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RESEARCH ARTICLE

What determines national convergence of EU law? Measuring the implementation of consumer sales law

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Abstract
Harmonisation and legal convergence are core tasks of the EU. This paper explores the question about the determinants for national convergence of EU law, specifically applied to the ever-growing body of European consumer sales law. The measurement of national convergence is based on a unique coding of five directives in seven Member States. Using the fuzzy-set Qualitative Comparative Analysis (fsQCA) method, the paper finds that differences in national convergence can partly be explained by favourable features of the corresponding directives; however, mainly, they are the result of a combination of domestic political factors and, to a lesser extent, the country characteristics. This has important policy implications, for instance, on the need to 'bring in politics' in the debate about convergence, harmonisation and consumer sales law.

Keywords: convergence; consumer sales law; fsQCA

Introduction

Legal convergence is in the DNA of the EU. As a supranational construct, the EU aims for deep political, economic and legal integration, and legal harmonisation is the main tool used to this end. Harmonising national law through EU law has led to a wealth of rules at European level. This paper focuses specifically on the impact of EU directives. Here, comparative legal research has shown that EU law based on directives has not led to full legal convergence across all Member States.[1] One problem is that Member States do not always correctly transpose EU directives. This is monitored by the European Commission, which also publishes an Internal Market Scoreboard on the transposition of directives.[2] Correspondingly, researchers in political science have used inferential statistics such as regression analysis in order to explore the reasons for non-compliance with EU law.[3]

This paper aims to contribute to a multidisciplinary framework for exploring legal convergence in the EU. To this end, the paper suggests that the question of national legal convergence is not merely a matter of the correct transposition of a directive. Gaining a more complete understanding of a directive's implementation is important given the scope of the expanding number of European consumer

[†]We thank Gijs van Dijck, Gerhard Schnyder, William Hubbard, the participants of the Fifth Empirical Legal Studies Workshop at the University of Amsterdam and the Second Conference on Empirical Legal Studies in Europe at KU Leuven and two anonymous reviewers for helpful comments. The remaining errors are entirely our responsibility.

[1]Specifically for consumer law H Schulte-Nölke et al (eds) *EC Consumer Law Compendium: The Consumer Acquis and its Transposition in the Member State* (Munich: Sellier European Law Publishers, 2008). For further references, for consumer law as well as other areas of law, see Section 2 (b), below.

[2]Available at http://ec.europa.eu/internal_market/score/index_en.htm.

[3]See the references in Section 2 (c), below.

instruments, in particular as regards further harmonisation in the field of consumer law. The research underlying this paper, as specifically applied to EU consumer sales law, therefore considers, for example, how specific and comprehensive an EU directive is and whether Member States dilute a directive's effect through the use of words different from the instrument. The assessment of these factors is presented as a Convergence Index which has been coded across five directives and seven Member States.[4]

A further innovation of this paper is that it applies the method of a 'fuzzy-set Qualitative Comparative Analysis' (fsQCA) in order to analyse the determinants for national convergence of EU consumer sales law. The methods of qualitative comparative analysis are frequently used in political science and management studies;[5] yet, so far, they have only been applied to few legal questions.[6] In the present case, we use this approach as it can show us which logical combinations of conditions are likely to be the determinant ones for high or low national convergence.

The remainder of this paper is structured as follows: Section 1 provides the theoretical background of the discussion about EU harmonisation and convergence in consumer sales law. Section 2 explains the underlying data on national convergence and the possible determinants for differences across directives and Member States, followed by the fsQCA in Section 3 and the conclusion.

1. Background: harmonisation and convergence in consumer sales law

The EU started regulating European consumer sales law in the 1980s to empower consumers in cross-border transactions.[7] On the one hand, such a policy would support consumers in exercising their four freedoms (goods, services, persons and capital), and on the other hand this would entail a stronger internal market.[8] A considerable number of regulatory instruments aimed at ensuring the goal of further economic integration were adopted after 1985, starting with Directive 85/577/EEC on doorstep selling, and then Directive 93/13/EEC on unfair contract terms, Directive 97/7/EC on distance selling, Directive 1999/44/EC on consumer sales, and Directive 2005/29/EC on unfair commercial practices.[9]

In light of its effects on national legal systems, regulatory approximation – the policy of harmonisation as envisaged by the European legislator – has always been shadowed by issues of political consensus. Two separate considerations can be highlighted on this matter: first, the scope of the relevant regulatory instruments has been at the core of political debate. The directives adopted on consumer contract matters have either focused on transactions of a certain nature (distance selling, doorstep selling, consumer credit, etc), or tackled specific contractual topics across different types of transactions (unfair contract terms, conformity with the contract, etc), as opposed to offering a complete contractual regime for consumers to enjoy throughout Europe. One such attempt was finally made when the European Commission designed

[4]See further Section 2 (a) and (b) below.

[5]See references and explanations in Section 3 (a) below.

[6]The path-breaking study applying fsQCA to law was TT Arvind and L Stirton 'Explaining the reception of the Code Napoleon in Germany: a fuzzy-set qualitative comparative analysis' (2010) 30 Legal Studies 1. Other forms of QCA have been applied by PJ Castillo-Ortiz et al 'Gender, intersectionality, and religious manifestation before the European Court of Human Rights' (2019) 18 Journal of Human Rights 76; PJ Castillo Ortiz 'Councils of the judiciary and judges' perceptions of respect to their independence in Europe' (2017) 9 Hague Journal for the Rule of Law 315; PJ Castillo Ortiz and I Medina 'Paths to the recognition of homo-parental adoptive rights in the EU-27: a QCA analysis' (2015) 22 Contemporary Politics 40; PJ Castillo Ortiz *EU Treaties and the Judicial Politics of National Courts: A Law and Politics Approach* (Abingdon: Routledge, 2016).

[7]See eg F Cafaggi 'The making of European private law: governance design' in F Cafaggi and H Muir-Watt (eds) *Making European Private Law: Governance Design* (Cheltenham: Edward Elgar, 2008) p 289; R Goode 'Contract and commercial law: the logic and limits of harmonisation' (2003) 7(4) Electronic Journal of Comparative Law, available at http://www.ejcl.org/74/art74-1.html.

[8]European Commission (1985) 'White Paper on Completing the Internal Market', COM(85) 310. See also H-W Micklitz 'European consumer law' in E Jones et al (eds) *The Oxford Handbook of the European Union* (Oxford: Oxford University Press, 2012) p 526 (move towards market-focused law).

[9]These are the Directives analysed in this paper, see further Section 2 (a), below.

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the Common European Sales Law, but lacking the necessary political support, then withdrew it in 2015. From this perspective, European consumer contract law remains a so-called 'piecemeal' subfield of European private law, meaning that it is regulated by a plethora of separate complementing instruments.[10]

Secondly, Member States had to agree on the level of consumer protection awarded through the relevant directives. Some of them have historically enjoyed a higher standard of consumer protection, or already had complex legislation on relevant matters. For this reason, harmonisation as a policy technique took different shapes: starting out as a form of standardisation, it was turned into a minimum common denominator (minimum harmonisation), while in more recent times the bar was raised to align all Member States to the same standard (maximum harmonisation).[11]

The constant development of this field, as well as its intricate particularities, have made it transcend its origins as an appendix of the debate on the strengthening of the internal market.[12] One particular European institution contributed to this: the Court of Justice (ECJ/CJEU). The vast array of case law produced by the ECJ/CJEU on questions submitted by national courts on matters dealing with consumer contract law have offered national legal systems additional tools to interpret and apply consumer protection effectively.[13] The Court's work on Directive 93/13/EEC alone is a source of inspiration for questions relating to how Member States are accommodating European consumer contract law. This reflects the normative dimension of the standard of protection offered to consumers in the EU: unlike other legal systems, the European legislator promotes a paternalistic view on consumer protection, expressed through a complex structure of rules aimed at removing the consumer bargaining handicap in business-to-consumer (B2C) transactions.[14]

Nevertheless, the question of whether and how harmonising consumer contracts helps the internal market is not purely normative as it needs to reflect the reality of how this policy works across Member States. In other words, the EU's harmonisation strategy is supposed to have converging effects, which are supposed to improve the internal market. However, the details of the economic consequences of convergence are not fully understood, as even the task of comparing national transpositions in 28 Member States poses its own challenges when conducted on a scale of many directives of direct and indirect importance for this field.

