

European consumer law: making sense

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Rede

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Door
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Mijnheer de Rector Magnificus,
Geachte collega's en vrienden,

Het is voor mij een grote eer om vandaag te mogen spreken over de ontwikkeling van het Europees consumentenrecht. De onstuimige groei van dat rechtsgebied biedt de mogelijkheid om een substantiële bijdrage te leveren aan de ontwikkeling van het Europees privaatrecht, het Nederlands privaatrecht en de rechtsvergelijking. In dat perspectief heb ik gekozen voor een benadering die zowel het belang van het consumentenrecht benadrukt, maar ook recht doet aan de plaats van het consumentenrecht in het juridisch wetenschappelijk onderzoek en onderwijs. Vandaar de titel van deze oratie: *European consumer law: making sense*.

If one looks carefully at the European Commission's Action plans regarding European consumer law over the past 30 years (the first EEC preliminary programme for consumer protection and information policy dates from the 25th of April 1975) at least one thing is very clear: consumer protection is not merely one of the means of completing an internal 'frontier free' market: it now exists for itself. But is consumer law market behaviour law or truly law for the benefit of the consumer?¹ In an effort to bring European consumer law closer to the citizens, the Commission has laid down ten basic principles. Most of these are familiar to all of us:

'buy what you want, where you want; if it doesn't work, send it back; know what you are eating; protecting while you are on holiday; consumers should not be misled, and sometimes consumers can change their mind. Comparing prices should be easy, contracts should be fair to consumers, and in cross-border disputes, effective redress should be available.'

This basic list apparently brings consumer law back to the consumer. But can consumers 'help themselves' with these principles? Lawyers will immediately comment that these general 'slogans' are not effective, and lack legal certainty. The Commission appreciates this. In a footnote an 'important legal notice' is given: the principles are intended for information purposes only, and do not constitute official guidance from the Commission on the interpretation of EU laws or policies. But how should consumers make sense of this in daily life?

Recently, my colleague Schulte-Nölke has reviewed the current situation concerning European consumer law², and one cannot but agree with his assessment that at present, a conclusive, coherent corpus of European consumer law does not exist. European consumer law exists in the form of individual pieces of legislation, which have grown over the course of many years under very different political conditions; overlapping notions and structures

¹ R.H. Stutterheim, *Recht voor de burger*, Amsterdam 2002. The application of the rules for a free market requires complex legal reasoning, cf. J. Borgesius, *Economisch ordeningsrecht en verzekeringsbedrijf*, Groningen, 2004, K.J. Cseres, *Competition Law and Consumer Protection*, Utrecht/Deventer 2005, departs from the perspective of law and economics, that is of justice, fairness, and reasonableness on the one hand, and of efficiency on the other.

² H. Schulte-Nölke, *Perspectives for the development of European consumer law*, Tijdschrift voor Consumentenrecht en Handelspraktijken (TvC) 2005, p. 137-140, with many references.

are lacking, except – up to a point - in specific categories such as the term ‘consumer’. The exact definition of ‘consumer’ is unclear.³ Inspired by the US Uniform Commercial Code Klik⁴ has questioned the feasibility of a consumer protection system without the use of the concept ‘consumer’, and – looking at the consumer’s counterpart – asked whether we actually need the concept at all. It must be said: even in European consumer law the concept is not always used (for example: the notion of consumer is absent in the product liability directive). There seemingly is a beginning of consensus regarding its definition: a consumer is a natural person, acting for purposes which are outside his trade, business or profession. This definition is quite general, but in practice always limited to transactions covered by the relevant EC legislation. The Court of Justice of the European Communities (CJEC) has its own views on the matter, apparently in order to avoid the question whether it should institute its own consumer protection policy by protecting weaker parties in all events, or so it seems.

Consumer interests are collective interests⁵, and consumers are somehow interchangeable: the United States Model regarding class actions opens the possibility of fluid class recovery. An interesting example of fluid recovery was the judgment⁶ against the Yellow Cab Co. by the courts of California at the end of a group action brought by a passenger on behalf of the other members of the class. The company had increased its rates by modifying its meters in violation of a municipal ordinance, causing its passengers to pay an excessive price. Since it was impossible to identify all the damaged passengers and compensate them, the court ordered a fluid recovery: the defendant company would have to charge a lower than normal rate until the illegal gains had been returned to the class of users.

The area of consumer law is not simple: at least three layers of relevant legislation exist: community law, member state laws and the emerging third layer: the Common Frame of Reference (and, possibly also, the Optional Instrument).

Schulte-Nölke describes a dazzling future perspective of consumer law: a spiral movement of mutual influences pointing in the direction of the upper levels of consumer protection offered by the existing spectrum. Consumer law might be more colourful than expected!

Today, I would like to take a closer look at this perspective: what is the truth about European Consumer law, and does it make sense? This inquiry⁷ is looking for the answer to a question, which will have to explain everything that those engaged in the search take it to be the business of consumer law to explain.

