumer Rights Bill: Supply of Goods, Revised Impact Assessment: Final, BIS/13/1360 (2014) 3.

<sup>80</sup> The Law Commission and the Scottish Law Commission, Consumer Remedies for Faulty Goods, Law Com No. 317, cm7725 (2009) 28.

<sup>81</sup> For a critique of the content of the Bill on this aspect, see Christian Twigg-Flesner, 'Some thoughts on Consumer law reform: Consolidation, Codification or a Restatement?' in Gullifer L and Vogenauer S (eds), *English and European Perspectives on Contract and Commercial Law – Essays in Honour of Hugh Beale* (Hart 2014) 75-77.

<sup>82</sup> Sections 20 to 24.

have the service repeated or a right to a price reduction.<sup>83</sup>

One of the key innovations of the Bill is to define the rights consumers have when buying digital products.<sup>84</sup> The question was unsettled because of a lack of, as well as, conflicting authorities in the way digital products could be defined (goods or services or sui generis). The courts struggled to fit existing consumer rights to different types of digital content transactions, leaving the law uncertain and unclear.<sup>85</sup> The Bill decidedly identifies digital products as sui generis category<sup>86</sup> and defines a legal regime mid-way between goods and services. Indeed, the rights offered mimic the quality standards for goods since digital content has to be of satisfactory quality, fit for a particular purpose and as described.<sup>87</sup> In cases of breach, consumers are given a right to repair or replacement, the right to a price reduction and in most extreme cases, a right to a refund.<sup>88</sup> Remedies for damages caused to devices or other digital content due to a defect in the content sold are also available.<sup>89</sup> The quality standard applicable in those cases is one of reasonable care and skills exercised by the trader, tailored on the quality standard applicable to services.<sup>90</sup> The liability of the trader cannot be excluded or limited.<sup>91</sup>

### 5.2.3. Unfair terms

Unfair terms are another good case in point to illustrate the complexity that derives from the overlap between, the common law, statutes and European law. Two overlapping statutes co-exist: one of national origin, the Unfair Contract Terms Act 1977 (UCTA)<sup>92</sup>, and the other implementing European legislation, the Unfair Contract Terms in Consumer Contracts Regulations 1999 (UTCCR).<sup>93</sup> Besides, case law on the incorporation of terms enables to circumvent altogether the application of the statute at common law, although since the advent of the UCTA in this area, judges have shown a strong preference for the application of statute rather

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<sup>83</sup> Sections 55 to 57.

<sup>84</sup> Sections 34 to 48.

<sup>85</sup> Robert Bradgate, 'Consumer Rights in Digital Products – a Research report prepared for the UK Department for Business, Innovation and Skills' (September 2010).

<sup>86</sup> Luke Anthony, 'Fitting the Bill – tailoring consumer rights in digital content', (2013) Ent. L.R. 24(8), 272-274.

<sup>87</sup> Sections 34, 35 and 36.

<sup>88</sup> Sections 43, 44 and 45.

<sup>89</sup> Section 46.

<sup>90</sup> Section 46(1)(d).

<sup>91</sup> Section 47.

<sup>92</sup> 1977 c. 50.

<sup>93</sup> SI 1999/2083.

than the common law.<sup>94</sup> The scopes of both pieces of legislation are often inconsistent and overlap<sup>95</sup>, creating confusion. The UTCCR applies to business to consumer contracts<sup>96</sup>, while the UCTA has a wider scope, encompassing contracts and notices both between two business entities or a business and a consumer. The types of terms covered also differ. The UCTA applies to exclusion clauses only whereas the UTCCR applies to all types of terms as long as they have not been individually negotiated<sup>97</sup>, a requirement that does not exist under the UCTA. The tests used for assessing the unfairness of terms are also different. The UCTA uses black lists, where the UTCCR only resorts to grey lists. Besides, the assessment of fairness is based on ‘reasonableness’<sup>98</sup> in the UCTA and on the creation of a ‘significant imbalance’ between the rights and obligations of the parties under the rules of the UTCCR<sup>99</sup>. The enforcement of the legislation is also complex, since the UCTA is primarily focussed on private enforcement, while public enforcement bodies, such as the OFT and other qualifying bodies, can intervene on behalf of consumers under the Unfair Terms in Consumer Contracts Regulations 1999.<sup>100</sup> Part 2 of the Consumer Rights Bill<sup>101</sup> endorses the recommendations of the Law Commission and Scottish Law Commission that have worked towards a reform since 2005. Indeed the outcome of a first report was that both Acts ought to be consolidated.<sup>102</sup> A new consultation launched in 2012<sup>103</sup> led to the recommendation to streamline both Acts as planned.<sup>104</sup> The Bill adopted the recommendation of the Law Commission to reformulate the exemption for core terms and limit it to terms that are transparent and prominent.<sup>105</sup> Under

