



**Department of Law**

**Dimensions of Property under European Law**  
*Fundamental Rights, Consumer Protection and Intellectual Property:  
Bridging Concepts?*

**Sandra Passinhas**

Thesis submitted for assessment with a view to obtaining the degree of  
Doctor of Laws of the European University Institute

Florence, March 2010

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“(…) il diritto di proprietà (terribile e forse non necessario diritto)…”

Cesare Beccaria, *Dei delitti e delle pene*, XXII.

## **Introduction: Property - A Melancholic Eulogy?<sup>1</sup>**

Property is highly contentious, both as a concept and as a social institution. Firstly, the conception of property as a bundle of rights, and the personalist conception of property in many legal systems (that is, among scholars and in courts' case-law) lead to the desegregation of property rights and to an unhelpful concept, lacking internal or definitional coherence and efficient boundaries. Secondly, changes both in the kind of commodities that increasingly dominate the market and in the 'raw material', in particular information and socio-culturally skilled labour, endangered the importance of property as a social institution.

In fact, a range of theorists from the 1960s onwards have brought into prominence the shift of the economic centre of gravity from manufacturing to service and informational industries.<sup>2</sup> Economic activity is less involved in the transformation of material things and more in producing or commodifying activities, interpersonal relations, and acknowledge. More recently, in his book, *The Age of Access*,<sup>3</sup> JEREMY RIFKIN, an

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<sup>1</sup> I borrowed this expression from Christian Joerges, “What is Left of the European Economic Constitution? A Melancholic Eulogy”, (2005) 30 *E.L.Rev.* 461-489.

<sup>2</sup> John Kenneth Galbraith, *The New Industrial State*, 2<sup>nd</sup> ed., Deutsch, London, 1972; Mark Poster, *The Mode of Information: Poststructuralism and Social Context*, Polity Press in association with Blackwell, Cambridge, 1990; Alain Touraine, *The Post-Industrial Society: Tomorrows Social History, Classes, Conflicts and Culture in the Programmed Society*, Wildwood House, London, 1974.

<sup>3</sup> Jeremy Rifkin, *The Age of Access: The New Culture of Hypercapitalism, Where All of Life is a Paid-for Experience*, J.P. Tarcher/Putnam, New York, 2000.



American sociologist, claimed that we are entering in a new era, the so-called age of access, where markets are making way for networks, and ownership is steadily being replaced by access.

In RIFKIN's opinion, markets and the exchange of property between sellers and buyers – the most important feature of the modern market system – give way to short-term access between servers and clients operating in a network relationship. The new commerce occurs in cyberspace, an electronic medium far removed from the geographically bound marketplace. Whereas in a geographically based economy, sellers and buyers exchange physical goods and services, in cyberspace, servers and clients are more likely to exchange information, knowledge, experience, and even fantasies. In former realm, the goal is transferring property, while in the new realm, the goal is providing access to one's daily existence.<sup>4</sup>

In the network economy, both physical and intellectual property are more likely to be accessed by business rather than exchanged. Ownership of physical capital, however, once the heart of the industrial way of life,<sup>5</sup> becomes increasingly marginal to the economic process. It is rather regarded by companies as a mere operational expense rather than an asset, and something to borrow rather than to own. Intellectual capital, on the other hand, is the driving force of the new era, and much coveted. Concepts, ideas, and images – not things – are the real items of value in the new economy. Intellectual capital, RIFKIN points out, is rarely exchanged. Instead, it is closely held by the suppliers and leased or licensed to other parties for their limited use.<sup>6</sup> Where the market used to boast sellers and buyers, now the talk is more of suppliers and users.

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<sup>4</sup> *Ibidem*, p. 17. A network-based global economy both drives and is driven by a dramatic acceleration in technological innovation. Because production processes, equipment, and goods and services all become obsolete faster in an electronically mediated environment, long-term ownership becomes less palatable, while short-term access becomes a more frequent option. Sped-up innovation and product turnover dictate the terms of the new market economy.

<sup>5</sup> See Philip Selznick, *Law, Society, and Industrial Justice*, Transaction Books, 1969, p. 63, on power and property.

<sup>6</sup> In the network economy, characterized by shorter product lifecycles and an ever expanding flow of goods and services, it is human attention rather than physical resources that becomes scarce. Giving away products will increasingly be used as a marketing strategy to capture the attention of potential costumers.

Moreover, goods themselves – the bulwark of the private property regime – are becoming transformed into pure services, the end of property as a defining concept of social life. As goods become more information-intensive and interactive, and are continually upgraded, they change character. They lose their status as products and metamorphose into evolving services. Their value lies less in the physical scaffolding or container in which they come and more in the access to services they provide. The nature of services is also changing. Traditionally, services have been treated more like goods and negotiated as discrete market transactions, each one separated in time and space. Now, with the advent of electronic commerce, services are being reinvented as long-term multifaceted relationships between servers and clients.<sup>7</sup>

The changes taking place in the structuring of economic relationships, according to RIFKIN, are part of an even larger transformation occurring in the nature of the capitalism system. We are making a long-term shift from industrial production to cultural production and a transition into what economists call an experience economy – a world in which each person’s own life becomes, in effect, a commercial market. If, for example, one contracts for an air-conditioning service rather than buying the air conditioner itself, one pays for the experience of having air-conditioning. The new capitalism, then, is more temporal than material. Instead of commodifying places and things and exchanging them in the market, we now secure access to one another’s time and expertise and borrow what we need, treating each thing as an activity or event that we purchase for a limited period of time. Capitalism is shedding its material origins and increasingly becoming a temporal affair.

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Holding their attention will depend on the ability of companies to deliver effective services and creating lasting relationships. Giving away software programs is a particularly effective strategy for information-technology firms because the more people who are linked together through a company’s program, the greater the benefits are to each participant and the more valuable the enterprise’s potential services become. In the industry, this phenomenon is known as the ‘network effect’. The larger the network, the greater the links, the more valuable the network becomes to those who are part of it. Giving away software helps build networks and is increasingly seen as a cost of doing business. *Ibidem*, pag. 85.

<sup>7</sup> *Ibidem*, p. 85.

When virtually everything becomes a service, capitalism is transformed from a system based on exchanging goods to one based on accessing segments of experience. In the Industrial Age, when producing goods was the most important form of economic activity, being propertied was critical to survival and success. In the new era, where cultural production is increasingly becoming the dominant form of economic activity, securing access to many cultural resources and experiences that nurture one's psychological existence becomes just as important as holding onto property. Old institutions grounded in property relations, market exchanges, and material accumulation are slowly being uprooted to make room for an era in which culture becomes the most valuable possession, and each individual's own life becomes the ultimate market.

In the new age of cultural capitalism, access becomes far more relevant and property far less in the ordering of commercial life.<sup>8</sup> Property relations are compatible with a world in which the primary task of economic life is the processing, manufacturing and distribution of physical goods. Inert objects are easily measurable, and because hard goods can be quantified, they are amenable to pride.<sup>9</sup> They can be possessed by only one party at a time and fit the requisite of exclusivity. They are both autonomous and, for the most part, mobile – with the exception of real estate. But in the new cultural economy, the organization of commercial life is not so simple.<sup>10</sup>

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<sup>8</sup> The principle of access to essential facilities is fundamental in networks industries. Where a monopoly or a dominant company owns or controls something access to which is essential to enable its competitors to compete, it may be pro-competitive to oblige the company in question to give access to a competitor, if its refusal to do so has sufficiently serious effects on competition. Cf. John Temple Lang, "The Principle of Essential Facilities in European Community Competition Law – The Position since Bronner", (2000) 1 *Journal of Network Industries* 375-405.

<sup>9</sup> John Kenneth Galbraith, *The New Industrial State*, 2<sup>nd</sup> ed., Deutsch, London, 1972; Mark Poster, *The Mode of Information: Poststructuralism and Social Context*, Polity Press in association with Blackwell, Cambridge, 1990; Alain Touraine, *The Post-Industrial Society: Tomorrows Social History, Classes, Conflicts and Culture in the Programmed Society*, Wildwood House, London, 1974.

<sup>10</sup> Jeremy Rifkin, *The Age of Access: The New Culture of Hypercapitalism, Where All of Life is a Paid-for Experience*, J.P. Tarcher/Putnam, New York, 2000, p. 138.

## *Introduction*

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The world of the young people of the new protean generation, as described by RIFKIN, is, mainly, a world that is more theatrical than ideological and oriented more to a play ethos than to a work ethos. For them, access is already a way of life, and while property is important, being connected is even more important. For the first generation of the ‘age of access’, personal freedom has less to do with the right of possession and the ability to exclude others and more to do with the right to be included in webs of mutual relationships.

Following RIFKIN, it might be noticed that, when exclusive property relations were the reigning paradigm for organizing human activity, freedom was associated with autonomy, and autonomy with ownership. To be free was to be autonomous – that is, not dependent or not beholden to others. Autonomy, in turn, depended on being propertied. The more one could claim as mine rather than thine, the more independent and autonomous one could be. The government’s role was conceived of as a limited one – to help secure one’s private property and, by so doing, preserve each person’s individual freedom. In a network economy of suppliers and users, however, in which embedded relationships become the axial principle for structuring activity, freedom comes to mean something very different. Inclusion and access, rather than autonomy and ownership, become the more important tests of one’s personal freedom. Freedom is a measure of one’s opportunities to enter into relationships, forge alliances, and engage in networks of shared interest. Being connected makes one free. Autonomy, once regarded as synonymous with personal freedom, becomes its opposite. The right not to be excluded, the right of access, on the other hand, becomes the baseline for measuring personal freedom.<sup>11</sup> Government’s role in the new scheme of things is, thus, to secure every individual’s right to access the many networks – both in geographic space and

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<sup>11</sup> Not surprising, the shift from ownership to access is being accompanied by new theories about property relations. While property dealt with the narrow material question of what’s mine and thine, access deals with the broader cultural question of who controls lived experience itself.

cyberspace – through which human beings communicate, interact, conduct business, and constitute culture.<sup>12</sup>

RIFKIN does not claim that property disappears in the coming ‘age of access’. Property continues to exist but is far less likely to be exchanged in markets. Instead, the role of property will change radically. Suppliers hold onto property in the new economy and lease, rent, or charge an admission fee, subscription, or membership dues for its short-term use.

The sociological approach made by RIFKIN is a very provocative and interesting one, which should be reconsidered in legal terms. In my opinion the discussion of the usefulness and validity of property as a social institution demands, first of all, a clear definition of the concept of private property rights.

In Chapter One, I will reflect upon the concept of property. I will take a two-dimensional approach to property rights, both as ‘constitutional’ rights and as private individual rights. Property rights, for constitutional and international discourse, are individual rights to which individuals or legal persons are entitled before public authorities. They should be widely defined in terms of patrimonial rights, that is, the concept of property should be understood as comprising the whole of a person’s assets assessable in monetary terms. As concerns property as individual private rights, I will claim that the essence of rights *in rem* lies in the immediate and direct power of a

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<sup>12</sup> According to Jeremy Rifkin, *ibidem*, p. 178, access is, after all, about distinctions and divisions, about who is to be included and who is to be excluded. Access is becoming a potent conceptual tool for rethinking our worldview as well as our economic view, making it the single most powerful metaphor of the coming age. Like property relations, access relations are meant to create distinctions. With property, the distinction is between those who possess and those who are dispossessed. With access, the distinction is between those who are connected and those who are disconnected. Both property relations and access relations, then, are about inclusion and exclusion. In the former case, the separation is between the haves and the have-nots. In the latter case, the separation is between those who are inside and those who are on the outside. It is measured in quantitative terms by the number of networks one is a part of, and in qualitative terms by the embeddedness of one’s relationship and connections with others. In a society built around private property, whoever owns the physical capital and controls the means of production is in a position to determine who will succeed. In a society built around access relations, whoever owns the channels of communication and controls the passageways into the networks determines who is the player and who is not.

person over a thing. For an analysis of the discussion about the concept of property, both in Anglo-American countries and in Europe, I will sketch the fundamental debate about the ‘bundle of rights’ theory, the ‘exclude’ theories and the ‘integrated’ theories in the Anglo-American countries, and between realists and personalists in continental Europe. I will observe, first, that in the Anglo-American countries, the integrated theories (claiming that the thing itself matters, both as an empirical and theoretical matter, in the definition of property rights) are getting stronger. Similarly, in continental Europe the distinction between real rights and credit rights was never endangered by a prominent personalist theory (characterizing property rights as producing a universal and passive obligation, that is, the obligation of everybody to refrain from acts that interfere with the owner’s control of his goods). Finally, I will propose my own definition of property: an immediate power of control over a thing that is enforceable as against everybody. Private property comprises, first of all, a variety of contextual relationships among individuals and objects of social wealth. Secondly, property implies a variety of relations among individuals themselves and among individuals and the state. As a metaphor, I will borrow the web of interests metaphor proposed by CRAIG ARNOLD.<sup>13</sup> The web of interests’ metaphor focuses attention on the nature and characteristics of the object of property interests: it impinges upon both the relationships between interest holders and the object, and upon the diverse relationships among the interest holder.

After I have clarified my operative concept of ownership, I will expound upon the needlessness of property as a social institution, in Chapter Two. I will start by claiming that property is undergoing a major change. First, the object of property comprises mostly consumption goods. And secondly, the use of the thing is not direct, but conversely depends on a contract. Property is intrinsically linked to consumption, and the owner is often necessarily a consumer. I will inquire then, how property must be reinterpreted and is to fulfil the function normatively ascribed to it, in this context. I

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<sup>13</sup> Craig A. Arnold, “The Reconstitution of Property: Property as a Web of Interests”, (2002) 26 *Harv. Envtl. L. Rev.* 281-364.

will, first, devote my attention to consumers' search for meaning through consumption in contemporary societies. And, secondly, I will inquire into the answer provided by property rights. It is my contention that property is becoming increasingly relational. With its facets of interactivity, interpersonality, intertextuality, and interdiscursivity, property is *in relation* to contract and is a means for the owner *to establish relations* with others. A new conception of property, as increasingly dynamic, active, vibrant, vigorous, and communicative, is required to fulfil the needs of individuals in contemporary societies. The prognosis of the legal consequences of such a change will be made clear. Namely, that Property and Consumer Law are part of a web of interconnected regimes that revolve around things.

In Chapter Three, I will analyse the protection of property as a fundamental right under EU law. I will claim that economic regulation seems to have implied the total subjugation of individual property rights to Community policies. The European Court of Justice (hereinafter, ECJ) does not have a strong approach to property rights protection: in no case so far has the Court found a violation of the right to property. The outcome of such an adjudicative process is that the ECJ does not consider the need to establish a general principle to compensation. I will claim that the ECJ's challenge is to strike the right balance between property rights and market build-up. Such a balance is to be found in the institutionalized communicative network of discourses for the ECJ adjudicative activity on fundamental rights: the case-law of the European Court of Human Rights (hereinafter, ECtHR), and common traditions of Member States. In so doing, I will compare the case-law of the ECJ and of the ECtHR in two aspects: first, through the permission and, second, through the impairment of property rights. I will then suggest that the ECJ should be open to inputs from the ECtHR and appropriately ensure effective protection of individual property rights, namely through the 'excessive burden' criterion. According to this criterion, individuals shall not suffer an excessive burden; on the contrary, a fair balance must be found between the demands of the general interest of the community and the requirements of the protection of the individual's property right. Under this criterion, in order to assess the proportionality of

an interference with property rights, the payment of compensation (along with other elements, such as the increase of price) must necessarily be taken into consideration.

In Chapter Four, I will rely on the legal outcomes of the conclusions I have reached in Chapter Two. The fact that property is mainly restricted to consumer goods and that the use of goods increasingly depends on an ancillary contract implies that the owner is often a consumer. I will ask how the property holder must be conceived of in the framework of European Consumer Law. The function of EC consumer [protection] law, the function of European consumer policy, and the definition of the European consumer are the three interrelated questions that will guide my inquiry. The notion of consumer is linked up with functional approaches, namely the build-up and functioning of the internal market. The consumer is thus characterized as a confident, informed, circumspect and rational market player. The European market provides the enabling structural conditions to the flow of communicative actions among economic actors: the exercise of an effective and autonomous choice presupposes consumers to have the ability to choose among distinct options. Whilst a communicative framework, European intervention must be pragmatic and promote and reinforce effective autonomy and choice. I will claim that consumer policies should be asymmetrical: they shall create benefits for those who are boundedly rational while imposing little or no harm on those who are to be considered fully rational. Such policies are relatively harmless to those who reliably make decisions in their best interests, while at the same time advantageous to those making suboptimal choices. This distinction provides the basis for a new standard in the assessment of the costs and benefits of regulatory options. In respect of property rights holders, where the authority of the Community is so strong, fundamental rights protection may mandate specific policy decisions. That will be the object of my inquiry in the next Chapter.

In Chapter Five, I will, then, inquire how the proper balance between the provision of enabling conditions and the imposing of limits to distinct properties might be achieved. Intellectual capital is at the heart of the new economy, and gives rise to new regulatory questions. In fact, there are situations where a conflict of properties might exist between



a corporeal thing and an intellectual property right. This is often the case in the field of motor vehicles - consumer durables which at both regular and irregular intervals require expert maintenance and repair - and that I will adopt for my operative research. The principal producer might claim to be the intellectual property holder of a design right that encompasses spare parts, and consequently, the distribution can be made only through authorized car dealers and repair shops. The interest of the owner of the corporeal thing, the car, on the contrary, is to buy safe but cheaper products. If the car producer is protected by an intellectual property right, the owner of the car must buy a spare part that is exactly the same as the one whose design the law protects; the design right therefore requires him to buy the spare part from the original or an authorized producer. Before such a conflict, one might ask what exactly the scope of a design right is. The ECJ has already adjudicated on it, in cases *Maxicar* and *Volvo*, much debated decisions. The Directive on the legal protection of designs, adopted ten years after those decisions, failed to reach a consensus and failed to harmonize completely the Member States' laws on spare parts. I will contend that EC law has a word to say in such a situation, where intellectual property and physical property might conflict. The resolution of the conflict within the framework of a legal system begs a conceptual question, and must, therefore, be found during the institutive moment of the rule creating a property right. Rights are not pre-ordained truths to be discovered but rather are constructions, linked up with functional approaches. Therefore, the scope of a right shall be defined in such a way to make it possible to avoid foreseeable conflicts. Before formulation of property rights, an appropriate weighing and balancing of all relevant interests is thus in need, in order to avoid normative inconsistencies. In making explicit a property right, the regulatory decision encodes an overall assessment and displays a heuristic message on the communicational assessment of conflicting interests. The balancing outcome is a conditional, preferential statement, a requirement to optimize the guarantee, and obtain legal consistency. Intellectual and physical property should be treated identically in the law, for the grant of intellectual property rights cannot abridge or set aside entirely the interests of the owner of the corporeal things. My normative claim is that law-making bodies must autonomously consider the interest(s) of the

## *Introduction*

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owner of the corporeal thing in the overall assessment of granting an intellectual property right.

*Dimensions of property*

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“Place au droit réel! Et que tous les rangs s’ouvrent pour lui faire passage, lors qu’il s’avance tout-puissant et absolu, par sa propre et seule force, sans l’intermédiaire d’aucun débiteur, vers la chose même sur laquelle il porte directement.”

C. Demolombe, Cours de Code Napoléon, IX, Paris, 1881, n. 473.

## Chapter I - Reconceiving Property

### *Introductory note*

A discourse about the usefulness and validity of property as a social institution demands, first of all, a clear definition of the legal concept of property rights. In the suggestive expression of LAURA UNDERKUFFLER,<sup>14</sup> property, in its common conception, not only protects us against government interference, but also against all others. It is, by its very nature, bound up with ideas of individual separation, individual isolation, individual autonomy and individual control. As I have previously mentioned, I will take a two-dimensional approach to property rights, both as constitutional and international rights and as private individual rights.

Property rights, for constitutional and inetrantional discourse, are individual rights to which individuals or legal persons are entitled before public authorities. I will suggest that constitutional property should be widely defined in terms of patrimonial rights,<sup>15</sup> that is, the concept of scope of protection should be understood as comprising the whole of a person’s assets assessable in monetary terms.

In respect of property as individual private right, I will discard the dogma that property rights are merely a relation between one person and an indefinite set of many others. On the contrary, I will claim that a right *in rem* requires a relationship to a thing. ‘*This is mine*’ reflects precisely, for the lay person, that immediate nexus between the individual and a thing. The essence of rights *in rem* lies in the immediate and direct power of a

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<sup>14</sup> Laura S. Underkuffler, “Property as Constitutional Myth: Utilities and Dangers”, (2006) 92 *Cornell L. Rev* 1244.

<sup>15</sup> See Ali Riza Çoban, *Protection of Property Rights within the European Convention on Human Rights*, Ashgate, 2004, p. 10.

person over a thing.<sup>16</sup> Accordingly, the core of the legal relationship is essentially an impersonal one, focused as it is on an object.

This relation between a person and a thing, however, is meaningful only in a social environment. That is, such a relation can be qualified as a right only if it is recognized and respected by other people. Therefore, a right to property also refers to a power to exclude others from things. The holder of a right *in rem* benefits from the existence of an exclusionary reason, a duty *in rem* that is, not to interfere with the property of others. This duty is universal, binding upon all. Property rights are good against the whole world, as opposed to rights held *in personam*, good only against specific individuals.

Thus, there are two sides to the coin of property - one inward-looking, the relationship between the individual and material resources<sup>17</sup> - and one outward-looking, the exclusionary relationship between the right-holder and *the rest of the world*. The definition of private property cannot, however, be done acontextually, without regard for the resource itself, third parties and general interest. My efforts to reconstitute a property concept are in no way an attempt to revert to a physicalist, absolutist concept of property. As it is widely accepted, full-blooded ownership in its many guises

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<sup>16</sup> See F. H. Lawson/Bernard Rudden, *The Law of Property*, edited by Peter Birks, 3<sup>rd</sup> ed., Clarendon Law Series, Oxford University Press, 2002, p. 90; François Terré/ Philippe Simler, *Droit Civil – Les biens*, 5<sup>th</sup> ed., Dalloz, Paris, 1998, p. 94; Patrice Jourdain, *Les biens, Traité de Droit Civil*, Gabriel Marty and Pierre Raynaud, Dalloz, Paris, 1995, p. 48; Manuel Henrique Mesquita, *Obrigações Reais e Ônus Reais*, Almedina, Coimbra, 1990.

<sup>17</sup> Private property entitlements are varied and flexible. Property systems allow for varying powers and degrees of control over objects of social wealth, as well as different rights and powers and duties in the same object. The degree of ultimate control or excludability is governed by the type of entitlement one actually has: ownership or some less powerful estate or dismemberment. The fullest of all real rights is ownership. Opposed to ownership we have the rights over the things of others (*jura in re aliena*). Ownership is a right, unlimited in respect of its contents, to exercise control over a thing. The difference, in point of conception, between ownership and the *jura in re aliena* is that ownership, however susceptible of legal limitations (*e.g.*, through rights of others in the same thing), is nevertheless absolutely unlimited as far as its own contents are concerned. As soon therefore as the legal limitations imposed upon ownership – whether by the rights of other or by rules of public law – disappear, ownership at once, and of its own accord, re-establishes itself as a plenary control. That is what is sometimes described as the ‘elasticity’ of ownership.

(*dominium*, full liberal ownership, absolute ownership, totality ownership, etc.) exists only as a theoretical construct.<sup>18</sup>

I will suggest a definition of property rights that comprises both a variety of contextual relationships among individuals and objects of social wealth; and, second, a variety of relations among individuals themselves and among individuals and the state. As I metaphor, I will borrow ARNOLD's<sup>19</sup> web of interests. The web of interests metaphor focuses attention on the nature and characteristics of the object of property interests. It depicts both the relationships between interest holders and the object, and the diverse relationships among the interest holders, including society's interest in the object. The characteristics of the object determine both the relationships between interest-holders and the object, but also the application of property rules and principles to specific situations.

## **Section I – Property for Constitutional and International Discourse**

### **1. Property for constitutional and international discourse**

The first question to consider is the meaning of property for constitutional and international discourse. The expression 'property' is commonly used for constitutional discourse in every Western legal system. We can find it, for example, in the French

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<sup>18</sup> Nor can it exist in practice, as any property text in any Western legal system will immediately and expressly concede. Article 544 of the French Civil Code: '*La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements*'; Article 832 of the Codice '*Il proprietario ha il diritto di godere e disporre delle cose in modo pieno ed esclusivo, entro i limiti e con l'osservanza degli obblighi stabiliti dall'ordinamento giuridico*'; Article 1305 of the Portuguese Civil Code: '*O proprietário goza de modo pleno e exclusivo dos direitos de uso, fruição e disposição das coisas que lhe pertencem, dentro dos limites da lei e com observância das restrições por ela impostas*'; Article 348 of the Spanish Civil Code: '*La propiedad es el derecho de gozar y disponer de una cosa, sin más limitaciones que las establecidas en las leyes*'. The German Civil Code has a different formulation. Article 903 BGB states: '*Die Eigentümer einer Sache kann, soweit nicht das Gesetz oder Rechte Dritter entgegenstehen, mit der Sache nach Belieben verfahren und andere von jeder Einwirkung ausschließen. (...)*'.

<sup>19</sup> Craig A. Arnold, "The Reconstitution of Property: Property as a Web of Interests", (2002) 26 *Harv. Envtl. L. Rev.* 283.

Declaration of Human and Civic Rights of 26 August 1789: '[t]he aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are freedom, property, safety and resistance to oppression',<sup>20</sup> and '[s]ince the right to property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity is to be paid'.<sup>21</sup> Similarly, Article 42(2) and (3), of the Italian Constitution states that: '[p]rivate ownership is recognized and guaranteed by laws determining the manner of acquisition and enjoyment and its limits, in order to ensure its social function and to make it accessible to all', and '[p]rivate property, in cases determined by law and with compensation, may be expropriated for reasons of common interest.' The very much debated Article 14 of German Constitution [property, inheritance, expropriation] reads in (1) and (2) that '[p]roperty and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws' and '[p]roperty entails obligations. Its use shall also serve the public good.' Article 33(1) of the Spanish Constitution also reads as follows: '[t]he right to private property and inheritance is recognised.' Even under the Dutch Constitution, which contains no general right to property, protection against deprivation is granted. Article 14(1) states that: '[e]xpropriation may take place only in the public interest and on prior assurance of full compensation, in accordance with regulations laid down by or pursuant to Act of Parliament.'

As concerns the constitutional right to, or of, property, I would borrow the two distinct types of claims that FRANK I. MICHELMAN categorizes, respectively, as direct and derivative rights.<sup>22</sup>

A direct constitutional right of property is asserted by claiming that the Constitution requires, for some significant set of valued objects, the law to provide for some kind of

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<sup>20</sup> Article 2.

<sup>21</sup> Article 17.

<sup>22</sup> Frank I. Michelman, "Property as a Constitutional Right", (1981) 38 *Wash. & Lee L. Rev.* 1097-1114. See *idem*, "Mr. Justice Brennan: a Property Teacher's Appreciation", (1980) 15 *Harv. C.R.-C.L. L. Rev.* 296-308.

private entitlement. The general law must establish and maintain at least some of those legal relations – rights and duties, powers and liabilities – thought characteristic of a private property system.

A derivative constitutional right of property, by contrast, makes no such demand, on the content of the general laws. It allows that those laws may, as of any given moment, provide or not provide for private entitlements respecting any given class of objects. The derivative right attaches only to such instances of entitlement; it protects those contingent but actual entitlement relations against certain cases of governmental impairment.<sup>23</sup>

The first point to emphasize is that property for constitutional or international discourse encompasses a fluid permission, by generally imposing some direct or derivative private entitlement. It is up to the law to give some kind of crystallisation to this licensing.<sup>24</sup> A constitutional and international sense of property rights, it should be emphasized, refers not just to land or possessions or things, but also to incorporeal entitlements, stock ownership (the so-called new property) and the right to make contracts in reference to property.<sup>25</sup>

The second point worth adducing is that, under constitutional discourse, a *rapprochement* of property and popular sovereignty arises.<sup>26</sup> Rights under a political

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<sup>23</sup> On this distinction, see also Miguel Nogueira de Brito, *A Justificação da Propriedade Privada numa Democracia Constitucional*, Almedina, Coimbra, 2007, pp 972 ff.

<sup>24</sup> See Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers, OUP, 2002, p. 219. A direct relation between the concept of property for constitutional discourse and the civil law is to be found, v.g., in the Dutch Constitution. Article 14 states that expropriation may take place only in accordance with regulations laid down by or pursuant to Act of Parliament, and that in the cases laid down by or pursuant to Act of Parliament there shall be a right to full or partial compensation.

<sup>25</sup> See James L. Oakes, “Property Rights in Constitutional Analysis Today”, (1980) 56 *Wash. L. Rev* 588.

<sup>26</sup> This is suggested by Frank I. Michelman, “Property as a Constitutional Right”, (1981) 38 *Wash. & Lee L. Rev.* 1097-1114. Carol M. Rose, in “Property as the Keystone Right?”, (1996) 71 *NTDLR*. 329, claims that property’s most serious political claim is as an almost invisible educational institution. The author advances seven reasons why the right to property is the most important right in a constitutional liberal order. First, the security of property makes other rights secure (priority argument). Second, property diffuses power (power-spreading argument), although in Rose’s opinion property regimes occupy only a



### *Dimensions of property*

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constitution, including property rights, are first of all to be regarded as political rights, because and insofar as they are rights affecting the individual's participation in popular sovereignty itself. Property is an essential component of individual competence in social and political life; it constitutes a 'material foundation' for 'self-determination and self-expression'. In sum, property is 'an indispensable ingredient in the constitution of the individual as a participant in the life of the society, including not least the society's processes for collectively regulating the conditions of an ineluctably social existence', in the words of MICHELMAN. If rights under a political constitution are political rights, then:

what one primarily has a right is to the maintenance of the conditions of one's fair and effective participation in the constituted order, as an individual no less entitled than others to the respect and concern of the community, and also no more entitled than [others] to any particular outcomes save those that [bear on] the conditions of continued effective participation.<sup>27</sup>

Reference to property rights, under constitutional and international discourse, is often made to property both as a system and as a private entitlement. Those notions need to be several, though. A system of property is a system of rules (rules of acquisition, rules

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middle ground in the diffusion-of-power scale. Third, property is the keystone right because property makes individuals independent and thus capable of self-government. The central idea of the independence argument is that property removes people's dependence on others, and fundamentally autonomy makes them capable of exercising unencumbered judgement in the political forum. Hence all political powers, and certainly all the other rights, depend on the right to property. The modern version of the independence argument is radically different. The basic idea is still there - that property nurtures the independence necessary for political participation - but in its modern permutation, this idea becomes a platform for distributive rights. The modern form of the independence argument is that all people should have a voice in the political order, but to acquire that voice they need a secure baseline of property - and if necessary, this baseline must be secured by redistribution. Fourth, property is the keystone right because it symbolizes all other rights (the symbolic argument). Fifth and sixth arguments are more important in their historical form: the acquisition and management of property inculcates the moral and civil behaviour on which rights depend (the civilizing argument); the pursuit of property can open up competing attractions to passion-driven political feuds, and thus safeguard all the other rights (the distraction argument). Finally, property protects all other rights by fulfilling its economic function, and by making a society wealthier (the luxury-good argument).

<sup>27</sup> Frank I. Michelman, "Property as a Constitutional Right", (1981) 38 *Wash. & Lee L. Rev.* 112.

of protection and rules of transfer) governing access to and control of material resources.

A reference to property as a system can be found in Article 295 of the EC Treaty and I will now devote some attention to it. I will claim that Article 295 has a specific political nature and a symbolic importance in imposing the Community's neutrality in respect of property rights system of Member States. This provision must, however, be read in the context of a Treaty creating a European market system, which presupposes both a system of private property and freedom of contract, as legal mechanisms. Therefore, I will assert that Article 295 requires national private property systems. Only within this framework are Member States free to plan out their property systems, namely, to nationalize or privatize enterprises. The Community's neutrality in respect of property rights system of Member States is, thus, related to that fundamental choice. In regulatory terms, therefore, it does not prevent European action, v.g. in matters such as reservation of title, transfer of risk, or in the creation of a unified system of conveyancing.<sup>28</sup>

### *1.1. Article 295 EC Treaty: property as an organizing idea*

The text of the Schuman Declaration<sup>29</sup> already read that '*[l]’institution de la Haute Autorité ne préjuge en rien du régime de propriété des entreprises*' and Article 83 of the ECSC Treaty (included among the 'general and final provisions' of the Treaty) also included this wording when it provided that 'the establishment of the Community shall

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<sup>28</sup> With respect to the Directive on Consumer Goods, Twigg-Flesner and Bradgate, 'The E.C. Directive On Certain Aspects of the Sale of Consumer Goods and Associated Guarantees - All Talk and No Do?' [2000] Web JCLI, <http://webjcli.ncl.ac.uk/2000/issue2/flesner2.html>. See also Article 23 of the Proposal of the Commission for a Directive of the European Parliament and of the Council on Consumer Rights (COM (2008) 614 final). For a recent analysis of the proposal, see Hans-W. Micklitz and Norbert Reich, "Crónica de una muerte anunciada: The Commission Proposal for a 'Directive on Consumer Rights'" (2009) 46 *CMLRev* 506-507.

<sup>29</sup> Schuman Declaration of 9 May 1950.

in no way prejudice the system of ownership of the undertakings to which this Treaty applies'.<sup>30</sup>

According to the preparatory documents,<sup>31</sup> the first version of what was to become Article 295 EC was presented by the Drafting Committee on 5 December 1956. It was number 9 of the general principles, and stated: '*[l]e présent Traité ne préjuge en rien le régime de propriété des moyens de production existant dans la Communauté*'. The second version, prepared by the Common Market Group, appeared on 18 January 1957. It was the same as that contained in Article 83 ECSC, but was placed amongst the provisions relating to monopolies. Three days later the Group decided to include it amongst the competition rules and at the same time removed the superfluous reference to subjection to the Treaty. The definitive version, which was to be incorporated in Part Six of the Treaty, was adopted by the Committee of Heads of Delegation of 6 March 1957, which deleted the additional phrase 'of the undertakings'. So Article 295 read as follows: '[t]he Treaty shall in no way prejudice the rules in the Member States governing the system of property ownership'.<sup>32</sup>

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<sup>30</sup> The term 'system of ownership of the undertakings' suggested that the true concern of the provision had to do with the ownership of the companies engaged in trading activities rather than with the structure of control in each of the Member States. In his opinion, delivered on 3 July 2001 Cases C-367/98, C-483/99 and C-503/99, *Commission of the European Communities v Portuguese Republic, French Republic and Kingdom of Belgium* [2002] ECR I-4756, 52, Advocate General Ruiz-Jarabo Colomer relates that according to the wording put forward by Schuman, the objective of the Treaties establishing the European Communities was to achieve sectorial and, therefore, partial, integration. The definition and implementation of economic policy remained in the hands of the States, which were subject only to restrictions relating to the instruments used to pursue their political and economic objectives, such as the rules on free competition and State aid. The aim of this provision is to declare the neutrality of the Treaty in respect of the ownership of undertakings, in the economic sense, that is to say, as means of production.

<sup>31</sup> As they are stated in S. Neri and H. Sperl, *Traité instituant la CEE, Travaux préparatoires*, Luxembourg, 1960, p. 410, with reference to the Acts of the Ministers for Foreign Affairs (MAE 641/56, 177/57, 243/57 and 786/57).

<sup>32</sup> It should also be noted that Article 295 is included in Part Six, which is devoted to general and final provisions and affects all the Treaty rules. The subject of Article is not the provisions of the Treaty, but the Treaty itself, as a whole. According to Advocate General Colomer (Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 3 July 2001 Cases C-367/98, C-483/99 and C-503/99, *Commission of the European Communities v Portuguese Republic, French Republic and Kingdom of Belgium* [2002] ECR I-4756 (43)), in arithmetical terms, it would be placed 'in front of the bracket'. See Thorsten Kingreen, "Artikel 295", in *Kommentar des Vertrages über die Europäische Union and des Vertrages zur*

The meaning of the expression ‘system of property ownership’ has been much debated and often misunderstood. It should be underlined, however, that Article 295 refers to property rights as an organizing idea, not to property as a civil right or as a constitutional entitlement before public authorities.<sup>33</sup> As a legal and social institution, property is a complex organizing idea.<sup>34</sup> A system of property rights places limits on the actions of individuals and governments, affects the distribution and use of resources, and invokes legal sanctions to remedy rights violations.<sup>35</sup>

As a system, property rights are a system that determines for each object at any time which individuals are entitled to realize which of the constrained set of options socially available (with respect to that object at that time).<sup>36</sup> A property system is a system of rules governing access to and control of material resources. Property rules are a system of social rules aiming at solving the problem of allocation, that is to say, the problem of determining peacefully and reasonably predictably who is to have access to which resources for what purposes and when.

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*Gründung der Europäischen Gemeinschaft – EUV/EGV*, Christian Calliess and Matthias Ruffert, Luchterhand, p. 2455.

<sup>33</sup> As noted by Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers, OUP, 2002, p. 351, if we want to say what the guarantee of property requires, we cannot avoid answering basic questions about the normative ordering of the society. On the debate about the system of property rights, see David Schmitz, “The Institution of Property”, in Ellen Frankel Paul, Fred D. Miller Jr, Jeffrey Paul (eds.), *Property Rights*, CUP, 1994, p. 42-62. Christian Koenig and Jürgen Kühling, “Artikel 295”, in *EUV/EGV*, Rudolf Streinz, Beck, München, 2003, pp 2438-2439, distinguished between a narrow and a strict sense: in the strict sense, a system of property as mentioned in Article 295 refers only to privatisations and nationalizations.

<sup>34</sup> According to James Harris, *Property and Justice*, Clarendon Press, 1996, p. 3, property’s complexity is twofold. It resides partly in the fact that the institution comprises many elements, from determinate prescriptive or permissive rules to open-ended principles of exclusive use and allocation. Its complexity resides also in the fact that the package of elements it contains varies enormously in time and place and is nowhere static for long.

<sup>35</sup> Ellen Frankel Paul, Fred D. Miller. Jr, and Jeffrey Paul, *Property Rights*, CUP, 1994, at vii.

<sup>36</sup> Robert Nozick, *Anarchy, State and Utopia*, Oxford, Blackwell, 1975, p. 171, and Jeremy Waldron, *The Right to Private Property*, Clarendon Press, Oxford, 1998, p. 31.

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A system of property rights shall encompass,<sup>37</sup> firstly, rules of acquisition, which call for the assignment of property rights in things external to the individual – that is, in various kinds of physical and intellectual resources. A legal system of property rights must indicate the ways in which it will match up particular persons with particular things.<sup>38</sup>

Secondly, property rights are only of value if the holders of these rights are in a position to preserve or enforce their possession against allcomers. Therefore a system of property rights is in a sense strictly correlative with the creation of a tort system, in respect of rules of protection. Without the system of protection afforded by the rules of tort, there is no stability of expectations in any system of property rights. And without that stability, there will be no investment in useful or productive activities.<sup>39</sup>

Finally, rules of transfer are necessary to complete a system of property rights.<sup>40</sup> The rules of transfer have two distinct roles. First, these rules are designed to determine whether the interest in question is one that should be transferable. Second, rules of transfer determine the mechanisms whereby transfer of these interests can take place. The system of transfer consequently involves the entire law of contract, and also systems of public support, such as registration, and control.

In a system of private property, the rules governing access to and control of material resources are organized around the idea that resources are on the whole separate objects

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<sup>37</sup> I am closely following Richard Epstein, “Property as a Fundamental Civil Right” (1992) 29 *Cal. W. L. Rev.* 190-193.

<sup>38</sup> See, v.g., Article 42, 2, of the Italian Constitution: ‘Private ownership is recognized and guaranteed by laws determining the manner of acquisition and enjoyment and its limits, in order to ensure its social function and to make it accessible to all.’

<sup>39</sup> See v.g. Article 17 of the French Declaration of Human and Civic Rights of 26 August 1789: ‘Since the right to property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity is to be paid.’

<sup>40</sup> Article 62 of the Portuguese Constitution expressly states that: ‘1. Everyone shall be guaranteed the right to private property and to the transmission thereof in life or upon death, as laid down by the Constitution.’

each assigned and therefore belonging to some particular individual.<sup>41</sup> The organizing idea of a private property system is that, in principle, each resource belongs to some individual.<sup>42</sup> But other designs might exist. In a system of collective property, instead, the problem of allocation is solved by a social rule that the use of material resources in particular cases is to be determined by reference to the collective interests of society as a whole. The idea of common property is superficially similar to that of collective property in that no individual stands in a specially privileged situation with regard to any resource.<sup>43</sup> But it is different inasmuch as the interests of the collective have no special status either. In a system of common property, rules governing access to and control of material resources are organized on the basis that each resource is in principle available for the use of every member alike.<sup>44</sup>

Article 295 EC Treaty preserves intact the systems of property in the Member States, which should therefore be free to determine the extent and internal organisation of their

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<sup>41</sup> Jeremy Waldron, "Property, Justification and Need", (1993) 6 *Can. J. L. & Jurisprudence*, at 206. According to Cass R. Sunstein, "On Property and Constitutionalism", (1992) 14 *Cardozo L. Rev.* 907-935, a system of private property helps to bring about economic prosperity. The author advances four reasons for this result. First, the institution of private property creates and takes advantage of the powerful human inclination to bring goods and services to oneself and to people one cares about. Second, a system of private property performs a coordinating function. It ensures that the multiple desires of consumers will be reflected in market outcomes. Third, the institution of private property solves, all at once, a serious collective action problem faced by people in any system without that institution. When property is unowned, no one has a sufficient incentive to use it to its full advantage or to protect it against exploitation. And finally, a system of private property creates the kind of stability and protection of expectations that are precondition for investment and initiative, from both international and domestic resources. If a society permits private property, a primary question is how much, if any, inequality in property holdings should be allowed. Moreover, the theory must determine which sort of things can be privately owned or transferred and the limits or provisions to which this is subject, all in the light of the end of realizing social and political justice. Peter Benson, "Philosophy of Property Law", in *The Oxford Handbook of Jurisprudence of Law*, Jules Coleman and Scott Shapiro, OUP, 2002, p. 753.

<sup>42</sup> For the pedagogic and legitimating character of the organizing idea, see Jeremy Waldron, *The Right to Private Property*, Clarendon Press, Oxford, 1998, pp 42-43.

<sup>43</sup> Armen A. Alchian and Harold Demsetz only distinguish between a communal right system and private right system as property right structures, for economic analysis. See "The Property Right Paradigm", (1973) 33 *The Journal of Economic History*, pp 16-27.

<sup>44</sup> Jeremy Waldron, *The Right to Private Property*, Clarendon Press, Oxford, 1998, pp 38-41.

public sectors.<sup>45</sup> Thus, it would seem that Article 295 constitutes a forceful and unconditional limitation on Community's powers. But, inasmuch as Member States are free in respect of economic policy options, Article 295 is a positive prescription (a *Kompetenzausübungsnorm* rather than a negative *Kompetenzbestimmung*, i.e. a guideline for exercise of a power rather than a circumscription of a power).<sup>46</sup>

As it was soon remarked,<sup>47</sup> because of the close relationship between Article 295 (ex Article 222) of the EC Treaty and Article 83 of the ECSC, there is general agreement that Article 295 was not meant to be a Community guarantee of property rights that would supplement guarantees against uncompensated deprivations of property found in the law of some Member States. The expression 'system of property ownership' contained in Article 295 EC Treaty does not refer to the civil rules concerning property relationships - an aspect which was, furthermore, at time, wholly alien to the purposes of the Treaties.<sup>48</sup>

However, as noted by Advocate General RUIZ-JARABO COLOMER,<sup>49</sup> in most of the cases in which this provision has been raised its application was inappropriate. The subject-matter of the judgments delivered has been - far from the principle of neutrality

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<sup>45</sup> H. Smit and P. Herzog, *The Law of the European Community – A Commentary on the EEC Treaty*, p. 6-216.61; Ingrid F. Hochbaum, in *Kommentar zum EU-/EG-Vertrag*, Hans von der Groeben, Jochen Thiesing, Claus-Dieter Ehlermann (eds.), 5<sup>th</sup> ed., Vol. 5, Nomos, Baden-Baden, pp 383-393; Derrick Wyatt and Alan Dashwood, *European Community Law*, 5<sup>th</sup> ed., London, Sweet & Maxwell, 1993; Giuseppe B. Abbamonte, "Market Economy Investor Principle: A Legal Analysis of an Economic Problem", (1996) 4 *ECRL* 258. See Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 3 July 2001 Cases C-367/98, C-483/99 and C-503/99, *Commission of the European Communities v Portuguese Republic, French Republic and Kingdom of Belgium* [2002] ECR I-4756, para 44.

<sup>46</sup> Thorsten Kingreen, "Artikel 295", in *Kommentar des Vertrages über die Europäische Union and des Vertrages zur Gründung der Europäischen Gemeinschaft – EUV/EGV*, Christian Calliess and Matthias Ruffert, Luchterhand, p. 2456.

<sup>47</sup> H. Smit and P. Herzog, *The Law of the European Community – A Commentary on the EEC Treaty*, p. 6-216.61.

<sup>48</sup> Ingo Binker, "Artikel 295", in *EU-Kommentar*, Jürgen Schwarze (ed.), Nomos, Baden-Baden, p. 2336.

<sup>49</sup> Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 3 July 2001 Cases C-367/98, C-483/99 and C-503/99, *Commission of the European Communities v Portuguese Republic, French Republic and Kingdom of Belgium* [2002] ECR I-4756, para 78.

in relation to State initiative in economic activities - questions relating to rules on patent and copyright,<sup>50</sup> and to immovable property transactions.<sup>51</sup> Reliance on Article 295 EC in these categories of cases, although admissible, given the broad and imprecise wording of the provision, must be considered spurious in relation to the aims in fact pursued.

This miscomprehension might well justify that, until now, there is no express ruling by the Court of Justice on the scope of Article 295 EC in the area in which it should properly take effect, that is to say in relation to the public authorities imposition of economic policy options.<sup>52</sup>

The first idea to keep in mind is that Article 295 has, thus, a specific political nature and a symbolic importance in imposing the Community's neutrality in respect of property

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<sup>50</sup> Cases C-235/89, *Commission v Italy* [1992] ECR I-777, and C-30/90, *Commission v United Kingdom* [1992] ECR I-829.

<sup>51</sup> E.g. in Case 182/83, *Fearon* [1984] ECR 3677, and Case C-302/97, *Konle* [1999] ECR I-3099. In the former case the Court was asked whether an Irish statute containing a condition requiring the obligation to reside on or near land, within the framework of legislation concerning the ownership of rural land would infringe Community law. In the latter case, the Court was asked whether Austrian statutes (Sections 9(1)(a) and 12(1)(a) of the TGVG 1993: 'acquisition of the ownership of building land is subject to authorisation by the authority responsible for land transactions'; Section 14(1) of the TGVG 1993 providing that authorisation 'shall be refused, in particular where the acquirer fails to show that the planned acquisition will not be used to establish a secondary residence'; and Section 10(2) of the TGVG 1993 stating that authorisation 'is not ... required where the right acquired relates to land which has been built on and the acquirer makes a written declaration to the authority responsible for land transactions that he has Austrian nationality and that the acquisition will not be used to establish a secondary residence' would constitute a breach of Community law. The Court of Justice stated that a rule of that nature was contrary to the freedom of movement of capital, in spite of the fact that the system was, in theory, applicable without distinction to nationals and foreigners. See also Case C-300/01, *Doris Salzmann* [2003] ECR I-4899.

<sup>52</sup> However, two Advocates-General have indeed addressed the issue of neutrality of the Treaties in relation to economic interventionism on the part of the State. In his Opinion in Joined Cases 188/80 to 190/80, Advocate General Reischl, when examining the scope of Article 90(3) of the EC Treaty (now Article 86 EC), considered that the then Article 222 placed limits on the Commission's powers under Article 90 of the Treaty to exert an influence on the internal structure of public undertakings, inasmuch as 'the public authorities' freedom to engage in economic activity may not be restricted to a greater extent than that provided for in the Treaty ([1982] ECR 2589, 3). In a similar context and in line with that interpretation, Advocate General Tesauro, in the Opinion in Case C-202/88 (*France v Commission*, [1991] ECR I-1223, especially at I-1239) maintained that it follows from the direct and self-evident relationship between Article 90 and Article 222 of the EC Treaty that 'there is at least a strong presumption in favour of the legality of a public undertaking, or a holder of exclusive rights as such.'



rights system of Member States.<sup>53</sup> This provision must, however, be read in the context of a Treaty creating a Community and a market. Article 2 of EC Treaty sets the establishment of a common market and an economic union as a Community task. The activities of the Community shall include, according to Article 3, c) ‘an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital’ and according to Article 3 g) ‘a system ensuring that competition in the internal market is not distorted’. Next, Article 4(1) states that, for those purposes, the activities of the Member States and the Community shall include ‘the adoption of an economic policy which is based on the close coordination of Member States’ economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition’. A market system presupposes both a system of private property and freedom of contract, as legal mechanisms.

A market economy, it should be recalled, is one in which individuals and private firms make the major decisions about production and consumption. A system of prices, of markets, of profits and losses, of incentives and rewards determines what, how, and for whom firms produce the commodities that yield the highest profits (the *what*) by the techniques of production that are least costly (the *how*). Consumption is determined by individuals’ decisions about how to spend the wages and property incomes generated by their labour and property ownership (the *for whom*).<sup>54</sup>

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<sup>53</sup> According to Colomer, the imprecision, from a legal point of view, of the expression ‘system of property ownership’ constitutes perhaps the clearest indication that this is not a legal, but an economic, concept. Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 3 July 2001 Cases C-367/98, C-483/99 and C-503/99, *Commission of the European Communities v Portuguese Republic, French Republic and Kingdom of Belgium* [2002] ECR I-4756, 47.

<sup>54</sup> By contrast, a command economy is one in which the government makes all important decisions about production and distribution. In a command economy, the government owns most of the means of production (land and capital); it also owns and directs the operations of enterprises in most industries; it is the employer of most workers and tells how to do their jobs; and it decides how the output of the society is to be divided among different goods and services. In short, in a command economy, the government answers the major economic questions through its ownership of resources and its power to enforce decisions. Paul Samuelson and William Nordhaus, *Economics*, McGraw-Hill, 2001, p. 8.

In thinking about a market economy, economists focus their attention on three broad categories of markets in which individuals and firms interact. The markets in which firms sell their outputs to households are collectively referred to as the product market. Many firms also sell goods to other firms; the output of the first becomes the input of the second. These transactions too are said to occur in the product market. On the input side, firms need (besides the materials they buy in the product market) some combination of labour and machinery to produce their output. They purchase the services of workers in the labour market. They raise funds to buy inputs in the capital market. Traditionally, economists have also highlighted the importance of a third input, land, but in modern industrial economies land is of secondary importance. So three markets should be distinguished: the product market (the markets in which firms sell the goods they produce); the labour market (the market in which households sell labour service and firms buy labour service); the capital market (the market in which funds are borrowed and lent).<sup>55</sup>

The existence of a market economy, whether with state-owned or private market enterprises, requires robust and clear property rights.<sup>56</sup> The second note to be emphasized is that the system of property rights required for an open market economy, and presupposed by Article 295 of EC Treaty, should be a private property system. As a complex build-up of interactions, the market is a place of institutionalized exercise of private autonomy, where forms of networks of interaction are structured.

The European market is built on pragmatic considerations. It provides the enabling (economical, but also political and social) structural conditions to the flow of communicative actions among economic actors. Therefore, the market is a

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<sup>55</sup> Joseph Stiglitz, *Economics*, Walsh, p. 15.

<sup>56</sup> Tamar Frankel, "The Legal Infrastructure of Markets: The Role of Contract and Property Law", (1993) 73 *B.U.L. Rev.* 392. See Jeremy Waldron, *The Right to Private Property*, Clarendon Press, Oxford, 1998, pp 53-55.

communicative framework, and a governed market system.<sup>57</sup> The market system, as a method of social coordination, is a set of activities of distinctive pattern. Certain customs and rules are required to make a market system, and to the degree that they are observed, a market system exists. European norms on free movement and competition presuppose a market economy, based on the legal institutions of property and contract.<sup>58</sup>

The build up of an open market economy is, therefore, the foundational aim or goal to be promoted.<sup>59</sup> The logical form of property rights, necessary to achieve this goal, is given in Article 295. This provision seeks to specify or indicate the necessary features of property rights. As I suggested *supra*, private property rights are necessary to meet the requirements of an open market economy. So, Member States must have a system of property rights built around the idea of private property. A private property system designates a subset of legitimate interests or liberties to be accorded special protection by law. Once chosen, the relevant interest or liberty enjoys a privileged status by being labelled a right or entitlement. Each legitimate interest that is marked as a right is necessarily associated with, and in fact entails, some legitimate claims.

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<sup>57</sup> Well-known is the distinction between market system and market. Although not all societies embrace or contain a market system, all existing societies make use of markets. A market system exists only when markets proliferate and link with each other in a particular way – specifically to organize or coordinate many of the activities of a society. The market system organizes or coordinates activities not through governmental planning but through the mutual interactions of buyers and sellers. To establish a market system it is not enough that people buy and sell. Also required is that their purchases and sales, not central authorities, coordinate the society. Market system is a system of societywide coordination of human activities not by central command but by mutual interactions in the form of transactions. Charles E. Lindblom, *The Market System: What It Is, How it Works, and What to Make Of It*, Yale University Press, 2001, p. 4.

<sup>58</sup> Since the European Council of Copenhagen of 1993, the candidates to accession have first to secure a market economy in the domestic sphere. See Julio Baquero Cruz, *Between Competition and Free Movement - The Economic Constitutional Law of the European Community*, Hart Publishing, 2002, p. 77. Claiming that justice enjoins an economic system encompassing both private property and market freedoms, John Gray, “Contractarian Method, Private Property, and Market Economy”, in *Markets and Justice, Nomos XXXI*, John W. Chapman and J. Roland Penncock (eds.), NYUP, 1989, p. 15.

<sup>59</sup> In drawing this structure, I was strongly influenced by Jules Coleman, in “Rethinking the Theory of Legal Rights”, (1986) 95 *Yale LJ* 1335.

Notwithstanding, the content of rights is a matter of contingent fact. It is up to the Member States to calibrate, in each case, their property systems. Since they assume the characteristic of private property systems, Member States are free to nationalize or privatize enterprises,<sup>60</sup> and the Community must remain neutral in respect of economic policy options.

Finally, it should be stressed that the general approach of Community law to undertakings which are State controlled or which enjoy a privileged legal status, is that, while there can be no objection in principle to their special relationship with the State, whatever legal form this may take, their behaviour as market participants is governed by the same rules as those applicable to purely private undertakings, except where the Treaty itself permits some derogation. Member States are, thus, obliged to respect rules on free movement and on competition imposed by the Treaty.

In respect of the proper meaning of Article 295, the Court of Justice has merely stated briefly that application of Article 295 EC does not detract from application of the fundamental rules of the Treaty, namely rules on free movement<sup>61</sup> and competition<sup>62</sup>

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<sup>60</sup> Christian Koenig and Jürgen Kühling, “Artikel 295”, in *EUV/EGV*, Rudolf Streinz, Beck, München, 2003, p. 2436; Thorsten Kingreen, “Artikel 295”, in *Kommentar des Vertrages über die Europäische Union und des Vertrages zur Gründung der Europäischen Gemeinschaft – EUV/EGV*, Christian Calliess and Matthias Ruffert, Luchterhand, 2458; Ingo Binker, “Artikel 295”, in *EU-Kommentar*, Jürgen Schwarze (ed.), Nomos, Baden-Baden, p. 2334. W. Devroe, “Privatizations and Community Law: Neutrality Versus Policy” (1997) 34 *CMLRev* 297-306 debates whether it is desirable for the Community to remain neutral towards privatisations is a policy question. Devroe argues that, in apparent contrast with the wording of Article 295, the Community legal system has grown less and less neutral with regard to the system of property ownership in the Member States. An increasing number of primary and secondary Community law provisions would be inciting, if not forcing, Member States to privatize. The author refers to provisions concerning economic policy (stringent budgetary discipline; the Council ‘broad guidelines of the economic policies’ and the promotion of private funding of transeuropean networks); competition policy (the conditioning of state aid upon privatization; and the process of demonopolization); and environmental regulation.

<sup>61</sup> In Cases C-367/98, C-483/99 and C-503/99, *Commission of the European Communities v Portuguese Republic, French Republic and Kingdom of Belgium* [2002] ECR I-4756 (golden shares); Case C-463/00, *Commission v Spain* [2003] ECR I-4581 para 67; Case C-274/06, *Commission of the European Communities v Spain* [2008] ECR; Case C-112/05, *Commission of the European Communities v Federal Republic of Germany* [2007] ECR I-8995.

<sup>62</sup> Joined Cases T-204 and T-270/97, *EPAC v Commission* [2000] ECR II-2267, para 122: ‘(...) it must be pointed out, first, that, under Article 90(1) of the Treaty, the competition rules apply without distinction to both those types of undertaking, and, second, that Article 222 of the Treaty does not contravene that

(including state aids).<sup>63</sup> The state is free to decide whether an undertaking is public or private, but after doing so, it is settled case-law of the ECJ that the State must play by the rules. That is to say, the State cannot reserve privileges for itself,<sup>64</sup> or using the Court's expression, 'Article 295 EC does not detract from application of the fundamental rules of the Treaty'.<sup>65</sup>

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principle.' Again in Case C-163/99, *Portugal v Commission*, in which the Portuguese Republic contested a decision prohibiting the practices regarding the fixing of landing taxes followed by a company responsible for managing airports, the Court of Justice considered that the application of Article 86 of the EC Treaty to the case did not infringe the principle of neutrality as regards property ownership in the Member States: 'The Portuguese Republic maintains, however, that the contested decision infringes the principle of neutrality as regards property ownership in the Member States contained in Article 222 of the EC Treaty (now Article 295 EC). In its view, the contested decision precludes undertakings which operate franchises or enjoy exclusive rights, or are responsible for running public services, from employing the sales strategies normally used by other undertakings. 59. The Commission replies, quite correctly, that the provisions of Article 86 of the Treaty apply to all undertakings occupying a dominant position, irrespective of whether they belong to public or private entities, and that in this case it has in no way infringed the principle of neutrality as regards property ownership in the Member States by applying those provisions in respect of ANA-EP.' (para 58)

<sup>63</sup> In Joined Cases T-288/99 and 233/99, the Court ruled, 'the competition rules, which are fundamental rules, apply without distinction to public and private undertakings (...) Article 295 EC cannot therefore be held to restrict the scope of the concept of State aid within the meaning of Article 87(1) EC.' (paras. 193-194) Similarly, in Joined Cases T-116/01 and 118/01, para 152: 'Article 295 EC cannot therefore be considered to restrict the scope of the concept of State aid for the purposes of Article 87(1) EC.'

<sup>64</sup> See Opinion of Advocate General Miguel Poiares Maduro, delivered on 6 April 2006 in Joined Cases C -282/04 and C-283/04, [2006] ECR I-9141, para 28-30: "28. In my view, the Court's position [on Article 295] is consonant with its case-law in other areas where questions arise as to the limits imposed on the State when it acts as a market participant. When a State decides to open a certain sector of the market, it must act in a manner which is consistent with that decision. This requirement for consistency arises from the need to ensure that the State acts in conformity with either the market process or the political process. 29. In the case of the privatisation of former State owned companies, this requirement is particularly important. The Treaty entitles the Member States to maintain public ownership of certain companies. Nevertheless, it does not entitle them to curtail selectively the access of market operators to certain economic sectors once those sectors have been privatised. If the State were entitled to maintain special forms of market control over privatised companies, it could easily frustrate the application of the rules on free movement by granting only selective and potentially discriminatory access to substantial parts of the national market. 30. When the State privatises a company, therefore, the free movement of capital requires that the company's economic autonomy be protected, unless there is a need to safeguard fundamental public interests recognised by Community law. In this way, any State control, given that it is outside the normal market mechanism, of a privatised company must be linked to carrying out the activities of general economic interest associated with that company". Also opinion delivered on 6 December 2007 in Joined Cases C-463/04 and C-464/04, paras. 26-27.

<sup>65</sup> More recently, see Case 503/04, *Commission v Germany* [2007] ECR I-6153, at para 37. The Court recalled that Article 295 does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty, and, therefore, the particular features of the system

To sum up, Article 295 is of programmatic nature, and refers to property as a system. That provision confirms the neutrality of the Treaty in respect of the nature, public or private, of undertakings.<sup>66</sup> The reference to ‘system of property ownership’ under Article 295 of EC Treaty has a political rather than a strictly technical legal sense. The Treaty provision aims at preventing any Community action directed at the attribution, for political-economic reasons, of property to private or to public holders.<sup>67</sup> In respect of regulatory attributions, European institutions are not precluded from dealing with the private law aspects of property, such as risk transfer or title retention, or with a unified system of conveyancing.<sup>68</sup>

I shall recall now that property for constitutional and international discourse requires both direct and derivative constitutional claims, in respect of patrimonial rights. The concept of property for constitutional and international discourse is, thus, different from the system of property rights, although the system of property rights is also to be found in several constitutional documents. A property system aims at solving the problem of allocation, that is to say, the problem of determining who is to have access to which resources for what purposes and when (the reference to a ‘system of property ownership’ in Article 295 of EC Treaty is used in this meaning). I will continue the discussion on the protection of property under constitutional discourse *infra*, in Chapter III. Now, I will now turn to the analysis of property as an individual private right.

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of property ownership in a Member State cannot therefore justify the continuation of a failure to fulfil obligations which consists of an obstacle to the freedom to provide services in disregard of the provisions of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ L 209/1.

<sup>66</sup> Christian Koenig and Jürgen Kühling, “Artikel 295”, in *EUV/EGV*, Rudolf Streinz, Beck, München, 2003, p. 2435.

<sup>67</sup> See Ulrich Drobniç, “Property Law in a Future European Code”, in *Um Código Civil para a Europa, Studia Iuridica*, Faculdade de Direito da Universidade de Coimbra, 64, Colloquia 8, Coimbra Editora, 2002, p. 105.

<sup>68</sup> *Ibidem*. See also Peter Sparkes, *A New Land Law*, 2<sup>nd</sup> ed., Hart Publishing, 2003, p. 35.

## **Section II – Property as an Individual Private Right**

In the analysis of property rights as individual rights, I will start by presenting the sketch of the debate taking place in continental Europe (between realists and personalists), and in Anglo-American countries (the bundle of rights theory, the right to exclude theories and the integrated theory) because they both run parallel, and because it is conspicuous that they influence each other.

### **1. The debate in continental Europe**

#### *Introductory note*

I will start my analysis with the Roman concept of property (or the absence of one), passing through the Glossators, Commentators and jusnaturalist authors, until the debate that took place along the twentieth century.

No Roman definition of ownership exists in the available sources, and it may be safely assumed that the classical lawyers never attempted to give such a definition.<sup>69</sup> In republican times, when *dominium* and *proprietas* had not yet become technical legal terms, ownership was designated by describing its principal content. *Dominium* would include the *jus utendi*, or the right of appropriating its use; the *jus fruendi*, or the right of appropriating its fruits whether natural or civil; the *jus abutendi*, which involves the right of destruction, consumption, and free disposition.<sup>70</sup>

Although not unlimited, the *dominium* would involve the highest and most absolute control which a person was permitted under the law to exercise with reference to an

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<sup>69</sup> Fritz Schulz, *Classical Roman Law*, Clarendon Press, Oxford, 1951, p. 338; Pietro Bonfante, *La proprietà, Corso di diritto romano* (raccolto e pubblicato a cura de Enrico Camaschella), Mattei & C., ed., 1914-1915, p. 209. For an outline of the birth and the growth of property as a legal concept, see Boudewijn Bouckaert, “What is Property?” (1990) 13 *Harv. J. L. & Pub. Pol.* 778 ff.

<sup>70</sup> See Alvaro D’Ors, *Derecho privado romano*, Eunsa, Pamplona, 9<sup>th</sup> ed., at § 142, p. 193; Andrew Stephenson, *A History of Roman Law*, Little, Brown and Co., Boston, 1912, p. 382.

object.<sup>71</sup> It was, in general, indefinite as to its extent, unlimited as to its duration, and unrestricted as to its disposition. The owner, or *dominus*, could hold the object to the exclusion of all other persons; he could use it according to its own free will; he could reap all the benefits capable of being legitimately derived therefrom; and he could freely dispose thereof during his lifetime or at his death.<sup>72</sup>

In connection with the simple idea of ownership just described, there were certain features relating to the form of ownership, or the mode in which *dominium* was exercised that should be noticed. Romans made a distinction corresponding in name to legal and equitable ownership.<sup>73</sup> This distinction was based on the enforceability of the right rather on its extent. *Dominium* referred originally to that right of property which was protected by the *jus civile* and was designated *dominium Quiritarium*.<sup>74</sup> The *praetor*, however, assumed the authority to protect *bona fide possessio* even when all the conditions of the *jus civile* had not been complied with. Such property was said to be held *in bonis*, and this right was designated as *dominium bonitarium*. At a later period, by the assimilation of the *jus civile* and the *jus gentium* these two rights became identical.<sup>75</sup>

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<sup>71</sup> Andrew Stephenson, *ibidem*, p. 380.

<sup>72</sup> See Andrew Stephenson, *ibidem*; and Henry John Roby, *Roman Private Law*, CUP, p. 1902. Although classical ownership did not imply an unlimited right over a thing, the right of *dominium* is the most extensive real right which a person can legally exercise over a thing. The powers of a slave-owner were restricted by imperial constitutions. Ownership of land was limited not only with regard to the interest of neighbours but also by public law. But it is evident that under classical law the bounds of ownership were very wide, according to the liberal principle which demanded that ownership should be as unrestricted as possible and that the greatest possible latitude should be given to individual action and initiative.

<sup>73</sup> Vittorio Scialoja, *Teoria della proprietà nel diritto romano*, vol. I, Roma, Attilio Sampaolesi Ed., 1928, pp 243 ff.

