The Necessity of a New Concept for the Further Development of the Consumer Law in the EU

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A. Is the Consumer Law Coming to an End?

The above question was raised by Ewoud Hondius a few years ago in his regularly held lectures on the state of consumer law in Europe at the University of Utrecht. The European consumer programme in its basic structure dates from the years 1975 respectively 1981.[1] It is rooted in President Kennedy's message to the consumers from the year 1962.[2] Substantial variations cannot be recognised regarding both consumer programmes. Notifications, programmatic declarations and new impulses adopted after 1981 – the titles of the messages were changing constantly – did not alter the fundamental statement of the original programme. If President Kennedy's message is proceeded from, then it could be formulated, with some exaggeration, that European consumer law in its fundamental ideas is 40 years old.[3]

I. The Two Consumer Programmes and Their Implementation

Driven by the European Commission, the Community has meanwhile implemented the crucial statements of the two consumer programmes dated in the years 1975 and 1981. The five fundamental rights, namely the right of the protection of health and safety, the right of the protection of economic interests, the right to claim damages, the right of education, and the right of legal representation (the right to be

[*] I have dedicated this article in honour of the retirement of Prof. Jean Calais-Auloy. Its slightly altered French version is published in the publication in his honour.

[1] ABl. C 92, 25.4.1975; ABl. C 133, 3.6.1981.

[2] Public Papers of the United States, *John F. Kennedy,* Containing the Public Messages, Speeches and Statements of the President, January 1 to December 31, 1962, 235-243.

[3] Rarely, there has been performed an analysis of the politics of the Commission, yet cf. *Joerges,* Zielsetzungen und Instrumentarien der europäischen Verbraucherrechtspolitik: eine Analyse von Entwicklungen im Bereich des Zivilrechts, ZVP 1979, 213; *Krämer,* ZVP 1979, 228 and a commentary referring thereto by *Joerges,* ZVP 1980, 57.

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heard in a courtroom),[4] have become reality to a large extent. The right of protection of health and safety has not only obtained quasi-constitutional status within the European legal system but has also assumed contours in the EC Directive on Product Safety 2001/95.[5] The right of protection of economic interests of the consumer is reflected in several Directives that can be summarised in two categories; on the one hand the protection against unfair and misleading advertising practices, and on the other hand the establishment of a genuine European consumer contract law. The constitutional safeguarding of the economic interests is moving on thin ice.[6] The right to claim damages constitutes the foundation for the adoption of the EC Directive on Product Liability 85/374.[7] The right of education updated by the right of information has been moved up in a constitutionally emphasised position at the latest upon the adoption of the Treaty of Amsterdam.[8] Its manifold reflection can be found in a broad canon of duties to inform. However, the education of consumers has only partially become an issue within Community law. The right to legal representation (the right to be heard in a courtroom) has been a main theme of the activities of the European Commission. By implementing a multitude of statutory regulations and not binding Directives, the Commission tried to strengthen the customer's right of legal representation in all relevant spheres that might concern the customer. Not expressly stated, but closely related to the right of legal representation, is the gradual right of granting an appropriate and effective legal protection developed by the ECJ.[9]

II. The Final Stage of the Development of the Consumer Law?

European consumer law brought a substantial innovative push regarding the entire legal system of the Member States.[10] This innovative push seems to fade more and more. At present, efforts to divest consumer law's special characteristics and to reinstate the regulations of traditional civil and public law play a predominant

[4] First consumer programme (FN.2), 3.

[5] ABl. L. 11, 15.1.2002, 4.

[6] *Micklitz,* Social Justice in European Private Law, Yearbook of European Law 1999/2000, 167-204.

[7] ABl. L. 210, 7.8.198, 29 changed through Directive 99/34 ABl. L 414, 4.6.1999, 20.

[8] *Reich,* Verbraucherpolitik und Verbraucherschutz im Vertrag von Amsterdam, VuR 1999, 3 et seq.

[9] *Reich/Micklitz,* Europäisches Verbraucherrecht, 4th edition, to be published in 2003, §§ 28-30.

[10] *Tonner,* Die Rolle des Verbraucherrechts bei der Entwicklung eines europäischen Zivilrechts, JZ 1996, 533.

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role.[11] The right of protection of health and safety is politically and programmatically reduced to the right to purchase groceries not being dangerous to the health. The technical law on the safety of products loses importance.[12] Similar developments can be observed in consumer civil law. Efforts to establish a European civil law do proceed from the assumption that consumer law is meant to be an integral part of European civil law that is to be established.[13] The EC Directive on Product Liability serves the European Commission as a base point for the establishment of a uniform European liability law.[14] The specific system of legal redress with regards to the consumer is absorbed by attempts to establish and extend a European judicial system.[15]

The perspective can be reversed and the question raised as to whether the integration of consumer law in traditional public and civil law fundamentally alters those fields of law.[16] But before drawing any conclusions from the possible end of consumer law to the one side or the other, it is necessary to clarify the consequences and effects of Europeanization. Then the question as to whether consumer law can only be perfected with the assumption that its theoretical and practical implications have largely been exhausted or whether it is possible and necessary to establish a new concept of consumer law in order to face the challenges which arise from the changed economic and social conditions can be proceeded with.

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[11] The notification of the European Commission and the European Parliament on the European contract law COM (2001) 398, final 11.7.2001 has raised a debate on a large scale on the future of European private law.

[12] *Schieble,* Deutsches und Europäisches Produktsicherheitsrecht, forthcoming in 2003.

[13] Principles of European Contract Law, Part I and II, prepared by the Commission on European Contract Law, edited by *Lando and Beale,* 2000; *Schulte-Noelke/Schulze* in association with *Bernardeau* (ed.), Europäisches Vertragsrecht im Gemeinschaftsrecht, 2002.