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<sup>94</sup> *Photo Production Ltd v Securicor Transport Ltd* 1980] UKHL 2. Diplock LJ, at page 9 explains: ‘the reports are full of cases in which what would appear to be very strained constructions have been placed upon exclusion clauses, mainly in what today would be called consumer contracts and contracts of adhesion. As Lord Wilberforce has pointed out, any need for this kind of judicial distortion of the English language has been banished by Parliament’s having made these kind of contracts subject to the Unfair Contract Terms Act 1977’.

<sup>95</sup> Department for Business, Innovation & Skills, *Consumer Rights Bill: proposal on unfair contract terms*, (Impact Assessment BIS 13/909) June 2013, 6.

<sup>96</sup> Reg 4(1) UTCCR.

<sup>97</sup> Reg 5(1) UTCCR.

<sup>98</sup> Sections 3, 11(2) and 24(2) and Schedule 2 UCTA.

<sup>99</sup> Reg 5(1) UTCCR.

<sup>100</sup> See Regs 10 to 16 UTCCR.

<sup>101</sup> Sections 62 to 77.

<sup>102</sup> The Law Commission and the Scottish Law Commission, ‘Unfair Terms in Consumer Contracts’ (2005) Law Com No 292; Scot Law Com No 199.

<sup>103</sup> <[http://lawcommission.justice.gov.uk/docs/unfair\\_terms\\_in\\_consumer\\_contracts\\_issues\\_summary.pdf](http://lawcommission.justice.gov.uk/docs/unfair_terms_in_consumer_contracts_issues_summary.pdf)> accessed 09 March 2015.

<sup>104</sup> The Law Commission and the Scottish Law Commission, *Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills* (2013)

<sup>105</sup> Section 65. In *Office of Fair Trading v Abbey National plc* [2009] UKSC 6, the court interpreted Regulation 6(2) UTCCR. However, uncertainty developed regarding notion of ‘core terms’ that escape fairness assessment. The Supreme Court had overturned the Court of Appeal and held that charges for unauthorised overdrafts where price terms exempt from assessment. Yet, the charges were buried in small print and were not clearly disclosed

the influence of European case law, the new Bill also contains a provision placing a duty on judges to raise the unfairness of terms even in cases where none of the parties have done so.<sup>106</sup>

### 5.3. Complexity as the main servant for a plea for codification

Complexity is evident. It is perhaps the main servant of a plea for codification. Indeed, complexity was also one of the main motivation for the adoption of a consumer law code in France. Just like across the channel back in the late 1980s early 1990s, the codification of this area of law would also bring about many benefits in England. The commission for the codification of the consumer law in France, reflecting on the necessity of a code, explained that consumer law was not satisfactory and noted that the observation would also be valid for other Countries.<sup>107</sup> Indeed, French consumer law at the time was composed of a multitude of texts, adopted ad hoc, without any regards for coherence. This made the rules applicable difficult to identify and understand even for specialist. This was, the commission noted, somewhat of a paradox because the subject matter is of interest to all citizens and should be as accessible as the Highway Code.<sup>108</sup> Similar observations can be made in the UK, although, as *Beale* notes, ‘it is not realistic to expect that we can ever draft provisions that will be readily understandable even the majority of consumers themselves.’ Instead, he suggests that it ‘would be realistic to aim at making it understandable to consumer advisors, many of whom are not legally qualified, and business people with some knowledge of contracting’.<sup>109</sup> Similarly *Twig-Flesner* deplores the high complexity of the law, although he opts for a Restatement rather than codification as a tool to end the complexity.<sup>110</sup> *Beale* also favours a restatement although he is not opposed to the idea of codifying the common law rules and the production of an official or at least semi-official code of consumer law that would include not

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to consumers. Under Section 65, core terms are excluded from assessment but only if they are transparent and prominent.

<sup>106</sup> Section 71. This section endorses cases decided by the CJEU, namely Case C-240/98 *Océano Grupo Editorial SA v Roció Murciano Quintero*, C-168/05 *Mostaza Calro v Centro Movil Millenium SL* and C-40/08 *Asturcom Telecommunications SL v Rodriguez Nogueira*.

<sup>107</sup> Jean Calais-Auloy, Propositions pour un code de la consommation, rapport de la commission pour la codification du droit de la consommation au Premier ministre (La Documentation Francaise 1990) 9.