<sup>74</sup> Max Kaser, *Das Römisches Privatrecht*, Beck, München, 1971, p. 402; Juan Iglesias, *Derecho romano*, (with Juan Iglesias-Redondo), 12<sup>th</sup> ed., Editorial Ariel, Madrid, 1999, pp 159 ff.

<sup>75</sup> Andrew Stephenson, *A History of Roman Law*, p. 382; and R. W. Leake, *Roman Private Law*, Macmillan and Co., Limited, 1909, p. 165.



Although no distinction can be found in Roman texts between property rights and obligatory rights, this distinction was, however, subjacent to the dichotomy between *actiones in rem/actiones in personam* (real or proprietary actions/personal actions).<sup>76</sup> The distinction between actions *in rem* and *in personam* was based not on what could seem to us to be the primary distinction, that between the rights, but on what was to the Romans the primary distinction, that between remedies.<sup>77</sup>

In the *actio in rem*, the plaintiff claims a right (*ius mihi esse*); in the *actio in personam* the plaintiff claims a duty in charge of the defendant.<sup>78</sup> The *actio in rem* was an action for a physical thing, rather than the assertion of a right available against everyone, and

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<sup>76</sup> In classical times the distinction between *actio in rem* and *actio in personam* is crossed by the distinction between actions *civiles* and actions *honorariae*. Both actions *civiles* and *honorariae* may be either *in rem* or *in personam*. Fritz Schulz, *Classical Roman Law*, Clarendon Press, Oxford, 1951, p. 33.

<sup>77</sup> I. 4, 6, 1: ‘The principal division of all actions between parties litigant whether before judges or arbiters for any cause whatsoever, is into two classes; that is to say, such as are either *in rem* or *in personam*, for every plaintiff either brings a suit against a party who is liable to him on a contract, or because of an illegal act, (in which instance the action is brought *in personam*, and in it the party states that his adversary should give him something or do something for him, or his allegations are made in some other way) or he brings suit against a party who is not liable to him personally, but against whom he institutes proceedings relating to certain property, and in this case the action granted is *in rem*. For instance, where a party has in his possession some corporeal property which Titius says is his, but the possessor says that he is the owner of the same; and if Titius in the pleadings alleges that the said property is his, the action is *in rem*.’ (Translation in [http://webu2.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/just4\\_Scott.gr.htm](http://webu2.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/just4_Scott.gr.htm) [last visited 31<sup>st</sup> December 2009])

GAI. IV, 2: ‘A personal action is an action which seeks to enforce an obligation imposed on the defendant by his contract or delict, that is to say, is an action by which one claims in the *intentio* of the *formula* that he is bound to convey some property to one, or to perform for one some service, or to make some other kind of performance’; and 3 ‘A real action is an action by which one claims as one’s own in the *intentio* some corporeal thing or some particular right in the thing, as a right of use or usufruct of a thing belonging to a neighbour, or a right of horseway or carriage-way through his land, or of fetching water from a source in his land, or of raising one’s house above a certain height, or of having the prospect from one’s windows unobstructed; or when the opposite party [that is the owner] brings the negative action asserting that there is no such right in the thing.’ (Translation in [http://webu2.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/gai4\\_Poste.htm](http://webu2.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/gai4_Poste.htm) [last visited 31<sup>st</sup> December 2009])

<sup>78</sup> Biondo Biondi, *Corso di istituzioni di diritto romano*, I, Ed. Siciliana Tipografica, Catania, 1929, p. 97; Rudolph Sohm, *The Institutes, A Textbook of the History and System of Roman Private Law*, translated by James Crawford Ledlie, 3<sup>rd</sup> ed., Clarendon Press, Oxford, 1907, pp 263 ff; Max Kaser and Karl Hackl, *Das Römische Zivilprozessrecht*, 2<sup>nd</sup> ed. Beck, 1996, pp 326-334; Emilio Betti, *Istituzioni di diritto romano*, vol. I, 2<sup>nd</sup> ed., 1942, p. 330 ff; Alvaro D’Ors, *Derecho privado romano*, Eunsa, Pamplona, 9<sup>th</sup> ed, §80, p. 123; Juan Iglesias, *Derecho romano*, (with Juan Iglesias-Redondo), 12<sup>th</sup> ed., Editorial Ariel, Madrid, 1999, pp 150-153; Pablo Fuenteseca, *Derecho privado romano*, Madrid, 1978, pp 69 ff.; Santos Justo, *Direito Privado Romano I*, 3<sup>rd</sup> ed., Coimbra Editora, 2006, pp 239 ff.

an action *in personam* in its origin was thought of rather as a claim to a person. But for classical law and later the two types may be regarded as means for the enforcement of, respectively, rights *in rem* and *in personam*.<sup>79</sup>

The distinction between *actio in rem* and *actio in personam* was clear in the structure of the *formula*, for when someone is claiming *in rem*, the defendant's name does not appear in the *intentio* at all (apart from exceptional cases, v.g. in the *actio negatoria*),<sup>80</sup> whereas, in a claim *in personam* it does of necessity.<sup>81</sup> Thus in the typical case of a vindication, because the plaintiff is only asserting a relationship between himself and the thing he claims, the *intentio* runs 'if it appear that the thing belongs at Quiritarian law to Aulus Agerius',<sup>82</sup> whereas if he is claiming *in personam*, i.e., alleging that some other persons under a duty towards him, then to make the extent of his assertion clear it

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<sup>79</sup> W. W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian*, CUP, 1932, p. 675.

<sup>80</sup> GAIUS 4, 87: 'When the defendant is represented by a *cognitor* or procurator in a personal action the principal is named in the *intentio*, and his representative in the *condemnatio*. In a real action neither the principal defendant nor his representative is named in the *intentio*, which only affirms that the thing belongs to the plaintiff' (translation in [http://webu2.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/gai4\\_Poste.htm](http://webu2.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/gai4_Poste.htm) [last visited 31<sup>st</sup> December 2009]). The lack of mention of the name of the defendant in the *intentio* came to be regarded as the feature of an action *in rem*, so that we get actions called '*actiones in personam in rem scriptae* (actions in personam that do not mention the name of the defendant's in the *intentio*)', such as divisory actions and *actio ad exhibendum*. W. W. Buckland, *ibidem*, p. 677.

<sup>81</sup> H. F. Jolowitz, *Historical Introduction to the Study of Roman Law*, CUP, 1932, p. 214. The outstanding example of an *actio in rem* is the *rei vindicatio*, i.e. the action of the owner of a thing to recover it from the defendant who is in possession of it. The *formula* of the *rei vindicatio* runs as follows:

*'Si paret fundum Cornelianum, quo de agitur, ex iure Quiritium Auli Agerii esse, Neque is fundus Aulo Agerio restituetur,  
Quanti is fundus erit, tantam pecuniam iudex Numerium Negidium Aulo Agerio condemnato, si non paret absolvito'*.

<sup>82</sup> See D. 44, 2, 11, 2: 'If, however, anyone brings suit for land on the ground that Titius had delivered it to him, and, having been defeated, afterwards sues for it on some other ground, he should not be barred by an exception.' (Translation in <http://web.upmf-grenoble.fr/Haiti/Cours/Ak/> [last visited 31<sup>st</sup> December 2009]) Further, D. 44, 2, 14, 2: 'In cases of this kind, personal actions differ from real ones, for where the same property is due to me from the same individual, each cause of action is based on a separate obligation; and a judicial proceeding having reference to one of them is not annulled by a similar demand for another. But when I bring a real action without mentioning on what ground I allege the property to be mine, all titles to it are included in the claim for one portion, because, although the property cannot be mine more than once, it may be due to me several times.' (Translation in <http://web.upmf-grenoble.fr/Haiti/Cours/Ak/> [last visited 31<sup>st</sup> December 2009])

is necessary that the name of the person from whom he claims, *i.e.*, the defendant, should be mentioned.<sup>83</sup> In an *actio certae creditae pecuniae* therefore the *intentio* reads: ‘if it appears that Numerius Negidius ought to pay Aulus Agerius’.

Another peculiarity of the classical *actio in rem* that lies in the proceeding *in iure* should be mentioned. Usually, the defendant has to defend his case *in iure*, *i.e.*, he has to accept a *formula* approved by the *praetor* and consequently a proceeding before a judge (*iudicium*).<sup>84</sup> Actions *in rem*, however, entail no such duty, the defendant being free to abandon his case, in accordance with the Roman idea that the plaintiff’s action *in iure* is not directed against the defendant’s person but against a thing (*in rem*) which the defendant is at liberty either to protect or to abandon.<sup>85</sup> If the thing was a movable, the *praetor* ordered the plaintiff to take it home (*duci vel ferri iubere*). If the thing was immovable, the *praetor* ordered the defendant to restore it by issuing the *interdictum quem fundum*.<sup>86</sup> In contrast to them, all actions *in personam* entail a duty to make defence in court.

The absolute separation between property rights and personal rights was also clear in the organization of legal institutions. Contracts and property rights were absolutely separate categories. That is the reason why the transfer of ownership was not the direct effect of a contract, but demanded a transfer of the thing although the hand over was

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<sup>83</sup> In the *condemnatio* the name of the defendant necessarily always appears, as it is he who, failing restitution, will be condemned to pay money to the plaintiff.

<sup>84</sup> For the distinction between *actio in rem* and *actio in personam* at the time of the XII Tables, see H. F. Jolowitz, *Historical Introduction to the Study of Roman Law*, CUP, 1932, p. 188.

<sup>85</sup> D. 6.1.80: ‘We are not compelled to endure an action in rem, because anyone is allowed to allege that he is not in possession, so that if his adversary can prove that the other party is actually in possession of the property, he can have the possession transferred to himself by an order of court; even though he does not prove that the property is his’ (Translation in <http://web.upmf-grenoble.fr/Haiti/Cours/Ak/> [last visited 31<sup>st</sup> December 2009]); D. 50, 17, 156, pr.: ‘No one can be compelled to defend another against his will’ (Translation in <http://web.upmf-grenoble.fr/Haiti/Cours/Ak/> [last visited 31<sup>st</sup> December 2009]).

<sup>86</sup> Max Kaser, *Das Römisches Privatrecht*, Beck, München, 1971, pp 414 ff.; Santos Justo, *Direito Privado Romano I*, 3<sup>rd</sup> ed., Coimbra Editora, 2006, p. 241, note 1203.

more symbolic than real.<sup>87</sup> The civil law methods of acquiring ownership were *mancipatio*, *in iure cessio* and *traditio*.<sup>88</sup>

*Mancipatio* was a sort of symbolical sale (*imaginaria venditio*).<sup>89</sup> For its accomplishment were needed the two parties to the transaction (the transferor and transferee), at least five witnesses, who must be Roman citizens above the age of puberty, a pair of scales and another citizen of full age to hold them (*libripens*), and a piece of copper (*aes*, also called *raudusculum*). The ceremony consisted in the transferee's grasping the thing to be transferred, if it was movable, and saying, *e.g.*, if it is a slave to be transferred, 'I assert that this man is mine according to Quiritarian right, and he bought to me with this piece of copper and these copper scales'.<sup>90</sup> Then he

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<sup>87</sup> Reinhard Zimmermann, *The Law of Obligations, Roman Foundations of the Civilian Tradition*, Juta and Beck, 1990, pp 230 ff. See also the seminal articles of Vieira Cura, "O Fundamento Romanístico da Eficácia Obrigacional e da Eficácia Real da Compra e Venda nos Códigos Cíveis Espanhol e Português", *Jornadas Romanísticas*, in *Studia Iuridica*, 70, Colloquia 11, Coimbra Editora, 2003, pp 73 ff, and "Compra e Venda e Transferência da Propriedade no Direito Romano Clássico e Justiniano (a Raiz do 'Sistema do Título e do Modo')", (2003) *Boletim da Faculdade de Direito de Coimbra - Volume Comemorativo do 75.º tomo*, pp 69 and ff.

<sup>88</sup> Max Kaser, *Das Römische Privatrecht*, Beck, München, 1971, pp 129-134; Pablo Fuentesecca, *Derecho privado romano*, Madrid, 1978, pp 116 and ff; Juan Iglesias, *Derecho romano*, (with Juan Iglesias-Redondo), 12 ed., Editorial Ariel, Madrid, 1999, pp 175-181. Gaius, Book II, paras. 18-22 wrote: '[t]here is an important difference between things mancipable and things not mancipable'; '[c]omplete ownership in things not mancipable is transferred by merely informal delivery of possession (tradition), if they are corporeal and capable of delivery'; '[t]hus when possession of clothes or gold or silver is delivered on account of a sale or gift or any other cause, the property passes at once, if the person who conveys is owner of them'; '[s]imilarly transferable are estates in provincial lands, whether stipendiary or tributary; stipendiary being lands in provinces subject to the dominion of the people of Rome; tributary, lands in the provinces subject to the dominion of the Emperor' and '[m]ancipable things, on the contrary, are such as are conveyed by mancipation, whence their name; but surrender before a magistrate has exactly the same effect in this respect as mancipation.' (Translation in [http://webu2.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/gai2\\_Poste.htm#10](http://webu2.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/gai2_Poste.htm#10) [last visited 31<sup>st</sup> December 2009]) On the evolution of the classification of the objects, see Henry Maine, *Ancient Law*, Dent, New York, pp 160 ff.

<sup>89</sup> H. F. Jolowitz, *Historical Introduction to the Study of Roman Law*, CUP, 1932, p. 145; J. A. C. Thomas, *Textbook of Roman Law*, North-Holland Publishing Company, 1976, p. 152; Andrew Stephenson, *A History of Roman Law*, p. 87; A. A. Vieira Cura, "O Fundamento Romanístico da Eficácia Obrigacional e da Eficácia Real da Compra e Venda nos Códigos Cíveis Espanhol e Português", *Jornadas Romanísticas*, in *Studia Iuridica*, 70, Colloquia 11, Coimbra Editora, 2003, p. 77.

<sup>90</sup> *Hunc ego hominem ex iure Quiritum meum esse aio, isque mihi emptus esto hoc aere aeneaque libra.*

### *Dimensions of property*

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would strike the scales with the piece of copper and give it to be transfer by way of price (*quasi pretii loco*).<sup>91</sup>

Whereas *emptio venditio* was a mere contract, *i.e.*, an agreement giving rise to duties (on the part of the seller to transfer the thing sold and on the part of the buyer to pay the price for it) and quite separate from the subsequent conveyance and payment by which these obligations were fulfilled, the primitive *mancipatio* was a sale and conveyance in one, for there was no previous contract and the payment of the price (*i.e.*, the weighing out of the metal) was part of the form necessary for the conveyance.<sup>92</sup> The *in iure cessio*,<sup>93</sup> like *mancipatio*, was a form of conveyance, and, as its name implies, took place before the magistrate. In classical times, the parties would go before a magistrate of the people, the urban or peregrine praetor at Rome, or the governor in the provinces, and the intended transferee, grasping the thing to be conveyed, would say (if *e.g.*, it was

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<sup>91</sup> Gaius, I. 119: ‘Mancipation, as before stated, is an imaginary sale, belonging to that part of the law which is peculiar to Roman citizens, and consists in the following process: in the presence of not fewer than five witnesses, citizens of Rome above the age of puberty, and another person of the same condition, who holds a bronze balance in his hands and is called the balance holder, the alienee holding a bronze ingot in his hand, pronounces the following words: THIS MAN I CLAIM AS BELONGING TO ME BY RIGHT QUIRTARY AND BE HE (OR, HE IS) PURCHASED TO ME BY THIS INGOT AND THIS SCALE OF BRONZE. He then strikes the scale with the ingot, which he delivers to the mancipator as by way of purchase money.’ (Translation in [http://webu2.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/gai1\\_Poste.htm#110](http://webu2.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/gai1_Poste.htm#110) [last visited 31<sup>st</sup> December 2009])

<sup>92</sup> H. F. Jolowitz, *Historical Introduction to the Study of Roman Law*, CUP, 1932, p. 146; W. W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian*, CUP, 1932, p. 235 ff; Juan Iglesias, *Derecho romano*, (with Juan Iglesias-Redondo), 12<sup>th</sup> ed., Editorial Ariel, Madrid, 1999, pp 259-264; Alvaro D’Ors, *Derecho privado romano*, Eunsa, Pamplona, 9<sup>th</sup> ed., § 487, p. 548 ff; Pablo Fuenteseca, *Derecho privado romano*, Madrid, 1978, pp 258 ff.

<sup>93</sup> Gaius, II, 24: ‘Conveyance by surrender before a magistrate (*in iure cessio*) is in the following form: in the presence of some magistrate of the Roman people, such as a praetor, the surrenderee grasping the object says: I SAY THIS SLAVE IS MY PROPERTY BY TITLE QUIRITARY. Then the praetor interrogates the surrenderor whether he makes a counter-vindication, and upon his disclaimer or silence awards the thing to the vindicant. This proceeding is called a statute-process; it can even take place in a province before the president’ (Translation in [http://webu2.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/gai2\\_Poste.htm#10](http://webu2.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/gai2_Poste.htm#10) [last visited 31<sup>st</sup> December 2009]). H. F. Jolowitz, *Historical Introduction to the Study of Roman Law*, CUP, 1932, p. 150; W. W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian*, CUP, 1932, p. 233 ff; J. A. C. Thomas, *Textbook of Roman Law*, p. 155; Andrew p. 87; A. A. Vieira Cura, “O Fundamento Romanístico da Eficácia Obrigacional e da Eficácia Real da Compra e Venda nos Códigos Cívicos Espanhol e Português”, *Jornadas Romanísticas*, in *Studia Iuridica*, 70, Colloquia 11, Coimbra Editora, 2003, p. 77.

a slave): ‘*I assert that this man is mine by Quiritarian right.*’<sup>94</sup> The magistrate then would ask the transferor whether he would make a similar claim (*a contra vindicet*); the transferor either would remain silent or would said ‘no’; and the magistrate then ‘adjudged’ (*addicit*) the thing to the transferee. This process is usually described as a sort of collusive action. In order to achieve the desired result of transferring ownership in a thing, the parties would pretend that it already belonged to the transferee, who claimed that it was his; his claim was then admitted by the transferor and confirmed by a judgment of the court. *Traditio* was transfer of ownership of *res nec Mancipi*, by hand over of the thing itself. The recognized mode of transfer for *res Mancipi*, of peregrine ownership and of provincial land, tradition would in classical law, give bonitary ownership of *res Mancipi*. In later law, *traditio* was the common form of transfer.<sup>95</sup>

Only with the revival of Roman Law, in the twelfth century, in Italy, by way of the work of Glossators and Commentators, a new conceptualization arose.<sup>96</sup> The Glossa will keep that, ‘*dominus dicitur qui rei vindicationem habet*’. The shift, however, will come later on, due to BARTULUS: ‘*[d]ominium est ius de re corporali perfecte disponendi nisi si quis lege prohibeatur*’,<sup>97</sup> and BALDUS: ‘*[d]ominium absolute dictum est plena proprietas cum alienandi potestate*’.<sup>98</sup> These definitions were adopted, with slight variations, by ALCIATUS (*[d]ominium est ius perfecte disponendi*), DUARENO (*[d]ominium sic definimus: ius de re aliqua corporali plene ac libere disponendi extra quam si quid lege prohibeatur*); CUIACIO (*[v]ulgo dominium definitur hoc modo: ius re*

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<sup>94</sup> *Hunc ego hominem ex iure Quiritum meum esse aio.*

<sup>95</sup> J. A. C. Thomas, *ibidem*, p. 179. See also Vieira Cura, “Compra e Venda e Transferência da Propriedade no Direito Romano Clássico e Justiniano (a Raiz do ‘Sistema do Título e do Modo’)”, (2003) *Boletim da Faculdade de Direito de Coimbra - Volume Comemorativo do 75.º tomo*, pp 102-103 on the requirements of validity of the *traditio*.

<sup>96</sup> For the evolution on the theological level, see Boudewijn Bouckaert, “What is Property?” 1990 13 *Harv. J. L. & Pub. Pol.* 786 ff.

<sup>97</sup> *Operae omnia*, Venezia, 1615, vol. V, 4, ad 1. 178 §1 D. 41, 2 - Comment to L.17 §1, Dig. De acquirenda vel amittenda possessione, XLI), *apud* Vittorio Scialoja, *Teoria della proprietà nel diritto romano*, vol. I, Roma, Attilio Sampaolesi Ed., 1928.

<sup>98</sup> Comment to l. 3§1, *Cod. De secundis nuptiis*, V, 9, *apud*, Vittorio Scialoja, *ibidem*.

*corporali perfecte disponendi aut vindicanti nisi quod lex aut conventio prohibetur*); and NOODT (*[e]st dominium ius pro arbitrata de re disponendi praeter quam si quid vi aut iure prohibeatur*).<sup>99</sup>

GROTIUS, who is regarded as the first modern rights' theorist,<sup>100</sup> delivered a conception of rights, and especially of the right to property, quite novel in his time. In developing this original argument for property, the author sets forth a two-step process for defining the source and nature of property: first, there must be some action by an individual that places him in the proper relationship with an object in the world, and second, there must be some sort of social recognition of this relationship. In other words, the concept of property begins with the use or occupation of a possession, but this is not a sufficient condition for creating property (dominion) in the world.<sup>101</sup> In order for property to make its final appearance, individuals must consent to recognize and respect each other's rights.

The second step in GROTIUS' explanation of the evolution of property is that individuals consent to the recognition of property rights as a means of providing for proper and peaceful social relations:

[a]t the same time, we learn how things passed from being held in common to a state of property. It was not by the act of the mind alone that this change took place. For men in that case could never know, what others intended to appropriate to their own use, so as

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<sup>99</sup> *Apud* Vittorio Scialoja, *ibidem*, p. 265.

<sup>100</sup> I am closely following Adam Mossoff, "What is Property? Putting the Pieces Back Together", (2003) 45 *Ariz. L. Rev.* 379. See also Franz Wieacker, *Privatrechtsgeschichte der Neuzeit unter Besonderer Berücksichtigung der Deutschen Entwicklung*, translated by António M. Hespanha, Fund. Calouste Gulbenkian, Lisboa, pp 328 ff; Antonio Gambaro "La proprietà nel Common Law Anglo-Americano", in Albina Candian, Antonio Gambaro and Barbara Pozzo (eds.), *Property-Propriété-Eigentum*, CEDAM, 1992, pp 102 ff.

<sup>101</sup> 'God gave to mankind in general, dominion over all creatures of the earth, from the first creation of the world (...) every man seized to his own use or consumption whatever he met with; a general exercise of a right, which supplied the place of private property'. Hugo Grotius, *The Rights of War and Peace*, translated by A. C. Campbell, Walter Dunne, London, 1901, Book Two, Chapter II, p. 86. See also Adam Mossoff, "What is Property? Putting the Pieces Back Together", (2003) 45 *Ariz. L. Rev.* 380.

to exclude the claim of every other pretender to the same; and many too might desire to possess the same thing. Property therefore must have been established either by express agreement, as by division, as by tacit content, as by occupancy. For as soon as it was found inconvenient to hold things in common, before any division of lands has been established, it is natural to suppose it must have been generally agreed, that whatever any one had occupied should be accounted his own.<sup>102</sup>

Prior to this agreement, people were already using things, and the use-right that justifies this act does not require any recognition or consent by others to be a valid entitlement.<sup>103</sup> In the pre-social conditions of the state of nature, a person has the right to use things before any social agreements, tacit or express. These actions do not presuppose anyone else accepting them as valid sources of entitlement, at least for the duration of the action or occupation. The only thing left then for people to consent to, is that the use of something should be transformed into an exclusive right that endures over time. This begs the question, however, whether there is a normative justification for individuals to use things, *i.e.*, if there is such a thing as an original use-right. The justification of the use-right is revealed in GROTIUS' formulation of exactly what people are consenting to accept: 'that what each had occupied he should have as his own'.<sup>104</sup>

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<sup>102</sup> Hugo Grotius, *ibidem*, Book Two, II, p. 89.

<sup>103</sup> John Selden also claimed that, 'dominion as a right of using, enjoying, alienating, and free disposing, is either common to all men as possessors without distinction, or private and peculiarly lonely to some; that is to say, distributed and set apart ... in such a manner that others are excluded, or at least in some sort barred from a liberte of use and enjoyment'. See John Selden, *Of the Dominion or Ownership of the Sea*, p. 16, and Adam Mossoff, "What is Property? Putting the Pieces Back Together", (2003) 45 *Ariz. L. Rev.* 396.

<sup>104</sup> Grotius, writing on behalf of the Dutch East India Company, sought to repudiate the property claims by the Portuguese, in the late sixteenth and early seventeenth centuries, over the oceans traversed by their trade ships, as well as the island nations with which they traded: '[t]here is a natural reason also, which renders the sea, considered in the view already taken, incapable of being made property: because occupancy can never subsist, but in things that can be confined to certain permanent bounds'. See *idem*, Book II, III, p. 90, and Adam Mossoff, "What is Property? Putting the Pieces Back Together", (2003) 45 *Ariz. L. Rev.* 384.



PUFENDORF<sup>105</sup> will also recognize the logical and historical primacy of use-rights in human development. In order for property rights to evolve out of use-rights, the author claims that an external act or seizure was needed, and for this to produce an obligation on the part of others to refrain from a thing already seized by someone else, an antecedent pact was required. This pact should be an express pact, when several men divided among themselves things open to all; and it could only be a tacit one when the things occupied at that time had been left unpossessed by the first dividers of things:<sup>106</sup>

Inasmuch as a social life is the very foundation of a natural law, and since it is at the same time sufficiently evident from the temper and genius of mankind, that in a great multitude, where all join their endeavours towards improving life with various inventions, the peace and beauty of society could not be kept up without distinct dominions of things; such dominions were therefore settled; and this very rightly and agreeable to the aim of nature's laws, human affairs plainly requiring it to be done. And after this establishment, the same law [positive law] commands the observance of the every thing that may conduce to the end for which these private dominions were enacted. (...) the precept of nature about abstaining from what is another's then first began to exert its force, when at length Men, by mutual agreement, had marked out and appointed what would belong to others, and what each person could claim as his own.<sup>107</sup>

Following GROTIUS, PUFENDORF believes that property is predicated upon an individual act of possession (*i.e.*, use or occupation):

When mankind first began to separate into many families, distinct dominions were settled by division: after this division, he is said originally to acquire a thing lying void and without a possessor, who happens to be the most early occupant of it; *i.e.* he who

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<sup>105</sup> Franz Wieacker, *Privatrechtsgeschichte der Neuzeit unter Besonderer Berücksichtigung der Deutschen Entwicklung*, translated by António M. Hespanha, Fund. Calouste Gulbenkian, Lisboa, pp 351 ff; Antonio Gambaro "La proprietà nel Common Law Anglo-Americano", in Albina Candian, Antonio Gambaro and Barbara Pozzo, *Property-Propriété-Eigentum*, CEDAM, 1992, pp 109 ff.

<sup>106</sup> Adam Mossoff, "What is Property? Putting the Pieces Back Together", (2003) 45 *Ariz. L. Rev.* at 385.

<sup>107</sup> See Samuel Pufendorf, *Of the Law of Nature and Nations: Eight Books*, Book IV, Chapter IV, XIV, pp 376-377.

lays hold on such a thing before others, or gets the start of them in putting in his claim to it.<sup>108</sup>

Second, it is predicated upon an agreement among individuals to recognize and respect these rights in a society: '[s]uch is the force of property or dominion, that the proprietor alone has power to dispose of his own goods; and all others are bound to abstain from them'.<sup>109</sup>

By the end of the nineteenth century, influenced by Kantian philosophy, WINDSCHEID claimed that legal rights exist between persons and not between a person and a thing.<sup>110</sup> A new definition of real rights would, therefore, emerge from this insight concerning the structure of legal relations. In France, after a solid and long tradition of considering property rights as rights over a thing,<sup>111</sup> CAPITANT would distinguish property rights from personal rights, the latter being rights between a creditor and a debtor.<sup>112</sup>

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<sup>108</sup> *Idem*, Book IV, Chapter VI, II, p. 386.

<sup>109</sup> *Idem*, Book IV, Chapter VIII, I, p. 405. In overcoming the central difficulty with Grotius's and Pufendorf's account - their reliance upon consent as a predicate for property rights - Locke will only emphasize the importance and significance of exclusion in the moral achievement of dominion. In accomplishing this task, Locke reformulated the developmental argument for property, removing the second step of consent that was required by his predecessors. The end result is a theory of property that relies solely upon the acts of acquisition and labour as the fountainhead for the concept of property. Individuals in the state of nature do not possess property rights, but rather share a common right to use things in the world. Locke will derive an exclusive property right from an inclusive claim-right to use the commons, using his 'mixing labour' argument for property. See Jeremy Waldron, *The Right to Private Property*, Clarendon Press, Oxford, 1998, p. 137 ff; Lawrence C. Becker, *Property Rights. Philosophical Foundations*, Routledge, 1977, pp 32 ff.

<sup>110</sup> Bernhard Windscheid, *Diritto delle Pandette*, (translated by Carlo Fadda and Paolo Emilio Bensa), UTET, 1902, vol I, part I, § 38, p. 173.

<sup>111</sup> V.g. by Toullier, Pothier, Duranton, Demolombe, Aubry and Rau. Further in H. Michas, *Le droit réel considéré comme une obligation passivement universelle*, A. Pedone Ed., Paris, 1900, pp 35 ff; 51 ff; 68 ff.

<sup>112</sup> Henri Capitant, *Introduction à l'étude du Droit Civil*, 4<sup>th</sup> ed., A. Pedone ed., Paris, 1925, p. 118, note 2. But the author continues: '*Quelques auteurs, donnant à cette remarque une importance exagérée, ont proposé d'abandonner la définition traditionnelle et de dire: un droit réel est un rapport juridique établi entre une personne comme sujet actif et toutes les autres comme sujets passifs. A notre avis, cette définition est mauvaise et doit être rejetée. D'abord l'obligation purement négative à laquelle elle fait allusion n'est pas un vrai lien juridique, comme l'obligation née du droit de créance: c'est l'expression pure et simple de ce principe que nous ne devons empiéter sur la liberté d'autrui. (...) De plus, il ne nous paraît pas possible de définir le droit réel sans parler de l'objet sur lequel il porte, car c'est, là l'idée*

Nevertheless, he would anticipate that, ‘[l]e droit réel suppose bien, si l’on veut, un rapport entre personnes, en ce sens que tout individu est obligé de respecter le pouvoir que j’exerce sur la chose’. This reasoning was furthered by PLANIOL. In his opinion, to speak of a right as a relationship between a thing and a person was nonsense; rights only exist among persons. Consequently, all rights are, at one and the same time, relationships between people.<sup>113</sup> The traditionally called real rights were no more than personal rights affected with a ‘*obligation passivement universelle*’ [universal passive obligation]. The right of ownership, for example, is conceived as a relationship between the owner (the creditor) and everyone else in the world (the debtors). This personalist view of legal rights parallels and properly situates all legal rights in the realm of social relationships.<sup>114</sup> By arguing that all rights were essentially personal rights, PLANIOL’s conception of legal rights ultimately rests on the detachment of the notion of real rights from things in themselves.

By the same time MICHAS, in his *thèse pour le doctorat*: ‘Le droit réel considéré comme une obligation passivement universelle’, would consider *ex professo* this matter and conclude that:<sup>115</sup>

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*essentielle*’. Shaping real rights as liberties, René Capitant, “Sur la nature juridique des droits réels”, in *Mélanges Juridiques dédiés à M. le Professeur Sugiyama*, Librairie du Recueil, Paris, pp 29-37.

<sup>113</sup> Marcel Planiol, *Traité élémentaire de droit civil*, vol. 1, Librairie générale de droit & de jurisprudence, Paris, 1911, 5<sup>th</sup> ed., para 2159 ff.

<sup>114</sup> See Marcel Planiol, *ibidem*: ‘[u]n rapport d’ordre juridique ne peut pas exister entre une personne et une chose: ce serait un non-sens. Par définition, tout droit est un rapport entre les personnes. C’est la vérité élémentaire sur laquelle est fondée toute la science du droit, et cet axiome est inébranlable’, and Marcel Planiol and Georges Ripert, *Traité pratique de droit civil français, Les biens*, III, LGDJ, 1926, p. 45: ‘droit réel: celui qui impose à toute personne l’obligation de respecter le pouvoir juridique que la loi confère à une personne déterminée de retirer de biens extérieurs tout ou partie des avantages que confère leur possession, ou, si on le préfère, celui qui, donnant à une personne un pouvoir juridique direct et immédiat sur une chose, est par cela même susceptible d’être exercé, non pas seulement contre telle personne déterminée, mais envers et contre tous’.

<sup>115</sup> H. Michas, *Le droit réel considéré comme une obligation passivement universelle*, A. Pedone Ed., Paris, 1900, p. 258.

*un droit réel est un rapport juridique existant entre une ou plusieurs personnes, en nombre limité, et les autres membres de la société, rapport qui consiste dans l'obligation imposée à ces derniers de s'abstenir d'un ou de plusieurs actes économiquement avantageux, à propos d'une chose individuellement déterminée, et cette obligation peut être imposée par le sujet actif, en vertu d'un pouvoir, à lui reconnu par la loi, et qui constitue son 'droit'. Il résulte de là que les droits réels ont au fond une nature obligatoire, tout aussi bien que les droits de créance, et que la différence essentielle entre ces deux catégories de relations juridiques réside dans le caractère universel ou particulier du sujet passif.*

Real rights would differ from personal rights inasmuch as they establish a different kind of interpersonal obligation: they imply a universal and passive obligation, that is, the obligation of everybody to refrain from acts that interfere with the owner's control of his goods.<sup>116</sup>

The conception of real rights as an interpersonal relationship remained dominant in the first half of the twentieth century,<sup>117</sup> when a shift towards eclectic theories did occur.<sup>118</sup>

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<sup>116</sup> Boudewijn Bouckaert, "What is Property?" (1990) 13 *Harv. J. L. & Pub. Pol.* 794.

<sup>117</sup> One attempt to collapse the category of personal rights into the category of real rights is attributed to Saleilles. Saleilles sought to objectify all rights as real rights. A personal right is not a right as against a person, but rather as against a thing - that person's patrimony: a personal right is simply an indeterminate real right. See S. Ginossar, "Pour une meilleure définition du droit réel et du droit personnel", (1962) 61 *Rev. trim. dr. civ.* 573-589 (also S. Ginossar, *Droit réel, propriété et créance: Elaboration d'un système des droits patrimoniaux*, LGDJ, Paris, 1960); and also F. Hage-Chahine, "Essai d'une nouvelle classification des droits privés", (1982) *Rev. trim. dr. civ.* 705: the essence of ownership is the owner's ability to profit from the legal object of his or her rights: ownership describes a relationship of attachment, not the materiality of the attachment. Ownership can be established in respect of objects or claims. What varies as between claims and things is not the scope of their opposability but the identity of the debtor of the specific obligation they impose. The central distinction is thus between owing and owning, not between personal rights and real rights. Real rights of enjoyment are, in this understanding, quite different in substance than ownership itself. They are, like personal rights, simply a species of relative right; what makes an obligation a real right is only that the obligation which it comprises - for example, the obligation of an owner towards a usufructuary - rests on a specified object. Real rights less than ownership, personal rights and mixed rights are all species of claims (or relative rights) that imply a specified debtor and a specified creditor. See Christian Larroumet, *Droit civil*, 2, Les Biens, 3<sup>rd</sup> ed., Economica, Paris, 1997. For criticism and an analysis of a theory of patrimonial rights, see Roderick A. Macdonald, "Reconceiving the Symbols of Property: Universalities, Interests and Other Heresies", (1994) 39 *McGill L.J.* 794 ff.

<sup>118</sup> See Louis Rigaud, "A propos d'une renaissance du 'jus ad rem' et d'un essai de classification nouvelle des droits patrimoniaux", (1963) 15 *Revue Internationale de Droit Comparé* 557-567 (This author had

Thereafter, continental authors mostly adopted an eclectic depiction of property rights: real rights are rights over a thing enforceable against everybody. There are slight differences, though. Some of them consider that the legal core of a property right is the power over a thing, and that the enforceability against all is just a corollary of property rights.<sup>119</sup> Some others consider that the core of property rights is the enforceability against the world and that the exclusive power over a thing is just a factual consequence of that legal faculty (parallel to right to exclusion theorists).

These conceptions still remain consistent all over continental Europe. The account of Civil Law codes is much more succinct. The description of ownership as the power of use and disposal of things is a marked feature of, *v.g.*, the French, Italian, Portuguese, and Spanish Civil codes. The owner is entitled with full and exclusive right of possession and disposal according to the Roman classification of *ius utendi, fruendi*, and *abutendi*.

## 2. The debate in Anglo-American countries

### *Introductory note*

The following analysis will depart from WILLIAM BLACKSTONE'S description of property as a simple and non-social relationship between a person and a thing, in his *Commentaries on the Laws of England*, published in 1765.<sup>120</sup> Later on, in the late nineteenth and early twentieth centuries, a new metaphor of property as a bundle of rights would emerge to facilitate a growing economy based on intangible wealth and to

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already claimed an eclectic approach in “La théorie du droit réel et de l’obligation et la ‘Science Juridique pure’”, in (1925) 45 *Revue Critique de Législation et de Jurisprudence* 423-439.

<sup>119</sup> Bernard Moreno Quesada (ed.), *Curso de Derecho Civil*, III, Tiran Lo Blanch, València, 1999, p. 31; Manuel Albaladejo, *Derecho Civil*, III, 8<sup>th</sup> ed., Bosch ed., Barcelona, 1994, pp 19 ff.

<sup>120</sup> William Blackstone, *Commentaries on the Laws of England*, Clarendon Press, Oxford. See also Bradley Bryan, “Property as Ontology: on Aboriginal and English Understandings of Ownership”, (2000) 13 *Can. J. L. & Jurisprudence* 3; John Lawler and Gail Gates Lawler, *A Short Historical Introduction to the Law of Property*, BeardBooks, 1940.

limit private property rights and allow the very sort of regulation or property.<sup>121</sup> The widespread standard HOHFELD-HONORÉ analysis would replace the Blackstonian concept of property and dominate for a long time. In a later stage, and as a response to the bundle of rights theory, exclusion theorists picked up a single stick - the right to exclude - and attempted to reduce property to this single right, sharing with the bundle theory a fragmented view of property.<sup>122</sup> Finally, in recent years, a diverse array of legal scholars, composed of environmentalists, feminists, and conservatives, have brought academic attention again to the nature of the owned thing in determining and defining property rights.<sup>123</sup>

## 2.1. - Blackstone

According to a long tradition, rooted in Roman law principles, property was firstly defined as a right of a person with respect to a thing. That is, property rights established a power relationship between a person and a thing. The title of ownership would provide the title-holder both with a right to enjoy or to dispose of a thing and with an area of freedom against interferences arising from others or from the state. In BLACKSTONE's words: 'one of the absolute rights inherent in every Englishman, is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land'.

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<sup>121</sup> For other early uses of the metaphor, see, for example, Arthur L. Corbin, "Comment, Taxation of Seats on the Stock Exchange", (1922) 31 *Yale L.J.* 429; Robert L. Hale, "Rate Making and the Revision of the Property Concept", (1922) 22 *Colum. L. Rev.* 209; and Morris R. Cohen, "Property and Sovereignty" (1927) 13 *Cornell L.Q.* 8.

<sup>122</sup> Adam Mossoff, in "What is Property? Putting the Pieces Back Together", (2003) 45 *Ariz. L. Rev.* at 377, notes that although exclusion theorists ultimately fail in fully describing the concept of property and the legal rules intended to protect it, their intended goal to save this concept from the disintegrating effects of the bundle theory is laudable. In providing at least one essential hook on which to hang property rules, the exclusion theory gives legal institutions a theoretical grounding. Its substantive description of property lacks the breadth necessary to sufficiently describe and justify Anglo-American property institutions.

<sup>123</sup> Craig A. Arnold, "The Reconstitution of Property: Property as a Web of Interests", (2002) 26 *Harv. Envtl. L. Rev.* 283.

Further, ‘there is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe’.

This expression became what I would consider a slogan of bad memory, by expressing a physicist and absolute concept of property, and would give rise to sharp criticism.<sup>124</sup> By way of the reconceptualization of property as a bundle of rights, the definition of property would shift from ‘absolute dominion over things’ to ‘a set of legal relations among persons’.<sup>125</sup> This reconceptualization of property as a bundle of rights is due to social and intellectual forces.

On the social front, the transformation of the United States economy beginning in the nineteenth century and continuing into the twentieth century, from agrarian to industrial to information-based – requiring an understanding of property that could encompass complex legal and financial relationships, disaggregate ownership into a variety of interests held by a variety of stakeholders, and accommodate rights in intangibles.<sup>126</sup> Second, the rise of the regulatory state in the twentieth century also had a strong impact on the articulation of a new conception of property.<sup>127</sup>

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<sup>124</sup> Claiming that this passage is misleading and inconsistent with Blackstone’s doctrine on a natural right of property, see Frederick G. Whelan, “Property as Artifice: Hume and Blackstone”, in *Nomos XXII, Property*, J. Roland Pennock & John W. Chapman (eds.), 1980, pp 116-117.

<sup>125</sup> Kenneth J. Vandavelde, “The New Property of the Nineteenth Century: The Development of the Modern Concept of Property”, (1980) 29 *Buff. L. Rev.* pp 328-30; see also Jeremy Waldron, *The Right To Private Property*, Clarendon Press, Oxford, 1988, pp 27-28.

<sup>126</sup> See Thomas C. Grey, “The Disintegration of Property” in *Nomos XXII, Property*, J. Roland Pennock & John W. Chapman (eds.), 1980, at 70; Kenneth J. Vandavelde, *ibidem*, at 333 ff; Carol M. Rose, “The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems”, (1998) 83 *Minn. L. Rev.* 129.

<sup>127</sup> The social dimensions of private property had already been embraced, at least in part, in Blackstone’s writings. See, v.g., Carol M. Rose, “Canons of Property Talk, or, Blackstone’s Anxiety”, (1998) 108 *Yale L.J.* 601; Gregory S. Alexander, “Time and Property in the American Republican Legal Culture”, (1991) 66 *N.Y.U. L. Rev.* 273; and William H. Simon, “Social-Republican Property”, (1991) 38 *UCLA L. Rev.* 1335.

On the intellectual front, legal realists and legal pragmatists, influenced by Progressive thought, attacked the physicalist and absolutist conception of property.<sup>128</sup> The idea that property was a tangible thing entitling the owner with complete dominion and control was already in decline in American jurisprudence by the end of the nineteenth century, even though its influence persisted.<sup>129</sup>

## **2.2. - The bundle of rights metaphor**

The term ‘bundle of rights’ was used to describe property as early as 1888.<sup>130</sup> Yet, the most important contributor to the bundle of rights conception was WESLEY NEWCOMB HOHFELD. In articles published in 1913 and 1917, HOHFELD contended that property is not properly conceived as rights to things, but rather as fundamental legal relations, which he categorized according to four jural opposites (right-no right; privilege-duty; power-disability; immunity-liability) and four jural correlatives (right-duty; privilege-no right; power-liability; immunity-disability).<sup>131</sup> In effect, HOHFELD was positing that all legal relations are correlative relations between and among people: ‘[s]ince the

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<sup>128</sup> See, generally, Kenneth J. Vandavelde, “The New Property of the Nineteenth Century: The Development of the Modern Concept of Property”, (1980) 29 *Buff. L. Rev.* 325. Regarding the influences of Legal Realism, Legal Pragmatism, and Progressivism on the bundle of rights conception of property, see Thomas C. Grey, “The Disintegration of Property” in *Nomos XXII Property*, J. Roland Pennock & John W. Chapman (eds.), 1980, at 81; Felix S. Cohen, “Dialogue on Private Property”, (1954) 79 *Rutgers L. Rev.* pp 361-63; J. L. Schroeder, “Chix Nix Bundle-o-Stix: A Feminist Critique of the Disaggregation of Property” (1994) 93 *Mich.L.Rev.* pp 239-40, note 2; and J. Penner, “The ‘Bundle of Rights’ Picture of Property”, (1996) 43 *UCLA L. Rev.* 713.

<sup>129</sup> Kenneth J. Vandavelde, *ibidem*, p. 333 ff.

<sup>130</sup> Jeanne L. Schroeder in “Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property”, (1994) 93 *Mich. L. Rev.* pp 241-44 refers to John Lewis, *A Treatise on the Law of Eminent Domain in the United States*, Chicago, Callaghan & Co., 1888. p. 43, where Lewis stated: ‘The dullest individual among the people knows and understands that his property in anything is a bundle of rights’ and to a passage from Benjamin N. Cardozo, *The Paradoxes of Legal Science*, 1928, p. 129, as one of the earliest uses of the ‘bundle of sticks’.

<sup>131</sup> See Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning”, (1911) 23 *Yale L.J.* 16; and, *idem*, “Fundamental Legal Conceptions as Applied in Judicial Reasoning”, (1917) 26 *Yale L.J.* 710.



purpose of the law is to regulate the conduct of human beings, all jural relations must, in order to be clear and direct in their meaning, be predicated of such human beings.<sup>132</sup> Further, '[a]ll proceedings, like all rights, are really against persons. Whether they are proceedings or rights in rem depends on the number of persons affected'.<sup>133</sup>

This view gave rise to HOHFELD's famous definition of rights *in personam* and rights *in rem* as 'paucital' and 'multital' rights, respectively. A paucital right, or claim (right *in personam*), is either a unique right residing in a person (or group of persons) and availing against a single person (or single group of persons); or else it is one of a few fundamentally similar, yet separate, rights availing respectively against a few definite persons. A multital right, or claim (right *in rem*), is always one of a large class of fundamentally similar yet separate rights, actual and potential, residing in a single person (or single group of persons) but availing respectively against persons constituting a very large and indefinite class of people.<sup>134</sup>

Rights *in rem* are therefore not rights to things, or rights the subject of which is some thing, or rights mediated by a thing, however broadly one would wish to construe 'thing'. A right *in rem* is defined according to its membership in a huge class of rights whose content is 'fundamentally similar'.<sup>135</sup> Property relations, on this view, are merely a multiplicity of similar bilateral legal relations 'stacked' one on top of another: paucital relations were thus transformed into multital relations. HOHFELD used property relations among his examples.<sup>136</sup>

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<sup>132</sup> Wesley N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning", at 75.

<sup>133</sup> *Ibidem*, at 50.

<sup>134</sup> *Ibidem*, at 72.

<sup>135</sup> Wesley N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning", (1917) 26 *Yale L.J.* at 743 (noting that, 'the supposed single right *in rem* ... really involves as many separate and distinct "right-duty" relations as there are persons subject to a duty').

<sup>136</sup> Though the metaphoric shift from thing-ownership to bundle of relations modern version is usually attributed to Hohfeld, he never mentions the expression 'bundle of rights'. Nevertheless, he developed the now standard idea that property comprises a complex aggregate of social and legal relationships made

Just over forty years later, HONORÉ produced *Ownership*, and provided the elaboration which gave the bundle of rights thesis the substance it required, by giving an account of the standard incidents of ownership: *i.e.*, those legal rights, duties and other incidents which apply, in the ordinary case, to the person who has the greatest interest in a thing admitted by a legal system.<sup>137</sup> The bundle of rights thesis is a combination of HOHFELD's analysis of rights and HONORÉ's description of the incidents of ownership. According to HOHFELD,<sup>138</sup> any right *in rem* should be regarded as a myriad of personal rights between individuals. Any standard right in property is properly treated as a bundle of rights the owner holds against many others.

The central premise of the bundle of rights conception of property is that property is a set of legal relationships among people, and therefore most emphatically is not ownership of things neither relationships between owners and things. Some scholars insist that the definition of property has nothing to do with things and everything to do with social relationships.<sup>139</sup> Other scholars, unable to move entirely away from the idea

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up of rights, privileges, duties, and immunities. Michael A. Heller, "Three Faces of Private Property", (2000) 79 *Or. L. Rev.* 430.

<sup>137</sup> A. M. Honoré, "Ownership", in *Oxford Essays in Jurisprudence*, A. G. Guest Ed., 1961, at pp 107 and 128. According to J. Penner, "The 'Bundle of Rights' Picture of Property", (1996) 43 *UCLA L. Rev.* pp 733-734, 'there could hardly be a clearer statement that Honoré thinks that analyzing "ownership" consists of describing what it means to have an interest in a thing. "To own" says Honoré, is transitive; the object of ownership is always spoken of as a "thing" in a legal sense, a res. There is, clearly, a close connexion [sic] between the idea of ownership and the idea of things owned, as is shown by the use of words such as "property" to designate both. A perusal of ownership would convince anyone that Honoré's complex concept of ownership never abandons its reliance on the notion of a "thing." J. Penner, claims that such a radical version of the bundle of rights view does not escape the "right to a thing" approach. The bundle of rights view does not get us beyond the obligation to understand property in terms of a right to a thing. According to David Lametti, "The Concept of Property: Relations through Objects of Social Wealth", (2003) 53 *U. Toronto L. J.* 341, the nature of ownership varies according to the object owned. The conclusion thus far is that objects are, to some extent, important to understanding private property relations. As a consequence, Honoré's analysis is used to supplement the deficiencies in Hohfeld's structure by giving content to the bilateral relations Hohfeld had described. What remains unclear is the extent to which objects are important conceptually to the property bundle.

<sup>138</sup> Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*, Walter W. Cook Ed., 1923, p. 67.

<sup>139</sup> For an analysis of the social relations theory of property, see Stephen R. Munzer, "Property as Social Relations", in *New Essays in the Legal and Political Theory of Property*, CUP, 2001, pp 36-75. See also Felix S. Cohen, "Dialogue on Private Property", (1954) 9 *Rutgers L. Rev.* 357; Kenneth J. Vandeveld, 57

that there must be some object of the rights in the bundle, state that property is about legal relationships among people with respect to things.<sup>140</sup>

Furthermore, the substance of the property right itself is subject to fractionation. HOHFELD splinters a property right into a bundle of rights of various kinds, including liberties, claim-rights, powers, and immunities. Thus HONORÉ elaborates not only the kind of rights we have when we own, but also further incidents, or features of ownership, including duties and liabilities, which provide a more accurate picture. Properly understood then, 'property is a bundle of rights' expresses the thesis that property constitutes a legal complex of various normative relations, not simply rights. His list of incidents is as follows: ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary.<sup>141</sup> In every case, HONORÉ explains these incidents with respect to an owner's relation to a thing. For example: '[t]he right to possess, viz. to have exclusive physical control of a thing, or to have such control as the nature of the thing admits, is the foundation on which the whole superstructure of ownership rests'. Also: '[t]he right to the capital consists in the power to alienate the thing and the liberty to consume, waste or destroy the whole or part of it.'<sup>142</sup>

These incidents overlap, allowing for the possibility of a wide variety of 'ownership' interests with different constellations of rights and obligations, and degrees of control and liability. For HONORÉ, possession is the essential incident, entailing not only that the owner should have control of the thing but also that others do not interfere with the

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"The New Property of the Nineteenth Century: The Development of the Modern Concept of Property", (1980) 29 *Buff. L. Rev.* 357-66.

<sup>140</sup> Cf. F. H. Lawson & Bernard Rudden, *The Law of Property*, 3<sup>rd</sup> ed., OUP, 2002, p. 5.

<sup>141</sup> See A. M. Honoré, "Ownership", in *Oxford Essays in Jurisprudence*, A.G. Guest Ed., 1961, p. 113.

<sup>142</sup> *Ibidem*, pp 113 and 118.

thing. The right to use is also a ‘*cardinal feature*’. These pivotal roles for possession and use indicate that there might be a hierarchy in this listing. However, placing some form of possession aside as a common feature in all the incidents, it seems, according to LAMETTI, that HONORÉ’s enumeration entails the possibility that there is a more flexible, not necessarily linear or spectral articulation of the possible groupings of powers and responsibilities.<sup>143</sup>

HONORÉ regarded his list of incidents as criteria for the correct application of the term ‘owner’ in law. The claim is that the ‘bundle’ is a bundle of criteria for the application of the term property, criteria which are not to be regarded as necessary and sufficient conditions for applying the term. Accordingly, no subset of the elements of the bundle is found in every instance of property, and indeed HONORÉ goes to some length to show that the absence of any particular one does not rule out the possibility that the holder of the others may yet be properly called the owner.<sup>144</sup>

Soon the bundle of rights metaphor would become the dominant metaphor in modern legal discourse in Anglo-American countries.<sup>145</sup> It still maintains that position, but it is

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<sup>143</sup> David Lametti, “The Concept of Property: Relations through Objects of Social Wealth”, (2003) 53 *U. Toronto L. J.* 340.

<sup>144</sup> The traditional Hohfeld-Honoré compact generates not one thesis, but two theses. The first is a thesis about the aggregate nature of the right to property, which despite appearances issues an intellectual promissory note that one day a substantial concept of the appropriate objects of property, *i.e.*, of ‘things’, will be provided. The second makes an entirely different claim, which is that the concept of “property” is a complex term whose analysis requires something different than a quest for a definition in terms of necessary and sufficient conditions. J. Penner, “The ‘Bundle of Rights’ Picture of Property”, (1996) 43 *UCLA L. Rev.* 738.

<sup>145</sup> While perhaps more clearly dominant in the United States, it is certainly prevalent in the United Kingdom as well. See F. H. Lawson & Bernard Rudden, *The Law of Property*, 3<sup>rd</sup> ed., OUP, 2002, p. 5. In the United Kingdom, unlike in North America, land law textbooks, rather than general property textbooks, are the norm. These typically have introductions defining the nature and scope of the legal concept of land, and do not raise the general concept of property. More recent usages by Jeremy Waldron, *The Right to Private Property*, Clarendon Press, Oxford, 1998, at 5. See David Lametti, “The Concept of Property: Relations through Objects of Social Wealth”, (2003) 53 *U. Toronto L. J.* 338; J. Penner, *ibidem*, at 711; Jeanne L. Schroeder, “Chix Nix Bundle-o-Stix: A Feminist Critique of the Disaggregation of Property”, (1994) 93 *Mich. L. Rev.* 239; Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, (1980) 29 *Buff. L. Rev.* pp 357-67. Thomas C. Grey “The Disintegration of Property” in *Nomos XXII, Property*, J. Roland Pennock & John W. Chapman (eds.), 1980, at 69; Craig A. Arnold, “The Reconstitution of Property: Property as a Web of Interests”, (2002) 26 *Harv. Envtl. L. Rev.* 290.

under attack. LAWRENCE BECKER goes so far as to state that the bundle metaphor is a ‘dominant paradigm’ in the Kuhnian sense, such that modern scholarship could well profit by taking the description as a given and moving onto more pressing issues or justification.<sup>146</sup>

In a radical version of the bundle of rights metaphor, property rights turned into a flexible or malleable concept, with no definable essence. This would lead to its usefulness and at some point, to its abandon. FELIX COHEN, in his attack on a conceptual approach to law, included property rights within a class of legal concepts that the author defined as ‘supernatural entities’ and ‘transcendental nonsense’.<sup>147</sup> In 1954, in his Dialogue on Private Property, a Socratic dialogue taken from his lecture notes and class readings at Yale Law School,<sup>148</sup> COHEN argued that property is ‘relations between people’ (and more precisely ‘exclusions which individuals can impose or withdraw with state backing against the rest of society’); things, he would conclude, are irrelevant to a pragmatic or realistic definition of property.<sup>149</sup>

In his seminal essay *The Disintegration of Property*, GREY described the potential and limits of the bundle of rights concept.<sup>150</sup> Building on the Hohfeldian replacement of the

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<sup>146</sup> See Lawrence C. Becker, “Too Much Property” (1992) 21 *Phil. & Pub. Affairs* pp 198-99. According to Becker, we are now, to use a Kuhnian metaphor (the use of paradigm metaphors to explain the idea of dominance and normalcy in the process of evolutionary and revolutionary change comes from T. S. Kuhn, *The Structure of Scientific Revolutions*, University of Chicago Press, 1962), in a state of ‘normal science’. The bundle of rights analysis of property can serve as a ‘dominant paradigm’ under the aegis of which working lawyers and academic theorists may attend to particular problems in the law of property. For a recent defence of Hohfeldian analysis, see P. Eleftheriadis, “The Analysis of Property Rights” (1996) 16 *O.J.L.S.* 31.

<sup>147</sup> According to Felix S. Cohen, “Transcendental Nonsense and the Functional Approach”, (1935) 35 *Colum. L. Rev.* 821, legal concepts (for example, corporations and property rights) are supernatural entities which do not have a verifiable existence except to the eyes of faith. See also Jeremy Waldron, “‘Transcendental Nonsense’ and System in the Law”, (2000) 100 *Colum. L. Rev.* 16.

<sup>148</sup> See Felix S. Cohen, “Dialogue on Private Property”, (1954) 9 *Rutgers L. Rev.* 357-87.

<sup>149</sup> Craig A. Arnold, “The Reconstitution of Property: Property as a Web of Interests”, (2002) 26 *Harv. Envtl. L. Rev.* 378.

<sup>150</sup> See Thomas C. Grey, “The Disintegration of Property” in *Nomos XXII, Property*, J. Roland Pennock & John W. Chapman (eds.), 1980, p. 69.

‘property-as-thing-ownership’ concept with the ‘property-as-a-bundle-of-rights’ concept, GREY essentially declared that property as a distinct and coherent concept was dead. In fact, he captured an understanding of property widely shared by scholars, lawyers, and judges: property is a malleable, divisible, disaggregable, functional set of rights among people. New property interests can be created in intangibles, as well as tangibles, and in abstract concepts, as well as concrete realities.<sup>151</sup> According to GREY, the distinction between property rights and other kinds of rights (e.g., human rights, liberty interests, contract rights) breaks down, and any attempt at categorization is a matter of convenience or public policy, not conceptual coherence.<sup>152</sup> As a bundle of rights between and among persons, property issues are pushed into the realm of mutual agreements or involuntary harms, and can no longer be considered as a distinct sphere of private law.<sup>153</sup> Rather, as JAMES PENNER would point out, property is subsumed into other areas of private law and, therefore, is controlled entirely by principles extrinsic to it. As such, the bundle metaphor is really not an explanatory model at all but betrays the absence of one.<sup>154</sup>

A critical analysis of the bundle of rights theory might, however, go further. First, the bundle of rights theory fails to provide a concept: the core idea of the property relationship is never really defined. The concept of property lacks any economically efficient boundaries or bundling principles and therefore allows for sub-optimal over-propertyization: too much property<sup>155</sup> and offers very little real guidance to courts in

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<sup>151</sup> *Ibidem*, pp 74-81.

<sup>152</sup> *Ibidem*, at 73. Antonio Gambaro, “Il diritto di proprietà nel XXI secolo: un concetto fondamentale, o un concetto troppo frammentato”, in *Um Código Civil para a Europa?*, Faculdade de Direito da Universidade de Coimbra, Coimbra Editora, 2002. In this Article the author claims a new concept of property for a ‘diritto comune europeo’.

<sup>153</sup> Thomas C. Grey, “The Disintegration of Property” in *Nomos XXII, Property*, J. Roland Pennock & John W. Chapman (eds.), 1980, at 69.

<sup>154</sup> J. Penner, *The Idea of Property in Law*, OUP, 1997, p. 1.

<sup>155</sup> See Michael A. Heller, “The Boundaries of Private Property”, (1999) 108 *Yale L.J.* 1163; Thomas W. Merrill & Henry E. Smith, “Optimal Standardization in the Law of Property: The Numerus Clausus

defining property rights.<sup>156</sup> The concept of property as shaped by bundle of rights theory fails to provide any coherent theory for distinguishing property rights from any other rights, and is unhelpful in the determination of types of property.<sup>157</sup>

Secondly, the bundle of rights theory ignores ‘thingness’. A different type of incoherence flows from the false dichotomy between legal relationships and things. The bundle of rights conception is one-dimensional, defining property only along the plane of relationships between people. It lacks multidimensionality: an understanding of the intersection of the person-person plane with the person-thing plane. The bundle of rights, by focusing solely on rights and relationships between people, ignores the characteristics of the object of the rights - the thingness of property.<sup>158</sup> Legal relationships among those people holding property interests, the intersubjective

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Principle”, (2000) 110 *Yale L.J.* 1; Carol M. Rose, “The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems”, (1998) 83 *Minn. L. Rev.* 129.

<sup>156</sup> See J. W. Harris, *Property and Justice*, 1996, pp 119-61; Jeremy Waldron, *The Right to Private Property*, Clarendon Press, Oxford, 1998, p. 33; Thomas C. Grey, “The Disintegration of Property” in *Nomos XXII, Property*, J. Roland Pennock & John W. Chapman eds., 1980, J. Penner, “The ‘Bundle of Rights’ Picture of Property”, (1996) 43 *UCLA L. Rev.* 711; Kenneth J. Vandavelde, “The New Property of the Nineteenth Century: The Development of the Modern Concept of Property”, (1980) 29 *Buff. L. Rev.* pp 362-67 wrote that “[s]uch an explosion of the concept of property threatened to render the term absolutely meaningless in two ways. First, if property included all legal relations, then it could no longer serve to distinguish one set of legal relations from another. It would lose its meaning as a category of law. Second, the greater the variety of interests that were protected as property, the more difficult it would be to assert that all property should be protected to the same degree”; Courtney C. Tedrowe, “Conceptual Severance and Takings in the Federal Circuit”, 85 *Cornell L. Rev.* 586. Also Craig A. Arnold, “The Reconstitution of Property: Property as a Web of Interests”, (2002) 26 *Harv. Envtl. L. Rev.* 291, considers that, the bundle of rights ‘not only “kills” property, but also offers very little real guidance to courts in defining property rights’. For a declaration of the death of property, see E. F. Roberts, “The Demise of Property Law”, (1971) 57 *Cornell L. Rev.* 1. On the contrary, James E. Krier, “The (Unlikely) Death of Property”, (1990) 13 *Harv. J.L. & Pub. Pol’y* 75, claims the continued vitality and function of property as a concept.

<sup>157</sup> See Adam Mossoff, “What is Property? Putting the Pieces Back Together”, (2003) 45 *Ariz. L. Rev.* 290, and Craig A. Arnold, “The Reconstitution of Property: Property as a Web of Interests”, (2002) 26 *Harv. Envtl. L. Rev.* 339.

<sup>158</sup> See J. Penner, *The Idea of Property in Law*, OUP, 1997; Stephen R. Munzer, *A Theory of Property*, CUP, 1990, 33-34; Jeremy Waldron, *The Right to Private Property*, Clarendon Press, Oxford, 1998, pp 27-35; Thomas W. Merrill & Henry E. Smith, “What Happened to Property in Law and Economics?”, (2001) 111 *Yale L.J.* 357-59; Craig A. Arnold, “The Reconstitution of Property: Property as a Web of Interests”, (2002) 26 *Harv. Envtl. L. Rev.* 293.

component of property, are inherently related to the objects of those interests, the objective component of property.<sup>159</sup> The bundle of rights theory, by rejecting the importance of things and person-thing relationships, promote an alienated concept of property.<sup>160</sup> The person's self-conception as having particular relationships with particular objects, and all that those relationships mean for his or her self-identity grow increasingly foreign and distant with each experience he or she has with modern property law.<sup>161</sup>

Third, these theories focus on rights, while de-emphasizing duties.<sup>162</sup> The bundle of rights masks an essentially individualistic, commodifying, acquisitive concept of property every bit as reified and anti-social as the Blackstonian concept.<sup>163</sup>

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<sup>159</sup> Craig A. Arnold, "The Reconstitution of Property: Property as a Web of Interests", (2002) 26 *Harv. Envtl. L. Rev.* 292.

<sup>160</sup> By alienation, I mean estrangement, disconnection, diminished relationship, or isolation, which is called 'estrangement-alienation', following Craig A. Arnold, *ibidem*, p. 297.

<sup>161</sup> According to Craig A. Arnold, *ibidem*, p. 299, alienation from things becomes alienation from self. The bundle of rights concept also alienates interest-holders from other people in two ways. First, it diminishes the human relationships and forms of community that are constituted or partially constituted by relationships between property owners and the objects of their interests. People use objects to facilitate relationships with others, and alienation from those objects tends to diminish the human relationships surrounding the dynamic between owner and object. The second way that the bundle of rights concept alienates interest-holders from other people is that in disaggregating the interests people can hold in property (*i.e.*, the various sticks in the bundle), the contemporary definition disaggregates the rights' holders themselves. In other words, holders of property rights are atomistic participants in markets and legal institutions whose relationships with one another are characterized by the rights, claims, duties, and responsibilities they hold against one another, instead of by their shared interests in the object of their rights. The bundle of rights concept tends to alienate people from their work. It conceives of the work relationship as a merely human-human relationship, dominated by legal rules, private market dynamics, power distribution, and social policy. Missing from the role of property law in work or employment relationships is the role of the worker's relationship to the product of his work. Alienation from the objects of property, especially when those objects involve land or natural resources (the 'things' of the natural world), results in alienation from nature.

<sup>162</sup> According to Craig A. Arnold, "The Reconstitution of Property: Property as a Web of Interests", 26 (2002) *Harv. Envtl. L. Rev.* 304 ff, with its strong rights orientation, the bundle of rights metaphor cannot sustain an adequate vision of property as shared responsibility. First, common goals and a sense of a common stake in property should be emphasized just as much as conflicts and tensions among interests. Second, the disaggregable nature of the bundle of rights also tends to diminish personal and social responsibility with respect to property. Third, a rights-oriented approach - at least to the extent that it emphasizes duties at all - emphasizes legal duties to other people. Nonetheless, its concept of duty is incomplete, as long as it focuses just on duties to others, and ignores equally important duties to self,



Aware of this criticism, the ‘right to exclude theory’ - a moderate deviation from the bundle of rights metaphor - emphasizes the stick concerning the right to exclude as a condition *sine qua non* of property rights. I will, therefore, devote the next section to the analysis of the right to exclude theories.

### 2.3. - The right to exclude theories

Right to exclude theories claim that property means the right to exclude others from valued resources. The right to exclude others is fundamental to the concept of property - it is the *sine qua non*. The right to exclude others is a necessary and sufficient condition of identifying the existence of property. Whatever other sticks may exist in a property owner’s bundle of rights in any given context, these other rights are purely contingent in terms of whether we speak of the bundle as property.<sup>164</sup> Such an idea (that some considered to be already found in BLACKSTONE<sup>165</sup> and BENTHAM,<sup>166</sup> and reasserted by FELIX COHEN)<sup>167</sup> has recently been discovered again by a new generation of

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nature, ethical values, and God. Responsibility has not just a social dimension but also a moral dimension. See also John E. Cribbet, “Property Lost: Property Regained”, (1991) 23 *Pac. L.J.* 101.

