

# *Protection of Consumers' Economic Interests by EC Contract Law — Some Follow-up Remarks*

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## ***Abstract***

This paper is a follow-up to a former article on “Protection of Consumers’ Economic Interests by the EC” published in 1992 in 14 *Syd LR* 23. It concentrates on developments in EU consumer contract law in the last 15 years. Both legal practice within then existing directives and the adoption and implementation of new directives, for example on unfair terms in consumer contracts and on consumer sales, will be analysed. The paper starts with a reflection on changes in EU consumer philosophy and competence, and ends with an evaluation of the new trend of creating a genuine European contract law alongside which the “consumer law *acquis*” can be separately codified in an EU-Consumer Contract Law Regulation (ECCLR).

## ***1. Dedication***

I have been asked to contribute to the international symposium in honour of the late David Harland. My contribution will turn around a subject which was of particular interest to David, namely consumer contract law and, owing to my own specialisation, European Union (EU) law. I had a chance to teach with David on these matters while being Allen Allen and Hemsley Visiting Professor at the Sydney Law School in 1991 to 1992. As a result, an article was published with the title ‘Protection of Consumers’ Economic Interests by the EC’.<sup>1</sup> This paper will be a follow-up and evaluation of the trends which David and I observed nearly 15 years ago.

Before doing so, I should mention that David took a particular interest in the specific development of EU consumer law — not just contract law, but also product safety and liability, advertising and marketing practices as well as complaint handling — areas which will be covered by my colleague Geraint Howells. Contract law was still very much in the offing and has rapidly developed since, both through law-making via EU directives and through case law by the European Court of Justice (ECJ) which did not exist (with some rare exceptions) at the time the mentioned article was written.

I continued this very fruitful cooperation during my different teaching and research assignments in Germany, the UK, France, Switzerland and, later, new

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<sup>1</sup> (1992) 14 *Syd LR* 23.

Member countries. As then legal editor of the Journal of Consumer Policy (JCP) — David served actively on its Board<sup>2</sup> — I had a chance to turn to David for advice when questions on publishing papers on European and comparative consumer law arose, willingly gave his advice and helped to improve submitted draft papers. Sometimes I was certain that David understood more about European consumer law than many EU lawyers for whom this subject was to some extent beyond EU competence.

I will structure this ‘follow-up’ in the following way: I first have to come back to the EU consumer ‘philosophies’<sup>3</sup> and competence for enacting consumer specific directives (Part 2). I will then give an account of what has ‘happened’ to the directives mentioned in Part 4 of my *Sydney Law Review* paper,<sup>4</sup> namely the Doorstep Selling Directive 85/577/EEC, Package Holiday Directive 90/314/EEC, and the proposal on unfair contract terms.<sup>5</sup> The Consumer Credit Directive 87/102/EEC and measures concerning payment systems will be omitted; they are under review now, including new proposals for directives (Part 3). Part 4 will evaluate the important and controversial Directive 1999/44/EC<sup>6</sup> on consumer goods and guarantees, without going into detail concerning several other consumer law initiatives, namely distance selling via Directive 97/7/EC<sup>7</sup> and 2002/65/EC,<sup>8</sup> as well as the E-commerce Directive 2000/31/EC.<sup>9</sup> The last part, Part 5 will be devoted to initiatives designed to create a ‘European contract law’ in which the afore mentioned directives should play an important role, but which so far start from a mere technocratic understanding. The conclusion (Part 6) will present an outlook into the future of EU consumer contract law and take up some of the critical remarks made in 1992.

2 An obituary was published in Norbert Reich, ‘David Harland In Memoriam’ (2005) 28 *JCP* 141.

3 This discussion is well documented in Jules Stuyck, ‘European Consumer Law After the Treaty of Amsterdam: Consumer Policy Beyond the Internal Market?’ (2000) 37 *CML Rev* 367; Stephen Weatherill, *EU Consumer Law and Policy* (2005); Geraint Howells & Thomas Wilhelmsson, ‘EC Consumer Law: Has it Come of Age?’ (2003) 28 *E LR* 370; see also Norbert Reich, ‘A European Concept of Consumer Rights: Some Reflections on Rethinking Community Consumer Law’ in Jacob Ziegel (ed), *New Developments in International Commercial and Consumer Law* (1998) at 431; Norbert Reich, ‘The Consumer as Citizen – The Citizen as Consumer’ in Christophe Albiges, Jean-Francois Artz, Joan-Manuel Baderias Carpio & Jean Beauchard (eds), *Liber Amicorum Jean Calais-Auloy, Etudes de Droit de la Consommation* (2004) at 943; Thomas Wilhelmsson, ‘Is There a European Consumer Law – and Should There Be One?’ in *Centro di Studi e Ricerche di Diritto Comparato e Straniero, saggi, conferenze e seminari*, Vol 41 (Rome, 2000); Hans-W Micklitz, ‘Principles of Justice in Private Law within the European Union’ in Esa Paasivirta & Kirsti Rissanen (eds), *Principles of Justice and the Law of the European Union* (1995) at 259.

4 Reich, above n1. Detailed references stating the law as of 1992 can be found there and will not be repeated.

5 The then draft proposal was turned into Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29.

6 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L 171/12.

7 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L 144/19.

8 Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC [2002] OJ L 271/16.

## 2. *EU Consumer Philosophies and Competence*

### A. *EU Consumer Philosophy*

EU consumer philosophy has changed substantially over time. Even in 1992, a shift from a 'consumer rights' and 'citizen' rhetoric to a more 'internal market approach' could be observed.<sup>10</sup> The consumer was not seen so much as a 'weak person' needing protection against the intricacies of the market, but as an active partner who should be encouraged to use the increased possibilities of cross-border shopping. This development has certainly continued, even though the citizen' oriented approach has not been completely abandoned. Article 153 EC which was introduced by the Amsterdam Treaty of 1997 and had a forerunner in Article 129a of the Maastricht Treaty of 1992 talks of a 'consumer right to information and education', as well as on protection of the 'safety, health and economic interests' of consumers.

These rather vague concepts have been put into action by different Commission programs, one dating from 2002 and a more recent one from 6 April 2005.<sup>11</sup> The most interesting paradigm shift has to do with recognising the consumer as an active market subject whose opportunities for increased choice in the internal market should be protected by confidence building measures, including legal protection in 'business to consumer' (B2C) contracts. The confident consumer, to use a term coined by Weatherill,<sup>12</sup> became the yardstick for evaluating EC measures. At the same time, the Commission proposed a reversal of its former 'minimum protection' to a 'full harmonisation' approach, to avoid creating additional barriers to intra-Community trade caused by different Member State implementation of EU consumer law — a debate which will be taken up by Howells' paper in this special issue and which therefore will only be mentioned in passing here.

### B. *EU Competence*

Unlike environmental law, there is no explicit EU competence to legislate in consumer law and in particular in consumer contract law. On the other hand, the new Article 153 (3) EC allows a double path of EU involvement in consumer affairs, namely by adopting:

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9 *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)* [2000] OJ L 178/1; Norbert Reich & Axel Halfmeier, 'Consumer Protection in the Global Village: Recent Developments in German and European Union Law' (2001) 106 *Dickinson L Rev* 111.

10 I refer to Stuyck, above n3.

11 Com (2002) 208 final; (2005) 115 final.

12 Stephen Weatherill, 'The Evolution of European Consumer Law: From Well Informed Consumer to Confident Consumer' in Hans-W Micklitz (ed), *Rechtseinheit oder Rechtsvielfalt in Europa?* (1996) at 423; Thomas Wilhelmsson, 'The Abuse of the "Confident Consumer" as Justification for EC Consumer Law' (2004) 27 *JCP* 317.

- measures based on the internal market competence of Article 95 EC; and
- measures which support, supplement or monitor the policy pursued by the Member States.