<sup>108</sup> *Ibid.*

<sup>109</sup> Hugh Beale, ‘The Draft Directive on Consumer Rights and UK Consumer Law - Where now?’, in Geraint Howells and Reiner Schulze (eds.), *Modernising and Harmonising Consumer Contract Law* (Sellier 2009) 299.

<sup>110</sup> Christian Twigg-Flesner, ‘Some thoughts on Consumer law reform: Consolidation, Codification or a Restatement?’ in Gullifer L and Vogenauer S (eds), *English and European Perspectives on Contract and Commercial Law – Essays in Honour of Hugh Beale* (Hart 2014) 67.

only the legislative provisions but also a restatement of the common law rules.<sup>111</sup>

## 6. Consolidation of Consumer Law: a Step Closer to Codification

The complexity, which until now has characterised the UK landscape, has been an obstacle to an effective application of the laws in place.<sup>112</sup> *‘A review of consumer law by the former Department for Business Enterprise and Regulatory Reform in 2008 revealed widespread criticism and almost all respondents agreed in principle that there would be significant advantages to simplifying the structure and language of consumer law and consolidating it so far as possible in one piece of legislation. Business organisations, consumer groups and consumer law enforcers agreed that the current lack of clarity undermines consumer confidence as people don’t know their rights and increases the cost of compliance for business. It also has a distorting effect on competition because people who are uncertain about their rights are reluctant to buy from firms that are not established high street names.’*<sup>113</sup> Efforts started with the rationalisation of unfair trading practices back in 2008. Rationalisation is now also being continued with intervention in the area of competition law<sup>114</sup>, sales law, unfair terms and changes to the enforcement framework. Further reforms should follow in the area of consumer safety and product liability in line with EU law.

All efforts are illustrative of a move towards codification of laws in the UK in a bid to streamline and clarify consumer rights. However the most recent discourse remains anchored into reform, simplification, streamlining, consolidation but not codification properly so called. The Government response to the Consultation on the Consumer Bill, for example, does not mention codification at all, whereas all other terms appear in the document.<sup>115</sup> Earli-

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<sup>111</sup> Hugh Beale, ‘The Draft Directive on Consumer Rights and UK Consumer Law - Where now?’, in Geraint Howells and Reiner Schulze (eds.), *Modernising and Harmonising Consumer Contract Law* (Sellier 2009) 302.

<sup>112</sup> See University of East Anglia for BERR, *Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries* (2008) 5, <<http://www.bis.gov.uk/files/file50027.pdf>> accessed 21 May 2014.

<sup>113</sup> BIS, *Enhancing Consumer Confidence by Clarifying Consumer Law* (July 2012) 16, <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31350/12-937-enhancing-consumer-consultation-supply-of-goods-services-digital.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31350/12-937-enhancing-consumer-consultation-supply-of-goods-services-digital.pdf)> accessed 21 May 2014.

<sup>114</sup> Leading to the adoption of the Enterprise and Regulatory Reform Act 2013. A main feature of consumer empowerment is the establishment of a right of private action in competition law, which will be enacted via the adoption of the Consumer Rights Bill, Section 80.

<sup>115</sup> <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/274787/bis-13-916-draft-consumer-rights-bill-governemnt-response-to-consultations-on-consumer-rights.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274787/bis-13-916-draft-consumer-rights-bill-governemnt-response-to-consultations-on-consumer-rights.pdf)> accessed 26 February 2015.

er, a team of eminent academics had also worked on a report on *Consolidation and Simplification of the UK Consumer law* for the government, without openly discussing codification, although the term actually appears 11 times in the document.<sup>116</sup> The report also explains, concerning remedies in relation to goods that ‘*a comprehensive codification of the law, going beyond these detailed reforms, is a possible way forward. It would be a significant undertaking and it would require confronting and resolving some controversial issues. But in terms of clarity and accessibility, this is the best solution and it is recommended that the attempt be made to draft such a comprehensive code.*’<sup>117</sup>

It is true that the current changes are presented as being driven by economic realities rather than legal debate on the place of consumer law in the overall legal system and on the advantages of a stand-alone code. Indeed, ‘*the reforms taken together are estimated to be worth over £4 billion to the UK economy over 10 years in quantified net benefits*’.<sup>118</sup> The common law systems are traditionally more attached to pragmatism than they are to classification and seeing rights organised and charted for accessibility. Political efficiency therefore dictates that consolidation, all in all easier to achieve than codification, prevails. *Beale* notes that Ministers and Departments are reluctant to agree to devote large amounts of Parliamentary time to projects that might make the law more coherent, clearer and more accessible but which could solve some pressing problems.<sup>119</sup>