<sup>163</sup> Jeanne L. Schroeder, “Chix Nix Bundle-o-Stix: A Feminist Critique of the Disaggregation of Property”, (1994) 93 *Mich. L. Rev.* at 241; Leif Wenar, “The Concept of Property and the Takings Clause”, (1997) 97 *Colum. L. Rev.* 1923.

<sup>164</sup> Thomas W. Merrill “Property and the Right to Exclude” (1998) 77 *Neb. L. Rev.* 731.

<sup>165</sup> This version would have been first endorsed by Blackstone, when he described property as ‘that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe’.

<sup>166</sup> See Jeremy Bentham, “Idea of a Complete Law”, in *Of Laws in General*, Hart, 1970, pp 156 and 177.

<sup>167</sup> Cohen vividly summarizes his discussion in a manner suitable for memorialization on the blackboard: [T]hat is property to which the following label can be attached:

*To the world: Keep off X unless you have my permission, which I may grant or withhold.*  
*Signed: Private citizen*  
*Endorsed: The state.*

See Cohen, “Dialogue on Private Property”, (1954) 9 *Rutgers L. Rev.* 374. See also Felix Cohen, “Transcendental Nonsense and the Functional Approach”, (1935) 35 *Colum. L. Rev.* 809.

philosopher-lawyers in the English tradition, such as J. W. HARRIS<sup>168</sup> and J. PENNER.<sup>169</sup>

A first position that I would call, following THOMAS MERRILL,<sup>170</sup> single essentialism posits that the right to exclude others is the irreducible core attribute of property. Under

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<sup>168</sup> J. W. Harris, *Property and Justice*, Clarendon Press, 1996. Harris's avowedly descriptive theory posits two fundamental organizing ideas for the characteristics that any property institution will exhibit: the 'ownership spectrum' and 'trespassory rules'. The first conceptual pillar, the ownership spectrum, is the range of possible groupings or bundles of use privileges and controlling powers over social wealth. These bundles of rights, powers, and privileges span from 'mere property', where the use privileges and powers over social wealth are quite limited, to 'full-blooded ownership', where the largest possible agglomeration of rights and powers resides in a single person. Each point on the spectrum is a bundle representing a kind of private property right. According to Harris, nothing unites the various points on the spectrum except their open-ended character, their authorized self-seekingness, and the fact that they represent relations between persons and resources. In consequence, there is potentially a multiplicity of ownership interests along the ownership spectrum. The second pillar, trespassory rules, is composed of the rules that protect the powers in the bundles along the spectrum against invasion from others. As with Honoré's substantive list of incidents and using a contextual approach, we are left with a highly flexible set of possibilities for property entitlements. Nevertheless, Harris's spectrum is predicated on a hierarchy of rights that individuals have over resources.

<sup>169</sup> J. Penner, *The Idea of Property in Law*, OUP, 1997.

<sup>170</sup> Thomas W. Merrill, "Property and the Right to Exclude" (1998) 77 *Neb. L. Rev.* 730 identifies three different intellectual traditions regarding the role of the right to exclude: the 'single-variable essentialism', 'multiple-variable essentialism', and 'nominalism'. Essentialism is the search for the critical element or elements that make up the irreducible core of property in all its manifestations. These three schools of thought - single-variable essentialism, multiple-variable essentialism, and nominalism - do not exhaust the possibilities with respect to understanding of the nature of property. One of the most sophisticated modern expositions of property by a philosopher is that of Jeremy Waldron, *The Right to Private Property*, Clarendon, 1988. Borrowing a distinction developed by Ronald Dworkin, Waldron argues that private property is best understood as a general 'concept', of which the various incidents or elements catalogued by Honoré and others embody different 'conceptions'. He defines the general concept of private property as the understanding that, in the case of each object, the individual person whose name is attached to that object is to determine how the object shall be used and by whom. His decision is to be upheld by the society as final. This general concept, Waldron argues, takes on different conceptions in different contexts, depending on the type of resource involved, the traditions of the legal system, whether ownership is unified or divided, and so forth. For example, agricultural land may be subject to different types of restrictions on use than is personal property.

In Merrill's opinion, Waldron's account can be seen as a combination of single-variable essentialism and nominalism. His definition of the core concept of private property - giving a named individual 'final' authority to determine how resources 'shall be used and by whom' - bears a strong family resemblance to Blackstone's sole and despotic right to exclude. Waldron would not define property solely in terms of this feature, however, but depicts property as morphing into a variety of conceptions in a manner consistent with the bundle of rights metaphor associated with nominalism. For example, he argues that the right of inheritance is entirely contingent and that one could have a system of private property with or without inheritance, without affecting the conclusion that the system was still one of private property. Waldron hints at one point that the right to transfer has a 'tightness of connection' to the core concept that distinguishes it from other incidents like inheritance. This concession points arguably toward a partial embrace of multiple variable essentialism. So Merrill suggests that Waldron's account can be seen as a blending or merging of all three.

this conception, the right to exclude (‘sole and despotic dominion’) is both a necessary and sufficient condition of property. A second version of essentialism posits that the essence of property lies not just in the right to exclude others, but in a larger set of attributes or incidents, of which the right to exclude is just one [sufficient but not necessary condition]. Under the third version, the multiple-variable version of essentialism, the right to exclude is a necessary but not a sufficient condition of property. Without the right to exclude, there is no property. But more than the right to exclude is needed in order to create a package of rights sufficiently impressive to be called property. According to MERRIL, this multiple-variable essentialism has also been defended in the work of later generations of commentators; the most elaborate of it is HONORÉ.<sup>171</sup>

A special mention to PENNER’s definition of property is due: the right to property is the right to determine the use or disposition of an alienable thing in so far as that can be achieved or aided by others excluding themselves from it, and includes the right to abandon it, to share it, to license it to others (either exclusively or not), and to give it to others in its entirety.<sup>172</sup> The definition is considered a variant of the view that the right to property is a right to exclude, but there are a couple of specific features worth pointing out. First, the right to property is a right of exclusion which is grounded by the interest the holder has in the use of things. In contrast, the definition of the right to property offered by PENNER is based entirely on the idea that property protects the exclusive use of an owner; nevertheless, this notion of ‘exclusive use’ incorporates some elements which are normally regarded as falling under the power to alienate.<sup>173</sup>

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<sup>171</sup> See Tony Honoré, “Ownership”, in *Making Law Bind*, 1987, pp 161-192. Multiple-variable essentialism also finds some support in the Supreme Court’s decisions. Thomas W. Merrill “Property and the Right to Exclude” (1998) *77 Neb. L. Rev.* 730 ff, relates that on several occasions, the Court has stated that property rights in a physical thing have been described as the rights to possess, use and dispose of it.

<sup>172</sup> J. Penner, “The ‘Bundle of Rights’ Picture of Property”, (1996) *43 UCLA L. Rev.* 742.

<sup>173</sup> According to Penner, *ibidem*, p. 744, on this formulation, use justifies the right, while exclusion frames the practical essence of the right. Exclusion embraces a plurality. Non-interference might also be

Second, the right to property itself is the right that correlates to a general duty that all others have to exclude themselves from the property of others. It is a right of exclusion, certainly, but it is not the right physically or by order or otherwise (say by putting up fences) to actually exclude others from one's property. The right to property is like a gate, not a wall. The right to property permits one not only to make solitary use of property via the exclusion of others, but also permits one to make a social use of property, that is with other people, via the selective exclusion of others.<sup>174</sup>

PENNER<sup>175</sup> explains his concept of 'property' in terms of a duty of non-interference which characterizes the kind of right a property right is, and a notion of 'thinghood' which characterizes the objects of property which serve to mediate between an owner and his legal relation to all others who have that duty. Following the normative structure erected by JOSEPH RAZ, the norm protects the interest of use through exclusion. This characterization PENNER calls the 'exclusion thesis': private property is predicated on the interest in the exclusive use of the objects of property. Property norms protect this interest by framing norms in terms of exclusion.<sup>176</sup>

An ownership right is, thus, a right of exclusive engagement or use, allowing the owner or co-owners to determine the disposition of a thing because all others are under a duty not to interfere with it. No particular realization of the value of the thing is indicated. Owners can do with their property what they are independently capable of doing, for their right correlates only with the duty of non-interference on all others; no others are under a duty to assist the owner to realize any particular value of the things they own. Property rights, by contrast, are narrower. A property right is a right of an individual to

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used, although this term is less common. The basic idea is that non-owners of the property in question may not trespass, take, handle, damage, or destroy the property, and what this non-interference actually amounts to will depend, of course, on the kind of property in question.

<sup>174</sup> J. Penner, "The 'Bundle of Rights' Picture of Property", (1996) 43 *UCLA L. Rev.* 744.

<sup>175</sup> *Ibidem*, p. 817.

<sup>176</sup> David Lametti, "The Concept of Property: Relations through Objects of Social Wealth", (2003) 53 *U. Toronto L. J.* 344.

realize a particular value of the thing by engaging with it in a particular way. In the law a proprietary right is a right in property which ‘runs’ with the property, so as to bind subsequent holders of the property.<sup>177</sup>

Back to MERRILL, the author advances three different types of argument in order to support the supremacy of the right to exclude: first, the logical primacy of the right to exclude; second, an historical argument; and, third, an argument from existing legal usage and practice.

The first argument in support of an essentialist definition of property centred on the right to exclude is basically a logical one. It goes like this: if one starts with the right to exclude, it is possible to derive most of the other attributes commonly associated with property through the addition of relatively minor clarifications about the domain of the exclusion right. On the other hand, if one starts with any other attribute of property, one cannot derive the right to exclude by extending the domain of that other attribute; rather, one must add the right to exclude as an additional premise.<sup>178</sup>

The second argument in support of the primacy of the right to exclude is historical in nature. There is strong evidence that, with respect to interests in land, the right to exclude is the first right to emerge in primitive property rights systems. Only as property systems evolve in complexity and sophistication do other rights, such as the rights of transfer, inheritance, pledging as collateral, subdivision, and so forth, develop. The fact that the right to exclude can be found in even the most primitive land-rights systems provides further support for the conclusion that the gatekeeper right provides the key to understanding the nature of property.<sup>179</sup>

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<sup>177</sup> J. Penner, “Ownership, Co-ownership, and the Justification of Property Rights”, in Timothy Endicott, Joshua Getzler and Edwin Peel (eds.), *Properties of Law, Essays in honour of Jim Harris*, OUP, 2006, pp 167-168.

<sup>178</sup> Thomas W. Merrill “Property and the Right to Exclude” (1998) 77 *Neb. L. Rev* 740.

<sup>179</sup> *Ibidem*, 745.

The third argument looks to existing legal practices in a mature legal system to discern whether the right to exclude is invariably associated with those interests identified as property rights.<sup>180</sup>

In a slightly different manner, the right to exclude theory is not exempted from criticism. The analytical and normative fulcrum for property is not exclusion, but rather the use of things in the world. The right to exclude is the right to exclude from the right of use, or more specifically, from the rights of acquisition, use and disposal. As I will try to demonstrate *infra*, the right to exclude is the formal means by which a legal system identifies and protects the substantive core of rights that constitute property. The right to exclude is an essential element of property, but is only secondary or derivative within the concept of property. It lacks substantive meaning by itself and only serves to emphasize the social dimension of a right to property.<sup>181</sup> The right to exclude is essential to the concept of property, but it is not the only characteristic, nor is it the most fundamental. Other elements of property - acquisition, use, and disposal - are necessary for a sufficient description of this concept.

### 3. Taking position: An integrated theory and the web of interests metaphor

The role of things - objects of social wealth, whether they be tangible or intangible - is crucial to private property at a conceptual level. This being so, the time has come for reconstitute property, to articulate a conception of property that integrates both its humanness and its thingness. To understand rights *in rem* we must discard both the dogma that rights are always relations between two persons, and the idea that a right *in rem* is a simple relation between one person and an indefinite set of many others.<sup>182</sup>

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<sup>180</sup> *Ibidem*, 747.

<sup>181</sup> Adam Mossoff, "What is Property? Putting the Pieces Back Together", (2003) 45 *Ariz. L. Rev.* 393.

<sup>182</sup> According to J. Penner, "The 'Bundle of Rights' Picture of Property", (1996) 43 *UCLA L. Rev.* 802, there is a significant distinction between the uses we feel justified in making of 'things' which lack personality, whether objects, space, ideas, and even particular concretely specified relations between

Property is a right to things, a normative relation between an individual, or co-owners, and others which has as its focus and justification the exclusive determination of the uses to which a thing may be put.<sup>183</sup> An integrated theory maintains that the elements of exclusive acquisition, use, and disposal represent a conceptual unity and gathered they serve to give full meaning to the concept of property.

An adequate account of the concept of property includes the fundamental rights of acquiring, using, and disposing of one's possessions, called generally 'use-rights' or 'possessory rights'.<sup>184</sup> Exclusion represents only the final step in the complete account of property in an operating legal system. Accordingly, a fully descriptive and normative account of property rules must do more than merely establish the fundamental status of exclusion in the concept of property. It must be able to account for all elements of property, including the central possessory rights of acquisition, use, and disposal.

The fountainhead of property is found in possession, *i.e.*, the use of something, and it is this fact that serves as the primary element in the concept property.<sup>185</sup> Of course, the right to exclude is a particularly significant element of property once the property-holder lives among other people within an explicit social and political organization. It is

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people, such as debts, and 'things' which do have or significantly involve personality, such as people, their actions, and their ongoing, dynamic relations with other people. Property, on this view, isolates a particular area of human practice, dealing with things, as opposed to the practice of dealing with other people that may be called 'personality-rich' relationships.

<sup>183</sup> *Ibidem*, at 722.

<sup>184</sup> The label 'possessory rights' is preferred to that of 'use-rights' because the central rights of property are broader than the right to use a possession. The fundamental rights also include the rights of acquisition and disposal. According to Adam Mossoff, "What is Property? Putting the Pieces Back Together", (2003) 45 *Ariz. L. Rev.* 390, possessory rights' captures the breadth and scope of these fundamental rights, and focuses one's attention on the fact that property is fundamentally about what one does with one's possessions.

<sup>185</sup> See Louis Josserand, "Configuration du droit de propriété dans l'ordre juridique nouveau", *Mélanges Juridiques dédiés à M. le Professeur Sugiyama*, Librairie du Recueil, Paris, p. 101: '*...car, à raison même de la diversité de son objet, la propriété devait revêtir des aspects très différents selon qu'elle affectait telle ou telle catégorie de biens ; elle n'est pas uniforme, mais multiforme, infiniment diverse et variée; il existe, non pas une propriété, mais des propriétés, soumises à des statuts diversifiés et spécialisés.*'

only when property comes to serve as a fundamental benchmark for defining certain types of interactions among people in society that the right to use becomes absolute - when mere use becomes exclusive use. Exclusion is understood by reference to these prior entitlements.<sup>186</sup>

As the Roman concept of property already reflected, exclusion is only a logical corollary of the substantive elements of acquisition, use and disposal.<sup>187</sup> The thing itself matters, both as an empirical and theoretical matter. Things and thingness are still extremely important, be they tangible or intangible. The duty to respect property by non-interference does not involve the duty-owner in any personal dealings with the owner in order to respect his ownership.<sup>188</sup> The relation is mediated via the thing the owner owns, not on the basis of its personal interactions. The practice of property protects the ownership relation by instituting a blanket prohibition on the interference with things that others own. This duty illustrates the way in which property rights are rights *in rem*. The scope of the right is not to be visualized as an owner's possession of billions of personal rights against others, each of which having individuated personal duties to every owner of property. Rather, people simply have a duty not to interfere with the property of others; in general, if it is not ours and we have no permission from the owner, we are not entitled to interfere with it. We need know nothing about who

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<sup>186</sup> The right to exclude has meaning only by reference to these more substantive rights. To wit, the right to exclude presupposes an answer to the logically prior questions: 'excluding from what and why?' See Adam Mossoff, *What is Property? Putting the Pieces Back Together*, (2003) 45 *Ariz. L. Rev.* 440.

<sup>187</sup> V.g., Rudolph Sohm, *The Institutes, A Textbook of the History and System of Roman Private Law*, p. 308.

<sup>188</sup> Thomas Merrill and Henry Smith point out that private property rights are qualitatively different from bilateral private law relationships, in that they attach to individuals only insofar as they have a certain relationship with a thing. See Thomas W. Merrill & Henry E. Smith, "What Happened to Property in Law and Economics?" (2001) 111 *Yale L.J.* 364. On the way different legal traditions may lead to a greater or lesser protection of property rights, see Ross Levine, "Law, Endowments, and Property Rights", (2005) 19 *Journal of Economic Perspectives*, at 69 ff.



owns what to comply with this duty. It is an impersonal duty, correlating with as impersonal a right as one can imagine.<sup>189</sup>

I would argue, following DAVID LAMETTI,<sup>190</sup> that the crucial point is the question of symmetry or asymmetry in legal relationships. HOHFELD's picture of bijural relations was one of a simple symmetry: all rights had corresponding duties, but, more importantly, each right-holder in a paucital (*i.e.*, simple, bilateral) relation had a corresponding duty-holder. All relations were one-to-one. The point here is that in property relations, there is no such symmetry. A right-holder sees his right as good against the world; it is not a simple bilateral relation. Conversely, the duty-holder owes a duty not to interfere with all property objects that are not his, focusing his duty not to interfere on the object itself ('that's not mine') and making the right-holder in a sense irrelevant. The bilateral nature of the relation is undermined by this asymmetry of singular right-holders and non-identified duty-holders (from the perspective of the right-holder) and the singular duty-holder and non-identified right-holders of owned objects. Property relations are distorted by the Hohfeldian characterization.

However, I do not follow LAMETTI when he defines private property as a social institution that comprises a variety of contextual relationships among individuals through objects of social wealth.<sup>191</sup> In my view, private property not only comprises a variety of contextual relationships among individuals and objects of social wealth, but also among individuals themselves and among individuals and the state.

Property-as-relationship refers to the ways or modalities in which objects of social wealth are held: in this sense, it appears to mean, firstly, a relation to resources. This is the intuitive relation that the layman has, or feels that he has, directly to its goods: he

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<sup>189</sup> I am following J. Penner, *The Idea of Property in Law*, OUP, 1997, 128 ff.

<sup>190</sup> See David Lametti, "The Concept of Property: Relations through Objects of Social Wealth", (2003) 53 *U. Toronto L. J.* 343.

<sup>191</sup> David Lametti, *ibidem*, 326.

can use them, sell them, and so forth.<sup>192</sup> This intuitive view is insufficient but it is essential. In a more complete sense, however, the relationship is also with others through resources or a relationship mediated by a resource. Hence, property (as relationship) involves the juridical relationship one has with the objects of property, and, by either extension or necessary implication, the relationship one has with others with respect to these objects.<sup>193</sup> Implied by property is also a relationship with other individuals with respect to the object. The freedom to use or possess limited resources implies a correlative vulnerability in others.<sup>194</sup> Others are *de facto* excluded by another's control and have a duty not to interfere; to wit, private property is a relationship both to and through objects of social wealth.<sup>195</sup>

The content of property rights and obligations, of course, will differ with different social resources. In understanding of property as both relationship and object, neither rights nor duties are prior to each other, as some rights or obligations may exist with specific resources but not with others. For most kinds of resources owners will mainly have rights and non-owners mainly duties, but recognizing the possibility of duties *in rem* for some resources is an important addition to a fuller understanding of this institution. The object of a property relation has necessarily some impact on the property relationship itself: in particular, certain objects of property determine the contours of the property relationship, conditioning its duties (such as duties of stewardship or obligations to use in a certain manner) and rights. The general social goals of private property as an institution, as well as the particular social goals pertaining to a specific resource, are a necessary part of understanding private property. Private property as a legal concept may be necessarily subject to ethical limitations and imperatives. Put simply, one

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<sup>192</sup> See Joan Williams, "The Rhetoric of Property", (1998) 83 *Iowa L. Rev.* 284.

<sup>193</sup> According to David Lametti, this second relational sense is the more complete in terms of capturing the significant features of the institution (the right to a degree of exclusivity and the asymmetry of the relationship) and thus probably subsumes the first intuitive sense. See "The Concept of Property: Relations through Objects of Social Wealth", (2003) 53 *U. Toronto L. J.* 338.

<sup>194</sup> Joseph William Singer, "Sovereignty and Property", (1991) 86 *Nw. U. L. Rev.* 41.

<sup>195</sup> *Ibidem*, p. 329.

cannot understand private property without understanding its teleology (or aspirations), and these cannot be comprehended without some reference to a moral discourse underlying property.<sup>196</sup>

Private property, even if defined in terms of control and exclusion, becomes more than a merely Hohfeldian relationship between individuals: the object mediates the rights and obligations that are owned *in rem*. Control and exclusion, along with restrictions and duties, are the hallmarks of private property are focused on the object. The former are conditioned by the object: some traditional rights may not be present at all with respect to certain resources; the latter might include an obligation to preserve a valuable resource such as land and even to take active steps to conserve it.

As a result, I would define private property rights as an immediate power of control over a thing that is enforceable as against everybody. Private property comprises, first of all, a variety of contextual relationships among individuals and objects of social wealth. Second, property implies a variety of relations among individuals themselves and among individuals and the state, through objects of social wealth.

Real rights belong to the category of ‘absolute’ rights, or rights enforceable as against everybody, because their effect is simply to empower the person in whom they vest to act in a particular manner. Everyone is accordingly bound to respect a proprietary right in the thing, such as it is. Property rights exclude everyone from the use and disposition of the thing without the owners’ consent. Exclusion is, in essence, a formal right that explains the ways in which a property-holder is free to act upon the substantive possessory rights that constitute his right to property. But, rather, the right to exclude others entails a duty, enforceable by state coercion, to defer to the owner’s will. In this sense, the state confers a property right by granting a specific person or group of

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<sup>196</sup> *Ibidem*, at 327.

persons the right to call on the aid of the state to keep others from using particular resources without the owner's consent.<sup>197</sup>

It should be emphasized that bringing objects of property into the formal definition of property and reminding us of private property's social aspect, will raise a number of important implications for property theory and justification.<sup>198</sup> If a metaphor is still needed, following CRAIG A. ARNOLD, I would suggest that property be thought of as a web of interests.<sup>199</sup> The web is a set of interconnections among persons, groups, and entities each with some stake in an identifiable (but either tangible or intangible) object, which is at the centre of the web. All of the interest-holders are connected both to the object and to one another.

As it was claimed *supra*, what is distinctive about property as a legal category is its thingness. A depiction of property should enable us to see the objects of our rights, responsibilities and relationships, as well as the shared, interconnected nature of those relationships with regard to objects. ARNOLD draws a new image that captures the complexity of the ways in which people relate to each other, to objects, and to the body of legal rules, principles, and institutions that make up property.

The web of interests' metaphort captures, first, the distinctiveness of property. To treat property rights like other kinds of rights or, even worse, to treat other rights as property impoverishes them both. The web's focus on some object of property interests helps

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<sup>197</sup> See Joseph William Singer, "Sovereignty and Property", (1991) 86 *Nw. U. L. Rev.* 41.

<sup>198</sup> Entitlements not only entitle but also obligate. See Jane B. Baron, "The Expressive Transparency of Property", (2002) 102 *Colum. L. Rev.* 210, and Laura S. Underkuffler, "On Property: An Essay" (1990) 100 *Yale L. J.* pp 127-148.

<sup>199</sup> Craig A. Arnold, "The Reconstitution of Property: Property as a Web of Interests", (2003) 26 *Harv. Envtl. L. Rev.* 281 developed this metaphor in order to accommodate both the thingness of property and the principles of environmentalism: (1) the interconnectedness of people and their physical environment and (2) the importance of the unique characteristics of each object [from Aldo Leopold, *A Sand County Almanac and Sketches Here and There* (1949)]. The fundamental tenets of an environmental ethic emphasize both context-specific interconnectedness and the value of the object itself. In this article, Arnold argues that property as a web of interests' metaphor can better accommodate integration of human-human relationships, human-object relationships, and the importance of the particular characteristics of the object to defining the nature of the legal interests in it.

conceptually to distinguish property law from social relationships generally, although the web does not preclude us from seeing how economic, power, or other social relationships affect the way property rights are defined.<sup>200</sup>

The web of interests' metaphor also captures the interconnectedness, that is, it accounts for the interconnections between person-thing, person-person, and person-state relationships. The web of interests encompasses, first, an object, which has particular characteristics that are relevant to the web; secondly, persons, groups, and entities, who have particular interests that they share in the object; thirdly, relationships (or connections) between the persons and the object; and, finally, relationships (or connections) among the persons.

Third, the web on interest's metaphor is broad enough to serve a wide range of values and to be useful to adherents of different theories of property.<sup>201</sup>

Finally, Property Law is defined and applied in particular contexts, which not only have social, economic, and political dimensions, but also involve specific objects with particular characteristics and specific person-object relationships, also with particular characteristics.<sup>202</sup>

As a functional and contextual tool, the web of interests' metaphor focuses attention on the nature and characteristics of the object of property interests, the relationships between interest holders and the object, and the relationships among the interest holders, including society's stake in the object. At the centre of any web of property interests is, thus, an object. The characteristics of the object are often relevant to the development of relationships between interest-holders and the object, the definition of rights and duties of the interest-holders with respect to the object, and the application of property rules and principles to specific situations.

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<sup>200</sup> *Ibidem*, at 336.

<sup>201</sup> *Ibidem*, at 333.

<sup>202</sup> *Ibidem*, p. 336.

To sum up, I propose a concept of property rights as an immediate power of control over a thing, enforceable as against everybody. It comprises both a variety of contextual relationships among individuals and objects of social wealth, and, a variety of relations among individuals themselves and among individuals and the state. As a metaphor, I borrow ARNOLD's suggestion that property should be thought of as a web of interests: a set of interconnections among persons, groups, and entities each with some stake in an identifiable (but either tangible or intangible) object, which is at the centre of the web. All of the interest-holders are connected both to the object and to one another.

The distinctiveness of property rights as a legal concept, with its definitional coherence and functional boundaries, shows the instability of the arguments that predicted the end of property rights as a useful concept and social institution. RIFKIN's insight into the new economy and his description of the age of access, however, has the merits to give evidence that something is changing in the social realm. In the next chapter, I will pursue that line of discussion.

*Dimensions of property*

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“In any case, I believe in giving dead concepts a decent burial. By that I mean that if the concept of property that I have outlined is no longer tenable, then it is incumbent upon us as lawyers to make sense of that fact.”

J. Penner, *The 'Bundle of Rights' Picture of Property*, p. 819.

## **Chapter II - The Shift to Consumption: Relational Property**

### *Introductory note*

In the foregoing chapter, I have argued for a concept of property where the thing matters. I have suggested that property implies mainly a variety of contextual relationships among individuals and things. I have also claimed that this immediate and direct power over the object of social wealth grants the distinctiveness and the importance of property as a legal concept.

This is not a blind assumption, though. Ownership, as a legal institution, is essential to the enterprise of analyzing legal systems as coherent sets of interrelated rules. As a legal concept, ownership denotes things which for legal purposes we conceive of as existing through time. Rights of ownership have temporal existence; they are set up, or instituted by the performance of some act or the occurrence of some event and they continue in existence until the moment of some further act or event. The law lays down an institutive rule, that is, it lays down that on the occurrence of a certain (perhaps complex) act or event a specific instance of the institution comes in existence. It also lays down consequential rules, that is a whole set of further legal consequences in the



way of rights and powers, duties and liabilities. And finally, the law lays down terminative rules, legal provisions as to termination.<sup>203</sup>

As an institution, private property serves primarily the purpose of providing facilities for private arrangements between individuals with respect to objects.<sup>204</sup> The characteristics of the object are, thus, relevant to the modelling of property rights. It means that property is undergoing a major change, because, as I will try to demonstrate, the thing itself is changing.

The first assumption to be taken into consideration is, then, that in modern societies the object of property is changing itself. Ownership for the average person is increasingly restricted to homeownership and/or personal consumer goods – cars, personal computers, domestic utilities, books, CDs, and clothing. The average person is apart from the means of production. In general, ownership of the means of production in the economy has become increasingly associated with paper wealth such as stocks and bonds. Consumerism plays, thus, a crucial role in society, which necessarily had legal consequences.<sup>205</sup> Means of production - as an instrument of political, legal, and economic analysis - have given place to consumption as a tool for the discovery and analysis of new social trends.

The second assumption to be taken into consideration concerns the use of the thing. Nowadays, it is easy to find in our daily lives a certain kind of goods that cannot be used immediately; instead, to make use of them implies entering into a contract relationship. I will call them inert goods. By the expression ‘inert goods’, I am referring to things that do not provide to the owner any direct power (or only marginally so) of

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<sup>203</sup> See Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law, New Approaches to Legal Positivism*, Reidel, 1986, pp 51 ff.

<sup>204</sup> Joseph Raz, *The Authority of Law*, Clarendon Press, Oxford, 1979, p. 169.

<sup>205</sup> All societies, of course, have seen consumption feature amongst the activities that are necessary to sustain and reproduce them. A consumer society, however, sees this common, everyday activity elevated to new heights. See, for all, David B. Clarke, *The Consumer Society and the Postmodern City*, Routledge, 2003, p. 13.

use. The owner cannot use them because they are inert: they do not have proper movement or activity.<sup>206</sup>

In order to clarify this concept, let us use some examples. For example, to make a computer function, I need to install appropriate software. Before this installation I have a disk, a memory RAM, etc. I can say I have a computer, but it is not, *per se*, of any use to me. To watch a DVD, I need a DVD-player. I could multiply the examples, but what I would like to stress is that, in the above-mentioned situations, the use of the thing is not autonomous; on the contrary, it depends on a contract. The owner of an inert thing has either to obtain another thing or to contract for a service in order to make use of the thing. Use is no longer individualist; conversely, it requires exchange. Two situations can be distinguished.

In the first situation, use of a thing depends on my will to buy some other things or to get a license. The dependence on the external thing is sporadic. The need of the thing can be discontinuous, *i.e.*, from time to time (for example, the necessity to insert ink cartridge in a printer) or autonomous, *i.e.*, a succession of more or less independent acts (for example, insert a DVD).

In the second situation, use of a thing depends on a continuous provision from a company. For example, if someone has fax equipment, its use is intrinsically linked to a contract concluded with a telecommunications company. Every time a person makes use of the fax, she has to pay to the company, and she may only use it in the conditions set up and provided for in the contract.

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<sup>206</sup> According to the Oxford English Dictionary, VII, 2<sup>nd</sup> ed., Clarendon Press, Oxford, being inert means have no inherent power of action, motion or resistance; to be inactive, inanimate. Inertia is that property by virtue of which something continues in its state, whether the rest or of uniform motion in a straight line, unless that state is altered by an external force. An inert thing is one that does not provide the power to make use of it. But this is an objective feature, not a subjective one. If I have a microwave and I do not know how to use it, this thing is not inert. An inert thing is one that nobody is able to make independent use of; for example, to print a document, it is necessary to put the ink cartridge in the printer. The use of an inert thing is a process rather than something finished.

What distinguishes the second situation from the first situation, is that in the latter, ownership depends on a contract, usually a long term-contract, for supplying a service. Where in the first situation, contracts of sale are required, in the second situation contracts of supply are a pre-requisite to making use of the thing.

Under the category included in the second situation described, a further distinction is to be made. In several cases, the thing has primary and secondary utilities, and only the former are dependent on a supply contract. Let us take the example of the ownership of a mobile phone. The equipment has, *per se*, utilities: phone book, alarm clock, timer, stopwatch, calculator, games, etc. However, the main utility – communications (phone calls, MMS or SMS) - depends on services provided by a telecommunications company. The primary utilities are not autonomous and do not result from the direct use of the goods. Instead, they result from the continuous provision of a supplier. Contrary to primary utilities, secondary utilities can be provided by the equipment *per se*, unless parties agree to the contrary.

To put it simply, making use of an inert thing depends on a contract: or a sale-purchasing contract or a long-term contract for supplying a service.<sup>207</sup> If the use of the thing depends on a service, we can distinguish two situations: either all the commodities of the thing are dependent on a contract, or, when goods provide primary and secondary utilities, only the formers are dependent on the contract.<sup>208</sup>

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<sup>207</sup> I will not refer to electricity and similar supplies because essential services regime are beyond the scope of this work.

<sup>208</sup> A market definition with components as separate products rather than systems of products is part of a wider European tendency to regulate essential infrastructures which create dependency relationships or 'lock-ins' in 'after markets' such as maintenance markets, spare parts markets, consumable markets and complementary markets. In its definition of markets, the European Commission has increasingly acknowledged the existence of 'technology markets' and the possibility that intellectual property rights such as patents or copyright can confer dominance or reinforce market standards in such markets. It also has been prepared to define informational goals such as programme listings and databases as sufficiently separate entities to amount to separate 'markets' or facilities when they create market power which can extend to their 'after markets'. See D. Anderman and Hedvig Schmidt, "EC Competition Policy and IPRs", in Steven D. Anderman (ed.) *The Interface Between Intellectual Property Rights and Competition Policy*, 2007, p. 42.

It should be taken into consideration, though, that the situation where the use of the thing depends on a service makes clear the changing relationship between goods and services that accompany them. Whereas for most of the Industrial Age the emphasis was on selling goods and attaching free service warranties to the products as an incentive to buy, now the relationship between goods and services is being reversed. An increasing number of businesses almost give away their products for free in the hopes of entering into long-term service relationships with clients.<sup>209</sup> The idea of a post-industrial society based on services, instead of industry and manufacturing was already pointed out by DANIEL BELL.<sup>210</sup> In the economic sector - one of the five dimensions or components of the concept of the post-industrial society – a change from a goods producing to a service economy has been identified.

The predominance of the services sector has already led to political and legal consequences.<sup>211</sup> At European level, the Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, about the key factors underlying the new strategy on consumers' policy 2002-2006, already read as follows:

[c]onsumption patterns are also changing. The service sector is growing. In the EU, it is now at least double the size of the manufacturing sector in terms of GDP; three times the size if social and public services are included. This means that services, including

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<sup>209</sup> Further in Jeremy Rifkin, *The Age of Access: The New Culture of Hypercapitalism, Where All of Life is a Paid-for Experience*, J.P. Tarcher/Putnam, New York, 2000, p. 6.

<sup>210</sup> Daniel Bell, *The Coming of Post-Industrial Society*, New York, Basic Books, 1976, described the decline of industry and manufacturing and the supplanting by services as one feature of the post-industrial society. This is one of the changes that run through the social structure of the emerging post-industrial world, one that does not wholly displace the agrarian and industrial worlds (though it transforms them in essential ways) but represents new principles of innovation, new modes of social organization, and new classes in society.

<sup>211</sup> See Articles 14, 2 and 49 of the EC Treaty on the free movement of services.

their safety aspects, will have to be increasingly taken into account in EU consumer policy.<sup>212</sup>

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market<sup>213</sup> and Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market might also be mentioned to recall the growing importance of the services sector.<sup>214</sup>

Where property is so intrinsically linked to consumption, and the owner is so often necessarily a consumer, one may even ask if we are still talking about property, as I have proposed: an immediate power of control over a thing, enforceable as against everybody. Does the owner of inert goods, whereas the use of the goods depends on the performance and collaboration of a contactor, still hold a property right? I do think so. The owner of inert goods still has an autonomous and direct power over the thing, namely, the exclusive physical control of the thing; the power to exclude others from the use or other benefits of the thing; the power to manage: that is, to decide if a thing shall be used and how; the power to decide who will be the seller of the goods or the supplier of the service; the power to choose the nature and quality of the goods or service; the power to transfer, modify or destroy the thing.

The mutation of the object of property rights and on the relation between the thing and contract, are, however, to be taken into consideration in a stipulative definition of property. The idea that buttresses my inquiry is, hence, that property is more strongly linked to consumption. It is linked directly - because individuals mainly own

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<sup>212</sup> 2002/C 137/04.

<sup>213</sup> OJ 2006 L 376, p. 36, where it can be read in (4) that, 'services constitute the engine of economic growth and account for 70% of GDP and employment in most Member States, this fragmentation of the internal market has a negative impact on the entire European economy, in particular on the competitiveness of SMEs and the movement of workers, and prevents consumers from gaining access to a greater variety of competitively priced services'.

<sup>214</sup> OJ 2007 L 319, p. 1.

consumption goods -, or indirectly - because the use of a thing depends on a further contract and the owner is necessarily a consumer. It can be assumed that property, contract and consumer law will constitute a web of interconnected regimes that revolve around an inert thing.<sup>215</sup>

The mutation of the legal concept of property finds its roots in deep social and economic changes. After the Second World War the term consumer society was contrived precisely to grasp the fact that consumption had become a central mode of modern life and has reorganized everyday experience.<sup>216</sup> In the modern era, the expression ‘consumer society’ was used to emphasise both the fact that goods were no longer as scarce as they were before the industrial society, and that large segments of population had access to a prosperous way of life, by an unprecedented private affluence, and by high average levels of personal consumption.<sup>217</sup> Consumption is in

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<sup>215</sup> The EU Consumer Policy Strategy 2007-2013 (COM (2007) 99 final), at 2.1, reads as follows: ‘[t]he technological revolution brought about by the Internet and digitalisation will also grow even faster. The key driver is the rollout of broadband technology, which is likely to give a significant boost to e-commerce. E-commerce has great potential to improve consumer welfare, by making a greater range of products available, boosting price competition and developing new markets. It also brings significant new challenges for consumers, business and consumer protection. In particular it weakens the grip of traditional advertising and retail mediums over consumer markets. This will challenge traditional modes of regulation, self-regulation and enforcement. SMEs will have more direct access to consumers and goods and services will be increasingly tailored to the individual. But traditional consumer rights will be less and less adapted to the digital age.’

<sup>216</sup> See Robert Rochefort, *La société des consommateurs*, Ed. Odile Jacob, 1995, p. 41. Roberta Sassatelli, “Tamed Hedonism: Choices, Desires and Deviant Pleasures”, in Jukka Gronow and Alan Warde (eds.), *Ordinary Consumption*, Routledge, 2001, p. 94. Developments under the second half of the twentieth century represent both an expansion and an intensification of changes already under way before the war. See Susan Strasser, Charles McGovern and Matthias Jut, “Introduction” to *Getting and Spending – European and American Consumer Societies in the Twentieth Century*, CUP, 1998, p. 5. Similarly, our notions of inner and outer are indeed strange and without precedent in other cultures and times. See Charles Taylor, *Sources of the Self: The Making of the Modern Identity*, HUP, p. 114.

<sup>217</sup> Cf. Gianpaolo Fabris, *Il nuovo consumatore: verso il postmoderno*, FrancoAngeli, Milano, 2003, p. 17. For criticism on this, see Tim Edwards, *Contradictions of Consumption, Contradictions, Practices and Politics in Consumer Society*, OUP, 2000, pp 104-105: ‘[i]n witnessing the expansion of contemporary consumer society to all aspects of life in Western societies, from the privatization of wealth and education to fast cars and designer fashion, one point remains curiously missed, which is that this expansion has taken place not simply at the expense of plundering the resources of the Third World or developing societies, although this is indeed valid, but more immediately at the cost of excluding, or not including, greater and greater sections of the Western population itself. When thinking of affluent Western society it would seem that we are considering an increasingly limited and narrowly defined group of consumers: young(ish), gainfully employed, located in cities or their surrounding areas, often

itself central to contemporary capitalism: growth is a function of increased production, and a result of increased, or continual, consumption.<sup>218</sup>

Consumption became, thus, one of the basic features of modern life. As JEAN BAUDRILLARD pointed out, daily life is the locus of consumption.<sup>219</sup> We consume to satisfy the multiple aspects of our life: family, professional, social, cultural.<sup>220</sup> The *kinaesthesia* of consumption is that one continually desires new and different things, not necessarily just more things in general.<sup>221</sup> At a certain point – generally where basic needs are met – the desire for more becomes the desire for the new, and the need for the new sets up a loop of consumption. Companies know this: they strategically meet the needs of consumers and stimulate new ones.

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professional and with relatively few financial or personal commitments. Other important consumer groups do, of course, exist, particularly in terms of supermarket cultures, but the dominance of the aforementioned group characteristics at the expense of the elderly, unemployed, those in rural locations or with low discretionary incomes, as well as the entire credit “underclass”, is a salutary reminder that consumer society is not for everyone. Moreover, and very important, consumer society seems increasingly premised, despite its apparent and paradoxical expansion, on a small core of high-spending consumers. It would seem, that, especially in light of the enormous expansion of credit to include population who could not even hope to afford its luxuries, consumer society is, in effect, walking the plank into never-never land’. This criticism is valid only for a single dimension notion of consumer. I argue for distinct subjectivities of the consumer, *infra*.

<sup>218</sup> Mike Featherstone, *Postmodernism and Identity*, SAGE, 1995, p. 67.

<sup>219</sup> Jean Baudrillard, *The Consumer Society, Myths and Structures*, SAGE, p. 34.

<sup>220</sup> Shopping is polysemic – a multidimensional and multilayered practice that parallels the multidimensional and multilayered nature of everyday life itself. Minjoo Oh and Jorge Ardití, “Shopping and Postmodernism”, in Mark Gottdiener (ed.), *New Forms of Consumption, Consumers, Culture and Commodification*, Rowman & Littlefield, 2000, p. 87.

<sup>221</sup> According to Jeremy Rifkin, *The Age of Access: the New Culture of Hypercapitalism - Where All of Life is a Paid-For Experience*, J.P. Tarcher/Putnam, New York, 2000, 7 and 96, we are making the transition into what economists call an experience economy – a world in which each person’s own life becomes, in effect, a commercial market. As long as commerce was bound to discrete transactions between sellers and buyers, the commodification process itself was limited in time and space to either the negotiation and transfer of goods or the time elapsed in the performance of services. All other time still was free of the market and not beholden to market consideration. In the emerging cyberspace economy, network forces pull all remaining free time into the commercial orbit, making each institution and individual a captive of an all-pervasive ‘commerciality’. Describing how consumption and abundance represent something of a fundamental mutation in the ecology of human species, Neala Schleuning, *To Have and To Hold-The Meaning of Ownership in the United States*, Praeger, 1997, p. 25.

What sets the members of consumer society apart from their ancestors is the emancipation of consumption from its past instrumentality that used to draw its limits – the demise of ‘norms’ and the new plasticity of ‘needs’, setting consumption unleashed from functional bonds and absolving it from the need to justify itself by reference to anything but its own pleurability. In BAUMAN’s expression, in a consumer society, consumption is its own purpose and so is self-propelling. Orthodox psychology defined ‘need’ as a state of tension that would eventually disperse and wither away once the need has been gratified. According to the author, the ‘need’ which sets the members of consumer society in motion is, on the contrary, the need to keep the tension alive and, if anything, make it stronger with every step. While our ancestors could recommend ‘delay of gratification’, consumer society proclaims the impossibility of gratification and measures its progress by ever-rising demand.<sup>222</sup> Today, consumers barely have time to experience a new technology, product, or service before its upgraded successor becomes available.<sup>223</sup> Enterprises try to create more and more needs to individuals, so that they can then satisfy them.<sup>224</sup>

How property must be conceived and is to fulfil the function normatively ascribed to it in the context of contemporary society is the object of my inquiry in this chapter. I will, first, inquire about the individuals’ search for meaning through consumption in contemporary society. And then I will inquire after the answer provided by property, *i.e.*, I will search how property reshaped itself. I have defined property rights as an immediate power of control over a thing that is enforceable as against everybody. My

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<sup>222</sup>I am following Zigmunt Bauman, “Consuming Life”, (2001) 1 *Journal of Consumer Culture* 13.

<sup>223</sup> Consequently, for enterprises, each person is a client and can open up a myriad of opportunities to sell and to provide, *i.e.*, each individual represents a specific market. A single enterprise can thus provide one individual with television, phone and internet services; or clothes, shoes, bags, sunglasses, and perfumes; or even cars, clothes, bags, lighters, and other accessories. The fact that an enterprise offered to supply a service to many consumers as possible would be an inexplicable self-limitation: there are no problems in production; the means are not scarce; only the number of consumers is limited. So, now the new idea in marketing is to concentrate on share of customer rather than share of market. See Jeremy Rifkin, *The Age of Access: the New Culture of Hypercapitalism - Where All of Life is a Paid-For Experience*, New York, J.P. Tarcher/Putnam, 2000.

<sup>224</sup> See Zigmunt Bauman and Tim May, *Thinking Sociologically*, 2<sup>nd</sup> ed., Blackwell, 2001, at 150.



analysis will take me further now. Through deeper investigation, it will be revealed that property is becoming increasingly relational.

## **1. The consumer**

### 1.1. The consumer: the beginnings

According to GRANT MCCrackEN three moments in the history of consumption are to be pointed out: the late quarter of the sixteenth century, the eighteenth century and the nineteenth century.<sup>225</sup>

In the late quarter of the sixteenth century, a spectacular consumer boom occurred due to two important developments in the period. First, Elizabeth I used expenditure as an instrument of government. And second, a strong competition took place among the Elizabethan nobility. The dependence of the noblemen on royal favour led to increased expenditure on the Queen's behalf and on their own behalf.

The eighteenth century, on the contrary, saw a consumer explosion on its own. The world of goods expanded dramatically to include new opportunities for the purchase of furniture, pottery, silver, mirrors, cutlery, gardens, pets and fabric. There were also new developments in the frequency with which goods were bought, the influences brought to bear on the consumer, the numbers of people engaged as active consumers, and the tastes, preferences, social projects, and cultural co-ordinates according to which consumption took place.<sup>226</sup> It appears that in the eighteenth century goods began to

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<sup>225</sup> Grant McCracken, *Culture and Consumption, New Approaches to the Symbolic Character of Consumer Goods and Activities*, Indiana University Press, 1990. Frank Trentmann, "Knowing Consumers – Histories, Identities, Practices - An Introduction", in Frank Trentmann (ed.), *The Making of the Consumer - Knowledge, Power and Identity in the Modern World*, Berg, 2006, p. 2, points out that literature on consumption has offered surprisingly little in the way of explaining the evolution of the consumer into a master category of collective and individual identity.

<sup>226</sup> According to Claire Walsh, "The Newness of the Department Store: a View from the Eighteenth Century", in Geoffrey Crossick and Serge Jaumain, *Cathedrals of Consumption*, Ashgate, 1999, p. 46-71, it is important to establish that purchasing through fixed retail shops was already a firmly established practice at the very beginning of the eighteenth century. While it has been assumed that elaborate display

carry a new kind of status and that goods were becoming the carriers of other kind of meanings as well.

The consumer, however, was virtually absent from eighteenth century discourse. In the eighteenth century Europe and America the meanings and practices of consumption remained embedded in older social identities defined by craft, land, trade and production. The conceptual evolution of the consumer before the nineteenth century was limited, carrying yet little significance for social and political identities.<sup>227</sup>

Only by the nineteenth century the consumer revolution had installed itself as a structural feature of social life. The nineteenth century saw, *e.g.*, the emergence of new consumer lifestyles and their novel patterns of interaction between persons and things. New marketing techniques such as the employment of new aesthetic, cultural, and sexual motifs were devised to add value to the products. Ever more social meanings were being loaded into goods through new and more sophisticated devices for meaning transfer. Social changes had created new and more pressing communicational needs than the language of goods could claim to answer.<sup>228</sup>

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techniques and extravagant interior fittings were first deployed in nineteenth-century department stores, inventories of high-class London shops of the eighteenth century reveal the use of an impressive display of expensive interior fittings. Visual enticement in department stores was part of a long-standing retail tradition. Shoppers in the eighteenth century had to contend with all manipulative techniques that also faced the consumers of the nineteenth century: the lure of quantities of goods attractively displayed, the use of exotic references in displays, the seductive ambience of pleasing and dramatic interiors, the management of the flow of shoppers through the shop, and the pressure of artful sales patter. Selling in the department stores was based on deferential service and advice. The level of the market at which nineteenth-century department stores targeted themselves varied depending on their location, but they drew in the main on the lower middle and upper middle classes.

<sup>227</sup> Frank Trentmann, “The Modern Genealogy of the Consumer, Identities, Meanings and Synapses”, in John Brewer and Frank Trentmann, *Consuming Cultures, Global Perspectives*, Berg, 2006, p. 23 and 26.

<sup>228</sup> Even though the fundamental elements of a consumer culture – the use of goods for both social positioning and as a symbolic means of self-expression – were both in place by the nineteenth century, it is only with the rise of industrial capitalism that a full-blown consumerism appeared. After the eighteenth century, activities that were once restricted to the elite were now practiced by the masses as well. A flood of common industrial goods swept over the market that itself expanded through new opportunities for buying. Innovations such as the department store made shopping a regular and attractive activity. See Matt Gottdiener, “Approaches to Consumption: Classical and Contemporary Perspectives”, in *New*

Still, in nineteenth and early–twentieth century Europe, the status of the ‘consumer’ remained ambiguous, as the precise relationship between consumption and production, between private and public activities and between material and non-material acts of consumption remained subjects of ongoing debate amongst social and economic writers.<sup>229</sup> The ‘consumer’ mainly appeared with reference to particular physical or metaphysical processes of use, waste and destruction. Consumers were individuals who used up energy resources or basic utilities (water, gas, coal, electricity) or who were affected by particular consumption taxes, such as excise duties.<sup>230</sup> The organizational base of consumers remained civil society. It was there that consumer organizations like the cooperatives saw their main area for moralizing the market and creating a higher social conscience amongst consumers.

According to TRENTMANN, instead of picturing a natural synergy between the consumer, individualism and liberal economics, it is vital to retrieve the earlier moment of an association between civil society, citizenship and the consumer.<sup>231</sup> The populist

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*Forms of Consumption, Consumers, Culture and Commodification*, Mark Gottdiener (ed.), Rowman & Littlefield, 2000, 12.

<sup>229</sup> See Donald Winch, “The Problematic Status of Consumer in Orthodox Economic Thought”, in Frank Trentmann (ed.), *The Making of the Consumer: Knowledge, Power and Identity in the Modern World*, Berg, 2006, pp 31 ff.

<sup>230</sup> According to Frank Trentmann, “The Modern Genealogy of the Consumer, Identities, Meanings and Synapses”, in John Brewer and Frank Trentmann, *Consuming Cultures, Global Perspectives*, Berg, 2006, pp 26 ff, two historical settings in which the politics of citizenship and taxation provided an important synapse for the consumer as a social actor and public voice were first, battles over access, control and the payment of water in Victorian London; and second, a more global-local conjuncture in which anxieties over trade energized consumption as a question of national identity and citizenship around the turn of the twentieth century. According to the author, attention to social and political traditions suggests the degree of commodification might account less for the strength of the consumer in the modern period than conventionally thought. The non-threatening image of the consumer as a public interest (rather than a sectional interest) was underwritten by a self-denying view of state power. British liberals and radicals saw the House of Commons as a kind of virtual representation for all consumers, representing all taxpayers (including women) irrespective of whether they had vote or not. Consumers thus did not corrupt the much idealized ‘*purity of politics*’. Radical and progressive traditions were subsequently able to build on this liberal foundation and invoke the civic, community oriented outlook of a citizen-consumer.

<sup>231</sup> See Frank Trentmann, *ibidem*, p. 42, on the consumer leagues that sprang up in America and continental Europe in the 1890s.

consumption of the consumer would happen in the First World War, driven forward by the state as well as civil society. The First World War would place new social, ethical and political responsibilities on the consumer, even or especially in producer-oriented national traditions. Scarcities and inflation produced consumer boycotts and demands for representation.<sup>232</sup> The growing prominence of the consumer as a pillar of wealth, welfare and peace was reinforced not only by the material challenge prompted by world depression (1929-32) but also by the spread of totalitarian ideologies. The consumer advanced into an attractive pillar of social order, an antidote to the temptations of fascism and communism alike.<sup>233</sup>

## 1.2. *Homo economicus*: the consumer as a market agent

The intellectual pursuit of the consumer took off in the 1890s,<sup>234</sup> soon after the rise of marginal utility theory in the 1870s. This disciplinary development signalled a movement away from political economy's explicit concern with problems of social and

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<sup>232</sup> *Ibidem*, p. 44.

<sup>233</sup> The growing attention given to consumer in society, culture and political economy in the inter-war years, however, was not uniformly possible everywhere. In Europe and the United States, the liberal upgrading of the consumer worked in tandem with progressive debates about the civic nature and limits of consumers. In the United States, the New Deal created a very different political synapse for citizens and consumers from earlier traditions, combining an economic model of growth through increased purchasing power with a democratic model of mobilizing consumers as citizens supported by the state. Frank Trentmann, *ibidem*, p. 48.

<sup>234</sup> National economists in Germany, the radical liberal Hobson in England, the progressive Patten in the United States, and the cooperator Charles Gide in France. Hobson invoked a 'citizen-consumer' whose material acts and desires would increasingly be informed by civic values. Likewise, Gide, who devoted an entire book in his *Cours d'économie politique* to consumption, focused on collective action amongst consumers to advance the interests of society. Patten saw selfish individuals as atavistic survivors of a past age of scarcity who would give way to the socialized generosity of an age of abundance. But rather than couched in a positivist emphasis on individual consumer choice and satisfaction or measurable quantity and demand, Patten's vision was about increasing the quality of consumption and seeking to reconcile desire and restraint in a way that advanced communal welfare. For all these differences, consumers in these reformist visions were mobilized for their civic and collective characteristics, not some inherent economic individualism. See Frank Trentmann, *ibidem*, p. 29.

political order, focusing instead on market exchange (market order and market action) and as the basic object of economic inquiry.<sup>235</sup>

A technical approach to market processes was twinned with a technical approach to market agents. The new economics was particularly well suited to the analysis of an emergent consumer society in which consumption was becoming a primary economic activity.<sup>236</sup> The market agent posited by modern economics offered an ideal-type of formal rationality, as an analytic measure of empirical economic behaviour.

Whereas classical political theory had struggled to establish the relation between the material value of goods and the prices they commanded in markets, marginal utility theory made a clear distinction between value and price. Value is not a material or objective factor, fixed by the costs of production and reflected in goods' natural price. Rather it becomes a subjective concept, relative to different consumers of goods. Goods in a market are worth as much as someone is willing to pay for them. Economics could say nothing about value (a non-economic notion), but supplied the technical means for analysing how prices (economic phenomena) are arrived at.<sup>237</sup>

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<sup>235</sup> Don Slater and Fran Tonkiss, *Market Society - Markets and Modern Social Theory*, Polity, 2001, pp 45-46.

<sup>236</sup> Don Slater and Fran Tonkiss, *ibidem*, p. 48, underlie that marginal utility theory rests on a simple proposition about human action: individuals exchange goods so as to maximize the sum of their own utility. Economic behaviour is governed by the desire to maximize utility (or, in the hedonist terms, pleasure) and to minimize disutility (or pain). Whereas our desires tend to be unlimited, however, the resources we have to satisfy them are not: people's pursuit of their utility is therefore constrained by the scarcity of their means. Within the constraints of scarcity (of goods, time, resources), the individual must make choices between available ends. Economics, then, analyses the kind of formal rationality that people use to allocate their scarce resources to maximize their desired ends. Such a definition proceeds on the following assumptions: first, individuals possess wants, which can be ranked in order of preference; second, conditions of scarcity apply, such that there are limited resources with which to satisfy individual wants; third, in this context of scarcity, individuals make choices in order to maximize their own benefit.

<sup>237</sup> Don Slater and Fran Tonkiss, *Market Society, Markets and Modern Social Theory*, Polity, 2001, p. 49.

In respect of the *homo economicus* drawn by economics, the paradoxical outcome mentioned by WINCH cannot be disregarded.<sup>238</sup> Economists have good claims to have been the first to rescue the consumer from a political economy of power and plenty that only had room for producer's interests; they have also pioneered ways of addressing the central question of how the living standards of the mass of society could be improved. But, in the process the choosing agent seems to have achieved sovereignty at the cost of becoming an isolated rational individual whose tastes are given and whose sensitivity to change is limited to the numerical information contained in prices, incomes and estimates of the risks or uncertainties that impinge on his profit-seeking or pleasure and leisure-maximizing goals.

### 1.3. The postmodernist consumer: capitalism, desire, *pleonexia*

Aware of the difficulties, analysis of the consumer was increasingly distanced from the unrealistic assumptions of orthodox economics. Consumption was considered to be better understood for its symbolic and communicative significance than for its capacity to meet practical needs.

The progressive enculturation of the market can be seen as part of a process of increasing abstraction that arises out of the market, yet turns around to engulf and transform the landscape of market capitalism. According to SLATER and TONKISS, BAUDRILLARD's radical semiotic rewriting of economic history is doubtless the clearest example of this approach, albeit one of the most extreme. Market exchange has long been understood, particularly within Marxism, as a triumph of abstraction through the dominance of abstract exchange value over use value.<sup>239</sup> In BAUDRILLARD's argument,

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<sup>238</sup> Donald Winch, "The Problematic Status of Consumer in Orthodox Economic Thought", in Frank Tretmann (ed.), *The Making of the Consumer: Knowledge, Power and Identity in the Modern World*, Berg, 2006, p. 32.

<sup>239</sup> Marx shows how a thing, a product, assumes, under certain conditions, the form of a commodity. The thing splits in two; without losing its material reality and use value it is transmuted into an exchange value. All commodities are measured by money and have exchange value. Marx's analysis of the commodity discusses the social-psychological aspects of consumption.

this process of abstraction is overtaken by yet another: the commodity, freed from its use value and hence from the concrete particularity of needs, labour and real material properties, is able to take on a different kind of value, a ‘sign value’. Sign value derives neither from the object’s place in the real order of needs and objects, nor from its value in exchange relations, but rather from its position within codes of meaning and semiotic process.<sup>240</sup>

BAUDRILLARD attempted a semiotic mapping in which objects come to represent specific social positions.<sup>241</sup> Consumption is the systematic manipulation of signs; therefore the rational consumer is an illusion.<sup>242</sup> For BAUDRILLARD,<sup>243</sup> in the case of

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<sup>240</sup> See Don Slater and Fran Tonkiss, *Market Society, Markets and Modern Social Theory*, Polity, 2001, 183.

<sup>241</sup> According to Ben Fine, “Addressing the Consumer “, in Frank Trentmann (ed.), *The Making of the Consumer: Knowledge, Power and Identity in the Modern World*, Berg, 2006, at p. 293 Baudrillard’s simulacrum of desire can be interpreted as a nightmarish restoration of consumer sovereignty through collapsing the material to a symbolic world within the mind.

<sup>242</sup> According to Andre Jansson, analysis (in “The Mediatization of Consumption: Towards an Analytical Framework of Image Culture” (2002) 2 *Journal of Consumer Culture* 17): ‘Braudrillard’s argument is to be seen as an extreme philosophical extension of Marx’s theory of commodity fetishism and Benjamin’s descriptions of metropolitan consumerist phantasmagoria. Between these endpoints – the Marxist and the postmodernist – it is also possible to identify the theories of the spectacle, introduced by the French neo-Marxist and Situationist movements of the 1960s, headed by figures like Henri Lefebvre and Guy Debord. As Best and Kellner (1997) argue, there is a clear theoretical trajectory ‘from the society of the commodity to the society of the spectacle to the society of the simulacrum, paralleled by increasing commodification and massification to the point of implosion of the key phenomena described by modern theory’. The shift from early Marxism to the neo-Marxist/Situationist standpoint is essentially a reorientation from production to consumption, or from the factory to everyday life. While still adhering to a Marxist interpretation of society, Debord (1994 [1967]) argues in *The Society of the Spectacle* that the dominant force of alienation is no longer the mere commodity, produced in factories by workers, but the spectacle, primarily generated by symbolic producers in the culture industry. Parallel to the Frankfurt School’s ideas of the capitalist expropriation of people’s ‘free time’, Debort, p. 29, asserts that ‘alienated consumption is added to alienated production as an inescapable duty of the ‘masses’. Yet, the emerging forms of consumption, predominantly governed by the mechanisms of commercialized media culture, are not concerned with the use-value in its original sense, but with the illusion of use-value; what things seem to be, and what solutions they seem to provide. This is also what Lefebvre refers to as the creation of make-believe. If industrial society created false needs in the form of a wide-spread urge to have certain things, the society of the spectacle is a social arrangement marked by an extreme preoccupation with how things appear. According to Debord, the spectacle is most clearly manifested in the fact that the use-value of commodities is judged to an increasing extent according to their style and surface. As a student of Lefebvre, Baudrillard was clearly inspired by the situationists. However, when the notion of the spectacle is implicitly brought up in Baudrillard’s subsequent writings on simulation and simulacra, it is in a negative sense.’

postmodernism, the triumph of the sign threatens the very notion of social reality as a basis for either social analysis or critique, let alone as a source of alternative cultural values. The fullest exposition of this particular anthropological perspective was given by BOURDIEU in his analysis of taste, where it was the classification of class position that was deemed fundamental. To Bourdieu, consumption is a stage in a process of communication, that is, an act of deciphering, decoding, which presupposes practical or explicit mastery of a cipher code. According to BOURDIEU, the taste functions as a sort of social orientation, a ‘sense of one’s place’, guiding the occupants of a given place in social space towards the social positions adjusted to their properties, and towards the practices or goods which befit the occupants of that position. It implies a practical anticipation of what the social meaning and value of the chosen practice or thing will probably be, given their distribution in social space and the practical knowledge the other agents have of the correspondence between goods and groups.<sup>244</sup>

The notion of consumer culture has registered these worries very clearly. The term consumer culture points not only to the increasing production and salience of cultural goods as commodities, but also to the way in which the majority of cultural activities and signifying practices become mediated through consumption, and consumption progressively involves the consumption of signs and images. Hence the term consumer culture points to the ways in which consumption ceases to be a simple appropriation of utilities, or use values, to become a consumption of signs and images in which the emphasis upon the capacity endlessly to reshape the cultural or symbolic aspect of the commodity makes it more appropriate to speak of commodity-signs. The culture of the

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<sup>243</sup> Jean Baudrillard, *The Consumer Society, Myths and Structures*, SAGE.

<sup>244</sup> See Pierre Bourdieu, *Distinction, A social critique of the judgement of taste*, translated by Richard Nice, Routledge, p. 467. According to the author, knowledge, and in particular all knowledge of the social world, is an act of construction implementing schemes of thought and expression, and that between conditions of existence and practices or representations there intervenes the structuring activity of the agents, who, far from reacting mechanically to mechanical stimulations, respond to the invitations or threats of a world whose meaning they have helped to produce. However, the principle of these structuring activity is not, as an intellectualist and anti-genetic idealism would have it, a system of universal forms and categories but a system of internalized, embodied schemes which, having been constituted in the course of collective history, are acquired in the course of individual story and function in their practical sense, for practice (and not for the sake of pure acknowledgement).



consumer society is therefore held to be a vast floating complex of fragmentary signs and images, which produce an endless signplay which destabilizes long-held symbolic meanings and cultural order.<sup>245</sup>

As with the term culture itself,<sup>246</sup> the consumer culture may be identified with the achievement through marketization of self-determined choice; or it may represent a bitter irony – consumer culture is a contradiction in terms, since no real culture is possible on the basis of individual choice mediated through commodities. Moreover, consumer culture comes to represent the cultural manipulation of the consumer through the market and non-market powers (for example, advertising) of firms, as well as indirectly through the commodification and monetarization of everyday life. According to SLATER and TONKISS, the term ‘consumer culture’ first tends to argue that core values and identities are now bound up with or negotiated through consumption and commodities. Hence, people constantly talk about values such as choice, desire and pleasure, privacy and freedom, appearance, fashion and style, materialism and rising material standards, comforts and conveniences, and so on. All of these are seriously important to modern citizens as ideals (whether or not they can afford them), are understood in relation to the market, and tend to be experienced in terms more of the role of consumer than of alternative prestigious social roles (citizen, family members, worker, religious adherent), which themselves tend to be recast in terms of being a consumer.<sup>247</sup>

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<sup>245</sup> Mike Featherstone, *Consumer Culture and Postmodernism*, SAGE, 1991.

<sup>246</sup> Don Slater and Fran Tonkiss, *Market Society, Markets and Modern Social Theory*, Polity, 2001, pp 183-184.

<sup>247</sup> Neala Schleunig, *To Have and To Hold -The Meaning of Ownership in the United States*, Praeger, 1997, p. 127, discusses some of the basic assumptions underlying consumer culture. The first is naturalistic: things control people. This process is referred to by various theorists as the ‘fetishization of commodities’, the ‘reification of desires’, ‘displaced meaning’, or ‘commodity’ meaning’. The belief in a world of objects that stands outside of and is antithetical to human control is endemic in this literature. Second, meaning itself is being reconstructed by this ever-changing world of commodities, and this reconstructed meaning-in-process, in turn, shapes the human character and human society to its own ends. Where meaning used to be realised through social and economic relations, all meaning – personal and collective – is now to be found in a world of objects and signs. The human being is dwarfed by this

The creation of self-identity is substantially achieved through symbolic consumption decisions which form an individual's lifestyle. What is sold is not simply the value of a product, but its symbolic significance as a building block within a particular lifestyle.<sup>248</sup> Industrial production is increasingly a matter of symbolic circulation – a matter of responding to, or creating, semiotic rather than functional needs.<sup>249</sup>

Commodities are a system for communication which makes visible and stable the categories of culture, with an emphasis upon social difference, exclusion and

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material world of his own creation. Third, there is a general argument that a new set of social values has been and is being shaped by commodity consumption. The consumer ethic is a private, individualistic ethic. And, finally, this process is relentless: the steamroller of capitalism and consumerism is probably unstoppable.