[14] The harmless sounding invitation to tender, A call for tender Markt/2002/11/D – Comparison of the national laws implementing Directive 85/374 on liability for defective products with other existing liability systems, contains in its main feature an important instrument of legal policy which the ECJ has raised in its rulings regarding Art. 13 of Directive 85/374.

[15] Cf. Green Book on alternative dispute resolution regarding civil and commercial law (COM [2002] 196 final 19.4.2002).

[16] The reform of the German law of obligations constitutes a classic example. Yet, in the ongoing discussion the dogmatic integration of the new law of obligations plays a predominant role, beyond the Europeanization that went along with the integration of consumer law.

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B. The Consequences of Europeanization of Consumer Law

I. The Rescue of Customer Law, Ideal of EC Law Over National Law

Consumer policy, consumer protection and consumer law were brought to attention through the consumer society. The Member States of the European Community initiated the establishment of a concept to improve the rights of the consumer in the sixties and seventies. In so far it concerns a political and legal response to the specific act conditions and risks the individual respectively the consumer collective in the consumer society bears. Consumer policy, consumer protection and consumer law have their base point within the national states. Jurisprudence may throw light upon the different approaches of the Member States of the European Community. Therefore it is inevitable to refer back to the beginning of consumer policy.[17] At the end of the sixties and at the beginning of the seventies, the European Community consisted of nine Member States. The so-called Scandinavian element was represented by Denmark. At that time there could be determined four basic legal systems, the common law area, the Romance area as well as the Germanic and Scandinavian area.
The common law countries react on questions concerning consumer policy in a pragmatic-political way. They bank on precise regulations by strictly limiting the capacity to act. Beyond that they rely on self-regulation.[18] Law enforcement is within the responsibility of the state authority. Co-operative structures are only little developed. Therefore, consumer's associations only play a secondary role.

The Romance countries waver between *laissez-faire* and interventionism with regards to pecuniary sanctions.[19] Consumer policy is exposed to strong political variations and closely related to social trends. Law enforcement is centrally and bureaucratically organised. Semi-state consumer's associations hold a legitimating supportive function.

Countries of German-legal tradition bank on long-term composition of political posts.[20] Legal interventionism with consumer protection leans on the systematic and coherence within the legal system. Law enforcement focuses on safeguarding

[17] Critical view *Kötz,* Abschied von der Rechtskreislehre, ZEuP 1998, 493.

[18] Helpful *Teubner,* Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences, 61 (1998) Modern Law Review 11.

[19] *Osman* (ed.), Vers un Code de la Consommation, 1998.

[20] Cf. Münch.Komm-*Micklitz,* introductory remarks §§ 13, 14 BGB.

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through courts. Co-operative structures in which consumer's associations play a significant role are predominant.
Scandinavian countries regard consumer law as an independent market behaviour law.[21] Regulatory intervention varies between privatisation and nationalisation. In regards to law enforcement, centrally organised state authorities are predominantly solving problems by co-operation. Consumer's associations secure the state-dominated consumer protection.

When the European Commission assumed its work at the beginning of the seventies and gradually seized the consumer policy, as raw material it faced a heterogeneously developed consumer law within the Member States.[22]

The input of the common law countries was mainly confined to the field of product security and competition law, both of which consumer protection had been realised in.[23]
The Romance countries took a leading role in the field of consumer information and consumer contract law, due in no small part to the significant measures taken by the French government in those days.[24]

Germany and the countries of German-legal tradition only focused on parts of consumer law in the seventies. Their main theme arose from the heated discussion for an adequate control of standard business conditions that had been led since the *Weimarer Republik*.[25]

The Scandinavian countries had already disposed of a developed consumer law. The comparably sophisticated system of legal provisions under the control of a consumer ombudsman led to a high standard of provisions of legal protection not only in the filed of product security but also in the field of the protection of eco-

[21] *Dahl Melchior/Tamm,* (ed.) Danish law in a European Perspective, 2nd edition, 2002.

[22] Consumer legislation in the EC Countries, *Reich/Micklitz,* Verbraucherschutz in den EG-Staaten, 1979; *Fontaine/Bourgoignie,* Consumer legislation in Denmark, 1981; *Calais-Auloy* et. al., Consumer legislation in France, 1981; *Reich/Micklitz,* Consumer legislation in Germany, 1980; *Ghidini,* Consumer legislation in Italy, 1980; *Hondius,* Consumer legislation in the Netherlands, 1980; *Whincup,* Consumer legislation in the United Kingdom and the Republic of Ireland, 1980.

[23] *Whincup,* Consumer legislation in the United Kingdom and the Republic of Ireland, 1980.

[24] *Calais-Auloy,* Le Droit de la Consommation en France, 1981.

[25] *Reich/Tonner/Wegner,* Verbraucher und Recht, 1976.

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nomic interests. A close network of extrajudicial settlement provides for efficient legal protection.[26]

Upon the adoption of the first consumer protection programme in the year 1975, the initial position between the Member States and the European Commission changed drastically which can be illustrated at the discussion on the EC Directive on Product Liability. This topic has been on the agenda of any member State since the sixties. Upon the adoption of the first consumer protection programme the conclusion was reached that the problems arising from liability had to be solved under Community law. Within a few years the Commission took the political initiative and tried to bundle the different starting points by applying politics of maximisation. The Member States appeared politically relieved to be able to hand over the nationally complex and heterogeneous field of consumer politics that governed several conflicts of the European Commission. The almost unpredictable happened, though. The Commission not only took over the task to arrange consumer politics, consumer protection and consumer law but also made this field of politics an instrument of the process of European integration.[27] This included alterations in content regarding the orientation of consumer law. It is likely that national consumer protection and national consumer law would have lived in the shadow during the past 20 years if the European Commission had not discovered the potential of that field of politics.