Borrowing a well-known expression: make no mistake, consumer law is serious business. Consumer law is an important and substantial part of the *acquis communautaire*. Present

³ M.B.M. Loos, WPNR 05/6638, p. 771-772.

⁴ P. Klik, *The consumer in consumer law: who needs him? Some reflections on the consumer’s counterpart*, TvC 2005, p. 39-40.

⁵ Viewed from the public and private law dichotomy, the question has been raised whether the public, as consumers, have the right to be properly informed (as implied from the whole notion of consumer protection): G.H. Samuel, *Ex facto ius oritur*, Civil Justice Quarterly 1989, p. 62-63.

⁶ *Daar v Yellow Cab Co.*, 67 Cal. 2d 695, 63 Cal. Rptr. 724, 727, 433 p. 2d 732 (1967). The example can be found in European Consumer Law Group report *The need for group action for consumer redress*, ECLG/033/2005.

⁷ B. Williams, *Truth and truthfulness*, Princeton 2002, p. 257.

day-directives oblige Member States to ensure that producers and distributors comply with their obligations; Member States shall define the tasks, powers, organisation and cooperation arrangements of competent authorities, and if rules on penalties are applicable, they should be implemented. The penalties provided for shall be effective, proportionate and dissuasive.⁸ This requirement is in conformity with CJEC-case law: penalties for infringements shall be, in any event, effective, proportionate and deterrent, see for example the Yonemoto-case⁹ regarding hydraulic press brakes in industrial machines. In this case, rules regarding essential health and safety requirements were at stake. Member States are required, within the bounds of the freedom left to them by Treaty provisions, to choose the most appropriate forms and methods to ensure the effectiveness of directives. Where a directive does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. While the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and which, in any event, make the penalty effective, proportionate and deterrent. In this way, France had to cope more strictly with vandalism: I am not referring to the present troubles, but to the problems in 1994 regarding French farmers who attacked Spanish transports of fruits and vegetables.¹⁰

The history, the achievements and ambitions of European consumer law have been thoroughly examined¹¹. Consumer law is truly 'Europeanized'.

Joerges states¹² that its proponents not only know and cite each other, they strive for a common cause. Their approach, however, differs. One can choose for a thematic description, departing from the perspective of the consumer as a passive participant on the internal market¹³, "als passiver Marktbürger". Reich and Micklitz have thus developed consumer law doctrine beyond the original approach, as described by Vivienne Kendall, which was: the exposure of the individual as a consumer to risks which face any of us in everyday life. There is no doubt that everyday life is full of risks, varying from the hazards of food and non-food products (as described by my colleague Ellen Vos¹⁴), to minor consumer problems of a very specific nature. Anyone will appreciate the fact that enjoying too much fast food is hazardous; but does this imply that a consumer who is overweight due to the fact that he or she has indulged in eating too many hamburgers is entitled to compensation from McDonald's? The US House of Representatives have denied claims

⁸ Art. 7 Dir. 2001/95/EC.

⁹ CJEC 8 September 2005, Case C-40/04 (Syuichi/Yonemoto).

¹⁰ CJEC 9 December 1997, Case C-265/95 (Commission v France).

¹¹ Chr. Joerges, *The Challenge of Europeanization in the realm of private law: a plea for a new legal discipline*, Duke Journal of Comparative & International Law Vol. 14:149, 2004. Duke has developed rapidly since the 1920s: (Michael) Few was convinced that the key to becoming a great university was to build a strong faculty. He embarked on a campaign to recruit the best professors with unheard-of salaries. One leading Harvard psychologist was wooed by telegram with a remarkable offer. The Harvard professor quickly cabled back, 'I accept. Where is Durham?', S. Mansfield, *The richest girl in the world*, Kensington publishing (NY), 1994, p. 104.

¹² P. 156, fn. 15.

¹³ N. Reich & Hans-W. Micklitz, *Europäisches Verbraucherrecht*, Nomos 2003, p. 11.

¹⁴ E.I.L. Vos, *Overcoming the Crisis of Confidence: Risk Regulation in an enlarged European Union*, inaugural lecture Maastricht University, 2004.

from fat people against the fastfood-industry in the recent ‘Cheeseburger Act’ (October 20, 2005). And if one looks carefully, many products are dangerous. For instance, hospitals in the United Kingdom have registered 7093 casualties in 2004 caused by Wellington boots (regenlaarzen). People wearing ‘wellies’ have slipped whilst walking, and many have pulled a muscle when putting them on. Should there be a ban on rubber boots¹⁵? Or can we expect detailed instruction manuals by the rubber boot-industry, in an effort to avoid liability by informing the consumer, seeking ‘informed consent’ for wearing them? And there is a wider perspective: rubber boots contain many chemicals and, when disposed of, present serious environmental hazards (and apparently jam garbage incinerators). Consumer law presents legislators, courts and lawyers with the difficulties of ‘filling in’ and ‘leaving out’: areas that have been regulated require a clear explanation and areas that have been left out (possibly in the expectance of future developments) present further difficulties: if one leaves out, one is left with an incomplete or unconvincing explanation, or none at all¹⁶. And, in recent years, another dimension of European consumer law has added to its importance. Consumer protection has been both a functional need and a normative achievement since the 1970’s¹⁷. Initially, the European Commission supported clear (pertinent) research activities and the formation of a European community of consumer law advocates. The private law community, however, generally responded with benign neglect for as long as practically possible. The growing weight of European (consumer) law lead to a profound change in attitude: as Joerges states:¹⁸