The resulting complexity of European consumer sales law is an issue that can only be fully addressed by combining methods, tools and perspectives. One of the tools developed in this respect, and underlying this paper, is the Convergence Index, which we define as the legally-converging effect of harmonisation policies undertaken by the EU in the field of consumer sales law.[15] Applying quantitative methods is not straightforward: validity and reliability of measurement needs to be ensured, as many quantities are not directly observable;[16] and the construction of an index needs to consider the challenges of building a composite indicator.[17] The Convergence Index is a metric designed to measure the level of convergence stemming from the transposition of European directives into national

[10]C Twigg-Flesner 'The (non-)impact of harmonizing measures on English legal terminology' (2012) 20 European Review of Private Law 1369.

[11]F Gómez-Pomar and JJ Ganuza 'An economic analysis of harmonisation regimes: full harmonisation, minimum harmonisation or optional instrument?' (2011) 7 European Review of Contract Law 275.

[12]J Stuyck 'European consumer law after the Treaty of Amsterdam: consumer policy in or beyond the internal market' (2000) 37 Common Market Law Review 367.

[13]MJ Sørensen 'In the name of effective consumer protection and public policy!' (2016) 24 European Review of Private Law 791.

[14]O Bar-Gill and O Ben-Shahar 'Regulatory techniques in consumer protection: a critique of European consumer contract law' (2013) 50 Common Market Law Review 109.

[15]For variations of the use of the terms 'convergence' and 'harmonisation' see eg C Goanta *Convergence in European Consumer Sales Law* (Antwerp: Intersentia, 2016) pp 1–29; B van Leeuwen *European Standardisation of Services and its Impact on Private Law: Paradoxes of Convergence* (Oxford: Hart Publishing, 2017) pp 12–27.

[16]See generally S Jackman 'Measurement' in JM Box-Steffenmeier et al (eds) *The Oxford Handbook of Political Methodology* (Oxford: Oxford University Press, 2008) p 119. For related questions in the research on 'numerical comparative law' and 'leximetrics' see eg M Siems *Comparative Law* (Cambridge: Cambridge University Press, 2nd edn, 2018) pp 180–228; Z Adams et al 'The CBR-LRI dataset: methods, properties and potential of leximetric coding of labour laws' (2017) 33 International Journal of Comparative Labour Law and Industrial Relations 59.

[17]We focused on the OECD Handbook given that it is one of the few resources which can be used as a checklist for the building of a composite indicator: OECD *Handbook on Constructing Composite Indicators: Methodology and User Guide* (2008),

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legal systems, with a two-fold goal: (i) to show the converging effects of the EU harmonisation policy; and (ii) to better understand how EU law permeates national legal orders in the light of subsequent patterns which can highlight the strengths and weaknesses of EU harmonisation. The next section explains the Convergence Index and its use in this paper in more detail.

2. Data on convergence and possible determinants

(a) Coding national convergence

The main aim of this paper is to explain variations in national legal convergence of EU consumer sales law. This is based on information from a Convergence Index which also covers variations of European convergence (see sub-section (b) below). The set of components of this index is summarised in Table 1. The study underlying this index explains the choice and coding of these components in detail,[18] and a sample of the coding explanations is available online.[19] In the following, we also provide an overview of the considerations behind the coding of the different components, as well as the choice of countries and directives.

Table 1. National dimension of Convergence Index

Indicator	Assumption	Coding
National transposition technique	The transposition of a directive through satellite laws or specialised codes leads to more convergence than its transposition through civil codes.	Transposing European law in a consumer code or a satellite law (1) leads to more convergence than transposing the rules in a civil code (0).
Reception of selected novel concepts	Incorporating European legal concepts into national legislation correctly leads to a higher level of convergence.	If the selected novel concepts have been transposed correctly (1 – this also includes functional equivalents), this leads to more convergence than if they have not (0).[20]
Reception of selected open-ended norms	Incorporating open-ended norms into national legislation correctly leads to a higher level of convergence.	If the selected open-ended norms have been transposed correctly (1 – this also includes functional equivalents), this leads to more convergence than if they have not (0).[21]
Reference to European law in end legislation	Reference to the European instrument made in transposing legislation leads to more convergence.	If there is a reference to the transposed Directive in transposing legislation (1), it leads to more convergence than if there is none (0).
Timely transposition (date of national legislation)	Transposing a directive within the time frame established by the European legislator leads to more convergence.	If Member States transpose European law in a timely manner (1), it leads to more convergence than if they do not (0).
Infringement procedures	Transposing a directive correctly leads to more convergence.	If a Member State has had no infringement procedures initiated against it (1), this entails more convergence than if infringement procedures have been brought against a State (0).

available at http://www.oecd.org/std/42495745.pdf. For a good example of a composite indicator see also M Nardo et al 'The consumer empowerment index', JRC Scientific and Technical Reports, 2011, available at http://composite-indicators.jrc.ec.europa.eu/.

[18]Goanta, above n 15, pp 164–175.

[19]See http://www.mepli.eu/convergence-in-european-sales-law/.

[20]This factor sometimes requires normalisation, depending on the number of novel concepts selected. It is done by creating an average, which then becomes the maximum value allotted to one individual such concept (eg if two concepts are identified, the maximum value given to each if the concept has been transposed correctly is 0.5).

[21]The same normalisation approach as with the previous factor was applied.

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The first component, *national transposition technique*, entails that if a national legislator chooses to transpose European legislation through a code or satellite law, the rules are likely to reflect a harmonised European identity. However, if European consumer rules are accommodated in a civil code, they will very likely have to fit into the existing national private law framework and thus the converging effect might be weaker. For example, if a national legislator must amend a civil code to accommodate European legislation, it will adapt the latter to the terminology used by established codification, and thus the European identity of the rules will be diluted.

The second component, *reception of selected novel concepts*, stands for the identity and interpretation of selected substantive provisions that are new to a national legal order. As European terminology lies at the core of the harmonisation debate, novel concepts are defined here as European legal concepts giving rise to legal rights or obligations, independent of any similar rights or obligations that might exist at national level. An example is the way some EU directives include the right of consumers to withdraw from a contract in a 'cooling-off period': here, while Member States may achieve the same effect through other legal concepts, such as termination of the contract, this leads to less convergence than the precise use of the novel European concept.[22]

Similarly, the third component, *reception of selected open-ended norms*, focuses on the way in which national legal systems accommodate blanket clauses. Open-ended norms are behavioural and moral standards that parties are held to respect in a contractual relationship, depending on their specific circumstances. This factor is partially connected to terminology that comes with a separate content from whatever equivalents might exist in the national legal order, which should ideally be treated independently. A good illustration of this problem is the concept of good faith.[23] The Unfair Contract Terms Directive uses this concept in its general test, and the danger of not acknowledging the European roots of good faith in the context of unfair terms leads to the application of the national equivalent. The ideal interpretation of good faith in a European context is shown by Justice Mann in *Foxtons*, when citing the Preamble of the Directive for a better understanding of its definition: 'That recital brings in the concept of good faith. This is an autonomous Community expression and has been elaborated in English authority as will in due course appear'.[24]

The fourth component, *reference to European law in end legislation*, deals with the way a national legal instrument can signal its European source in order to guide practitioners into applying it as such, and not solely as a national set of rules. Being aware that specific consumer sales rules stem from the European legislator facilitates the interpretation as a source of European law (which is required for EU hard law, such as directives), instead of mistaking this identity for a national framework.[25]

Timely transposition, the fifth national component, is relevant since any delay hinders effective harmonisation. Failure to implement a directive by a specified date leads to national courts having to interpret national law in the light of the purpose of the directive, as mandated by direct effect. However, sometimes it might prove difficult for national courts to do just that. Although untimely transposition may also be the subject of infringement procedures, often such applications become obsolete because Member States have, in the meantime, enacted transposing legislation. In order to avoid the bias of overlooking these cases, this component focuses on the initial failure of a timely transposition.