Thus, the question arises as to if the European Community represents a separate legal system replacing the four legal systems respectively to what extent a separate European legal system could be compatible with national legal cultures and traditions. It is my hypothesis that the national legal systems including their different legal cultures and traditions regarding law enforcement will continue whereas consumer law will be established as a separate legal system under Community law.[28] Under the central theme of a strategy of maximisation, European consumer law unites the pragmatism of the common law countries, the centralism of the Romance countries, the perfectionism of the countries of German-legal tradition and the efficiency and effectiveness of the Scandinavian countries.

[26] *Scherpe,* Außergerichtliche Streitbeilegung in Verbrauchersachen, 2002.

[27] Cf. *Joerges* (FN.3).

[28] Contrary *Legrand,* European Legal Systems are not converging, (1996) 45 International Law Quarterly (ICLQ), 52; *same author,* Against a European Civil Code, (1997) 60 Modern Law Review (MLR), 44.

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II. From Consumer Protection Law Via Consumer Law to Civil Rights

European consumer law has already gone through phases. At present, we are in phase three.[29] The first development phase, which lasted until the adoption of the Single Act, had been characterised by social-state considerations reflecting the Commission's efforts to take the idea of protection into account. This is evidently shown by the development of the EC Directive 85/577, the so-called EC Directive to protect the consumer in respect to contracts that have been negotiated away from business premises.[30] The standard formula of the effects of the different legal provisions on the Common Market appears hollow[31] –at least from a legal history point of view – as the main emphasis of doorstep selling refers to concrete circumstances of the individual customer in its native country.

The change of consumer protection law to consumer law commenced upon the adoption of Single Act.[32] The White Book on the completion of the Single European Market offered the Commission the opportunity to accomplish the different projects on the improvement of consumer law, which have got stuck. This was now to be realised under the new label "Measures on the completion of the Single European Market", supported by the principle of majority rule. The extremely influential Sutherland-Report provided for the Commission's legitimisation. Ever since then, consumer protection and consumer law are seen as an integral part of the project on the completion of the Single European Market. Within a short period of time, the EC Package Tour Directive 90/314,[33] the EC Directive on Abusive Contract Clauses 93/13,[34] EC Directive on Timesharing 94/47,[35] the EC Directive on the protection of consumers in respect of distance contracts 97/7,[36] the EC Directive on injunctions for the protection of consumer's interests 98/27,[37] the EC Directive on

[29] Münch.Komm-*Micklitz,* introductory remarks §§ 13, 14 BGB, MN. 28, 29.

[30] ABl. L 172, 31.12.1985, 31.

[31] Thus *Roth,* Europäischer Verbraucherschutz und BGB, JZ 2001, 473 hit the bull's-eye with his criticism.

[32] Europäisches Verbraucherrecht.

[33] ABl. L 158, 23.6.1990, 59.

[34] ABl. L 95, 21.4.1993, 29.

[35] ABl. L 280, 29.10.1994, 83.

[36] ABl. L. 144, 4.6.1997, 19.

[37] ABl. L 166, 11.6.1998, 51.

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the sale of consumer goods 99/44[38] and the EC Directive concerning the distance marketing of consumer financial services 2002/65[39] have all been adopted.

Today, subsequent to the activities of the nineties, the depth of the changes that the Community had generated by the adoption of the Directives becomes evident. Consumer law falls under the Single European Market. The reasonable customer has to play an important role in establishing the Single European Market. The customer will be granted rights and means which it will have to use in order to establish the project. The protection of the weaker party and of the uninformed consumer who does not have sole responsibility remains with the Member States. National consumer protection law and European consumer law are in danger of falling apart.

The present phase is characterised by the transition of consumer law into civil rights. N. Reich has developed the elements of the consumer as a subject of the European Union. Consumer law as civil rights within the European Union refers to the abandonment of consumer protection from the strict productive understanding and to the development of consumer protection as a part of a political, social and cultural seen European citizenship.[40] With its ruling in the case *Cowan*,[41] the ECJ set an early and still effective sign. In European consumer-civil rights national protection law and European consumer law have to grow together. The rulings in the cases *Océano*[42] and *Gabriel*[43] contain first indications for a changing orientation that not only considers the informed and reasonable consumer but also a consumer who is to be protected qua Community law.

III. From an Open to a Closed System

For a long time it appeared as if the European Community merely pursued a piecemeal approach, limiting its efforts to the selective enactment of provisions. Only towards the end of the nineties the stringency which the Commission applied in order to produce a global consumer law became evident; particularly striking is the development of consumer civil law. The Directives, which rule the modalities of the

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[38] ABl. L 171, 17.7.1999, 12.

[39] ABl. L 271, 9.10.2002, 16.

[40] Bürgerrechte in der Europäischen Union, 1999, S. 263.

[41] Rs. 186/87 Slg. 1989, 195.

[42] Rs. C-240-244/98 Slg. 2000, I-4941.

[43] Rs. C-96/00 Slg. 2002, I-nnv, = EuZW 2002, 539, MN. 58.