“the lamenting over the patchwork character of European legislative acts characterized by early initiatives in the realm of consumer protection was followed by a plea for nothing less than a European codification of private law”.

Although this seemingly has cooled off a bit since the problems the European Constitution¹⁹ encountered, this dimension of European consumer law is a strong and

¹⁵ With the potential risk of eliminating such fine events as rubber boot-throwing (47.5 m. for men, 39.6 m. for women, Guinness 1978, p. 229).

¹⁶ Williams (2002), p. 249-250.

¹⁷ Joerges (2004), p. 156.

¹⁸ Joerges, l.c. See also Chr. Joerges, *On the Legitimacy of Europeanising Private Law: Considerations on a Law of Justi(ce)-fication (justum facere) for the EU Multi-level System*, METRO, Institute for transnational legal research, Maastricht 2003 (*Ius Commune Research School*). Legal diversity will remain part of a future Europe: J.M. Smits, *The Good Samaritan in European Private Law, On the Perils of Principles without a Programme and a Programme for the Future*, Maastricht/Deventer 2000, p. 46. The question whether the notion of a common civil code is necessary has been fiercely debated (see also fn. 46): P. Legrand, *Against a European Civil Code*, 60 *Modern Law Review* 1997, p. 44 ff.; and see A. Watson, *Legal Transplants and European Private Law*, METRO, Institute for transnational legal research, Maastricht 2000 (*Ius Commune Research School*). The ‘best practices’ approach seems valuable: competing legal systems *in lieu of* a supra-national system of private law, J.M. Smits, *NTBR* 2004/10, p. 490-500, and H.-B. Schäfer, *Direktiven als Ersatz für Humankapital: Empfehlen sich für Entwicklungs- und Transformationsländer präzise Rechtsnormen als für hochentwickelte Staaten?*, *RabelsZ* Bd. 67 (2003) S. 550-580: *Polizeyrecht* used to reign since the 16th Century, for example: *Nach einer Süddeutschen ‘Polizeyordnung’ war es verboten, Fische auf einem Fischmarkt zu verkaufen, wenn sie nicht eine bestimmte Größe aufwiesen. Dieses Verbot kontrollierten die Polizeibeamten anhand von Schablonen mit realitätsgetreuen Abbildern der Fische in der zulässigen Minimalgröße. Diese wurde dann mit der Größe der Fische, die auf dem markt angeboten wurden, verglichen*, at p. 575.

¹⁹ For a holistic approach : D. Curtin, *Mind the Gap: the Evolving EU Executive and the Constituion*, Walter van Gerven Lecture (3), Leuven (*Ius Commune Research School*) 2004. Quite cautious on the question whether the Constitution could generate or construct a sense of European solidarity in the longer term: G. de Búrca, *The EU Constitution: in Search of Europe’s International Identity*, Walter van Gerven Lecture (4), Leuven (*Ius Commune Research School*) 2005.

effective force in the process of Europeanization. Whether this could lead to a return to orthodox supranationalism, or true European citizenship by empowering Member State subjects is a different question²⁰. Clearly, the law itself must learn how to find principles and provide procedures which organize the interactions between political actors and courts at varying levels of governance, and must be able to accompany and legitimise social change (Joerges).

Present day consumer law is everybody's business: Member States, the EU, professionals, courts, lawyers, consumer organisations, supervising authorities and consumers themselves.

The European Commission has decided to abolish 15.000 of the 80.000 pages of EU-regulation: the *acquis communautaire* should become more simple, cheap and effective²¹. EU-regulations will be more widely used as an instrument for unification, and the use of directives should be limited.

European consumer law doctrine faces the question how to describe systematic aspects of this area of law in view of its structure, outlook and concepts. Trying to 'make sense' requires accuracy and sincerity, and the willingness to appreciate realism and fantasy: what are people's beliefs, and are they satisfied?²²

And the story goes on: consumer law is far from being complete. Hondius has²³ described the tendency to enlarge the content of consumer law by requiring attention for other consumer concerns, such as discrimination, dumping, sustainable consumption and development, and environmental issues. This implies that consumer law could be embedded in other, very different areas of law than private law. The recent change in the approach of protecting the interests of consumers through better information and enhanced control by supervising authorities presents additional difficulties for the development of a comprehensive theory of consumer law. Are we dealing with a 'command and control' consumer society, or is enforcement of existing rules sufficient?²⁴ And how should the interests of commerce be protected? "Das Sinken der Loyalität" worries trade and industry: "Es macht keinen Spaß mehr, zu verkaufen" is the point of departure for Pinczolit's book 'Der befreite Vertrieb'²⁵.