<sup>248</sup> Zigmund Bauman/Tim May, *Thinking Sociologically*, 2<sup>nd</sup> ed., Blackwell, 2001, p. 155. In all cultures at all times, it is the relation between use and symbol that provides the concrete context for the playing out of the universal person-object relation. The power of advertising comes from the need for meaning. Sut Jhally, *The Codes of Advertising, Fetishism and the Political Economy of Meaning in the Consumer Society*, Routledge, 1990, p. 197. Accordingly, advertising not only promotes specific products but also fosters a consumer way of life. Michael Schudson, *Advertising, the Uneasy Persuasion - Its Dubious Impact on American Society*, Basic Books, 1984, p. 238. In lifestyle ads, a more balanced relationship is established between the elemental codes of person, product, and setting by combining aspects of the product-image and personalized formats. The lifestyle format expands the identity matrix of the individual into a framework of judgement for social beings in a social context. In one variant of the lifestyle advertising, the idea of social identity is conveyed primarily through the display of the product in a social context; the people who are inserted into the scene remain undefined, providing only a vague reference to the person code (and therefore implicitly to use or consumption style). The other major variant of the lifestyle format synthesizes the component codes through a primary reference to an activity rather than directly to a consumption style. Here the activity invoked in text or image becomes the central cue for relating the person, product, and setting codes. Lifestyle ads commonly depict a variety of leisure activities (entertaining, going out, holidaying, relaxing). Implicit on each of these activities, however, is the placing of the product within a consumption style by its link to an activity. William Leiss, Stephen Kline and Sut Jhally, *Social Communication in Advertising*, 2<sup>nd</sup> ed., Routledge, 1990, p. 259. How Nike ads hail viewers as members of a political community and not as individual consumers, see Robert Goldman & Stephen Papson, *Nike Culture*, SAGE, 1998, at 96. It does not speak about any act of consumption, but rather about relationships of race, class, sport, and hope.

<sup>249</sup> According to Scott Lash and John Urry, *Economies of Signs & Space*, SAGE, 1994, p. 14-15, objects in contemporary political economies are emptied both of symbolic and material content. What are increasingly being produced are not material objects, but signs. These signs are primarily of two types. Either they have a primarily cognitive content and thus are post-industrial or informational goods. Or they primarily have an aesthetic, in the broadest sense of the aesthetic, content and they are primarily postmodern goods. This is occurring, not just in the proliferation of non-material objects which comprise a substantial aesthetic component (such as pop music, cinema, magazines, video, etc.), but also in the increasing component of sign value or image in material objects. This aestheticization of material objects can take place either in the production or in the circulation and consumption of such goods.

inclusion.<sup>250</sup> Signs and the logic of their production take on a high degree of autonomy both from their objects and from the material production of those objects.<sup>251</sup> Capitalist postmodernity generates a hyperreality, an aesthetic coating of the world with images that replace, displace and themselves generate what was used to be called ‘society’. We can no longer conceive of the social order as arising from the interactions of autonomous subjects; it is rather bound together through relations of meaning: the sign itself is what brings about social bonds between people.<sup>252</sup>

The *pleonexia* in modern societies has led to a well-known constrained life and to the diminution of autonomy. The dwarfed consumer arose as a self-reflexive actor who, having become aware of the plasticity of personal biography, was constantly forced to choose among alternative courses of action through which the self would come to be constituted. People live by consuming mass-produced goods whether they wish to or not; and goods are also symbols that convey meaning.<sup>253</sup> Producers are accused of

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<sup>250</sup> See Mary Douglas and Baron Isherwood, *The World of Goods: Towards an Anthropology of Goods*, Allen Lane, London, 1978. Thorstein Veblen had already wrote in *The Theory of The Leisure Class*, The Modern Library, New York, 1934 [1899], at 28 that: ‘[p]ossessions come to be valued as evidence of the prepotence of the possessor of these goods over other individuals within the community. The invidious comparison now becomes primarily a comparison of the owner with the other members of the group’, and at 26: ‘(...) as far as regards those members and classes of the community who are chiefly concerned in the accumulation of wealth, the incentive of subsistence or of physical comfort never plays a considerable part. Ownership began and grew into a human institution on grounds unrelated to the subsistence minimum. The dominant incentive was from the outset the invidious distinction attached to wealth, and, save temporarily and by exception, no other motive has usurped the primacy at any later stage of the development’.

<sup>251</sup> This train of thought, developing partly out of Marx’s analysis of fetishism, argues that such intensive mediation of both world and desire through commercially generated images ultimately ‘*de-realize[s] reality*’. Postmodernism, in one of its many definitions, is the culture of a market society that has become completely abstract through aestheticization, in which ‘it is the build-up, density and seamless, all-encompassing extent of the production of images in contemporary society which has pushed us towards a qualitatively new society in which the distinction between reality and image becomes effaced and everyday life becomes aestheticized’. About the aestheticization of every day life, see Mike Featherstone, *Consumer Culture and Postmodernism*, SAGE, 1991, pp 65 ff.

<sup>252</sup> Don Slater and Fran Tonkiss, *Market Society, Markets and Modern Social Theory*, Polity, 2001, at 182.

<sup>253</sup> Robert D. Sack, “The Consumer’s World: Place as Context”, (1988) 78 *Annals of the Association of American Geographers*, pp 643-644. As pointed out by Don Slater and Fran Tonkiss, *Market Society - Markets and Modern Social Theory*, Polity, 2001, p. 25, because most of the goods we consume are not only produced but also designed (given cultural form) by profit-seeking firms, we therefore carry out

manipulating consumers through advertising<sup>254</sup> or by over familiarity with that they make available.

This manipulation of consumers' autonomy and choices had carried serious problems, namely overindebtedness. Already in the Resolution of 26 November 2001 on consumer credit and indebtedness,<sup>255</sup> the Council noted that over-indebtedness affects a significant and growing number of European consumers in all the Member States. It also noted that information on indebtedness and over-indebtedness, despite the work done by the Commission, nevertheless remained inadequate, in particular owing to the lack of a systematic study of over-indebtedness, resulting from the incomparability of data, where such data are available in the Member States, and the lack of a harmonized definition of over-indebtedness. Soon after, Regulation (EC) 1177/2003, of 16 June 2003,<sup>256</sup> established a common framework for the systematic production of Community

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much of our everyday life using a material culture that is governed by market interests rather than directly by our own needs. This mediation may be associated with domination and alienation, in that the relationship between needs and goods is not directed but managed by market-oriented enterprises.

<sup>254</sup> Although the first posted advertisements began to appear at the end of the fifteenth century, it is not until the second half of nineteenth century that advertising begins to acquire its thoroughly modern meaning, in which the sense of informing becomes fully subordinate to that of persuasion. See Malcolm Barnard, "Advertising: The Rhetorical Imperative", in Chris Jenks (ed.), *Visual Culture*, Routledge, 1995. According to Christopher Lasch, in *The Culture of Narcissism*, Norton & Company, 1979, p. 72, advertising manufactures a product of its own: the consumer, perpetually unsatisfied, restless, anxious, and bored. Advertising serves not so much to advertise products as to promote consumption as a way of life. In his words: '[i]t "educates" the masses into an unappeasable appetite not only for goods but for new experiences and personal fulfillment. (...) The propaganda of commodities serves a double function. First, it upholds consumption as an alternative to protest or rebellion. (...) In the second place, the propaganda of consumption turns alienation itself into a commodity. It addresses itself to the spiritual desolation of modern life and proposes consumption as the cure'. According to Vance Packard, *The Hidden Persuaders*, Penguin Books, 1957, p. 216: '[t]he most serious offence many of the depth manipulators commit, it seems to me, is that they try to invade the privacy of our minds. It is the right to privacy in our minds – privacy to be either rational or irrational – that I believe we must strive and protect'. For criticism, see Michael Schudson, *Advertising, the Uneasy Persuasion, Its Dubious Impact on American Society*, Basic Books, 1984. In his opinion, the effectiveness of advertising depends on the amount and kind of product information available to consumers. Sources of information are: personal experience, personal influence, information in the mass media besides advertising, formal channels of consumer education, information from no-advertising market. For a legal analysis of Benetton advertising (with respect to the pictures of terror), see Henning Hartwig, "Image Advertising under Unfair Competition Law and the Benetton Campaign", (2001) 7 *IIC* 777-786.

<sup>255</sup> OJ C 364, p. 1.

<sup>256</sup> OJ L 158, p. 33.

statistics on income and living conditions, encompassing comparable and timely cross-sectional and longitudinal data on income, and on the level and composition of poverty and social exclusion at national and European Union levels (EU-SILC), and Regulation 215/2007, of 23 April 2008,<sup>257</sup> provides the list of target secondary variables relating to over-indebtedness and financial exclusion.<sup>258</sup>

In my opinion, the common view of consumers as manipulated, passive buyers of goods that capitalists produce to increase corporate profits does not fully depict the consumer's figure and needs to be questioned. New perspectives arose recently and should be considered. In a more pragmatic and realistic way, scholars devoted their attention to everyday consumption, and more specifically, to provisioning as the most frequent and probably the most important form of consumption. Social scientific investigations have, arguably, concentrated excessively on the *akrasia* of the consumer, on his/her musical taste, clothing fashion, private purchase of houses and vehicles, and the attendance at 'high' cultural performances like theatre and museums, to the exclusion of everyday food consumption, use of water and electricity, organisation of domestic interiors and listening to the radio. At very least, these activities appear to require a different approach and a different set of concepts to understand their social uses.<sup>259</sup>

Private consumption at household level forms an important part of everyday life.<sup>260</sup> The house, as a social space, also allows people to take part in creation and reproduction of meaning.<sup>261</sup> I propose now a closer look at this perspective.

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<sup>257</sup> OJ L. 062, p. 8.

<sup>258</sup> Already in 24 April 2002, in its Opinion on "Household over-indebtedness" (OJ C 149, p. 1), the Economic and Social Committee claimed that a Community-wide approach to the essential legal aspects of household over-indebtedness was absolutely vital to the single market's effective operation.

<sup>259</sup> See Jukka Gronow and Alan Warde, "Introduction", *Ordinary Consumption*, Routledge, 2001, at 4.

<sup>260</sup> Feeding, like most household work, is performed as direct service for family members, outside of cash-mediated relations, and is often experienced as freely given, out of 'love'. The family is a place where people expect to be treated as unique, personally specific way. Part of the work of feeding is to give this kind of individual attention, and doing so constitutes a particular household group as the kind of place we expect a 'family' to be. See Marjorie L. DeVault, *Feeding the Family - The Social Organization*

#### 1.4. Alternative conceptions: provisioning as a form of consumption

In his seminal book, *The Theory of Shopping*,<sup>262</sup> DANIEL MILLER claimed that the act of buying goods is mainly directed at two forms of ‘otherness’. The first of these expresses a relationship between the shopper and a particular other individual such as a child or a partner, either present in the household, desired or imagined. The second of these is a relationship to a more general goal which transcends any immediate utility and is best understood as a cosmological in that it takes the form of the values to which people wish to dedicate themselves.

Shopping may be primarily an act of love, which in its daily conscientiousness becomes one of the primary means by which relationships of love and care are constituted in practice. That is to say, shopping does not merely reflect love, but is a major form in which this love is manifested and reproduced.<sup>263</sup> Most shopping is directed to people other than the shoppers themselves.<sup>264</sup> Shoppers develop and imagine those social relationships which they most care about through the medium of selecting goods.

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*of Caring as Gendered Work*, UCP, 1991, at 85. About convenience and care, see also Alan Warde, *Consumption, Food and Taste*, SAGE, 1997, pp 126 ff.

<sup>261</sup> According to Bente Halkier “Routinisation or Reflexivity? Consumers and Normative Claims for Environmental Consideration”, in Jukka Gronow and Alan Warde (eds.), *Ordinary Consumption*, Routledge, 2001, at 27, this does not imply that everyday life analysis deals with a cosy micro sanctuary for social relations, characterised by closeness, familiarising and mutuality, resting in its own common sense taken for grantedness. On the contrary, late modern everyday lives are embedded in larger, ambivalent social dynamics, such as enhanced individualisation and enhanced institutionalisation. Among other things, these dynamics prompt more indefinite social processes, more compelling choice for the individual, and more dependency in mediated institutional dynamics.

<sup>262</sup> Daniel Miller, *A Theory of Shopping*, Polity Press, 1998.

<sup>263</sup> *Ibidem*, at p. 23, Miller clarifies that not every shopping practice is about love; there are other that are related more to selfishness, hedonism, tradition and a range of other factors. What the author claims, however, is that love is not only normative but easily dominant at the context and motivation for the bulk of actual shopping practice.

<sup>264</sup> See Daniel Miller, *ibidem*, p. 48. Annemarie Money, “Material Culture and the Living Room: The Appropriation and Use of Goods in Everyday Life”, (2007) 7 *Journal of Consumer Culture* 355, gives

MILLER's theory of shopping and sacrifice is presented through a division of both shopping and sacrifice in three stages.<sup>265</sup> The first stage comprises a vision of excess which is found primarily in the discourse rather than in the practice of shopping: it is argued that both the discourse of shopping and that of sacrifice represent a fantasy of extreme expenditure and consumption as dissipation. The second stage consists of the central rites of shopping and sacrifice, whose importance lies in their ability to negate these same discourses. The ritual is thereby turned instead towards the constitution of, and obeisance before, an image of transcendence. The core of this ritual is a splitting of the objects of sacrifice between that which is given to the deity and that which is retained for human consumption. An equivalent central ritual to shopping expeditions is found to be that which transforms a vision of spending into an experience of apparent saving. Subsequently there is a similar split in the forms of transcendence evoked during shopping. That which is implied in a general sense of thrift becomes the second stage, while that which is directed to an expression of love and other relationships becomes the third stage. During the third stage the emphasis moves to the dissemination of that which has been sanctified through its having passed through the rites of sacrifice, but which now returns to the sphere of the profane. While the second stage was directed towards a general transcendent goal of life established through thrift, in this final stage the social orders of this world are re-established.

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notice that it has long been argued that changes in family structure, changes in leisure pursuit and activities, the decline of community relations, and the impact of processes of industrialization and urbanization have resulted in a more insular society with people increasingly leading private lives centered on the home and the nuclear family. The home, therefore, and the material culture contained and displayed within it increasingly becomes the site for both the appropriation of the outside, public world and the representation of the private, inside world. More recently, on the centrality of relationships to modern life, and the centrality of material culture to relationships, see Daniel Miller, *The Comfort of Things*, Polity Press, 2008.

<sup>265</sup> According to Miller, *A Theory of Shopping*, Polity Press, 1998, pp 73-75, two principal arguments will be made for a relationship between sacrifice and shopping. The first will be based on the observation that both cases represent a key moment when the labour of production is turned into the process of consumption. In both cases the fear is expressed of mere mundane and materialistic consumption and the rituals are designed to ensure that goods are first used for reaffirming transcendent goals. The second link is at level of structure. It will be argued that there is a clear analogy between the main stages of sacrifice and shopping as devotional rites. Sacrifice is, ultimately, about constituting a relationship between those involved and a transcendent or sacred world.

A final parallel is drawn between shopping and sacrifice in that both are found to be practices whose primary goal is the creation of a desiring subject.<sup>266</sup> The purpose of shopping is not so much to buy things that people want, but to strive to be in a relationship with subjects that want these things. In both sacrifice and shopping the believer prefers to conceptualize the relationship from the opposite direction, that is, they merely provide for the given wants of their subjects. What the shopper desires above all is for others to want and to appreciate what she brings. Under this perspective, objects are the means for creating the relationships of love between subjects rather than some kind of materialistic dead end and which takes devotion away from its proper subject – other persons.

To sum up, according to MILLER, shopping is not about possessions *per se*, nor is it about identity *per se*. It is about obtaining goods, or imagining the possession and use of goods. Objects shall therefore be judged on their ability to objectify personal and social values and condemned when they fetishize or in some other way diminish those values. Commodities are, therefore, meaningful – they become to matter as means for constituting people that matter.<sup>267</sup> Within MILLER's discourse, consumption is conventionally aligned with the market, commerce and the family and pushed into the private sphere, opposed to the public spheres of the state and citizenship.<sup>268</sup>

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<sup>266</sup> The presence of goods is made manifest by the sense that they desire or demand sacrifice. The shopper is not merely buying goods for others, but hoping to influence these others into becoming the kind of people who would be appropriate recipients for what which is being bought. Sacrifice ensures that the very best of what society has produced is effectively and efficiently spent to obtain not merely mundane provisioning but the benefits of a relationship of love and devotion to a divine force. Sacrifice is held to transform what might otherwise have been merely acts of expenditure or consumption, and turn them into a primary means by which the transcendent is affirmed. The true act of sacrifice seems to be one that is directed as a devotional act to a devotional agent. To make an analogy with shopping the author demonstrates that shopping is a regular act that turns expenditure into a devotional ritual that constantly reaffirms some transcendent force, and therefore becomes a primary means by which the transcendent is constituted. See Daniel Miller, *ibidem*, p. 78.

<sup>267</sup> Daniel Miller, *ibidem*, p. 152.

<sup>268</sup> How families draw on communication forms and use marketplace resources to manage interplays among individual, relational and collective identities, see Amber M. Epp and Linda L. Price, "Family Identity: A Framework of Identity Interplay in Consumption Practices", (2008) 35 *Journal of Consumer Research*, p. 50-70.



MILLER's account of consumption as provisioning is of mostly importance for a full understanding of consumers' identity. Besides provisioning, however, other activities are relevant to oppose to a definition of consumer as manipulated and passive agents. A recent intellectual trend mainly takes into consideration that consumers buy products for political, ethical, and social reasons.<sup>269</sup> Because arenas for consumer choice are less distanced from our daily lives than public decision-making ones, they at times represent more intense struggles over public values and virtues than those involving the government sphere and political system. I would suggest a closer look at this trend, and how it blurs the distinction between private and public sphere.

### 1.5. Alternative conceptions: the political consumer

Political consumerism is a form of citizen engagement in politics.<sup>270</sup> It assumes a micro-politics where shopping is part of citizens' individualized way to take responsibility for shaping and creating the social and political environment in both private and public

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<sup>269</sup> Political consumerism capitalizes on the fact that the modern individual is usually a member of both worlds: of the economy as a consumer and of the polity as either an active politician or a more passive voter. See Boris Holzer, "Political Consumerism between Individual Choice and Public Action: Social Movements, Role Mobilization and Signalling", (2006) 30 *International Journal of Consumer Studies* 407. The political richness and intensity of the market as an arena for politics and consumer choice as a political tool can be explained in one other way. Political consumerism can be characterized as a pluralist activity because it has looseness and an indeterminacy that appeals to citizens who tend to find themselves marginalized and alienated from formal political settings. It has, thus, been and continues to be an important instrument for reinventing citizenship. See Michele Micheletti, *Political Virtue and Shopping, Individuals, Consumerism and Collective Action*, Palgrave Macmillan, 2003, p. 19.

<sup>270</sup> For historical roots of the contemporary political consumerism movement, see David Vogel, "Tracing the American Roots of the Political Consumerism Movement", in *Politics, Products, and Markets – Exploring Political Consumerism Past and Present*, Michele Micheletti, Andreas Follesdal and Dietlind Stolle (eds.), Transaction Publishers, 2004, pp 83 ff., and Frank Trentmann, "The Modern Genealogy of the Consumer, Identities, Meanings and Synapses", in John Brewer and Frank Trentmann, *Consuming Cultures, Global Perspectives*, Berg, 2006, p. 22. According to Lawrence B. Glickman, "The Strike in the Temple of Consumption: Consumer Activism and Twentieth-Century American Political Culture", (2001) 88 *The Journal of American History* 99-128, recent phenomena, including 'green consumerism', campaigns of a living wage, boycotts of companies that rely on low-wage workers, and the 'voluntary simplicity' movement, all suggest that the linking of consumption and political engagement was not an evanescent product of the radical thirties, but a significant and continuing, though frequently overlooked, feature of the political culture of the twentieth-century United States.

life,<sup>271</sup> under a strategy of creating power bottom-up. People, individually and/or collectively, use their shopping choices consciously to press for societal change.<sup>272</sup>

The phenomenon of consumer behaviour as political involvement and global responsibility-taking has been called consumer activism, ethical consumerism, and socially responsible investing.<sup>273</sup> Following MICHELE MICHELETTI, I will use the term political consumerism. It represents actions by people who make choices among producers and products with the goal of changing objectionable institutional or market practices. Their choices are based on attitudes and values regarding issues of justice, fairness, non-economic issues that concern personal and family well-being and ethical or political assessment or favourable and unfavourable business and government practice.

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<sup>271</sup> A distinction between ethical consumerism and anticonsumerism should be made. Ethical consumerism is a development of green consumerism (this is where people purchase or participate in goods or services which attempt to replace existing ones with something designed to be ‘friendlier’ and less damaging to ecosystems and natural planetary resources) which considers a variety of issues beyond a product’s green credentials, such as whether or not the manufacturer invests in the arms trade or has supported oppressive regimes. Though a comprehensive monitoring of the behaviour of modern business, ethical consumerisms aims to encourage trade to be as ‘fair’ and responsible as is possible within the current economic system. Anticonsumerism takes the view that the rich nations of the world are fundamentally damaging the planet and themselves in the pursuit of material acquisition. Rather than just buying green or ethically produced goods, different ways of living, trading and working are advocated in order to ‘live more lightly’ on the Earth and to be less dependent on buying things to feel good about ourselves. See Jonathan Purkis, “The City As a Site of Ethical Consumption and Resistance”, in Justin O’Connor and Derek Wynne (eds.), *From the Margins to the Centre*, Popular Cultural Studies, Arena, 1996, pp 209-210. Another way of expressing this is through Dobson’s distinction between environmentalism and ecologism. Green and ethical consumption are still really kinds of environmentalist managerialism, where the aim is to curb the worst excesses of capitalism and make it responsible without altering most of its basic structures. Ecologism, however, favours the construction of a society based around ecological balance and diversity, sustainable levels of production and consumption, and non-exploitative human relationships or power structures. Further, in Andrew Dobson and Derek Bell (eds.), *Environmental Citizenship*, MIT, 2006. How green consumers engage and identify on an everyday level with environmental issues, in John Connolly and Andrea Prothero, “Green Consumption: Life-politics, Risk and Contradictions”, (2008) 8 *Journal of Consumer Culture* 117-145.

<sup>272</sup> Michele Micheletti and Andreas Follesdal, “Shopping for Human Rights. An Introduction to the Special Issue”, in (2007) 30 *J. Consumer Policy* 172, and Allan C. Hutchinson, “Life after Shopping: From Consumers to Citizens”, in Iain Ramsay (ed.) *Consumer Law in Global Economy – National and International Dimensions*, Ashgate, 1997, p. 26.

<sup>273</sup> Roberta Sassatelli, “Virtue, Responsibility and Consumer Choice” in John Brewer and Frank Trentmann (eds.), *Consuming Cultures, Global Perspectives: Historical Trajectories, Transnational Exchanges*, Berg, 2006, p. 223.

People use their market choices as a means for political expression and as political action.<sup>274</sup> This development is related to two main abstract socio-political trends: the process of ‘individualization’, on the one hand, whereby social actors are increasingly reflexive about their everyday identities, values and actions, and, on the other, the process of ‘sub-politicization’, whereby politics is emerging in places other than the formal political arena (sub-politics) because citizens no longer think that traditional forms of political participation are adequate.

Political consumerism concerns the politics of products, power relations among people and choices about how resources should be used and allocated globally. As long as market choices reflect an understanding of market products as embedded in a complex social and normative context,<sup>275</sup> consumers become potentially important agents of political change. The political agency that develops from consumerism is therefore rooted in the integration of citizen concerns with consumer choices. Consumers view their choice of products in a political fashion, and citizens find that they can work on political causes in the marketplace. The political consumer or citizen-consumer is a responsibility-taking actor who sees market transactions as having interesting political potential.<sup>276</sup> Being so, the politics of consumer products<sup>277</sup> politicizes what we have

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<sup>274</sup> Michele Micheletti, *Political Virtue and Shopping, Individuals, Consumerism and Collective Action*, Palgrave Macmillan, 2003, p. 12.

<sup>275</sup> *Ibidem*, 3.

<sup>276</sup> *Ibidem*, p. 18. See also W. Lance Bennett, “Branded Political Communication: Lifestyle Politics, Logo Campaigns, and the Rise of Global Citizenship”, in *Politics, Products, and Markets – Exploring Political Consumerism Past and Present*, Michele Micheletti, Andreas Follesdal and Dietlind Stolle (eds.), Transaction Publishers, 2004, p. 104.

<sup>277</sup> A consequence of the political landscape changes – governance, globalization, individualization, postmodernization, and reflexive modernization - is that it is not possible to make sharp distinctions between politics, economics, and private life. This means that we as individuals cannot assume that we have taken sufficient responsibility for ensuring a good life and a sustainable future by voting in elections and paying fees to memberships associations. The complexities of contemporary life have broadened the meaning of the term political. Our everyday conduct crosses the divide between politics, economics, and private life and, as reflected in the footprint metaphor, this crossover is increasingly important for our understanding of politics. Michele Micheletti, *ibidem*, at 2.

traditionally conceived as private consumer choice and erases the division between the political and economic spheres. The market becomes an arena for politics.<sup>278</sup>

The translation of political concerns into the monetary logic of the economy is conceived through what HOLZER labelled ‘role mobilization’, that is, social movements turn the role sets of their supporters into transmission belts for political objectives, and by authoritatively communicating those objectives, they provide signals to producers, who otherwise would not know a great deal about their consumers’ preferences.<sup>279</sup>

The growth of ‘alternative’ or ‘ethical’, ‘critical’ or ‘political’ modes of consumer action – as manifested, for example, in the successful boycotting of global brands and chains, in the rising demand for organic food and fair trade,<sup>280</sup> or in the flourishing of

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<sup>278</sup> Already at the turn of the nineteenth century in the United States, for example, the National Consumer League promoted the so-called ‘White Lists’, a sort of labelling scheme which aimed at listing national companies that treated their employees fairly. Some campaigns have placed as emphasis on safety and the environment, such as the campaign against McDonald’s; others have instead concentrated on the conditions of labour, for example campaigns against Nike (about the treatment of the labourers who manufacture Nike shoes, see Robert Goldman & Stephen Papson, *Nike Culture*, SAGE, 1998, p. 9 and ff); others still have stressed environmental and humanitarian issues, as in campaigns against Nestlé’s distribution of artificial baby milk in Africa or the wider movement against GM foods. However, especially after the 1999 World Trade Organization protests in Seattle, which have worked as a catalyst and umbrella for a number of social and political movements concerned with ‘critical’ consumption, a variety of discourses about the ‘duty’ and ‘responsibilities’ of social actors *qua* ‘consumers’ have consolidated into an appealing and compelling narrative. Efforts to explicitly link consumption with the pursuit of moral and political aims have a long history. Further, in Roberta Sassatelli, “Virtue, Responsibility and Consumer Choice”, in John Brewer and Frank Trentmann (eds.), *Consuming Cultures, Global Perspectives: Historical Trajectories, Transnational Exchanges*, Berg, 2006, at 219. See also Michele Micheletti, *ibidem*, at 149.

<sup>279</sup> See Boris Holzer, “Political Consumerism between Individual Choice and Collective Action: Social Movements, Role Mobilization and Signalling”, (2006) 30 *International Journal of Consumer Studies*, at 405-415. The process ‘role mobilization’ involves, ‘first, a specific kind of “resource mobilization” that relies on the financial resources and social capital of potential movement participants, *i.e.*, their purchasing power and their entanglement in various role contexts. Second, it depends on a reasonably affluent social environment to provide an opportunity structure in which consumers make recurring choices between different and to some extent substitutable commodities. And third, it needs to legitimize the de-differentiation of roles so that movement participants can account for their sometimes unusual blurring of role boundaries, *e.g.*, if spending more on an environmentally sound commodity needs to be justified against a restricted budget or other money-spending opportunities’.

<sup>280</sup> See Torsten Steinrücken and Sebastian Jaenichen, “The Fair Trade Idea: Towards an Economics of Social Labels”, (2007) 30 *J. Consum. Policy* 201-217. For an historical analysis, see Frank Trentmann, “Before Fair Trade – Empire, Free Trade and Moral Economies of Food in the Modern World”, in *Food and Globalization – Consumption, Markets and Politics in the Modern World*, Alexander Nützenadel and Frank Trentmann (eds.), Berg, Oxford, 2008, pp 253 ff. Sarah Lyon recalls two negative trends of fair

symbolic initiatives against multinational companies or in favour of simpler lifestyles – is often taken as an example of what is widely portrayed as a bottom-up cultural revolution touching upon both everyday lifestyles and the nature of political participation.<sup>281</sup>

Political consumerism shows how our different spheres are interrelated and how our private lives and actions impact public concerns locally and globally.<sup>282</sup> It gathers self-interest and public interest in uncommon interpretations of political life in real life practice.<sup>283</sup> People are increasingly and explicitly asked to think that to shop is to vote

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trade: the reinforcement of producer-consumer differences and low levels of farmer participation in fair trade networks beyond the realm of commodity production. The author claims that overstating the exceptional nature of fair trade consumption may weaken the market's transformative potential. See "Evaluating Fair Trade Consumption: Politics, Defetishization and Producer Participation", (2006) 30 *International Journal of Consumer Studies* 452-464.

<sup>281</sup> Roberta Sassatelli, "Virtue, Responsibility and Consumer Choice", in John Brewer and Frank Trentmann (eds.), *Consuming Cultures, Global Perspectives: Historical Trajectories, Transnational Exchanges*, Berg, 2006, p. 221. A historical evolution of green consumerism and fair trade (le commerce de la solidarité) can be seen in Robert Rochefort, *La société des consommateurs*, Ed. Odile Jacob, 1995, pp 159 ff. Green attitudes and consumption styles can be regarded as a life-style-based expression of an individual consumer's concern about the state of the environment. See Leena Haanpää, "Consumer's Green Commitment: Indication of a Postmodern Lifestyle", (2007) 31 *International Journal of Consumer Studies* 479. Demonstrating that perceived psychological consequences of environment friendly behaviour, environment acknowledge and perceived seriousness of threats to the global environment are key determinants to environment friendly behaviour (and not environmental concern), see Alhassan G. Abdul-Muhmin, "Explaining Consumers' Willingness to Be Environmentally Friendly", (2007) 31 *Journal of Consumer Studies*, pp 237-247 and, on the ecological consumer's psychographic profile, see Elena Fraj and Eva Martinez, "Ecological Consumer Behavior: an Empirical Analysis", (2007) 31 *International Journal of Consumer Studies* 26-33. It should be borne in mind, however, that in environmental policy the focus on individual consumers is limited and thus needs to be problematized. See, for all, Johanna Moisander, "Motivational Complexity of Green Consumerism", (2007) 31 *International Journal of Consumer Studies* 404-409.

<sup>282</sup> Consumption practices, however, are also processes that tie individuals to larger systems of provision, linking private and public worlds. This has implications for the focus of what is at stake in considering the relationship between consumption and citizenship. It is the practices that shape public life, rather than the goods themselves or their symbolic value. Consumption practices depend on external conditions, including policy and infrastructures, but consumers, though their practices, also help to shape these systems – telecommunications, tourism and mobility, gas and water are obvious examples. In addition to openly political forms of action (such as boycotts or political mobilization), consumers through their everyday practices, consciously or unconsciously, leave an active mark on these larger social systems. Frank Trentmann, "Citizenship and Consumption", (2007) 7 *Journal of Consumer Culture* 155.

<sup>283</sup> Political consumerism is a controversial topic. It provokes social scientists because it signals that citizens are looking outside traditional politics and civil society for guidelines to help them formulate their more individualized philosophy of live and live as good citizens. It challenges our sense that money

and that ethical daily purchase, products boycotts and consumer voice may be the only way that men and women around the world have to intervene in the working of global markets.<sup>284</sup>

When the engaged consumer becomes the politicized citizen, it is no longer the state that is necessarily the primary and dominant actor in politics.<sup>285</sup> Rather, these tasks and responsibilities are often shared and coordinated in less conventional ways and through multilayered networks.<sup>286</sup> Politics is no longer the prerogative of the state and civil society traditionally conceived. A new kind of politics – subpolitics – is emerging from

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and morality cannot be mixed, as it is in green businesses, socially responsible, codes of conduct, and general trends toward corporate citizenship. Most important, it forces us to consider the role of the market in politics and the role of politics in the market. It challenges our traditional thinking about politics as centered in the political system of the nation-state and what we mean by political participation. Political consumers not only cross the border of the political and economic sphere in their action but also the public/private divide that separate people as political individuals (citizens) from private actors (consumers and family members). Politics can no longer be defined as the nation-state's authoritative distribution of values in society that is implemented either by force or by the legitimacy created by general popular agreement. Neither is politics delimited to the proceedings to the different branches of government, that is, the political system. Today politics goes deeper than the public debate over public decisions. It concerns interactions among different spheres and levels of live or what political scientists earlier referred to as the environment of the political system. Michele Micheletti, *Political Virtue and Shopping, Individuals, Consumerism and Collective Action*, Palgrave Macmillan, 2003, p. 3.

<sup>284</sup> See Daniel Miller, "Could Shopping Ever Really Matter?", in Pasi Falk and Colin Campbell (eds.), *The Shopping Experience*, SAGE, 1997, p. 32. The politics of consumption through the citizen consumer serves as a counterpart to the voter citizen, which elected government reflecting political preferences just as the market reflects consumer preferences. But there is much more to politics than voting. Arguably, much more goes on behind the scenes of electioneering and shopping than is revealed by them. See also Ben Fine, "Addressing the Consumer", in Frank Trentmann (ed.), *The Making of the Consumer: Knowledge, Power and Identity in the Modern World*, Berg, 2006, at 305, and Roberta Sassatelli, "Virtue, Responsibility and Consumer Choice", in John Brewer and Frank Trentmann (eds.), *Consuming Cultures, Global Perspectives: Historical Trajectories, Transnational Exchanges*, Berg, 2006, p. 220.

<sup>285</sup> Frank Trentmann (ed.), *The Making of the Consumer: Knowledge, Power and Identity in the Modern World*, Berg, 2006, p. 305. On the overlap and interaction of citizenship and consumption, see also Frank Trentmann, "Citizenship and Consumption", (2007) 7 *Journal of Consumer Culture* 148.

<sup>286</sup> Michele Micheletti, *Political Virtue and Shopping, Individuals, Consumerism and Collective Action*, Palgrave Macmillan, 2003, p. 6, and Andreas Follesdal, "Political Consumerism as Chance and Challenge", in *Politics, Products, and Markets – Exploring Political Consumerism Past and Present*, Michele Micheletti, Andreas Follesdal and Dietlind Stolle (eds.), Transaction Publishers, 2004, p. 9.

below that encourages, empowers and allow citizens to take more responsibility for their personal and collective well-being.<sup>287</sup>

In sum, according to MICHELETTI, there are five reasons that theoretically justify conceiving of consumption as politics. First, consumption is at times an access point or venue for people to express themselves politically. Consumption offer people a space (an arena) to work on their political issues and helps them exercise influence to solve their problems. Second, people can use consumption to set the political agenda of other actors and institutions and to pressure them to the negotiating tables. Third, consumption is politics because there is a politics of products that involves classical political issues about power relations and the allocation of values in society that are to large degree decided by private corporations. Fourth, consumption offers people market-based political tools like boycotts and ‘buycotts’.<sup>288</sup> Fifth, consumption is becoming more political because of political landscape changes and the increasing global presence of transnational enterprises.<sup>289</sup> MICHELETTI is developing the concept of individualized collective action to capture the essence of this form of citizen engagement that combines self-interest and general good.<sup>290</sup>

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<sup>287</sup> Michele Micheletti, *ibidem*, p. 9.

<sup>288</sup> Consumer boycotts put to political use the ideal of freedom, choice and the sovereign consumer given circulation by neoliberal discourse and policies. Frank Trentmann, “Citizenship and Consumption”, (2007) 7 *Journal of Consumer Culture*, p. 149. For a general analysis of market-oriented boycotts, see Monroe Friedman, “Using Consumer Boycotts to Stimulate Corporate Policy Changes: Marketplace, Media, and Moral Considerations”, in *Politics, Products, and Markets – Exploring Political Consumerism Past and Present*, Michele Micheletti, Andreas Follesdal and Dietlind Stolle (eds.), Transaction Publishers, 2004, p. 47-50.

<sup>289</sup> According to Micheletti, a second view of political engagement, the private virtue tradition of politics, can also be found in the phenomenon of political consumerism. Its point of departure is the realization of self-interest. Here self-oriented consumers buy certain products over others to solve what we may call private problems. Many social scientists are uncomfortable with accepting this private virtue tradition of politics. They argue that it legitimizes the role of self-interest in politics, a development that they believe has negative consequences for democracy. Michele Micheletti, *Political Virtue and Shopping, Individuals, Consumerism and Collective Action*, Palgrave Macmillan, 2003, p. 20.

<sup>290</sup> Michele Micheletti, *ibidem*, p. 25. With these words, she wants to make a clear theoretical distinction between citizen-prompted, citizen-created action involving people taking charge of matters that they themselves deem important in a variety of arenas (individualized collective action) and conventional

Political consumerism is not beyond criticism. First, it would be mistaken always to attribute a deliberately political finality to consumer choices. Second, it is debatable whether all practices of consumption are indeed conducted by social actors who self-reflexively constitute themselves as consumers. Third, there are a number of other reasons why it is important to problematize the equation between alternative and critical consumerism and political action. A conspicuous problem has to do with the fact that different practices which are usually collected under this banner are fragmented and potentially conflicting (for example, the demand for organically grown vegetables typically mixes private health concerns with some degree of environmental consciousness and stems from diverse sources, from a large vegetarian movement as well as health-conscious or gourmet carnivores), thus rendering rather difficult the formation of viable collective identities and initiatives.<sup>291</sup> Finally, considering

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definitions of political engagement, involving taking part in structured behaviour already in existence and oriented toward the political system per se (collectivist collective action, political participation). While individualized collective action occurs in a variety of settings and more spontaneously, political participation is involvement that takes place in a given arena and in accordance with a given mode of activity and given agenda. The concept of individualized collective action reflects the political landscape changes of postmodernization, risk society and globalization. These landscape changes imply that citizens must juggle their lives in situations of unintended consequences, incomplete acknowledge, multiple choices and risk-taking. Political engagement and citizenship is, thus, a task that people must deal with on an increasingly individual basis. It is not laid out as in the first modernity (industrial society and nation state dominance) in which citizens define themselves more directly in terms of established institutions and social positions. Individualized collective action is the practice of responsibility-taking for common well-being through the creation of concrete, everyday arenas on the part of citizens alone or together with others to deal with problems that they believe are affecting what they identify as the good life. Individualized collective action involves a variety of different methods for practicing responsibility-taking including traditional and unconventional political tools. About individual collective action as an instance of 'everyday resistance' against representative politics, and its persistence in the history of political thought, see Simon Tormey, "Consumption, Resistance and Everyday Life: Ruptures and Continuities", (2007) 30 *Journal of Consumer Policy* 263-280.

<sup>291</sup> According to Roberta Sassatelli, "Virtue, Responsibility and Consumer Choice", in John Brewer and Frank Trentmann (eds.), *Consuming Cultures, Global Perspectives: Historical Trajectories, Transnational Exchanges*, Berg, 2006, pp 224-225, this clearly shows 'the extent to which alternative consumer practices, with all the ordinariness which accompanies daily consumption, cannot be easily translated as "means" of political participation. They can be easily absorbed by the market precisely because they are often routine and polysemic practices situated within the market. Ethical and political dimensions are perhaps now entering the market more explicitly than at previous times, but this does not mean that purchase decisions become a form of political practice *tout court*, a practice which subjectively and institutionally targets the functioning principles of the entire economic and political system. (...) This does not mean that ethical claims can be easily used in a pure instrumental fashion, as ethical oriented consumers may demand proof of standards and may pressure companies much further than expected. But it does suggest that it is unrealistic to imagine that there is a simple demand/supply relation between consumers and producers'.



consumption as politics, as a new but powerful means of political participation, we may underestimate the role that the political has to play in translating ordinary practices into politically consequential ones and lose sight of the politics of consumption, ranging from social distinction to the realization of intimate aesthetic experiences.<sup>292</sup> However, political consumerism emphasizes that consumption can unequivocally be a way of political action.

The above-analysed approaches to the consumer (the *homo economicus*, the manipulated and passive consumer, the everyday household provider and the political consumer) should, in my opinion, be treated as integrative and interrelated rather than as alternatives or exclusionary. They are all rooted in a multi-variable essence of the consumer. A full depiction of that figure cannot be obtained without taking into account all those distinct but essentially interrelated aspects.

The next step in my inquiry is, then, to pinpoint how much the concept of property - an immediate power of control over a thing that is enforceable as against everybody, and comprises both a variety of contextual relationships among individuals and objects of social wealth, among individuals themselves, and among individuals and the state- has changed to adapt itself to the complex demands of multi-shaped individuals/consumers.

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<sup>292</sup> Roberta Sassatelli, "Virtue, Responsibility and Consumer Choice" in John Brewer and Frank Trentmann (eds.), *Consuming Cultures, Global Perspectives: Historical Trajectories, Transnational Exchanges*, Berg, 2006, pp 225-226, argues that it would be mistaken to simply suppose that the 'consumer' now realizes a new 'global citizenship', working on pure universalistic, cosmopolitan and humanitarian goods. Political charged consumer actions often have a national orientation, being entangled in national public debates, rather than representing a real form of transnational citizenship embedded in a global public discourse. A global humanitarian consumer-citizenship may also require further economic disembedding, as it commands growth rates and volumes for green and ethical products which are at odds with small-scale local production.

## 2. Consequences on the concept of property

Property rights in their various forms structure our daily lives, our human relationships, and our assurance of human survival.<sup>293</sup> They dictate our ability to both realize our dreams and avoid our fears.<sup>294</sup> As I have claimed at the beginning of this chapter, how property must be conceived and fulfil the function normatively ascribed to it should be understood in the context of contemporary society.

People's involvement with material culture is such that mass consumption infiltrates everyday life not only at the levels of economic processes, household structures, and social activities, but also at the level of meaningful psychological experience – affecting the construction of identities, and the formation of relationships.<sup>295</sup> As a consequence, consumer society constitutes the enabling context within which people work out their

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<sup>293</sup> The ethnological universal called 'property' should include both tangible property and intellectual property. The particular concrete and legal economic shape of goods to be protected under the shelter of the concept of property must lead to different modes of thought or cultural circumstances. In this sense, they are meta-concepts and meta-values. See Wolfgang Fikentscher, "Intellectual Property and Competition – Human Economic Universals or Cultural Specificities? – A Farewell to Neoclassics", (2007) 2 *IIC* 137-165.

<sup>294</sup> Laura S. Underkuffler notices in "Property as Constitutional Myth: Utilities and Dangers", (2006) 92 *Cornell L. Rev* 1248, how the mythical belief about the nature of the right to property protection is rooted in a deep human psychological need: '[w]e believe that property rights are free-standing, individually protective, and socially acontextual because we want to - we need to - believe this myth'.

<sup>295</sup> See Stuart Ewen, "Marketing Dreams", in Alan Tomlinson (ed.), *Consumption, Identity, & Style: Marketing, Meanings and the Package of Pleasure*, Routledge, 1990, p. 52. Also Peter L. Lunt and Sonia M. Livingstone, *Mass Consumption and Personal Identity, Everyday Economic Experience*, OUP, 1992, p. 24. More recently, Matt Gottdiener, "Approaches to Consumption: Classical and Contemporary Perspectives", in *New Forms of Consumption, Consumers, Culture and Commodification*, Mark Gottdiener (ed.), Rowman & Littlefield, 2000, 23. According to Mary Douglas, *Thought Styles, Critical Essays on Good Taste*, SAGE, 1996, pp 104 and 112, the shopper is not expecting to develop a personal identity by choice of commodities: that would be too difficult. Shopping is an agnostic struggle to define not what one is, but what one is not. Modern identities are constituted through our relationship with the symbolic world of consumption rather through our relationship with the material world. The basic choice is not between kinds of goods, but between kinds of society, and, for the interim, between the kinds of position in society that are available to us as we line up in the debate about transforming society.

personal and social identities.<sup>296</sup> Consumerism provides the primary arena within which citizens of contemporary Western societies conduct their everyday lives.<sup>297</sup>

Consumption, while a particular field of practice in everyday sociality, combines the satisfying of needs with expressions of identity.<sup>298</sup> Consumption is thematized as the primary realm of self-construction, offering material for both its personal and social dimensions and for both sides of individuation – as separation and distraction and as the self-completion (introjective self-fulfilment).<sup>299</sup> Products are used to achieve personal purposes, to fulfil internal psychological and emotional needs or objectives. Buying is a purposive activity that reflects the measurement of what a satisfactory life involves.<sup>300</sup> Due to its cultural character and the aestheticizing process it sustains, consumption is a major medium for the flow of signs. Signs are tools in the process of social interaction, rather than compelling forces in their own right. Although goods have sign value, that

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<sup>296</sup> The understanding of consumption and the consumer in terms of material systems of provision and cultural systems around specific commodities reflects two different stances: first, the heavy dependence of contemporary consumption upon (capitalist) commodity production and the need to understand the latter in comprehending the distinctiveness of non-commodity consumption. See Ben Fine, “Addressing the Consumer”, in Frank Trentmann (ed.), *The Making of the Consumer: Knowledge, Power and Identity in the Modern World*, Berg, 2006, pp 301-302.

<sup>297</sup> Steven Miles, *Consumerism – As a Way of Life*, SAGE, 1998, p. 147-148, identifies the ‘consuming paradox’: the idea that while, on one hand, consumerism appears to offers us individuals all sorts of opportunities and experiences, on the other hand, as consumers we appear to be directed down certain predetermined routes of consumption which ensure that consumerism is ultimately as constraining as it is enabling.

<sup>298</sup> Bente Halkier, “Routinisation or Reflexivity? Consumers and Normative Claims for Environmental Consideration”, in Jukka Gronow and Alan Warde (eds.), *Ordinary Consumption*, Routledge, 2001, p. 27.

<sup>299</sup> Pasi Falk, *The Consuming Body*, SAGE, 1994, pp 10 and 144.

<sup>300</sup> Peter N. Stearns, *Consumerism in World History, The Global Transformation of Desire*, Routledge, 2001, p. 21. According to John O’Shaughnessy, *Why People Buy?*, OUP, 1987, p. 11, acquiring goods is motivated and directed by the belief that the consequences of buying make life much happier. It is one reason why advertising focuses on consumer experiences and satisfactions with the product rather than on the product itself. The trademark, born with the Industrial Revolution, is an indispensable means of evaluation for the consumer. Its current economic and commercial importance is the result of the development of mass production, distribution and consumption; it flourishes in an advanced market economy, for it permits the mass commercialization of goods. See, v.g., Vito Mangini, “Competition and Monopoly in Trademark Law: An EEC Perspective”, (1980) 5 *IIC* 592.

value is used as a vehicle for the core activities of consumption; but signs are also used as modes of self-expression and in the battle for social position.<sup>301</sup> Consumption allows objects, identities and markets to be constantly redefined, recontextualized and renewed, in an aestheticized everyday life.<sup>302</sup>

Consumption is a kind of metalanguage by which we communicate: consumption establishes our choices. Individuals constitute themselves in a performatively referential manner, according to the individuality and action plans which they want socially to communicate.<sup>303</sup> Hence, the performative meaning of consumption should be recognized. It is a communicative presupposition that channels our messages, according

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<sup>301</sup> See Matt Gottdiener, "Approaches to Consumption: Classical and Contemporary Perspectives", in *New Forms of Consumption, Consumers, Culture and Commodification*, Mark Gottdiener (ed.), Rowman & Littlefield, 2000, p. 26. Often highly valorized signs, such as designer clothing or high-status cars, also possess the most exchange value. In this way, both wealth and status interact.

<sup>302</sup> See Mike Featherstone, *Undoing Culture - Globalization, Postmodernism and Identity*, SAGE, 1995, p. 67. According to Ben Fine and Ellen Leopold, *The World of Consumption*, Routledge, 1993, pp 60-61, commodities are increasingly perceived to be taking on the attributes that are ascribed to them by individual attitudes. Put the commodity in front of the mirror and what stares back is a lifestyle or some other flavour in the mouth. Although consumption goods and processes always have cultural meaning, under consumer culture those meanings become essential raw material both for producers to use for increased sales and for consumers to use to negotiate their identities, aspirations and choices. The 'meanings of things' become the site of enormous specialist labour by designers, advertisers, sales forces, the media and leisure industries, labour which is directed towards moulding these meanings in the direction of increasing sales, engaging wider or larger consumer constituencies, and building synergies between products (such as though lifestyle concepts spread across different markets and media). In this sense, see Don Slater and Fran Tonkiss, *Market Society, Markets and Modern Social Theory*, Polity, 2001, p. 185.

<sup>303</sup> Don Slater and Fran Tonkiss, *idem*, p. 184, consider that market society is corrosive of stable social hierarchies that ascribe identities to individuals; instead consumer culture both embodies market society's promises of egalitarian and socially mobile identity while at the same time destabilizing status systems. We are incited to construct our identities through the assemblage of commodities into personal lifestyles or shared subcultures or communities of taste.

to a grammar, syntax and a system of rules of its own.<sup>304</sup> Therefore it constitutes a way to maximise the self, improving the personal and social potential of the individual.<sup>305</sup>

As ERVING GOFFMAN described, when an individual enters the presence of others, they commonly seek to acquire information about him and to bring into play information about him already possessed. They will be interested in his general socio-economic status, his conception of self, his attitude towards them, his competence, his trustworthiness, etc.. Although some of this information seems to be almost an end in itself, there are usually quite practical reasons for acquiring it. Information about the individual helps to define the situation, enabling others to know in advance what he will expect of them and what they may expect of him. Informed in these ways, the others will know how best to act in order to call forth a desired response from him.<sup>306</sup>

To the self-consciousness performing self, the only reality is the identity he can construct out of consumption. Consumption, nowadays, is clearly a way of communication and a sort of language. Beyond bare needs, the key goals in the decision to acquire and use property are indeed social, namely, signal to others the consumer's rank, values, and preferred self-image.<sup>307</sup>

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<sup>304</sup> Gianpaolo Fabris, *Il nuovo consumatore: verso il postmoderno*, FrancoAngeli, Milano, 2003, p. 18. Erving Goffman, *The Preservation of Self in Everyday Life*, Penguin Books, 1959, p. 40, explains that while in the presence of others, the individual typically infuses his activity with signs which dramatically highlight and portray confirmatory facts that might otherwise remain unapparent or obscure. For, if the individual's activity is to become significant to others, he must mobilize his activity so that it will express during the interaction what he wishes to convey.

<sup>305</sup> John O'Shaughnessy, *Why People Buy?*, OUP, 1987, p. 13-14, gives note that to want a particular product is to have a disposition toward using, consuming, or possessing that product. Wants are always identified in terms of a disposition to some action. Wants express goals since goals subsume wants. Wants express goals in the sense that we can the preferred life vision in the want itself. Desires and some needs are special types of wants. A desire is a want which an individual is acutely aware of not having realized, while a need is a want that is a basic requirement or a universal want such as the need for food.

<sup>306</sup> Erving Goffman, *The Preservation of Self in Everyday Life*, Penguin Books, 1959, in "Introduction".

<sup>307</sup> John O'Shaughnessy, *Why People Buy?*, OUP, 1987, p. 10. Even though for a theoretical point of view human actors encode things with significance, from a methodological point of view it is the things-in-motion that illuminate their human and social context. Consumption is eminently social, relational, and active rather than private, atomic, or passive. This means looking at consumption as a focus not only for

As IGOR KOPYTOFF distinguished,<sup>308</sup> in small-scale societies, a person's social identities are relatively stable and changes in them are normally conditioned more by cultural rules than by biographical idiosyncrasies. The drama in an ordinary person's biography stems from what happens within the given status. It lies in the conflicts between the egoistic self and the unambiguous demands of given social identities, or in conflicts arising from interaction between actors with defined roles within a clearly defined structured social system. In complex societies, by contrast, a person's social identities are not only numerous but often conflicting, and there is no clear hierarchy of loyalties that makes one identity dominant over the others. Here the drama of personal biographies has become more and more the drama of identities – of their clashes, of the impossibility of choosing between them, of the absence of signals from the culture and the society at large to help in the choice. The drama, in brief, lies in the uncertainty of identity.<sup>309</sup>

Similarly, in small-scale societies, the status of things in the clearly structured system of exchange values and exchange spheres is unambiguous. An eventual biography of a thing is for the most part one of events within the given sphere. Any thing that does not fit the categories is clearly anomalous and is taken out of normal circulation, to be either sacralised or isolated or cast out.

What one glimpses through the biographies of both people and things in these societies, above all, is the social system and the collective understanding on which it rests. The postmodern individual is split between a multitude of social masks and linguistic

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sending social messages, but for receiving them as well. See Arjun Appadurai, "Introduction: Commodities and the Politics of Value", in Arjun Appadurai (ed.), *The Social Life of Things, Commodities in Cultural Perspective*, CUP, 1986, p. 31.

<sup>308</sup> Igor Kopytoff, "The Cultural Biography of Things: Commoditization as Process", in Arjun Appadurai (ed.), *The Social Life of Things, Commodities in Cultural Perspective*, CUP, 1986, pp 64 ff.

<sup>309</sup> If the modern problem of identity was how to construct an identity and keep it solid and stable, the postmodern 'problem of identity' is primarily how to avoid fixation and keep the options open. In the case of identity, as in other cases, the catchword of modernity was creation; the catchword of postmodernity is recycling. See Zygmunt Bauman, "From Pilgrim to Tourist – or a Short History of Identity", in Stuart Hall and Paul du Gay (eds.), *Questions of Cultural Identity*, Sage, 1996, p. 18

constructs. The analysis of the individual as a whole has been replaced by the examination of individuals acting in each of their social roles; at each moment of their lives; in each of the facets of their individuality. The inner subject was decentred; a holistic investigation of individuals has instead to take into account the multiplicity of his fragmented aspects.<sup>310</sup> In complex societies, an eventual biography of a thing becomes the story of the various singularizations of it, of classifications and reclassifications, in an uncertain world of categories whose importance shifts every minor change in context. As with persons, the drama here lies in the uncertainties of valuation and of identity.<sup>311</sup>

Individual decisions concerning what to acquire, how to acquire, how to use a thing, are generally part of some overall consumption system or lifestyle, rather than an isolated event. The problem for the consumer is not identifying expressions of preferred life vision, but determining an overall lifestyle or consumption pattern that represents an acceptable specification of goals.<sup>312</sup> Within our consumer society there are three general arenas in which style plays a conspicuous role.<sup>313</sup> First, style has become a pivotal factor in definitions of the self (*e.g.* style is a way of stating who one is; is a device by which we judge others). Second, style has a major impact on the way we understand society (social institutions are continually mediated by the mirages of style). And third, style has come to comprise a basic form of information within our society (style is a

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<sup>310</sup> Personality certainly involves freedom from determination by inclination. However, it no less essentially contains the positive feature of being an owner, namely, being an agent whose specific utility is due to the exercise of will that has given itself an external embodiment consonant with that of others. Although this is true of all property relations, being an owner has its own minimal determination that is distinct from the other derivative modes of ownership that presupposes and incorporates it. Richard Dien Winfield, "With What Must Ethics Begin? Reflections on Benson's Account of Property and Contract", (1989) 11 *Cardozo L. Rev.* 543.

<sup>311</sup> Igor Kopytoff, "The Cultural Biography of Things: Commoditization as Process", in Arjun Appadurai (ed.), *The Social Life of Things, Commodities in Cultural Perspective*, CUP, 1986, pp 89-90.

<sup>312</sup> Consumer wants form a coordinated system that is shaped by what the consumer believes to be a desirable and feasible way of life that reflects the preferred life vision. See John O'Shaughnessy, *Why People Buy?*, OUP, 1987, pp 13-14.

<sup>313</sup> Stuart Ewen, "Marketing Dreams", in Alan Tomlinson (ed.), *Consumption, Identity, & Style: Marketing, Meanings and the Package of Pleasure*, Routledge, 1990, p. 43-44.

powerful element of consciousness about the world we inhabit). Since style became a basic form of information, people increasingly define themselves according to their style of living.<sup>314</sup>

Lifestyles and personal interests function as a marker of identity and as a means to connect with others. Nowadays people increasingly relate to each other through commonly held consumption practices such as their preferences in sports, vacations, music, films, restaurants, and not the least, modes of shopping itself.<sup>315</sup>

More correctly, the pursuit of distinctive lifestyles through consumption represents a means of developing a sense of self and of actualizing this identity politics.<sup>316</sup> Developing new lifestyles is an act of pure creation and should be set in relation to the ability of the groups to create themselves. MICHEL MAFFESOLI puts forward the tribal paradigm. This paradigm is opposed to an organization in which the individual can be sufficient by himself; the group can be understood only within a whole. This is an essentially relationist perspective, grounded on a resurgence of group belonging.<sup>317</sup> The concept of belonging has also become increasingly complex in society. People develop their identities through belonging – to family, friend, religion, racial, gender, cohort, and class groups, and lifestyles. Neotribes arise from the individuals' acts of self-

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<sup>314</sup> *Ibidem*, p. 52.

<sup>315</sup> Matt Gottdiener, "Approaches to Consumption: Classical and Contemporary Perspectives", in *New Forms of Consumption, Consumers, Culture and Commodification*, Mark Gottdiener (ed.), Rowman & Littlefield, 2000, p. 21.

<sup>316</sup> Matt Gottdiener, *ibidem*, p. 22. According to Anthony Giddens, *The Class Structure of the Advanced Societies*, Hutchinson, London, 1973, Marx and Weber together provide the essential conceptual tools for analysing contemporary class structures, namely the economic factors that give rise to classes: the ownership of property and the possession of knowledge and physical labour power. The class system of modern capitalism is an impersonal and relatively open one, and provides the context in which the idea of classlessness may exert a powerful influence. For criticism, see Stephen Edgell, *Class*, Routledge, 1993, pp 83 ff.

<sup>317</sup> Michel Maffesoli, *The Time of the Tribes, The Decline of Individualism in Mass Society*, SAGE, 1996, p. 97, explains that the saturation of the principle of individuation and the increasing development of communication may give rise to the belief that the multiplication of micro-groups can only be understood in an organic context. Tribalism and massification go hand in hand.



definition in a search for identity. Allegiances are formed to particular styles of life in a world of belonging that exists at a lower social level than the formal institutions of society, such as religion, work, and politics, or even the generic categories of race, gender, and class.<sup>318</sup> The lifestyles that mark neotribes are formed by a postmodern culture that mixes many influences – the media, fashion, local customs, loosely articulated political ideologies, styles of consumption, and friendship networks.<sup>319</sup>

Within the sphere of tribal proximity, just as in the organic mass, there is ever greater recourse to the mask. The further individuals proceed masked, the more the community bonds are strengthened. Indeed, in a circular motion, in order to recognize oneself, symbolism is required, that is, duplicity, which in turn engenders recognition. According to MAFFESOLI, it becomes possible to explain the development of symbolism, in its various guises, which we can observe around us today: ‘[t]he social is based on the rational association of individuals having a precise identity and an autonomous existence; as to sociality, it is founded on the fundamental ambiguity of symbolic structuring.’

In this process of the aestheticization of the self, meaningful individual identity and lifestyle are made up out of market choices, inspired by pragmatic considerations oriented to personal preferences. Property is traced back axiologically to a constellation of (social) preferred values and empirically to the effectiveness of a technical social rule. The only way for a person to be individualized is through consumption - modern individualism takes the form of consumption.<sup>320</sup>

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<sup>318</sup> Matt Gottdiener, “Approaches to Consumption: Classical and Contemporary Perspectives”, in *New Forms of Consumption, Consumers, Culture and Commodification*, Mark Gottdiener (ed.), Rowman & Littlefield, 2000, p. 24.

<sup>319</sup> Matt Gottdiener, *ibidem*, pp 22-23.

<sup>320</sup> Within contemporary culture, the term ‘lifestyle’ connotes individuality, self-expression, and a stylistic self-consciousness. One’s body, clothes, speech, leisure, eating and drinking preferences, home, car, choice of holidays, etc. are to be regarded as indicators of the individuality of taste and sense of style of the owner/consumer. See Mike Featherstone, *Consumer Culture and Postmodernism*, SAGE, 1991, p. 83. According to Scott Lash and John Urry, *Economies of Signs & Space*, SAGE, 1994, p. 61: ‘[w]hole

When individuals become a complex and endless signplay of meanings and order, consumption allows for endless reformation of individual personality and its symbolic aspect.<sup>321</sup> Consumerism compensates for change, and also sustains further change in the interests of apparent personal fulfilment and new forms of identity.<sup>322</sup>

Consumption is above all contextual; it means that the thing is not only located in specific circumstances but that these are associated with particular and variable meanings to the consumer. It cannot go unnoticed, however, that individuals are not only passive victims of signs and meanings. Rather, they constitute themselves as dynamic mediators of meanings. Individuals receive signs and meanings through and from goods, but they constitute a personal and social identity therefrom. As such, consumption while an instrument of individual individuality building, acquires a heuristic status; it offers a guide for (re)constructing the network of individual discourse. By saying so, I am departing from GRANT MCCRACKEN's proposal, but I will arrive at a different solution.

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areas of lifestyle and consumer choice are freed up and individuals are forced to decide, to take risks, to bear responsibilities, to be actively involved in the construction of their own identities for themselves, to be enterprising consumers. It is these processes which are largely responsible for the shift to extremely small batch production in goods and services; for the proliferation of advanced consumer services which provide professional help (and 'expert systems') to de-traditionalized individuals; and the semioticization of consumption whose increasingly symbolic nature is ever more involved in self-construction of identity'. See also Pietro Barcellona, *Diritto privato e società moderna*, Jovene Editore, Napoli, 1996, p. 223.

<sup>321</sup> See Neala Schleuning, *To Have and To Hold - The Meaning of Ownership in the United States*, Praeger, 1997, p. 130, for criticism on the destabilization, constant change, and an inordinate preoccupation with the self, of consumer personality. About the continuous character of individual self-construction, from the ontogenic scene to social interaction (as a complex of relations between subjects and objects), see Pasi Falk, *The Consuming Body*, SAGE Publications, 1994. There is no such thing as a fully developed individual self coming out of the 'ontogenic tube'. This is because the modern conditions of social existence demand a continuous reconstruction of one's self. Secondly, the general principles underlying the formation of both 'personal' and 'social' identities are fundamentally the same, which means that the 'social' is already present in the 'personal' and vice-versa.

<sup>322</sup> Peter N. Stearns, *Consumerism in World History, The Global Transformation of Desire*, Routledge, 2001, p. 138. According to Scott Lash and John Urry, *Economies of Signs & Space*, SAGE, 1994, p. 57, inasmuch as consumption has taken on heightened significance in contemporary identity-building, choice here should not be understood in a simple utilitarian sense.

In MCCRACKEN's proposal,<sup>323</sup> meaning is usually drawn from a culturally constituted world and transferred to the consumer goods. It is then drawn from the object and transferred to the individual consumer. There are, in other words, three locations of meaning: the culturally constituted world, the consumer good, and the individual consumer, as well as two moments of transfer: world-to-good and good-to-individual. The original location of the meaning that resides in goods is the culturally constituted world. This is the world of everyday experience in which the phenomenal world presents itself to the senses of the individual, fully shaped and constituted by the beliefs and assumptions of his or her culture. To become resident in consumer goods, meaning must be disengaged from the world and transferred to goods. The institutions of advertising and fashion system are now used as instruments of transfer. This meaning, now resident in consumer goods, is transferred from goods to consumer. Reference must be made to another set of instruments of meaning transfer; all of them appear to qualify as special instances of 'symbolic action'.

According to MCCRACKEN, symbolic action, or ritual, as it is more conventionally called, is a kind of social action devoted to the manipulation of the cultural meaning for purposes of collective and individual communication and categorization. Ritual is an opportunity to affirm, evoke, assign, or revise the conventional symbols and meanings of the cultural order. Ritual is to this extent a powerful and versatile tool for the manipulation of cultural meaning. When meaning comes finally to rest in the consumer, it has completed its journey through the social world. This meaning is used to define and orient the individual in ways that we are only beginning to appreciate. It is clear that individuals in this culture have an enormous freedom in the meaning they seek to draw from goods. One of the ways individuals satisfy the freedom and responsibility of self-definition is through the systematic appropriation of the meaningful properties of

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<sup>323</sup> Grant McCracken, *Culture and Consumption, New Approaches to the Symbolic Character of Consumer Goods and Activities*, Indiana University Press, 1990, pp 72-88.

goods. Indeed, it serves us well to see consumers as engaged in an ongoing enterprise of self-creation.<sup>324</sup>

In my opinion, the MCCracken scheme is incomplete. The author did not take into consideration that meaning does not rest as such in the consumer. On the contrary, meaning is mediated by the consumer, in a *poesis* of personal and social identity. Consumption, as a special code, operationalizes individual messages. Individuals also constitute their identities out of goods. While an instrument of individuality building, consumption allows the construction and communication of the individual discourse. In people's everyday praxis, objects enter into complex systems of social categories which are established and negotiated through the social interaction between people.<sup>325</sup> The final location of meaning is, thus, social. The fixation of social meaning is established through interpretations made by consumers in contexts. Consumer goods are embedded in complex intertextual patterns, which in turn interact with the practices and communities of everyday life, where actors attempt to harmonize their own interpretations according to the negotiation of shared cultural meanings. Individual citizens participate in a plurality of social belongings with clear rules for interpretation and action in different relations and situations.

The individual, thus, plays a role as the intermediary between goods and creation of wealth. The way consumption goods create wealth must be understood in relation to the individual and his personal identity. Ownership of consumption goods does not lead to wealth *per se* because these goods are not, by nature, collectable. On the contrary, wealth is produced only in an indirect and mediated way: by improving the personal

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<sup>324</sup> I am following Grant McCracken, *Culture and Consumption-New Approaches to the Symbolic Character of Consumer Goods and Activities*, Indiana University Press, 1990.