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conclusion of the contracts, constitute its general part.[44] This includes the EC Directive to protect the consumers in respect of contracts which have been negotiated away from business premises 85/577, EC Directive on the protection of consumers in respect of distance contracts 97/7 and EC Directive concerning the distance marketing of consumer financial services. The EC Directive on unfair terms in consumer contracts 93/13 opens the possibility to have horizontal standard business conditions and individually negotiated contracts examined within the legal boundaries. Specific consumer law governs all relevant types of contracts and product liability law;[45] contract law in EC Directive 99/44, package tours in EC Directive 90/314, timesharing in EC Directive 94/47, consumer credit in EC Directive 87/102 and product liability in EC Directive 87/374. Not least, the consequence the Community has applied in further developing the European consumer private law has contributed to the increase in discussion on the future of a European civil law upon the adoption of the Commissions notification on the European contract law.[46]

Within the past 20 years, the Commission has refined the regulatory techniques. The EC Directives on doorstep selling and on the protection of consumers in respect of distance contracts that are similar in content represent a significant example. In its Directive 97/7, the Commission generated an approach that it had already outlined in its first draft to the EC Directive to protect the consumers in respect of contracts that have been negotiated away from business premises at the beginning of the seventies.[47] The regulatory freedom that remains with the Member States shrinks. The latest EC Directives are based on the principle of minimum harmonisation. But as a matter of fact, the Commission sets standards that arise to full harmonisation.

Beyond the minimum harmonisation, the drafting process is firmly restricted by the ECJ.[48] Under the doctrine *effet utile* it generates the initial regulatory approaches of the Commission which appeared not to be enforceable in the legislative procedure. The first EC Directives on consumer law, which had been drafted relatively ambiguously, provide for a broad interpretation. Preliminary ruling procedures to the

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[44] *Micklitz,* Vertragschlussmodalitäten, in Micklitz/Pfeiffer/Tonner/Willingmann (eds.), Schuldrechtsreform und Verbraucherschutz, series of publications VIEW, Volume 9, 2001, 191 et seq.

[45] The notification of the Commission (FN 11) covers consumer contract directives as well as liability law.

[46] Cf. the entire spectrum of all contributions in *Schulte-Noelke/Schulze* (FN 14).

[47] ABl. C 22, 29.1.1977, 6.

[48] Rs. C-168/00 *Leitner,* Slg. 2002, I-nnv=EuZW 2002, 339.

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EC Package Tour Directive, [49] and increasingly to the EC Directive on unfair terms in consumer contracts could have an additional impulse on the process of Europeanization. The preliminary ruling procedure serves the ECJ as a "legal-political forum of drafting".[50]

C. Perfectionism as an Alternative?

European consumer politics have lost in regards to impetus. Apart from the persistently pursued purpose of the DG SANCO to establish an independent European fair trading law;[51] the latest programme confines itself to perfect the established provisions.[52] The programme does not contain any actual new approaches regarding the prospective tasks of consumer law; or to state it differently, the European Commission is "swimming" in the orientation of its politics. If wanted, it could also be noticed that the Commission's primary drive is aiming to systematically penetrate European consumer law in order to abandon existing deficits. The task linked thereto must not be underestimated. The Commission has not yet specified as to whether it is going to establish the European consumer law as a self-contained system or whether, on medium-term, it is going to rely on the merger of European consumer law in a European civil code.

I. The Completion of European Consumer Law

The conceptual fundamentals of European consumer law, the definition of the term "defect" in product liability and contract law, the legitimate foundation for the review of abusive clauses are supposed to agree with the different legal traditions and cultures of the Member States. The Commission successfully showed possibilities going beyond the mere assumption of the concept through the national states. These fundamentals are hardly changeable and should remain applicable for years.

The comprehensive exceptional provisions are easier accessible for a regulatory active Commission. Oddly enough and hardly comprehensible, the particular inter-

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[49] Survey in *Tonner,* 10 Jahre EG-Pauschalreise-Richtlinie – eine Bilanz, EWS 2000, 473.

[50] *Reich,* Die Vorlagepflicht auf teilharmonisierten Rechtsgebieten am Beispiel der Richtlinien zum Verbraucherschutz, RabelsZ 66 (2002), 531-552, speaks of a legal-political garage.

[51] Green Book on consumer protection COM (2001) 531 final 2.10.2001 as well as follow-up measures to the Green book on consumer protection COM (2002) 289 final 11/6.2002.

[52] European Commission, Notification to the European Parliament, the Council of the European Communities, Economic and Social Committee and the Committee of the Regions, consumer-political strategy 2002-2006, 7.5.2002, COM (2002) 208 final.

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ests of single professions are provided for in the EC Directives on consumer law. Here, the flaws of a punctual approach referring to a particular problem become evident. The Commission intends to restrict the exception or to state it the other way around to broaden the scope of application. The granted special position of public companies constitutes only one variation. The deregulation of former public sectors that arises from the Single Market will be reflected in consumer law on medium-term.[53]

The integration of the thought of consumer protection in antitrust and unfair competition law constitutes the second main task. So far, the Commission has only dealt with European law of fair trading. It intends to establish a European market behaviour law that is to evolve around market communication. Trademark law has taken over the classical historical function of law of fair trading; therefore there are no obstacles for a new approach.[54] Antitrust law is in the hands of the *DG Wettbewerb,* which increasingly makes the consumers' interests an instrument of its politics.[55] The ECJ understands consumer protection as an integral part of European antitrust law.[56] The ball is now in the Commission's court.

The tasks the European Commission has performed to further develop consumer civil law are minor. This includes the unsolved problem of the adaptation of the EC Directive on doorstep selling to the stipulations of the EC Directive on the protection of consumers in respect of distance contracts.[57] The anew establishment of a new European regulation of liability on defective services constitutes a more eager task.[58] The project's significance is comparable to the EC Directive on Product Liability. In regards to the further development of legal protection, the Commission banks on new approaches of extrajudicial settlement.[59]

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[53] *Rott/Butters,* Öffentliche Versorgungsbedingungen und Vertragsgerechtigkeit im Lichte des Gemeinschaftsrechts, VuR 1999, 107.

[54] *Micklitz, Keßler,* Europäisches Lauterkeitsrecht, GRUR Int. 2002, 885 et seq.

[55] DG Wettbewerb ABl. L 203, 1.8.2002,30.