An investigation into the structure, outlook and concepts of consumer law should depart from two basic questions: what is the common measure of consumer law, and: what is the truth about consumer law as an area of law, or even: a goal in itself. The investigation should focus on the development of consumer law, and finally assess its impact.

I would like to give some examples of the difficulties European consumer law has to face.

²⁰ Joerges (2004), p. 196. Consumer law, as a right-creating category, poses threats on many classification fronts. Consumer rights are now sufficiently well established as no longer to require any patronising treatment from private lawyers, cf. G. H. Samuel, *Consumer rights and the law of restitution*, Northern Ireland Legal Quarterly [Vol. 38, No. 4 Winter 1987], at p. 329.

²¹ Press Release 25 October 2005; see COM(2005) 456 final, Report from the Commission – First Annual Progress Report on European Contract Law and the *Acquis* Review, 23 September 2005.

²² Williams (2002), p. 131, 126, 256-257.

²³ E.H. Hondius, *Kroniek Consumentenrecht*, Nederlands Juristenblad (NJB) 2004, p. 1660-1671.

²⁴ Nederlands Tijdschrift voor Burgerlijk Recht (NTBR) 2004, nr. 10 (Rinkes).

²⁵ Karl Pinczolit, *Der befreite Vertrieb*, 2004, p. 41.

One of the most important difficulties is the question of the willingness of all involved to deal comprehensively with an issue that is quite important for consumers. I'm referring to the problems consumers encounter when entering into consumer credit agreements.

Present European consumer credit legislation dates from 1987²⁶. It has become outdated, and fails to stimulate cross-border lending. Furthermore, the evolution and growth of the market for consumer credits requires legislative action. The Commission aimed in its initial proposal of 2002²⁷ at transparency regarding costs, terms and conditions. The consumer should be enabled to compare offers; money-lenders should assess the risks of lending the consumers money: they should 'know their clients'. The Commission's proposal encountered substantial resistance, upon which the original proposal was restricted in scope and certain issues were left out (for instance: the obligation for Member States to set up national consumer credit databases enabling creditors to identify consumers who are already in debt). This resulted in an amended proposal in 2004²⁸, which - again - was not received with unanimous approval. For example, the European Consumer Law Group was not satisfied²⁹ with the aim of the directive to harmonise the field of consumer credit in full (maximum harmonization). Moreover, various types of credit were excluded, such as real estate/housing credit, operational lease, small credits and very large ones. Especially, the decision to exclude investment-credits (securities market), was received with critique: consumers who take up credit in order to invest in the securities market deserve protection on a similar basis as regular consumers. Presently, the proposal has been modified³⁰. The new (2005) draft is the result of changes made on the basis of objections and reflections made by members of the European Parliament, Council and consultations with stakeholders. The Commission expresses its hope that this will facilitate adoption of the proposal. However, the modified proposal continues to balance in a delicate way between the consumer credit business and consumer protection against the background of one of its main objectives: establishing the conditions for a genuine internal market for consumer credit, increasing competitiveness of EU creditors by enhancing competition and promoting product innovation.

The consumer should benefit from harmonized provisions in the area of retail financial services, coupled with targeted mutual recognition. The method of calculating the cost of credit is - for credits up to € 50.000 - harmonised, consumers should receive a list of information and have the right to break a credit contract if the related purchase is cancelled. Moreover, consumers will get a right of withdrawal of up to 14 days³¹.

The Commission³² maintains the full harmonization approach, with a degree of flexibility for Member States in certain areas. Only those elements explicitly dealt with in the text are fully harmonized whereas issues such as joint and several liability are left to the national legal systems.

²⁶ Directive 87/102/EEC, OJ 1987, L 42/48, also published in H. Beale e.a. (eds.), *Fundamental texts on European Private Law*, Hart Publishing (Oxford) 2003.

²⁷ COM(2002) 443 final, V. Heutger, *The Commission's revised proposal for a new EU Consumer Credit Law - strengthening cross-border trade?*, TvC 2005/3, p. 94-99.

²⁸ COM(2004) 747 final.

²⁹ European Consumer Law Group report ECLG/030/2005.

³⁰ COM(2005) 483 final.

³¹ IP/05/1237.

³² COM(2005) 483 final, p. 7.