Seemingly, the second paragraph contains a rather weak authority for contract law legislation (but see Part 6), while the first has to be measured against the criteria used by Article 95 itself, which have as their object the establishment or functioning of the internal market, that is, by eliminating either barriers to free movement or distortions of competition.<sup>13</sup> While contract law will rarely create barriers to trade and therefore cannot be used to eliminate them,<sup>14</sup> different contract law rules of mandatory character, as is the case in consumer law may create distortions of competition. This ‘negative approach’ has therefore been used by the EU institutions to justify their involvement in consumer contract law. A more positive element was added by referring to the goals of consumer policy as enshrined in Article 153 (1) itself: to promote consumer information and to protect their economic interests, for example by creating minimum standards on pre-contractual information in direct and distance selling, by increasing freedom of choice through rights of withdrawal, by establishing rules on the transparency and fairness of pre-formulated terms and guarantees, and by ensuring quality standards through mandatory rules on compensation and warranties.

This approach came under pressure when the ECJ, in its famous tobacco-advertising judgment of 5 October 2000,<sup>15</sup> decided to substantially curtail the rather ‘loose’ use of the internal market power for consumer protection legislation. This judgment has provoked an intense debate among European legal scholars, about whether there is a genuine EU competence in contract law in general and in consumer contract law in particular, which will not be followed in detail here. The case, and this should not be forgotten, concerned a particularly strict EU directive that prohibited any type of tobacco advertising and even allowed Member States to go further because it was meant to be a minimum directive(!)<sup>16</sup> One can of course debate the usefulness of such rules for combating health risks (which was the main justification behind this directive), but from a purely legal point of view the judgment referred to some particulars of EU law which are not present in consumer contract law:

- EU law expressly excludes harmonisation in health policy affairs, pursuant to Article 152 (4)(c) EC; there is no similar rule with regard to consumer contract law.
- The tobacco advertising directive did not improve the circulation and

13 Norbert Reich & Hans-W Micklitz, *Europäisches Verbraucherrecht* (4<sup>th</sup> ed, 2003) at paras 1.20–1.24.

14 An exception may be form requirements which have mostly been eliminated with regard to e-commerce by *Directive 2000/31*, above n9.

15 *Federal Republic of Germany v European Parliament and Council of the European Union* [2000] ECR I–8419.

16 *Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations, and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products* [1998] OJ L 213/9.

marketing of tobacco products, but restricted it severely, for example through the minimum protection clause.

- It did not help the functioning of the internal market by increasing competition because in practice the prohibition on advertising practically prevented the appearance of newcomers.

Later cases have softened this rather radical approach of the ECJ, namely by recognising that measures adopted for the establishment and functioning of the internal market may also serve to protect consumers' health, and that they can be taken to avoid future distortions of competition which are likely to happen by allowing, for example by unilateral Member State action. The Court mentioned that the directive under scrutiny did not contain a minimum protection clause, and is allowed free circulation of goods or services when the requirements of the directive were fulfilled.<sup>17</sup> In intellectual property matters, the ECJ was quite generous in allowing EU legislation on the patentability of biotechnological inventions.<sup>18</sup> Why should the Community not be permitted to do in favour of consumers what it is justified to do for traders? Functioning consumer markets have two partners, namely business and consumers, and both need protection of their specific economic interests.

Such a broad understanding of Community jurisdiction in consumer law matters recently found explicit recognition by the Court in *Leitner*:

It is not in dispute that, in the field of package holidays, the existence in some Member States but not in others of an obligation to provide compensation for non-material damage would cause significant distortions of competition, given that... non-material damage is a frequent occurrence in that field. Furthermore, the Directive .... is designed to offer protection to consumers and, in connection with tourist holidays, compensation for non-material damage arising from the loss of enjoyment of the holiday is of particular importance to consumers.<sup>19</sup>

This statement is remarkable since the Court not only justified Community jurisdiction in the field of package holidays, but extended the unclear concept of compensation in the directive to include non-material damage which was recognised by some Member States (for example Germany, UK), but not by others (for example Austria), referring to the somewhat artificial argument of avoiding distortions of competition.

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17 *R v Secretary of State for Health ex parte British American Tobacco (Investment) Ltd et al and Imperial Tobacco Ltd* [2002] ECR I-11453; Joined cases C-154 and C-155/04 *R, National Association of Health Stores and Ors v Secretary of State for Health, National Assembly for Wales* [2005] ECR not yet reported (judgment of 12 July 2005) at 105.

18 *Kingdom of the Netherlands v European Parliament and Council of the European Union* [2001] ECR I-7079.

19 *Simone Leitner v TUI Deutschland GmbH & Co KG* [2002] ECR I-2631 at 21-22.

### C. *Conflict Rules v Substantive Rules on Consumer Contracts*

Another important question of EU consumer contract law has been the debate whether it is sufficient to rely on conflict rules, or whether the Community should be allowed to establish substantive rules. This is a very fundamental problem of any system of multi-level governance in private law, and the solutions chosen in the US, Australia, Brazil, and the EU differ considerably. As mentioned in the *Sydney Law Review* article of 1992, the EU already has an instrument concerning conflict rules for obligations arising out of contracts, including protective provisions on consumer contracts. There is one fundamental weakness in the present system: the Rome Convention of 1980, though generally adopted by all Member States including the new ones, has so far remained outside the Community, including ECJ jurisdiction, and therefore Member States have applied its principles quite differently. This may change once the ECJ uses its newly gained authority to interpret the Convention upon reference from (higher) national courts. The Convention may in the future be transformed into a regulation as has been proposed by the Commission and thereby become a directly applicable EU law instrument.<sup>20</sup> With regard to consumer protection, there is another fundamental weakness which is quite opposite to the internal market spirit of EU consumer law: it protects only the passive consumer, not the 'active' one who is shopping around in the internal market, and it does not fit into the new approach for consumer protection chosen by Article 15 of the jurisdiction regulation (EC) 44/2001<sup>21</sup> which makes consumer protection dependent on the marketing behaviour of the trader, and not on the role of the consumer.<sup>22</sup>

Conflict rules, even if they contain a protective ambit, can never reach a minimal or even less a uniform standard of consumer protection. This is one of the reasons why — despite all its criticism — EU consumer contract law so far has been quite a success story because it has enabled old and new Member States to modernise their contract or at least consumer protection law.<sup>23</sup>

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20 *Com* (2002) 654 final; see Norbert Reich, *Understanding EU Law: Objectives, Principles and Methods of Community Law* (2nd ed, 2005) at 284; now Commission Proposal for a Regulation 'Rome I', *Com* (2005) 650 final of 15.12.2005.

21 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.

22 Ksenija Vasiljeva, '1968 Brussels Convention and EU Council Regulation No 44/2001: Jurisdiction in Consumer Contracts Concluded Online' (2004) 10 *European Law Journal* 123; Mario Tenreiro, 'La Compétence Internationale des Tribunaux en Matière de Consommation: Les Consommateurs Protégés, dans la Société de l'information' in Albiges et al, above n3 at 1093. This solution would be taken over by the new Art 5 (2) of the proposed 'Rome I' regulation, above n20.

23 See Norbert Reich, 'Transformation of Contract Law and Civil Justice in the New EU Member Countries' (2005) 23 *Penn State Int'l L Rev* 587 (with accounts of the development in the Baltic states, in Poland and Hungary).

### 3. *Experience with the 'acquis'*

#### A. *The Protective Purpose to the Directives*

The three directives that had been already adopted when my paper in *Sydney Law Review* was published were the directives on doorstep selling 85/577/EEC, on consumer credit 87/102<sup>24</sup> and on package holidays 90/314. In the meantime there have been several references by national courts to the ECJ under the procedure of Article 234 EC which gives the ECJ interpretative authority on questions of Community law raised before a national jurisdiction. Lower courts have an option to refer if they think that Community law is relevant to their case, while the highest courts are under an obligation to do so, although this can only be indirectly enforced through rules on state liability for breaches of Community law.<sup>25</sup> Many of these references were brought by lower courts that felt an obligation to overcome the rigidities of their own law as interpreted and applied by the highest courts of a country; I have spoken of how the reference procedure constitutes a 'Reparaturwerkstatt', for instance, a 'repair shop', with regards to deficits on consumer protection left by (implementing) national law.<sup>26</sup> And indeed, there have been some spectacular cases and changes in national law provoked by the ECJ.