[56] Rs. C-453/99 *Courage* Slg. 2001, I-6297.

[57] *Micklitz/Monazzahian/Rößler,* Door-Door-Selling – Pyramid Selling – Multilevel-Marketing, A Study commissioned by the European Commission, Volume I and II, November 1999, accessible on the website of DG SANCO.

[58] Open call for Tender – Sanco/2002/B4/001 Comparative analysis of national liability systems for remedying damage caused by defective consumer services.

[59] Green Book COM (2002) 196 final 19.4.2002

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II. From Partial Harmonisation to Full Harmonisation

Other than the measures the European Commission took in order to realise the consumer's right of protection of health and safety, all EC Directives – the protection of the consumers' economic interests, and its rights of education and legal representation – merely establish a minimum level of protection. The right to claim compensation for occurred damages has a special status as the EC Directive on Product Liability aims at full harmonisation, but it only gives little freedom to the Member States.

From the viewpoint of legal politics, the character of the formula of minimum harmonisation is determined by compromises. Along with the Single Act, the Commission had acquired competencies in the scope of consumer law which were strengthened in the Treaties on the European Commission signed in Maastricht and Amsterdam. The Member States defend their national legal cultures and traditions referring to the requirement of minimum harmonisation. From legal-theoretical point of view, minimum harmonisation plays an increasing role in the discussion on the future of the European private law.[60] With the help of this principle, national traditions and cultures can be retained and secured against the access of Community law.[61] As a matter of fact, an independent European legal tradition, which is unlikely to be compatible with the regulatory provisions of the Member States, is in the process of being established. The theoretical discussions conducted on a high level do not amount to the practical importance of the principle of minimum requirements. In its few rulings, the ECJ did not succeed either[62] to give it a dogmatic structure.

Probably, the significance of the principal of minimum requirements is overestimated taking a legal-political as well as legal-dogmatic viewpoint. The previous discussion focused too much on the level of substantive law. It neglects the detail that uniform legal standards may have to be applied non-uniformly within varying legal systems and cultures. If that was the case then it must be clarified whether the differences regarding the implementation of law and law enforcement generate more serious consequences than the different material legal standards. Established

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[60] *Stuyck,* Patterns of Justice in the Constitutional Charter: minimum harmonization in the field of consumer law, Liber Amicorum *Reich,* Law and diffuse Interests in the European Legal Order 1997, 279; *Wilhelmsson,* Is There a European Consumer Law – and Should There be one, Centro di studi e richerche di diritto comparato e straniero, (41) 2000.

[61] *Legrand,* European Legal Systems are not converging, (1996) 45 International Law Quarterly (ICLQ), 52; *same author,* Against a European Civil Code, (1997) 60 Modern Law Review (MLR), 44.

[62] Rs. 382/87 *Buet,* Slg. 1989, 1235; Rs. C-169/00 *Leitner,* Slg. 2002, I-nnv=EuZW 2002, 339.

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legal systems such as the United States exist in spite of diverging legal rules and different intensities of application.

In regards of the unsettled significance of the principle of minimum requirements it is not surprising that the Commission programmatically establishes full harmonisation as the new objective of its politics.[63] Obviously, the Commission intends to disallow the Member States to look after their "consumer-gardens". The more the Community is going to regulate the Single Market, the less it can allow solos. The Commission took a first approach thereto within its preparatory works on the EC Directive concerning distance marketing of consumer financial services and largely accomplishing it as a result. A new discussion is developing concerning the argument on the reform of the EC Directive on consumer credit.[64] The same applies to the preparatory works on a European law of fair trading.[65]

Full harmonisation out-levers Art. 30 of the EC Treaty and renders the court ruling in the case *Cassis de Dijon*[66] obsolete. The engagement in the work on the EC Directive on Product Liability was preceded by an intensive discussion on the extent of full harmonisation and its consequences on the redistribution of the competencies among the Member States and the European Community. From today's perspective, the Commission fell back on a "successful" approach. Yet, the constitutional requirements with regards to the European integration have changed.[67] The EC Directive on Product Liability has been adopted unanimously. Since the adoption of the Single European Act, full harmonisation has become feasible by the means of the principle of majority rule. An overall reorganisation of the depth of regulation requires a legal-theoretical, but also a legal-political, debate on the objectives of the European integration.

III. Regulatory Instruments

Hitherto, the European Commission banked on Directives on the establishment and further development of a European consumer law. At no time, it has been consid-

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[63] Consumer Policy Strategy (2002-2006), ABl. C 137, 8.6.2002, 2.

[64] Proposal for a Directive on the Harmonization of consumer credit, COM (2002) 443 final, 11.9.2002.

[65] Consequences on the Green Book on consumer protection, COM (2002) 289, final 11.6.2002.

[66] Rs. 120/78 *REWE Zentrale v. Monopolverwaltung für Branntwein,* Slg. 1979, 649.

[67] The ECJ followed the restrictive reasoning of the Commission. Rs. C-52/00, *Commission/France,* Slg. 2002, I-nnv; Rs. C-154/00, *Commission/Greece,* Slg. 2002, I-nnv, Rs. C-183/00, *Sánchez/Asturia,* Slg. 2002, I-nnv=EuZW 2002, 574.

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ered to interfere with the Member States' civil law systems by the means of subordinate legislation. In that regards, changes are on the verge to take place. The Commission aspires to regulate the co-operation of the Member States regarding cross-border prosecution of unfair and misleading trading practices through a subordinate legislation.[68] Realistically, the Commission has already divested the Directive.[69] The Directives adopted during the nineties are no longer restricted to provide for guidelines for the Member States; furthermore they contain detailed standards.