The proposed provision of mutual recognition poses additional difficulties: the European Consumer Law Group had warned that conflict of laws rules in Directives are not satisfactory at all in terms of legal certainty. The modified proposal complements full harmonization (to the benefit of consumers) with mutual recognition for a limited number of issues (thus helping consumer credit businesses). A creditor would only have to comply, for an activity in another Member State than the one he is established in, with legal requirements of its Member State of origin (or equivalent ones) and not with those of the host Member State. In the area of contract law, this could lead to another result than foreseen by Article 5 of the Rome Convention. In an Article 5 situation, which would lead to the application of the law of the country where the consumer has his habitual residence, this latter law may establish standards that, in relation to the equivalent standards applicable in the incoming creditor's home country, restrict that creditor's activity, for instance by being higher (or different) than his home country standards. In that case, if areas mentioned in the mutual recognition clause are concerned, the host Member State has to ensure that the said standards would not apply to the contract. Either the law chosen by the parties, or, in the absence of such a choice the requirements of the creditor's home country would continue to apply. Member States shall take the necessary measures to ensure that consumers do not lose the protection granted by this Directive by virtue of the choice of the law of a third country as the law applicable to the credit agreement, if the credit agreement has been a close link with the territory of one or more Member States. Not for the first time, European Consumer law is thus confronted with the principles of private international law, with its own desires regarding – i.a. - consumer protection.³³

On a more general note, the modified proposal for a directive on consumer credit makes manifestly clear that consumer law is about consumer protection on an internal market where conflicting interests and goals have to be reconciled.

Willingness to achieve the best results is necessary from both sides of the market. However, the question is who really desires to foster the interests of consumers on an equal level as lobbying professionals? The legitimacy of EU-proposals depends to a large extent on the system of consultation (comitology)³⁴, but in the area of consumer law consultation is at its best an institutionalised dialogue without teeth³⁵. How should one then assess the spirit of the attempt to regulate the European consumer credit market from the perspective of the desires of consumer protection? If the proposal is adopted, consumer credit law will 'mix' European and Member State laws, enriched with the principle of (creditor's) home country control.

³³ CJEC 9 November 2000, Case C-381/98 (Ingmar GB Ltd/Eaton Leonard Technologies Inc), see *Nederlandse jurisprudentie* (NJ) 2005, nr. 332, ann. By Th.M. de Boer: should harmonised or unified private law prevail over rules regarding conflict of laws? The Internet leads to unexpected problems in this field; perhaps transnational law can offer solutions, cf. G.-P. Callies, *Transnationales Verbrauchervertragsrecht*, *RabelsZ* Bd. 68 (2004) S. 244-287: *Von einem transnationalen Verbrauchervertragsrecht wird man im Ergebnis erst sprechen können, wenn sich die im Wettbewerb der verbraucher-schützenden Zivilregimes herausprozessierenden best practices zu Prinzipien und Grundregeln grenzüberschreitender Verbraucherverträge verdichten, die die gesellschaftliche Praxis des Abschlusses solcher Verträge und die alternative Streitschlichtung tatsächlich anleiten*, and – more ambitious – in 'Global German': *Denn in Gegensatz zu den regional stark divergierenden Lösungen des mandatory consumer law bildet das facilitative consumer law gleichsam den Common Core der nationalen Verbrauchervertragsrechte, für den sich der nötige rough consensus über Prinzipien eines Weltverbrauchervertragsrechts mit Aussicht auf Erfolg besorgen läßt.*

³⁴ M. De Witte & A. Vermeersch, *Europees consumentenrecht*, Maklu (Antwerpen) 2004, p. 45 fn. 252.

³⁵ De Witte/Vermeersch (2004), p. 46-47.

On a more theoretical note, the question is whether European law establishing the conditions for a genuine internal market as well as ensuring a high level of consumer protection can be approached with a coherent theory of consumer law.

One can investigate into the arguments for “filling in” – for instance – consumer protection in credit agreements, but the question why and how other aspects of consumer protection have been “left out” quite often defies explanation.

European consumer law may be somewhat haphazard, but equally, the attitude taken by some Member States can be earmarked as ‘minimalistic’. Sometimes, maximum harmonisation is successful – as seems to be the case with product liability – but then again it is a serious threat for the coherence of national law.³⁶ In other areas maximum harmonisation is undesirable due to differences in development of specific areas of trade and industry. Some fields of European consumer law are still a mystery, such as liability for services³⁷. European sale of goods law ‘fills in’ the rights of consumers up to a point, but actually leaves much to the discretion of the seller. Some parts of European unfair contract terms legislation are clear and directly applicable; others have failed the test. The travelling consumer still faces difficulties in getting redress for disappointments, and flying can still be hazardous. Certainty regarding cross-border financial services is incomplete, and cross-border payments are still difficult to make and quite often costly. Regarding e-commerce, telecom, (health) insurance and energy supply consumers can expect enhanced duties of disclosure and information, but how should they be able to decide which offer suits them best? Unfair trade practices and anti-competitive behaviour can be attacked, but how can individual consumers enforce action by competent authorities, and what effect will this have on individual contracts?

Not all is lost, however. The bench-mark of the expectations of an average consumer, who is reasonably well-informed and reasonably observant and circumspect still stands³⁸, and serves various purposes.