Sixth, the component on *infringement procedures* covers Member State behaviour when assessing willingness to engage in harmonisation efforts. Infringement procedures may be taken against a

[22]Thus, a change in terminology matters, as it leads to divergent practical applications of the law and contradicts the existence of the EU as a *sui generis* juridical order shaped by a common identity: eg Directive 85/577/EEC includes the right of consumers to withdraw from the contract; yet, when Romania and France chose to transpose this concept through that of 'termination', the legal nature of this right was transformed.

[23]S Bright 'Winning the battle against unfair contract terms' (2000) 20 Legal Studies 331.

[24]*The Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), para 18.

[25]European instruments have long been drafted with the requirement that the transposing legislation must make reference to the specific implemented Directive, see for instance Art 10(2) of Directive 93/13/EEC or Art 19 of Directive 2005/29/EC; however, when transposing European instruments through civil code provisions, this reference cannot be inferred.

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Table 2. National convergence across five Directives and seven Member States (maximum 6)

Countries	Doorstep Selling	Unfair Contract Terms	Distance Selling	Consumer Sales	Unfair Commercial Practices
Belgium	3.5	4.5	4.5	2	2.8
France	3.5	3.75	3	2.33	3.6
Germany	4.5	2.5	3.5	4.5	4
Ireland	4.5	6	5	5	5.6
Netherlands	2.5	0.25	2.5	2.91	2.3
Romania	4.5	5	3.5	6	3.8
UK	3.5	5	5	3.75	5

Member State pursuant to Art 258 TFEU for the failure to fulfil an obligation under the Treaties, be it regarding the untimely adoption of implementing measures, or issues regarding the conformity and correct application of these measures. However, this last factor only takes into account resilience to harmonisation, manifested in the incorrect transposition of European law. In order to avoid any overlap with timely transposition, this component therefore only considers those infringement procedures resulting in CJEU decisions on incorrect transposition.

In the study underlying this section, the values of these six national convergence components were coded for five directives (Doorstep Selling, Unfair Contract Terms, Distance Selling, Consumer Sales and Unfair Commercial Practices)[26] and seven Member States (Belgium, France, Germany, Ireland, the Netherlands, Romania and the UK).[27] Several reasons account for this selection. First, it focuses on key consumer sales directives from the consumer *acquis* that address substantive issues of sales law and apply a general level of consumer protection, while other directives either deal with specific procedural aspects or industries[28] or were too recent for the Index to be relevant.[29] Second, as regards the countries, the selection includes both the civil and common law countries, as well as newer and older Member States.[30] In addition, the targeted analysis of a limited number of units is deliberate in this paper given the use of fsQCA as an extension of a case-based method of social science research.[31]

The resulting aggregate values on national convergence are displayed in Table 2. We use these aggregates, rather than the individual values, as our main point of interest because they provide good variation across the 35 observations. It is also in line with research that expresses a preference for composites or 'bundles' of variables in order to capture substitutes and complements of individual variables,[32] as well as the more general literature on index construction which accepts the usefulness of composite indicators.[33]

(b) Coding European convergence

This paper explores the determinants of these aggregate values of national convergence. An initial point to consider is the role of the EU in stimulating convergence. This EU dimension of the

[26]Directive 85/577/EEC; Directive 93/13/EEC; Directive 97/7/EC; Directive 99/44/EC; Directive 2005/29/EC.

[27]Note that the question of the UK's departure from the EU is not relevant here, as we examine a period well in advance of the Brexit referendum of 2016.

[28]Directive 2007/64/EC on payment services; Directive 2000/31/EC on certain legal aspects of information society services; Directive 2008/48/EC on consumer credit.

[29]Eg Directive 2011/83/EU on consumer rights (which also amended and repealed some of the prior directives).

[30]The underlying study builds on the selection of directives and countries, see Goanta, above n 15.

[31]See Section 3, below.

[32]See eg R García-Castro et al 'Bundles of firm corporate governance practices: a fuzzy set analysis' (2013) 21 Corporate Governance: An International Review 390; G Schnyder 'Measuring corporate governance: lessons from the "bundles approach"', CBR Working Paper No 438/2012, available at http://ssrn.com/abstract=2220616.

[33]Eg OECD, above n 17.

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Table 3. European dimension of Convergence Index

Indicator	Assumption	Coding
Law v policy	Mandatory law leads to a higher level of harmonisation than policy.	Law (1) leads to more convergence than policy (0).
Type of European instrument	Some EU instruments envisioned by Art 288 TFEU lead to a higher level of harmonisation than others	Regulations (1) lead to more convergence than directives (0).
Nature of policy	Maximum harmonisation leads to more harmonisation than minimum harmonisation.	Maximum harmonisation (1) leads to more convergence than minimum harmonisation (0).
Reference to self-regulation	Explicit reference to forms of self-regulation in the Directive (eg codes of conduct) leads to more harmonisation.	If reference to self-regulation is made in an instrument (1), it leads to more convergence than if no such reference in made (0).
General clause	Instruments establishing general clauses lead to less harmonisation than those not using such clauses.	If an instrument does not contain a general clause (1), it leads to more convergence than if it does (0).
Black list	Instruments that annex a black list of practices lead to more convergence.	If an instrument contains a black list (1), it leads to more convergence than if it does not (0).
CJEU case law	Interpretation and application of Directive previously unclear.	Low number of preliminary references for Doorstep Selling, Distance Selling and Consumer Sales Directives (1); high number for Unfair Commercial Practices and Unfair Contract Terms Directive (0).[37]

convergence debate can draw on an extensive literature in general European private law[34] and further afield.[35] Specifically, the following has to consider that the five directives may have different predispositions to stimulate national convergence. Here, we use the European dimension of the Convergence Index. It consists of the components of Table 3. Again, the study underlying this index explains the choice and coding of these components in detail;[36] thus, here, we just provide a summary.

The first component in the European set, *law versus policy*, reflects the nature of the European instrument: mandatory or voluntary. It can be argued that if an instrument is mandatory (eg it is a directive), the national transposition efforts reflect *top-down* harmonisation, and that is more far-reaching than informal coordination policies. Even if the latter may prove successful, legal norms theoretically have a higher converging effect than political norms, because of – among other reasons – their enforceable nature. Moreover, it must be kept in mind that not only this component, but all the components below are assumed to be indicators of *legal* convergence, and not (mere) policy convergence.[38]

[34]Eg P Legrand 'Public law, europeanisation and convergence: can comparatists contribute?' in P Beaumont et al (eds) *Convergence and Divergence in European Public Law* (Oxford: Hart Publishing, 2002) p 225; C Joerges 'The europeanisation of private law as a rationalisation process and as a contest of disciplines – an analysis of the Directive on Unfair Terms in Consumer Contracts' (1995) 3 European Review of Private Law 175; M Hesselink *The New European Legal Culture* (The Hague: Kluwer International, 2002).

[35]For changes to the EU's economic policy see eg N Jabko *Playing the Market A Political Strategy for Uniting Europe, 1985–2005* (Ithaca, NY: Cornell University Press, 2006). For two specific areas of law see eg B Duncan 'Health policy in the European Union: how it's made and how to influence it' (2002) 324 British Medical Journal 1027; R Eising and N Jabko 'Moving targets: institutional embeddedness and domestic politics in the liberalization of EU electricity markets' (2001) 34 Comparative Political Studies 742.

[36]Goanta, above n 15.

[37]The cut-off between law/high was set at '10' (information coded up to October 2016).

[38]For the latter see eg L Tholoniat 'The career of the open method of coordination: lessons from a "soft" EU instrument' (2010) 33 West European Politics 93.

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The second component, *type of European instrument*, focuses on the types of legislative acts. In the field of consumer sales law, directives are the main legislative acts (eg Unfair Contract Terms, Unfair Commercial Practices, etc). In more recent years, the proposal for a Common European Sales Law (CESL) has paved the way to regulation-based harmonisation; however, the CESL has been withdrawn by the Commission, which in turn presented three new directives on related matters.[39] The main difference between CESL and the existing (and proposed) directives is that the CESL had been shaped into a regulation, which would have been applicable as such (even as an optional instrument), whereas directives still need to be transposed in national legislation.