From a methodological point of view, the ECJ seemed to be inspired by a 'pro-consumer' attitude<sup>27</sup> — some people even thought was too 'pro-consumer'. While contract law directives do not, in the jargon of Community law, take a 'horizontal direct effect',<sup>28</sup> that is they cannot create in themselves obligations against private parties, they may nevertheless be used as basis for a 'directive conforming interpretation' of national law, including in the pronouncements of the ECJ.<sup>29</sup> I will give some examples in the following section, without pretending to give a complete overview or evaluation of the now quite substantial case law.

24 The Commission has presented a proposal substantially modifying *Directive 87/102 EEC*, *Com* (2002) 443 final of 11 September 2002, amended by *Com* (2004) 747 final of 28 October 2004, and more recently modified by *Com* (2005) 483 final of 7 October 2005. The most controversial point has been on the extent of harmonisation: the Commission has opted for full harmonisation.

25 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239 on condition that this breach is however 'manifest' at 55 and 120.

26 Norbert Reich, 'Die Vorlagepflicht auf Teilharmonisierten Rechtsgebieten am Beispiel der Richtlinien zum Verbraucherschutz' (2002) 66 *RabelsZ* 531.

27 Klaus Tonner, 'Europäisches Verbrauchervertragsrecht oder Europäisches Vertragsrecht – Konvergenz oder Divergenz?' in *Festschrift (FS) für Peter Derleder* (2005) at 145, 164.

28 The leading case is *Paola Faccini Dori v Recreb Srl* [1994] ECR I-3325; for a discussion see Reich, above n20 at 20–23; a recent case seems to suggest 'negative horizontal direct effect', at least with regard to non-discrimination directives, *Werner Mangold v Rüdiger Helm* [2005] ECR, unreported (judgment of 22 November 2005); my critical comment in *Europäische Zeitschrift für Wirtschaftsrecht* (2006) *EuZW* 20.

29 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135 and later cases; see Reich above n20 at 49–52; Sacha Prechal, Joined cases C-397/01 to C-403/01 *Bernhard Pfeiffer et al* (2005) *CML Rev* 1445; Marc Amstutz, 'In-Between-Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning' (2005) 11 *European Law Journal* 766.

### **B. Interpretation of Directive 85/577/EEC**

The most spectacular and controversial case which arose under Directive 85/577/EEC concerned the so-called ‘*Heininger*’ Saga.<sup>30</sup> The litigation turned on the question of whether real estate credit transactions, which were expressly excluded from the Consumer Credit Directive 87/102/EEC, could nevertheless be subsumed under the doorstep directive if the credit transaction was entered into or prepared in a ‘doorstep situation’. This question arose when many consumers had entered into seemingly profitable real estate investment in Germany after unification, supported by considerable tax benefits and financed by building societies. Consumers, after discovering the shaky nature of their investment, wanted to get rid of the transaction and be freed from the obligation to repay the loan, particularly if the project manager had become bankrupt, or if the rent ‘guaranteed’ and promised from the investment could not be realised.

At the time the litigation came before German courts, it was accepted legal opinion (*herrschende Meinung*) that neither the Consumer Credit nor the Doorstep Directive applied to real estate credit transactions and that therefore the implementing German legislation was in conformity with European law. Therefore, the banks had not informed the consumer of an eventual right of cancellation, as required by Directive 85/577/EEC, because in their opinion no such right existed anyhow.

In the *Heininger* proceedings brought before the ECJ by a reference from the highest German civil court, the *Bundesgerichtshof* (BGH), the ECJ found, to the surprise of most legal observers, to the opposite:

- Directive 85/577/EEC is also applicable to real estate credit transactions because it is not expressly exempted, and such exemptions must be interpreted strictly in order not to frustrate the protective ambit of the directive.<sup>31</sup>
- If the consumer has not been informed about his or her right to cancellation, then the 7 day period for cancellation does not lapse: an uninformed consumer cannot make use of a right conferred upon him or her by the directive.
- The ECJ rejected any effort to restrict the temporal effects of the judgment.

Obviously the judgment caught the German legal establishment by surprise. The BGH, in the follow-up decision of 8 April 2002, carefully ‘re-interpreted’ German law to apply it in formal accordance with the judgment.<sup>32</sup> At the same time, the BGH insisted that any defences arising in the investment transaction cannot be held against the bank to stop repaying the debt which had arisen out of the real estate credit. It even tended to make the situation of the consumer — who,

30 *Heininger v Bayr. Hypo und Vereinsbank* [2001] ECR I-9945; for a detailed account in German see Norbert Reich, ‘Heininger und das Europäische Privatrecht, in *Derleder*’, above n27 at 127.

31 This principle was already developed in *Travel Vac Antelm v Manuel José Sanchis* [1999] ECR I-2195.

32 We will spare the non-German reader with details of this rather ambitious interpretation effort!

according to *Heininger*, had cancelled his or her contract because it was concluded at the doorstep — worse than before cancellation: the consumer would have to pay back immediately the entire sum credited by the bank, and would still have to pay the normal market interest rate for the capital. The BGH justified this rather surprising consequence with the illuminating statement that sometimes ‘consumer protection can turn against the consumer...’<sup>33</sup> Consumers, beware of consumer protection!

This was not the final result of the litigation because, in the meantime, several German courts had referred the question consumer remedies in cases of cancellation of a doorstep real estate contract to the ECS. The basic argument was the rather broad and still unspecific Community law principle of ‘effective legal protection’<sup>34</sup> which seems to be violated under the case law of the BGH. On 25 October 2005, the ECJ decided the *Schulte* case<sup>35</sup> in a Great chamber and the *Crailsheimer Volksbank* case<sup>36</sup> in the second chamber which took word for word most of the reasoning of the *Schulte* judgment and made some brief comments on the existence of a doorstep situation. The main reasoning is as follows and must be implemented by national courts:

- Directive 85/577 is not applicable to real estate transactions as such, whether isolated or in connection with a loan agreement which is entered into for the financing of the purchase. The Court rejected the theory of ‘single economic unit’ within the scope of application of Directive 85/577, unlike its express recognition in the consumer credit Directive 87/102/EEC.
- Even if national law is empowered to determine the consequences of cancellation, it must take all measures to ensure that the directive is fully effective, that is, that its protective ambit should not be frustrated.
- If the loan is directly paid out to the developer and serves to finance the investment, Community law does not preclude a requirement that the consumer must repay the loan in full after cancellation.
- The cancellation does not preclude a national rule that requires immediate repayment of the loan after cancellation according to Article 5 of Directive 85/577.
- The bank could in this case request interest according to market rates because Article 5 (2) requires restoration the status quo ante.
- However, Article 4 (3) requires Member States to ensure that their legislation protects consumers who have been unable to avoid exposure to such risks [loss of rental income and property value incurred because of not knowing of their right of cancellation under the Directive], by adopting suitable measures to allow them to avoid bearing the consequences of the materialisation of those risks.<sup>37</sup>

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33 See critique in Reich, above n30 at 130.

34 Id at 137.

35 *Elisabeth & W Schulte v Deutsche Bausparkasse Badenia AG* [2005] ECR (unreported (judgment of 25 October 2005)).

36 *Crailsheimer Volksbank eG v K Conrads et al* [2005] ECR (unreported (judgment of 25 October 2005)).

**C. *Package Holiday Directive 90/314/EEC***

Today's consumers — in particular those of the middle classes in the EU and in Australia — are keen on travelling, and it is no surprise that Directive 90/314/EEC has become a popular object of litigation. Two questions are also particularly interesting for the non-EU lawyer:

(i) *Article 7: Evidence of Security in Case of Insolvency of the Tour Operator*

Shortly after adoption of the directive, my *Sydney Law Review* article commented somewhat sceptically on that provision:

The Directive does not take up the Commission proposal on compulsory insurance or an operator's guarantee fund in case of bankruptcy. On the other hand, Article 7 obliges the organiser to provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency. It is not clear how this obligation should be implemented by the Member States.<sup>38</sup>

Quite surprisingly, the ECJ read into this rather vague and indeterminate provision a far reaching obligation of Member States and of tour operators to directly provide such security, as well as a 'subjective right' of the consumer to be effectively protected against the hazards of bankruptcy of the tour operator. If a Member State (in this case Germany) had not in time enacted the necessary legislation in time, it would even be under an obligation to compensate consumers under the principles of state liability if they lost the money they had paid over or had to pay twice for the repatriation because of the insolvency of the tour operator.<sup>39</sup> In a case against Austria<sup>40</sup> the ECJ insisted on full implementation which would not allow any exclusion or limitation of liability by the tour operator in respect of the security instrument provided.