Pragmatism³⁹ serves the Court of Justice EC apparently well when dealing with – for example – cases regarding advertisements. Quite recently, Mars (not unknown in EC-case law) disputed Nestlé’s application for the registration of its mark as a slogan, but consumer expectations prevailed and Nestlé was granted the right to register its well-known slogan

³⁶ NTBR 2005/7 (Hondius). Cf. J.A. Jolowicz, The protection of the consumer and purchaser of goods under English law, 92 *The Modern Law Review* (1969): *the common understanding – for such I am sure it is – that it is the manufacturer and not the seller who is responsible if goods turn out to be unsatisfactory is reinforced in several ways by the facts of contemporary life which affects us all.*

³⁷ *There is no such thing as a European policy on consumer service contracts*, ECLG/040/05 (Micklitz). And: *the field of services which are relevant to consumers requires much more attention, at the national and at the European level. Parts of the work might probably be done in the groups of researchers who are discussing all over Europe what the *acquis communautaire* in European contract law is, or what a comparative analysis of national contract law might contribute to the envisaged Common Frame of Reference, but ECLG is calling for a launch of more consumer focused initiatives in the field of services.*

³⁸ CJEC 10 August 2002, Case C-299/99 (Philips), ECR I-5475, paragraphs 59 and 63; however see recently CJEC 20 January 2005, Case C-464/01 (Johann Gruber/Bay Wa AG), M.B.M. Loos, WPNR (2005) 6638, p. 771-772; see on the notion of ‘consumer’ in (European) case law regarding commercial communication J.C. Kabel, *Rechter en publieksopvattingen: feit, fictie of ervaring? Over de beoordeling door de rechter van commerciële communicatie*, UvA/Amsterdam 2005.

³⁹ De Witte/Vermeersch (2004), p. 76.

‘Have a break, ... have a Kit Kat’⁴⁰. And recently, the Court had to decide⁴¹ whether the Greek authorities are justified in regarding bread and bakery products which are either semi-baked or fully baked and frozen (the ‘bake-off’ method) as a full process for the preparation and baking of bread. The Commission holds the opinion that ‘bake-off’ products are thus rendered less attractive for consumers compared with other baked bakery products. Some products are attractive by other means, such as Worcester sauce with its distinctive colour. This attractiveness fails, however, if the sauce has been dyed by using chilli powder containing an unauthorized and dangerous colour (‘Sudan I’). The contaminated products were traced with difficulty: many processed products seemingly contain Worcester sauce. The problem in this case was that the United Kingdom provided information for other Member States through their website and not through the Rapid Alert System for Food and Feed⁴². Furthermore, the information was not sufficient for the other Member States to carry out investigations within their respective countries. This is just one example where the care taken and the methods used in protecting the interests of consumers are less effective than one would desire.

Sometimes, consumer protection policy can be self-deceptive or even result in fantasy: in trying to promote a life without tobacco the Commission has now launched an EU-wide TV advertising campaign that seeks to ‘de-normalise’ the deadly habit. The three adverts depict a teenager under pressure from his peers to start smoking, an adult smoker longing to quit and a non-smoker enduring other people’s smoke at a party. However, in each ad the smokers are pictured blowing on party whistles rather than smoking cigarettes⁴³. It is expected that the sale of party whistles will boost in the near future.

The 1993 Directive on the hygiene of foodstuffs is the focal point of a recent case now before the European Court of First Instance, dealing with automatic vending machines. More specifically, the question is whether such machines may distribute chewing gum without wrapping⁴⁴.

Furthermore in Case C-324/05⁴⁵ the Court had to decide whether the Court of First Instance was correct (‘wishful thinking’?) in assuming that the relevant public for smoking is particularly attentive, and would easily distinguish between ‘Turkish Blend’ and ‘Turkish Power’ tobacco trade marks. The main argument is – I quote – that it is not established that consumers are more attentive when buying cigarettes than when buying groceries or other consumer goods.

This brief survey reveals that any investigation into the area of consumer law should consider the difficulties in identifying attitudes, desires, the spirit of the attempt, the care taken and methods used, pragmatic issues, wishful thinking and sometimes fantasy. Schulte-Nölke was very accurate in his colourful description of the future of consumer law!

⁴⁰ CJEC 7 July 2005, Case C-353/03.

⁴¹ Notice for the OJ *re* Case C-82/05, CJEC 16 April 2005, case C-82/05.

⁴² Memo/05/62, 24 February 2005.

⁴³ IP/05/606.

⁴⁴ CJEC 24 November 2005, Case C-366/04 (Opinion 28 July 2005).

⁴⁵ CJEC 26 November 2005, Case C-324/05.

In order to make sense of European consumer law specific issues should be addressed: is it necessary, logical and transparent? Are the measures taken practical, flexible, consistent and coherent? How effective is consumer law and how should one measure its effectiveness for the average consumer? As Bossuet has said: ‘comme chacun raisonne à sa mode, la loi deviendrait arbitraire’⁴⁶.