The third component, *nature of policy*, looks into the degree of harmonisation. While in earlier days, consumer contracts were governed by minimum harmonisation, the trend in more recent times has been that of maximum harmonisation. This shift affects the way in which national jurisdictions accommodate European law. Moreover, it can be said that by not allowing Member States to derogate from common standards, national regimes become more similar.[40]

The fourth component, *reference to self-regulation*, assesses any self-regulation references in a directive, as well as the extent to which it is promoted by that directive. Private law actors complement state-made law with their own standards (eg trustmarks, codes of conduct, etc). Acknowledging the activity of the private sector may lead to the creation of public-private structures that can check this activity and make sure it does not fall short of the European standards it is supposed to fulfil.[41]

The fifth component, *general clause*, deals with standard tests imposed by the law. A general clause is a provision in the text of the directive that uses a statutory test to determine whether the professional in a B2C transaction has fulfilled a specific legal standard. The general test normally includes several generic conditions, designed in a way that can include different factual patterns applicable to consumer contracts.[42]

The sixth component, *black list*, reflects the listing of specific factual situations which must be interpreted in the same manner throughout all Member States when it comes to specific consumer transactions. It can be argued that if the European legislator sets out examples of practices which national courts are required to follow, then it is more likely that legal systems converge more, since such a list has a unifying role in relation to practice. An example of this is the black list found in the Unfair Commercial Practices Directive. Not the same can be said about all such lists: while black lists have the unifying effect mentioned before, grey lists only include examples of practices that must still be tested against circumstantial facts.[43]

[39]European Parliament, Legislative Train Schedule (Common European Sales Law), available at http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-common-european-sales-law. See also C Twigg-Flesner 'Good-bye harmonisation by directives, hello cross-border only regulation? – a way forward for EU consumer contract law' (2011) 7 European Review of Contract Law 235.

[40]F Cafaggi and A Nicita 'The evolution of consumer protection in the EU' in T Eger and H-B Schäfer (eds) *Research Handbook on the Economics of European Union Law* (Cheltenham: Edward Elgar, 2012) p 263.

[41]See eg A Beckers 'Corporate codes of conduct and contract law: a doctrinal and normative perspective' in R Brownsword et al (eds) *Research Handbook on Contract and Regulation* (Cheltenham: Edward Elgar, 2017) p 89; F Cafaggi 'Self-regulation in European contract law' (2007) 1 European Journal of Legal Studies 163; J Thøgersen et al 'Consumer responses to ecolabels' (2010) 44 European Journal of Marketing 1787.

[42]H Beale 'General clauses and specific rules in the principles of European contract law: the good faith clause' in S Grundmann and D Mazeaud (eds) *General Clauses and Standards in European Contract Law* (The Hague: Kluwer Law International, 2006) p 205; G Teubner 'Legal irritants: good faith in British law or how unifying law ends up in new divergences' (1998) 61 Modern Law Review 11; T Wilhelmsson 'The abuse of the "confident consumer" as a justification for EC consumer law' (2004) 27 Journal of Consumer Policy 317.

[43]R Mańko 'Unfair contract terms in EU law, Unfair Terms Directive and common European sales law', EU Parliament Library Briefing, 19 September 2013; C Willett 'General clauses and the competing ethics of European consumer law in the UK' (2012) 71 Cambridge Law Journal 412; J Stuyck et al 'Confidence through fairness? The new directive on unfair business-to-consumer commercial practices in the internal market' (2006) Common Market Law Review 107.

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The seventh component, *CJEU case law*, reflects the usefulness of patterns that can be found in the volume of case law decided on by the ECJ/CJEU.[44] The assumption here is that an unclear directive will lead to more cases as national courts struggle with the interpretation and application of European law. While the subsequent European case law may then foster European convergence, it does not change the fact that the original directive was drafted in a way necessitating judicial clarifications.[45] This view is supported by the nature of the CJEU's activity: in recent years the Court has issued orders instead of judgments for various cases coming specifically from Slovenia, the Czech Republic, Hungary and Romania. Procedurally, the Court may choose to do so for questions on matters that have already been decided. Based on the fact that national courts can consult this case law, and still take the liberty to ask questions through the preliminary reference procedure, it is therefore argued that the provisions needing interpretation are so complex that national courts still do not know how to relate to them.

Coding the five directives of consumer law, we find that they have different predispositions to stimulate national convergence. Aggregates of the seven components of Table 3 lead to the score of '1' for the Unfair Contract Terms Directive, '3' for the Doorstep Selling, Distance Selling and Consumer and Consumer Sales Directives, and '4' for the Unfair Commercial Practices Directive.[46] We also considered using other conditions, for example, the length of the directives and their transposition periods.[47] Yet, as this information would be identical for all of the countries under consideration, there is no benefit in including more conditions on the respective directives. It would potentially be interesting to code whether some of the Member States opposed a directive in the Council. However, as also noted in the literature,[48] such information has only been made available recently; in particular, it is impossible to gather such information for the 1980s and 1990s:[49] thus, it could not be considered in the analysis in this paper.

(c) Possible further determinants for national convergence

In addition to the European dimension of the convergence index, this paper examines which other factors influence legal convergence in consumer sales law. This can draw on a rich literature from legal research on private law harmonisation, as well as other fields and topics of European research.[50]

[44]See eg S Weatherill 'Interpretation of the directives: the role of the court' in A Hartkamp et al (eds) *Towards a European Civil Code* (The Hague: Kluwer Law International, 2011) p 181; S Weatherill 'The limits of legislative harmonisation ten years after tobacco advertising: how the court's case law has become a "drafting guide"' (2011) 12 German Law Journal 827; G Beck *The Legal Reasoning of the Court of Justice of the EU* (Oxford: Hart Publishing, 2013).

[45]For further explanation, see Goanta, above n 15, p 171: 'In recent years, especially when dealing with the UCPD, the Court started issuing orders instead of judgments. These orders are procedurally justified using Article 99 of the Rules of the Court. The fact that the Court still issues reasoned opinions in spite of the high load of existing case law can be interpreted to mean that national courts simply do not understand how to apply transposing legislation […] It thus follows that the [national] courts behind these specific preliminary references have asked questions that the Court had addressed before. This stands to show that even in spite of the growing body of case law on the UCPD, national courts continue to look at the Court of Justice for interpreting Article 3 of the directive and its interaction with national provisions'.

[46]For details see Goanta, above n 15.

[47]As done in A Zhelyazkova 'Complying with EU directives' requirements: the link between EU decision-making and the correct transposition of EU provisions' (2013) 20 Journal of European Public Policy 702.

[48]MZ Hillebrandt et al 'Transparency in the EU Council of Ministers: an institutional analysis' (2014) 20 European Law Journal 1.

[49]For recent data see www.votewatch.eu/en/term8-council-latest-votes.html and http://api.epdb.eu/#data.

[50]The non-empirical literature on legal convergence also touches upon additional factors arising out of the supra-national policy-making nature of the European Union. See eg D Caruso 'The missing view of the cathedral: the private law paradigm of European legal integration' (1997) 3 European Law Journal 3; C Joerges 'Taking the law seriously: on political science and the role of law in the process of European integration' (1996) 2 European Law Journal 105; T Wilhelmsson 'The legal, the cultural and the political – conclusions from different perspectives on harmonisation of European contract law' (2002) 13 European Business Law Review 541. For the political science literature see Zhelyazkova, above n 47, as well as the further references in the present section.