Other cases were concerned with the concrete extent of this security obligation. It has included also the additional payments which a consumer had to make for the hotel accommodation because the owner who had not been paid by the bankrupt operator would not let him depart without the additional payment<sup>41</sup> quite a surprising result where the illegal action of the hotel owner against the consumer is put on charge of the security instrument! The ECJ justified this by reference to the purpose of Article 7, being to grant a right of full compensation to consumers if they become stranded in the country where they want to take their vacation and have paid for it.

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37 *Schulte*, above n35 at 101.

38 *Reich*, above n1 at 56.

39 *Dillenkofer and Ors v Federal Republic of Germany* [1996] ECR I-4845.

40 *Rechberger and Ors v Republik Österreich* [1999] ECR I-3499.

41 *Verein für Konsumenteninformation v Österreichische Kreditversicherungs AG* [1998] ECR I-2949.

*(ii) Article 5: Liability of the Tour Operator for a 'Lost Holiday'*

Article 5 provides for compensation of the consumer in cases of improper performance of the package holiday contract.<sup>42</sup> The above mentioned *Leitner* case concerned compensation of an Austrian tourist who had suffered from salmonella poisoning in a sub-standard Turkish hotel and therefore could not enjoy her holiday.<sup>43</sup> The defendant and several governments argued that the directive only set minimum standards, and that it should be left to national law to decide whether to grant compensation for a 'lost holiday'. AG Tizziano in the comparative overview of his opinion of 20 September 2001, as well as the ECJ did not follow this restrictive view. Both stressed the purpose of the directive to eliminate barriers between national laws and practices of the Member States and concluded that this elimination of disparities required the uniform interpretation of the term 'damages' to also include non-material damages caused by a 'lost holiday'.

The judgment, even though its reasoning is very brief and not well elaborated, is not only important with regard to EU competence in consumer contract law, as mentioned before, but also may be important as a nucleus of an emerging substantive European contract law to which I will refer later.

**D. Directive 93/13/EC on Unfair Contracts Terms***(i) A 'Horizontal' Approach to European Consumer Contract Law*

The *Sydney Law Review* article of 1992 mentioned the proposal of the Commission concerning a directive on unfair terms in consumer contracts. In the meantime, this directive has been adopted and has had quite an influence, particularly in the contract law of new member countries,<sup>44</sup> and by giving rise to considerable debate in 'old' Member countries.<sup>45</sup> It even influenced initiatives to create a common 'European contract law' (Part 5).

The changes which were introduced by the final version of the directive, as compared with the proposal, are the following:

- The directive is only concerned with 'not individually negotiated terms', ie with such terms in a consumer contract which, according to Article 3 (2), have been 'drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.' This is contrary to my prior suggestion to include any contract between a consumer and a trader because an '[i]nequality of bargaining power exists in either case'.<sup>46</sup>
- The unfairness test has been somewhat narrowed to combine the reference to 'good faith' as in the German tradition, and the 'imbalance in the parties

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42 See Reich, above n1 at 55.

43 *Leitner*, above n19; detailed comment in Reich & Micklitz, above n13 at para 18.22

44 See Reich, above n23.

45 For an overview see Hugh Beale, Arthur Hartkamp, Hein Kotz & Denis Tallon (eds), *Cases Materials and Text on Contract Law* (2002) at 513.

46 Reich, above n1 at 58.

rights and obligations' as in French law, per Article 3 (1). There is no more reference to the concept of 'legitimate expectations' otherwise used in EU law.<sup>47</sup>

- The Annex has not been made into a genuine blacklist, but into an 'indicative, non-exhaustive list of ... terms which may be regarded as unfair', Article 3(3).

Notwithstanding these modifications, the directive imposed a broad 'horizontal approach' to consumer contracts and included, still a novelty for many common law countries, an explicit reference to the concept of good faith.<sup>48</sup> In later proceedings before the British House of Lords,<sup>49</sup> a more procedural approach was taken under the good faith clause, referring to fair dealing and not to the contents of the clause. Unfortunately, the House of Lords did not refer the case to the ECJ under its obligation under Article 234 (3) EC. Therefore it is not clear under European law whether a more substantive or a more procedural approach to the unfairness test should be taken. The different approaches of civil and common law must be respected and have not been harmonised.<sup>50</sup>

(ii) *Practical Experiences with Directive 93/13/EC before European Jurisdictions*

So far relatively little case law has dealt with the interpretation of Directive 93/13/EC, which suggests that it has not brought much change to Member State contract law, and has only marginally contributed to improving the consumers' position on the market. The Commission, in infringement proceedings under Article 226 EC, was mostly concerned with a formally correct transposition of the directive into national law. The importance of the transparency principle has been stressed by the Court in the litigation against the Netherlands<sup>51</sup> for incorrect implementation of the Directive. Since Articles 3, 4 and 5 are intended to grant rights to the consumer, it is essential that the legal situation resulting from national implementing measures be sufficiently precise and clear and that individuals be made fully aware

47 Reich, above n20 at 230.

48 Richard Brownsword, Norma Hird & Geraint Howells (eds), *Good Faith in Contract: Concept and Context* (1998); the paper by David Harland comes to a different conclusion with regard to Australia, but mostly with regard to the concept of 'unconscionability': David Harland 'Unconscionable and Unfair Contracts: An Australian Perspective' in Brownsword et al, above n48 at 243; see also the critical account by Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' (1998) 61 *Modern L Rev* 11.

49 *Director General of Fair Trading v First National Bank plc* [2001] WLR 1297, critical analysis Hans-W Micklitz, 'Zum Englischen Verständnis von Treu und Glauben in der Richtlinie 93/13/EWG, Entscheidung des Englishchen House of Lords vom 25 October 2001' (2003) 4 *ZEuP* 865; Geraint Howells & Stephen Weatherill, *Consumer Protection Law* (2<sup>nd</sup> ed, 2005) at 282–285; Harland, above n48 at 259 refers to a similar approach in Australian law under the leading case of *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

50 For a detailed and critical account of the English litigation see Hans-W Micklitz, *The Politics of Judicial Co-operation in the EU: Sunday Trading Equal Treatment and Good Faith* (2005) at 401–423.

51 *Commission of the European Communities v Kingdom of the Netherlands* [2001] ECR I–3541; also *Commission v Italy* [2002] ECR I–819 concerning remedies.

of their rights so that, where appropriate, they may rely on them before national courts. The Court stated:

... even where the settled case-law of a Member State interprets the provisions of national law in a manner deemed to satisfy the requirement of a directive, this cannot achieve the clarity and precision needed to meet the requirement of legal certainty.<sup>52</sup>

The Court took a less strict view with regard to the implementation of the so-called indicative list of the Annex. It is sufficient that the list be included in the *travaux préparatoires* if they are regularly consulted by the judiciary in interpreting the law.<sup>53</sup>

With regard to interpreting the general clause of Article 3 itself, the ECJ took a somewhat conflicting and ambiguous point of view. The first litigation came before the Court in *Oceano*.<sup>54</sup> Several Spanish clients were sued by a book-club company at its place of business but not at their residence, because a jurisdiction clause was inserted in the standard contract form. The Spanish judge was not sure whether he could raise the issue of his territorial incompetence *ex officio* because he regarded the jurisdiction clause to be unfair under Article 3(2) of Directive 93/13/EC and paragraph 1(q) of the so called indicative list of the Annex. The Court gave a somewhat unclear answer:

[a] jurisdiction clause must be regarded as unfair within the meaning of Article 3 of the Directive (93/13/EC) *in so far as* it causes, contrary to the requirement of good faith, a significant imbalance in the parties rights and obligations existing under the contract to the detriment of the consumer.<sup>55</sup>

The Court insisted on the protective ambit of Directive 93/13/EC. This means that the judge should be able to raise *ex officio* the potential unfairness of the jurisdiction clause, and that he should apply and interpret his national law in conformity with Community law. However, the Court did not completely condemn the jurisdiction clause, but left this to the national judge, depending on the circumstances of the case. There is, nonetheless, great likelihood that such unilateral clauses are unfair because they contradict the principle of effective judicial protection.<sup>56</sup>

In the case of *Freiburger Kommunalbauten*,<sup>57</sup> a municipal construction company had sold to Mr and Mrs Hofstetter a parking space to be built by the

52 *Commission v Netherlands*, above n51 at 21.