Beside statutory legal instruments, the Commission has always relied on soft regulations, which it applied to make the Member States, especially the involved circles, act without the intention to directly sanction violations. The instrument of recommended practices brought conflicting experience. Well-meant recommended practices had gradually been transferred in binding legal instruments.[70] The Commission is in the process of transforming the recommendations 98/257/EC and 2001/310/EC into binding legal instruments.[71]

The so-called co-regulation constitutes a true new legal instrument appearing in the discussion on a European law on fair trading. The heart of the matter concerns the connection of statutory law with non-binding provisions.[72] The European Commission acquired experience with that instrument in connection with technical security law. The new approach regarding the technical harmonisation and standardisation provides for a sense of achievement of Community law.[73] With the draft of the EC Directive on e-commerce, the Commission undertook a first attempt to make that instrument available for civil law. Its attempt failed because of the European Parliament and Council of the European Communities.[74] In regards to European law on fair trading, the Commission carefully gropes for new regulatory approaches

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[68] The publishing of that project has been scheduled for the end of 2002.

[69] *Schwintowski,* Vertragsschluss für Waren und Dienstleistungen in Europäischen Verbraucherrecht: Form und Inhaltsbindungen kontra Privatautonomie, EWS 2001-2008.

[70] The history of EC Directive 97/5 cross-boarder credit transactions ABl. L 43, 14.2.1997 can be used as an illustrative example.

[71] Green Book COM (2002) 196, final 19.4.2002.

[72] Now COM (2002) 278 final, 5.6.2002 Suivi du Livre blanc sur la gouvernance européenne – Pour un usage mieux adapté des instruments.

[73] ABl. C 136, 4.6.1985, 1.

[74] ABl. C. 3, 5.2.1999, 4 Art. 23 in connection with Art. 22(1).

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that lower the regulatory density and strengthen the initiative of the involved circles to establish non-binding standards of conduct.

D. Unanswered questions

The programme on the completion of the Single Market generated a regulatory impulse. Therefore, it is not surprising that the infiltration and processing of the effects of the Single Market programme on the European and national legal systems respectively on the structure of the two systems among each other has been little researched. Within the broad field of probable complexes there are three unanswered questions which are of particular interest, the competency structure, and the emerging effects in contract law as well as the changing legal nature of European consumer law.

I. The Competency Structure

In its Tobacco-ruling, the ECJ exposed the shaky foundation of the competency structure of consumer law.[75] So far, the Commission relied on Art. 100 lit., 95 in order to enforce EC Directives on consumer protection. The discussion on the load capacity and extent of the competency structure takes shape whether and to what extent a European contract law can be based on Art. 153, 95, according to which the field of consumer law merely has limited competency.[76]

It has not become a subject as to whether the concept of executing federalism within the European Community remains an objective. Within the scope of consumer law the Commission has secured executive powers. The EC Directive on Product Liability, adopted in 1992, plays a pioneering role which grants the Commission regulatory powers in emergency situations. The Directive's altered version, adopted in 2001, extends the Commission's executive powers substantially. In response to the complained filed by Germany, the ECJ ruled the shifting – which had been conducted in the first EC Directive – admissible under Community law.[77] Yet, the extent of competency provided for by Art. 95 remained undetermined. Furthermore, it remained open as to whether the shifting, which had been formulated in the EC

[75] *Reich,* Wie gesund ist der Gesundheitsschutz in der Gemeinschaft? Die Folgen des EuGH v. 5.10.2000 für das Gemeinschaftsrecht (forthcoming in the publication in honours of Gerd Winter 2003) sees the grounds in the failed combination of advertising ban and minimum harmonization.

[76] *Weatherill,* Justifying Limits to Party Autonomy in the Internal Market – EC Legislation in the Field of Consumer Protection, in: Grundmann/Kerber/Weatherill (eds.), Party Autonomy and the Role of Information in the Internal Market, 2001, 173.

[77] Rs. C-359/92, Slg. 1994, I-3681.

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Directive on Product Liability and approved by the ECJ, is applicable to other fields of European consumer law. The academic debate revolves around the European law on fair trading. The Commission' considerations regarding a discussion on co-operating in the field of consumer law enforcement are based on Art. 153 Para/ 3 lit. b Treaty establishing the European Union.[78]

The high-ranked level of the constitutional allocation of competencies constitutes another complex of problems that arises from the emerging practical importance of Community law. National courts increasingly seek redress in the ECJ in order to acquire assistance in regards to the interpretation of Community law. The ECJ remains within its allocated jurisdiction only if it limits itself to provide for an interpretation under Community law that can be understood by national courts. As repeatedly stated by the ECJ, it is the within the responsibility of the national courts to decide on how to rule *in concreto* against the background of the accurate reading of Community law.[79]

Taking a view under Community law, the example of the consumer had to be normatively upgraded. The ECJ cannot take the circumstances of the particular case into consideration; it has to extend its judgement standards normatively. The ECJ proceeds from a self-responsible consumer whereas courts of the Member States have to judge the specific circumstances of the disadvantage. Thus, in Community law and in its interpretation, which is provided for by the ECJ, the business-legal notion of the consumer takes a predominant position. The original idea based on a social state namely to provide for protection for inferior consumer against those risks that he cannot comprehend is shifted to the competencies of the national courts respectively executive organs. Regarding its main ideas, European consumer law is business law. National consumer law can provide for protection for the factually inferior customer. Briefly spoken, consumer law and consumer politics disintegrate into European business law and national social politics respectively national social law. The consequences of that development cannot only be observed in consumer law. They have also an impact on the entire competence structure of the Community. After all, it concerns the question as to whether the European Community can cope with a development in which the normatively upgraded business law and factually occupied protection law of the member states part. The ECJ's efforts to counteract illustrate a reorientation but European consumer-civil law has not yet been implemented.

[78] So far there exists a working paper only.