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Table 4. Possible determinants for national convergence

Conditions	Data sources	Time
EU convergence:		
Propensity of directive to stimulate convergence	Own calculations based on Convergence Index (see (b) above)	n/a
Country characteristics:		
No existing legislation on matter of directive	Own calculations: coded as '1', '0' and '0.5' (if there was partial legislation)	EU year adoption
Good legal system	Legal system and property rights, as available at www.fraserinstitute.org/economic-freedom/	Middle value[52]
Public support for EU	Data for question 'people who said that EU membership is a good thing', available at http://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/Chart/getChart/themeKy/3/groupKy/3	Middle value[53]
National politics:		
Effective government	Based on information available at www.parlgov.org/, with average score of: (i) political diversity of the government, ie whether government consists of one or multiple parties (and in the latter case considering the distance of the parties which are most left and right-wing), and (ii) voting power of the parties of government in parliament. For France this condition treats the two cases of 'cohabitation' (government and president belonging to different parties) as akin to a coalition.	National enactment
Left-wing government	Data available at www.parlgov.org/ (also considering coalition governments and 'cohabitation' as in previous condition)	National enactment
No interruption by elections	Period between EU adoption and national enactment not interrupted by elections	(see left)

For present purposes, first, we identified conditions that aim to complement the national factors of the Convergence Index, given that such national characteristics of the legal system can help to clarify the role of the national legislator in legal convergence. Secondly, we considered the political dimension of the transposition debate with the aim of testing the Convergence Index on conditions that deal with national politics.

Thus, based on our reading of the literature, we identify six further conditions that can be divided into two groups of three conditions dealing with 'country characteristics' on the one hand and 'national politics' on the other. The selection of the conditions also considered that, for all of them, we expect only a unidirectional causal relationship for national-level convergence; thus, we do not face issues of endogeneity which have been a source of concern for some of the previous empirical research on the relationship between law and society (including political and economic factors).[51]

The summary of the corresponding six conditions in Table 4 indicates that we have used different moments in time for different conditions. This is due to the fact that we expect some conditions to be relevant for the substantive orientation of the directive (eg whether a government is left- or right-wing) and therefore consider the moment of the national enactment. In other instances, our expectation is

[51]See the discussion in M Siems and S Deakin 'Comparative law and finance: past, present and future research' (2010) 166 Journal of Institutional and Theoretical Economics 120.

[52]This refers to the middle value of the data: (i) for EU year adoption; and (ii) national enactment. However, for Romania we only considered the national implementation year.

[53]For Romania information is only reported from 2007: thus, here, this year has also been used for the prior implementations.

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that the entire period from EU adoption to national enactment has shaped the domestic process of implementation (eg public support for the EU).

The three conditions on 'country characteristics' consider, first, whether there is *no existing legislation* in the matter of the respective directive.[54] The rationale is that existing legislation creates path-dependence and therefore, potentially, less legal convergence for the Member State in question. Secondly, we include a condition on the *quality of the legal system*. The rationale is that it can be expected that in countries with good protection of rights in general, there is also the motivation to provide high levels of consumer protection. Similar conditions have been used in related studies; for example, Börzel and colleagues consider bureaucratic quality and rule of law.[55] Specifically, our choice for the data on 'Legal system and property rights' by the Fraser Institute is due to the fact that it provides information for the 1980s and 1990s,[56] while most of the other datasets (eg the various corruption indicators) only start in the late 1990s. The third condition, *support for the EU*, is also commonly used in studies that evaluate the non-compliance with EU law.[57] It may be relevant here since the law-making institutions of a country can reflect the view of the population as regards either more complete or more limited legal convergence.

Further conditions related to 'country characteristics' were considered in our preliminary assessment but eventually not included in the final analysis,[58] such as the divide between civil and common law countries or differences based on cultural variables (eg the Hofstede data[59]). The two common law countries of our study tend to show slightly higher scores for national convergence.[60] In terms of culture, it may be hypothesised that aspects such as individualism or uncertainty avoidance[61] could reflect a country's approach to consumer protection. However, the problem is that these conditions would not vary across time. Thus, the validity of any results based on the current dataset would be too slim.[62]

The group of conditions dealing with 'national politics' also consists of three potential conditions. First, the condition on the *effectiveness of the government* examines whether a powerful government can more easily enact laws, leading to full convergence – or, in other words, whether the need to make compromises leads to less convergence. This condition is related to conditions used in the literature, for instance, on the number of veto players and constraints of government branches.[63] In this paper we consider the political diversity of the government, the voting power of the parties of government in parliament and the specific case of the French 'cohabitation'. Secondly, as far as national politics is concerned, it can be hypothesised that *left-wing governments* are more willing to support consumer protection and therefore also more willing to implement measures leading to full national convergence (noting that four out of five directives used in this paper are based on the concept of minimum harmonisation). It may also be argued that this factor can capture that right-wing governments can be nationalistic and Eurosceptic. Thus, in this regard, this condition supplements the coding of the EU support of the general population. Thirdly, if the *implementation period is interrupted*,

[54]Based on the information of Schulte-Nölke et al, above n 1.

[55]T Börzel et al 'Obstinate and inefficient: why member states do not comply with European law' (2010) 43 Comparative Political Studies 1363.

[56]Up to the year 2000, however, it only coded in a five-year interval (ie 1980, 1985, 1990, 1995, 2000): thus, here, we extrapolated the intermediate scores for the other years.

[57]Eg Börzel et al, above n 55.

[58]For the inherent limitations of the choice of conditions see also the Conclusion, below.

[59]https://geerthofstede.com/research-and-vsm/.

[60]Aggregating the data for all directives, the ranking of the seven countries is: (1) Ireland (26.1); (2) Romania (22.8); (3) UK (22.25); (4) Germany (19); (5) Belgium (17.3); (6) France (16.18); (7) The Netherlands (10.46).

[61]As in the Hostede data, see above n 59.

[62]Other factors might influence convergence by proxy, such as: consumer rights awareness; consumer preferences; the number of cases per judge; judicial training; or the number of lawyers specialised in European law in relation to the total number of lawyers, etc. While relevant for convergence in general, such data is not consistently available and would pose further issues for the accuracy of the results.

[63]M Kaeding 'Necessary conditions for the effective transposition of EU legislation' (2008) 36 Policy & Politics 261; Börzel et al, above n 55.

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convergence may be incomplete or delayed. Such a condition is used in related studies.[64] It also fills a gap left by the condition 'effective government', which only considers the situation at the moment of the national enactment; thus, the information about the interruption of the implementation period can be relevant as it captures the potential influence of the previous government.

3. Fuzzy-set QCA of convergence and lack of convergence

(a) FsQCA in a nutshell

This paper applies the method of a fsQCA in order to analyse the determinants for national convergence of EU consumer sales law. FsQCA has become a popular method across many academic disciplines. For example, in political science and European studies, it has been applied to the transposition of EU legislation[65] and the 'gold-plating' of European directives.[66] There are also examples from legal scholarship[67] and management studies[68] which have used fsQCA in order to understand legal and regulatory differences between countries.

FsQCA differs from regression analysis, because it does not require a large number of observations and a small number of explanatory variables, ie it can work with a small number of observations and a relatively large number of explanatory factors (in the fsQCA terminology: 'conditions'). More specifically, it aims to 'facilitate a dialogue between theory and evidence';[69] thus, it also asks researchers to use qualitative skills and knowledge in research design and evaluation. In the present case, fsQCA in combination with configurational narratives can indicate variants of causal relationships for the specific countries and directives under investigation (as the following will show). This also means that this approach can achieve a relatively high level of internal validity (though with a lower level of external validity than studies of 'large n' regression analysis).

The use of fsQCA is an extension of 'Qualitative Comparative Analysis' (QCA). Charles Ragin, the founding father of QCA, summarises QCA as follows:[70] it is an 'analytic technique that uses Boolean algebra to implement principles of comparison used by scholars engaged in the qualitative study of macro social phenomena'. Its aim is that, 'by formalizing the logic of qualitative analysis, QCA makes it possible to bring the logic and empirical intensity of qualitative approaches to studies that embrace more than a handful of cases – research situations that normally call for the use of variable-oriented, quantitative methods'. The ultimate goal of this exercise is to show 'the different combinations of conditions that produce a specific outcome'.

Conventional 'crisp-set' QCA codes the conditions in a binary way ('0 and '1). The 'fuzzy-set' in fsQCA means that the analysis allows intermediate numbers that range from '0' to '1'. Thus, this

[64]Eg D Finke and T Dannwolf 'Who let the dogs out? The effect of parliamentary scrutiny on compliance with EU law' (2015) 22 Journal of European Public Policy 1127 at 1136 (for legislative discontinuity); Kaeding, above n 63, at 266 (for year of election cycle).