<sup>325</sup> The turn to everyday life recognizes that the 'cultural', or what is meaningful to people, can be found wherever there is communication and social interaction. Hence, culture arises through people's hermeneutic praxis. Continuous cultural praxis both presuppose and create more or less structured webs of significance – that is, interpretative communities. See Andre Jansson, "The Mediatization of Consumption: Towards an Analytical Framework of Image Culture", (2002) *Journal of Consumer Culture* 9.

and social potential of the individual.<sup>326</sup> The individual mediates the wealth-value of the thing.<sup>327</sup> One cannot be a self on one's own. One is a self only in relation to certain interlocutors: in one way in relation to those conversation partners who are essential to the achievement of self-definition; in another in relation to those who are crucial to the continuing grasp of languages of self-understanding. A self exists only in what CHARLES TAYLOR labelled 'webs of interlocution'; and property constitutes in itself an interlocutory means.<sup>328</sup>

As pointed out by SLATER and TONKISS,<sup>329</sup> the skills and capital required of the overgrowing ranks of knowledge workers and cultural intermediaries are quite close to the self: to succeed in these fields requires presenting *oneself*, not merely one's material labour power, as a commodity in the labour market, a development exacerbated by the increasing prevalence of short-term contracts, subcontracting, self-employment. Being a knowledge worker or cultural intermediary requires aestheticized work on the self and its presentation; being either kind of worker also implicates one in taste structures and relations to culture as a worker which spill over into one's relationship to culture as a consumer. Hence if postmodernization has become a recognizable feature of modern marketing and consumption, this is at least partly attributable to the way in which knowledge workers and cultural intermediaries market goods to themselves as consumers, or 'virtual consumers' constructed in their own image.

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<sup>326</sup> According to Neala Schlenning, *To Have and To Hold-The Meaning of Ownership in the United States*, Praeger, 1997, the modern philosophy of consumer ownership was characterised by four main ideas: the emergence of a radical individualism based on a cult of the personality; a foregrounding of the emotional and psychological connection to property creating a cult of desire linked closely to ideas of freedom; a shift to viewing property as having value through exchange; and a consumer ethic based on the right to unlimited individual wealth, the imperative to consume, and an unrestrained growth in the economy as a whole.

<sup>327</sup> As noted by Scott Lash and John Urry, *Economies of Signs & Space*, SAGE, 1994, p. 15, the consumer takes on the role of agent of aestheticization or of banding. For example, the tourist consumes services and experiences by turning them into signs, by doing semiotic work of transformation.

<sup>328</sup> Charles Taylor, *Sources of the Self, The Making of the Modern Identity*, HUP, 1989, p. 36.

<sup>329</sup> In *Market Society, Markets and Modern Social Theory*, Polity, 2001, pp 177-178.

Consumer's personality is positive and affirming mainly because of the perceived links between ownership, freedom and individuality. Property provides enabling conditions of institutionalized exercise of private autonomy. The performance of an individual accentuates certain matters and conceals others. If we see perception as a form of contact, then control over what is perceived is control over contact that is made, and the limitation and regulation of what is shown is a limitation and regulation of contact.<sup>330</sup> Self-determination consists of a structure of interaction in which participants determine both what they will and the form of artificial agency they exercise.<sup>331</sup> I recall RIFKIN's words that, '[i]ndividuals are taught that acquiring and accumulating property are integral parts of their earthly sojourn and that who they are is, at least to some degree, a reflection of what they own'.<sup>332</sup>

In this context, property shifts from power to consumption. It assumes a clear new role: property moved away from property as status in community to an overwhelming positive means of establishing identity, self-expression, and self-gratification.<sup>333</sup> Property constructs and defines a self, in a constant process of updating and change. Consumption is a reference system of self-determination and self-realization. Property became a right to participate in a system of social relations which enable the individual to live a full life, in a relationship of reciprocal references. Goods have a

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<sup>330</sup> Erving Goffman, *The Preservation of Self in Everyday Life*, Penguin Books, 1959, p. 74.

<sup>331</sup> Richard Dien Winfield, "With what Must Ethics Begin? Reflections on Benson's Account of Property and Contract", (1989) 11 *Cardozo L. Rev.* pp 537-544.

<sup>332</sup> Jeremy Rifkin, *The Age of Access: The New Culture of Hypercapitalism, Where All of Life is a Paid-for Experience*, New York, J.P. Tarcher/Putnam, 2000.

<sup>333</sup> Following Don Slater and Fran Tonkiss, *Market Society, Markets and Modern Social Theory*, Polity, 2001, pp 17-18, traditional social order can be characterised in terms of fixed and ascribed relationship between people, along the model of status. Formally, at least, one could neither choose nor buy one's status; one was born into a rank, a place within a communal order to which particular sources of income and styles of life were 'naturally' appropriate. Not only were social relationships conceptualized as fixed but so too were forms of property: the idea that land could be sold – literally, that it was 'alienable' and could be separated from the current possessor - was anathema, a betrayal of the fixed order, in that the possessor was seen not as an owner but merely as one embodiment of an ancient relationship of lineage to land. The transition to market society was revolutionary in the way that social obligations came to be mediated by contract. Parties to a market transaction are individuals who entered into a limited agreement, of their own choosing.

communicative value, and the market is a place of symbols that can include status and power, self-expression, self-fulfilment, freedom, sexual closure, or a desire for permanence and stability.<sup>334</sup> Property is a linguistic medium through which interactions are gathered together and forms of life are structured. Furthermore, property has even come to be a means of defining the self. We are what we consume and we are because we consume.

In a world where property of consumer goods is increasing in such a clamorous way, and where property holders are so often consumers, the consequences on the concept of property shall structurally affect the established conceptions. Later, I will reconstruct property as relational. I will suggest that with its facets of interactivity, interpersonality, intertextuality, and interdiscursivity, property puts the right-holder in relation to others.<sup>335</sup>

### **3. Relational property**

Due to all the afore-mentioned changes, it is my contention that the role of property is changing radically and the implications for society are enormous and far-reaching. As a result, a reconstructive project of property needs to be thought out.<sup>336</sup>

The scarcity of goods used to be regarded as the central, controlling fact of the contexts in which problems about property rights arose. However, most of the problems discussed in contemporary debates on property are related to consumption of products and general access to intellectual property. These ideas are far removed from the classic problem of scarcity; on the contrary, they deal with problems raised by mass production

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<sup>334</sup> Gianpaolo Fabris, *Il nuovo consumatore: verso il postmoderno*, FrancoAngeli, Milano, 2003, p. 20.

<sup>335</sup> Neala Schleunig, *To Have and To Hold-The Meaning of Ownership in the United States*, Praeger, 1997, p. 5.

<sup>336</sup> Legal systems are dynamic and the interplay of socially existent norms and observable features of social life should be emphasized, despite the normatively conditioned rule-making element. See Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law, New Approaches to Legal Positivism*, Reidel, 1986, p. 21.

and general access in an affluent society. Property shall be discussed according to this assumption.

Some features of this new kind of property might, subsequently, be highlighted. First, the property of consumer goods does not comply with a function once attributed to ownership: stability, for it is time-limited or, at least, does not tend to be perpetual.<sup>337</sup> Secondly, it demands a permanent and continual process of acquisition: it simultaneously grounds and stimulates production. Thirdly, it answers to an immediate satisfaction of (individual) fragmented needs. Property fulfils fragmented, partial, isolated, emergent, sporadic interests of the decentred individual.<sup>338</sup> Fourthly, it is not constructive, in the sense that it is not a way to accumulate (on the contrary, in industrial capitalism, where property of the means of production was the goal, the economic logic was one of accumulation), for acquisition is rather pragmatic and impulsive.

As soon as one pretends to reinterpret property, two starting points are to be recalled. First, we own mostly consumption goods. Secondly, most of the goods that we use in our daily lives cannot be directly used by the owner, endangering the immediation of the power over a thing. In fact, making use of those so-called inert things often implies entering into a further contractual relationship. These two trends buttress the assumption that property is strongly linked to consumption; and by exploring their inter-relationships we may enrich our understanding.

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<sup>337</sup> On the perpetuity of ownership, see Catherine Pourquier, *Propriété et Perpétuité, Essai sur la durée du droit de propriété*, Press Universitaire D'Aix-Marseille, 2000.

<sup>338</sup> As Zigmunt Bauman wrote in "Consuming Life", (2001) 1 *Journal of Consumer Culture* 13, consumer society and consumerism are not about satisfying needs. The *spiritus movens* of consumer activity is not a set of articulated, let alone fixed, needs, but desire. Desire is narcissistic: it has itself for its paramount object, and for that reason is bound to stay insatiable, however tall the pile of other (physical or psychical) objects marking its past course may grown. The 'survival' at stake is not that of consumer's body or social identity, but of the desire itself: that desire which makes the consumer – the consuming desire of consuming.



Property rights are, in their intrinsic nature, rights to things, a normative relation between an individual and others which has its focus and justification on the exclusive determination of the uses to which a thing may be put. Accordingly, the object of a property relation has necessarily some impact on the property relationship itself: objects of property determine the contours of the property relationship.

The intrinsic nature of property, that used to be characterized as the direct and immediate power over a thing, has changed profile: it has become ancillary relational.<sup>339</sup> Often it is linked to or interconnected to a contract - a relation between two human actors who exchange their valuable resources for the mutual satisfaction of their subjective needs - that property reaches the maximum potential. It gains further emphasis in respect of consumption goods, whereas consumption is a realm of self-construction and a major way of flow of signs.

Property is thus traced back axiologically to a constellation of social preferred values and empirically to the effectiveness of a technical social rule. The meaning of goods is drawn from a culturally constituted world and transferred for the consumer good; it is then drawn from the object and transferred to the individual consumer. But the goods have not yet completed its journey through the social world. While an instrument of individuality-building, goods operationalize individual codes of messages. By supporting the construction and communication of the individual discourse, in a process mediated by the individual itself, meaning turns back to the social world.

Thus, property obtains a new function as a means of communication. Previously, acquiring goods was a means of acquiring and granting a status. Now, it has become a way to communicate an identity, to delineate a personality: mood, systems of values, lifestyles, belonging to a group or individuality, distinctiveness and uniqueness.

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<sup>339</sup> Relational analysis may be applied to any social interaction in which reciprocity is the dominant element. For a relational analysis of legal theory, s. Gidon Gottlieb, "Relationism: Legal Theory for a Relational Society", 50 *U. Chic. L. Rev.* 567.

In contemporary life, characterized by an existential polycentrism, where individuals participate in various centres and belong to many worlds, property satisfies the socially constructed interests of owners, insofar as it connects not subjective desires but socially constructed interests.<sup>340</sup> Property is thus less a mono-personal relation between individuals and things; it is rather a space of communication and interaction among individuals.<sup>341</sup> Property now provides individuals with their own discursive projects, in a world of impersonal relations of intertextuality. For communicative rationality is expressed in a (decentred) complex of enabling (social, economical, political) structural conditions, property forms a universal horizon of understanding.

With its facets of interactivity, interpersonal, intertextuality, and interdiscursivity, property is *in relation* to contracts and is a means for the owner *to establish relations* with others. I will elaborate on each of the elements immediately below.

Property as a space of communication among individuals provides the platform for them to enter into interactivity. Consuming goods, giving access to goods or asking for the supply of goods or services are interactive activities rather than being passive. Property is now a multidimensional activity and the relation between an individual and a thing has become rich and multifaceted.

Property has become a device for interpersonal relations - a socially active dimension in the proper structure of property is to be found and is transforming interdiscursivity

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<sup>340</sup> Gianpaolo Fabris, *Il nuovo consumatore: verso il postmoderno*, FrancoAngeli, Milano, 2003, p. 51.

<sup>341</sup> Penner challenges the all too common idea that ownership is one of the most, if not the most, individualistic of rights. The paradigm or 'standard' picture of property comprises the single owner, alone with their goods, occupying their land, to the exclusion of others. While all basic human rights, for example the right to freedom of expression, the right to freedom of religion, the right to freedom of contract, and so on may be regarded as serving to enhance the autonomy of the individual, our understanding of these rights seems necessarily to involve the interaction of the right-holder with others: one express oneself to others, one (typically, at least) follows religious practices with other adherents, and contracts require at least two persons to agree about something. But ownership seems to work as much for the hermit as for anyone else, for, by operating as a norm that excludes others, it appears to contain no significant social dimension at all. Penner dislodges the picture with one in which ownership is seen primarily to provide a means, or resources, for significantly social activity. See James Penner, "Ownership, Co-Ownership and the Justification of Property Rights", in Timothy Endicott, Joshua Getzler, and Edwin Peel (eds.), *Properties of Law, Essays in Honour of Jim Harris*, OUP, pp 166-167.

between individuals. At this point, one feature needs to be clarified. Interpersonal relations are not integrative. When the individual acquires and consumes goods, when he supplies access to a thing or when he demands for services or goods, he is not integrating the other into his ownership. Rather, he is entering only into a collaborative relation. Interpersonal relations are thus cooperative relations.

The property of goods communicates partial aspects of the identity of the holder; in this sense it resembles a text used by the owner to exchange social messages. The self, as a social presence, is a string of fragmented texts. When the individual acquires consumption goods, when he holds property over inert goods or intellectual property, these are no more than texts, with a proper content, that he will use to get into contact with others.

The discourse of contemporary individuals assumes a new shape. The presence of the property holder is discontinuous, mutable and relative rather than total and absolute. Even so, property is still a device of interdiscursivity. Consuming goods, giving access to property rights or using inert goods are ways of being present in the social web and of roaming over different tribes.

Such a definition of property profoundly changes our classic understanding of the concept. Property is becoming increasingly dynamic, active, vibrant, vigorous, and communicative. And this way, it steps in to fulfil the functions required by the multi-variable essence of individuals. The legal consequences of such a change in the conception of property are now clear. Namely, property and consumer law are part of a web of interconnected regimes that revolve around an inert thing.

In the next chapters, I will attempt to ascertain the protection of property under European law and how the above mentioned changes are taken into consideration. I will start by the protection of property as a fundamental right, that is, the entitlement individuals have against interventions in their patrimonial rights, and how the social interest in the common organization of the market might impose an excessive burden to individuals.

“We cannot know the price of something and know at the same time that it is priceless”.

Margaret Jane Radin, The domino theory, in *Contested Commodities*, p. 101.

## Chapter III - Property as a Fundamental Right under EU Law

### *Introductory note*

As I have pointed out in Chapter I, property for constitutional and international discourse, encompasses a fluid permission, by generally imposing some private entitlement.

The European Union is bound, according to Article 6(2) of EC Treaty, by fundamental rights. Article 6 states that,

[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.<sup>342</sup>

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<sup>342</sup> About ‘un véritable espace constitutionnel européen ... autour des droits fondamentaux’, Luzius Wildhaber and Johan Callewaert, “Espace constitutionnel européen et droits fondamentaux”, in Ninon Colderic, David Edward, Jean-Pierre Puissochet, Damaso Ruiz-Jarabo Colomer, *Une communauté de droit*, Festschrift für Gil Carlos Rodríguez Iglesias, BWV, pp 61-85. On the linkage between membership and human rights, Bruno de Witte and Gabriel Toggenburg, “Human Rights and Membership of the European Union”, in Steve Peers and Angela Ward, *The European Union Charter of Fundamental Rights*, Oxford and Portland Oregon, 2004, pp 59-82.

Article 17 of the Charter of Fundamental Rights of the European Union<sup>343</sup> reads that:

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.

Nevertheless, the protection of fundamental rights in the Community legal order has been almost entirely the product of ECJ's case-law.<sup>344</sup> There is extensive literature dealing with this issue. Suffice it to say that, according to ECJ case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures.<sup>345</sup> In *Internationale Handelsgesellschaft*,<sup>346</sup> the Court ruled that, 'respect for fundamental rights forms an integral part of the general principles of law protected by

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<sup>343</sup> OJ 2007 C 303/01.

<sup>344</sup> In Community law, the basic Treaties themselves made no reference to the protection of human rights as such. This may perhaps be explained by the historical origins of the Community and by the essentially economic character of the Communities. Many years before the Member States had resolved, in Maastricht, to insert an express reference to fundamental rights in the EU Treaty, the ECJ had decided the fundamental rights were part of the unwritten general principles of Community law which it enforces; and, even after the enactment of Article 6, it is still as general principles that fundamental rights are enforced by the ECJ today. This does not only result from the wording of Article 6 itself, but also from the fact that Article 46 of the same Treaty of Maastricht did not extend the jurisdiction of the ECJ to Article 6, so that the Court, even after Maastricht, could only continue to apply its doctrine of unwritten general principles. See, for all, Takis Tridimas, *The General Principles of EU Law*, 2<sup>nd</sup> ed., Oxford EC Law Library, OUP, 2006, p. 300. According to Bruno de Witte, "The Past and Future Role of the European Court of Justice in the Protection of Human Rights", in Philip Alston (ed.), with the assistance of Mara Bustelo and James Heenan, *The EU and Human Rights*, OUP, 1999, p. 860, the final words of Article 6, 'as general principles of Community law' are, in part, *a coup de chapeau* to the pioneering action of the ECJ. Considering the reading an unwritten bill of rights into Community law as the most striking contribution the Court has made to the development of a constitution for Europe, see G. Federico Mancini, "The Making of a Constitution for Europe", (1989) 26 *CMLRev* 611. For a general overlook on case law on human rights protection in the European Union, see Lammy Betten and Nicholas Grief, *EU Law and Human Rights*, Longman, 1998, and Andrew Williams, *EU Human Rights Policies, A Study in Irony*, OUP, 2004.

<sup>345</sup> On general principles of law, see Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice*, Clarendon University Press, Oxford, 1993, p. 226.

<sup>346</sup> Case 11/70, [1970] *ECR* 1125.

the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community'.<sup>347</sup>

In *Nold*,<sup>348</sup> the Court identified as a source of human rights, for the first time, 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories' – such treaties providing 'guidelines which should be followed within the framework of Community law', referring specifically to the European Convention on Human Rights (hereinafter, ECHR).<sup>349</sup> Since then, the adjudicative process on fundamental rights has depended upon communication and interplay between the ECJ, the ECtHR, and the Member States (through their common constitutional traditions). Similarly, explanations relating to the Charter of Fundamental Rights<sup>350</sup> clarify that the meaning and scope of the right are the

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<sup>347</sup> Para 4. The recognition, by the ECJ of the existence of an unwritten 'Community Bill of Rights' was, to a large extent, the result of a direct challenge by the German Constitutional Court (and, to a lesser extent, the Italian Constitutional Court) of the idea that Community law could prevail over national constitutions. See Mancini, "The Making of a Constitution for Europe", (1989) 26 *CMLRev* 608; R. M. Dallen, "An Overview of European Community Protection of Human Rights with some Special References to the UK" (1990) 27 *CMLRev* 766-72; M. Cartabia, "Principi inviolabili e integrazione europea", 1995, p. 95 ss. Bruno de Witte considers that the doctrine of general principles of Community law itself and its application to fundamental rights are closely modelled on, and possibly inspired by, developments in French constitutional law. Bruno de Witte, "The Past and Future Role of the European Court of Justice in the Protection of Human Rights", in Philip Alston (ed.), with the assistance of Mara Bustelo and James Heenan, *The EU and Human Rights*, OUP, 1999, p. 864.

<sup>348</sup> Case 4/73, *Nold v. Commission* [1974] ECR 491.

<sup>349</sup> Para 8. In this judgment, the Court also laid down the basic formula on the basis of which human rights would be protected by the Court, at para 14: 'The rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder. For this reason, rights on this nature are protected by law subject always to limitations laid down in accordance with the public interest. Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched'. In reaching that conclusion, the Court drew inspiration from the constitutions of the Member States where the right to property and the freedom to trade and practice a profession are made subject to limitations in the public interest. See Takis Tridimas, *The General Principles of EU Law*, 2<sup>nd</sup> ed., Oxford EC Law Library, OUP, 2006, p. 303.

<sup>350</sup> OJ 2007 C 303/17.

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same as those of the right guaranteed by the ECHR and the limitations may not exceed those provided for therein.<sup>351</sup>

Economic and property rights, including the right to property, the freedom to trade, and the right to choose and practise freely a trade or profession, are amongst the rights that have been expressly recognized by the Court as fundamental.<sup>352</sup>

In respect of the ECHR, however, the right to property proved to be one of the most controversial issues when it was being drafted.<sup>353</sup> That is why the right to property was included in Article 1 of Protocol No. 1, rather than in the convention itself.

Article 1 of Protocol No. 1 reads as follows:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

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<sup>351</sup> See Marco Comporti, “Relazione introduttiva”, in *La Proprietà nella Carta Europea dei Diritti Fondamentali*, Giuffrè, Milano, 2005, p. 5, for criticism on Article 17.

<sup>352</sup> Thomas W. Merrill, in “The Landscape of Constitutional Property”, (2000) 86 *Va. L. Rev.* 885, endorses the ‘patterning division method’ for identifying constitutional property rights. Under this strategy, Courts should proceed in two steps. First, they would identify, as a matter of federal constitutional law, general criteria that distinguish constitutional property from other interests or expectancies that do not rise to the level of property. Second, they would canvas sources of non constitutional law (most prominently, but not exclusively, state law) to determine where the claimant has a legally recognized interest that satisfies these criteria and hence constitutes constitutional property.

<sup>353</sup> On the legislative history of the guarantee of property under the European Convention on Human Rights, see Wolfgang Peukert, “Protection of Ownership under Article 1 of the First Protocol to the European Convention on Human Rights”, (1981) 2 *Hum. Rts. L.J.* 38; Karel Vasak, *La Convention européenne des droits de l’homme*, p. 4 ff; Ralph Beddard, *Human Rights and Europe*, 3<sup>rd</sup> ed., Grotius Publications Limited, Cambridge, 1993, p. 19 ff; J. G. Merrills and A. H. Robertson, *Human Rights in Europe*, 4<sup>th</sup> ed., Juris Publishing, 2001, pp 5 ff; Michael R. Antinori, “Does Lochner Live in Luxembourg? An Analysis of the Property Rights Jurisprudence of the European Court of Justice”, (1995) 18 *Fordham Int’l L.J.* pp 1798 and ff.

Opposition to including a guarantee of property centered around hesitation to empower an international court to review the lawfulness of limitations imposed on private property. Some delegates argued that permitting a court to review the lawfulness of such limitations would allow the court to define a state’s economic policies. Further, several speakers argued if the right to ownership were guaranteed, it must be balanced against other social rights such as the right to a reasonable standard of living. For the origins and history of Article 1 of Protocol 1, see Ali Riza Çoban, *Protection of Property Rights within the European Convention on Human Rights*, Ashgate, 2004, pp 127.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.<sup>354</sup>

By recognising that everyone has the right to the peaceful enjoyment of his possessions, Article 1 is in substance guaranteeing the right of property. In *Marckx*<sup>355</sup> the Court expressly ruled that, ‘[t]his is the clear impression left by the words “possessions” and “use of property” (in French: “*biens*”, “*propriété*”, “*usage des biens*”); the “*travaux préparatoires*”, for their part, confirm this unequivocally: the drafters continually spoke of “right of property” or “right to property” to describe the subject-matter of the successive drafts which were the forerunners of the present Article 1’.

The ECTHR has interpreted Article 1 of Protocol No. 1 as encompassing three distinct rules. First, the Protocol establishes the general principle of peaceful enjoyment of property. The second rule covers deprivations of property, which are subject to the conditions provided for by international law. The third rule covers measures controlling the use of property and recognizes the power of the states to enact laws that the state deems necessary to control the use of property for the general good.

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<sup>354</sup> According to Ali Riza Çoban, *Protection of Property Rights within the European Convention on Human Rights*, Ashgate, 2004, p. 138, the text of Article 1 of Protocol 1 comprises two philosophical strands relating to the right to property. On the one hand, the first sentence assures that the right to property is a fundamental right. This represents the individual or personal function of the right to property. On the other hand, the second sentence of the first paragraph and second paragraph recognize states’ power to interfere with property for public or general interest. These provisions make reference to the social or public function of property, to serve public interest. This conception suggests that the basic reason why the institution of property is recognised is to advance the collective goods of the society. For criticism on the protection granted by Article 1, James Kingston, “Rich People Have Rights Too? The Status of Property as a Fundamental Human Right”, in Liz Heffernan (ed.), *Human Rights: an European Perspective*, The Round Hall Press, 1994, claiming that such protection could equally have been provided by rights falling more easily within the framework of human rights such as a right to freedom from discrimination and arbitrary treatment at the hands of the law.

<sup>355</sup> Judgment of 13 June 1979, *Marckx*, para 63. About the concept of possession, see Alberto M. Aronovitz, “Individual Patrimonial Rights under the European Human Rights System - Some Reflections on the Concepts of Possession and Dispossession of Property”, 25 *Int’l J. Legal Info.* 87-104.



It should be borne in mind, however, that the ECtHR originally interpreted Article 1 as protecting only limited categories of proprietary interests from state interferences. The Protocol did not prevent the states from expropriating the property of its own nationals without compensation. Further, compensation to non-nationals was only mandated in the limited case where an individual was deprived of ownership of property. If there was no deprivation of ownership, the measure would be categorized as a control of use of property.<sup>356</sup> However, the ECtHR would not normally review the compatibility of measures controlling the use of property with the Protocol maintaining that the state was the sole judge of whether the public good justified the interference.

Only in *Sporrong and Lönnroth v. Sweden*, would the ECtHR repudiate the framework of the previous interpretations of the Protocol.<sup>357</sup> The ECtHR, in *Sporrong* held that all interferences with private property must be judged in light of the first rule of the Protocol, which enunciates the general principle of the peaceful enjoyment of property. Under the ECtHR' rule in *Sporrong and Lönnroth*, property, as it is protected by the Protocol, is defined by reference to all the proprietary interests of an individual. The Court enunciated a two-part test to determine whether interferences with private property are permissible under the Protocol. First, interferences with private property must pursue an aim in the general interest. Second, the measure must balance the requirements of the general interest and the individual's property rights. Interferences with private property must not, with regard to the aim pursued, place a disproportionate burden on the individual. Under the second prong of the test, a state may be required to compensate an individual for interferences with their property. At some point, the

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<sup>356</sup> In *Handyside*, judgment of 7 December 1976, the United Kingdom provided for the forfeiture and destruction of schoolbooks that were deemed dangerous to the general interest. Even though the owner was permanently deprived of the books, the ECtHR deemed the action to be a control of use and thus permitted under the second paragraph of Article 1 of Protocol 1.

<sup>357</sup> Judgment of 23 September 1982. About this 'véritable tournant jurisprudentiel', see Luigi Condorelli, "Premier Protocol Additionel, Article 1", in Louis-Edmond Pettiti, Emmanuel Decaux, Pierre-Henri Imbert, *La Convention européenne des droits de l'homme*, Commentaire article par article, 2<sup>nd</sup> ed., Economica, p. 973. See also Ali Riza Çoban, *Protection of Property Rights within the European Convention on Human Rights*, p. 1 and ff; and Pieter van Dijk, Fried van Hoof, Arjen van Rijn, and Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights*, Intersentia, 2006, pp 864 ff.

burden suffered by the individual becomes so great that, regardless of what the general interest requires, the interference can only be justified upon the payment of compensation.

In order to be compatible with the general rule set forth in the first sentence of the first paragraph of Article 1, such interference must strike a ‘fair balance’ between the demands of the general interest of the community and the requirements of the protection of the individual’s property right. Of course, the issue of whether a fair balance has been struck ‘becomes relevant only once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary’.<sup>358</sup>

I recall that, since *Nold*, the case-law of the ECtHR, and common traditions of Member States became the institutionalized discourses for the ECJ adjudicative activity, in a vast communicative network. This is especially important in respect of the right to property, which has, since the beginning, been interconnected with the recognition of fundamental rights by the ECJ.<sup>359</sup>

It has been noted in the literature, namely by WEILER,<sup>360</sup> that the ECJ might be reluctant to exercise a sufficiently robust individual protection policy. The protection afforded to

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<sup>358</sup> See *Iatridis*, Judgment of 25 March 1999, para 58.

<sup>359</sup> Filiberto Trione, *La tutela dei diritti fondamentali in ambito comunitario*, Editorial Scientifica, 2004, Napoli, pp 20 ff.

<sup>360</sup> Joseph Weiler, “Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities” (1986) 61 *Wash. L. Rev.* p. 1108, wrote that ‘[t]he Court, and other bodies dealing with human rights in the context of European integration, might well find themselves in difficult policy dilemmas trying to reconcile these conflicting purposes of a higher law of human rights in the EEC. The ECJ might find this particularly painful since it has been one of the champions of the process of European integration, taking an active role in its furtherance by adopting a teleological approach to the interpretation of the Treaty – an approach which has greatly favored the process. There are good legal and policy reasons for the Court to take this approach, but this does not remove the potential dilemma. On the one hand, in terms of its own values and policy preferences – crucial factors in the operation of any superior court – the ECJ might be reluctant to undermine an important Community policy by favoring an individual whose rights were allegedly violated. The ECJ may be even more reluctant, given the growing difficulties to the Community legislature composed of the governments of the Member

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the individuals normally would turn against the Community policies to further the goals of European integration. What was at stake was not the fear of excessive zeal in asserting individual rights but fear of the opposite: a reluctance of the Court to exercise a sufficiently robust individual protection policy. If distrust exists it is not distrust of a Court overreaching itself in protecting the individual, but of a Court not reaching far enough.<sup>361</sup>

The afore-mentioned difficulties are more pronounced in property rights matters, because the authority of the Community is strongest in the area of economic regulation. In practice, economic regulation seems to have implied the total subalternization of individual property rights to Community policies.

As it will be shown above, the ECJ case-law on property rights is highly functionalized to the market. I will demonstrate that this functionalisation is shown, firstly, by the alliance between the right to property and the right freely to pursue a trade or profession;<sup>362</sup> and, secondly, the restrictions that impinge on the right to property must, *inter alia*, satisfy a public interest, which has been, in most cases, a common organization of the market.<sup>363</sup>

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States, to reach the compromises necessary for legislation. Community legislation is the outcome of so tortuous a process that the Court might be loath to overturn it unless absolutely compelled.’

<sup>361</sup> This is what Weiler calls the ‘credibility issue’. See *ibidem*.

<sup>362</sup> The opposite is not true. In Case 234/85, *Staatsanwaltschaft Freiburg v Franz Keller*, [1986] ECR 2897, the Court assessed where Community rules limiting the terms which German producers may use to describe their table wines are incompatible with the freedom to pursue their trade. The Court ruled that the Community had in no way ‘impinge on the actual substance of the freedom to pursue that activity’.

<sup>363</sup> According to Michael R. Antinori, “Does Lochner Live in Luxembourg? An Analysis of the Property Rights Jurisprudence of the European Court of Justice”, (1995) 18 *Fordham Int’l L.J.* 1842, an important difference between the approach of the ECtHR and the approach of the ECJ concerns the selection of an appropriate baseline. Under the first step of the proportionality test, the ECtHR defers to the legislative judgment that altering the status quo is in the public interest unless that judgment is ‘manifestly without reasonable foundation’. The ECJ, however, will defer to the legislative judgment that altering the status quo is in the public interest only if the ECJ considers that judgment to be reasonable. For instance, in *Hauer*, the property owner, prior to the Community legislation, had the right to grow grapes on her property under German private law relating to property use. The Community legislation altered the status quo baseline set by German private law by prohibiting Ms. Hauer from growing grapes on her property. The ECJ, unlike the ECtHR, was willing to independently assess whether the justification offered by the

The ECJ, therefore, does not have a strong approach to the values to be weighed. Notably, in no case so far has the Court found a violation of the right to property or the freedom to trade. The outcome of such adjudicative process is, thus, that the ECJ does not consider the need to establish a general principle to compensation.

There is, of course, an internal complexity in the adjudicative process. What I will claim is that the ECJ's challenge is to strike the right balance between property rights and market build-up. Property rights boundaries are constantly contested; therefore, adjudication will improve outcomes insofar as it constructs an interpretation of property that is rational for all those affected by the matter at hand.<sup>364</sup> A new attempt to reconcile property and market is needed. I will suggest that the ECJ should be open to inputs from the ECtHR and appropriately ensure effective protection of individual property rights, namely granting compensation to deprivation of property.

In so doing, I will compare the case-law of the ECJ and of the ECtHR. Property rights protection will be discussed subsequently under two aspects: first, through the permission and, second, through the impairment of the property right. It is the contention of this section that we can enrich our understanding by exploring the inter-relationship between ECJ and the ECtHR.

## **1. Analysis of the relevant case-law: the permission**

In this section, my analysis is focused on the permission granted by property rights, both on ECJ case-law and under Article 1 of Protocol No. 1 to the ECHR.

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Community legislature was in the public interest. The ECJ's analysis in *Hauer* reflects the assumption that the status quo distribution of entitlement under the baseline set by Member State property rules is presumptively legitimate.

<sup>364</sup> Doctrines and practices of justification can be justified from a discourse theoretical point of view, when they are formulated and they develop in the framework of rational and open argumentation guided by the principles of formal or procedural rationality. See Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice*, Clarendon University Press, Oxford, 1993, p. 178.

### 1.1. Property as a fundamental right under ECJ case-law

Property rights were first recognized as fundamental rights in *Nold*,<sup>365</sup> where the Court had to assess a Commission decision authorising a coal selling agency (*Ruhrkohle AG*) to render direct supplies of coal subject to the conclusion of fixed two-year contracts, stipulating the purchase of at least 6000 metric tons per annum for the domestic and small-consumer sector. The Commission had justified this measure by the need for *Ruhrkohle AG*, in view of the major decline in coal sales, to rationalize its marketing system in such a way as to limit direct business association to dealers operating on a sufficient scale. The requirement that dealers contract for an annual minimum quantity was in fact intended to ensure that the collieries could market their products on a regular basis and in quantities suited to their production capacity. *Nold* contended that the quantity of 6000 metric tons greatly exceeded its annual sales and that the decision withdrew the status of direct wholesaler. It claimed that the restrictions introduced by the new trading rules authorized by the Commission would have the effect, by depriving it of direct supplies, of jeopardizing both the profitability of the undertaking and the free development of its business activity, to the point of endangering its very existence. In this way, the decision was said to violate, in respect of the applicant, a right akin to property, as well as its right to the free pursuit of business activity.

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<sup>365</sup> Case 4/73 *Nold v. Commission* [1974] ECR, p. 491. The recognition of fundamental rights had been rejected in *Geitling*. Indeed in the early stages of the development of the Community law, the Court did not accept that the competence of Community institutions was subject to the requirement to protect the fundamental rights guaranteed by the Constitutions of the Member States (see Case 1/58 *Stork and Co* [1959] ECR 43, and Case 36/59 *Präsident RuhrkohlenVerkaufsgesellschaft* [1960] ECR 857). This was because the Court considered that that might prejudice the primacy of Community law. If Community acts were to prevail over national law, including national constitutional law, then judicial review of those Community acts could only be based on Community law itself. The Court of Justice therefore decided to fill a threatening gap in the legal protection of individuals by formulating its own doctrine of the protection of fundamental rights as an unwritten part of Community legal order (see Bruno de Witte, “The Past and Future Role of the European Court of Justice in the Protection of Human Rights”, in Philip Alston (ed.), with the assistance of Mara Bustelo and James Heenan, *The EU and Human Rights*, OUP, 1999, at 863). About the category of economic, commercial and property rights within Community law, see Gráinne de Búrca, “The Language of Rights and European Integration”, in Jo Shaw and Gillian More, *New Legal Dynamics of European Union*, Clarendon Press, 1995, pp 31 ff.

The Court stated that in safeguarding fundamental right ‘the Court is bound to draw inspiration from constitutional traditions to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those states’. However, the Court concluded that: ‘[a]s regards the guarantees accorded to a particular undertaking, they can in no respect be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity’. Two notes should be considered. First, the ECJ made clear, since the beginning, that property rights protection does not encompass mere commercial interests or opportunities, *i.e.* shares of the market. Second, the Court recalls the risk inherent to economic activity, and deems Community rules themselves as part of that risk that an economic operator should bear.

The judgment in *Nold* was reiterated in the *Hauer* case.<sup>366</sup> Here a Council regulation, within the framework of measures designed to adjust wine-growing potential to market requirements, had prohibited Member States from granting authorization to new planting of vines. The prohibition on new planting had been justified by an undeniable public interest, ‘making it necessary to put a brake on the overproduction of wine in the Community, to re-establish the balance of the market and to prevent the formation of structural surplus.’ The German Administrative Court asked the ECJ whether such a regulation, laying down a prohibition of general application, so as to include even land appropriate for the wine-growing, would be compatible with fundamental rights guaranteed by Articles 12 and 14 of the *Grundgesetz*, respectively the right to property and the right freely to pursue trade and professional activities.<sup>367</sup>

In this case, the Court made a distinct analysis of the infringement of the right to property and of the freedom to pursue a trade or profession. As to the former, the ECJ indulged in a long exegesis on Article 1 of Protocol No. 1 to ECHR.<sup>368</sup> However, the

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<sup>366</sup> Case 44/79, *Hauer v. Land Rheinland-Pfalz*, [1979] ECR 3727.

<sup>367</sup> Paras. 8 and 13.

<sup>368</sup> Paras. 17-19. In general, see Sílvia Marcus-Helmons, “La place de la CEDH dans l’intégration européenne”, in *La mise en œuvre interne de la Convention européenne des droits de l’homme en Europe*

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Court was not interested on the permission implied in Article 1, ‘the peaceful enjoyment of his possessions’. It did elaborate on the act depriving property rather than in the licensing. The Court considered, first, if the regulation at stake was a privation or restriction to property rights. The Court briefly concluded that, ‘it is incontestable that the prohibition of new planting cannot be considered to be an act depriving the owner of his property, since he remains free to dispose of it or to put it to other uses which are not prohibited’.<sup>369</sup> But was there an impairment of property? After it emphasized the ways in which the rights of a property owner may be impaired, the Court concluded that Article 1 did not enable a sufficiently precise answer to be given to the question submitted and went on the analysis of specific provisions of the German, Irish and Italian Constitutions.<sup>370</sup> The ECJ considered, first, that the right of property was subject to limitations in the public interest (in case, to bring an end to the surplus in European wine production and to re-establish the balance of the market both in the short and in the long term). Second, the Court showed that the regulation in issue did not go beyond the limitations generally allowed.<sup>371</sup> The Court concluded that restrictions on the new

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*de Lest et de l’Ouest, Actes du Séminaire, Leyde, 24-26 octobre 1991*, Kehl, Engel, (1992) *Revue universelle des droits de l’homme*, at 434-439. About the special relationship between Community law and the rights found in the European Convention, see Andrew Chapman (ed.), *Introduction to European Union - The Human Rights Challenge*, vol. I.

<sup>369</sup> Para 19.

<sup>370</sup> In *Nold and Hauer*, the ECJ appeared more accommodating to the national constitutions than in *Internationale Handelsgesellschaft* declaring that measures which are incompatible with fundamental rights recognized and protected by the Constitutions of the Member States cannot be upheld (*Nold*, 13; *Hauer*, 15). According to Bruno de Witte, “The Past and Future Role of the European Court of Justice in the Protection of Human Rights”, in Philip Alston (ed.), with the assistance of Mara Bustelo and James Heenan, *The EU and Human Rights*, OUP, 1999, p. 859, the ECJ evinces a cautious approach aimed at ensuring that the determination that Community institutions are bound by fundamental rights co-exists with the eagerness to secure the autonomy of the Community polity. See also Takis Tridimas, *The General Principles of EU Law*, 2<sup>nd</sup> ed., Oxford EC Law Library, OUP, 2006, p. 304.

<sup>371</sup> In para 19, the Court recalled that, in all Member states ‘numerous legislative measures have given concrete expression to that social function of the right to property. Thus in all the Member States there is legislation on agriculture and forestry, the water supply, the protection of the environment and town and country planning, which imposes restrictions, sometimes appreciable, on the use of real property’. Further, in para 2: ‘all the wine producing countries of the Community have restrictive legislation, albeit of differing severity, concerning the planting of vines, the selection of varieties and the methods of cultivation. In none of the countries concerned are those provisions considered to be incompatible in principle with the regard due to the right to property’. In Case 116/82, *Commission v. Germany*, [1986] ECR 2519, an application for the declaration that Germany had failed to fulfil its obligation under the

planting of vines was a type of restriction which is known and generally accepted in identical or similar forms in the constitutional structure of all the Member States.<sup>372</sup> After assessing the structure of the prohibition itself, the Court did inquire into the public interest pursued and the proportionality of the impairment, and did conclude that it was lawful.<sup>373</sup>

In *Metallurgiki Case*,<sup>374</sup> the Court was asked to assess restrictions on production. The applicant claimed against a Commission Decision that established for undertakings in the iron and steel industry a monitoring system and a new system of production quotas in respect of certain products. The Decision was meant to spread the effects of the crisis in the sector in the most equitable manner possible among all undertakings in

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provisions adopted within the framework of the common organization of the market of wine, the German Government argued that the undertakings affected by the prohibition of wine making would be forced to cease business, since their plant could not, from an economic point of view, be converted or sold on suitable terms. The prohibition would constitute, as claimed by the German government a serious infringement of the right to property and the freedom to pursue a trade or profession which was not justified in the general community interest. The Court gave a laconic reply and tried to apply the controversial distinction on the existence and exercise of fundamental rights: '[i]t should be observed in the first place that the provision at issue does not affect the existence of the undertakings producing quality wines PSR or the substance of the freedom to choose a trade or profession. It bears not directly but merely indirectly on a related right since the restrictions contained therein have same effect upon the possible ways in which producers run their business and solely to that extent upon the pursuit of a trade or a profession'. Further: '[i]n the light of that objective of general interest, the restriction imposed by the provision at issue does not involve any undue restriction on the exercise of fundamental rights' (see paras. 27 and 29). The same approach was followed in the *méthode champenoise* case (Case C-306/93, *SMW Winzersekt*, [1994] ECR I-5555, paras. 22-24, where the Court ruled that the prohibition of the use of the designation '*méthode champenoise*' (a term which, prior to the adoption of the regulation, all producers of sparkling wines were entitled to use) could not be regarded as an infringement of an alleged property right vested in *Winzersekt*.

<sup>372</sup> As Weiler points out, the Community is a new polity the constitutional ethos of which must give expression to a multiplicity of national traditions. The frequent references to the constitutions of the Member States in *Nold* and *Hauer* however suggest that, in the field of human rights, concepts of national law are more influential than in relation to other general principles. The reason for this is that respect for rights recognized as fundamental by the laws of the Member States provides political legitimacy and ideological grounding for the Community legal order. Joseph Weiler, "Fundamental Rights and Fundamental Boundaries", in N. A. Neuwahl and A. Rosas (eds.), *The European Union on Human Rights*, Kluwer, 1995, p. 66.

<sup>373</sup> For the combined examination of pleas based on breach of the principle of proportionality and the right to property, see *Joined Cases C-153 and C-204/94, Faroe Seafood and Other* [1996] ECR I-2465.

<sup>374</sup> Case 258/81 [1982] ECR 4261.



the Community. The applicant claimed that, in fixing the applicant's reference production, reference quantities and production and delivery quotas for rolled products, the Decision had infringed its right to property. The Court ruled that, '[t]he fact that restrictions on production necessitated by the economic situation might affect the profitability and very existence of certain undertakings cannot be considered to be an infringement of the right to property. The applicant may not claim respect for its right to property in order to evade the constraints imposed upon the entire European steel industry'.<sup>375</sup> The Court concluded that, 'the applicant was in a position to calculate, at least approximately, the quota which would be allocated to it and could have arranged its production programme accordingly'. This ruling repays more searching scrutiny. The ECJ decided, similarly, in *Hoogovens Groep BV v Commission*,<sup>376</sup> that the measure at stake was again a restriction on production. And the Court reiterated that, 'the fact that restriction on production necessitated by the economic situation might affect the profitability and the very existence of certain undertakings cannot be considered to be an infringement of property rights'.<sup>377</sup> It should be pointed out that, in both cases, the regulation at stake could have endangered the existence of the undertakings. The Court, however, did not admit the privation of property.

In *Biovilac*,<sup>378</sup> the ECJ had to assess the liability of the Community for damage resulting from legislation enacted by the Commission, laying down rules for implementing measures for reducing stocks of skimmed-milk powder, aimed at reconciling the need to ensure a fair standard of living for the agricultural community with the stabilization of markets. The applicant complained of an appreciable reduction in the sales of its products, and that the regulation in question had infringed its right to property and its right to carry on an established business. The Court considered that:

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<sup>375</sup> Para 13.

<sup>376</sup> Joined Cases 172/83 and 226/83, *Hoogovens Groep BV v Commission*, [1985] ECR 2831.

<sup>377</sup> Para 29.

<sup>378</sup> Case 59/83 *Biovilac v EEC* [1984] ECR 4057.

The measures adopted by the Commission do not deprive the applicant of its property or of the freedom to use it and therefore do not encroach on the substance of those rights. Even though those measure may (...) have a detrimental effect on sales of its products, that negative effect could not be regarded as an infringement if the substance of those rights, particularly where (...) the detrimental effect was merely an indirect consequence of a policy with which aims of general public interest are pursued.<sup>379</sup>

Further, the Court emphasized that, ‘an undertaking cannot claim a vested right to the maintenance of an advantage which it obtained from the establishment of the common organization of the market and which it enjoyed at a given time’.<sup>380</sup>

In *Georg von Deetzen v Hauptzollamt Oldenburg*,<sup>381</sup> the Court went on to formulate a negative delimitation of property rights. It clarified that, ‘the right to property thus safeguarded within the Community legal order does not comprehend the right to dispose, for profit, of an advantage, such as the reference quantities allocated in the framework of the common organization of a market, which does not derive from the assets or occupational activity of the person concerned’.<sup>382</sup>

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<sup>379</sup> Para 22.

<sup>380</sup> Para 23. The case law has adopted a functional rather than formalistic approach to the notion of ‘assets’ upon which property rights may be recognized. The milk quota cases imply that the right to property encompasses in principle instruments of market control, such as milk quotas, which have a market value and can be disposed for profit. See Takis Tridimas, *The General Principles of EU Law*, 2<sup>nd</sup> ed., Oxford EC Law Library, OUP, 2006, p. 319. For the relation between Community quotas and property rights, see John A. Usher, *General Principles of EC Law*, Longman, 1998, p. 95 and ff, and on the property nature of milk quotas, Peter Sparkes, *A New Land Law*, 2<sup>en</sup> ed., Hart Publishing, 2003, p. 93.

<sup>381</sup> Case C-44/89, *Georg von Deetzen v Hauptzollamt Oldenburg*, [1991] ECR I-5119.

<sup>382</sup> Para 27. In Case C-2/92, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock*, [1994] ECR I-955, the Court was asked whether Community rules on the additional levy on milk that did not require a Member State to introduce a scheme for the payment by a landlord of compensation to an outgoing tenant and did not confer directly on a tenant a right to such compensation in respect of the reference quantity transferred to the landlord on the expiry of a lease, would be contrary to the property rights of the tenant. The Court ruled that, the right to property safeguard by the Community legal order does not include the right to dispose, for profit, of an advantage, such as the reference quantities allocated in the context of the common organization of a market, which do not derive from the assets or occupational activity of the person concerned. Accordingly, the protection of the right to property guaranteed by the Community legal order would not require a Member State to introduce a

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The first note to keep in mind in respect of the protection of property by the ECJ is the negative formulation used by the Court. The ECJ only mentions what a right to property is not or what it does not encompass. In the main *Bananas* judgment,<sup>383</sup> the applicant government contended that the Regulation was in breach (among others) of the right of property, and the freedom to pursue one's business or profession. The claim of a breach of the right to property was summarily dismissed by the Court with the argument that: 'no economic operator can claim a right to property in a market share which he held at a time before the establishment of a common organization of a market, since such a market share constitutes only a momentary economic position exposed to the risks of changing circumstances'.<sup>384</sup> However, the invocation of the freedom to pursue a trade or business was the occasion for more searching analysis. The Court readily admitted that it had been restricted by the Community legislature, but added that there were valid justifications for this restriction.

To sum up, it is settled case-law that the freedom to pursue an economic activity confers the assurance that a trader may not be arbitrarily deprived of the right to pursue his professional activities but clearly does not guarantee him a particular volume of business or a specific share of the market.<sup>385</sup> Mere commercial interests or opportunities are not protected as property rights. And a trader cannot claim a right to property in a market share which he held at a time before the establishment of a common organization of the market, since such a market share constitutes 'only a momentary

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scheme for payment of compensation by a landlord to an outgoing tenant and does not confer a right to such compensation directly on the tenant (see paras. 19-20).

<sup>383</sup> C-280/93, *Germany v Council* [1994] ECR I- 4973. The judgment was confirmed in Case C-104/97, *Atlanta AG and others v Commission of the European Communities and Council of the European Union*, [1999] ECR I-6983.

<sup>384</sup> Para 79.

<sup>385</sup> V.g., Case T-521/93, *Atlanta and Others v. European Community* [1996] ECR II-1707, para 62. Also in Case C-22/94, *Irish Farmers Association and Other v Minister for Agriculture, Food and Forestry (Ireland) and the Attorney General* [1997] ECR I-1809, paras. 26, assessing where the permanent withdraw of 4,5% of plaintiffs reference quantities without compensation infringed the right to property.

economic position exposed to the risks of changing circumstances'.<sup>386</sup> Arguably, what the protection of property positively encompasses cannot be derived from the ECJ's case-law.

## 1.2. The protection of property under the ECHR<sup>387</sup>

In the following analysis, I will go through the case-law on the first rule of Protocol No. 1: the general principle of peaceful enjoyment of property.

It is settled case-law that the concept of 'possessions' in Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions' for the purposes of this provision.<sup>388</sup> What is guaranteed in

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<sup>386</sup> C-280/93, *Germany v Council* [1994] ECR I- 4973, para 79. The ECJ does not protect the profitability of enterprises. On the contrary, in *Wachauf* the Court declared that Community rules that had the effect of depriving a tenant farmer of the fruits of his labour would be incompatible with fundamental rights (para 19) but did not specify which rights would be infringed as a result. The context of the case suggests that the Court was referring to the right to property. See Takis Tridimas, *The General Principles of EU Law*, 2<sup>nd</sup> ed., Oxford EC Law Library, OUP, 2006, p. 318.

<sup>387</sup> Wolfgang Peukert, "Protection of Ownership under Article 1 of the First Protocol to the European Convention on Human Rights", (1981) 2 *Hum. Rts. L.J.* 38; see R. Anthony Salgado, "Protection of National's Rights to Property under the European Convention on Human Rights: *Lithgow v. United Kingdom*", (1987) 27 *Va. J. of Int'l L.* 881 ff; see also Peter Van Den Broek, "The Protection of Property Rights under the European Convention on Human Rights", (1986) 1 *Legal Issues Eur. Integration* 52 (discussing Protocol). Louis Henkin, "Economic Rights under the United States Constitution", (1994) 32 *Colum. J. Transnat'l L.* 112-13.

<sup>388</sup> Wolfgang Peukert, "Protection of Ownership under Article 1 of the First Protocol to the European Convention on Human Rights", (1981) 2 *Hum. Rts. L.J.* 43 ff. In general, see Rudolf Bernhardt, "Thoughts on the Interpretation of Human-Rights Treaties", in *Protecting Human Rights: the European Dimension – Studies in Honour of Gérard J. Wiarda*, Franz Matscher and Herbert Petzold (ed.), Carl Heymanns Verlag KG, 1990, pp 65-71. Following the author, the notions contained in human rights conventions have an autonomous international meaning; however, such meaning must be determined by a comparative analysis of the legal situation in the participating States. To the extent that this analysis shows considerable differences and disparities among the States, a national 'margin of appreciation' is and must be recognized. Human-rights treaties must be interpreted in an objective and dynamic manner, by taking into account social conditions and developments; the ideas and conditions prevailing at the time when treaties were drafted retain hardly any continuing validity. Nevertheless, treaty interpretation must not amount to treaty revision. Interpretation must therefore respect the text of the treaty concerned.

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Article 1 of the Protocol No. 1 is the concept of property as understood in its widest sense and not limited to rights *in rem*, according to the idea that both in international law and for constitutional discourse, the concept of property is identical with the concept of acquired or vested rights.

To date, the ECtHR considered the following assets protected under the right to property: rights *in rem* (*GASUS Dossier*), expectations of inheritance (*Marckx; Inze*), rent rights (*Mellacher*); building permits (*Pine Valley*) and permits to exploit (*Fredin*), compulsory transfers of hunting rights (*Chassagnou*); monetary contributions (*Van Raalte c Pays Bas, Darby*); shares in companies (*Barcelona Traction*); business goodwill (*Van der Musselle*), and *clientèle* (*Iatridis*); contributions to fund pensions and benefits; pecuniary claims against public authorities (*Pressos Compania Naviera; Raffineries Grecques Stran and Stratis Andreadis; Smokovitis and others*); licences (*Tre Traktörer AB*); and intellectual property (*Anheuser-Busch and Balan*).

In *Iatridis*,<sup>389</sup> the ownership of a cinema site had been a matter of dispute between the lessors of the cinema and the State since 1953 and that dispute had still not been resolved by the date of adoption of the judgment. The ECtHR ruled:

It is not for the Court, in deciding this case, to take the place of the national courts and determine whether the land in question belonged to the State or whether the lease between K. N.'s heirs and the applicant was void under Greek law. It will confine itself to observing that, before the applicant was evicted, he had operated the cinema for eleven years under a formally valid lease without any interference by the authorities, as a result of which he had built up a clientele that constituted an asset (...); in this connection, the Court takes into account the role played in local cultural life by open-air cinemas in Greece and to the fact that the clientele of such a cinema is made up mainly of local residents.<sup>390</sup>

The Court noted that the applicant, who had a specific licence to operate the cinema he had rented, was evicted from it by Ilioupolis Town Council and had not set up his

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<sup>389</sup> Judgment 25 March 1999.

<sup>390</sup> See para 54.

business elsewhere. It also noted that, despite a judicial decision quashing the eviction order, Mr Iatridis could not regain possession of the cinema because the Minister of Finance refused to revoke the assignment of it to the Council. In those circumstances, an interference with the applicant's property rights was set. Since Mr. Iatridis held only a lease of his business premises, this interference neither amounted to an expropriation nor was an instance of controlling the use of property but would come under the first sentence of the first paragraph of Article 1.

In *GASUS Dossier-Fordertechnik GmbH*,<sup>391</sup> the applicant company proved that it had sold a concrete-mixer to Atlas subject to retention of title until the full price had been paid. Since at the time of the seizure the full price had not been paid, the ownership of the concrete-mixer still remained with GASUS. This, in their contention, meant that the seizure and subsequent selling of that machine by the Netherlands tax authorities had interfered with their right of ownership. The Government contended that retention of title was more in the nature of a security right *in rem* than of 'true' ownership and that the 'enjoyment' of it was limited to security for payment of the purchase price. 'True' or 'economic' ownership was vested in the purchaser, who stood to lose by damage to or loss of the goods purchased and stood to gain by their use or resale. At the time of the events complained of, the concrete-mixer was thus no longer a 'possession' whose 'peaceful enjoyment' was guaranteed to GASUS by Article 1 of Protocol No. 1. The Court recalled that the notion 'possessions' in Article 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions', for the purposes of this provision. The Court considered it therefore immaterial whether GASUS's right to the concrete-mixer is to be considered as a right of ownership or as a security right *in rem*: '[i]n any event, the seizure and sale of the concrete-mixer constituted an "interference" with the applicant company's right "to the

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<sup>391</sup> Judgment of 23 February 1995.

peaceful enjoyment” of a “possession” within the meaning of Article 1 of Protocol No. 1.<sup>392</sup>

In *Beyeler*,<sup>393</sup> the *Portrait of a Young Peasant*, painted by Vincent van Gogh, in Saint-Rémy-de-Provence (France), in 1889, was in issue. Both the Government and the Commission were of the opinion that Mr. Beyeler had never become the owner of the painting. Nevertheless, the Court pointed out that, ‘the concept of “possessions” in the first part of Article 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as “property rights”, and thus as “possessions” for the purposes of this provision’.<sup>394</sup> Although the determination and identification of a right of property is governed by the national legal system and it is to the applicant to establish both the exact nature of the right he claims and his prerogative to freely enjoy that right, the Court considered that neither the lack of recognition by the domestic laws of a private interest such as a ‘right’ nor the fact that these laws do not regard such interest as a ‘right of property’, does not necessarily prevent the interest in question, in some circumstances, from being regarded as a ‘possession’ within the meaning of Article 1 of Protocol No. 1. *In casu*, the Court ruled that, ‘those factors prove that the applicant had a proprietary interest recognised under Italian law – even if it was revocable in certain circumstances – from the time the work was purchased until the right of pre-emption was exercised and he was paid compensation (a measure classified by the Consiglio di Stato as falling into the category of expropriation measures). This interest therefore constituted a “possession” for the purposes of Article 1 of Protocol No. 1’.

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<sup>392</sup> See para 53.

<sup>393</sup> Judgment of 5 January 2000.

<sup>394</sup> See para 100.

Similarly, in *Öneryıldız*,<sup>395</sup> the title to the land on which the applicant had built his slum dwelling was vested in the Treasury. The applicant was, moreover, unable to establish that he had any property right or claim in respect of the land in question; neither could he show that he had brought any proceedings of any kind to establish a right of acquisition by adverse possession. The national Court, nonetheless, considered that the fact that the applicant had occupied land belonging to the Treasury for approximately five years could not amount to a ‘possession’ within the meaning of Article 1 of Protocol No. 1, given that there is no evidence in the file from which to conclude that the applicant was entitled to claim a transfer of title to the land in question and that in this respect the hopes he might have entertained were of no relevance since Article 1 of Protocol No. 1 applies only to a person's existing possessions and does not guarantee the right to become the owner of property. The dwelling built by the applicant on the land in question would call for a different assessment from the ECtHR. The Court clarified that it was not its task ‘to determine the legal position with regard to the slum dwelling in question in the light of all the domestic legal provisions; the little evidence it has been able to gather of its own motion shows, however, that the edifice built by the applicant breached the relevant town-planning regulations.’<sup>396</sup> It accepted that, ‘notwithstanding that breach of the planning rules and the lack of any valid title, the applicant was nonetheless to all intents and purposes the owner of the structure and fixtures and fittings of the dwelling he had built and of all the household and personal effects which might have been in it’, namely the applicant had been living in that dwelling without ever having been bothered by the authorities, which meant he had been able to lodge his relatives there without, *inter alia*, paying any rent, and he had established a social and family environment there.<sup>397</sup> The Court considered that the

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<sup>395</sup> Judgment of 30 November 2004.

<sup>396</sup> Para 121.

<sup>397</sup> ‘It should be pointed out that those factors and, *inter alia*, the noted failure to take adequate measures (see paragraph 87 above and 146 below), which amounted to implicit tolerance by the authorities of Mr Öneryıldız’s position, enable this case to be distinguished from that of Mrs Chapman (see *Chapman v. the United Kingdom* [GC], no. 27238/95, ECHR 2001-I) in which the applicant, a Gypsy by birth, had been ordered to leave her land on which she had installed her caravan without obtaining the statutory



dwelling built by the applicant and his residence there with his family represented a substantial economic interest. That interest, which the authorities had allowed to subsist over a long period of time, would amount to a ‘possession’ within the meaning of the rule laid down in the first sentence of Article 1 of Protocol No. 1.

In the case of *Matos e Silva, Lda. and Others v. Portugal*, the applicants’ unchallenged rights over the disputed land for almost a century and the revenue they derived from working qualified as ‘possessions’ for the purposes of Article 1.<sup>398</sup>

The first conclusion to draw is that the concept of possession encompasses patrimonial rights, that is, the whole of a person’s assets assessable in monetary terms.<sup>399</sup> The possession might be disposable or not.<sup>400</sup>

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residence permit, as required by domestic law, and had been fined twice before she would leave. In the specific context of that case the Court stated that it would be slow to grant protection, under Article 8 of the Convention, to those who consciously defied the prohibitions of the law and, having regard to the circumstances of that case, it concluded that the judicial measures imposed on the applicant could be regarded as proportionate to the legitimate aim of protecting the “rights of others” through preservation of the environment’.

<sup>398</sup> Judgment of 16 September 1996. In the case of *Almeida Garrett, Mascarenhas Falcão and Others v. Portugal* (judgment of 11 January 2000), the Court observed that Article 1 of Protocol No. 1 protects pecuniary assets, such as debts and that the relevant Portuguese legislation, afforded the applicants a right to compensation for the loss of their property. In Mr. Almeida Garrett’s case the Supreme Administrative Court also recognised, in an obiter dictum in its judgment of 12 July 1994, his right to ‘fair compensation’. The Court found that the applicants could therefore claim to be entitled to recover their debt against the State; accordingly, it concludes that Article 1 of Protocol No. 1 is applicable. And in case *Broniowski v. Poland*, judgment of 22 June 2004, the Court found that a ‘debt chargeable to the State Treasury’ which had ‘a pecuniary and inheritable character’ was a proprietary interest eligible for protection under that Article. In the *Langborger* case, The Court’ ruled that the obligation to pay the small sums involved cannot be regarded as inconsistent with Article 1.

<sup>399</sup> Francesco Bilancia, *I diritti fondamentali come conquiste sovrastatali di civiltà - Il diritto di proprietà nella CEDU*, Giappichelli Ed., Torino, 2002, pp 94 ff; and Karen Reid, *A Practitioner’s Guide to the European Convention on Human Rights*, 2<sup>nd</sup> ed., Thomson, 2004, pp 459-466.

<sup>400</sup> In the case of *van Marle and Others* (judgment of 26 June 1986), the Court ruled that as a result of the Board of Appeal’s decisions, their income and the value of the goodwill of their accountancy practices had diminished. They maintained that they had thereby been subjected to an interference with the exercise of their right to the peaceful enjoyment of their possessions and to a partial deprivation thereof without compensation: ‘by dint of their own work, the applicants had built up a clientèle; this had in many respects the nature of a private right and constituted an asset and, hence, a possession within the meaning of the first sentence of Article 1 (P1-1). This provision was accordingly applicable in the present case.’ (para 41). Further, the refusal to register the applicants as certified accountants ‘radically affected the conditions of their professional activities and the scope of those activities was reduced. Their income

Article 1 does not guarantee a right to acquire property.<sup>401</sup> In *Van der Musselle*,<sup>402</sup> the Legal Advice and Defence Office of the Antwerp Bar had decided on 18 December 1979 that no assessment of fees could be made to Mr. Van der Musselle. Article 1 was considered to enshrine ‘the right of everyone to the peaceful enjoyment of “his” possessions; it thus applies only to existing possessions’ and does not comprehend the absence of remuneration.<sup>403</sup> Similarly, in the case of *Anheuser-Busch Inc. v. Portugal*,<sup>404</sup> the Court recalled that, ‘future income cannot be considered to constitute “possessions” unless it has already been earned or is definitely payable. Further, the hope that a long-extinguished property right may be revived cannot be regarded as a “possession”; nor can a conditional claim which has lapsed as a result of a failure to fulfil the condition’.<sup>405</sup>

The second note, thus, is that Article 1 protects only existing property. Often, the Court refers to domestic law in order to assess the existence of a possession.<sup>406</sup> As ruled in *Pressos Compañia Naviera*:

in order to determine whether in this instance there was a ‘possession’, the Court may have regard to the domestic law in force at the time of the alleged interference, as there is nothing to suggest that that law ran counter to the object and purpose of Article 1 of

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fell, as did the value of their clientèle and, more generally, their business. Consequently, there was interference with their right to the peaceful enjoyment of their possessions’ (para 42). See also *Tre Traktörer*, judgment of 7 July 1989, para 37.

<sup>401</sup> For criticism, see Henry G. Schermers, “The International Protection of the Right to Property”, in *Protecting Human Rights: the European Dimension – Studies in Honour of Gérard J. Wiarda*, Franz Matscher and Herbert Petzold (ed.), Carl Heymanns Verlag KG, 1990, p. 572.

<sup>402</sup> Judgment of 23 November 1983.

<sup>403</sup> Para 48.

<sup>404</sup> Judgment of 11 January 2007.

<sup>405</sup> Para 64.

<sup>406</sup> About the relation between domestic law and European Convention rules see Francesco Bilancia, *I diritti fondamentali come conquiste sovrastatali di civiltà, Il diritto di proprietà nella CEDU*, Giappichelli Ed., Torino, 2002, pp 98 ff.

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Protocol No. 1 (P1-1). The rules in question are rules of tort, under which claims for compensation come into existence as soon as the damage occurs. A claim of this nature ‘constituted an asset’ and therefore amounted to ‘a possession’ within the meaning of the first sentence of Article 1 (P1-1). This provision (P1-1) was accordingly applicable in the present case.<sup>407</sup>

However, although it is true that the determination and identification of a right of property is governed by the national legal system and that the applicant must establish both the exact nature of the right he claims and his prerogative freely to enjoy that right, the Court considers that the lack of recognition by the domestic laws of a private interest such as a ‘right’ or the fact that these laws do not regard such interest as a ‘right of property’, do not necessarily prevent the interest in question, in some circumstances, from being regarded as a ‘possession’ within the meaning of Article 1 of Protocol No. 1. The concept of ‘possessions’ is not limited to ‘existing possessions’ but may also cover assets, including claims, in respect of which the applicant can argue that he has at least a reasonable and ‘legitimate expectation’ of obtaining effective enjoyment of a property right.<sup>408</sup> In *Öneriyildiz*,<sup>409</sup> the Court expressly ruled that, ‘[t]he concept of “possessions” is not limited to “existing possessions” but may also cover assets, including claims, in respect of which the applicant can argue that he has at least a reasonable and “legitimate expectation” of obtaining effective enjoyment of a property right’.<sup>410</sup>

In *Pine Valley*,<sup>411</sup> the Supreme Court held that the outline planning permission granted to Mr. Thornton was a nullity *ab initio*. The first question that arose was whether the applicants had ever enjoyed a right to develop the land in question which could have

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<sup>407</sup> See para 31.

<sup>408</sup> See Luzius Wildhaber, “The Protection of Legitimate Expectations in European Human Rights Law”, in Mário Monti, Prinz Nikolaus von and zu Liechtenstein, Bo Vesterdorf, Jay Westbrook, and Luzius Wildhaber, *Economic Law and Justice in Times of Globalisation – Festschrift for Carl Baudenbacher*, Nomos Verlag, Baden-Baden, 2007, pp 253-263.

<sup>409</sup> Judgment of 30 November 2004.

<sup>410</sup> At para 124.

<sup>411</sup> Judgment of 29 November 1991.

been the subject of an interference. The Court took into account that when Pine Valley purchased the site, it did so in reliance on the permission which had been duly recorded in a public register kept for the purpose and which it was perfectly entitled to assume was valid. That permission amounted to a favourable decision as to the principle of the proposed development, which could not be reopened by the planning authority. So, '[i]n these circumstances it would be unduly formalistic to hold that the Supreme Court's decision did not constitute an interference. Until it was rendered, the applicants had at least a legitimate expectation of being able to carry out their proposed development and this has to be regarded, for the purposes of Article 1 of Protocol No. 1 (P1-1), as a component part of the property in question'.<sup>412</sup>

It should be noted, however, that no legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national courts.<sup>413</sup> Similarly, the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be considered as a '*possession*' within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition.<sup>414</sup>

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<sup>412</sup> *Pine Valley*, judgment of 29 November 1991, para 51. See also *Presos Compañía Naviera*, judgment of 20 November 1995, para 31.