[79] Notwithstanding, see *Lenz,* Unlauterer Wettbewerb und freier Warenverkehr in der Rechtsprechung des Europäischen Gerichtshofes, ZEuP 1994, 624; proving that the ECJ sporadically makes judgments.

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II. The Effects of Consumer Contract Law on Civil Law

There is little or no attention paid to the fact that the European Commission established a contract concept that significantly diverges from the concept established within the civil legal systems of the Member States. Contract law is under the priority of competition law. Therefore, European consumer contract law is competitive contract law.[80] The new orientation gives rise to the improvement and establishment of a European civil legal system. The conceptual fundamentals of consumer contract law reach far beyond their actual subject matter.

The Community has introduced gradual contractual regulations with the primary objective of intensifying the competition between the market participants by means of contract law. Preliminary duties to inform, requirements of transparency, subsequent possibilities of revocation and the improvement of legal protection serve that objective.

Preliminary duties to inform shall enable the consumer to make a decision based on information. Contractual transparency is not only aimed bilaterally towards the relationship between consumer and entrepreneur but also horizontally towards entrepreneurs among each other. The duties to inform cause a standardisation and uniformity of the contract. If an entrepreneur intends to comply with the law he has to standardise his contract in compliance with Community law. As a result, standardised contracts that are tailored to typical contractual constellations will be applicable throughout the entire Community.

The subsequent possibility to revoke the contract while facing barely any consequences increases the pressure on the market participants to provide for contractual stipulations that allow the consumer to enter into or revoke the contract at any time in order to establish the most favourable stipulations for themselves and for the competition as a whole. In its *Heininger*[81] ruling, the ECJ set the direction. Upon failure to instruct on the right of revocation, the consumer is entitled to withdraw from the contract. As far as that goes, the duty to instruct constitutes a kind of continuance guarantee. The consumer's rights are linked to the offeror's obligations.

This system of information, transparency and the possibility to revoke the contract can function only if adequate legal protection mechanisms are available. With the help of the ECJ, a differentiated European legal protection system has been estab-

[80] *Micklitz,* The New German Sales Law – Changing Patterns on the Regulation of Product Quality, Journal of Consumer Policy, 2002, 379.

[81] Rs. C-481/99, *Heininger/Bayrische Hypo und Vereinsbank,* Slg. 2001, I-9955.

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lished. The contractual factor of European consumer contract law is no longer *pacta sunt servanda,* but the simplified termination of a concluded contract in order to enter into a new contract offering better conditions.

The central elements of competitive contract law are not limited to consumer contract law. Duties to inform, which apply to entrepreneurs, can also be found within the EC Directive on E-commerce, which knowingly does not constitute a Directive on consumer law.[82] Contractually designed distribution systems are broken up along the lines of an improvement of the competitive conditions in order to abridge the termination of tying arrangements regarding distribution.[83] In particular, entrepreneurs benefit from the improvement of the legal protection through the ECJ. The projects on the development of a European civil code neglect the innovative potential that lies in consumer contract law. They deprive themselves of the possibility to examine the present consumer contract law in regards to the changes which have taken place during the past 20 years, the reason why they have taken place, and whether and to what extent it is possible and meaningful to transfer these change to a European civil law which does not only apply bilaterally to the relationship between entrepreneur and consumer.

III. The Application of the Law and Law Enforcement

Within the scope of the negotiations with the MOE-States, the European Commission has urged that the potential candidates either establish a consumer law according, or adapt their existing consumer law to, the stipulations of the Community law.[84] Regarding the increasingly concrete planning, it is no utopia now that consumer law, the concept of which had been established by the European Community during the seventies and eighties, is going to provide for a Europe-wide protection standard within almost thirty countries in the near future. Depending on the point of view, the triumphant advance of consumer law in Europe may either be welcomed and importance might even be attached to its trend-setting effects for a reorganisation of international business law, or attention might be drawn to the conse-

[82] ABl. L 78, 17.7.2000, 1.

[83] Verordnungen über die Gruppenfreistellung von vertikalen Vertriebsbindungen im Kfz-Sektor, Nr. 1400/2002 ABl. L 203, 1.8.2002, 30.

[84] *Bourgoignie,* The Approximation Process of Consumer Law of Central and Eastern European Countries to EU Legislation: A Favourable Context but an Urgent Need for Clarification, in Micklitz (ed.) Rechtseinheit und Rechtsvielfalt in Europa, 1996, 91.

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quences arising from a field of law the "trademark" of which could become its mere symbolic character.[85]

The European Community has early recognised the significance attached to the application of the law and the means of law enforcement necessary thereto. In the first phase of consumer law, it relied on the Member States as applicants that had to provide for appropriate legal means. Along with the establishment of the Single Market programme, the Community created a law enforcement competence as an annex competence. The most important legal means during the second phase has been the integration of the consumer, both as an individual and collectively, in order to accomplish the Single Market. Individual and collective legal means were to increase the application of the law in practice. The ECJ even upgraded the legal status from a human rights point of view not only to secure the application of Community law but also to enhance legal protection.[86] While the ECJ realises approaches to a consumer civil law, it appears as if the Commission recently relied on bureaucratically and centrally organised law enforcement.[87] As far as that goes, the White Book on European Governing marks a turning point followed by first actions taken by the Commission. It strives for an intensification of its executive authorities. At the same time it banks on an improved co-operation of the executive organs of the Member States under the Commission's guidance. Collective legal means are driven out.

According to the conditions in the MOE-candidate countries, the practical relevance of the European consumer law in the Member States is high regardless of any differences. As far as that goes, the legal circles seem to retain their specific peculiarities despite any attempts to harmonise the instruments of law enforcement.