[65]M Kaeding *Better Regulation in the European Union: Lost in Translation or Full Steam Ahead? The Transposition of EU Transport Directives Across Member States* (Leiden: Leiden University Press, 2007), as well as Kaeding, above n 63.

[66]E Thomann 'Customizing Europe: transposition as bottom-up implementation' (2015) 22 Journal of European Public Policy 1368.

[67]See the references above n 6.

[68]Eg VF Misangyi et al 'Embracing causal complexity: the emergence of a neo-configurational perspective' (2017) 47 Journal of Management 255; I Haxhi and RV Aguilera 'An institutional configurational approach to cross-national diversity in corporate governance' (2017) 54 Journal of Management Studies 261; MA Witt and G Jackson 'Varieties of capitalism and institutional comparative advantage: a test and reinterpretation' (2016) 47 Journal of International Business Studies 778.

[69]A Marx et al 'The origins, development, and application of qualitative comparative analysis: the first 25 years' (2014) 6 European Political Science Review 115. Closer interaction between theory and data is also advocated for more conventional empirical approaches, see eg G Schnyder et al 'Twenty years of "law and finance": time to take law seriously' Socio-Economic Review, available at https://doi.org/10.1093/ser/mwy041; CH Achen 'Toward a new political methodology: microfoundations and ART' (2002) 5 Annual Review of Political Science 423.

[70]For all of the following quotes: www.u.arizona.edu/~cragin/fsQCA/index.shtml.

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approach opens this line of research to types of data as collected in the current paper as all but one of the conditions are of a non-binary nature.[71] We therefore normalised the data of all possible conditions to the scale of '0' to '1', ie the lowest value was set as '0', the highest as '1' and the others were scaled accordingly in a continuous way, rounded to two decimal places.[72] Subsequently, the dataset was imported into the main software for fsQCA.[73]

(b) Methodological choices

The main outcome analysed in the following is the level of national convergence.[74] In addition, it is possible to set the outcome as 'negated'.[75] This means that, in the present case, we also examined what factors account for particularly low levels of convergence. The possible causal conditions are the seven conditions discussed in the previous section.

In contrast to regression analysis, fsQCA requires a more active position of the researcher in the analysis,[76] as will be shown in the following. First, the fsQCA program presents the result in a 'truth table', which shows the different combinations of the causal conditions with the corresponding consistency thresholds.[77] The default consistency threshold is 0.8, and for a small number of observations and few outcomes with more than one case (as here), it is recommended to choose a threshold of '1'.[78] We have no reason to deviate from this recommendation in the present case, but also checked alternative specifications and the results remain unchanged.

Secondly, the next decision to take is whether researchers expect the causal conditions to be 'present', 'absent', or either 'present or absent'. To be precise, their information helps the software to distinguish 'easy' from 'difficult' counterfactuals during logical minimisation. In the dataset of this paper, the explanatory factors were defined in a way that we expect a positive effect for a high level of national convergence (and vice versa for a low level of national convergence). Sometimes the fsQCA program also presents the researcher with a 'prime implication chart' indicating model ambiguities. In the present case, any such ambiguities can also be resolved by way of expressing a preference for a positive effect for a high level of national convergence (and vice versa for a low level of national convergence).

Thirdly, the fsQCA results are then presented as 'complex', 'parsimonious' and 'intermediate' solutions. These three solutions indicate a trade-off between coverage and consistency (ie breadth and accuracy of the solutions).[79] The complex solution has the highest consistency but the lowest coverage, while it is the opposite for the parsimonious solution. Some of the literature, discussing fsQCA results,

[71] See Section 2, above (the exception is 'no interruption by elections').

[72] Other studies (eg Arvind and Stirton, above n 6) code the data in a way that only specific intermediate scores are allowed (eg, 0.5, or 0.25, 0.5 and 0.75). We also checked whether such an approach would make a difference, but our results remain unchanged; see also CQ Schneider and C Wagemann *Set-Theoretic Methods for the Social Sciences: A Guide to Qualitative Comparative Analysis* (Cambridge: Cambridge University Press, 2012) p 38 (choice of strategy makes little difference for results). Appendix 1 of this paper displays the descriptive statistics of this dataset as well as a table of correlations of the conditions.

[73] C Ragin and S Davey, fs/QCA, version 3.0, available at www.socsci.uci.edu/~cragin/fsQCA/software.shtml.

[74] See Section 2 (a), above.

[75] As also done, eg, by Haxhi and Aguilera, above n 68; Arvind and Stirton, above n 6.

[76] Of course, the former also has degrees of subjectivity, as explicitly accepted in Bayesian statistics but also inevitable elsewhere; cf eg N Fenton et al 'Bayes and the law' (2016) 3 Annual Review of Statistics and Its Application 51 at 70 ('… there is the major challenge of getting legal professionals to accept the validity of subjective probabilities that are an inevitable part of Bayes. Yet, ultimately, any use of probability – even if it is based on frequentist statistics – relies on a range of subjective assumptions'). See also the comparison of the assumptions in QCA and regression analysis in J Seawright 'Qualitative comparative analysis vis-à-vis regression' (2005) 40 Studies in Comparative International Development 3.

[77] See Appendix 2, below.

[78] See C Ragin *User's Guide to Fuzzy-Set / Qualitative Comparative Analysis* (University of Arizona 2008) p 46, also available at www.u.arizona.edu/~cragin/fsQCA/download/fsQCAManual.pdf.

[79] For more technical definitions see Ragin, above n 78, p 85 ('coverage measures how much of the outcome is covered (or explained) by each solution term and by the solution as a whole'; 'consistency measures the degree to which solution terms and the solution as a whole are subsets of the outcome').

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Table 5. Determinants for high national convergence ('intermediate solution' with results also in 'parsimonious solution' in large signs)[82]

	Pathways					
	1	2	3	4	5	6
EU convergence	●		●		●	
Country characteristics						
No existing legislation			•	•	•	
Good legal system		•			•	
Public support for EU	•			•		•
National politics						
Effective government		●	●			●
Left-wing government					•	•
No interruption by elections				●		●
Consistency	0.84	0.88	0.95	0.96	0.92	1.00
Raw Coverage	0.56	0.60	0.53	0.31	0.32	0.21
Unique Coverage	0.07	0.06	0.04	0.07	0.01	0.00
Cases with >0.5 membership	17	10	7	7	5	1

Overall Solution Consistency 0.84 (intermediate), 0.71 (parsimonious)
Overall Solution Coverage 0.93 (intermediate), 0.98 (parsimonious)

presents all three solutions,[80] but more commonly researchers are selective in the way they report the solutions – ie whether to focus on the complex, parsimonious or intermediate solution, or combinations of those.[81] In the present case, we discuss the parsimonious and intermediate solutions, as the complex solution did not reduce the data to an extent that it would facilitate interpretation of the configurational outcomes.

With these methodological explanations and choices, we can now turn to the results.

(c) Result and discussion for high national convergence

Table 5 presents the results for the main question of interest of this paper: what determines high levels of national convergence for the observations of this study? The solution coverage and solution consistency of the intermediate solution have high numbers (above 0.8). As one would expect, the parsimonious solution has lower overall consistency but higher overall coverage. The main focus of the following analysis will be the intermediate solution with some references to the parsimonious one.

Different from the output of a regression analysis, Table 5 does not contain different models but different pathways. Thus, fsQCA considers that different combinations can lead to the same outcome of interest (in the present case: high convergence).[83] We also established that none of the conditions alone is necessary for the outcome.[84] In the comparison of the different pathways, it can be seen that

[80]Eg, Arvind and Stirton, above n 6.

[81]Eg, Witt and Jackson, above n 68; García-Castro et al, above n 32.

[82]The cases with more than 0.5 membership are, referring to the five directives in a chronological order (see Table 2, above): for pathway (1): Romania 1,2,4,**5**; Netherlands 1,3,4,**5**; Ireland 1,3,4,**5**; Belgium 1,**5**; Germany 1,5; France 1; for pathway (2): Germany **2**,3,4,**5**, UK **2,3,4**, Netherlands 1,4, Belgium 1; for pathway (3): UK 1,3,5, Germany 1,3, France 5, Romania 4; for pathway (4) Romania **1,2,3,4,5**, Ireland 2, Germany 1; for pathway (5): Netherlands 3,5, Germany 3, UK 3, France 3; for pathway (6): France 2. The cases with more than 0.7 membership have been underlined in bold just above.