I would like to start with the question of the necessity of consumer law.

Consumer protection is commonly connected with the concepts of justice, justified interests and the desire to remove inequalities between parties. The needs of commerce have had to adapt to the growth and influence of an interest group which, at one and the same time, has given a new impetus to the traditional civil/commercial law distinction as well as bringing it into question. This new interest group is the consumer. Perhaps the greatest influence of consumer pressure has been felt in regard to the principle of freedom of contract, with the result that some areas of contract, where there had been frequent abuse of consumer interests, are now controlled by statute. Moreover the influence of the consumer is making itself felt in case law: the courts are now more willing to look at the status of the parties in certain kinds of contract and tort cases and to decide liability in terms of a policy which distinguishes the consumer from the commercial relationship.

The starting point for consumer protection is the legally and economically unequal balance between professionals and consumers. Legislation can be helpful: parasitic interest rates (usury), unfair contract terms and unfair selling methods and trade practices are primarily of a legal nature. Protection of the weaker party plays an important role: this concept could arguably be one of the few really new and innovative principles of justice and fairness in private law. It has been questioned⁴⁷ whether the point of departure of the weak consumer is correct: ‘les consommateurs sont-ils en position de faiblesse?’ This benchmark will cause problems: Straetmans⁴⁸ quotes Calais-Auloy in pointing out that ‘faiblesse’ is a contamination of ‘faire blesser’ and ‘faible’, and this could come very close to being ‘débile’. ‘En protégeant le plus faible, on finit par l’excuser de son étourderie et de sa négligence: on finit par lui donner une mentalité d’assisté. En voulant le protéger contre sa faiblesse, on risque de perpétuer cette faiblesse’. In this perspective, the best approach would be to recognize the collective interest as the correct basis for consumer protection.

In the end, consumer protection and consumer law should contribute to a better society. Consumers and professionals determine their own rules in their economic relationship. The consumer quite often lacks bargaining power in individual transactions. Consumer law as

⁴⁶ Œuvres de Bossuet, tome XXIII (Versailles 1816), p. 539. The question presupposes that all European consumers would benefit from uniformity, and has reminiscences of the development of unified private international law: *Communauté juridique, cela voudrait-il dire, peut-être, communauté de droit (non)? Ou du moins seulement communauté de principes juridiques importants (cela non plus, assurément)?* E.

Frankenstein (later of Zionist fame), *Tendances nouvelles du Droit International Privé*, Recueil des Cours 1930–III, p. 241–350, at p. 261. More balanced regarding Von Savigny, and certainly with more vision, Meijers remarks *L’histoire nous a appris dans quelle mesure la jurisprudence est conservatrice et ne veut rien savoir des savants, and la tradition continue à être une force réelle qu’on ne peut combattre avec succès qu’en recherchant ses sources et en démontrant que les raisons d’être d’autrefois n’existent plus*, E.M. Meijers, *L’histoire des principes fondamentaux du Droit International Privé à partir du Moyen Age, spécialement dans l’Europe occidentale*, Recueil des Cours 1934–III p. 543–673, at p. 672.

⁴⁷ G.H. Samuel & J.G.J. Rinkes, *Contractual and non-contractual obligations in English Law*, Maastricht/Nijmegen 1992, p. 91.

⁴⁸ G. Straetmans, *Consument en markt*, Kluwer (Antwerpen) 1998, p. 54.

the result of the consumer movement is therefore primarily focused on restoring the equilibrium between weak and powerful players on the market. A second (logical) aim is to regulate markets: dealing with problems and conflicts and preventing distortions through legislation, self-regulation and free competition. Consumer law has thus developed on two separate levels: it has an individual and a collective dimension.

The time has come for a closer look at the future consumer policy of the EU. Consumer protection is a field of law under development, a dynamic field of law continuously influenced by social and economic circumstances⁴⁹. How should policy-makers deal with it? Simple straightforward answers are not available: the effective enforcement of consumer protection laws is inherently difficult.⁵⁰ Consumer protection laws apply to millions of commercial transactions each and every day, but consumers and businesses do not always understand the relevant law. The increasingly complex nature of transactions and the Internet (progressively increasing the much desired cross-border trade) are crucial obstacles to efficient consumer protection. The Commission has focused in this respect on better consumer redress by attacking – at the sharp end of the spectrum of infringements – unfair commercial practices. Furthermore, the Commission tries to improve individual access-to-justice by facilitating alternative dispute resolution schemes and developing tools for the courts of the Member States to actively promote the use of mediation. On a more practical level, the Commission has investigated the challenges regarding consumer information, for example in the area of labelling (now under pressure from the deregulation movement). It admits that the answers are not yet available; probably the right questions have not yet been asked.⁵¹ Regarding consumer information, regulatory requirements could be in the public interest (ensuring basic policy objectives such as health, safety and the protection of financial interests). Information is equally important as an advertising and marketing vehicle. And finally, consumers should benefit from free choice and the possibility to compare offers on the market.