Nevertheless, the Government used the latest reforms contained in Directive 2011/83 on Consumer Rights<sup>120</sup> as a catalyst for change. While the process of reforms was started before the Directive was even envisaged, it was stalled pending EU modifications to the consumer

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<sup>116</sup> Geraint Howells, Christian Twigg-Flesner, *Consolidation and Simplification of UK Consumer Law* (2010) URN 10/1255, <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/274787/bis-13-916-draft-consumer-rights-bill-governemnt-response-to-consultations-on-consumer-rights.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274787/bis-13-916-draft-consumer-rights-bill-governemnt-response-to-consultations-on-consumer-rights.pdf)>

Geraint Howells, Christian Twigg-Flesner, *Consolidation and Simplification of UK Consumer Law* (2010) URN 10/1255, <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/274787/bis-13-916-draft-consumer-rights-bill-governemnt-response-to-consultations-on-consumer-rights.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274787/bis-13-916-draft-consumer-rights-bill-governemnt-response-to-consultations-on-consumer-rights.pdf)> 86, accessed 26 February 2015.

<sup>118</sup> BIS, ‘Consumer Rights Bill: Proposals on Unfair Contract Terms, impact assessment final (June 2013).

<sup>119</sup> Hugh Beale, ‘English Law Reform and the Impact of European Private Law’, in Stefan Vogenauer and Stephen Weatherill, *The Harmonisation of European Contract Law* (Hart Publishing 2006) 36.

<sup>120</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance, [2011] OJ L304/64.

law regime.<sup>121</sup> The Consumer Rights Bill contains some key modifications<sup>122</sup> to UK consumer laws and an update and consolidation of a number of pieces of statute.<sup>123</sup> The reform pulls together hire purchase, sale of goods, sale of services and unfair terms amongst others. Enforcement powers are also being streamlined.<sup>124</sup> The Bill contains three main parts and 9 schedules threshing out some of the details. For example the grey list of unfair terms is contained in Schedule 2 and details of their procedural enforcement in Schedule 3. Part I is devoted to Consumer contracts for goods, digital content and services. Part II controls unfair terms. Part III is entitled ‘miscellaneous and general’ and is sub-divided into a number of chapters tackling enforcement<sup>125</sup>, competition<sup>126</sup>, a student complaint scheme<sup>127</sup> and regulates the duty of letting agents to publicise their fees<sup>128</sup>.

This is therefore a reform of wider dimension than political expediency would have required. One may see this as further evidence for an appetite for codification in this area of law, although, no matter how significant this Bill is, and how much it amalgamates some aspects of consumer law into one place, it falls short of codification. It is more a package than a code that government finally settled on delivering. The architecture of the Bill itself continues to be quite a patchwork of legislation and amendment to legislation. At the same time, the legislator also adopted separate instruments to implement the bulk of Directive 2011/83 on Consumer Rights. It adopted legislation concerning:

- The Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013 (Regulations).<sup>129</sup> These came into force on 13 June 2014 and implement the bulk of the CRD.

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<sup>121</sup> For example, reform of unfair terms was first started back in 2005 with a joint issues paper by the Law Commission and the Scottish Law Commission entitled ‘Unfair Terms in Consumer Contracts’ (2005) Law Com No 292; Scot Law Com No 199.

<sup>122</sup> Discussing the substantive changes that the Consumer Rights Bill brings is beyond the remit of this article. For a discussion of some of the key changes, see Christine Riefa, ‘Consumer Law in England: from Common Law to Codification’, In Jorge Luis Tomillo Urbina, Julio Alvarez Rubio (eds), *La Proteccion Juridica de los consumidores en el espacio euroamericano*, Editorial Comares 2014; Christian Twigg-Flesner, ‘Some thoughts on Consumer law reform: Consolidation, Codification or a Restatement?’ in Gullifer L and Vogenauer S (eds), *English and European Perspectives on Contract and Commercial Law – Essays in Honour of Hugh Beale* (Hart 2014).

<sup>123</sup> For a discussion of the key changes in the area of Sales or Unfair terms, see above 5.2.

<sup>124</sup> Andrew Leaky, ‘Consumer Rights’, (2013) 25 *Tolley’s Practical Audit and Accounting* 2, 24.

<sup>125</sup> Chapter 1, Sections 78 to 81.