[83]Accounting for causal complexity is one of the advantages of (fs)QCA, see Misangyi at al, above n 68.

[84]The consistencies for the necessity of the conditions are: EU convergence: 0.5; No existing legislation: 0.76; Good legal system: 0.7; Public support for EU: 0.75; Effective government: 0.77; Left-wing government: 0.66; No interruption by elections: 0.54.

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all of the paths have high consistency and that there is a trade-off with the raw coverage of a path as it decreases from the first to the last pathway.

In an ideal world, an interpretation of fsQCA results would be able to show precisely how each of the pathways accounts for a plausible configuration of conditions. In the present case, we can provide some explanations of the configurations; however, as a caveat, we also need to note that it is not possible to present perfect narratives that would rationalise all of the conditions and pathways (nor can we exclude that, for particular cases, idiosyncratic conditions may not also play a role[85]).

To start with, it is noticeable that EU convergence is often relevant but only in combination with other factors, which confirms the non-empirical finding by Baghi, emphasising how the harmonisation debate must be equally viewed in the light of the social and political aspects of the legal systems which are desired to be converged.[86] On the basis of the factors analysed in this study, it can be said that the favourable attitude of an EU directive towards convergence is mediated through the domestic level. In particular, it can be seen that in two of the three pathways EU convergence is relevant in combination with 'no existing legislation'. This configuration is plausible, namely that lack of prior domestic legislation followed by a favourable EU directive (ie a directive with a high score for European convergence) leads to a high level of national convergence.

For the two other groups of conditions, the general picture is that 'national politics' features more often than 'country characteristics', notably also with two of the conditions in the parsimonious solution. The role of national politics is rarely explored in consumer protection literature:[87] thus, this is an important finding, pointing to the need to 'bring in politics' to the debate about convergence and consumer sales law. The fact that country characteristics are less relevant can be interpreted in a progressive way, namely that countries are not somehow impaired by circumstances such as performing poorly in indicators of 'good law' or low public support for the EU when it comes to the capacity to implement full legal convergence.

Considering the typical cases, ie those with more than 0.5 membership, or even more than 0.7 membership,[88] the analysis of the pathways can be explained as follows. The first pathway includes the largest number of cases, notably four of the respective Romanian, Dutch, Belgian and Irish cases. The two conditions of a favourable attitude of the respective EU directive and public support for the EU complement each other well. It may then also be plausible that the main countries of this pathway are four of the relatively less populous Member States as here there may be greater willingness to respond to such conditions than, say, in France, Germany and the UK. All four cases with more than 0.7 membership included in the first pathway are linked to the Unfair Commercial Practices Directive, the only maximum harmonisation directive in the study.

By contrast, the cases of both the second and the third pathway are predominantly from Germany and the UK. Both share the condition of an effective government, which can also be explained in terms of trust in public institutions. In the second pathway, this is combined with the condition of a good legal system and in the third pathway it is combined with the conditions of EU convergence and no existing legislation. It can therefore be said that both countries show more complex configurations when it comes to the determinants for high national convergence, with the second pathway being somehow more generic and the third pathway linked to the gap a new directive may be able to fill.

The fourth pathway applies to all of the Romanian cases. This is likely to be due to the fact that Romania transposed all directives at around the same time, given that all these instruments pre-date Romania's accession to the EU in 2007. In substance, the conditions can be seen as typical for one of the EU accession countries: there is no experience with EU legislation, no existing legislation on

[85]See also the Conclusion, below.

[86]A Bagchi 'The political morality of convergence in contract' (2018) 24 European Law Journal 36.

[87]For instance, see Tenreiro's article on the challenging negotiations around the Unfair Contract Terms Directive from a perspective of how certain Member States influenced negotiations: M Tenreiro 'The Community Directive on Unfair Terms and National Legal Systems – the principle of good faith and remedies for unfair terms' (1995) 3 European Review of Private Law 273. For research considering the role of national politics see Section 2 (c), above.

[88]See n 82, above.

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matters covered by EU directives, and public support for the EU is high because of the low level of trust in national institutions, and high level of trust in supranational institutions, combined with no disruption of the law making process by new elections.

The conditions of the fifth and sixth pathways are the most complex ones (and they do not show any cases with more than 0.7 membership), with the former being mainly about EU convergence and country characteristics and the latter being mainly about national politics. As the sixth pathway only includes one case, it is more interesting to consider the fifth pathway more closely. Here, it is noteworthy that four of the five cases concern the Distance Selling Directive. The relevant conditions show that there has been a gap in the respective Member States filled by a favourable EU Directive and supported by left wing politicians in government, presumably since the latter are keen to restrict the power of large multi-national corporations engaged in distance selling.

(d) Result and discussion for low national convergence

The fsQCA results discussed in the following reverse the question, asking which pathways lead to particularly *low* levels of national convergence. Here too we established that none of the conditions alone is necessary for the outcome.[89]

In Table 6, EU convergence is not relevant in any of the pathways. This is an interesting finding, as it shows that it is mainly domestic factors, not the EU approach, that lead to low levels of legal convergence. The condition most relevant – and which is also present in the parsimonious solution – is that there is an interruption by elections (to be precise, not 'no interruption by elections'). This is

Table 6. Determinants for low national convergence ('intermediate solution' with results also in 'parsimonious solution' in large signs)[90]

	Pathways		
	1	2	3
EU convergence			
Country characteristics			
No existing legislation			⊖
Good legal system			
Public support for EU		⊖	
National politics			
Effective government	⊖		
Left-wing government			
No interruption by elections	⊖	⊖	⊖
Consistency	0.84	0.76	0.59
Raw Coverage	0.53	0.45	0.36
Unique Coverage	0.15	0.05	0.03
Cases with >0.5 membership	8	8	5

Overall Solution Consistency 0.63 (intermediate), 0.50 (parsimonious)
Overall Solution Coverage 0.70 (intermediate), 0.75 (parsimonious)

[89]The consistencies for the necessity of the conditions are here: EU convergence: 0.64; No existing legislation: 0.47; Good legal system: 0.68; Public support for EU: 0.66; Effective government: 0.75; Left-wing government: 0.80; No interruption by elections: 0.74.

[90]The cases with more than 0.5 membership are, referring to the five directives in a chronological order (see Table 2, above): for pathway (1): Netherlands 2,3,5, Ireland 1,3, Belgium 4,5, France **3**; for pathway (2): France 3,4,5, UK **1,4**,

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plausible, as such an interruption may negatively affect both the timeliness and the substance of an implementation of EU law.

Considering the typical cases, ie those with more than 0.5 or even 0.7 membership,[91] the analysis of the three pathways can be explained as follows: in the first pathway are three cases from the Netherlands, two from Belgium and two from Ireland. These are countries with often complex coalition governments; thus, it is plausible that here we have situations where both the lack of an effective government and interruption by election lead to low levels of national convergence.

The second pathway refers to situations where, in addition to the interruption by elections, low support for the EU has had a negative impact on national convergence. This includes, perhaps unsurprisingly, two cases from the UK – which are also the ones that even have 0.7 membership – but also three from France, two from Germany and one from Belgium. Those latter cases are primarily about the more recent directives; thus, they may reflect the rise of Eurosceptic populism across the EU, notably in France with the Front National, which also impacts on the mainstream political parties. By contrast, the third pathway mainly concerns the convergence as regards the two older directives; thus, this may reflect that the 'interference' of EU law into existing prior legislation was felt to be more severe than in later years.

Conclusion

The body of European consumer law is ever-growing. As the European legislator continues its endeavours of harmonising national standards,[92] questions about the overall impact of this policy must be raised. In particular, the effects of convergence need to be explored from different perspectives, as their assumed success is at the centre of the entire body of consumer policy proposed by the European Commission. This paper contributed to this debate by way of using a new Convergence Index and the method of an fsQCA, which had yet to be applied to European consumer sales law.