<sup>413</sup> In the case of *Anheuser-Busch Inc. v. Portugal* (judgment of 11 January 2007), the Court recalled that: 'in certain circumstances, a "legitimate expectation" of obtaining an "asset" may also enjoy the protection of Article 1 of Protocol No. 1. Thus, where a proprietary interest is in the nature of a claim, the person in whom it is vested may be regarded as having a "legitimate expectation" if there is a sufficient basis for the interest in national law, for example where there is settled case-law of the domestic courts confirming its existence' (para 65).

<sup>414</sup> In the case of *Stretch v. the United Kingdom*, judgment of 24 June 2003, it was commented at para 32 that, '[t]he Court recalls that, according to the established case-law of the Convention organs, "possessions" can be "existing possessions" or assets, including claims, in respect of which the applicant can argue that he has at least a "legitimate expectation" of obtaining effective enjoyment of a property right (...). By way of contrast, the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be considered as a "possession" within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition (...)'.

From the analysis taken, a sharp difference between the permission granted by the ECJ and the ECtHR can be mentioned. The ECJ takes a cautious approach: decisions focus on the negative borders of property. And the assessment of the existence of property rights is made in the light of the market. The ECtHR takes a wider approach: in some cases the permission as nothing to do with market interests (although they are patrimonial interests), *e.g.*, in *Marckx* (expectations of inheritance) and in *Chassagnou* (compulsory transfers of hunting rights).<sup>415</sup>

## **2. Analysis of the relevant case-law: the impairment of property rights**

I will now discuss the case-law both of the ECJ and of the ECtHR with respect to impairment and deprivation of property rights.

### **2.1. Restrictions to property in the ECJ's case-law**

The right to property is the most vulnerable to violation by Community legislation due to the strong authority of the Community in the area of economic regulation.<sup>416</sup> Under the ECJ's case-law, restrictions to fundamental rights may be imposed provided that they correspond to objectives of general interest pursued by the Community; and do not constitute a disproportionate and intolerable interference which intruded upon the very substance of the rights guaranteed.

The Court shall take into account, first, whether the measure is justified by an overriding general interest. According to the ECJ, measures that interfere with private

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<sup>415</sup> Judgments of 13 June 1979 and of 29 April 1999.

<sup>416</sup> Joseph H. H. Weiler, "Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities" (1986) 61 *Wash. L. Rev.* 1128; and Michael R. Antinori, "Does Lochner Live in Luxembourg? An Analysis of the Property Rights Jurisprudence of the European Court of Justice" (1995) 18 *Fordham Int'l L.J.* 1785.

property will be reviewed to determine if the legislative justification for the measure is reasonable.<sup>417</sup> Such an interest includes, *inter alia*, the establishment of the internal market,<sup>418</sup> sector crises,<sup>419</sup> the objective of eliminating speculative or artificial practices in relation to import licences,<sup>420</sup> health protection,<sup>421</sup> consumers' confidence,<sup>422</sup> and the effectiveness of economic sanctions.<sup>423</sup>

In *Nold*, the Court established for the first time the formula on the basis of which fundamental rights would be protected. The Court ruled that:

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<sup>417</sup> See Michael R. Antinori, *ibidem*, p. 1805; Massimo Fragola, *Limitazioni e contenuto minimo della proprietà nel sistema italo-europeo*, Edizioni Scientifiche Italiane, 26, Napoli, 2002, p. 268 ff; and Mario Comba, "I Diritti Civili – Verso una nuova funzione della proprietà privata", in Gustavo Zagrebelsky, *Diritto e Costituzione nell'Unione Europea*, Laterza, 2003, pp 166.

<sup>418</sup> T-113/96, *Dubois et Fils v Council and Commission* [1998] ECR II-125, at 75.

<sup>419</sup> Joined Cases C-248 and C-249/95, *SAM Schiffahrt GmbH and Heinz Stapf v Germany* [1997] ECR I-4475: 'Under the Court's case-law, the right to property and the freedom to pursue a trade or business both form part of the general principles of Community law. Those principles are, however, not absolute, but must be viewed in relation to their social function. Consequently, the exercise of the right to property and the freedom to pursue a trade or business may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed (judgment in Case C-280/93 *Germany v Council* [1994] ECR I-4973, paragraph 78). In the light of those criteria, the Court finds that the disputed legislation, which is designed to remedy a worrying economic and social situation in the inland waterways sector, corresponds to objectives of general interest pursued by the Community. Moreover, as has been held at paragraphs 27, 32, 36 and 37 of this judgment, the Council had reasonable grounds for taking the view that the system of contributions to scrapping funds constituted a solidarity measure that was appropriate and beneficial for the whole sector in the context of its restructuring'.

<sup>420</sup> In Joined Cases C-37 and 38/02, *Di Lenardo Adriano Srl (C-37/02) and Dilexport Srl (C-38/02) v Ministero del Commercio con l'Estero*, [2004] ECR I-6911, the restriction at stake aimed at combating speculative or artificial practices in relation to the issue of import licences, thereby precluding the possibility of a traditional operator who already had a tariff quota from being included in the same quota again as a non-traditional operator through the intermediary of another operator to which it was related.

<sup>421</sup> Case C-293/97, *The Queen v Secretary of State for the Environment and Ministry of Agriculture, Fisheries and Food* [1999] ECR I-2603; Joined Cases C-20 and C-64/00, *Booker Aquaculture Ltd v The Scottish Minister*, [2003] ECR I-7411, paras. 90-92; Case T-13/99, *Pfizer Animal Health SA v Commission*, [2002] ECR, II-3305.

<sup>422</sup> Case T-13/99, *Pfizer. Ibidem*.

<sup>423</sup> Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport and the Attorney General* [1996] ECR I-3953: 'Moreover, the importance of the aims pursued by the regulation at issue is such as to justify negative consequences, even of a substantial nature, for some operators.' (para 23)

### *Dimensions of property*

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the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder. For this reason, rights of this nature are protected in accordance with the public interest. Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched.<sup>424</sup>

In *Hauer*,<sup>425</sup> the Court considered that restrictions on the new planting of vines was a type of restriction which was accepted as lawful in the constitutional structure of all the Member States, and affirmed the Community's ability to restrict the exercise of the right to property in the context of a common organization of the market and for the purposes of a structural policy. The measures at stake were meant to establish lasting balance in the wine market at a price level which was profitable for producers and fair to consumers, and, secondly, to obtain an improvement in the quality of the wines marketed. Similarly, in case 116/82, *Commission v. Germany*, the provision at issue formed part of the general framework of the common organization of the market and in particular of the policy of quality in wines.<sup>426</sup> Similar reasoning can be found in respect of the market of milk and dairy products.<sup>427</sup>

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<sup>424</sup> Para 14.

<sup>425</sup> Case 44/79, *Alfred Hauer v Council of the European Union and Commission of the European Communities*, [1979] ECR 3727.

<sup>426</sup> The same, or a very similar, formula is used in any other fundamental rights cases (v.g. in Case C-200/96, *Metronome Musik v. Music Point Hokamp*, [1999] ECR I-1953, para 21) Sometimes however, the Court is, for reasons unknown, much more laconic and simply states that fundamental rights 'may be subject to restrictions justified by objectives of general interest pursued by the Community', without further qualifications (Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others*, [1996] ECR I-3985). According to Bruno de Witte, "The Past and Future Role of the European Court of Justice in the Protection of Human Rights", in Philip Alston (ed.), with the assistance of Mara Bustelo and James Heenan, *The EU and Human Rights*, OUP, 1999, p. 881, this formula combines the criteria used by the ECtHR (existence of a public interest and proportionality of the restriction with regard to the public interest) with an additional criterion directly taken from German constitutional law where it is known as the *Wesengehaltsgarantie*: the very substance of a right may not be impaired. Despite this impressive doctrinal apparatus, the Court was not particularly severe in its actual examination of the Banana Regulation, and accepted that all the restrictive features of the Regulation could appear to the Community legislator to be necessary means for establishing the

In *Schraeder*,<sup>428</sup> the Court was asked whether a Regulation laying down detailed rules for the application of the co-responsibility levy between producers and processors in the cereals sector, infringe the fundamental rights of Schraeder's (an undertaking which trades in processed cereals), in particular its right to enjoy property and the right to pursue an occupation or business. The Court ruled that a co-responsibility levy system, where the pecuniary burden of the levy was borne, in economic terms, by the producers alone, and the processors bore only an administrative and accounting charge in connection with the payment and the transfer of the levy, did not infringe the processors' property rights. Further, the Court ruled that the right to property and the freedom to pursue a trade or profession might be restricted, particularly in the context of a common organization of the cereals market, provided that those restrictions in fact corresponded to objectives of general interest pursued by the Community and that they did not constitute a disproportionate and intolerable interference which infringed upon the very substance of the rights guaranteed.<sup>429</sup>

In respect of the impairment in the very substance of the right pursued, it should be noted that in *Bosphorus*, the Court ruled that restrictions to property and to freedom to pursue a commercial activity may be substantial, according to the importance of the aims pursued by the regulation at issue.<sup>430</sup> And in *Pfizer Animal Health SA v Commission*, 'the restoration of consumer confidence can in such circumstances also

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common market of bananas. The proportionality test, applied in conjunction with those rights, was quite lenient.

<sup>427</sup> See Case 59/83 *Biovilac v EEC*, [1984] ECR 4057, and Case C-177/90, *Ralf-Herbert Kühn v Landwirtschaftskammer Weser-Ems*, [1992] ECR I-0035.

<sup>428</sup> Case 265/87, *Hermann Schröder HS Kraftfutter GmbH & Co. KG v Hauptzollamt Gronau* [1989] ECR 2237.

<sup>429</sup> See para 15.

<sup>430</sup> *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport and the Attorney General* [1996] ECR I-3953, at para 23: '[m]oreover, the importance of the aims pursued by the regulation at issue is such as to justify negative consequences, even of a substantial nature, for some operators.'



*be an important objective which may justify even substantial economic consequences for certain traders’.*<sup>431</sup>

Finally, it should be pointed that a general principle of compensation cannot be found in Community law. In Case C-22/94,<sup>432</sup> the Court ruled that,

conversion into a definitive reduction without compensation does not affect the actual substance of that right inasmuch as the Irish producers were able to continue to pursue their trade or profession as milk producers. Moreover, the reduction in milk production led to an increase in the price of milk, thus compensating, at least in part, the loss suffered. (...) It is evident from the case law that a right may be deprived of much of its economic value without that amounting to a breach of the right to property. It seems that the purpose of that right is to prohibit expropriation. It has been suggested that the hallmarks of an expropriation measure are two, namely, the measure must result in the deprivation of all appreciable economic value in the (tangible or intangible) asset in issue and the deprivation must be permanent.

And in *Booker Aquaculture*, the Court expressly stated that,

[i]t is necessary, firstly, to identify the objectives pursued by Directive 93/53 and, secondly, to determine whether, taking account of such objectives, the destruction and slaughter measures provided for by that directive constitute, in the absence of compensation for affected owners, a disproportionate and intolerable interference impairing the very substance of the right to property.

## 2.2. The second and third rules of Article 1 of Protocol No. 1

As I have already mentioned, since the *Sporrong and Lönnroth* decision, it is settled case-law that Article 1 of Protocol No. 1 comprises three distinct rules. The first rule,

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<sup>431</sup> Case T-13/99, [2002] ECR II- 3305.

<sup>432</sup> Case C-22/94, *The Irish Farmers Association and others v Minister for Agriculture, Food and Forestry, Ireland and Attorney General*, [1997] ECR I-1809.

which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule, covering deprivation of possessions and subjects it to certain conditions, appears in the second sentence of the same paragraph. The third rule, recognising that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose, is contained in the second paragraph. And in *James and Others*, the Court went further: '[t]he three rules are not, however, "distinct" in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule'.<sup>433</sup>

Article 1 of Protocol No. 1 distinguishes between two types of interference with property: expropriation (sentence 2 of paragraph 1) and control of the use of property (paragraph 2). A distinction between the two types of interference can in fact only be justified if one assumes that in principle there is a duty to pay compensation on expropriation, for, in other aspects, the requirements prescribed by the Convention for both types of interference are substantially the same, that is to say, they must both be provided by law and be in accordance with the public interest (sentence 2 of paragraph 1 in respect of expropriation) or in the general interest (paragraph 2 in respect of control of the use of property).<sup>434</sup>

Deprivation of property embraces nationalisation (compulsory transfer of ownership to the State or to private individuals or legal persons),<sup>435</sup> confiscation<sup>436</sup> and expropriation

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<sup>433</sup> Judgment of 21 February 1986, para 37. See also *Lithgow*, judgment of 8 July 1986, para 106, and *AGOSI*, judgment of 24 October 1986, para 48.

<sup>434</sup> Wolfgang Peukert, "Protection of Ownership under Article 1 of the First Protocol to the European Convention on Human Rights", (1981) 2 *Hum. Rts. L.J.* 54.

<sup>435</sup> V.g. Case *Jasiūnienė*, judgment of 6 March 2003, and Case *Hakansson*, judgment of 21 February 1990.

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in the broader sense. The seizure cannot be provisional; only a total and definitive dispossession is to be considered deprivation of property. In *Handyside*,<sup>437</sup> the Court clarified that, the expression ‘deprived of his possessions’, applies only to someone who is ‘deprived of ownership’ (*privé de sa propriété*). In this case, the seizure complained of was provisional; it did prevent the applicant, for a period, from enjoying and using as he pleased possessions of which he remained the owner and which he would have recovered had the proceedings against him resulted in an acquittal. Also in the case of *Erkner and Hofauer*, the transfer carried out by the Austrian authorities in August 1970 was a provisional one that only the entry into force of a consolidation plan would make irrevocable.<sup>438</sup> The applicants might even recover their land if the final plan did not confirm the distribution made at the earlier stage of the proceedings. Accordingly, the Court ruled that it could not be said that the applicants had been definitively ‘deprived of their possessions’ within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1. Similarly, in the case of *Wiesinger v. Austria*, the transfer effected was considered to be only provisional, since the applicants might recover at least part of their land when the consolidation scheme would enter into force.<sup>439</sup> A permanent interference, however, is a sufficient but not a necessary condition for the measure to be considered an expropriation.<sup>440</sup>

In *Sporrong et Lönnroth*,<sup>441</sup> although the expropriation permits had left intact in law the owners’ right to use and dispose of their possessions, they nevertheless in practice significantly had reduced the possibility of its exercise. They had also affected the very

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<sup>436</sup> The *Vasilescu v. Romania* Case was the first case where the Court found *de facto* confiscation. See Sanja Djajic, “The Right To Property And The *Vasilescu v. Romania* Case”, (2000) 27 *Syracuse J. Int’l L. & Com.* 363.

<sup>437</sup> Judgment of 7 December 1976, para 62.

<sup>438</sup> Judgment of 23 April 1987, para 74.

<sup>439</sup> Judgment of 30 October 1991, para 72.

<sup>440</sup> Luigi Condorelli, “Premier Protocol Additionel, Article 1”, in Louis-Edmond Pettiti, Emmanuel Decaux, Pierre-Henri Imbert, *La Convention européenne des droits de l’homme, Commentaire article par article*, 2<sup>nd</sup> ed., Economica, pp 983 ff.

<sup>441</sup> Judgment of 23 September 1982.

substance of ownership in that they had recognized that any expropriation would be lawful and had authorized the City of Stockholm to expropriate whenever it found it expedient to do so. The applicants' right of property thus had become precarious and defeasible. The prohibitions on construction, for their part, undoubtedly restricted the applicants' right to use their possessions. There was therefore an interference with the applicants' right of property and the consequences of that interference were undoubtedly rendered more serious by the combined use, over a long period of time, of expropriation permits and prohibitions on construction. The Court concluded that,

in the absence of a formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of (...). Since the Convention is intended to guarantee rights that are 'practical and effective' (...), it has to be ascertained whether that situation amounted to a de facto expropriation, as was argued by the applicants.

In *Papamichalopoulos*,<sup>442</sup> the situation was as follows: in 1967, under a Law enacted by the military government of the time, the Navy Fund took possession of a large area of land which included the applicants' land; it established a naval base there and a holiday resort for officers and their families. From that date the applicants were unable either to make use of their property or to sell, bequeath, mortgage or make a gift thereof. Mr Petros Papamichalopoulos, the only one who would obtain a final court decision ordering the Navy to return his property to him, was even refused access to it. As early as 1969 the authorities had drawn the Navy's attention to the fact that part of the land was not available for disposal. And after democracy had been restored, they sought means of making good the damage caused to the applicants. In 1980, they even recommended, if not returning the land, at least exchanging it for other land of equal value. The Court considered that, 'the loss of all ability to dispose of the land in issue, taken together with the failure of the attempts made so far to remedy the situation complained of, entailed sufficiently serious consequences for the applicants de facto to have been expropriated in a manner incompatible with their right to the peaceful

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<sup>442</sup> Judgment of 24 June 1993.

enjoyment of their possessions’, and concluded that there had been a breach of Article 1 of Protocol No. 1.<sup>443</sup>

Another case of *de facto* expropriation is the Italian Court of Cassation’s case-law on constructive expropriation.<sup>444</sup> Constructive expropriation is an adjudicative creation: when a landowner had *de facto* lost use of the land as it had been possessed and building works in the public interest had been undertaken, the Italian Courts would consider that the applicants’ right of property had been extinguished on completion of the public works - *occupazione acquisitiva* or *accessione invertita*. The mere fact that works had been carried out meant that the owner had also lost title to the land.

Nevertheless, despite the reference to *de facto* deprivations, a closer look to the Court’s case-law reveals that requirements to qualify a measure as deprivation are very strict. In fact, often the interference is considered a control of the use of property falling within the scope of the second paragraph of Article 1. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose.<sup>445</sup> State

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<sup>443</sup> Para 45.

<sup>444</sup> See, v.g., *Case of Carbonara and Ventura v. Italy*, judgment of 30 May 2000, para 61: ‘[t]he Court notes that in the present case the Court of Cassation held, in a decision that was final and in which it applied the constructive-expropriation rule, that there had been a transfer of property in favour of the Noicattaro Town Council; as a consequence of that decision the applicants were deprived of the possibility of obtaining damages. In those circumstances, the Court finds that the effect of the judgment of the Court of Cassation was to deprive the applicants of their possessions within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1 (...)’.

<sup>445</sup> In *Sporrong et Löhnroth*, judgment of 23 September 1982, the Court concluded that, ‘(...) the applicants could continue to utilise their possessions and that, although it became more difficult to sell properties in Stockholm affected by expropriation permits and prohibitions on construction, the possibility of selling subsisted; according to information supplied by the Government, several dozen sales were carried out’. There was therefore no room for the application of the second sentence of the first paragraph in the present case (see para 63). In *Mellacher*, judgment of 19 December 1989, para 44, the Court found that the measures taken did not amount either to a formal or to a *de facto* expropriation: ‘ [t]he contested measures which, admittedly, deprived them of part of their income from the property amounted in the circumstances merely to a control of the use of property. Accordingly, the second paragraph of Article 1 (P1-1) applies in this instance’. In the *Fredin* case, judgment of 18 February 1991, the applicants contended that the revocation of a permit to exploit gravel amounted to a formal expropriation. Again, the Court considered the revocation of the applicants’ permit to exploit gravel as a control of use of property falling within the scope of the second paragraph of the Article 1 of Protocol

regulation is permissible also to secure the payment of taxes or other contributions or penalties.<sup>446</sup>

The seizures and forfeitures imposed by criminal law, both temporary and definitive, also fall under this provision.<sup>447</sup> In the case of *Vendittelli*,<sup>448</sup> the sequestration of the flat

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No. 1 (para 42). In *Pine Valley*, judgment of 29 November 1991, the impugned measure was designed to ensure that the land was used in conformity with the relevant planning laws; the title remained vested in Healy Holdings. The Court considered that Healy Holdings' powers to take decisions concerning the property were unaffected (§56). In *Holy Monasteries*, judgment of 9 December 1994, the Section 3(1)(A) of Law no. 1700/1987, and in particular the terms 'shall be deemed to be the property of the ... State', were at stake. The provision created a presumption of ownership, a legal fiction of State ownership. The expression 'deemed to be the property of the ... State' did not mean that the State actually acquired ownership of the relevant property; that issue remained in abeyance until the rights asserted by the monasteries were satisfactorily established in law: In para 58, the Court considered that, 'by creating a presumption of State ownership, section 3(1)(A) shifts the burden of proof so that it now falls on the applicant monasteries, which can only assert their ownership of the land in issue if it derives from a duly registered title deed, from a statutory provision or from a final court decision against the State. Section 3(1)(A) taken together with section 1(1) thus deprives them of the possibility of relying, in order to adduce proof to the contrary, on all the means of acquiring property provided for in Greek law and by which the applicant monasteries possibly accumulated their property, including adverse possession and even a final court decision against a private individual (...)'. In *Chassagnou*, judgment of 29 April 1999, the applicants complained that the compulsory transfer of the hunting rights over their land to an ACCA, pursuant to the provisions of the Loi Verdeille, constituted an interference with their right to the peaceful enjoyment of their possessions. The Court noted that 'although the applicants have not been deprived of their right to use their property, to lease it or to sell it, the compulsory transfer of the hunting rights over their land to an ACCA prevents them from making use of the right to hunt, which is directly linked to the right of property, as they see fit. In the present case the applicants do not wish to hunt on their land and object to the fact that others may come onto their land to hunt. However, although opposed to hunting on ethical grounds, they are obliged to tolerate the presence of armed men and gun dogs on their land every year. This restriction on the free exercise of the right of use undoubtedly constitutes an interference with the applicants' enjoyment of their rights as the owners of property. Accordingly, the second paragraph of Article 1 is applicable in the case' (para 74). See also *Matos e Silva*, judgment of 16 September 1996, para 85, *Tre Traktörer*, judgment of 7 July 1989, para 55, and *Katte Klitsche de la Grange*, judgment of 27 October 1994, para 40.

<sup>446</sup> In *GASUS-Dossier*, the interference complained of was the result of the tax authorities' exercise of their powers: '(...) the most natural approach, in the Court's opinion, is to examine GASUS's complaints under the head of "securing the payment of taxes", which comes under the rule in the second paragraph of Article 1 (P1-1). That paragraph explicitly reserves the right of Contracting States to pass such laws as they may deem necessary to secure the payment of taxes. The importance which the drafters of the Convention attached to this aspect of the second paragraph of Article 1 (P1-1) may be gauged from the fact that at a stage when the proposed text did not contain such explicit reference to taxes, it was already understood to reserve the States' power to pass whatever fiscal laws they considered desirable, provided always that measures in this field did not amount to arbitrary confiscation (...). The fact that current tax legislation makes it possible for the tax authorities, on certain conditions, to recover tax debts against a third party's assets does not warrant any different conclusion as to the applicable rule. Neither does it suffice in itself to describe section 16(3) of the 1845 Act as granting powers of arbitrary confiscation.' (Para 74)

was a measure ancillary to the criminal proceedings. The Court found that the impugned measure was provided for by law and was designed not to deprive the applicant of his property but only to prevent him from using it. The sequestration, which was part of the criminal proceedings, had two objectives: to preserve the evidence of the offence and to prevent any aggravation of the offence. The measure therefore had a legitimate aim. The Court concluded, however, that,

the Court of Appeal ought to have ordered the immediate release of the property from sequestration without even waiting for Mr Vendittelli to raise the issue, as the considerations justifying sequestration until 30 October 1990 (...) had ceased to exist thereafter. Continuing the sequestration after that date until 21 May 1991 (...) therefore placed a disproportionate burden on the applicant.<sup>449</sup>

### ***2.1. The concepts of public and general interest (rules two and three)***

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<sup>447</sup> The Court includes under this provision the seizure and forfeiture imposed by criminal or tax law. In *Air Canada*, judgment of 5 May 1995, the applicant company complained that the seizure of its aircraft and the subsequent requirement to pay £50,000 for its return amounted to an unjustified interference with the peaceful enjoyment of its possessions contrary to Article 1 of Protocol No. 1 (P1-1) to the Convention. The Court considered that, ‘the seizure of the aircraft amounted to a temporary restriction on its use and did not involve a transfer of ownership, and, in the second place, that the decision of the Court of Appeal to condemn the property as forfeited did not have the effect of depriving Air Canada of ownership since the sum required for the release of the aircraft had been paid’ (para 33). Similarly, in *Handyside*, judgment of 7 December 1976: “[t]he forfeiture and destruction of the Schoolbook, on the other hand, permanently deprived the applicant of the ownership of certain possessions. However, these measures were authorised by the second paragraph of Article 1 of Protocol No. 1 (P1-1), interpreted in the light of the principle of law, common to the Contracting States, whereunder items whose use has been lawfully adjudged illicit and dangerous to the general interest are forfeited with a view to destruction’ (para 63). In *AGOSI*, judgment of 24 October 1986, the seizure of 1,500 Kruegerrands, gold coins minted in South Africa, was at stake: “[t]he prohibition on the importation of gold coins into the United Kingdom clearly constituted a control of the use of property. The seizure and forfeiture of the Kruegerrands were measures taken for the enforcement of that prohibition. (...) The forfeiture of the coins did, of course, involve a deprivation of property, but in the circumstances the deprivation formed a constituent element of the procedure for the control of the use in the United Kingdom of gold coins such as Kruegerrands. It is therefore the second paragraph of Article 1 (P1-1) which is applicable in the present case’ (para 51).

<sup>448</sup> Judgment of 18 July 1994.

<sup>449</sup> Para 40. See also *Raimondo*, judgment of 22 February 1994, para 33.

Expropriation of property is allowed under the second sentence of paragraph 1 of Article 1, subject to three conditions: it must be in the public interest; it must comply with such conditions as are provided for by the law; and it must in addition comply with the general principles of international law.<sup>450</sup> Measures controlling the use of property must be prescribed by law; and considered necessary in accordance with the general interest.

A common analytical approach is taken by the Court to all interferences with property falling within Article 1. That approach involves three steps. First, the Court ensures that the national measure complained of is provided for by national law. Secondly, the Court ensures that the interference is affected pursuant to the public interest (second

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<sup>450</sup> The relevant rules regarding protection of ownership in general international law have developed as a part of the international law relating to foreigners. They prescribe a duty to pay compensation on the expropriation of the property of foreigners. Wolfgang Peukert, "Protection of Ownership under Article 1 of the First Protocol to the European Convention on Human Rights", (1981) 2 *Hum. Rts. L.J.* 65. In *James*, judgment of 21 February 1986, the Court had ruled: 'In the first place, purely as a matter of general international law, the principles in question apply solely to non-nationals. They were specifically developed for the benefit of non-nationals. As such, these principles did not relate to the treatment accorded by States to their own nationals.' (para 60). In *Lithgow and Others*, judgment of 8 July 1986, it can be read: '117. Confronted with a text whose interpretation has given rise to such disagreement, the Court considers it proper to have recourse to the travaux préparatoires as a supplementary means of interpretation (see Article 32 of the Vienna Convention on the Law of Treaties). Examination of the travaux préparatoires reveals that the express reference to a right to compensation contained in earlier drafts of Article 1 (P1-1) was excluded, notably in the face of opposition on the part of the United Kingdom and other States. The mention of the general principles of international law was subsequently included and was the subject of several statements to the effect that they protected only foreigners. Thus, when the German Government stated that they could accept the text provided that it was explicitly recognised that those principles involved the obligation to pay compensation in the event of expropriation, the Swedish delegation pointed out that those principles only applied to relations between a State and non-nationals. And it was then agreed, at the request of the German and Belgian delegations, that, "the general principles of international law, in their present connotation, entailed the obligation to pay compensation to non-nationals in cases of expropriation". Above all, in their Resolution (52) 1 of 19 March 1952 approving the text of the Protocol (P1) and opening it for signature, the Committee of Ministers expressly stated that, "as regards Article 1 (P1-1), the general principles of international law in their present connotation entail the obligation to pay compensation to non-nationals in cases of expropriation" (emphasis added). Having regard to the negotiating history as a whole, the Court considers that this Resolution must be taken as a clear indication that the reference to the general principles of international law was not intended to extend to nationals. The travaux préparatoires accordingly do not support the interpretation for which the applicants contended. 118. Finally, it has not been demonstrated that, since the entry into force of Protocol No. 1 (P1), State practice has developed to the point where it can be said that the parties to that instrument regard the reference therein to the general principles of international law as being applicable to the treatment accorded by them to their own nationals. The evidence adduced points distinctly in the opposite direction. 119. For all these reasons, the Court concludes that the general principles of international law are not applicable to a taking by a State of the property of its own nationals.'



sentence), the general interest (third sentence), or to secure the payment of taxes or other contributions or penalties (third sentence). The third element of the Court's common approach is to examine whether the interference at issue strikes a balance between the demands of the general interest of the community and the requirements of the protection of an individual's fundamental rights. This means that there must be a reasonable relationship of proportionality between the means employed and the aims pursued. The question is sometimes expressed as being whether, overall, the applicant can be said to have suffered an excessive burden.<sup>451</sup>

### *I. Rule of law*

Any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph authorises a deprivation of possessions only 'subject to the conditions provided for by law' and the second paragraph recognises that the States have the right to control the use of property by enforcing 'laws'. The issue of whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights becomes relevant only once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary.<sup>452</sup>

The principle of lawfulness also presupposes that the applicable provisions of domestic law be sufficiently accessible, precise and foreseeable.<sup>453</sup>

### *II. Public interest*

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<sup>451</sup> David Anderson, "Compensation for Interference with Property", (1999) *E.H.R.L.R.* 547.

<sup>452</sup> See *Iatridis*, judgment of 25 March 1999, para 58; *Beyeler*, judgment of 5 January 2000, para 107; *Hakansson*, judgment of 21 February 1990, para 47; *Allan Jacobsson*, judgment of 25 October 1989, para 57.

<sup>453</sup> See, *Beyeler*, judgment of 5 January 2000, para 109: "(...) The Court observes that in certain respects the statute lacks clarity, particularly in that it leaves open the time-limit for the exercise of a right of pre-emption in the event of an incomplete declaration without, however, indicating how such an omission can subsequently be rectified. Indeed, this seems to have been implicitly acknowledged by the Court of Cassation.' Similarly, in the case of *Broniowski v. Poland*, judgment of 22 June 2004, para 147.

For these purposes there is no material distinction between the public interest and the general interest. The Court seldom rejects a submission by a State that a particular interference was in the public or general interest,<sup>454</sup> even when it is the State itself which benefits financially from the impoverishment of an individual.<sup>455</sup>

No definition of the concept of public interest and general interest is to be found in international law, but it should be necessarily extensive. What economic measures are in the public interest, according to the Court, involves considerations of economic and social issues. In *James and Others*,<sup>456</sup> the Court ruled that,

the words ‘*utilité publique*’ are also capable of bearing a wider meaning, covering expropriation measures taken in implementation of policies calculated to enhance social justice. The Court, like the Commission, considers that such an interpretation best reconciles the language of the English and French texts, having regard to the object and purpose of Article 1 (P1-1) (...), which is primarily to guard against the arbitrary confiscation of property.

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<sup>454</sup> In *Marckx* case, judgment of 13 June 1979, the Court found that, ‘the limitation applies only to unmarried and not to married mothers. Like the Commission, the Court considers this distinction, in support of which the Government put forward no special argument, to be discriminatory. In view of Article 14 (art. 14) of the Convention, the Court fails to see on what “general interest”, or on what objective and reasonable justification, a State could rely to limit an unmarried mother’s right to make gifts or legacies in favour of her child when at the same time a married woman is not subject to any similar restriction’ (para 65).

<sup>455</sup> In *Tre Traktörer*, judgment of 7 July 2008, para 58: ‘The Court’s power to review compliance with domestic law is limited. It is in the first place for the national authorities to interpret and apply that law (...), and nothing in the above-mentioned decision suggests that it was contrary to Swedish law’. However, in *Hentrich*, judgment of 22 September 1994, at para 42: “the Court considers it necessary to rule on the lawfulness of the interference. While the system of the right of pre-emption does not lend itself to criticism as an attribute of the State’s sovereignty, the same is not true where the exercise of it is discretionary and at the same time the procedure is not fair. In the instant case the pre-emption operated arbitrarily and selectively and was scarcely foreseeable, and it was not attended by the basic procedural safeguards. In particular, Article 668 of the General Tax Code, as interpreted up to that time by the Court of Cassation and as applied to the applicant, did not sufficiently satisfy the requirements of precision and foreseeability implied by the concept of law within the meaning of the Convention. A pre-emption decision cannot be legitimate in the absence of adversarial proceedings that comply with the principle of equality of arms, enabling argument to be presented on the issue of the underestimation of the price and, consequently, on the Revenue’s position - all elements which were lacking in the present case. The Court notes that the French legal system has in fact been modified in this respect, it now being mandatory for the reasons for administrative pre-emption decisions to be subject to the adversarial principle. It must, however, observe that this development did not avail the applicant, although it could have done’.

<sup>456</sup> Judgment of 21 February 1986, para 42.

The decision as to what lies in the public or general interest is naturally a matter within the discretion of the State authorities.<sup>457</sup> The state, therefore, has a wide measure of discretion and the Court will not substitute its own judgment of whether the measure is in the public interest for that of the state unless it is manifestly without reasonable foundation.<sup>458</sup>

To States is reserved a wide margin of appreciation with regard to the existence of a problem of public concern warranting measures of control, as to the choice of the detailed rules for the implementation of such measures, and for judging whether the consequences of implementation are justified in the general interest for the purposes of achieving that objective.<sup>459</sup> In the case of *Almeida Garrett, Mascarenhas Falcão and Others v. Portugal*,<sup>460</sup> the Court reiterated that: ‘the States have a wide margin of appreciation to determine what is in the public interest, especially where compensation for a nationalisation is concerned, as the national legislature has a wide discretion in implementing social and economic policies. However, that margin of appreciation is not unlimited and its exercise is subject to review by the Convention institutions’.<sup>461</sup> Such

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<sup>457</sup> On the indeterminacy of the common goods and how national communities can no longer make decisions and policies for themselves in autarchy, see Jan M. Broekman, *A Philosophy of European Union Law*, Peeters, Leuven, 1999, p. 439. About “Democratic Disablement and the Right to Property in the European Convention for the Protection of Human Rights”, see Howard Davis, in [1996] *J.C.L.* 125-138.

<sup>458</sup> Wolfgang Peukert, Protection of Ownership under Article 1 of the First Protocol to the European Convention on Human Rights, (1981) 2 *Hum. Rts. L.J.* 61; Michael R. Antinori, “Does Lochner Live in Luxembourg? An Analysis of the Property Rights Jurisprudence of the European Court of Justice”, (1995) 18 *Fordham Int'l L.J.* 1802. How the extensive notion of public interest weakens the protection granted by Article 1 of the Protocol, see Jean Raymond, “L’Article 1 du protocole additionnel et les rapports entre particuliers”, in *Protecting Human Rights: the European Dimension – Studies in Honour of Gérard J. Wiarda*, Franz Matscher and Herbert Petzold (ed.), Carl Heymanns Verlag KG, 1990, at 537; Maria Luisa Padelletti, *La tutela della proprietà nella convenzione europea dei diritti dell’uomo*, Giuffrè Ed., Milano, 2003, pp 165 ff.

<sup>459</sup> For analysis on this, see Michael R. Antinori, “Does Lochner Live in Luxembourg? An Analysis of the Property Rights Jurisprudence of the European Court of Justice”, (1995) 18 *Fordham Int'l L.J.* 1802 ff.

<sup>460</sup> Judgment of 11 January 2000, para 52.

an approach leaves scope for a finding of violation of Article 1 of Protocol No. 1 only in the most extreme cases.<sup>462</sup>

### *III. Proportionality*

The third element of the Court's common approach is to examine whether the interference at issue strikes a balance between the demands of the general interest of the community and the requirements of the protection of an individual's fundamental rights. This means that there must be a reasonable relationship of proportionality between the means employed and the aims pursued. The question is sometimes expressed as being whether, overall, the applicant can be said to have suffered an excessive burden.<sup>463</sup> Such a balance requires an overall examination of the various interests in issue, which may call for an analysis not only of the compensation terms but

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<sup>461</sup> In *James and Others*, judgment of 21 February 1986: 'Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken (...). Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation. Furthermore, the notion of "public interest" is necessarily extensive. In particular, as the Commission noted, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation. In other words, although the Court cannot substitute its own assessment for that of the national authorities, it is bound to review the contested measures under Article 1 of Protocol No. 1 (P1-1) and, in so doing, to make an inquiry into the facts with reference to which the national authorities acted.' (para 46)

<sup>462</sup> See Yves Winisdoerffer, "Margin of Appreciation and Article 1 of Protocol No. 1", (1998) *Human Rights Law Journal* 18-19; Luigi Condorelli, *Premier Protocol Additionel, Article 1*, in Louis-Edmond Pettiti, Emmanuel Decaux, Pierre-Henri Imbert, *La Convention européenne des droits de l'homme, Commentaire article par article*, 2<sup>nd</sup> ed., Economica, pp 988 ff. How this system creates a form of ordered pluralism, see Francesco Bilancia, *I diritti fondamentali come conquiste sovranazionali di civiltà, Il diritto di proprietà nella CEDU*, Giappichelli Ed., Torino, 2002, pp 113 ff.

<sup>463</sup> David Anderson, "Compensation for Interference with Property", (1999) *E.H.R.L.R.* 547. Also *AGOSI*, judgment of 24 October 1986, para 52, and *Allan Jacobsson*, judgment of 25 October 1989, para 55.

also of the conduct of the parties to the dispute, including the means employed by the State and their implementation.<sup>464</sup>

Article 1 contains no express obligation to pay compensation for State interferences with property; but the subject of compensation has been explored in the case-law.<sup>465</sup> In *Lithgow and Others*, the Court ruled:

“under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances not relevant for present purposes. As far as Article 1 (P1-1) is concerned,

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<sup>464</sup> In the case of *Almeida Garrett, Mascarenhas Falcão and Others v. Portugal*, judgment of 11 January 2000, twenty-four years had elapsed without the applicants being paid the compensation to which the domestic legislation stated that they were entitled: ‘[t]he delay is indisputably attributable to the State and neither the complexity of the authorities’ activities in that sphere nor the number of people entitled to compensation can justify a delay as long as that which has occurred here. Furthermore, the fact that the applicants received provisional compensation does not appear to be decisive, as it was paid several years after they were deprived of the land concerned. In any event, even though provisional compensation has been paid, the fact remains that the applicants continue to be faced with uncertainty. It is that uncertainty, coupled with the lack of any effective domestic remedy for rectifying the situation, that leads the Court to find that the applicants have already had to bear a special and excessive burden which has upset the fair balance which has to be struck between the demands of the public interest and the protection of the right to peaceful enjoyment of possessions. 55. In conclusion, there has been a violation of Article 1 of Protocol No. 1’ (para 54). In *Broniowski v. Poland*, judgment of 22 June 2004, the Court ruled: ‘[i]n assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are “practical and effective.” It must look behind appearances and investigate the realities of the situation complained of. That assessment may involve not only the relevant compensation terms – if the situation is akin to the taking of property – but also the conduct of the parties, including the means employed by the State and their implementation. In that context, it should be stressed that uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State’s conduct. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner’ (para 151). In the case of *Paola Esposito v. Italy*, of 19 February 2002, the Court referred to ‘its detailed reasons in the judgments cited above and notes that in this case, since June 1993, i.e. more than eight years and eleven months, the applicant is still left in a state of uncertainty as to when she would be able to repossess her flat. Consequently, there has been a violation of Article 1 of Protocol No. 1 and of Article 6 § 1 of the Convention in the present case’ (para 25).

<sup>465</sup> See Maria Luisa Padelletti, *La tutela della proprietà nella convenzione europea dei diritti dell’uomo*, Giuffrè Ed., Milano, 2003, pp 211 ff. In *Sporrong and Lönnroth*, judgment of 23 September 1982, the Court considered that ‘the two series of measures created a situation which upset the fair balance which should be struck between the protection of the right of property and the requirements of the general interest: the Sporrong Estate and Mrs. Lönnroth bore an individual and excessive burden which could have been tendered legitimate only if they had had the possibility of seeking a reduction of the time-limits or of claiming compensation. Yet at the relevant time Swedish law excluded these possibilities and it still excludes the second of them’ (para 73).

the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle. In this connection, the Court recalls that not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim “in the public interest”, but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. (...) Clearly, compensation terms are material to the assessment whether a fair balance has been struck between the various interests at stake and, notably, whether or not a disproportionate burden has been imposed on the person who has been deprived of his possessions.<sup>466</sup>

The payment of compensation is a means of striking a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. It is one element to take into account in order to assess if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realized by any measures applied by the State, including measures depriving a person of his or her possessions.<sup>467</sup> The Court

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<sup>466</sup> Judgment of 9 July 1986, para 120. See also, *Les Saints Monastères*, of 9 December 1994, para 70; *James*, judgment of 21 February 1986, para 54; *Beyeler*, judgment of 5 January 2000, para 114; *Broniowski v. Poland*, judgment of 22 June 2004, para 6. In the case of *Chassagnou and Others v. France*, judgment of 29 April 1999, the Court considered that, ‘1. (...) the result of the compulsory-transfer system which it lays down has been to place the applicants in a situation which upsets the fair balance to be struck between protection of the right of property and the requirements of the general interest. Compelling small landowners to transfer hunting rights over their land so that others can make use of them in a way which is totally incompatible with their beliefs imposes a disproportionate burden which is not justified under the second paragraph of Article 1 of Protocol No. 1. There has therefore been a violation of that provision’.

<sup>467</sup> In *Matos e Silva*, judgment of 16 September 1996, it was held that, ‘the various measures taken with respect to the possessions concerned did not lack a reasonable basis. However, it observes that in the circumstances of the case the measures had serious and harmful effects that have hindered the applicants’ ordinary enjoyment of their right for more than thirteen years during which time virtually no progress has been made in the proceedings. The long period of uncertainty both as to what would become of the possessions and as to the question of compensation further aggravated the detrimental effects of the disputed measures. As a result, the applicants have had to bear an individual and excessive burden which has upset the fair balance which should be struck between the requirements of the general interest and the protection of the right to the peaceful enjoyment of one’s possessions’ (para 92). See also Benedetto Conforti, “La Giurisprudenza della Corte di Giustizia di Strasburgo”, and Mario Trimarchi, “La proprietà nella Prospettiva del Diritto Europeo”, in Mario Comporti (ed.), *La Proprietà nella Carta Europea dei Diritti Fondamentali*, Giuffrè, Milano, 2005, pp 111 and 153.

must, therefore, ascertain whether by reason of the State's action or inaction the person concerned had to bear a disproportionate and excessive burden.<sup>468</sup>

Article 1 of Protocol No. 1 does not, however, guarantee a right to full compensation in all circumstances. The Court accepts the reimbursement for less than the full market value in view of legitimate objectives of 'public interest', such as are pursued in measures of economic reform or measures designed to achieve greater social justice<sup>469</sup> or an unjust enrichment derived to the State;<sup>470</sup> or the benefits deriving to owners.<sup>471</sup>

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<sup>468</sup> The principle of the abuse of right and the principle of proportionality apply in international law in the same way as in domestic legal systems. Wolfgang Peukert, "Protection of Ownership under Article 1 of the First Protocol to the European Convention on Human Rights", (1981) 2 *Hum. Rts. L.J.* 69. For criticism on the proportionality, see Ali Rıza Çoban, *Protection of Property Rights within the European Convention on Human Rights*, Ashgate, 2004, pp 204 ff. The author claims that the fair balance test requires the payment of a reasonable compensation. Since there is no clear criterion to decide what is reasonable, it is for the judge to decide, on an ad hoc basis, whether the compensation paid by national authorities is reasonable. But this approach also benefits the public interest because the judge abstains to find the compensation unreasonable unless there is obviously a clear injustice.

<sup>469</sup> In *James and Others*, judgment of 21 February 1986, the Court ruled that, 'Article 1 (P1-1) does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value. Furthermore, the Court's power of review is limited to ascertaining whether the choice of compensation terms falls outside the State's wide margin of appreciation in this domain' (para 54); in *Lithgow and Others*, judgment of 9 July 1986: '[b]oth the nature of the property taken and the circumstances of the taking in these two categories of cases give rise to different considerations which may legitimately be taken into account in determining a fair balance between the public interest and the private interests concerned. The valuation of major industrial enterprises for the purpose of nationalising a whole industry is in itself a far more complex operation than, for instance, the valuation of land compulsorily acquired and normally calls for specific legislation which can be applied across the board to all the undertakings involved. Accordingly, provided always that the aforesaid fair balance is preserved, the standard of compensation required in a nationalisation case may be different from that required in regard to other takings of property' (para 121).

<sup>470</sup> *Beyeler*, judgment of 5 January 2000, para 121: '[t]hat state of affairs allowed the Ministry of Cultural Heritage to acquire the painting in 1988 at well below its market value. Having regard to the conduct of the authorities between December 1983 and November 1988, the Court considers that they derived an unjust enrichment from the uncertainty that existed during that period and to which they had largely contributed. Irrespective of the applicant's nationality, such enrichment is incompatible with the requirement of a "fair balance"'.

<sup>471</sup> In *Katkaridis*, judgment of 15 November 1996, para 49, the Court recognised that when compensation due to the owners of properties expropriated for road works to be carried out is being assessed, it is legitimate to take into account the benefit derived from the works by adjoining owners.

The taking of property without compensation was never considered justified by the Court.<sup>472</sup>

### **3. Property and market: proportionality as a criterion?**

Respect for the same rights does not mean reaching the same outcome on the facts. It is clear that the content of a right as recognized in the Community legal order may be different from its content as recognized in the Constitution of the Member States and in the ECtHR case-law.<sup>473</sup>

Property rights along with the freedom to trade, and the right to choose and practise freely a trade or profession, had soon been expressly recognized by the Court as fundamental. Simultaneously, the authority of the Community is strongest in the area of economic regulation, jeopardizing or endangering individual property rights. The object of my inquiry is how the ECJ is balancing the requirements of the general interest and of the individual's property rights.<sup>474</sup>

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<sup>472</sup> See *v.g. Pressos Compañia Naviera*, judgment of 20 November 1995: 'The financial considerations cited by the Government and their concern to bring Belgian law into line with the law of neighbouring countries could warrant prospective legislation in this area to derogate from the general law of tort. Such considerations could not justify legislating with retrospective effect with the aim and consequence of depriving the applicants of their claims for compensation. Such a fundamental interference with the applicants' rights is inconsistent with preserving a fair balance between the interests at stake.' (para 43) In *Holy Monasteries*, judgment of 9 December 1994, the Court decided that '[c]ompensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden on the applicants. In this connection, the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 (P1-1) only in exceptional circumstances. Article 1 (P1-1) does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest" may call for less than reimbursement of the full market value.' (para 71).

<sup>473</sup> According to Takis Tridimas, *The General Principles of EU Law*, 2<sup>nd</sup> ed., Oxford EC Law Library, OUP, 2006, 304, this reflects the general position of the Court in deriving general principles of law from the national legal systems, according to which it does not seek to derive common denominators but makes a synthesis guided by the spirit of the Treaty and the requirements of Community polity.

<sup>474</sup> Following Gregory S. Alexander, Laura S. Underkuffler, in "Property as Constitutional Myth: Utilities and Dangers", (2006) 92 *Cornell L. Rev.* 1240, challenges the assumption that the constitutional



### *Dimensions of property*

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It is my contention that interferences with private property aiming at, *e.g.*, a common organization of the market, must not, with regard to the aim pursued, place a disproportionate burden on the individual. Payment of compensation to individuals for interferences with their property is a nuclear element in the assessment of the 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's property rights.

In *Booker Aquaculture*,<sup>475</sup> Council Directive 93/53/EEC of 24 June 1993 introducing minimum Community measures for the control of certain fish diseases was at stake.<sup>476</sup> The Directive laid down animal health and preventive measures which Member States should take to prevent and to eliminate certain fish diseases in their territory was at stake. No right of compensation for the benefit of owners whose fish have been destroyed or slaughtered following the implementation of such measures followed either from the scheme or from the terms of Directive 93/53.

Booker and Hydro Seafood contended that the Directive was incompatible with the fundamental right to property. They submitted that the principles of Community law on the protection of fundamental rights, in particular the right to property, were to be interpreted as meaning that they require compensation to be paid to owners whose fish have been destroyed, either by being killed and destroyed or by being slaughtered in circumstances such as those in the main proceedings. According to the petitioners in the main proceedings, the existence and extent of the right to compensation are important elements in the balance between the general public interest and private rights so as to ensure that the protection accorded by Article 1 of the Protocol No. 1 to the ECHR

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protection of property rights, or the text of particular constitutional property clauses, matters in the degree of protection that property enjoys. Although the presence or absence of constitutional protection of property may affect outcomes, it is far from outcome-determinative. Judicial interpretation of a constitutional property clause turns on many factors, among which is the text. Other factors that influence the interpretative process, such as background (no-constitutional) legal and political traditions and culture, are at least equally important.

<sup>475</sup> Joined Cases C-20/00 and C-64/00, [2003] ECR I-7411.

<sup>476</sup> OJ 1993 L 175/23.

against expropriation and deprivation of use of property is not illusory or wholly ineffective.

Booker and Hydro Seafood did not contend that the restrictions placed on their right to property run counter to objectives of general interest pursued by the Community in the context of the common organisation of the aquaculture market. However, in the absence of any form of compensation, they submit that the measures taken by the United Kingdom Government constituted a disproportionate and intolerable interference impairing the very substance of their right. Further, in so far as it affects a fundamental right such as the right to property, the complete absence of compensation for persons affected by national measures implementing a directive infringes the principle of proportionality.

The ECJ, nevertheless, maintained that restrictions may be imposed on the exercise of property rights, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.

The Court started by identifying the objectives pursued by Directive 93/53. Accordingly the Court ruled that: ‘the policy implemented by the Community is intended to contribute to the completion of the internal market in aquaculture animals and products while avoiding the spread of contagious diseases of fish’<sup>477</sup> and that the Directive seeks to attain ‘a double objective which is, firstly, to ensure, by the completion of the internal market, the rational development of the aquaculture sector and to increase its productivity and, secondly, to lay down, at Community level, health rules for that sector’.<sup>478</sup>

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<sup>477</sup> Para 72.

<sup>478</sup> Para 73.

### *Dimensions of property*

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With respect to the existence of a disproportionate and intolerable interference, impairing the very substance of Booker and Hydra Seafood property rights, the Court considered that the measures referred to did not deprive farm owners of the use of their fish farms, but enabled them to continue to carry on their activities there, and that the immediate destruction and slaughter of all the fish enable owners to restock the affected farms as soon as possible. Therefore, such measures did not constitute in the Court's opinion, even in the absence of compensation for affected owners, a disproportionate and intolerable interference impairing the very substance of the right to property.

By setting up its case-law this way, the Court assumes an ambiguous role. On one hand, it recognizes property rights as fundamental. On the other hand, it has never classified interference as disproportionate to or intolerable for impairing the very substance of that right.

There has been remarkably little discussion on this, but in my opinion the Court places an excessive burden on individuals in cases, such the afore-mentioned *Booker Aquaculture*, where there is evidence that the measure aiming at pursuing a general interest endangers the proper existence of the enterprise.

I suggest that to prevent the undermining of property rights necessarily implies the recognition of an inherent duty to pay compensation. The effective protection of property rights requires proportionality of the interference infringed upon the right. In several cases such proportionality can only be obtained through the payment of compensation to the owner deprived of his right.

Of course, other elements should be taken into consideration in order to find such a balance (e.g., the increase in the price of products).<sup>479</sup> Nevertheless, payment of compensation to individuals for interferences with their property should be a nuclear element in the assessment of the 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's

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<sup>479</sup> See Case C-22/94, *The Irish Farmers Association and others v Minister for Agriculture, Food and Forestry, Ireland and Attorney General*, [1997] ECR I-1809.

property right. The complete absence of compensation when enterprises are affected by national measures implementing a directive infringes the principle of proportionality and disintegrates property rights protection into mere illusion. And such recognition would square both with the ECtHR case-law, and the common constitutional traditions of Member States, increasing coherence in the European adjudicative process.

A shift from consistency to integrity is needed in ECJ case-law concerning property rights protection. The principle of integrity requires judges to treat the system of public standards as expressing and respecting a coherent set of principles, and, to that end, to interpret these standards in order to find implicit standards between and undergirding the explicit ones. Integrity demands that the public standards of the community be both made and seen, so far as it is possible, to express a single, coherent scheme of justice and fairness in the right relation. The ECJ should accept that ideal and depart from the narrow line of past decisions in search of strict fidelity to principles conceived as more fundamental to the scheme as a whole, namely property rights protection.<sup>480</sup> Law as integrity asks judges to continue interpreting the same material that they claim to have successfully interpreted themselves.<sup>481</sup> Integrity is about principle and does not require any simple form of consistency in policy.<sup>482</sup>

The market presupposes the existence of private property rights but it is also a communicative infrastructure *par excellence*, where property rights obtain full-existence. In semiotic terms, property is, first, a representation sign referring to a particular web of exchange relationships. For property rights do not exist in the absence

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<sup>480</sup> Ronald Dworkin, *Law's Empire*, Fontana Press, 1986, pp 219 and ff. Integrity encourages a judge to be wide-ranging and imaginative in his search for coherence with fundamental principles. The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness.

<sup>481</sup> *Ibidem*, p. 226.

<sup>482</sup> According to Ronald Dworkin, in “The Forum of Principle”, in *As a Matter of Principle*, Clarendon University Press, Oxford, 1986, p. 68, decisions of principle – deciding about the rights people must have under our constitutional system - shall be distinguished from decisions of policy – decisions about how the general welfare is best promoted.

of an interpretative web of relational exchange. The idea of property functions as a cultural-interpretative referent and operates to organize exchange relationships. Property in other words, organizes social status, defines power over semiotic space, and allocates resources according to conventionalized rules.<sup>483</sup>

By being in the market, a vast and complex communication network, individuals acquire a position that I would label ‘the right to have rights’,<sup>484</sup> namely, to be within a

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<sup>483</sup> I am following Robin Paul Malloy, “Framing the Market: Representations of Meaning and Value in Law, Markets and Culture”, in (2003) 51 *Buff. L. Rev.* 1.

<sup>484</sup> The right to have rights was formulated initially by Hannah Arendt and later elaborated upon by the French political philosopher, Claude Lefort: ‘[w]e became aware of the existence of a right to have rights (and that means to live within a framework where one is judged by one’s actions and opinions) and a right to belong to some kind of organized community only when millions of people emerged who had lost and could not regain these rights because of the new global situation’. Recently, attempts to give the ‘right to have rights’ a more intersubjective explanation that emphasizes the importance of political communication have emerged. According to a recent interpretation by James Bohman, “The Moral Costs of Political Pluralism: the Dilemmas of Difference and Equality in Arendt’s ‘Reflections on Little Rock’”, in Jerome Kohn and Larry May (eds.), *Hannah Arendt: Twenty Years Later*, 1996, pp 63-64, this basic right makes sense primarily as a right of equal access to the public world. Accordingly, we need to be able to participate on an equal basis in public affairs in order to articulate our opinions and have them listened to and to ensure that our actions may have some effect. However, the right to have rights entails more than mere access to the public sphere. It also refers to a broad concept of political equality that means that humans not only have access to the public space but that they can initiate action with others and initiate acts of deliberation with others about matters of common concern. Without rights of access that can also address the social inequalities that act as obstacles to the initiations of deliberation, people have little opportunity to define issues of common concern. As a result, public deliberation is reduced to the one-way discourse of expertise that allows the powerful to continue to marginalize other voices and to set the public agenda as they see fit. Without the right to have right, there is no deliberative equality and the public space is diminished.

The relationship of the politics of rights to the preservation and enhancement of the public space is central to understanding Claude Lefort’s more explicitly democratic interpretation of the right to have rights. According to Lefort, the key to the universality of rights lies in their articulation within a public space in civil society that is separate from the state. Accordingly, any diminishing or elimination of the public space is interpreted as a degradation of human rights. However, like Hannah Arendt, who recognizes that institutional guarantees remain effective only as long as they reflect “the living power of the people” (*On violence*, 1979, p. 7), Lefort acknowledges that no institution, including the state, can guarantee either rights themselves or the continued existence of the public space. Rights are gained and secured only in their declaration and practice by individuals in the presence of others who recognize the validity of their claims. According to Lefort, this recognition of human rights is based on the rights o have rights. Consequently, the recognition of this basic right leads to the generation of other rights and the opening up of the possibility of a potentially endless democratic adventure, the outcome of which is indeterminate. Interpreted in this manner, the right to have rights can provide the basis for critique of the partiality of existing rights and their failure to promote political equality defined in terms of access to the public world. In this way, the discourse of human rights can provide a fundamental critique of the inadequacy of existing institutions and also provide the impetus to generate new interpretations of existing legal rights and the political articulation of new rights. (...) Within the context of global

framework where one is judged by one's choices and actions and where everyone has a right of equal access. The market is a space of a particular sort of communication characterized by three necessary conditions.<sup>485</sup> First, the market is a type of forum in which the participants are 'a public' - that is, they may express their proposals and choices to others who in turn respond to them and raise their choices and answers. Second, such communication must manifest the commitment of participants to individual autonomy and sovereignty. Individuals shall be independent in virtue of an equally protected private autonomy in their life conduct.<sup>486</sup> Third, this communication must address an indefinite audience.

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ecological citizenship/politics, rights to equal access to the public world and to the equal capacity to initiate deliberation and action within it are central.

<sup>485</sup> I got inspiration and I am closing following James Boham in *Democracy Across Borders, From Dêmos to Démoi*, MIT Press, 2007, p. 61. According to James Boham, a public sphere is a space of a particular sort of communication characterized by three necessary conditions. First, the public sphere is a type of forum in which the participants are 'a public' - that is, a social sphere in which speakers may express their views to others who in turn respond to them and raise their opinions and concerns- Second, such communication must manifest the commitment of participants to freedom and quality. Third, rather than simple face-to-face interaction, this communication must address an indefinite audience. Communication is then public if it is directed at an indefinite audience with the expectation of a response. The public sphere is rather the informally mobilized body of non-governmental discursive opinion that can serve as a counter weight to the state. It is precisely this extragovernmental character of the public sphere that confers and aura of independence, autonomy, and legitimacy on the 'public opinion' generated in it. Nancy Fraser, *Justice Interrupts: Critical Reflections on the "Postsocialist" Condition*, Routledge, 1997, p. 90, distinguish between weak publics and strong publics. Weak publics are publics whose deliberative practice consists exclusively in opinion formation and does not encompass decision making. Strong publics (sovereign parliaments) are publics whose discourse encompasses both opinion formation and decision making. As a locus of public deliberation culminating in legally binding decisions (or laws), parliament was to be the site for the discursive authorize of the use of state power. This distinction was accepted by Jürgen Habermas, *Between Facts and Norms, Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg, MIT, 1998. See also William E. Scheuerman, "Between Radicalism and Resignation: Democratic Theory in Habermas's Between Facts and Norms", in *Discourse and Democracy: Essays on Habermas's Between Facts and Norms*, René von Schomberg and Kenneth Baynes (eds.), SUNY Press, 2002, p. 67.

<sup>486</sup> Private and public autonomy require each other. The two concepts are interdependent; they are related to each other by material implication. Citizens can make an appropriate use of their public autonomy, as guaranteed by political rights, only if they are sufficiently independent in virtue of an equally protected private autonomy in their life conduct. Members of society actually enjoy their equal private autonomy to an equal extent - that is, equally distributed individual liberties have 'equal value' for them - only if as citizens they make an appropriate use of their political autonomy. According to Jürgen Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles", (2001) 29 *Political Theory* 767, both principles are equally original. One is not possible without the other, but neither sets limits on the other. According to Kenneth Baynes, "Deliberative Democracy and the Limits of Liberalism", in *Discourse and Democracy: Essays on Habermas's Between Facts and Norms*, René von

Private autonomy thus takes on the form of a legally guaranteed freedom of choice. The market institutionalizes procedures and conditions of communication, as well as the interplay among institutionalized constituted autonomies.<sup>487</sup> The market provides the context for the possible transformation of individual preferences. Individuals whose interests are involved have an equal and effective opportunity to make their own choices and preferences known. This conception holds that participation in the market is fair when they are reasonably acceptable from each citizen's point of view.<sup>488</sup>

However, the market does not constitute an encompassing system of values that assimilates everything into itself. Rather, it should provide a means through which interactions weave together and forms of life are structured. The market provides the ensemble of conditions that both enable and limit.

As a provider of enabling structural conditions, the market must respect the subjective autonomy of actors - the autonomous and decentralized decisions of self-interested individuals in a certain sphere of action. The individual is provided with spheres of action and their autonomy is tailored to the strategic pursuit of individual interests.

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Schomberg and Kenneth Baynes (eds.), SUNY Press, 2002, p. 23, a virtue of the model is that it relates these ideals at an abstract level: public and private autonomy are two dimensions of the fundamental right to communicate liberty as it is expressed in the legal form. If one begins with this notion of communicative liberty, it is possible to regard the constitution as a sort of 'public charter' and the system of rights as a form of 'precommitment' that citizens make in undertaking to regulate their common lives by public law. As such the proposed reconciliation of democracy and rights neither undervalues public autonomy, nor overtaxes private autonomy. It is not based on a shared conception of the good, but on a mere abstract form of recognition contained in the idea of free and equal consociates under law.

<sup>487</sup> Kenneth Baynes, "Deliberative Democracy and the Limits of Liberalism", in *Discourse and Democracy: Essays on Habermas's Between Facts and Norms*, René von Schomberg and Kenneth Baynes (eds.), SUNY Press, 2002, p. 17. Michele Constatino, "Il diritto di proprietà tra diritto comunitario e diritto interno", in Mario Comporti (ed.) *La Proprietà nella Carta Europea dei Diritti Fondamentali*, Giuffrè, Milano, at 74, notices the relation between property and autonomy under European law.

<sup>488</sup> About 'complex proceduralism', Charles R. Beitz, *Political Equality, An Essay in Democratic Theory*, PUP, Princeton, 1989, p. 23. Also William Rehg and James Bohman, "Discourse and Democracy: The Formal and Informal Bases of Legitimacy in Between Facts and Norms", in *Discourse and Democracy: Essays on Habermas's Between Facts and Norms*, René von Schomberg and Kenneth Baynes (eds.), SUNY Press, 2002, p. 51.

But participation in the market is fair when enabling conditions are reasonably acceptable from each citizen's point of view. Individuals must have actionable claims to refrain others from impermissible interventions. Further, proportionality is a mechanism of action coordination that requires the admitted interferences with individual's autonomy to be proportional. Proportionality as a principle branches out into various universes of discourse: it is enlisted for the coordination of the action plans of different actors.<sup>489</sup>

As DWORKIN wrote,<sup>490</sup> rights might have to yield to another, or even to an urgent policy with which it competes on particular facts. The power of a right might even be weighted as its power to withstand such competition. Interferences with property rights entail encroachment into individuals' autonomy to make their own choices and to pursue their objectives. They should, then, be strictly necessary and proportionate.

To conclude, the market is a communicative infrastructure that encompasses an interpretative web of relational exchange. Individuals in the market must be provided with a right of equal access to and a right to act according to one's choices and actions. The market must thus assume a commitment with participants' individual autonomy and sovereignty (enabling function). But participation in the market is fair when they are reasonably acceptable from each citizen's point of view. Individuals must have actionable claims to prevent others from forbidden interventions, and the admitted interferences with individual's autonomy shall be proportional.

Similarly, in respect of interferences with property, the ECJ should depart from the narrow line of past decisions. The protection of the property right-holder, while an actor in the market, implies the recognition of rights of equal access to the market and the

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<sup>489</sup> The visible European private law should be understood as a transformation process which shifts the balance from autonomy to functionalism in competition and regulation. This process is the result of the interplay between the economisation of private law via the internal market and the politicisation of private law via the building of new governance structures. See Hans-W. Micklitz, "The Visible Hand of European Private Law", EUI Working Paper, 2008/14, p. 47.

<sup>490</sup> Ronald Dworkin, *Taking Rights Seriously*, Duckworth, 1977, p. 92.



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autonomy of one's choices and actions. Any restriction to individual's autonomy shall be strictly necessary and proportional. The individual shall not suffer an excessive burden; on the contrary, a fair balance must be reached between the demands of the general interest of the community and the requirements of the protection of the individual's property right. In this proportionality test, the payment of compensation (along with other elements, such as the increase of prices) must necessarily be taken into consideration.

Instead of the traditional judicial restraint, the ECJ should be open to inputs from the ECtHR and appropriately ensure effective protection of individual property rights, namely granting compensation to deprivation of property. By so doing, the Court would increase coherence in the European adjudicative process, which encompasses also the ECtHR, and the common constitutional traditions of Member States.

“Consumers, by definition, include us all.”

John F. Kennedy, Special Message to the Congress, March 15<sup>th</sup>, 1962<sup>491</sup>

## **Chapter IV – The Property Right Holder playing the role of the European Consumer**

### *Introductory note*

As I have demonstrated in Chapter II, in contemporary societies the object of property is undergoing a fundamental change. On one hand, it is increasingly restricted to consumer goods. On the other hand, the use of goods increasingly depends on an ancillary contract. In respect of what I have labelled inert things, the use of the thing itself depends upon a contract. The contract emerges, then, as a functional imperative of property and the owner is, often, necessarily a consumer. Therefore, property, contract and consumer law merge as a web of interconnected legal regimes that revolve around goods.

How the property holder must be conceived in the framework of European Consumer Law is the object of my inquiry in this chapter. The two moments of acquisition and use should be taken into consideration. In respect of, first, the *moment of acquisition*, Directive 1999/44/EC that provides consumers special protection on certain aspects of sale of consumer goods and associated guarantees obviously comes to mind.<sup>492</sup> But *e.g.*

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<sup>491</sup> <http://www.presidency.ucsb.edu/ws/?pid=9108> [last visited 31<sup>st</sup> December 2009]

<sup>492</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171/12.