53 *Commission of the European Communities v Kingdom of Sweden* [2002] ECR I-4147.

54 *Océano Grupo Editorial SA v Rocio Murciano Quintero and Ors* [2000] ECR I-4941; comment Jules Stuyck, 'Case Law' (2001) 38 *CML Rev* 719.

55 *Oceano*, above n54 at 24. Reich & Micklitz, above n13 at para 13.22 insist that the words in italics were not translated in the German version and this has caused some confusion about the ambit and scope of the judgment.

56 Reich, above n20 at 242.

57 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Ludwig Hofstetter* [2004] ECR I-3403.

former. Under the relevant clause, the total purchase price was due already on delivery of a security by Freiburger Kommunalbauten, irrespective of any progress made in the construction. The BGH was inclined to the view that the clause was not unfair but was not free from doubt, and therefore referred the case to the ECJ. To the surprise of observers, both AG Geelhoed and the Court declined to review the clause but left this to national courts. This means that the ECJ cannot decide on the unfairness of a particular clause without knowing the national law that forms the background of the decision and the circumstances of the individual case. The reference procedure of Article 234 EC is limited to interpreting Community law, but is not supposed to decide questions that lie in the mixture between national and EU law. The Court implicitly opted for a theory of judicial restraint on contract law matters — an option that should be kept in mind when proposing a genuine ‘European’ contract law.<sup>58</sup>

A recent reference from a local Hungarian court<sup>59</sup> — the first one from a new Member country — raises questions about the effects of an unfair clause: must there be an express declaration of the consumer, or does it cease to bind the consumer *ipso iure*? It seems obvious to this author that the ECJ will apply the *Océano* argument, that is, rely on the protective spirit of Directive 93/13 and therefore not require an express declaration of the consumer.

#### 4. *A New Approach to (Consumer) Sales Law: Directive 1999/44/EC*

##### A. *The Extraordinary History of Directive 99/44/EC*

Harmonisation of consumer sales law was originally not on the Community agenda. Indeed, one may question why the Community should take action in this area at all. For example, in the US — which has a much more developed internal market — there is no federal sales legislation, but there is a Uniform Commercial Code, a model law that has been taken over by most of the states. The internal market in the US seems to function without a uniform sales law. As a result, cross-border disputes are solved by conflict rules. This includes those between B2C arising out of different standards. Australia has put certain consumer protection rules in its *Trade Practices Act*, without preempting state law.<sup>60</sup>

However, the Community legislator was not satisfied with the functioning of the conflict rules of the Rome Convention as these only protect the passive consumer, not the active consumer shopping around in the internal market for the best offers.

58 Anne Röthel, ‘Missbräuchlichkeitskontrolle nach der Klauselrichtlinie: Aufgabenteilung im Supranationalen Konkretisierungsdialog-urteil des Europäischen Gerichtshofes vom 1 April 2004’ (2005) 13 *ZEuP* 418.

59 Case C-302/04 [2004] *Ynos Kft v János Varga* OJ C 251/5, see now the opinion of AG Tizzano of 22 September 2005. In its judgment of 10 Jan 2006, the Court declined its competence to decide the case which originated before accession of Hungary to the EU.

60 See David Harland, ‘The Liability to Consumers of Manufacturers of Defective Goods’ (1981) *JCP* at 212–227.

When the Commission proposed a directive on unfair contract terms in 1992,<sup>61</sup> it had blacklisted certain exemption clauses, for example, those in sales contracts. However, in order to make them effective it 'smuggled' some provisions on guarantees and warranties in consumer sales contracts into the proposed directive. These could not be contracted out of. This approach was rejected by the Council when adopting Directive 93/13/EC 'on unfair terms in consumer contracts' (above Part 3 D(i)). However, at the same time the Commission was charged with preparing a proposal on a consumer sales directive. The Commission first published a Green Paper on 15 November 1993<sup>62</sup> where it discussed the issues of harmonising and reforming the law of guarantees of consumer goods and after-sales service. It vigorously put forward the concept of legitimate expectations of consumers regarding product quality. This would allow liability for quality defects to fall not only on the seller, but also subsidiarily on the producer — in the case of selling a product in a chain of distribution. The result would be to severely restrict the privity of contract doctrine, which governed sales law in all Member States — with the exception of the French inspired *action directe*.<sup>63</sup>

However, the Commission proposal for a Directive on consumer sales and guarantees<sup>64</sup> did not take up the more ambitious proposals of the Green Paper. As a result, this was a modified privity of contract proposal, inspired in its main concepts by the UN Convention on Contracts for the International Sale of Goods of 1980 (CISG), made to fit the special needs of consumer protection. It did so, for example, by forbidding a contracting out of the sellers' obligations, and by giving the consumer a bundle of remedies against the seller in cases of non-conformity of the product. With regard to guarantees, the Commission made it clear that it wanted to regulate only 'commercial guarantees', that is, only those given voluntarily by the seller or the producer. The concept of legitimate expectations was watered down, but can be found in the (limited) liability of the seller for representations of the producer — an innovation that was particularly controversial in Germany.<sup>65</sup>

### ***B. Legitimate Expectations of the Consumer Concerning Product Quality***

The proposal was adopted by the European Parliament and the Council with some minor changes as Directive 1999/44/EC of 25 May 1999 'on certain aspects of the sale of consumer goods and associated guarantees'. In comparison with existing Member State law, it contains the following innovations:

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61 Amended proposal for a Council directive on unfair terms in consumer contracts [1992] OJ C 73/7.

62 *Com* (1993) 509 final; comment Hugh Beale & Geraint Howells, 'EC Harmonisation of Consumer Sales Law – A Missed Opportunity?' (1997) 12 *JCL* 21; Anton Schnyder & Ralf Straub, 'Das EG-Grünbuch über Verbrauchsgütergarantien und Kundendienst – Erster Schritt zu einem einheitlichen EG-Kaufrecht?' (1996) 4 *ZEuP* 8.

63 For a description see Jean Calais-Auloy & Frank Steinmetz, *Droit de la Consommation* (6th ed, 2003) at 265–267.

64 *Com* (1995) 520 final.

65 Hans-W Micklitz, 'The New German Sales Law: Changing Patterns in the Regulation of Product Quality' (2002) 25 *JCP* 379.

- The seller is liable for ‘conformity’ of the product with contractual arrangements. The older concepts of ‘defect’ (German law), ‘vice caché’ (French law) or ‘merchantable quality’ (common law) are replaced by a more modern concept taken from Article 35 *et sequ.* of the CISG. Delivery of a product conforming to the contract protects the legitimate quality expectations of the consumer. In the case of breach, a set of remedies is available to the consumer.
- The seller is liable not only for his or her own representations but also for ‘any public statements on the specific characteristics of the goods made about them ... by the producer or his representative, particularly in advertising or on labelling’.<sup>66</sup> The directive aims to protect the legitimate expectations of the consumer concerning the quality of the products to which the seller’s marketing adheres. The seller has certain defences, for example if he did not know or could not ‘reasonably have been aware of the statement in question’.<sup>67</sup>
- The directive is applicable to the sale and to some extent also to the ‘supply’ of ‘consumer goods’ to the consumer, referring to all movables including used goods. It excludes real estate property, electricity, water and gas where they are not put up for sale in a limited volume or in a set quantity, and the purchase of ‘rights’, such as financial securities.
- The time limit for liability for lack of conformity has been extended to two years minimum, which is considerably longer than in traditional German law (6 months). A lack of conformity that becomes apparent within 6 months of delivery of the goods is presumed to have existed at the time of delivery. It can be shortened to 1 year in the case of used goods.<sup>68</sup>
- The remedies of the consumer in cases of non-conformity have been regulated in great detail, with the exception of a claim for compensation which is left for Member States. Article 3 has, after debate in the legislative organs of the EU, introduced a two-step procedure. First, the consumer must either ask for repair or replacement of the non-conforming goods; only under qualifying conditions may he or she ask for reduction of the purchase price or rescission of the contract as a second step. Some authors suggest that the EU has left little room for Member States to modify the hierarchy of remedies.<sup>69</sup>
- The directive follows the classic privity concept, for example, it does not allow for a direct action against the producer if he or she is not the seller, unlike product liability law. But the seller has a right of redress against his

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66 Article 2(2)(d) of *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees* [1999] OJ L 171/12.