It is one of the features of QCA that it fills the gap between low-number case studies and large quantitative data analyses. In our case, we had 35 observations, which is a typical number of cases for QCA. The advantage of not having more cases is that its tools leave more freedom to the researcher to make sense of the dataset and the outcomes of the analysis. It also means that the results can be analysed in a more nuanced way than in a 'black-box-style' large-scale statistical analysis.

A corresponding limitation is, however, that we do not claim that our results offer a universal finding that may also hold, for example, for other Member States and for other areas of European harmonisation. The relatively small number of observations also means that it is necessary to be selective in the choice of explanatory factors:[93] thus, this paper could only include seven possible determinants; a necessary caveat is therefore that further determinants may play a role for particular countries and directives.[94]

The question this paper aimed to explore was about the determinants for national convergence of EU consumer sales law. The scores for national convergence were based on a unique coding of five directives in seven Member States. As possible explanatory factors, we considered seven conditions:

Germany 2,**3**, Belgium 4; for pathway (3): Germany 2,5, France 1, Ireland 1, Netherlands 1. The cases with more than 0.7 membership have been underlined in bold just above.

[91]See n 90, above.

[92]The most recent initiative is the so-called New Deal for Consumers, see https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal-consumers_en

[93]For the choice of possible determinants in this paper see Section 2 (c), above.

[94]For example, there could be national political dynamics in particular sectors, such as the influence of lobbying; for such cases see eg Duncan, above n 35; JW Cioffi and M Höpner 'The political paradox of finance capitalism: interests, preferences, and center-left party politics in corporate governance reform' (2006) 34 Politics & Society 463; the role of politics may also be related to behavioural aspects of consumer protection law, as discussed in H-W Micklitz et al (eds) *Research Methods in Consumer Law: A Handbook* (Cheltenham: Edward Elgar, 2018).

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the one on EU convergence, coded for each of the five directives, and two groups of three conditions on 'country characteristics' and 'national politics'.[95]

The main findings can be summarised as follows: EU convergence is often relevant but only in combination with other factors. In other words, the harmonising policies envisioned by the European legislator have a limited effect in so far as they do not account for national features of Member States, and a favourable attitude of an EU Directive towards convergence is mediated through the domestic level. With respect to the two other groups of conditions, the general picture is that 'national politics' matters more than 'country characteristics'. In the former group of conditions, it is in particular the condition on 'effective government' that accounts for high levels of national convergence. When we examine why countries have particularly low levels of convergence, we find that 'no interruption by elections' is the most relevant condition.

These findings have important policy implications. They show, first, that it matters how far an EU directive is favourable towards convergence. Secondly, the fact that country characteristics are less relevant than national politics means that countries are not somehow impaired by certain country characteristics when it comes to the capacity to implement full legal convergence. Thirdly, the strong showing of national politics is the most important finding of this paper. The role of national politics is rarely explored in the consumer protection literature:[96] thus, we suggest that there is the need to 'bring in politics' to the debate about convergence and consumer sales law and further explore the impact of politics on this field of law with mixed methodologies and perspectives.

Appendix 1 Descriptive statistics and correlation matrix

(a) Descriptive statistics (all: n = 35; min. = 0; max. = 1)

	Mean	Median	Standard deviation
National convergence	0.624	0.61	0.218
EU convergence	0.602	0.67	0.332
No existing legislation	0.671	1	0.382
Good legal system	0.555	0.54	0.291
Public support for EU	0.592	0.75	0.300
Effective government	0.576	0.55	0.221
Left-wing government	0.487	0.53	0.281
No interruption by elections	0.429	0	0.502

[95]Future research could examine these groups of variables as nested within clusters, analogous to a form of multilevel item response theory model.

[96]For the previous literature see the references in Section 2 (b) and (c), above.

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(b) Correlation of conditions

	National convergence	EU convergence	No existing legislation	Good legal system	Public support for EU	Effective government	Left-wing government	No interruption by elections
National convergence	1	-0.003	0.096	-0.219	-0.092	0.019	0.140	0.644
EU convergence	-0.003	1	0.170	-0.183	-0.079	0.106	0.031	-0.237
No existing legislation	0.096	0.170	1	-0.146	-0.039	-0.228	0.027	0.219
Good legal system	-0.219	-0.183	-0.146	1	-0.130	0.103	0.039	-0.368
Public support for EU	-0.092	-0.079	-0.039	-0.130	1	-0.642	-0.100	-0.088
Effective government	0.019	0.106	-0.228	0.103	-0.642	1	-0.073	-0.004
Left-wing government	0.140	0.031	0.027	0.039	-0.100	-0.073	1	0.203
No interruption by elections	0.644	-0.237	0.219	-0.368	-0.088	-0.004	0.203	1

Appendix 2 Truth tables

(a) Truth table for high national convergence

EU convergence	No existing legislation	Good legal system	Public support for EU	Effective government	Left-wing government	No interruption by elections	*Outcome*	*Consistency*	*Cases*
1	1	0	1	0	0	1	1	1	*Romania 1,3,5*
0	1	0	1	0	0	1	1	1	*Romania 2*
1	1	0	1	1	0	1	1	1	*Germany 1*
0	1	1	1	0	1	1	1	1	*Ireland 2*
1	1	0	0	1	1	1	1	1	*UK 5*
1	1	1	0	1	1	1	1	1	*UK 3*
0	0	0	1	1	1	1	1	1	*France 2*
1	1	0	1	1	1	1	1	1	*Romania 4*
1	0	1	1	1	1	0	1	0.97	*Germany 5*
1	0	0	1	1	1	0	1	0.97	*France 1*
1	0	0	1	0	0	0	1	0.95	*Ireland 1*
1	1	1	1	0	0	0	1	0.95	*Ireland 3*
1	1	1	0	1	1	0	1	0.94	*Germany 3*
1	1	1	0	0	1	0	1	0.94	*France 3*
1	1	0	0	1	0	0	1	0.90	*UK1, France 5*
1	1	0	1	0	1	0	1	0.90	*Belgium 5*
1	0	1	1	1	0	0	1	0.90	*Netherlands 1*
0	0	1	0	1	0	0	1	0.88	*Germany 2*
1	1	1	1	0	1	0	1	0.87	*Netherlands 3,5*
0	1	1	1	0	1	0	0	0.79	*Netherlands 2*

(b) Truth table for low national convergence:

EU convergence	No existing legislation	Good legal system	Public support for EU	Effective government	Left-wing government	No interruption by elections	*Outcome*	*Consistency*	*Cases*
1	1	1	0	0	1	0	1	1	*France 3*
0	0	1	0	1	0	0	1	1	*Germany 2*
1	1	0	1	0	1	0	1	0.95	*Belgium 5*
1	1	1	1	0	1	0	1	0.93	*Netherlands 3,5*
0	1	1	1	0	1	0	1	0.91	*Netherlands 2*
1	1	0	0	1	0	0	1	0.90	*UK 1, France 5*
1	0	0	1	1	1	0	1	0.89	*France 1*
1	0	1	1	1	0	0	1	0.88	*Netherlands 1*
1	1	1	0	1	1	0	1	0.88	*Germany 3*
1	0	1	1	1	1	0	1	0.85	*Germany 5*
1	1	1	1	0	0	0	1	0.83	*Ireland 3*
1	0	0	1	0	0	0	1	0.82	*Ireland 1*
0	0	0	1	1	1	1	0	0.77	*France 1*
1	1	0	0	1	1	1	0	0.71	*UK 5*
0	1	0	1	0	0	1	0	0.71	*Romania 2*
1	1	0	1	1	0	1	0	0.65	*Germany 1*
1	1	0	1	0	0	1	0	0.64	*Romania 1,3,5*
1	1	0	1	1	1	1	0	0.63	*Romania 4*
0	1	1	1	0	1	1	0	0.58	*Ireland 2*
1	1	1	0	1	1	1	0	0.52	*UK 3*

Note: The cases refer to the countries and the five directives on (1) Doorstep Selling, (2) Unfair Contract Terms, (3) Distance Selling, (4) Consumer Sales and (5) Unfair Commercial Practices.