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Council Directive 93/13/EEC of 5 April 1993,<sup>493</sup> on unfair terms in consumer contracts, also might be mentioned. For instance, in Case *Freiburger Kommunalbauten*,<sup>494</sup> a contract of sale of a parking space, celebrated between the Freiburger Kommunalbauten, a municipal construction company acting in the course of its business, and Mr and Mrs Hofstetter, who were dealing as consumers, was at stake. The national Court referred to the ECJ the following question:

Is a term, contained in a seller's standard business conditions, which provides that the purchaser of a building which is to be constructed is to pay the total price for that building, irrespective of whether there has been any progress in the construction, provided that the seller has previously provided him with a guarantee from a credit institution securing any monetary claims the purchaser may have in respect of defective performance or non-performance of the contract, to be regarded as unfair within the meaning of Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts?

Differently, in *Crailsheimer Volksbank*,<sup>495</sup> Directive 85/577/ECC on the protection of the consumer in respect of contracts negotiated away from business premises was applied to credit agreements concluded between the borrowers and a bank to finance the purchase of immovable property.<sup>496</sup> Directive 85/577/EEC was also at stake in *Hamilton*.<sup>497</sup> On 17 November 1992, Ms Hamilton signed, at her home, a contract for a loan with a bank in order to finance the acquisition of shares in a real property fund, containing the following notice concerning the right of cancellation: '[i]f the borrower

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<sup>493</sup> OJ 1993 L 95/29. The Proposal for a Directive of the European Parliament and of the Council on Consumer Rights (COM (2008) 614 final) issued by the Commission might repeal this Directive.

<sup>494</sup> Case C-237/02, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter*, [2004] ECR I - 3403.

<sup>495</sup> Case C-229/04, *Crailsheimer Volksbank eG v Klaus Conrads and Others*, [2005] ECR I-9273.

<sup>496</sup> Council Directive 85/577/EEC of 20 December 1985, to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372/31. The Proposal for a Directive of the European Parliament and of the Council on Consumer Rights (COM (2008) 614 final) might repeal this Directive.

<sup>497</sup> Case C-412/06, *Annelore Hamilton v Volksbank Filder eG*, [2008] ECR, I-2383.

has received the loan, cancellation shall be deemed not to have taken place unless he repays the loan either within two weeks of giving notice of cancellation or within two weeks of the paying out of the loan'. The ECJ was asked whether the first paragraph of Article 4 and Article 5(1) of the doorstep selling directive might be interpreted as meaning that the national legislature was allowed to place a time-limit on the right of cancellation.<sup>498</sup>

The second moment to be taken into consideration in order to ascertain how the property holder must be conceived in the framework of European Consumer Law is the *use moment*, where holders of a property right must contract for a further sale-purchasing or for a service supply in order to use the goods. *Mostaza Claro*,<sup>499</sup> for instance, related to a mobile phone contract concluded between Móvil and Ms. Mostaza Claro, containing an arbitration clause. The ECJ was asked whether Directive 93/13/EEC of 5 April 1993, on unfair terms in consumer contracts, required the national Court to determine whether the arbitration agreement was void and to annul the award if the arbitration agreement contained an unfair term to the consumer's detriment, when that issue was raised in the action for annulment but had not been raised by the consumer in the arbitration proceedings.<sup>500</sup>

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<sup>498</sup> The Court ruled that: 'Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises must be interpreted as meaning that the national legislature is entitled to provide that the right of cancellation laid down in Article 5(1) of the directive may be exercised no later than one month from the time at which the contracting parties have performed in full their obligations under a contract for long-term credit, where the consumer has been given defective notice concerning the exercise of that right'.

<sup>499</sup> Case C-168/05, *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, [2006] ECR I-10421.

<sup>500</sup> With respect to mobile phones, the high level of the prices payable by users of public mobile telephone networks when travelling abroad within the Community is a matter of concern to Community institutions. Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, and Regulation 717/2007 on roaming on public mobile telephone networks within the Community set up a common approach for ensuring that, 'users of terrestrial public mobile phone networks when travelling within the Community do not pay excessive prices for Community wide-roaming services when making or receiving voice calls, thereby achieving a high level of consumer protection while safeguarding competition between mobile operators and preserving both incentives for innovation and consumer choice' (cfr. Recital 16). The settlement of a Eurotariff was considered to be the best approach to regulating the level of prices. In September 2008, the Commission issued a Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 717/2007 Directive 2002/21/EC (COM(2008) 580 final).

European consumer policy, the definition of the European consumer, and the function of EC consumer protection law, are the three interrelated questions that will guide my inquiry. My final purpose is to explore the protection granted to the property right-holder when playing the part of a European consumer.

In this Chapter, I will start by identifying the distinct approaches to the notion of consumer under European Law. The Community has mainly adopted a transactional notion of consumer, linked up with functional approaches, namely the build-up and functioning of the internal market, and giving little space to judicial law-making. Consumer law is usually described as a set of rules and principles specifically designed to protect consumers in their relationships with enterprises, *e.g.* by setting measures concerning labelling, contractual terms, security standards, and fair commercial practices. European consumer law is purely market behaviour law; it does not strive for the concrete balance of the individual interests involved in each specific transaction and it is not meant to allow equitable *ad hoc* decisions. Hence, I will conclude that the success of a European consumer policy apparently depends on the institutionalization of procedures and conditions of communication for a formal transaction in a given market-oriented framework.

Afterwards, I will demonstrate how the European consumer has been conceived of as being confident, informed, rational, and an average person. The confident consumer is, first, regarded as active in the making of the internal market, so cross-border shopping is to be stimulated. Second, the European consumer is taken as an informed consumer. Information paradigm underlines transparency as the main method of consumer protection and it is closely connected with the emphasis on party autonomy as an important value of the internal market. Strongly related with this idea, is the assumption that European consumers are reasonably circumspect and are able to make rational choices and to take on responsibility to promote their own interests. Lastly, the Court has set the criterion of the average consumer, according to an assimilationist model, which emphasizes the extent to which consumers are all alike. I will deploy some criticism on these options, *e.g.*, by recalling the difficulties of a mortgage credit market (against the paradigm of the confident consumer) or the recent rise of mortgage

foreclosures (against the paradigm of the informed and circumspect consumer). I will also note that, in respect of the rationality of a property right-holder, the value of a piece of property to an individual increases as soon as the individual is actually given the property. This so-called endowment effect has strong consequences. First, endowment effect explains why people resist deviating from default rules in contract negotiation (default rules, along with mandatory rules and legal standards, become, thus, a specific matter of European policy-making). Second, it undermines the premise of the Coase Theorem that the assignment of property rights has no efficiency impact if transaction costs are low.

Finally, I will emphasize how the exercise of an effective and autonomous choice presupposes consumers have the ability to choose among distinct options. The European market provides the enabling structural conditions to the flow of communicative actions among economic actors. The Community, first, institutionalizes communication between consumers and businesses. Second, it empowers the consumer, enabling substantial and effective autonomy. Against this communicative framework, European intervention must be pragmatic and promote and reinforce effective autonomy and choice. It should be assumed, however, that by providing the adequate context for a substantive rationality, intervention in the market shall not impair individual freedom or legal certainty – it should be mildly paternalistic. My first claim is that consumer policies should be asymmetrical: they shall create benefits for those who are boundedly rational while imposing little or no harm on those who are to be considered fully rational. Such policies are relatively harmless to those who reliably make decisions in their best interest, while at the same time advantageous to those making suboptimal choices. This distinction provides the basis for a new standard in the assessment of the costs and benefits of regulatory options. As JOERGES wrote, European integration inserts new individual freedoms into legal systems ‘and so strengthens the realm of private autonomy, (...) imposes new duties upon traders and assigns

inalienable minimum rights to consumers; and it establishes transnational regulatory frameworks to which national institutions of private law must adapt themselves'.<sup>501</sup>

The state of the art is as follows: by implementing specific procedures, some cognitive errors and external constraints can be prevented, in order to obtain utility maximization decisions from private individuals. My second claim is that a full range of options is, thus, available to EC policymakers, namely with respect to education, information duties, withdraw rights, and effective redress.

Finally, I will suggest that concepts such as 'vulnerable and weak consumer' should be taken by European policymakers as an open criterion, where *ad hoc* rationalizations would have room to arise.

With specific regard to property rights holders, where the authority of the Community is so strong, fundamental rights protection may mandate specific policy decisions. That will be the object of my inquiry in Chapter Five.

## **1. The European consumer: a transaction definition**

Within the set of European legislative measures which are commonly considered 'consumer protection' measures, it is possible to identify distinct approaches to the notion of consumer.

All the contract directives (doorstep-selling,<sup>502</sup> consumer credit,<sup>503</sup> unfair terms,<sup>504</sup> timeshare,<sup>505</sup> distance-selling,<sup>506</sup> consumer guarantees<sup>507</sup>), Rome I<sup>508</sup> and the Brussels

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<sup>501</sup> Christian Joerges, "European Challenges to Private Law: on False Dichotomies, True Conflicts and the Need for a Constitutional Perspective", (1998) 18 *Legal Stud.* Pp 161-162.

<sup>502</sup> Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372/31.

<sup>503</sup> Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning

Regulation,<sup>509</sup> use a definition that rely on a transaction definition, according to which a consumer is a natural person who, in transactions covered by the legislation concerned, is acting for purposes which are not within his trade, business, craft or profession. Similarly, the Directive on prices<sup>510</sup> defines a consumer as ‘any natural person who buys a product for purposes that do not fall within the sphere of his commercial and professional activity.’

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consumer credit (as amended by Directive 98/7/EC of the European Parliament and of the Council of 16 February 1998, OJ 1998 L 101/17).

<sup>504</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29.

<sup>505</sup> Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 [OJ 2009 L33/10] on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts. Article 2 of Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis [OJ 1994 L 280/83] defined purchaser as: ‘any natural person who, acting in transactions covered by this Directive, for purposes which may be regarded as being outwith his professional capacity, has the right which is the subject of the contract transferred to him or for whom the right which is the subject of the contract is established’.

<sup>506</sup> 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, OJ 1997 L 144/19. The Commission issued in October 2008, a Proposal for a Directive of the European Parliament and of the Council on Consumer Rights (COM (2008) 614 final) that might repeal this Directive.

<sup>507</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171/12. The Commission Proposal for a Directive of the European Parliament and of the Council on Consumer Rights (COM (2008) 614 final) might repeal this Directive.

<sup>508</sup> See Article 6 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ 2008 L 177/06. Similarly Article 5 of the 1980 Rome Convention to the Law Applicable to Contractual Obligations [OJ 1988 C27/34] read: ‘1. This Article applies to a contract the object of which is the supply of goods or services to a person (‘the consumer’) for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object’. The consumer in the Convention can also be a legal person. The question what has to be view as ‘acting for purposes which can be regarded as outside trade or profession’ was not clear (v.g. it was unclear whether a businessman - who was a natural person - might be regarded as a consumer for transactions falling outside his business). See Jules Stuyck, “European Consumer Law after the Treaty of Amsterdam: Consumer Policy In or Beyond the Internal Market?” (2000) 37 *CMLRev* 376).

<sup>509</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12/1.

<sup>510</sup> Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ 1998 L 80/27.



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The Package Travel Directive,<sup>511</sup> on the contrary, draws a notion that covers any person who takes or agrees to take the package or any person on whose behalf the purchase of the package is made or to whom the package is transferred, and thus covers, for example, a businessman buying a business trip. Similarly, Regulation 717/2007, on roaming on public mobile telephone networks,<sup>512</sup> protects the customer of a provider of a terrestrial public mobile telephony services. Directives on labelling<sup>513</sup> use the word ‘ultimate consumer’ or ‘final consumer’ to refer to the consumer in the final stage of the economic process,<sup>514</sup> the person who actually consumes the product, but they do not further define the notion of the consumer. Directives on product liability<sup>515</sup> and product safety<sup>516</sup> contain a definition of ‘product’ and ‘producer’, but not of the other party, which is later referred to as ‘injured person’ or ‘consumer’. This approach can be justified, however, by the awareness that some measures need to cover wider economic categories so as to include, in contrast with the transaction definition, consumers who act in a professional capacity.<sup>517</sup> Damage to property, however, is compensated under

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<sup>511</sup> Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ 1990 L 158/59.

<sup>512</sup> OJ 2007, L 171/32.

<sup>513</sup> V.g. Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, OJ 2000 L 109/29, and Commission Directive 2008/5/EC of 30 January 2008 concerning the compulsory indication on the labelling of certain foodstuffs of particulars other than those provided for in Directive 2000/13/EC of the European Parliament and of the Council, OJ 2008 L 27/12.

<sup>514</sup> Claiming that the location at the final stage of economic process should be the general criterion to characterize the consumer, Thierry Bourgoignie, *Éléments pour une théorie du droit de la consommation*, E. Story-Scientia, Louvain-La-Neuve, 1988, p. 53.

<sup>515</sup> Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ 1985 L 210/29.

<sup>516</sup> Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, OJ 2002 L 11/4.

<sup>517</sup> According to Paolisa Nebbia and Tony Askham, *EU Consumer Law*, Richmond, 2004, p. 37, the primary focus of these directives is the general responsibility of producers for their products so that there is no need to restrict the obligations of the producer to any category of consumers. The authors claim that it would be not only impractical but also morally unacceptable to prescribe different degrees of product safety or liability according to the use the purchaser makes of the product.

the Product Liability Directive only if the product is of the type ordinarily intended for private use or consumption. A similar rationale justifies the choice made by the Misleading Advertising Directive<sup>518</sup> to extend its protection to all persons carrying out a trade or business or profession and the interest of the public in general, as well as consumers (once again not defined). Finally, in respect of Regulation on food law, final consumer means the ultimate consumer of a foodstuff who will not use the food as part of any food business operation or activity.<sup>519</sup>

The definition of European consumer depends on the object and scope of the protection to be granted. More precisely, within the general framework of European consumer law, there seem to be different types of measures: the ones which are addressed to the consumer *stricto sensu* and which give a clear definition of their addressee as a natural person acting outside his business and profession; other measures, which are broadly understood to be consumer protection measures (the word consumer is actually mentioned in the text or in the preamble of the measure at issue but no further defined)<sup>520</sup> but which, as a matter of policy choice, are addressed to a wider audience.<sup>521</sup>

The notion of consumer is, undeniably, a central issue in consumer law literature. A first decision to be taken is whether a broad or a restrictive concept should be chosen. Should a definition of consumer grant to small businesses the same protection as to

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<sup>518</sup> Directive 2006/114/EC of the European Parliament and of the Council, of 12 December 2006, concerning misleading and comparative advertising, OJ 2006 L 376/21.

<sup>519</sup> Regulation 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

<sup>520</sup> See *v.g.* Recital 1 of Regulation 717/2007 on roaming on public mobile telephone networks.

<sup>521</sup> See Paolisa Nebbia and Tony Askham, *EU Consumer Law*, Richmond, 2004, p. 38. According to the Authors, this uncertainty is somehow emphasised by the 'horizontal' nature of consumer law: the wish to protect the persona 'consumer', understood either in a narrow or broad sense, is the only common denominator to a number of measures which draw on a wide range of disciplines and extend across the traditional legal categories and economic policies without being fully integrated in any of these. Daniel Mortermans and Stewart Watson used the image of lottery to suggest that each lottery ticket stood for a different definition of the notion 'consumer'. They recognize, however, some system, albeit imperfect, in this diversity. See "The Notion of Consumer in Community Law: a Lottery?", in Julian Lombay (ed.), *Enhancing the Legal Position of the European Consumer*, BIICL, 1996, p. 55.

private consumers?<sup>522</sup> Such an approach would mean that rules governing contractual relations aim at protecting the weaker consuming party against the supposedly more powerful (professional) supplying party.<sup>523</sup> Or should a restrictive approach be adopted? This would mean that consumers are to be defined as natural persons acting for purposes which are outside their trade, business or professions - by opposition to professionals, defined as persons, legal or natural, acting for purposes relating to their trade, business and profession. And finally, should the notions of consumer and professional be viewed to include natural persons acting for purposes falling primarily outside (consumer) or primarily within (professional) their trade, business and profession?<sup>524</sup> Should consumer protection measures be extended to professionals who are in a situation of inferiority *vis-à-vis* their suppliers or clients, *e.g.*, small businessmen buying equipment they need to the exercise of their trade?

Obviously, the debate about the notion of consumer, namely whether a broad or a restrictive concept should be chosen, is not a neutral one; on the contrary, it reflects the debate about the function of EC Consumer Law. Shall the Community adopt rigid rules towards a formal notion of consumer - natural persons acting for purposes which are outside their trade, business or professions - by opposition to professionals, defined as persons (legal or natural) acting for purposes relating to their trade, business and profession?<sup>525</sup> Or shall the Community admit *ad hoc* decisions towards a material definition of consumer, according to equitable standards – accepting that a definition of consumer would include private consumers and small businesses, and that rules governing contractual relations aim at protecting the weaker consuming party against

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<sup>522</sup> This point is related to the question of considering legal persons as consumers.

<sup>523</sup> Jules Stuyck, “European Consumer Law after the Treaty of Amsterdam: Consumer Policy In or Beyond the Internal Market?” (2000) 37 *CMLRev* 376.

<sup>524</sup> The importance of consistent definitions of consumer and professional was referred to in The Green Paper on the Review of the Consumer Acquis, COM (2006) 744 final.

<sup>525</sup> See Duncan Kennedy, “Form and Substance in Private Law Adjudication”, (1975) 89 *Harv. L. Rev.* 1685, on how such a regime reduces the occasions of judicial lawmaking.

the supposedly more powerful (professional) supplying party.<sup>526</sup> By so doing, the notions of consumer and professional would include natural persons acting for purposes falling primarily outside (consumer) or primarily within (professional) their trade, business and profession. And consumer protection measures would be extended to professionals who are in a situation of inferiority *vis-à-vis* their suppliers or clients, *e.g.*, small businessmen buying equipment they need to the exercise of their trade.<sup>527</sup>

Some authors claim that it is already possible to detect a trend at the European level to extend the provisions of the consumer legislation to corporate persons and that there are no barriers, in principle, to such an extension.<sup>528</sup> They invoke, first, the Directive on

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<sup>526</sup> Such as Article 11 of the Project of the Portuguese Consumer Code. See António Pinto Monteiro, “Sobre o Direito do Consumidor em Portugal e o Anteprojecto do Código do Consumidor”, [2005] 7 *Estudos de Direito do Consumidor*, pp 254-255.

<sup>527</sup> It should be mention, by now, that a different question is whether contracts between private persons should be considered as consumer contracts when one of the parties act through a professional intermediary, for instance, when a car dealer sells a second-hand car on behalf of one consumer to another consumer. The consumer is not protected by the *acquis* when his contractual counterpart is another private person, neither when the other party makes use of a professional intermediary for the conclusion of the contract. Nevertheless, it has been argued that in these cases consumers need similar protection as in an ordinary business-to-consumer contract since the other part will benefit from the professional expertise of the intermediary and some Member States have chosen to extend consumer protection to these situations. Article 2 of the Proposal for a Directive on consumer rights defines intermediary as a trader who concludes the contract in the name of or on behalf of the consumer. In Article 7, the Proposal sets up a specific information requirement for intermediaries: prior to the conclusion of the contract, the intermediary shall disclose to the consumer, that he is acting in the name of or on behalf of another consumer and that the contract concluded, shall not be regarded as a contract between the consumer and the trader but rather as a contract between two consumers and as such falling outside the scope of the Directive. If the intermediary does not fulfil this obligation he shall be deemed to have concluded the contract in his own name. It should be pointed out, however, that the Green Paper on the Review of the Consumer *Acquis*, COM (2006) 744 final sets the arguments against the protection of consumers when the other party is acting through an intermediary. First, it may be very difficult to establish clear criteria as to when the role of the intermediary is so strong as to warrant consumer protection. Second, there may be a risk of unforeseen and negative knock-on effects on markets on which private persons trade with private persons. Third, it could also be argued, on one hand, that a private person might not realise that contracting a professional as her or his intermediary will put her or him in a position equivalent to a professional. On the other hand, a consumer who concludes a contract with a professional acting as intermediary for a private person may be more in need of protection than his contractual counterpart.

<sup>528</sup> Directive 88/357/EEC, the Second Non-Life Insurance Directive, OJ 1988 L 172/1 also used to be invoked. See *v.g.* Giovanni Aquaro, “Enhancing the Legal Protection of the European Consumer”, (2003) *EBLR* 408; and Daniel Mortermans and Stewart Watson, “The Notion of Consumer in Community Law: a Lottery?”, in Julian Lombay (ed.), *Enhancing the Legal Position of the European Consumer*, BIICL, 1996, p. 51.

Package Holidays,<sup>529</sup> the Product Liability Directive<sup>530</sup>, and the General Product Safety Directive,<sup>531</sup> where definitions are given of both the terms product and producer, but not of the party with whom the latter contracts. Second, Article 7 of the Action Plan 1993/1995 in the field of consumer protection, where the European Commission defined a consumer as a ‘natural or legal person, with a variable purchasing power, who buys goods or uses services for non-commercial purposes’ is also referred to.<sup>532</sup> Nevertheless, the Court has constantly maintained that a consumer is a natural person who is not acting within the course of his trade or profession, *e.g.*, in cases *Di Pinto*, *Dietzinger*, and *Cape and Others*.

The question of consumer’s definition was at stake in *Di Pinto*.<sup>533</sup> Di Pinto published a periodical in which businesses were advertised for sale. For the purpose of collecting such advertisements, he employed representatives to canvass, either at their homes or at their place of business, to traders who had expressed an intention to sell their businesses. As this practice was contrary to the French law on the protection of consumers regarding canvassing and door-to-door selling, criminal charges were brought against Di Pinto. In the course of the proceedings, the *Cour d’Appel* in Paris referred two questions to the Court of Justice on the interpretation of Directive 85/577/EEC. According to the Court, ‘[a] trader canvassed with a view to the conclusion of an advertising contract concerning the sale of his business is not to be regarded as a consumer protected by Council Directive 85/577/EEC of 20 December

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<sup>529</sup> Directive 90/314/EEC, OJ 1992 L 228/24.

<sup>530</sup> Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ 1985 L 210/29.

<sup>531</sup> Directive 92/59/EEC on general product safety, OJ 1992 L 228/24.

<sup>532</sup> COM (93) 378 final.

<sup>533</sup> Case C-361/89, *Di Pinto* [1991] ECR 1189.

1985 to protect the consumer in respect of contracts negotiated away from business premises.<sup>534</sup>

In *Dietzinger*,<sup>535</sup> the National Court referred to the ECJ the question whether a contract of guarantee or surety concluded under German law between a financial institution and a natural person who is not acting in that connection in the course of his trade or profession, in order to secure a claim by the financial institution against a third party in respect of a loan, is covered by the words ‘contracts under which a trader supplies goods or services to a consumer’ (Article 1(1) of Council Directive 85/577/EEC). The ECJ ruled that:

On a proper construction of the first indent of Article 2 of Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, a contract of guarantee concluded by a natural person who is not acting in the course of his trade or profession does not come within the scope of the directive where *it guarantees repayment of a debt contracted by another person who, for his part, is acting within the course of his trade or profession.* [Emphasis added]

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<sup>534</sup> According to Daniel Mortermans and Stewart Watson, “The Notion of Consumer in Community Law: a Lottery?”, in Julian Lombay, *Enhancing the Legal Position of the European Consumer*, BIICL, 1996, 48, where the Court in its interpretation of Article 8 of the Directive defines the scope of the of the freedom left to the Member States to take more favourable measures as ‘the area covered by the directive, namely that of the protection of consumers’, it should be pointed out that according to the wording of that provision such measures may be adopted or maintained to protect consumers ‘in the field which it (the directive) covers’. The field covered by the directive is that of door-step selling and not, as indicated by the Court, that of consumer protection. In other words, the Door-Step Directive is based on a transaction definition and protects one group vis-à-vis another. The Court defines one group, the consumers, in such a way that intermediaries must be included in the other group. Although the situation of the intermediary is regulated by the directive, these persons are not protected. Stricter measures in favour of the trader canvassed by Di Pinto are not possible, as is indicated in article 8.

<sup>535</sup> Case C-45/96, *Dietzinger* [1998] ECR I 1199. Mr Dietzinger's father ran a building firm in respect of which the Bank, *inter alia*, granted a current account overdraft facility. On 11 September 1992, Mr Dietzinger gave a direct recourse written guarantee, for a sum not to exceed DM 100 000, covering his parents' obligations to the Bank. The contract of guarantee was concluded at the house of Mr Dietzinger's parents during a visit by an employee of the Bank to which Mr Dietzinger's mother had agreed over the telephone. Mr Dietzinger was not informed of his right of cancellation. In May 1993, the Bank called in, with immediate effect, all the loans which it had granted to Mr Dietzinger's parents, which at that time totalled more than DM 1.6 million. It also sued Mr Dietzinger for payment of DM 50 000 under the guarantee. Mr Dietzinger sought to renounce the guarantee, maintaining that he had not been informed of his right of cancellation, contrary to the Gesetz über den Widerruf von Haustürgeschäften und ähnlichen Geschäften (Law on the Cancellation of ‘Doorstep’ Transactions and Analogous Transactions, BGBl. I, p. 122) of 16 January 1986, which implemented Directive 85/577 into German law.

In *Cape and Others*,<sup>536</sup> an undertaking had concluded a standard contract with another undertaking to acquire merchandise or services solely for the benefit of its employees. Hence, the national Court referred to the ECJ the question whether, first, it was possible to regard any party or entity as a consumer when it is acting for purposes not relating or conducive to its normal trade or business, or did the term consumer relate only to natural persons, to the exclusion of any other and, secondly, if a company could be regarded as a consumer? The Court answered that, 'the term consumer, as defined in Article 2(b) of the Directive 93/13/EEC, must be interpreted as referring solely to natural persons'.

This restrictive interpretation of the notion 'consumer' was also confirmed by the Court of Justice in several cases related to the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,<sup>537</sup> such as in *Shearson, OTT and Gruber*.

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<sup>536</sup> Joined Cases C-541/99 and 542/99, *Cape and others*, [2001] ECR I-9049. Idealservice had concluded with OMAI and Cape two contracts for the supply to them of automatic drink dispensers which were installed on the premises of those companies and were intended to be used solely by their staff. In relation to the performance of those contracts, Cape and OMAI instituted proceedings contesting a payment order, maintaining that the clause granting jurisdiction contained in the contracts was unfair within the meaning of Article 1469a, paragraph 19, of the Italian Civil Code and could not therefore be enforced against the parties to the contracts by virtue of Article 1469d of that code. In both cases, Idealservice contended that Cape and OMAI could not be regarded as consumers for the purposes of applying the Directive. In addition to the fact that they were companies and not natural persons, Cape and OMAI signed the contracts at issue before the national court in the course of their business activity.

<sup>537</sup> Article 13 stated: 'In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called 'the consumer', jurisdiction shall be determined by this Section, without prejudice to the provisions of Articles 4 and 5(5), if it is: 1. a contract for the sale of goods on installment credit terms; or 2. a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or 3. any other contract for the supply of goods or a contract for the supply of services, and (a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and (b) the consumer took in that State the steps necessary for the conclusion of the contract. Where a consumer enters into a contract with a party who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State. This Section shall not apply to contracts of transport.' Article 14 read: 'A consumer may bring proceedings against the other party to a contract either in the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Contracting State in which the consumer is domiciled. These provisions shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending'.

In the *Shearson* case,<sup>538</sup> the Court recalled that the concepts used in the Convention, which might have a different content depending on the national law of the Contracting States, might be interpreted independently, by reference principally to the system and objectives of the Convention, in order to ensure that the Convention was uniformly applied in all the Contracting States.<sup>539</sup> The special system established by the Convention was inspired by the concern to protect the consumer as the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract, and the consumer might not therefore be discouraged from suing by being compelled to bring his action before the courts in the Contracting State in which the other party to the contract was domiciled. The protective role fulfilled by those provisions implied that the application of the rules of special jurisdiction laid down to that end by the Convention should not be extended to persons for whom that protection was not justified. The Court concluded, thus, that it followed that Article 13 of the Convention was to be interpreted as meaning that a plaintiff who was acting in pursuance of his trade or professional activity and who was not, therefore, himself a consumer party to one of the contracts listed in the first paragraph of that provision,

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<sup>538</sup> Case 89/91, *Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH*, [1993] ECR I-139. The TVB had brought an action before the German courts against Hutton Inc., in reliance on a right assigned to it. The assignor, a German judge, had instructed the brokers Hutton Inc. to carry out currency, security and commodity futures transactions under an agency contract. To that end, the assignor paid over considerable sums in 1986 and 1987, but lost nearly all of his investments in those transactions. TVB claimed from Hutton Inc. the return of the sums lost by the assignor. It based its claims on unjust enrichment and on the right to damages for breach of contractual and pre-contractual obligations and for tortious conduct, on the ground that Hutton Inc. had not sufficiently informed the assignor of the risks involved in futures transactions. It must therefore be considered whether a plaintiff, a company assignor of the rights of the individual, may be regarded as a consumer within the meaning of the Convention and must, therefore, benefit from the special rules governing jurisdiction laid down by the Convention with respect to consumer contracts.

<sup>539</sup> Accordingly, the Court noted that under the system of the Convention the general principle, stated in the first paragraph of Article 2, is that the national courts of the Contracting State in which the defendant is domiciled are to have jurisdiction. It is only by way of derogation from that general principle that the Convention provides for the cases, exhaustively listed in Sections 2 to 6 of Title II, in which a defendant domiciled or established in a Contracting State may, where the situation comes under a rule of special jurisdiction, or must, where the situation comes under a rule of exclusive jurisdiction or of prorogation of jurisdiction, be sued in the courts of another Contracting State. Such an interpretation must apply *a fortiori* with respect to a rule of jurisdiction, such as that contained in Article 14 of the Convention, which allows a consumer, within the meaning of Article 13 of the Convention, to sue the defendant in the courts of the Contracting State in which the plaintiff is domiciled. Apart from the cases expressly provided for, the Convention appears clearly hostile towards the attribution of jurisdiction to the courts of the plaintiff's domicile.



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may not enjoy the benefit of the rules of special jurisdiction laid down by the Convention concerning consumer contracts.

This restrictive approach was founded, as the Court already stated in the *OTT* case,<sup>540</sup> on the consideration that Article 13 was intended for the protection of buyers who were in a position of economic weakness in comparison with sellers by reason of the fact that they are private consumers and were not engaged, when buying the product acquired in the course of trading or professional activities. To this, the Court added that the consumer usually is less experienced in legal matters than the party he concludes a contract with and that he should not be discouraged to take legal action by the fact that he is forced to bring proceedings before the courts of the State in which the other party is domiciled.<sup>541</sup>

Finally, in *Gruber*,<sup>542</sup> the Court had to assess whether a contract which related to activities which were partly business and partly private, must be regarded as having been concluded by a consumer for the purposes of the first paragraph of Article 13 of the Convention. Inasmuch as a contract was entered into for the person's trade or professional purposes, he must be deemed to be on an equal footing with the other party to the contract, so that the special protection reserved by the Brussels Convention for consumers was not justified in such a case. The private purpose remained relevant whatever the relationship between the private and professional use of the goods or service concerned, and even though the private use was predominant, as long as the proportion of the professional usage was not negligible. An interpretation which denied the capacity of consumer, if the link between the purpose for which the goods or services were used and the trade or profession of the person concerned was not negligible, was also that which was most consistent with the requirements of legal certainty and the requirement that a potential defendant should be able to know in

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<sup>540</sup> Case 150/77, *Bertrand v Paul Ott KG*, 1978 [ECR] 1431.

<sup>541</sup> Daniel Mortermans and Stewart Watson, "The Notion of Consumer in Community Law: a Lottery?", in Julian Lombay, *Enhancing the Legal Position of the European Consumer*, BIICL, 1996, p. 49.

<sup>542</sup> Case C-464/01, *Johann Gruber v Bay Wa AG*, [2005] ECR I-439.

advance the court before which he may be sued, which constitute the foundation of that Convention.

In the debate between a strict and a wide notion of consumer, the Court and European legislation, namely the contract directives, Rome I, and Brussels Regulation, have clearly followed the first path, by adopting a formal and rigid notion of consumer - the person that in a given transaction acts for purposes outside his trade or profession - and, thus, giving little space of judicial law-making. The definition of the consumer, *i.e.*, the extent of the granted protection, is linked up with functional approaches, namely the construction and the functioning of the internal market. Consumer law reaches its maximum potential in the nexus of reciprocal references constituted by the market. To that effect, the notion of consumer is traced back to the effectiveness of the market and is conceived in the context of formal and decentralized market transactions. European consumer law is about the interlocking of intersubjective actions in the market; it is about individuals acting as market actors. Hence, the success of a European consumer policy depends on the institutionalization of procedures and conditions of communication for a formal transaction in a given market-oriented framework. But such an approach has necessary implications: European consumer protection does not strive for the concrete balance of the individual interests involved in each specific transaction and does not allow *ad hoc* processes of rationalization and decision.

I here draw attention to the fact that a property right-holder does not always bear the distinctive stamp of being a consumer. Implications are that the protection granted, for instance, to the owner of a motor vehicle might differ substantially. The impact might have effects from the initial shopping until the end of the vehicle's life. Nevertheless, European Law seems largely to suppress the transactional consumer's depiction. I will thus direct my inquiry towards the formulation of European consumers.

## **2. The character of the European consumer: confident, informed, rational and average**

I will now demonstrate how the European consumer has been formulated as displaying the following characteristics: confident, informed, rational, and an average person.

Firstly, the confident consumer is regarded as an active actor in the making of the internal market and the increasing of consumers' confidence is a primary concern of European law.<sup>543</sup> Nevertheless, as I will demonstrate, the main obstacles perceived by consumers are practical ones.

Secondly, the European consumer is taken as an informed consumer. However, it is commonly accepted that information by itself does not always lead to utility maximizing decisions because: a) information may not reach the consumers; b) consumers may not want to look for information; c) consumers may have difficulties in understanding and using information; d) consumers may not have alternative solutions; e) and consumers' culture makes information less efficient. I will develop these points further.

Thirdly, the EC consumer has often been referred to by the Court as reasonably circumspect. Consumer policy aims at equipping consumers to make rational choices and take on responsibility to promote their own interests. I will bring into discussion the insights from behavioural economics, namely that the human action not only is shaped by relevant economic constraints but is also highly affected by people's endogenous preferences, knowledge, skills, endowments and a variety of psychological and physical constraints. I will also take into consideration the inputs from neuroeconomics, especially in respect of the endowment effect. Under the endowment effect (also referred to as the 'offer/asking gap' or the 'willingness to accept (WTA)/ willingness to pay (WTP) gap', the value of a piece of property to an individual increases as soon as

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<sup>543</sup> The term confident consumer is generally attributed to Stephen Weatherill, "Consumer Guarantees and the Development of the Internal Market", in Julian Lonbay (ed.), *Enhancing the Legal Position of the European Consumer*, BIICL, 1996.

the individual is actually given the property. The effect is a consequence of the fact that individuals tend to value losses more highly than equivalent gains (and thus wish to avoid losing things more than they desire gaining things of an equivalent value). This phenomenon is known as loss aversion and has serious implications in the Coase theorem, according to which, subject to income effects, the allocation of resources will be independent of the assignment of property rights when costless trades are possible.

Finally, the Court has set the criterion of the average consumer. Recently, the Directive on unfair commercial practices has expressly taken the average consumer paradigm. Nevertheless, it contains provisions aimed at preventing the exploitation of consumers whom, due to characteristics such as their mental or physical infirmity, age or credulity, are particularly vulnerable to unfair commercial practices. Here the debate is set between an assimilationist model, which emphasizes the extent to which consumers are all alike (the average consumer), and an accommodation model, which seeks to create special rights on the basis of real differences (the dichotomy average/vulnerable consumer).

Most of what I will write applies equally to all consumers, and not specifically to property rights holders. Nevertheless, I will try to underline, *infra*, in each case the distinct characteristics of property rights holders as consumers.

## 2.1. The confident consumer

The development of consumer policy at EU level was, firstly, an essential corollary of the progressive establishment of the internal market. The free circulation of goods and services required the adoption of harmonized rules to ensure the elimination of regulatory obstacles and competitive distortions and sufficient protection of consumer interests at the same time. The consumer was, thus, conceived as a passive beneficiary of structural change in the market.

Under the Treaty of Rome, consumer protection was a mere by-product of more fundamental Community policies and purposes such as the creation of a fully competitive environment in the market. The consumer would benefit from the process

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of integration through the enjoyment of a large and efficient single Community market, which would yield competition, allowing wider choice to consumers, lower prices and higher-quality products and services.<sup>544</sup> The notion of consumer appeared in the 1957 Treaty of Rome in Articles 33(e) (now 39(e));<sup>545</sup> Article 34 (now 40); Article 81(3) (now 85); Article 82 (now Article 86); and Article 87 (now 92). Nevertheless, consumer protection was not considered an objective of the EC Treaty. None of these references to the consumer represented an attempt to develop a set or structure of consumer rights or interests.

Since there existed no explicit basis in the original Treaty for making European Community legislation in the area of consumer protection and, since the Community can act only in areas in which it is attributed powers by the Treaty (Article 5(1) EC) [principle of attributed competence], legislative action affecting the consumer could only be indirect.<sup>546</sup>

In this sense, Community consumer law revolved around the application of the substantive provisions of the Treaty which acted as an instrument for the achievement of the economically efficient integrated market. Provisions designed to remove barriers to the free circulation of goods, persons and services, and the Treaty provisions which regulated the competitive conduct of commercial firms, were indirectly part of EC consumer law and policy.<sup>547</sup>

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<sup>544</sup> Stephen Weatherill, *EU Consumer Law and Policy*, 2005, Elgar European Law, p. 4. The implicit point of departure of the EC Treaty was that the whole exercise of the establishment of a common market as such would be to the benefit of the citizens of the Member States as consumers. See Daniel Mortermans & Stewart Watson, "The notion of consumer in Community Law: a Lottery?", in Julian Lombay, *Enhancing the Legal Position of the European Consumer*, BIICL, 1996, at 38.

<sup>545</sup> The Amsterdam Treaty, which entered into force in 1999, renumbered the whole of both the EC and the EU Treaties. The reader must be aware that pre-Amsterdam legal texts may have a different number from those that apply today.

<sup>546</sup> See Stephen Weatherill, "Harmonisation: How Much, How Little?" (2005) *EBLR* 533 ff.

<sup>547</sup> In this sense, they are themselves instruments of consumer policy – but of an inexplicit, 'hidden type'. See Stephen Weatherill, *ibidem*, 4. The silence of the Treaty on this subject can, however, be easily explained by the fact that, at the time of the drafting of the Treaty, consumer protection as a matter of government concern was still in its infant stages within the Member States. See L. Krämer, *La CEE et la*

The European Summit, which met in Paris, in 1972, constituted the starting point of the EC initiatives oriented specifically towards the promotion of the interests of the consumer. It officially assumed that the improvement of living conditions implied the protection of the health and safety of consumers, as well as the protection of their economic interests. The heads of State and of government invited the Community institutions to coordinate actions taken in favour of consumer protection and called for the submission of a programme of consumer protection policy.<sup>548</sup>

The preliminary programme of the European Economic Community for a consumer protection and information policy<sup>549</sup> contained the basic principles of consumer policy and described the priority measures to be taken, and summed up the five basic consumer rights<sup>550</sup> as: (a) the right to protection of health and safety; (b) the right to protection of economic interests; (c) the right of redress; (d) the right to information and education; and (e) the right to representation (the right to be heard).<sup>551</sup>

However, Point 4 of the programme recalls that, in conformity with the formal terms of the EC Treaty as they stood at the time, no consumer policy existed independent of other Community policies. Consumer policy would be amplified ‘by action under specific Community policies such as economic, common agricultural, social,

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*protection du consommateur*, Droit et Consommation XV, 1988, E. Story-Scientia, pp 1-6; and Daniel Mortermans and Stewart Watson, “The Notion of Consumer in Community Law: a Lottery?”, in Julian Lombay, *Enhancing the Legal Position of the European Consumer*, BIICL, 1996.

<sup>548</sup> Stephen Weatherill, *EU Consumer Law and Policy*, 2005, p. 6.

<sup>549</sup> Council Resolution of 14 April 1975, OJ 1975 C 92/1.

<sup>550</sup> Consumers are presented within the Programmes as parties enjoying ‘rights’: the right to protection against economic risks and the right to safety. They connect these basic rights of protection with the necessary procedural rights. Further, see Hans-Wolfgang Micklitz, “Consumer Rights”, in Antonio Cassese, Andrew Clapham, Joseph Weiler (eds.), *Human Rights and the European Community: the Substantive Law*, Baden-Baden, Nomos, 1991, pp 54 ff.

<sup>551</sup> According to Michelle Everson, “Legal Constructions of the Consumer”, in Frank Trentmann, *The Making of the Consumer: Knowledge, Power and Identity in the Modern World*, Berg, 2006, p. 99, the character of the consumer was to be reconstituted by rights and law and re-embedded within traditional liberal paradigms of economic-civic (‘economic interests’), political (‘representation’) and social (‘health and safety’) citizenship. The character of the ‘citizen-consumer’ and the law that created and protected it was to be the glue of reintegration within a differentiated world.

environment, transport and energy policies as well as by the approximation of laws, all of which affect the consumer's position'.<sup>552</sup>

The 1975 Resolution was followed in 1981 by a further Council Resolution on a second programme for a consumer protection and information policy.<sup>553</sup> The 1981 Resolution is based largely on the same premises as those which underlie the first Resolution of 1975. It repeats the basic five rights. The Resolution expresses a priority for action in the field of the quality of goods and services, the conditions affecting their supply and the provision of information about them. It also places rather firmer emphasis than the first Resolution on improving consultation between consumer representatives, producers and distributors.<sup>554</sup>

The third programme in the series was constituted by a June 1986 Council Resolution concerning the future orientation of the policy for the protection and promotion of consumer interests.<sup>555</sup> The Resolution draws on a Commission Paper entitled 'A New Impetus for Consumer Protection Policy',<sup>556</sup> which confesses to a shortfall in performances thus far. The Council Resolution linked the consumer interest to the

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<sup>552</sup> See Stephen Weatherill, *EU Consumer Law and Policy*, 2005, p. 7. The preliminary programme was, nevertheless, mentioned in Recitals (4) and (5) of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises; in Recital 5 of Directive 97/7/EC, on the protection of consumers in respect of distance contracts; and in Recital (3) of Directive 98/6/EC, on consumer protection in the indication of the prices of products offered to consumers.

<sup>553</sup> OJ 1981 C133/1.

<sup>554</sup> According to Norbert Reich, "Protection of Consumers' Economic Interests by the EC" (1992) 14 *Sydney Law Review* 25, the 'rights rhetoric' of these two programs certainly gave consumer policy in the EC an important thrust, and encouraged the submission of several proposals and later the adoption of directives in certain spheres relevant to consumers' economic interests.

<sup>555</sup> OJ 1986 C167/1.

<sup>556</sup> COM (85) 314.

benefits on offer as a result of completion of the internal market, planned for the end of 1992.<sup>557</sup>

In 1986, the discourse has moved towards the consumer as the beneficiary of the process integration. In December 1986, a further Council Resolution was devoted to the integration of consumer policy in the other common policies.<sup>558</sup> It readdressed the themes set out in the June 1986 Resolution and repeated the objective of taking greater account of consumers' interests in other Community policies.<sup>559</sup> As REICH wrote, 'consumer rights have been overridden by consumer choice'.<sup>560</sup> Perhaps the most striking change between the 1986 Resolution and the 1975 and 1981 programmes is the diminution in the assertion of consumer 'rights'.<sup>561</sup>

As I have described above, the development of consumer policy was considered, at the time, a fundamental tool to the progressive establishment of the internal market. The free circulation of goods and services required the adoption of harmonized rules to ensure the elimination of regulatory obstacles and competitive distortions and sufficient protection of consumer interests at the same time. Consumers should be stimulated to shop across the borders, and became an instrument of dynamization of the internal

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<sup>557</sup> Hans Micklitz and Stephen Weatherill, "Consumer Policy in the European Community: Before and After Maastricht", in Norbert Reich and Geoffrey Woodroffe (eds.), *European Consumer Policy after Maastricht*, Kluwer Academic Publishers, 1994, p. 12.

<sup>558</sup> OJ 1987 C3/1.

<sup>559</sup> Hans Micklitz and Stephen Weatherill, "Consumer Policy in the European Community: Before and after Maastricht", in Norbert Reich and Geoffrey Woodroffe (eds.), *European Consumer Policy After Maastricht*, Kluwer Academic Publishers, 1994, p. 12. On the conception of interests, see Francis Snyder, *New Directions in European Community Law*, Weidenfeld and Nicolson, London, 1990, pp 49-62.

<sup>560</sup> Norbert Reich, "Protection of Consumers' Economic Interests by the EC", (1992) 14 *Sydney Law Review* 25.

<sup>561</sup> These resolutions have attracted the Court's recognition as part of the structure of Community law and policy despite their 'soft law' status outside the list of formal acts in Article 189. In Case C- 362/88, *GB-INNO v Confédération du Commerce Luxembourgeois* [1990] ECR I- 667, pp 13-16.



### *Dimensions of property*

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market. Consumers' activity was considered vital in constructing the single market.<sup>562</sup> Confident consumers would engage in cross-border shopping, contribute to the constitution of the internal market which would provide consumers with a greater choice of products and services in a more competitive market.

Meanwhile, measures of consumer protection were taken through harmonization directives on the basis of Article 94 (ex 100) EC,<sup>563</sup> which required a direct link with the common market and unanimity within the Council, *e.g.*, the Directive 79/112 on the labelling of foodstuffs,<sup>564</sup> the Product Liability Directive,<sup>565</sup> and the Doorstep Sales Directive.<sup>566</sup>

The Single European Act did not introduce a specific provision into the Treaty regarding the competence of the Community in the field of the promotion of consumer interests. Nevertheless, it did introduce two modifications into the Treaty of Rome which had an important impact on the capacity of the EC institutions to adopt measures designed to protect consumers.<sup>567</sup>

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<sup>562</sup> See Stephen Weatherill, "Consumer Guarantees and the Development of the Internal Market", in Julian Lombay (ed.), *Enhancing the Legal Position of the European Consumer*, British Institute of International and Comparative Law in association with the European Law Institute, University of Birmingham, 1996, p. 58.

<sup>563</sup> Article 100 [94] stated, at the time, 'the Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market' and Article 235 [308] provided that 'if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures'.

<sup>564</sup> OJ 1971, C 33/1.

<sup>565</sup> Directive 85/374/EEC, of 25 July 1985, OJ 1985, L 210/29 (amended by Directive 99/34/EC of the European Parliament and of the Council of 10 May 1999).

<sup>566</sup> Directive 85/577/EEC of 20 December 1985, OJ 1985 L 372/31. For criticism, see Stephen Weatherill, "Can There be Common Interpretation of European Private Law?", (2002) 31 *Ga. J. Int'l & Comp. L.* 148 ff; and "The Commission's Options for Developing EC Consumer Protection and Contract Law: Assessing the Constitutional Basis", (2002) *EBLR* 501 ff.

<sup>567</sup> Paolisa Nebbia and Tony Askham, *EU Consumer Law*, Richmond, 2004, p. 8.

Firstly, Article 100a), introduced by the SEA, concerned the adoption of measures for the completion and functioning of the internal market.<sup>568</sup> The reference to consumer protection Article 100a) was considered to constitute an implicit recognition of the competence of the EC institutions to adopt measures in the field of consumer policy, although those measures might only be taken by the EC in so far as they were linked to the functioning of the internal market.<sup>569</sup>

Secondly, the SEA introduced qualified majority voting by the Council of Ministers into the EC decision-making process, principally for the measures related to the completion and functioning of the internal market, whereas previously unanimity was required.<sup>570</sup> The shift towards qualified majority vote would ensure the adoption of the

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<sup>568</sup> Article 100a read: ‘1. By way of derogation from Article 100 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 8a. The Council shall, acting by a qualified majority on a proposal from the Commission in co-operation with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. 2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons. 3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection. 4. If, after the adoption of a harmonization measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36, or relating to protection of the environment or the working environment, it shall notify the Commission of these provisions. The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States. By way of derogation from the procedure laid down in Articles 169 and 170, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article. 5. The harmonization measures referred to above shall, in appropriate cases, include a safeguard clause authorizing the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Community control procedure.’

<sup>569</sup> Norbert Reich, “Protection of Consumers’ Economic Interests by the EC” (1992) 14 *Sydney Law Review* 26; Jules Stuyck, “European Consumer Law after the Treaty of Amsterdam: Consumer Policy In or Beyond the Internal Market?” (2000) 37 *CMLRev* 378; Paolisa Nebbia and Tony Askham, *EU Consumer Law*, Richmond, 2004, p. 8. Claiming that Article 100a did not only confer powers but also obligations on the institutions of the Community, see Jürgen Basedow, “A Common Contract Law for the Common Market”, (1996) 33 *CMLRev* 1178.

<sup>570</sup> For example, Council Directive (EEC) 85/374 on product liability, OJ 1985 L210/29, was adopted after 12 years of discussions.

package of controversial legislation necessary to remove internal borders, as national consumer protection.<sup>571</sup>

After the entry into force of the SEA, further important consumer protection Directives were adopted under Article 95 [ex 100a] on the basis of proposals in which, pursuant to Article 95(3) [ex 100a(3)], the Commission had to take as a base a high level of consumer protection, such as Directive 90/314 on package travel, package holidays and package tours,<sup>572</sup> Directive 92/59, on general product safety,<sup>573</sup> and Directive 92/13 on unfair contract terms in consumer contracts.<sup>574</sup>

The SEA was followed by further soft law initiatives. A Council Resolution of 9 November 1989 on future priorities for relaunching the consumer protection policy<sup>575</sup> constituted a consolidation of the pre-existing policy. Referring to Article 100a (3), it emphasized the link between consumer protection policy and the effective completion of the internal market and, more generally, the consumer benefit which would accrue

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<sup>571</sup> See Paolisa Nebbia and Tony Askham, *EU Consumer Law*, Richmond, 2004, p. 8. A controversial element in this procedure is the capacity conferred on the Community to adopt common rules in pursuit of free trade which could depress existing standards of consumer protection in a minority of outvoted Member States. This concern was reflected in Article 100a(4), but the precise scope of the provision remained obscure but this potential out-put was, in effect, a concession to persuade States to agree to qualified majority voting under Article 100a(1). According to Hans Micklitz and Stephen Weatherill, "Consumer Policy in the European Community: Before and after Maastricht", in Norbert Reich and Geoffrey Woodroffe (eds.), *European Consumer Policy after Maastricht*, Kluwer Academic Publishers, 1994, p. 14, the notion of major needs under Article 100a(4) appears to cover the protection of consumers' health and safety, but not their economic interests. This provision was plainly designed to allay fears that the Community rules might undercut existing national standards of consumer protection; it is more a political statement than an enforceable legal norm. Of broader relevance to the consumer interest is Article 100a(3), which provided that: '[t]he Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection'. On the limitations of this provision, notably that it is addressed only to the Commission and not to the Council, and the imprecision of the expression 'high level', see Hans Micklitz and Stephen Weatherill, *ibidem*.

<sup>572</sup> OJ 1990, L 314/59.

<sup>573</sup> OJ 1992, L 228/24.

<sup>574</sup> OJ 1993, L 95/29.

<sup>575</sup> OJ 1989 C 294/1.

from the completion of it.<sup>576</sup> This was followed by the Commission's publication in May 1990 of a three-year action plan of consumer policy (1990-1992).<sup>577</sup>

The Treaty on the European Union, signed in 1992, would explicitly empower European Community action in the consumer protection field.<sup>578</sup> The explicit legal basis for EC action in the field of consumer policy could be found in two provisions. First, Article 3(s) [now t], stated the various actions of the Community to achieve the objectives laid down in Article 2, and listed, in its points: 'a contribution to strengthening of consumer protection'. Second, Article 129-A of the Maastricht Treaty was formulated as follows:

The Community shall contribute to the attainment of high level of consumer protection through:

a) measures adopted pursuant to Article 100a [now 95] in the context of completion of the internal market;

b) specific action which supports and supplements the policy pursued by the member states to protect the health, safety and economic interests of consumers and to provide adequate information to consumers.

2. The Council, acting in accordance with the procedure referred to in Article 189b [now 247] and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 1 (b).

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<sup>576</sup> Hans Micklitz and Stephen Weatherill, "Consumer Policy in the European Community: Before and after Maastricht", in Norbert Reich and Geoffrey Woodroffe (eds.), *European Consumer Policy after Maastricht*, Kluwer Academic Publishers, 1994, p. 15.

<sup>577</sup> COM (90) 98.

<sup>578</sup> According to Stephen Weatherill, *EU Consumer Policy*, 2005, p. 2, the relationship between this 'positive' commitment to market regulation at European level and the 'negative' emphasis on removing national laws that act as trade barriers in pursuit of market integration was obscure when the Maastricht Treaty came into force in 1993. The ambiguity has not been dispelled since. Neither the Amsterdam Treaty, which came into force in 1999, nor the Nice Treaty (2003) make any contribution to clarify the balance to be struck between integration, deregulation and re-regulation. It is not overstating the case to claim that striking this balance is the most controversial economic issue facing the European Union today.

5. Action adopted pursuant to paragraph 2 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.

Some difficulties of interpretation have arisen since the adoption of these provisions by the architects of the Treaty on the European Union.<sup>579</sup> The distinction between the measures listed in (a) and the actions referred to in (b) has led to the question whether the second category allowed the Community to take legislative measures.<sup>580</sup> The Treaty on the European Union has put an end to the controversies arising from the lack of an explicit legal basis for Community initiatives to promote consumer interests, by establishing a distinction between consumer protection initiatives linked with the completion of the internal market and other consumer protection measures, and

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<sup>579</sup> In case C-192/94, *El Corte Inglés v. Cristina Blázquez Rivero* [1996] ECR 1281, Mrs. Blázquez Rivero had entered into a contract for holiday travel with the travel agency Viajes El Corte Inglés SA, which she financed in part by a loan obtained from the finance company. The finance company had the exclusive right to grant loans to the travel agency's customers under an agreement between the two companies. Mrs Blázquez Rivero accused the travel agency of shortcomings in performing its obligations and made several complaints against it. When those complaints proved unsuccessful, she ceased to pay instalments on the loan, whereupon the finance company brought proceedings in the Juzgado de Primera Instancia, Seville, for payment of the outstanding balance. Mrs Blázquez Rivero entered the defence against the finance company that the travel contract had not been performed, without drawing any distinction between the finance company and the travel agent in view of the close bond between them. The national court took the view that Article 11(2) of the directive on consumer credit enabled the consumer to bring an action against the finance company. In the national court's view, it is irrelevant that the action was brought, as in this case by the finance company and not by the consumer, since rights may be relied on in any event whether by way of action or by way of defence. Nevertheless, the directive had not been transposed into Spanish law, even though the period prescribed for implementation had run out at the material time and that the result intended by that provision could not be attained by interpreting national law in conformity with the directive. For a general overview, see Norbert Reich, "Economic Law, Consumer Interests and EU Integration", in Norbert Reich, Hans-W. Micklitz, Peter Rott, *Understanding Consumer Law*, 2009, pp 13-16.

<sup>580</sup> Paolisa Nebbia and Tony Askham, *EU Consumer Law*, Richmond, 2004, p. 9. Despite the doubts, some authors claim that Article 129-A(1)(b) has offered the opportunity to develop a consumer policy which was autonomous from the imperatives of internal market policy. Stephen Weatherill, *EU Consumer Law and Policy*, 2005, p. 17, contends that, '[t]he entry into force of the Maastricht Treaty (...) is unquestionably important in formal terms, for it embraced consumer protection for the first time as an explicit EC competence. It provides a potential constitutional basis for the development of an EC strategy on consumer protection which is independent of harmonization policy in particular and the process of market integration in general. An institutional consideration hinted at a further basis for optimism that consumer policy might have come of age with its 'constitutionalization' in the Treaty as a result of the Maastricht amendments'. See also Daniel Mortermans and Stewart Watson, "The Notion of Consumer in Community Law: a Lottery?", in Julian Lombay, *Enhancing the Legal Position of the European Consumer*, BIICL, 1996, at 39.

therefore freed consumer policy from internal market policy. In addition, the application of the co-decision procedure provided for in Article 189b (now Article 247), which implied much more active participation from the European Parliament, must be considered as an important step towards a more active consumer policy at EC level.<sup>581</sup>

At the moment, Article 153, dealing with consumer protection states:

1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.
2. Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities.
3. The Community shall contribute to the attainment of the objectives referred to in paragraph 1 through:
  - (a) measures adopted pursuant to Article 95 in the context of the completion of the internal market;
  - (b) measures which support, supplement and monitor the policy pursued by the Member States.
4. The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 3(b).
5. Measures adopted pursuant to paragraph 4 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.

Article 153 grants the Community competence to act in the field of consumer protection through measures adopted pursuant to Article 95 in the context of the completion of the internal market<sup>582</sup> and measures which support, supplement and monitor the policy

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<sup>581</sup> Paolisa Nebbia and Tony Askham, *EU Consumer Law*, Richmond, 2004, p. 9. Article 129 makes no specific reference to consumer redress. The authors, however, suggest that given its horizontal nature, the right of access to justice is included in the list of other rights recognized in (b).

<sup>582</sup> According to Stephen Weatherill, "European Contract Law: Taking the Heat Out of Questions of Competence", (2004) *EBLR* 24, this authorization is the key to understanding the basis for EC legislative

pursued by the Member States. Further consideration of this provision is beyond the scope of my inquiry. I would, nevertheless, underline, first, that the amendments made to Article 153 by the Treaty of Amsterdam aim at further reinforcing the idea of a high level of consumer protection as an explicit Community objective in its own right.<sup>583</sup> Second, I would emphasise that a difference between the Amsterdam text (Article 153) and the pre-Amsterdam version is the recognition of consumer rights, *i.e.* the right to information, the right to education and the right to consumers to organize themselves in order to safeguard their interests.<sup>584</sup>

As I have illustrated, since 1990, new reasoning has motivated European consumer policy. It related the need for consumer protection to the aim of creating a dynamic and

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intervention into contract law. And, in *European Consumer Law and Policy*, 2005, at 18, the author wrote: “[t]he Member States were evidently willing to equip the EC with an explicit competence to act in the field of consumer protection but they were bent on keeping a short rein on what could be done in its name’.

<sup>583</sup> The Treaty does not set out in detail the priorities for action and the measures to be taken, thus leaving to the Commission the task of translating those provisions into practice. Besides the measures adopted within the framework of the internal market objective, the Community is now required to take measures (as opposed to the ‘specific actions’ mentioned in the pre-Amsterdam version of article 153) which support and supplement the policy pursued by the Member States. According to Stephen Weatherill, “The Commission’s Options for Developing EC Consumer Protection and Contract Law: Assessing the Constitutional Basis”, (2002) *EBLR*, 500, this provision falls short of offering the EC a general constitutional mandate to select whatever the style of consumer protection policy it regards as appropriate for its aspirations. Paolisa Nebbia and Tony Askham, *EU Consumer Law*, Richmond, 2004, p. 10, consider that it is unclear what in practice this provision may entail. In view of the possibility for the Community to adopt consumer protection measures in the context of the completion of the internal market, it is expected that the impact of this amendment will be low. See Jules Stuyck, “European Consumer Law After the Treaty of Amsterdam: Consumer Policy In or Beyond the Internal Market?” (2000) 37 *CMLRev.* 387. EU Consumer Policy Strategy 2007-2013 (Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, COM (2007) 99 final ) set three main objectives over this period: to empower EU consumers. Putting consumers in the driving seat benefits citizens but also boosts competition significantly. Empowered consumers need real choices, accurate information, market transparency and the confidence that comes from effective protection and solid rights; to enhance EU consumers’ welfare in terms of price, choice, quality, diversity, affordability and safety. Consumer welfare is at the heart of well-functioning markets; to protect consumers effectively from the serious risks and threats that they cannot tackle as individuals. A high level of protection against these threats is essential to consumer confidence.

<sup>584</sup> This turn to rights has been furthered in the Proposal of the Commission for a Directive on consumer rights (Proposal for a Directive of the European Parliament and of the Council on Consumer Rights (COM (2008) 614 final)). For criticism on the full harmonization proposed, and the subsequent levelling down of consumer protection in some Member states, see Hans-W. Micklitz and Norbert Reich, “Crónica de una muerte anunciada: The Commission Proposal for a ‘Directive on Consumer Rights’” (2009) 46 *CMLRev* 517.

functioning internal market.<sup>585</sup> Consumer protection should be developed throughout the internal market in order to stimulate consumers to shop across the borders, which would in turn activate the internal market.<sup>586</sup> This new type of argument adopted the internal-market purpose, but put the activity of the consumers into focus.<sup>587</sup> Starting as an anonymous destination for manufactured goods, the consumer was reconceived as a coherent economic actor with a specific identity and interests, as a market player whose action (or inaction) is vital in constructing the single market. From 1990 onwards, consumers were no longer just beneficiaries of the internal market; they were active actors, who should not be prevented from making use of the internal market by differences or inadequacies in national consumer laws.<sup>588</sup>

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<sup>585</sup> According to Thomas Wilhelmsson, “The Abuse of the ‘Confident Consumer’ as a Justification for EC Consumer Law”, (2004) 27 *Journal of Consumer Policy* 317-337, drawing on the Sutherland Report’s (European Commission (1992), *The Internal Market after 1992: Meeting the Challenge. Report on the EEC Commission by the High Level Group on the Operation of the Internal Market*. Brussels [COM (92) 383 final]). Suzanna De Boef and Paul M. Kellstedt in “The Political (and Economic) Origins of Consumer Confidence” (2004) 48 *American Journal of Political Science*, pp 633-649, claim that variation in consumer sentiment comes from economic and politic conditions. As Stephen Weatherill, “Reflections on the EC’s Competence to Develop a ‘European Contract Law’”, (2005) *ERPL* 418, wrote, ‘(...) without a reliable pattern of legal rights ‘on paper’ the consumer will simply not treat the internal market as trustworthy or viable. (...) The argument would therefore not be that without harmonised legal protection the internal market will work unfairly; it would instead be that without harmonised legal protection the internal market will not even come into existence in accordance with the pattern mapped by Article 14 EC’.

<sup>586</sup> Thomas Wilhelmsson, *ibidem*, p. 320. According to Christian Joerges, “The Bright and the Dark Side of the Consumer’s Access to Justice in the EU”, (2001) 1 *Global Jurist Topics* 5: ‘(...) the European consumer – once portrayed as something like a free rider of the integration process – turns into an active market citizen. (...) The European market citizen is encouraged to make use of the opportunities the Internal Market offers, but he does not need to move outside his national borders. His own sovereign must provide good reasons for imposing constraints that do not exist in other Member States. (...) We must uphold the strong claim that the market citizen has acquired a truly political status’.

<sup>587</sup> For constitutional reasons the secondary legislation originally had to be justified with reference to internal market reasons, as there was no basis in the Treaty for a protective policy in this area. The preambles of the directives often included arguments according to which the measure in question was needed because the existing disparities in the law between the Member States create barriers to trade within the internal market and/or distorted competition between businesses from different Member States. See Geraint Howells and Thomas Wilhelmsson, *EC Consumer Law*, Ashgate, 1997, pp 299 ff.

<sup>588</sup> Thomas Wilhelmsson, “The Abuse of the ‘Confident Consumer’ as a Justification for EC Consumer Law”, (2004) 27 *Journal of Consumer Policy* 318.



### *Dimensions of property*

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According to this view, through harmonising consumer laws,<sup>589</sup> EC law attempted to increase the confidence of consumers in their possibilities to make use of the internal market.<sup>590</sup> Protection of consumers which functioned well throughout the Community would reduce the reluctance of consumers to engage in cross-border shopping, and this was desirable, as such cross-border activity would contribute to the constitution of the internal market which would provide consumers with a greater choice of products and services in a more competitive market.<sup>591</sup>

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<sup>589</sup> The consumer-confidence has been connected to a new policy of total harmonization. The ‘consumer dimension of the internal market’ is claimed to require not only the establishment of a minimum safety net covering the whole internal market, but also a more thorough harmonization of consumer law within this market. The confidence and trust of consumers in the internal market require – so the argument goes – the eradication of the differences between the Member States so that consumers know they will have the same level of protection wherever they shop within the Union. This claim is usually connected with an express presumption that the harmonised EC legislation will ensure a ‘high level of consumer protection’. This is how the consumer-confidence argument has been used in defending, at first, the development of a minimum safety net for consumer protection on the internal market (the minimum confidence argument) and, later, the turn to a more total harmonization of the rules on consumer protection within the Community (the harmonized confidence argument). Thomas Wilhelmsson, “The Abuse of the ‘Confident Consumer’ as a Justification for EC Consumer Law”, pp 322-324. Nonetheless, in “EU Consumer Law: As it Come of Age”, (2003) 28 *E.L.Rev.* 370-388, Geraint Howells and Thomas Wilhelmsson stress the dangers inherent in the exclusive reliance on Community derived law and suggest that a shift towards maximal harmonization would require a thorough reassessment of substantive consumer policy.

<sup>590</sup> Paolisa Nebbia and Tony Askham, *EU Consumer Law*, Richmond, 2004, p. 12, notice that the role of the European consumer in the completion of the internal market is in principle equivalent to the freedom of undertakings to engage in European-wide activities. And, according to Thomas Wilhelmsson, “The Abuse of the ‘Confident Consumer’ as a Justification for EC Consumer Law”, p. 319, the focus of the justification was on the needs and activities of the businesses. Businesses should not be prevented by differences in national laws from trading on the whole internal market and the conditions of competition between businesses should be fair. See also Hans-Wolfgang Micklitz, “Consumer Rights”, in Antonio Cassese, Andrew Clapham, Joseph Weiler (eds.), *Human Rights and the European Community: the Substantive Law*, Baden-Baden, Nomos, 1991, at 59.