67 *Ibid.*

68 Article 5 of *Directive 1999/44*, above n66. Member States are allowed to introduce a 2 months obligation of the consumer to inform the seller of the lack of conformity.

69 Peter Rott, ‘Minimum Harmonisation for the Completion of the Internal Market? The Example of Consumer Sales Law’ (2003) 40 *CML Rev* 1107.

or her own seller in the chain of distribution which, in our opinion, must be effectively implemented by Member State law.<sup>70</sup> Recital 9 seems to suggest that this right to recourse cannot be contracted out of in general contract terms, but only if 'he has renounced that entitlement', thus referring to an individual transaction exempting the producer or previous seller from liability or reducing it vis-à-vis the final seller. This remedy of recourse by the final seller against the previous seller or the producer/importer of the consumer good is justified by the fact that the final seller would otherwise be caught in between the far reaching remedies of the consumer which cannot be contracted out of,<sup>71</sup> on the one hand, and, on the other hand his or her contractual relations in the chain of distribution where the producer or other partners in the chain may introduce an exemption clause concerning their liability towards the final seller, or make it subject to very short limitation periods and other restrictive conditions.

- Commercial guarantees are voluntary instruments of marketing, which must meet certain transparency requirements.

### C. *Implementation of the Directive into Member State Law*

The Directive was adopted under the minimum protection clause meaning that Member States were free to go beyond the personal and substantive scope of application and to either opt for special legislation or to integrate it into their general sales law. Indeed, the approaches taken differ quite considerably. A general trend in EU legislation which seems to result in more disparities of national laws after the adoption of a 'harmonisation' measure, such as a directive, than before! Different trends can be distinguished:

- Germany<sup>72</sup> as well as some new Member States like Estonia, Hungary and Lithuania<sup>73</sup> integrated the directive into their Civil Codes, thereby substantially modifying and modernising sales law.
- Other countries, like England<sup>74</sup> Poland and Latvia<sup>75</sup> choose special legislation on consumer sales because they could not completely modify their existing sales law in the short time left for implementation.
- Finally, countries, like France, with a traditional and already consumer friendly approach to sales law<sup>76</sup> have only recently managed to implement the directive, namely by regulation ('*ordonnance*') of 17 February 2005. The text of the directive was left nearly unchanged and was put into the

70 Article 4 of *Directive 1999/44*, above n66.

71 *Ibid.*

72 Micklitz above n65; For an overall discussion of the German reform, see Stefan Grundmann, 'Germany and the *Schuldrechtsmodernisierung 2002*' (2005) 1 *European Review of Contract Law* 129.

73 Reich, above n23.

74 Stefan Arnold & Hannes Unberath, 'Die Umsetzung der Richtlinie über den Verbrauchsgüterkauf in England' (2004) 12 *ZEuP* at 366; Howells & Weatherill, above n49 at 148–150.

75 Reich, above n23.

76 Calais-Auloy & Steinmetz, above n63 at 267–272.

'*Code de la consommation*' under the name '*garantie légale des vices cachés*.' It is applicable only between professional people ('*professionnels*') and consumers. The traditional French '*Code Civil*' rules on '*garantie des vices cachés*' of 1804 have not been modified. So there is a double régime now for consumer sales contracts, one following the old law, and another adopting the recent directive. It is not known how this double system — both of which are mandatory — will work in practice.

## 5. *Initiatives Towards and Against a 'European Contract Law'*

### A. *The case 'for' a 'European Contract Law'?*

As can be seen, the EU consumer contract law acquis is quite remarkable, and there has been no other area in contract law which has been under so much EU legislative influence. For many authors, the new-born consumer contract law could serve as a nucleus for a codification of European contract law, should there be political will and legal expertise behind such proposals. Such a codification could also help to overcome the obvious deficits of the existing acquis, namely its highly selective and haphazard character, its inherent contradictions, its ad-hoc terminology, its frequent lack of effective remedies and its differences as to the approach taken towards harmonisation (minimal versus total harmonisation).

On the other hand, the existing preparatory work on a European contract law has taken a somewhat different direction. The internal market philosophy of the Community has been its starting point. This philosophy is based on contractual autonomy<sup>77</sup> present in primary and secondary Community law, but has never been codified expressly. If such a codification could be attained it would lead to a truly European — or Community — contract law. 'Ideally' it would be able to overcome the present system of 25 contract laws which must be co-ordinated by the mechanisms of private international law, in particular the Rome Convention, itself based on party autonomy.

It has been argued, particularly by Basedow,<sup>78</sup> that such a European contract law would serve the purposes of the internal market well and thereby fall into the competence of the Community because: it would create uniform conditions for marketing in Europe, would avoid the risk of choosing or being submitted to an unknown legal order, and would save transaction costs for parties contracting across borders.

Basedow has even advocated the possibility of a Community contract regulation which would be applicable if the parties had not expressly contracted out of it. In contrast to the bits and pieces of the existing mandatory, mostly consumer contract law in the Community, it would allow the parties freedom of choice and would

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77 Norbert Reich, 'The Tripartite Function of Modern Contract Law in Europe: Enablement, Regulation, Information' in Franz Werro & Thomas Probst (eds), *Le Droit Privé Suisse Face au Droit Communautaire Européen* (2004) at 145.

78 Jürgen Basedow, 'A Common Contract Law for the Common Market' (1996) 33 *CML Rev* 1169.

only apply if no other legal regime had been chosen. Under this concept, it must be regarded as a hypothetical prolongation of the free will of the parties: what reasonable legal order would they have agreed on to settle their potential conflicts?

### **B. Private Initiatives: The European Principles**

The ideas of Basedow and other supporters of a European contract law have as yet not so much been taken up by political institutions of the Community but rather by private initiatives. The best known were elaborated on by a study group under the chairmanship of Professor Ole Lando.<sup>79</sup> Two volumes of principles were published in 2000 and have led to an intense discussion; a third one followed recently.<sup>80</sup>

We will not take up this discussion, but simply refer to the leading articles of the Principles of European Contract Law (Principles). Article 1:102 expressly recognises the principle of freedom of contract. It is limited only by:

- the principle of good faith;
- fairness in commercial transactions;<sup>81</sup>
- mandatory provisions as far as recognised by the principles;<sup>82</sup> and
- the principle of co-operation in order to make the contract effective.<sup>83</sup>  
*pacta sunt servanda.*

The Principles can be applied by express agreement, if the parties refer to 'general principles', *lex mercatoria* or similar rules, or if they have not chosen any law at all. Their application is not limited to cross-border transactions. The principles function as a supplementary legal order if the applicable law does not contain adequate rules.<sup>84</sup>

The true area of application of the Principles — should they become of any legal importance in the future — will, however, be cross-border commercial transactions in the EU. They do not suit consumer contracts (which are not even mentioned as such!) because of the substantial amount of mandatory law that the Community has adopted. The rules on unfair contract terms try to take over some EU concepts, for example in Article 4:110 the concept of 'Unfair terms not individually negotiated', Article 5:103 the contra preferentem-rule, and Article 8:109 on clauses excluding or restricting remedies, but their potential enforcement

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79 Ole Lando & Hugh Beale (eds), *The Principles of European Contract Law — Parts I and II* (2000). A comparison between the European Principles and the (revised) UNIDROIT Principles was published by Michael Bonell & Roberta Peleggi, 'UNIDROIT Principles of International Commercial Contracts and Principles of European Contract Law: A Synoptical Table' (2004) 9 *Uniform L Rev* 315.