But how should we understand consumer beliefs and consumer attitudes regarding information? The recently published⁵² Health and Consumer Policy Strategy includes consumer information as one of its main objectives, and indeed, tries to maximise the synergies between health and consumer policy. The Strategy proposes as common objectives to protect citizens (not: ‘consumers’!) from risks and threats which are beyond the control of individuals and that cannot effectively be tackled by individual Member States. Secondly, the Strategy should increase the ability of citizens to take better decisions about their health and consumer interests. Finally, mainstream health and consumer policy objectives should be present across all Community policies. Specific consumer objectives are the desire to ensure a common high level of protection for all EU-consumers, wherever they live, travel to or buy from in the EU, from risks and threats to their safety and economic interests, as well as increasing consumer’s capacity to promote their own interests: helping consumers help themselves. This new approach has raised some

⁴⁹ NTBR 2004/10. Van Schaick has pointed out that the weakness of consumers and legislative actions to redress this (mainly in private law) are exponents of the tendency to look at the *subjective* perspective of private law, A.C. van Schaick, *Contractsvrijheid en nietigheid*, Tilburg/Zwolle, 1994, p. 200.

⁵⁰ ECLG/030/2005.

⁵¹ Commissioner Kyprianou, Speech 05/237. See on consumer redress also OECD workshop document 19-20 April 2005, *Background Report [2005] OECD Workshop on Consumer Dispute Resolution and Redress in the Global Market Place*.

⁵² Commissioner Kyprianou, Speech on labelling, 05/266.

existential (essential) questions for European consumer law⁵³: what is the relationship between consumer policy and internal market policy, and can this issue be openly debated⁵⁴? Furthermore, a one-sided internal market approach could provide more goods and services to consumers, but would this be detrimental to consumer protection standards? Is the new consumer policy sufficiently flexible and effective?

The point of departure of this lecture was whether one can make sense of consumer law. The fact that consumer protection makes sense, is undisputed (albeit that trade and industry commonly approach the need for consumer protection from a rather egoistic perspective: how to make a profit and deal with consumer concerns)⁵⁵.

In order to ‘make sense’ of consumer law two questions have been asked: (1) what is the common measure of consumer law, and (2) what is the truth about consumer law? To start with the second question: the truth is that consumer law is an instrument to protect reasonable expectations of honest men regarding their health, safety and economic interests on a European (or: global) market.

Determining the common measure of consumer law is more difficult. Efforts to look into the possibilities of a genuine ‘Consumer Code’ or a European Civil Code have revealed⁵⁶ both the importance of consumer law in determining private law principles such as good faith and fair dealing, as well as its weakness in formulating clear and predictable rules and concepts, such as ‘consumer’ or – even – ‘citizen’ as addressee of legislation. The ‘common measure’ of consumer law is that it is common (to all of us) and applicable to everyone at any given time. It can easily be recognized (although it is difficult to define) and is closer to everyday life than most parts of private law. However, consumer law seems to be moving away from its roots. It is now practically all about transparency of markets, consumer information and market behaviour. Many important areas of consumer protection are nowadays ‘undercover’, for instance in telecommunication law or rules regarding liberalisation of the energy markets. Sometimes it has gone ‘underground’: how should consumers for example appreciate that rules regarding financial services are actually strongholds of consumer law?

Consumer law centres around information, authority and control, but in enforcing it a strong interest group seems to be forgotten: consumers themselves. European consumer law has become a vortex (ECLG Compilation 2003-4) of general and specific policy issues, consumer movement, consumer policy related to other policies and competition policy and other issues, and has evolved on different levels of legislation. Consumers - and all others involved – have to make sense of it all. Enforcement authorities, cooling-off periods, improved consumer information, consultation, access to justice and (alternative) dispute settlement may carry the day; but in the end, “*Verbraucheraufklärung macht nur Sinn, wenn man explizit die Verbraucherrechte darstellt. Nur so ist in diesem weitem Feld auch ein Fortschritt für den Bürger erreichbar*”.

⁵³ COM(2005)115 final.

⁵⁴ ECLG/036/05 (Weatherill).

⁵⁵ ECLG/036/05.

⁵⁶ Hondius, NTB 2005/7, p. 311. See for an interesting example the Canadian Consumer Protection Act (2002).

Therefore, on a final note, there is one thing that would boost consumer confidence in the achievements of the internal market: European consumer law should be made more simple and easily accessible. Consumer law is – as mentioned – serious business. It should provide uniform rules which are directly applicable (no ‘harmonised harmonisation directives’) and easily enforceable by adhering to market authorities (who can impose dissuasive penalties and/or start procedures in the general interest of consumers) and consumer organisations and in regular courts, at low costs. Small claims are no small beer. If consumers should learn how to help themselves, the solution is clear: admittedly fighting *pro aris et focis*⁵⁷, a European Consumer Code would make sense.

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⁵⁷ For my hearth and home, literally: for his altars and fires.