The common-law countries implement the directives into national law according to the formal and timely requirements. Due to the almost complete absence of statutory provisions, a pragmatic selective implementation is facilitated. The standards set by Community law only gain practical relevance in those fields where the common-law countries expect them to be beneficiary. The linking – inherited within Community law – of rights and legal means obliges the common-law system. At the

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[85] *Micklitz,* Verbraucherschutz West versus Ost – Kompatibilisierungsmöglichkeiten in der Europäischen Gemeinschaft – Einige Vorüberlegungen, in: Heiss (ed.) Brückenschlag zwischen den Rechtskulturen des Ostseeraums, Mohr Siebeck, 2001, 37.

[86] *Snyder,* The Effectiveness of European Community Laws: Institutions, Processes, Tools, Techniques, MLR (56) 1993, 19.

[87] COM (2001) 428 final, 25.7.2001.

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same time, collective remedies are merely of supportive and legitimising character for established governmental supervisory authorities.

The Romance countries tend to establish self-contained and coherent national consumer provisions which are only conditionally inconsistent with Community law as the national provisions often preceded the EC directives on consumer protection. Community law has improved the existing collective legal competencies. Yet, it failed to take up the pecuniary sanction mechanisms that are predominant in the Romance countries. Thus, from a Romance country point of view, Community law applies negatively.[88]

The countries of German-legal tradition experience difficulties in integrating consumer directives into their civil legal systems. They require a long time to implement the directives in order to accomplish the degree of perfection strived for in matching Community law and national law. The carefully conducted implementation increases the possibilities of the directives' practical applicability and use. Community law has strengthened collective legal protection. Consolidated administrative executive organs – beyond health protection – are relatively unknown within the countries of German-legal roots.[89]

The Scandinavian countries appear to be on the losing side in regards to the EC approximation of laws. Its established consumer law system has been broken up by Community law and transformed into a market orientated control approach. Centralised control organs as wished for by EC legal systems are predominant but these organs bank on soft forms of law enforcement.[90]

Consumer law, which has been implemented into the national legal systems, appears to be disparate, and it is difficult to evaluate its practical relevance. In cases where Community law has been incorporated but not gained any practical relevance, it runs the risk of becoming mere symbolic law. Here, the maximisation strategy is limited. Knowledge acquired in one legal circle on the functioning of consumer law in regards to a specific social-cultural and social-economical context cannot be easily implanted into another legal circle.

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[88] *Osman* (ed.), Vers un Code de la Consommation, 1998.

[89] *Micklitz/Pfeiffer/Tonner/Willingmann* (eds.), Schuldrechtsreform und Verbraucherschutz, series of publications VIEW, volume 9, 2001.

[90] *Dahl/Melchior/Tamm* (eds.) Danish law in a European Perspective, 2nd edition, 2002.

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E. The Future of a Consumer Civil Law

First approaches can be recognised regarding a legal outlining of a consumer civil law. The consequences for European consumer law that arise from the upheaval are hardly determined. That is where future legal-theoretical considerations could and should set in.

I. A New Ideal Between Protection and Responsibility

The ECJ has challenged the understanding of the weak and inferior consumer – an understanding that has been established in the seventies and shaped by the social state – in establishing the ideal of an ordinarily responsible consumer. The ECJ exposes pertinently the setback that had been a theoretical issue since the commencement of the consumer movement. Consumer protection and consumer law do not reach its addressees. The legal system, which had been established on behalf of the weak and inferior consumer, mainly serves those social classes that come most close to the ECJ's ideas of an informed and responsible consumer. The ECJ provides for the option that Member States can conduct social policy through consumer protection as long as the Member States can supply facts authorising special treatment of the socially weaker. Beyond that, the ECJ has recently begun to develop a consumer ideal which units the thoughts of protection and responsibility.

The Commission has not (yet) dealt with the self-responsibility of the consumer from a politically pragmatic point of view. The ECJ has not legally outlined the problem of self-responsibility either. Accordingly as Community law alters from consumer law to civil law, self responsibility which has been imposed respectively is to be imposed on the consumer will increasingly come to the fore.

II. New Scope of Tasks

The alteration from consumer law to civil law has not really been a subject matter of consumer law. From a concept point of view, consumer policy conducted under Community law appears to be borrowed from a model of consumer society that does not sufficiently take the upheavals in central parts of the economy into consideration. The extension of the private sector of economy, the pushing back of the State into its "actual tasks" have an impact on the scope of application as regards the person affected of consumer law as well as on possible subject matters of consumer civil law.

The strict consumer-term favoured by Community law cannot adequately react on the melting of the limits of consumption and working sphere. EC citizens are pushed from dependent employment relationships into (fictitious) self-

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employment. They find themselves in a legal position which is more similar to the legal position of consumer than to of an entrepreneur.[91] Furthermore, the entrepreneurial term does not adequately take into account the consequences of the process of privatisation of former state or state dominated sectors of the economy. Consumer civil law has to react on both phenomena by extending the consumer and entrepreneurial term.

Conversely, there are shortfalls regarding the subject matter of Community law. Former state fields of business law, which increasingly became private, are left out of consideration of traditional consumer law. While shortfalls can be abolished by the means of cancelling exceptions, there are even more serious problems in regards to fields that are facing further privatisation such as the entire sector of health and old age provision.[92] Here, consumer-political concepts are required, which make the chances and risks of highly sensitive sectors an issue and provide for recommended solutions. The project on the completion of the Single Market does not focus on the suffering and old consumer.

[91] *Micklitz/Monazzahian/Rößler,* Door-Door-Selling – Pyramid Selling – Multilevel-Marketing, A Study commissioned by the European Commission, Volume I and II, November 1999, accessible on the website of DG SANCO.

[92] If at all, the ECJ would have to deal with the coherence of national social security law and European antitrust law.

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