80 Ole Lando, Eric Clive, Andre Prum & Reinhard Zimmermann (eds), *The Principles of European Contract Law — Part III* (2003).

81 Article 1:201 of the Principles.

82 Article 1:103 of the Principles.

83 Article 2:102 of the Principles.

84 Article 1:101 of the Principles.

and legal consequences in cases of unfairness do not meet Community law requirements.<sup>85</sup> They would either have to be singled out in a separate Consumer code or be introduced *tel quel* into the Principles.

### C. *The Commission Communication of 2001*

The Community so far has not made any proposals in the direction of codifying contractual autonomy in a European civil code or some similar instrument. The European Parliament has on several occasions adopted resolutions encouraging or even urging Community institutions to pave the way towards a European contract law or even a Civil Code. The work done by private working groups, and the publication of the 'European Principles' in particular, has greatly encouraged this work.

The Commission published a Communication on 11 July 2001 on European Contract Law.<sup>86</sup> This Communication aroused lively comment and controversy amongst the research Community, which can be read in a publication edited by Grundmann and Stuyck.<sup>87</sup> In May 2002, the Commission reported on the reactions to its Communication and made known its intention to publish a Green or White paper summarising proposals for future action.<sup>88</sup>

The Commission communication of July 2001 did not present a European contract theory, nor any suggestion as to how to proceed under the existing legal basis. It merely referred to the principles of 'subsidiarity' and 'proportionality' as follows:

Moreover, legislation should be effective and should not impose any excessive constraints on national, regional or local authorities or on the private sector, including civil society.<sup>89</sup>

It summarised the existing *acquis* in private law (not only contract law) and put forward four options for action, namely:

1. No action.
2. Promote the development of common contract law principles leading to a greater convergence of national laws.
3. Improve the quality of legislation already in place.
4. Adopt new comprehensive legislation at EC level.

The communication then goes on to discuss the pros and cons of the different options, without making clear suggestions as to what direction to follow.

<sup>85</sup> Hans-W Micklitz, 'The Principles of European Contract Law and the Protection of the Weaker Party' (2004) 27 *JCP* 339.

<sup>86</sup> *Com* (2001) 398 final; compare Walter van Gerven, 'Codifying European Private Law? Yes, if' (2002) 27 *ELR* 156.

<sup>87</sup> Stefan Grundmann & Jules Stuyck, *An Academic Green Paper on European Contract Law* (2002).

<sup>88</sup> European Commission, *The Communication 2001*: <[http://europa.eu.int/comm/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/cont\\_law/communication2001\\_en.htm](http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/communication2001_en.htm)> (28 January 2006).

<sup>89</sup> *COM* (2001) 398 final at para 44.

Later discussion concentrated on the methodology of the communication and on the viability of the options suggested. There seemed to be agreement that Option One is not feasible and is not really an option.<sup>90</sup> Option Two is already under way with the several private initiatives on a European contract law. It remains to be discussed whether Option Three or Option Four is preferable. Option Three would concentrate on existing mandatory law, for example, in consumer and labour law. It would to some extent contradict the concept of autonomy and would instead follow the philosophy of 'adequate protection'. Option Four is more in line with ideas on autonomy merged into general principles of contract law, already present in the Rome Convention in particular and indirectly in the fundamental freedoms.

The Communication of May 2002 defined the next steps to be taken, namely:

- To identify areas in which the diversity of national legislation in the field of contract law may undermine the proper functioning of the internal market and the uniform application of Community law.
- To describe in more detail the option(s) for action in the areas of contract law which have the Commission's preference in light of the results of the consultation. In this context, the improvement of existing EC legislation will be pursued and the Commission intends to honor the requests to put forward legislative proposals to consolidate existing EC law in a number of areas.
- To develop an action plan for the chronological implementation of the Commission's policy conclusions.

The question remains as to the feasibility of the path chosen by the Commission. As Wilhelmsson writes:

One may... question this starting point. Does European identity really require unified systems of law — or unified social and cultural structures in general? Is not the prevailing European identity the opposite one?<sup>91</sup>

This criticism can be rephrased in accordance with the concept of autonomy as developed here: Does autonomy not imply that the parties themselves take care of the law they want to govern their contractual relationships?<sup>92</sup> And do the fundamental freedoms as such not impose a decentralised contract law? Protection can be left to either secondary legislation, or to conflict rules.

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90 Compare Reich in 'Critical Comments on the Commission Communication "On European Contract Law"' in Grundmann & Stuyck, above n87 at 283.

91 Thomas Wilhelmsson, 'Private Law in the EU: Harmonised or Fragmented Europeanisation' (2002) 10 *European Review of Private Law* 77 at 90.

92 Study Group, 'Social Justice in European Contract Law – a Manifesto' (2004) 10 *European Law Journal* 653 at 656.

**D. Action Plan of 12 February 2003**

In the meantime the Commission has proposed a new action plan.<sup>93</sup> This aims to combine Options Two and Three. It plans to establish a mix of non-regulatory and regulatory measures to attain more coherence in European contract law. In addition to sector-specific interventions, this includes measures:

- To increase the coherence of the Community *acquis* in the area of contract law.
- To promote elaboration of EU-wide general contract terms.
- To examine further whether problems in European contract law area may require non sector-specific solutions, such as an optional instrument.

Most importantly, it proposes a common frame of reference for terms frequently used in European directives, such as ‘damage’, ‘conclusion’ and ‘non-performance’ of a contract, to avoid the inconsistencies that result from the divergent use of concepts in different directives.

In such a project, the concept of autonomy and its limits will have to be defined more clearly than in the somewhat haphazard approach of today’s incremental law-making process.

**E. The ‘Common Frame of Reference’ (CFR)**

The Commission’s work on the action plan of 2003 has had its first results in-so-far as it has greatly encouraged comparative legal studies in the EU which now have to be extended to the new Member countries.<sup>94</sup> The most ambitious part of this work is concerned with elaborating a ‘common frame of reference’ (CFR) which was presented in some detail in a Commission communication of 11 October 2004.<sup>95</sup>

This CFR should be based on research and ‘stakeholder participation’. It should combine — in good comparative law tradition — the best solutions with regard to national law, the *acquis*, and international law like the 1980 UN Convention on Contracts for the International Sale of Goods (CISG). Its structure would start with fundamental principles, then define key concepts, and develop model rules. In its first phase it should be limited to contracts of sale and services as well as the retention of title of movables.

The Commission is still very vague in its proposals on how to improve and amend the existing consumer protection directives. It merely puts forward certain questions for consideration:

- Is the level of consumer protection required by the directives high enough to ensure consumer confidence?
- Is the level of harmonisation sufficient to eliminate internal market barriers and distortions on competition for business and consumers?

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93 *Com* (2003) 68 final.

94 See Reich, above n23.

95 *Com* (2004) 651 final.

- Does the level of regulation keep burdens on business to a minimum and facilitate competition?
- Are the directives applied effectively?
- Which of the directives should be given the highest priority?
- Does consumer contract law need to be further harmonised?
- Is there scope for merging some of the directives to reduce inconsistencies between them?

These are certainly important questions which do not yet show a clear direction. It seems that the Commission is not merely proposing a restatement, but a more general review of consumer contract law directives with a view to abandoning the minimum harmonisation approach.<sup>96</sup>

The status of such a CFR is, however, not yet clear.<sup>97</sup> Is it meant to be the core of a common EU contract law (perhaps extended to some aspects of security interests in movables)? Will it only be applicable to cross-border transactions, or is it meant to substitute, or at least to supplement, the existing national codifications in respect of contract laws? How will it relate to international law instruments like the CISG which has been ratified by most Member countries (with the exception of the UK, Ireland and Portugal)?<sup>98</sup> Does the EU have any competence to adopt a general European contract law on the basis of its internal market jurisdiction (Article 95 EC)?<sup>99</sup> At the time of writing the Commission is taking a very cautious approach; it seems to prefer making a recommendation to a formal legal instrument.