<sup>126</sup> Chapter 2, Section 82 which creates a right of private action in competition law (individual as well as collective). This section simply refers to Schedule 8 of the Bill and gives it effect.

<sup>127</sup> Chapter 4, Section 89. This section amends the Higher Education Act 2004, 2004, c. 8.

<sup>128</sup> Chapter 3, Sections 83 to 88.

<sup>129</sup> SI 2013/3134.

- The Consumer Rights (Payment Surcharges) Regulations 2012.<sup>130</sup> It came into force on 6 April 2013 and controls the imposition of additional fees to payment transactions, implementing Article 19 of the Consumer Rights Directive.<sup>131</sup>

Meanwhile, many areas that form part of the consumer law remain outside its boundaries and continue to exist alongside. This is the case for unfair commercial practices (although it was recently amended)<sup>132</sup> as well as product liability and safety to name but a few.

Complexity is not dead with this latest round of consumer law reforms, far from it. However, the Bill pulls a significant amount of consumer laws in areas that have not normally been grouped together, at least not on this scale. For example, following consultation<sup>133</sup>, Part III of the Bill rationalised enforcement powers shared between local weight and measures, trading standards and other regulators (such as the Competition and Markets Authority) that derived their powers from some 60 pieces of statutes.<sup>134</sup> Investigatory powers are now rationalised and the details is contained in Schedules 5 and 6. The Bill also increases the range of remedies available to consumers and enforcers alike and enables consumers to take action in the area of competition law<sup>135</sup> similar to those granted for unfair trading practices contained in the Consumer Protection (Amendment) Regulations 2014.<sup>136</sup>

With this, the Consumer Rights Bill has the hallmarks of codification even if the actual result falls short. One may remain optimistic. No codification was ever achieved in haste. The French Consumer Code itself was a project spanning over more than 10 years. In the UK, the process of consolidation has been widely welcomed in the UK by businesses and consumer representative alike, largely explained by the historical development of consumer law in the UK. Complexity had made it a practically intolerable system to navigate as a lawyer and con-

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<sup>130</sup> SI 2012/3110.

<sup>131</sup> [2011] OJ L304/64.

<sup>132</sup> The Consumer Protection from Unfair Trading (Amendment) Regulations 2013 came into force on 1 October 2014. They implement part of the CRD and amends the Consumer Protection from Unfair Trading Regulations 2008. The amendment gives consumers a private right of redress from businesses, which was lacking in English law.

<sup>133</sup> BIS, 'Enhancing consumer confidence through effective enforcement' (March 2012).

<sup>134</sup> BIS, Enhancing Consumer Confidence through Effective Enforcement, consultation on consolidating and modernising enforcement powers (March 2012) 18, <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31534/12-543-enhancing-consumer-confidence-effective-enforcement-consultation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31534/12-543-enhancing-consumer-confidence-effective-enforcement-consultation.pdf)> accessed 21 May 2014.

<sup>135</sup> See Section 80 and Schedule 8 of the Consumer Rights Bill.

<sup>136</sup> SI 2014/870.

sumer advisor. While the Bill consolidates sales law and unfair terms, other key areas of protection remain outside this instrument. If codification is not yet achieved on par with civil countries, the way is nevertheless paved for consumer law to be further consolidated and continue to evolve, in a more orderly fashion. At present the legislator has opted for modernisation but continues a piece meal approach. But it has made progress since entire areas are consolidated and rationalised. From there, the leap into a further consolidation exercise pulling together all of those areas in one accessible piece of statute (such as the Consumer Rights Act or a consumer code) appears achievable. In the interim, a solution may well be a restatement or the use of technology to create a digital act (that would link all notions that cannot be explained in text by way of hyperlinks) as suggested by *Beale*.<sup>137</sup> However, it seems judicious that the ultimate goal should be the codification of the law. For a codification would bring with it several advantages that the current system even modernised and streamlined cannot offer. Visibility to the public is a chief argument to justify pulling together many areas of consumer protection, including for example, credit and payment services as well as rules applicable to the institutions that enable the application of the law. At present, the title of the Bill is somewhat misleading and will be the source of further confusion for consumers and their advisors, who may hope to find in this instrument all of the available tools, when in fact it is far from the case. One should hope that in future years, governmental and parliamentary appetite will not waver and further progress will be made towards a Consumer Law Code in England.

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<sup>137</sup> Hugh Beale, 'The Draft Directive on Consumer Rights and UK Consumer Law - Where now?', in Geraint Howells and Reiner Schulze (eds.), *Modernising and Harmonising Consumer Contract Law* (Sellier 2009) 300.