Even more problematic is the relationship between the general rules of a European contract law and the specific protective directives setting, among other things standards for consumer protection.<sup>100</sup> Many authors fear that the consumer *acquis* will be sacrificed on the altar of European law harmonisation.<sup>101</sup> Others worry that the protection of the 'weak' in contract law may get lost.<sup>102</sup>

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96 See my critique, Norbert Reich, 'Die Stellung des Verbraucherrechts im "Gemeinsamen Referenzrahmen" und im "optionellen Instrument — Trojanisches Pferd" oder "Kinderschreck"' (2006) 14 ZEuP (forthcoming).

97 Study Group, above n92 at 662.

98 For an overview, see Jan Ramberg, *International Commercial Transactions* (3rd ed, 2004) at 25 *et sequ.*

99 Stephen Weatherill, 'The European Commissions' Green Paper on European Contract Law: Context, Content and Constitutionality' (2001) 24 *JCP* 339.

100 Jens Karsten & Ali R Sinai, 'The Action Plan on European Contract Law: Perspectives for the Future of European Contract and EC Consumer Law' (2003) 26 *JCP* 159.

101 Thomas Wilhelmsson, 'Varieties of Welfarism in European Contract Law' (2004) 12 *ELJ* 712; Study Group, above at 93.

102 See the contributions in the special issue of (2004) 27 *JCP* 243 by Ewoud Hondius, Ton Hartlief, Dirk Staudenmayer, Thomas Wilhelmsson & Hans-W Micklitz.

### ***F. The Commission ‘Progress Report’ of 2005***

The Report of 2005<sup>103</sup> is mostly concerned with reviewing the ‘consumer *acquis*’ in the framework of the CFR. One wonders what the consumer *acquis* has in common with the CFR, and why the Commission takes such a zeal in reviewing the contents instead of the system of consumer law. The Commission presents two options for its further work, on the one hand a vertical approach, and on the other a horizontal approach to regulating ‘the main consumer contractual rights and remedies’, for example with regard to consumer sales. There is neither a policy orientation nor a legal orientation recognisable in the presentation of the Commission. The question of minimum versus total harmonisation is avoided, but not closed.

With regard to the other instruments of the action plan of 2003, the Commission is much more cautious. It clearly discards the original proposal concerning cross-border standard contract terms because of frequent changes in the law, the need to constantly monitor and review it, and the costs involved in translation etc.

The so-called ‘optional instrument’ (26<sup>th</sup> regime) which would put a Community contract law alongside the existing member State law is only mentioned in passing. The Commission calls for a ‘feasibility study’, without questioning its approach as such. What would be the advantage of a ‘26<sup>th</sup> regime’ a or 27<sup>th</sup>, if one adds the Principles? Will the parties use this instrument? What form will it take? Will it be subject to interpretation by the ECJ? Could such a regime save transaction costs to that effect avoid distortions of competition or restrictions on free movement? There is no argument to that effect in the Commission communication.

### ***6. Conclusion: Option for an ‘EU Consumer Contract Law Regulation (ECCLR)’?***

At the time of writing a definite judgment on the future of European contract law is premature. This author would support a separate codification of EU consumer law as part of the general project on improving the existing *acquis*.<sup>104</sup> The idea of a ‘European Trade Practices Law’ was first voiced in a follow-up article from my *Sydney Law Review* paper<sup>105</sup> and relied on David Harland’s intimate knowledge of the *Australian Trade Practices Act 1974* (Cth).<sup>106</sup> In the EU context it should, as a first step, concentrate on a consolidation of existing consumer contract law which should be transferred into a ‘European Consumer Contract Law Regulation’ (ECCLR).

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103 *Com* (2005) 456 final.

104 Norbert Reich, ‘A European Contract Law, or an EU Contract Law Regulation for Consumers?’ (2005) 28 *JCP* 383; see also the proposal by Hans Rösler, *Europäisches Konsumentenvertragsrecht* (2004) at 205 *et sequ.*

105 Norbert Reich, ‘From Contract to Trade Practices Law: Protection of Consumers’ Economic Interests by the EC’ in Thomas Wilhelmsson (ed), *Perspectives of Critical Contract Law* (1993) at 55.

106 See his paper on unconscionability and good faith, Harland, above n49 at 262 and on liability to consumers of manufacturers of defective goods, Harland, above n60 at 212–227.

The ECCLR as such could be based on Article 153 (3)(b) EC as being a 'measure to support... the policy pursued by Member States'. Since all Member States now have — either on their own or through implementing EU directives — their national consumer law, the general principles of an overall EU approach to consumer protection based on information and fairness before entering into and within transactions, specific rules on 'cooling-off' periods in direct and distance selling, unfair terms and quality expectations in such well developed areas of EU consumer law as 'the consumer going shopping' and 'the consumer going travelling',<sup>107</sup> could easily be elaborated and 'codified'. It would be a 'measure' of legislative character which is expressly recognised in the (somewhat scant) practice under Article 153 (3) b).<sup>108</sup> Questions of competence and to minimal harmonisation would not arise pursuant to Article 153 (5) EC which reads:

Measures adopted pursuant to [paragraph 3(b)] shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.

Such an ECCLR would have to fulfill certain requirements:

- It should consolidate the *acquis*, ie eliminate existing contradictions, improve its legal structure and terminology, coordinate remedies, in particular in cases of violations of information requirements by the trader.
- It should develop a general part of EU consumer law, for example the concept of the consumer, the principles of information and fairness as leading guidelines of consumer protection in implementing Article 153 (1) EC, its internationally mandatory character, and the principles of judicial protection and effective remedies, including group actions, guidelines on Codes of practice and Alternative Dispute Resolution (ADR) instruments with consumer participation.
- It would transform existing directives into directly applicable regulations, thus avoiding the existing legal problems of non, late or false implementation of directives by Member States, their missing the 'horizontal direct effect', and the requirement of 'Community conforming interpretation of national law' as a substitute for direct effect, and the like.
- An attempt should be made to include important financial services into the Code which so far have been regulated mostly under institutional aspects.
- In respect of the principle of proportionality and subsidiarity, pursuant Article 5 (2, 3) EC,<sup>109</sup> the ECCLR should be mostly concerned with '*hard core rules*' on consumer protection in the EC, for example in blacklisting certain clauses in consumer contracts like jurisdiction or exemption clauses.

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107 Jens Karsten & Gösta Petri, 'Towards a Handbook on European Contract Law and Beyond: The Commission's 2004 Communication "European Contract Law and the Revision of the *Acquis*: The Way Forward"' (2005) 28 *JCP* 31 at 41–44.

108 Reich & Micklitz, above n13 at para 1.23.

109 Reich, above n20 at 44–47.

- The ECCLR could, at a later stage, also include rules on fairness in marketing, always keeping in mind that consumer law should be an instrument to ‘enable consumers to make their choice in full knowledge of the facts, in order to let them participate actively in the internal market.’<sup>110</sup>

The proposal voiced here takes up a suggestion recently put forward by Weatherill with regard to the harmonisation of EU consumer contract law:

The case here presented is therefore in favour of an interpretative bias against maximum harmonisation. In order to nurture diversity and the possibility of regulatory experimentation, EU rules would operate as minimum standards only — unless this was explicitly displaced by provision made by the legislature in the particular text concerned. Admittedly, it might be necessary to identify improved methods for tracking diverse choices made by Member States (for example, by discipline through notification requirements).<sup>111</sup>

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110 Malek Radeideh, *Fair Trading in EC Law: Information and Consumer Choice in the Internal Market* (2005) at 244, with reference to the EU proposed unfair commercial practices directive at 290–308 which has been adopted as *Directive 2005/29/EC of the European Parliament and the Council of 11 May 2005 as the ‘Unfair Commercial Practices Directive’* [2005] OJ L 149/22.

111 Stephen Weatherill, ‘Minimum Harmonisation as Oxymoron?’ in Hans-W Micklitz (ed), *Verbraucherrecht in Deutschland — Stand und Perspektiven* (2005) at 35.