On this topic, it is interesting to see the Eurobarometer survey Business attitudes towards cross-border sales and consumer protection - [http://ec.europa.eu/consumers/strategy/docs/fl224%20eurobar\\_cbs\\_analrep.pdf](http://ec.europa.eu/consumers/strategy/docs/fl224%20eurobar_cbs_analrep.pdf)

<sup>591</sup> It should, however, be emphasized the gaps in the internal market policy from the point of view of consumer protection. Monique Goyens, in “Development of EC Consumer Protection”, in Tony Askham and Anne Stoneham, *EC Consumer Safety*, Butterworths, 1994, pp 12-13, pointed out the gap between the approximation of the legal instruments and the different interpretation and enforcement procedures applied in the Member States by the national authorities and the lack of coherent redress to consumers’ complaints.

The need to increase consumers' confidence is still an actual concern in European law. It is often mentioned in preambles, *e.g.*, of the Unfair Contract Terms Directive,<sup>592</sup> the Directive on distance contracts,<sup>593</sup> the Directive on consumer goods,<sup>594</sup> the Financial Services Distance Marketing Directive,<sup>595</sup> the Directive concerning misleading and comparative advertising,<sup>596</sup> and the Directive on unfair commercial practices.<sup>597</sup>

Also procedural measures have been justified with references, *inter alia*, to the confidence of consumers. The Injunctions Directive<sup>598</sup> notes that difficulties in bringing about the cessation of unlawful practices that are harmful to collective consumer interests 'are likely to diminish consumer confidence in the internal market' and offers some approximated provisions on injunction procedures as a solution. The measures

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<sup>592</sup> See Recitals 2 and 3 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

<sup>593</sup> See Recitals 2 and 3 of 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.

<sup>594</sup> See Recital 2, 4 and 5 of Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

<sup>595</sup> See Recital 3 of 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.

<sup>596</sup> See Recital 6 of Directive 2006/114/EC of the European Parliament and of the Council, of 12 December 2006, concerning misleading and comparative advertising. Already the Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising stated: '(1) Whereas one of the Community's main aims is to complete the internal market; whereas measures must be adopted to ensure the smooth running of the said market; whereas the internal market comprises an area which has no internal frontiers and in which goods, persons, services and capital can move freely; (2) Whereas the completion of the internal market will mean an ever wider range of choice; whereas, given that consumers can and must make the best possible use of the internal market, and that advertising is a very important means of creating genuine outlets for all goods and services throughout the Community, the basic provisions governing the form and content of comparative advertising should be uniform and the conditions of the use of comparative advertising in the Member States should be harmonized'.

<sup>597</sup> See Recitals 2 and 4 of Directive 2005/29/EC of the European Parliament and of the Council, of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

<sup>598</sup> See Recitals 6 and 7 of Directive 2008/22/EC of the European Parliament and of the Council, of 23 April 2009, on injunctions for the protection of consumers' interests (OJ 2009 L 110/30). The same could already be read in Recitals 4 and 5 of Directive 98/27/EC on injunctions for the protection of consumers' interests.

### *Dimensions of property*

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aiming at approving consumers' access to justice in cross-border matters, such as the ADR Recommendation,<sup>599</sup> the Consensual Resolution Recommendation,<sup>600</sup> and the Extra-Judicial Network Resolution<sup>601</sup> also mention consumer confidence in the internal market as an important justification.

As expressed by the Commission in its 2007 Green Paper on the Review of the Consumer Acquis,<sup>602</sup> '[a]t the end of the Review of the Consumer Acquis it should, ideally, be possible to say to EC consumers "wherever you are in the EU or wherever you buy from it makes no difference: your essential rights are the same"'.<sup>603</sup>

Despite the emphasis given to consumers' confidence, there are several reasons for thinking that the consequences of consumers' confidence are not so radical. It should be taken into consideration, first, that empirical studies suggest that the main obstacles perceived by consumers are practical obstacles, such as language difficulties or

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<sup>599</sup> Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, preamble: 'the need to boost consumer confidence in the functioning of the internal market'.

<sup>600</sup> Commission Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, preamble (2): 'particular attention be paid to generating the confidence of consumers'.

<sup>601</sup> Council Resolution 2000/C155/01 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes, (2): 'reaffirms its concern as regards strengthening consumers' confidence in the functioning of the internal market'.

<sup>602</sup> COM (2006) 744 final. Already in the 2001 Green Paper on European Consumer Protection (COM [2001] 531 final): '[f]or the internal market to yield its benefits to consumers, they must be able to have easy access to goods and services promoted, offered and sold across the borders. It is the cross-border movement of goods and services that allows consumers to search out bargains and innovative products and services and thus ensures that they optimize their consumption decisions. This cross-burden demand increases competitive within the internal market and allows for a more efficient and competitively priced supply of goods and services. This virtuous circle can only be achieved if the regulatory framework in place encourages consumers and businesses to engage in cross-border trade. Different national laws on commercial practices relating to business-consumer relations can hinder this evolution'.

<sup>603</sup> That is in line with the approach taken by the Commission in its Communication 'A Citizens' Agenda – Delivering Results for Europe': '(...) consumers' confidence in the internal market must be stimulated by ensuring a high level of protection across the EU. Consumers should be able to rely on the equivalent rights and have resort to equivalent remedies if something goes wrong'.

difficulties in exchanging the product and getting it repaired.<sup>604</sup> The mortgage credit market can be taken as an example. In the White Paper on the integration of EU mortgage credit markets,<sup>605</sup> the Commission recognizes that consumers predominantly shop locally for mortgage credit and that the majority will probably continue to do so for the foreseeable future. The integration of EU mortgage markets will therefore be essentially supply-driven, in particular through various forms of establishment in the Member State of the consumer. According to the Commission, competitive and efficient EU mortgage credit markets can be achieved by measures which facilitate the cross-border supply and funding of mortgage credit, increase the diversity of products, improve consumer confidence and promote customer mobility.<sup>606</sup> The Commission

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<sup>604</sup> More details in Jules Stuyck, Evelyne Terryn, Tom Van Dyck, “Confidence through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market’, (2006) 43 *CMLRev* 115. See also Monique Goyens, “Development of EC Consumer Protection’ in Tony Askham and Anne Stoneham, *EC Consumer Safety*, Butterworths, 1994, p. 15; Thomas Wilhelmsson, *Social Contract Law and European Integration*, Dartmouth, 1995, pp 126 ff; Geraint Howells and Thomas Wilhelmsson, *EC Consumer Law*, Ashgate, 1997, p. 306-315. An analysis of the Eurobarometer Survey Consumer Protection in the Internal Market, [http://ec.europa.eu/consumers/strategy/docs/eurobar\\_298\\_summary\\_en.pdf](http://ec.europa.eu/consumers/strategy/docs/eurobar_298_summary_en.pdf) might be useful in this regard.

<sup>605</sup> COM (2007) 807 final. The ECJ has already dealt with the problem of the acquirer of property in Case C-222/97, *Manfred Trummer and Peter Mayer*, (1999) *ECR* I-1661. In 1995, Mr Mayer, residing in Germany, sold to Mr Trummer, residing in Austria, a share in the ownership of a property situated at Sankt Stefan im Rosenthal, Austria, for a sum denominated in German marks. Under the same agreement, Mr Mayer allowed Mr Trummer to settle the purchase price by 31 December 2000 at the latest and waived the provision of a value guarantee and the payment of interest. The parties agreed, however, that a mortgage should be created to secure payment of the purchase. On 1 July 1996 an application was made to the Bezirksgericht (District Court), Feldbach, for registration of the transaction in the Sankt Stefan im Rosenthal land register. On 17 July 1996 that application was allowed as regards registration of the joint property right but refused with regard to the mortgage. That decision was upheld on 19 February 1997 on appeal to the Landesgericht für Zivilrechtssachen (Regional Civil Court), Graz. Those two courts took the view that registration of a mortgage securing a debt payable in a foreign currency was contrary to Section 3(1) of the Verordnung über wertbeständige Rechte (Decree on fixed-value rights) of 16 November 1940, as amended by Section 4 of the Schillinggesetz (Law on the Austrian schilling). Under that provision, mortgages may be created only in Austrian schillings, failing which in such a way that the sum to be paid for the property is determined by reference to the price of fine gold. The Court ruled that Article 73b of the EC Treaty precludes the application of national rules requiring a mortgage securing a debt payable in the currency of another Member State to be registered in the national currency.

<sup>606</sup> Financial services providers can supply mortgages cross-border in several ways: through local presence (*e.g.* branches, subsidiaries, mergers and acquisitions); through direct distribution channels (*e.g.* via telephone or the internet); or through local intermediaries (*e.g.* brokers). Financial services providers can also engage in cross-border activity by purchasing a mortgage portfolio from a mortgage lender in another Member State. The existence of differing legal and consumer protection frameworks, of fragmented infrastructures (*e.g.* credit registers), as well as the lack of appropriate legal frameworks in some instances (*e.g.* for mortgage funding), create legal and economic barriers, which restrict cross-

believes that there can be no efficient market without confident and empowered consumers, who are able to seek out and choose the best mortgage product for their needs, regardless of the location of the mortgage lender. In order to make an appropriate choice, consumers require clear, correct, complete and comparable information on different mortgage products.<sup>607</sup>

Secondly, the lack of information about consumer protection laws in other EU countries is also pointed out as an empirical obstacle. In order to ameliorate this difficulty, Regulation 2006/2004<sup>608</sup> on consumer protection cooperation established a network of authorities responsible for monitoring the application of legislation concerning consumers.

Finally, difficulties related to dispute-settlement might constitute a serious obstacle to consumers' confidence. In regard to that barrier, Regulation 1896/2006<sup>609</sup> created a European order for payment procedure. Impediments to access to efficient justice in cross-border cases and the distortion of competition within the internal market due to imbalances in the functioning of procedural means afforded to creditors in different Member States necessitated Community legislation guaranteeing a level playing field

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border lending and prevent the development of cost-efficient, pan-EU funding strategies. The Commission, therefore, proposes to remove disproportionate obstacles, thus reducing the costs of selling mortgage products across the EU. See 3.1.

<sup>607</sup> The Commission considers it essential that mortgage lenders lend responsibly, in particular by thoroughly assessing the borrowers' ability to pay installments in the context of the transaction envisaged. They can do such an assessment in a variety of ways, for example by consulting a database. Irresponsible lending and mis-selling of mortgage loans by mortgage lenders or unscrupulous credit intermediaries can, as illustrated by the current sub-prime turmoil, have a negative impact on the economy at large. Good advice, including legal advice, is an important element in enhancing consumer confidence. It is distinct from information, which is merely a description of the product. The Commission wishes to promote high-level mortgage advice standards, whilst recognizing that not all consumers need the same level of advice. See 3.3.

<sup>608</sup> Regulation 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), establishes a network of authorities responsible for monitoring the application of legislation concerning consumers. The aim is to ensure compliance with the legislation and the smooth functioning of the internal market. The Regulation applies only to intra-Community infringements of consumer protection legislation. Regulation (EC) No 2006/2004 was implemented by Decision 2007/76/EC of 22 December 2006 [OL 2007 L 32].

<sup>609</sup> OJ 2006 L 399/1.

for creditors and debtors throughout the European Union. The purpose of the Regulation is to simplify, speed up and reduce the costs of litigation in cross-border cases concerning uncontested pecuniary claims, and to permit the free circulation of European orders for payment throughout the Member States by laying down minimum standards, compliance with which renders unnecessary any intermediate proceedings in the Member State of enforcement prior to recognition and enforcement.

Similarly, the European Small Claims Procedure established by Regulation 861/2007<sup>610</sup> is intended to improve access to justice by simplifying cross-border small claims litigation and by reducing costs in civil and commercial matters.<sup>611</sup> Consumers who have small or scattered claims refrain from bringing an individual court action because the cost of bringing the action is likely to outweigh the amount of damages claimed.

As expressed in the EU Consumer Policy Strategy 2007-2013,<sup>612</sup> '[t]he internal market has played a central part in meeting Europe's economic challenges and delivering tangible benefits for EU citizens. But the consumer dimension of the internal market and retail markets in particular needs to be further reinforced. The new economic, social, environmental and political context calls for a change in focus of EU policy towards consumers'.

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<sup>610</sup> Regulation 861/2007 of the European Parliament and of the Council of 11 July 2007 established a European small claims procedure. It will be applicable from 1 January 2009 in all EU Member States except Denmark.

<sup>611</sup> 'Small claims' are cases concerning sums under EUR 2 000, excluding interest, expenses and disbursements (at the time when the claim form is received by the competent court). Judgments delivered under this procedure are recognized and enforceable in the other Member States without the need for a declaration of enforceability. The procedure is optional, offered as an alternative to the possibilities existing under the national laws of the Member States.

<sup>612</sup> Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, COM (2007) 99 final.

## 2.2. The informed consumer

European consumer policy is drawn according to the information paradigm.<sup>613</sup> Information requirements are usually preferred to substantive, content-oriented rules and prohibitions.<sup>614</sup> As the ECJ ruled in *GB-INNO-BM*, ‘under Community law concerning consumer protection the provision of information to the consumer is considered one of the principal requirements’.<sup>615</sup>

The informed consumer is dealt with by the ECJ when outlawing trade barriers on the basis of the Treaty (rules on negative integration); that is, when the Court has to assess whether consumer protection is a legitimate ground of national measures restricting trade. The net effect of Articles 28 to 30 of EC Treaty is that quantitative restrictions on imports or exports, and measures having equivalent effect, are prohibited in trade between Member States, unless they are justified on one of the grounds listed in Article 30.<sup>616</sup>

While it is relatively clear that the expression ‘quantitative restrictions’ means quotas and prohibitions,<sup>617</sup> the concept of ‘measure having an equivalent effect’ gave rise to

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<sup>613</sup> Jules Stuyck, “European Consumer Law after the Treaty of Amsterdam: Consumer Policy In or Beyond the Internal Market?” (2000) 37 *CMLRev* 384. The right to information is undoubtedly the most fundamental specific consumer right, *i.e.* a right vested in all citizens in their capacity as consumers. See also Leone Niglia, “The Non-Europeanisation of Private Law”, (2001) 4 *ERPL* 590 and Norbert Reich, “Economic Law, Consumer Interests and EU Integration”, in Norbert Reich, Hans-W. Micklitz, Peter Rott, *Understanding Consumer Law*, 2009, pp 45-46.

<sup>614</sup> Thomas Wilhelmsson, “Cooperation and Competition Regarding Standard Contract Terms in Consumer Contracts”, (2006) *EBLR* 51.

<sup>615</sup> Case C-362/88, *GB-INNO-BM v Confédération du commerce luxembourgeois* [1990] *ECR* 667. In casu, a provision of the Luxembourg law on unfair competition prohibiting special sales offer with reference to the previous higher price was found by the Court not to serve the interests of consumers (because consumer information being the primary goal of EC consumer policy, a rule preventing consumers from receiving information which is not misleading could not be considered in the consumers’ interest). The Court emphasizes the role of the active consumers and the fact that, in order to make their decisions, they must have access to reliable information.

<sup>616</sup> A comparable approach emerges on the field of advertising of free movement of services. See *v.g.*, Case C-262/02, *Commission v. France* [2004] *ECR* I-6569.

<sup>617</sup> See, *v.g.*, Case 34/79, *Regina v Henn and Darby*, *ECR* [1979] 3795 and Case 2/73, *Geddo v Ente Nazionale Risi*, [1973] *ECR* 865.

the greatest difficulties. In *Dassonville*,<sup>618</sup> the ECJ ruled that, '[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions'.<sup>619</sup>

Initially it was believed that Article 28 only prohibited discriminatory measures: provided that a Member State would apply its legislation without distinction to domestic goods and to goods produced in other Member States, no breach of Article 28 would occur. However, in 1979, the Court's judgment in *Cassis de Dijon*,<sup>620</sup> ruled that goods manufactured and marketed in a Member State in accordance with the local legislation might be imported into any other Member State unless some mandatory requirement justifies their exclusion. Since 1979 the Court has delivered many judgments confirming that principle in cases where the Member State concerned prohibited the sale of goods not manufactured in accordance with certain rules governing the physical characteristics of goods.<sup>621</sup> The obstacles to trade between Member States resulting from such rules would include disparities in laws regulating the composition and presentation of goods, or law prescribing technical standards for goods.<sup>622</sup> A thorough examination of the problem of the outlaw of trade barriers on the

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<sup>618</sup> Case 8/74, *Procureur du Roi v Dassonville*, [1974] ECR 837.

<sup>619</sup> According to this ruling, even a slight hindrance to imports would be sufficient to bring Article 28 into play (v.g. *Van de Haar and Kaveka de Meern*, Joined Cases 177 and 178/82, [1984] ECR 1797).

<sup>620</sup> Case 120/78, *REWE-Zentral v Bundesmonopolverwaltung für Branntwein* ('Cassis de Dijon'), [1979] ECR 649.

<sup>621</sup> See Joined Cases 133-136/85, *Rau v De Smedt*, [1987] ECR 2289; Case 178/84, *Commission v Germany* [1987] ECR 1227; Case 407/85, *3 Glocken v USL Centro-Sud* [1988] ECR 4233; Case 302/86, *Commission v Denmark* [1988] ECR 4607.

<sup>622</sup> In the 1980s and early 1990s, several cases were lodge before the ECJ, in which Article 28 and the Cassis de Dijon principle were invoked, not in relation to legislation governing the physical characteristic of goods, but in relation to legislation governing the circumstances in which goods may be marketed. Aware of the contradiction existing at the time in the case law, the Court made an attempt to redefine the scope of Article 28 in *Keck and Mithouard* (Joined Cases C-267/91 and C-268/91, [1993] ECR 6097). It held that: '(...) contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment, provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing



basis of the Treaty is beyond the scope of this thesis. I will just stress three points on the *Cassis de Dijon* judgment.

First, the *Cassis de Dijon* judgment, by introducing the principle of mutual recognition, according to which goods marketed legally in one Member State are to be accepted on the market of another Member State, even if they do not comply with the regulatory framework in force applicable to its domestic goods in this Member State, would have landmark importance for the recognition of consumers as economic partners, whose needs and welfare would be taken into account as much as producers' needs. The promotion of the circulation of national goods and of the free movement of goods would provide wider choice for the consumers.<sup>623</sup> In this sense, the law of market integration would become itself a form of (indirect) consumer policy.<sup>624</sup> The achievement of a common market would benefit the consumer, and, accordingly, the legal prohibition of national measures and practices that impede trade across borders was considered in the consumer interest. As the Court held in *Wine and Beer*,<sup>625</sup> the legislation of a Member State must not 'crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to comply with them'.

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of domestic products and of those from other Member States'. The *Keck* judgment made a rigid distinction between rules relating to the physical characteristics of goods (rules on composition, presentation, labelling and packaging) and rules that restrict certain 'selling arrangements' (*modalités de vente* in French). The former automatically fell within the scope of Article 28, whereas the latter did so only if they produced some discriminatory effect to the detriment of imported goods.

<sup>623</sup> The Court's moulding of Articles 28 and 49 in this fashion has significant institutional consequences. Prohibiting a national rule contributes to free trade without the need for the Community to adopt legislation in the area. This has the gratifying consequence that diversity persists. Mutual recognition of diverse national traditions secures wider choice. See Stephen Weatherill, *EU Consumer Law and Policy*, 2005, p. 46. The case also had the effect of decreasing the Commission's workload in the area of positive harmonization by reducing the need to adopt common rules. Paolisa Nebbia and Tony Askham, *EU Consumer Law*, Richmond, 2004, p. 7.

<sup>624</sup> It should be noted, however, that decisions such as *GB-INNO* and *Yves Rocher*, seen as regulatory in the national context, are not so from a Community point of view, since, according to the Court, their outcomes lead to situations which correspond to the legislation of almost all Member States. See Miguel Poiaras Maduro, *We The Court - The European Court of Justice and the European Economic Constitution*, Oxford, Hart Publishing, 1998, p. 74.

<sup>625</sup> Case 170/78, *Commission v. United Kingdom* (1983) ECR 2265.

Second, the Court's approach would involve the transfer to a certain degree of decision-making in relation to consumer goods from the public level to the level of the individual.<sup>626</sup> It should be recalled that the concept of the informed consumer has been regarded an essential element of the Court's reasoning. The basic premise of the Court is that if a product has been admitted to the market of a Member State, it might be presumed that it was safe and suitable for use or consumption and therefore should be obtainable throughout the whole of the common market (doctrine of the mutual recognition of national standards). As long as the consumer knows what he is buying – and the product has already been admitted elsewhere in the common market – he does not need the State to steer his decisions.<sup>627</sup>

Thirdly, the Court would take a new model for checking national regulatory choices and assessing how the market should serve the consumer.<sup>628</sup> Either the Court outweighs the consumer interest in integration and wider choice by ruling national measures of (alleged) consumer protection incompatible with Article 28, or the Court upholds national measures of market regulation despite the damage they caused to the

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<sup>626</sup> The transfer of the decision-making powers away from the public authorities to the consumer is the key to these rulings, according to Stephen Weatherill, *EU Consumer Law and Policy*, pp 48-49.

<sup>627</sup> Daniel Mortermans and Stewart Watson, "The Notion of Consumer in Community Law: a Lottery?", in Julian Lombay (ed.), *Enhancing the Legal Position of the European Consumer*, BIICL, 1996, at 41. In this line of jurisprudence, the Court has claimed for itself a key role as a Community policy maker. Under Article 30, it balances the consumer interest in market liberalisation against the consumer interest in national protective initiatives. See Hans-W. Micklitz and Stephen Weatherill, "Consumer Policy in the European Community: Before and After Maastricht" in Nobert Reich and Geoffrey Woochoof (eds.), *European Consumer Policy after Maastricht*, Kluwer Academic Press, 1994, p. 8.

<sup>628</sup> I am following Weatherill, *The Role of the Informed Consumer*, 1994, p. 50 and 51. In Case 94/82, *De Kikvorsch Groothandel*, [1983] ECR 947, the Court insisted on the primacy of consumer choice over State regulation as a determinant of market availability: 'If the rules on trading in beer "prohibit a statement of the strength of the original wort of the beer on the pre-packaging or the label thereof, the extension of that prohibition to beer imported from other Member States, necessitating an alteration of the label under which the imported beer is lawfully an effect equivalent to a quantitative restriction, which is prohibited by Article 30 of the Treaty, unless such statement, regard being had to its specific terms, is of such a kind as to mislead the purchaser.' In Case 178/84, *Commission v. Germany*, [1987] ECR 1227 (the *Beer Purity* case), the Court explicitly identified the availability of consumer information as a regulatory device which is less restrictive of trade than mandatory composition requirements. (...) This was an application of the proportionality principle which was familiar in EC trade law, and through it EC law indirectly encouraged information disclosure as part of the process of market integration. The intended result was that the informed consumer was enabled to exercise choice in accordance with his or her own (informed) preferences, rather than have choice confined by governmental intervention.

elaborations of an integrated commercial strategy for the Community market. Negative law, that is, the removal of obstructive national rules, is based on assumptions about the advantages of cross-border trade as a means of improving the functioning of the economy to the benefit of the consumer. Accordingly, national measures that impair product and service market integration are treated with suspicion. But some such national measures will themselves reflect domestic concern to protect the consumer from perceived failings of the market system. This is the clash of competing consumer interests: the Community-driven notion of free trade versus the national choice about protection.<sup>629</sup>

As I have mentioned above, the net effect of Articles 28 to 30 of EC Treaty is that quantitative restrictions on imports or exports, and measures having equivalent effect, are prohibited in trade between Member States, unless they are justified on one of the grounds listed in Article 30. According to the ECJ, obstacles to the free movement of goods within the Community resulting from disparities between national laws must be accepted in so far as those laws may be recognized as being necessary in order to satisfy mandatory requirements in the general interest. It should be taken into consideration that there is no explicit reference to the consumer in Article 30, but the notion of the protection of the health and life of humans is understood as covering the protection of the physical integrity of the consumer.<sup>630</sup> Accordingly, national rules designed to secure

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<sup>629</sup> I am following Stephen Weatherill, *EU Consumer Law and Policy*, pp 40 ff. Monique Goyens, "Development of EC Consumer Protection" in Tony Askham and Anne Stoneham, *EC Consumer Safety*, Butterworths, 1994, p. 15, calls attention for the danger that principle of mutual recognition might level down national consumer protection, a 'negative integration' process. Industries submitted to more stringent domestic provisions than those which export to the Member State concerned would be tempted to enter into lobbying activities aimed at eliminating the distortion of competition existing, to their disadvantage, between them and foreign undertakings. Miguel Poiars Maduro, *We The Court - The European Court of Justice and the European Economic Constitution*, Oxford, Hart Publishing, 1998, p. 72, points out that deregulation may occur as a consequence of Article 30 even with regard to home nationals due to two factors: first, States may not want to continue to subject their own nationals to stricter rules or they may not be authorized to do so according to national law (e.g. national constitutional principles of equality); secondly, in some cases it is impossible to distinguish between the effects of the judicial decision on imported and domestic products since the striking down of national rules with regard to imported products automatically covers domestic products.

<sup>630</sup> Jules Stuyck, "European Consumer Law after the Treaty of Amsterdam: Consumer Policy In or Beyond the Internal Market?", (2000) 37 *CMLRev* 389, relates that consumer protection is undoubtedly the most relevant ground of justification under the mandatory requirements test (or 'rule of reason') which the Court of Justice has developed since the *Cassis de Dijon* case law. As Christoph Schmid notes,

health and safety may be enforced notwithstanding any impediment to integration, provided the conditions under Article 30 are satisfied.

Justification under Article 30 encompasses the compatibility with Community law of both the end in view and the means chosen to achieve that end. This is inherent in the second sentence of Article 30, which declares that ‘such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between member states.’ Accordingly it is incumbent on the Member State to show that the national measure adopted is apt to achieve the end in view and the least restrictive of trade necessary to achieve that end.<sup>631</sup>

The Court relies on the capacity of the consumer to process information and thereby to make informed choices about available products and services as a basis for ruling against national measures that go so far as to suppress the appearance on the market of

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consumer information requirements are widely construed in European consumer contract law, whereas national consumer protection-based limitation on the basic freedoms in national unfair competition law are construed narrowly. A wide recognition of national information rights would reduce the effect utile of the market freedoms; the ECJ’s true concern is not a uniform model of a consumer, and not even consumer protection as such, but the optimisation of Community law irrespective of its contents and objectives. Thus, ‘a coherent vision of consumer information, in particular, and private law, in general, is sacrificed to a schematic “*effet utile*” concept’. See Christoph U. Schmid, *The ECJ as a Constitutional and a Private Law Court – A Methodological Comparison*, ZERP-Diskussionspapier 4/2006, pp 23-24.

<sup>631</sup> See Stephen Weatherill, *EU Consumer Law and Policy*, 2005, p. 42. With respect to the proportionality principle, Case C-423/98, *Alfredo Albore* [2000] ECR I- 5965, should be mentioned. *In casu*, two properties at Barano d’Ischia, in an area of Italy designated as being of military importance, were purchased on 14 January 1998 by two German nationals, Uwe Rudolf Heller and Rolf Adolf Kraas, who did not apply for prefectural authorisation. In the absence of such authorisation, the Naples Registrar of Property refused to register the sale of the properties. The Court considered that Article 18 of Law No 898/76, in so far as it exempts only Italian nationals from the requirement of obtaining an authorisation to buy a property in certain parts of the national territory, imposes on nationals of the other Member States a discriminatory restriction on capital movements between Member States. Such discrimination is prohibited by Article 73b of the Treaty unless it is justified on grounds permitted by the Treaty. The requirements of public security, however, cannot justify derogations from the Treaty rules such as the freedom of capital movements unless the principle of proportionality is observed, which means that any derogation must remain within the limits of what is appropriate and necessary for achieving the aim in view. Furthermore, under Article 73d(3) of the EC Treaty (now Article 58(3) EC), such requirements may not be relied on to justify measures constituting a means of arbitrary discrimination or a disguised restriction on the free movement of capital. In that regard, a mere reference to the requirements of defence of the national territory, where the situation of the Member State concerned does not fall within the scope of Article 224 of the EC Treaty (now Article 297 EC), cannot suffice to justify discrimination on grounds of nationality against nationals of other Member States regarding access to immovable property on all or part of the national territory of the first State.

imported products and services. In the application of the proportionality principle, the Court had frequently held unlawful stricter measures which suppress products where information provision might have sufficed to achieve consumer protection. These are cases which demonstrate the principle that even where the end of consumer protection may provide a justification for a trade-restrictive measure, the means employed must be at least restrictive of trade available which are capable of meeting the end in view.<sup>632</sup>

In *Rau v. de Smedt*,<sup>633</sup> the provision in a Belgian Royal Decree that margarine could only be marketed in cubical forms (packages) was found not to be necessary to protect consumers against the risk of confusion with butter; in reality this old rule (which was justified at the beginning of the twentieth century when butter and margarine were sold unpacked and unlabelled) was maintained in order to accommodate Belgian manufacturers who regularly brought court actions against importers importing margarine in other forms than cubes from the neighbouring countries;<sup>634</sup> through the years the provision had lost its meaning as a measure of consumer protection.<sup>635</sup> The ruling of the Court was as follows:

The application to one Member State to margarine imported from another Member State and lawfully produced and marketed in that state if legislation prohibiting the marketing of margarine or edible fats where each block or its external packaging does not have a particular shape, for example, the shape of a cube, in circumstances in which the consumer may be protected and informed by means which hinder the free movement of

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<sup>632</sup> Stephen Weatherill, *EU Consumer Law and Policy*, 2005, p. 48.

<sup>633</sup> Case 261/81, *Rau v. de Smedt*, [1982] ECR 3961.

<sup>634</sup> I am following Jules Stuyck, "European Consumer Law after the Treaty of Amsterdam: Consumer Policy In or Beyond the Internal Market?" (2000) 37 *CMLRev* at 390.

<sup>635</sup> The Court considered, at para 17, that it cannot be reasonably denied that 'legislation designed to prevent butter and margarine from being confused in the mind of the consumer is justified. However the application by one member state to margarine lawfully manufactured and marketed in another member state of legislation which prescribes for that product a specific kind of packaging such as the cubic form to the exclusion of any other form of packaging considerably exceeds the requirements of the object in view. Consumers may in fact be protected just as effectively by other measures, for example by rules on labelling, which hinder the free movement of goods less'.

goods to a lesser degree constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.

In *Kikvorsch Groothandel*,<sup>636</sup> the Court was asked whether rules on trading in beer adopted by a Member would constitute an obstacle to the free movement of goods and, if so, to what extent such obstacles were justified. The Court considered that:

In particular, no consideration relating to the protection of the national consumer militates in favour of a rule preventing such consumer from trying a beer which is brewed according to a different tradition in another Member State and the label of which clearly states that it comes outside from the said part of the Community.<sup>637</sup>

And as regards consumers' protection against misleading labelling, the Court ruled:

Such consumer protection may also entail a prohibition of the provision on certain information on the products, particularly if that information may be confused by the consumer with other information required by the national rules. For such a prohibition to be applied to products from another Member State in such a way as to necessitate the alteration of the original labels of such products, the original label must actually be of such a kind as to give rise to the confusion which the rules seek to avoid.<sup>638</sup>

In the *Beer Purity Case*,<sup>639</sup> the protection of the health of consumers could not justify the prohibition of additives in beer, because the same additives were tolerated in other foodstuffs. The rule that only beer brewed according to the purity law could be named 'beer' was disproportionate to the objective of correct consumer information, since that objective could be attained by a less restrictive means, namely adequate labelling requirements.

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<sup>636</sup> Case 94/82, [1983] ECR 947.

<sup>637</sup> Para 8.

<sup>638</sup> Para 12.

<sup>639</sup> Case 178/84, *Commission v. Germany*, [1987] ECR 1227.

The rule in *Drei Glocken v. OSL Centro-Sud*<sup>640</sup> was that, '[t]he extension to imported products of a prohibition on the sale of pasta made from common wheat or from a mixture of common wheat and durum wheat, such as it is contained in the Italian law on pasta products, is incompatible with Articles 30 and 36 of the Treaty'. The consequence of the ruling is that non-Italian producers could sell their products in Italy and the Italian consumers could choose from a wider range of pastas. It appears to be assumed by the Court that a consumer will be able satisfactorily to grasp the differences between available pasta products. The Courts' ruling applies the *Cassis de Dijon* principle as a means of achieving market integration without waiting for the slow cogs of the Community legislative machinery to turn. Whereas the Advocate General doubted the workability of a market based solely on mutual recognition and would have upheld state decisions taken on behalf of the consumers pending Community legislative intervention, the Court's ruling is based on an implied expectation that an informed consumer is capable of making a proper choice.<sup>641</sup>

In the afore-mentioned cases, consumer protection was not a justification for a trade-restrictive measure, for the means employed were not proportional to the restriction they would produce on trade between Member States. An exception to the application of the proportionality principle is to be mentioned, though.<sup>642</sup> States may permissibly

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<sup>640</sup> Case 407/85 [1988] ECR 4233.

<sup>641</sup> See Stephen Weatherill, *EU Consumer Law and Policy*, 2005, p. 51.

<sup>642</sup> It should be noted that also in particularly sensitive areas, such as gambling the Court seems to apply a less strict proportionality test. In Case C-275/92, *Schindler*, [1994] ECR I-1039, para 61, the Court took into consideration the peculiar nature of lotteries as well as their moral, religious or cultural aspects. The Court also into account that lotteries involve a high risk of crime or fraud, given the size of the amounts which can be staked and of the winnings which they can hold out to the players, particularly when they are operated on a large scale and that they are an incitement to spend which may have damaging individual and social consequences. Even the fact lotteries may make a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture could not in itself be regarded as an objective justification. In Case C-124/97, *Markku Juhani Läära*, [1999] ECR I-6067, the Court went further: '[i]t is true that the sums thus received by the State for public interest purposes could equally be obtained by other means, such as taxation of the activities of the various operators authorised to pursue them within the framework of rules of a non-exclusive nature; however, the obligation imposed on the licensed public body, requiring it to pay over the proceeds of its operations, constitutes a measure which, given the risk of crime and fraud, is certainly more effective in ensuring that strict limits are set to the lucrative nature of such activities. 42. In those circumstances, in conferring exclusive rights on a single public body, the provisions of the Finnish legislation on the

protect domestic consumers even where this impedes integration, when scientific evidence advanced to show a health risk posed by the product subject to control is equivocal. Recently, the Court has adopted the language of the ‘precautionary principle’<sup>643</sup> in conceding to Member States the space to maintain rules that restrict trade in goods, especially foodstuffs, on the basis that there is doubt about the effects of particular ingredients on the health of consumers:

The precautionary principle constitutes a general principle of Community law requiring the authorities in question, in the particular context of the exercise of the powers conferred on them by the relevant rules, to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests. Since the Community institutions are responsible, in all their spheres of activity, for the protection of public health, safety and the environment, the precautionary principle can be regarded as an autonomous principle stemming from the Treaty provisions, in particular Articles 3(p) EC, 6 EC, 152(1) EC, 153(1) and (2) EC and 174(1) and (2) EC (...).<sup>644</sup>

The precautionary principle is considered within the analysis of risk management.<sup>645</sup> States enjoy a ‘discretion relating to the protection of public health [which] is

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operation of slot machines do not appear to be disproportionate, in so far as they affect freedom to provide services, to the objectives they pursue’ (paras. 41 and 42). See also Case C-67/98, *Questore di Verona v. Diego Zenatti*, [1999] ECR I -7289.

<sup>643</sup> See, for all, José Luís da Cruz Vilaça, “The Precautionary Principle in EC Law”, [2004] 10 *European Public Law* pp 369-406.

<sup>644</sup> Case T-392/02, *Solvay*, [2003] ECR II – 4555.

<sup>645</sup> See the Opinion of the Economic and Social Committee on ‘Use of the precautionary principle’ OJ 2000 C 268/06. The precautionary principle should be taken into consideration when applying, v.g. Regulation EC 1946/2003 of the European Parliament and of the Council of 15 July 2000, on the transboundary movements of genetically modified organisms and Regulation EC 1830/2003 of the European Parliament and of the Council of 22 September 2003, concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms. In Case C-41/02, *Commission v. Netherlands*, [2004] ECR I-11375, the Court ruled that a prohibition on the marketing of foodstuffs to which nutrients have been added must therefore be based on a detailed assessment of the risk alleged by the Member State invoking Article 36 of the Treaty. Such an assessment will demonstrate that there is much uncertainty, in science and in practice, in that regard (see paras. 52 to 54).



### *Dimensions of property*

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particularly wide where it is shown that uncertainties continue to exist in the current state of scientific research'. The Court insists, however, that national authorization procedures shall be targeted at identified risks, rather than applying indiscriminately or in cases of purely hypothetical risk, and that they shall be transparent and open to challenge.<sup>646</sup>

It is only where Member States can demonstrate that the provision of information alone is insufficient to safeguard consumer interests, for example, where the state of scientific knowledge is uncertain, that they retain power under Articles 36 and 56 or the rule of reason to adopt further-reaching measures in this area. According to GARLAND, a system of consumer law functions not so much to find fault and allocate blame but rather to distribute risk in patterns that are efficient as well as fair.<sup>647</sup>

Some such national measures will themselves reflect domestic concern to protect the consumer from perceived failings of the market system. For example, in *Commission v Germany* [insurance sector],<sup>648</sup> *De Agostini* [an outright ban on advertising aimed at children less than 12 years of age and of misleading advertising]<sup>649</sup> and Case 288/89 [restrictions on the broadcasting of advertisements]<sup>650</sup>, the Court has upheld national measures of consumer protection, because they were adequate and proportionate to the

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<sup>646</sup> *Ibidem*, para 43. See Cases 53/80, *Eyssen*, [1981] ECR 409, para 16; Case 247/84, *Motte*, [1985] 3887, para 19; Case 304/84, *Muller and Others*, [1986] ECR 1511, para 26; Case 236/01, *Monsanto*, [2003] ECR I-8105, para 111 to 113; Case C-443/02, *Schreiber*, [2004] ECR I – 7275, para 50.

<sup>647</sup> David Garland, “The Rise of Risk”, in R. Ericson (ed.), *Risk and Morality*, University of Toronto Press, 2003, at 61.

<sup>648</sup> Case 205/84, *Commission v. Germany*, [1986] ECR 3755, para 32.

<sup>649</sup> Joined Cases C-34, 35 & 36/95, *De Agostini*, [1997] ECR I-03843, paras. 47-54.

<sup>650</sup> In Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media*, [1991] ECR I- 4007, the Court ruled: ‘restrictions on the broadcasting of advertisements, such as a prohibition on advertising particular products or on certain days, a limitation of the duration or frequency of advertisements or restrictions designed to enable listeners or viewers not to confuse advertising with other parts of the programme, may be justified by overriding reasons relating to the general interest. Such restrictions may be imposed in order to protect consumers against excessive advertising or, as an objective of cultural policy, in order to maintain a certain level of programme quality’ (para 27).

objective of consumer protection pursued. In *Alpine Investments*,<sup>651</sup> the Court was asked whether imperative reasons of public interest could justify the prohibition of cold calling and whether that prohibition could be considered to be objectively necessary and proportionate to the end pursued. The Netherlands Government contended that the prohibition of cold calling in off-market commodities futures trading seeks both to safeguard the reputation of the Netherlands financial markets and to protect the investing public. The Court considered that, ‘the prohibition of cold calling by the Member State from which the telephone call is made, with a view to protecting investor confidence in the financial markets of that State, cannot be considered to be inappropriate to achieve the objective of securing the integrity of those markets’.

Although *Alpine Investments* had contended that a general prohibition of telephone canvassing of potential clients was not necessary for the achievement of the objectives pursued by the Netherlands authorities, because the requirement of broking firms to tape-record unsolicited telephone calls made by them would suffice to protect consumers effectively the Court decided that the fact that one Member State imposes less strict rules than another Member State does not mean that the latter’s rules are disproportionate and hence incompatible with Community law. The Court ruled that, ‘Article 59 does not preclude national rules which, in order to protect investor confidence in national financial markets, prohibit the practice of making unsolicited telephone calls to potential clients resident in other Member States to offer them services linked to investment in commodities futures’.

I have been reporting how the informed consumer is dealt with by the ECJ when outlawing trade barriers on the basis of the Treaty. However, the informed consumer is often referred to in secondary legislation in consumer law field, *e.g.*, in the Directive on prices,<sup>652</sup> or, more recently, the Unfair Commercial Practices Directive.<sup>653</sup> Those

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<sup>651</sup> Case C-384/93, *Alpine Investments*, [1995] ECR I141.

<sup>652</sup> Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers states that: ‘(6) [w]hereas the obligation to indicate the selling price and the unit price contributes substantially to improving consumer information, as this is the easiest way to enable consumers to evaluate and compare the price of products in an optimum manner and hence to make informed choices on the basis of simple comparisons; (...) (12)

Directives reflect a market-oriented approach and a belief in the information paradigm, which underlines transparency as the main method of consumer protection. The recent Proposal for a Directive on Consumer Rights<sup>654</sup> dedicates Chapter II to consumer information in respect of sales and service contracts. Article 5 establishes general information requirements (*e.g.*, the main characteristics of the product, to an extent appropriate to the medium and the product; the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence; the existence and the conditions of after-sales services and commercial guarantees, where applicable). The consequences of any breach of Article 5, shall, thus, be determined in accordance with the applicable national law. Member States shall provide in their national laws for effective contract law remedies of any breach of Article 5.

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Whereas Community-level rules can ensure homogenous and transparent information that will benefit all consumers in the context of the internal market; whereas the new, simplified approach is both necessary and sufficient to achieve this objective’.

<sup>653</sup> Cf. Recital 14. Under this Directive, consumer protection is limited to misleading practices that, ‘materially distort the economic behavior of consumers’, that means using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise (Article 2(e) of the Directive). So this Directive protects only the consumers’ ability to make an informed decision. See Christian Handig, “The Unfair Commercial Practices Directive - A Milestone in the European Unfair Competition Law” (2005) *EBLR* 1119. According to Stuyck, in this provision the European legislator seems to have based the general fairness test on the equation that ‘economic behavior=ability to make an informed decision’. This equation incorporates the assumptions that a consumer behaves economically, and that economic behaviour ultimately is based on the ability to make informed decisions. The equation correctly refers to the ability to make an informed decision rather than the informed decision itself. The consumer, in other words, is still free to ignore all information and make a stupid decision, on the condition that his ability to make an informed decision was not appreciably impaired. Jules Stuyck, Evelyne Terryn, Tom Van Dyck, “Confidence through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market”, (2006) 43 *CMLRev* 125.

<sup>654</sup> Proposal for a Directive of the European Parliament and of the Council on Consumer Rights (COM (2008) 614 final). In the Green Paper, the Commission had forwarded the opinion that although the horizontal instrument should not cover the existence and the content of the information requirements, considering the varying purposes of consumer information in the varying directives, it could encompass provisions on the failure to fulfil information requirements. One possibility was that the horizontal instrument would provide for an extension of the cooling-off period for failure to comply with information requirements. Another solution would be to combine such an extension of the cooling-off period with general remedies for the most serious breaches of information duties (*e.g.* no incorrect information on the price of a product could entitle the consumer to avoid the contract).

Further, more recently, the EU Consumer Policy Strategy 2007-2013<sup>655</sup> reads that: '[c]onfident, informed and empowered consumers are the motor of economic change as their choices drive innovation and policy.'

The predominance of the information paradigm in the Court's case-law and in EC consumer law is crystal-clear. The information paradigm underlines transparency as the main method of consumer protection and it is closely connected with the emphasis on party autonomy as an important value of the internal market. Only informed choices lead to efficient choices ensuring maximization of consumers' collective interests.<sup>656</sup> However, the criticism to the information paradigm emphasizes how the image of the informed consumer might disintegrate into a mere illusion:<sup>657</sup> information may not reach the consumers; consumers may not want to look for information; they may have difficulties in understanding and using information or may not have alternative solutions; finally, consumers' culture makes information less efficient. I will now develop these points.

First, information may not reach the consumers. The economic approach does not assume that all participants in any market necessarily have complete information or engage in costless transactions. Incomplete information or costly transactions should

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<sup>655</sup> Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, COM (2007) 99 final.

<sup>656</sup> It should be recalled that the information paradigm also implies a certain presumption concerning the existence of competition in the marketplace. On one hand, the primary purpose behind the information strategy of the EC consumer law is to allow the opportunity to shop around in the marketplace for offers that are more suitable and acceptable than the original one. On the other hand, the confident consumer is also regarded as a means to strengthen competition in the internal market: the development of EC consumer protection was a means to stimulate the consumers, to shop across the borders in order to activate the internal market. See Thomas Wilhelmsson, "Cooperation and Competition Regarding Standard Contract Terms in Consumer Contracts", (2006) *EBLR* 53.

<sup>657</sup> For criticism on the information paradigm and market transparency against the legal materialisation efforts of the post-war years, see Michelle Everson, "Legal Constructions of the Consumer, in Frank Trentmann, *The Making of the Consumer: Knowledge, Power and Identity in the Modern World*, Berg, 2006, p. 110. According to the author, '[t]his impression that the European Court of Justice had simply rolled back forty years of legal materialisation efforts to resurrect the figure of the sovereign consumer, protected by a dual regime of competition law and transactional transparency, is further bolstered by the explicit and repeated emphasis placed by the Court on the notion of "information" within its own perception of the European consumer'.

not, however, be confused with irrational or volatile behaviour. The economic approach has developed a theory of the optimal or rational accumulation of costly information that implies, for example, greater investments in information when undertaking major rather than minor decisions – the purchase of a house or entrance into marriage versus the purchase of a sofa or bread.<sup>658</sup> Costs of change include time and money expended the cost of delaying decisions, and psychological costs as frustration and annoyance of dealing with sales personnel.<sup>659</sup> Since consumers can only process a limited amount of information in a given time period, the potential danger of information overload has recently attracted a great deal of attention of consumer researchers<sup>660</sup> and policymakers.<sup>661</sup>

Second, consumers may not want to look for information. Consumers may not even find it worthwhile to look for information, considering the relatively small advantages it may bring.

Third, consumers may have difficulties in understanding and using information. Psychologists and economists have indicated that consumer decisions are function of a number of decision rules that include human limitations (motivation, knowledge or ability), circumstances (opportunity, time pressure, distraction or presentation) and the nature of the decision (importance or frequency). For example, over optimism leads most people to believe that their own risk of a negative outcome is far lower than the

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<sup>658</sup> George J. Stigler, “The Economics of Information”, (1961) 69 *Jo. Pol. Econ* 213-225, advanced the proposition that an individual would invest in information until the marginal cost of further investment is greater than or equal to the marginal gain (in terms of lower expected purchase price). See also Gary Becker, “Economic Analysis and Human Behavior”, in Leonard Green and John H. Kagel (eds.), *Advances in Behavioral Economics*, vol. 1, Ablex Publishing, 1987, p. 7.

<sup>659</sup> Louis L. Wilde, “Consumer Behavior under Imperfect Information: a Review of Research”, in Leonard Green and John H. Kagel (eds.), *Advances in Behavioral Economics*, vol. 1, Ablex Publishing, 1987, p. 229.

<sup>660</sup> For criticism, see Louis L. Wilde, *ibidem*, p. 238.

<sup>661</sup> See, v.g., the conference organized by the European Commission, DG Health and Consumers, on November 2008, ‘How Can Behavioural Economics Improve Policies Affecting Consumers?’ and the Conference on Behavioral Economics and Consumer Policy sponsored by the Bureau of Economics of the Fair Trade Commission (April 2007).

average person's. Similarly, the effect of salience may lead to substantial underestimation of certain risks encountered in everyday life (for example, the risks from poor diet), since these harms may not be very salient.<sup>662</sup> When overoptimism is combined with salience, people may underestimate risks substantially. It should be emphasised that these problems are not ones of insufficient information *per se*; they are problems of insufficient ability to process accurately the information one possesses insofar as that information bears on one's own risks. Thus, for example, people may have reasonably adequate information about the risks of smoking, but this does not at all imply that they have adequate perceptions of the risks of smoking that they themselves face. Even if people can obtain accurate statistical knowledge, it may not be enough to inform actual choices. It does not follow from this that information is useless; it is just that having information *per se* does not automatically imply optimal behaviour. This is because consumers often interpret information in ways that suit their prejudices. Thus information which supports their desired decision will be favourably received, whereas unwelcome information that might cause them to change approaches will sometimes be ignored or downplayed.<sup>663</sup> In other words consumers interpret information to justify their consumption behaviour and do not always use it in the rational manner, as neutral advice, as traditional economists suggest they ought. Businesses of course know this and are keen to ensure their legal obligations to inform are carried out in a manner which as far as possible supports the favourable images consumers have of their products.<sup>664</sup>

Fourth, consumers may not have alternative solutions. The regulation of information also lacks relevance if the consumer does not have any alternatives in practice. Information that a cheap product is of inferior quality in comparison to a corresponding

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<sup>662</sup> Christine Jolls, Cass R. Sunstein, Richard Thaler, "A Behavioral Approach to Law and Economics", (1998) 50 *Stan. L. Rev.* at 1542.

<sup>663</sup> For an introduction to behavioural economics and its implications for law, see Sunstein (ed.), *Behavioural Law and Economics*, CUP, 2000.

<sup>664</sup> Hanson and Logue, "The Costs of Cigarettes: the Economic Case for Ex Post Incentive-Based Regulation" (1998) 107 *Yale Law Journal* 1163.

more expensive one does not help a consumer who cannot afford to buy the more expensive one.

Fifth, consumers' culture makes information less efficient. There are different expectations concerning the level of substantive protection offered by authorities and legislation among the consumers in different Member States. In cultures with high expectations on the honesty of the marketplace, guaranteed by the authorities, consumers may not pay as much attention to information as in other cultures. A maximal harmonisation policy based on an information paradigm would be helpless against such differences.

No example better demonstrates the difficulties raised by an information paradigm than the field of home loans and mortgages. In 2001, the Commission issued a Recommendation on pre-contractual information to be given to consumers by lenders offering home loans.<sup>665</sup> Signing a home loan contract is often the most important financial commitment a consumer makes. It is essential in that context that the pre-contractual information as to the terms and conditions on which home loans are offered throughout the Community are transparent and comparable. To that end, lenders were invited to provide consumers with two sets of harmonized information, namely one containing general information and the other containing personalized information. The personalized information should be provided in a standard written format, known as a European Standardised Information Sheet. The elements of information - both general and personalized - to be given to consumers by lenders, have been negotiated under the auspices of the Commission by the associations and federations representing lenders, on the one hand, and consumers, on the other. These negotiations have resulted in a Voluntary Code of Conduct on pre-contractual information for home loans that set out in great detail information to be provided to consumers.<sup>666</sup>

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<sup>665</sup> Commission Recommendation of 1 March 2001 on pre-contractual information to be given to consumers by lenders offering home loans, OJ 2001 L 69/25.

<sup>666</sup> In certain Member States national requirements on additional pre-contractual consumer information for home loans already exist. It is desirable that these additional information elements be merged with

The information made available, however, did not prevent the recent rise of mortgages delinquencies and foreclosures, due to the inability of a large number of home owners to pay their mortgages as their low introductory-rate (sub-prime) mortgages reverted to regular interest rates, and the rise of owners finding themselves in a position of negative equity, *sc.* with a debt higher than the value of the property.

The information paradigm is, thus, more efficient when dealing with ‘strong consumers’. The concentration on information in Community consumer law is only possible because of the support to weak consumers within national consumer law and policy.<sup>667</sup>

### 2.3. The rational consumer: the European reasonably observant and circumspect consumer

In the analysis of the moulding of the European consumer, I have already mentioned the characteristics of confidence and information. I will now dedicate my attention to the rational consumer, that is, the prudent consumer, attentive to all the circumstances of a

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those in the European Standardised Information Sheet and that this be done in a manner that ensures comparability across borders for the consumer at European level. Where a Member State imposes on lenders from other Member States an obligation to give additional pre-contractual information to consumers above and beyond what is set out in the Annexes, it is invited to ensure that this information is in conformity with Community law. See n. 4.

<sup>667</sup> According to Peter Rott, “Consumers and Services of General Interest: is EC Consumer Law the Future?” (2007) 30 *J Consum Policy* 49-60, a consumer law that relies on information and choice might prove to be detrimental for the vulnerable (users of universal service) consumers and citizens. Universal service complements the variety of services that are offered in a competitive market. It is therefore necessary to view the users of electricity and gas and of telecommunications or postal service not only as consumers but also as citizens who enjoy fundamental rights. Consumer law, and in particular the laws on unfair contract terms and unfair commercial practices are of utmost importance for protecting the consumer in contracts for services of general interest. Therefore, unjustified privileges for service providers that stem from the old days of public service must be abolished. However, the future challenge to services of general interest does not lie in consumer law but in the formulation of precise and enforceable universal service requirements that guarantee access for everyone, whether the economic, social, or geographical situation, to a service of a specified quality at an affordable price, bearing in mind the increase divide between the ‘haves’ and the ‘have nots’ in the European Community. Reliance on establishing an internal market through information and choice, combined with the maximum harmonization approach, would certainly be detrimental if the latter were to restrict universal service requirements as established by the Member States.



choice or the probable consequences of an action. The circumspect consumer is cautious and careful not to take risks.

The EC consumer has often been referred to by the Court as reasonably circumspect; namely, the perception of the trademarks in the mind of the average consumer of the goods or services in question plays a decisive role in the global assessment of the likelihood of confusion of a trademark. The average consumer of the goods concerned is deemed to be reasonably well-informed and reasonably observant and circumspect. In *Philips*,<sup>668</sup> the Court ruled:

3. (...) it is for the national court to verify (...) that the presumed expectations of an average consumer of the category of goods or services in question, who is reasonably *well-informed and reasonably observant and circumspect*, are taken into account and that the identification, by the relevant class of persons, of the product as originating from a given undertaking is as a result of the use of the mark as a trade mark. (Emphasis added)

As it is well known, that definition of average consumer was a benchmark of the Directive on unfair commercial practices. Recital 18 reads that, ‘this Directive takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice (...)’.

Lastly, the EU Consumer Policy Strategy 2007-2013<sup>669</sup> states that consumer policy ‘ensures goods and services are safe and that markets are fair and transparent, so that consumers can exercise informed choice and rogue traders are excluded. Consumer

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<sup>668</sup> Case C-299/99, *Koninklijke Philips Electronics NV v Remington Consumer Products Ltd*, [2002] ECR I-5475. In case C-412/05, *Alcon v OHIM*, [2007] ECR I- 3569, the Court recalled in para 62 that, ‘where the goods or services with which the registration application is concerned are intended for all consumers, the relevant public must be deemed to be composed of the average consumer, reasonably well-informed and reasonably observant and circumspect.’ More recently, see v.g. Case T-287/06, *Torres v OHMI*, [2008] ECR II-3817, para 44.

<sup>669</sup> Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, COM (2007) 99 final.

policy can equip consumers to make rational choices and take on responsibility to promote their own interests.’

The economic approach to consumer behaviour is justified on the grounds that it extracts the rational and systematic part of the determinants of demand.<sup>670</sup> Psychology concerns rather the motivational factors and constraints that can explain the consumer behaviour,<sup>671</sup> what causes people to buy, how they do it, and how they experience consumption. It focuses upon how individuals seek, receive, calculate with and respond to, the information available in the commodities.<sup>672</sup>

At the beginning, economic thought had largely focused on the empirical study of self-interest that lead to utility functions, supply and demand curves, and Pareto optimal solutions. Since the introduction of Adam Smith’s invisible hand, economics had largely been guided by rational choice theorists who advanced the notion that the logical pursuit of self-interest would drive human choice in a free society and lead to prosperity.<sup>673</sup>

Inasmuch as the law and economics movement has sought to bring the insights of economics into the understanding of legal problems, rational choice theory has been adopted as the central account of human decision-making.<sup>674</sup> Starting from the principle

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<sup>670</sup> Ben Fine and Ellen Leopold, *The World of Consumption*, Routledge, 1973, at 48. For a general overview with respect to consumer policy paradigm, see Iain Ramsay, *Consumer Law and Policy – Texts and Materials on Regulating Consumer Markets*, 2.<sup>nd</sup> ed, Hart Publishing, 2007, pp 75-84.

<sup>671</sup> For a cursory overview of the relationship between psychology and the theory of consumer behaviour, see Ben Fine and Ellen Leopold, *ibidem*, at 55 ff.

<sup>672</sup> Utility maximization is just one among many possible motives behind consumption. An economist might view a transaction merely as the purchase of a utility-enhancing commodity. In reality, a whole bundle of social interactions, intangibles and symbolic are involved. The market is a social institution and not just an enabling mechanism. Accordingly, the full range of human behaviour is to be found there and potentially to have a causative impact on consumption. See Ben Fine and Ellen Leopold, *ibidem*, 56.

<sup>673</sup> “Introduction”, in Francesco Parisi and Vernon Smith (eds.), *The Law of Economics of Irrational Behavior*, Stanford University Press, 2005, at 1.

<sup>674</sup> See, for all, Thomas S. Ulen, “Rational Choice and the Economic Analysis of Law”, (1994) 19 *Law & Soc. Inquiry* 487-522.

that all human behaviour can be viewed as involving participants who maximize their utility from a stable set of preferences and accumulate an optimal amount of information and other inputs in a variety of markets, the task of law and economics is to determine the implications of such rational maximizing behaviour in and out of markets, and its legal implications for markets and other institutions.<sup>675</sup>

There is not a single conception of rational choice theory.<sup>676</sup> In order to facilitate better understanding, I shall follow the four conceptions categorized by KOROBKIN and ULEN: the definitional version, the expected utility theory, the self-interest version, and the wealth maximization theory. A definitional version of rational choice theory postulates that individuals are rational maximizers of their ends.<sup>677</sup> On this account, rationality is understood as fitting means to ends, but no normative theory of either means or ends is assumed. The expected utility theory is the one most dominant in modern microeconomics. This conception does not specify what preferences or goals decision-makers will pursue but it does specify the means (or at least some of the means) by which actors will seek to satisfy their goals and preferences. The self-interest version starts from expected utility theory's predictions about the manner in which actors will attempt to achieve their utility, and add predictions about the actors' goals and preferences - that is, about the content of the actor's utility function. The implication is that if we can figure out what course of action will most profit the decision-maker, we will be able to predict his course of action.<sup>678</sup> Finally, the wealth maximization version

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<sup>675</sup> See, v.g., Richard A. Posner, *Economic Analysis of Law*, 5<sup>th</sup> ed., 1998, pp 3 ff.

<sup>676</sup> According to Russell B. Korobkin and Thomas S. Ulen, "Law and Behavioural Science: Removing the Rationality Assumption from Law and Economics", (2000) 88 *Cal. L. Rev.* 1061, the different conceptions of rational choice theory can be understood as points along a continuum of how specific and precise the predictions of the theory are. On the left side of the spectrum are 'thin' conceptions of rational choice theory - that is, conceptions in which the theory is relatively undemanding and in which it is relatively easy for the behaviour of actors to be consistent with the theory. On the right side of the spectrum are 'thick' conceptions of the theory - that is, conceptions with more robust behavioural predictions that are more easily falsifiable by empirical evidence.

<sup>677</sup> See Richard A. Posner, "Rational Choice, Behavioral Economics and the Law", (1997) 50 *Stan. L. Rev.* 1550.

<sup>678</sup> Russell B. Korobkin and Thomas S. Ulen, "Law and Behavioural Science: Removing the Rationality Assumption from Law and Economics", (2000) 88 *Cal. L. Rev.* 1059.

specifically predicts that actors will attempt to maximize their financial well-being or monetary situation.

Rational choice theory lies in key assumptions, such as: objective criteria exist to differentiate rational from irrational; individuals' behaviour is predicated solely upon rational considerations;<sup>679</sup> individuals make their choices from among 'a stable set of preferences'; individuals always seek to maximize utility; in maximizing utility, individuals consider the risks involved; when not presumed, satisfaction can easily be assessed; and information provision will translate into information impact.<sup>680</sup> It is defined as a theory of instrumental rationality; that is, the actor has a set of pre-established ends and then decides how these ends are to be achieved.<sup>681</sup> If actors choose the optimal means to achieve their pre-established ends, they are rational; if they choose suboptimal means, they are irrational. The particular claim of rational choice theory is that people are rational in this sense; that is, they choose the optimal means to achieve their ends.<sup>682</sup>

The theory of rational choice has both a normative and a positive content. Normatively, it points to what should be done maximally to achieve some given end, and, while it might not prescribe any particular end,<sup>683</sup> it points to what it is to have a consistent set

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<sup>679</sup> On rationality and reasonableness, see John Gardener and Timothy Macklem, "Reasons", in *The Oxford Handbook of Jurisprudence of Law*, Jules Coleman and Scott Shapiro, OUP, 2002, pp 474 ff.

<sup>680</sup> Jacob Jacoby, "Is it Rational to Assume Consumer Rationality? Some Consumer Psychological Perspectives on Rational Choice Theory", (2000) 6 *Roger Williams U. L. Rev.* 101, would also refer as basic assumptions the differences between organizational behaviour and individual (consumer) behaviour are negligible and individual's behaviour is predicated upon consciously considered factors.

<sup>681</sup> It demands that a person's ends be complete and transitive. Ends are complete if a person either chooses between two alternative outcomes or expresses indifference between them. Ends are transitive if a person who prefers A to B and B to C also refers A to C. These requirements for rationality impose some constraints on a person's choices, but they do not rule out any choices on the basis of their substantive content.

<sup>682</sup> See Gary Becker, "Irrational Behavior and Economic Theory", (1962) 70 *Jo. Pol. Econ* 1-13.

<sup>683</sup> Rat choice is quite distinct from rational choice because it is a theory about the ends that people choose. Rat choice scholars argue that people are entirely self-interested in their choice of ends, that they are concerned exclusively about their own well-being, and that they will do whatever they can do to further their well-being at the expense of others. In other words, they will act like the kind of person who is colloquially known as a rat. Unlike rational choice, rat choice is not ethically irrelevant, but rather

of ends that are capable of being so maximized. Positively, the theory of rational choice is used to describe, explain and predict human behaviour. Agents are assumed generally to behave in an internally consistent way that can be rationalized by the theory of maximization.<sup>684</sup> Nevertheless, the deficiencies of rational choice theories arise precisely from their inadequacy in predicting future behaviour and/or the implausibility of their predictions, because rational models of judgment and choices are psychologically unrealistic. The analysis of the legal rules based on such implausible behavioural assumptions cannot possibly result in efficacious legal policy, at least not in all circumstances.<sup>685</sup>

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states a definitive and important position about the goals of human behaviour that challenges more aspirational and flattering accounts. Rat theory is linked to a body of policy recommendations that favour market mechanisms and that oppose government regulation of business, redistribution of income, and social welfare programs. Markets, it is generally agreed, provide a means by which people can satisfy their preferences for goods and services in a most efficient manner. Those preferences are regarded as pre-established and not subject to any normative evaluation. A competitive market will provide each product at the lowest possible price, that is, at its cost, including the cost of capital. It will refuse to satisfy someone's preferences only if the people who want that product are unwilling to pay the minimum price at which products can be produced. Thus, it can be said that a market is the most efficient way of satisfying individual preferences for goods and services. Rational choice theory and rat choice theory speak directly to this controversy. Taken together, these two theories present the best case for minimizing government regulation of the market. According to rational choice, people will seek the optimal means to satisfy their preferences. Consequently, they will be effective market actors. Market failures tend to be rare because consumers will seek substitutes for monopolized products and hasten to patronize any vendor who contests the monopoly; those subject to externalities will organize to transfer them whenever transaction costs of organizing are lower than the benefit to be received; and buyers will seek information to overcome information asymmetries. According to rat choice theory, people's preferences are determined by self-interest, which means that they are primarily concerned with maximizing their material well-being. Consequently, they will seek a minimum of public goods that can be provided by the market. According to rational choice and rat choice combined, people have self-interested goals which they then implement effectively, so they neither want to distribute money to others, nor feel that they themselves are likely recipients of such redistributive programs. Thus, rational choice theory and rat choice theory, when combined, provide a comprehensive argument for an unregulated market, an argument grounded in a theory of human behaviour and human choices. Rational choice and rat choice, to be sure, are both broader than market-oriented behaviour. Rational choice includes any effort to achieve one's ends by instrumentally rational means, including altruistic, religious, and aesthetic ends. Rat choice includes all self-regarding behaviour, including the way one acts in nonmarket settings such as government agencies and the way one treats one's family members. The converse, however, is true – market behaviour depends on both rational choice and rat choice. See Edward L. Rubin, "Rational Choice and Rat Choice: Some Thoughts on the Relationship among Markets, Rationality and Human Beings" (2005) 80 *Chic.-Kent L. Rev.* 1091-1127.

<sup>684</sup> Bruce Chapman, "Rational Choice and Categorical Reason", (2002) 151 *U. Pa. L. Rev.* 1169.

<sup>685</sup> Russell B. Korobkin and Thomas S. Ulen, "Law and Behavioural Science: Removing the Rationality Assumption from Law and Economics", (2000) 88 *Cal. L. Rev.* 1056.

Currently, behavioural economists have made large inroads into human rationality.<sup>686</sup> JOLLS, SUNSTEIN, and THALER in their seminal article ‘A Behavioural Approach to Law and Economics’, suggested that an approach based on behavioural economics will help to explain both the effects and content of law; to see how law might be used to achieve specified ends, such as deterring socially undesirable behaviour, and to assess more broadly the ends of the legal system.<sup>687</sup> KOROBKIN and ULEN argue that law and economics can invigorate itself by replacing the rationality assumption with a more nuanced understanding of human behaviour that draws on cognitive psychology, sociology, and other behavioural sciences, thus creating a new scholarly paradigm called ‘law and behavioural science’.<sup>688</sup>

Behavioural economists accept many of the premises of traditional economic thought, such as that situational outcomes are the result of individual decisions, taking place in a particular income environment. Behavioural economics is still a form of economics aiming at strengthening the predictive and analytic power of law and economics. Behavioural economics does not suggest that behaviour is random or impossible to predict; rather it suggests, with economics, that behaviour is systematic and can be modelled.<sup>689</sup> The task of behavioural law and economics, simply stated, is to explore the implications of actual (not hypothesized) human behaviour for the law.<sup>690</sup>

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<sup>686</sup> “Introduction”, Francesco Parisi and Vernon Smith (eds.), *The Law of Economics of Irrational Behavior*, Stanford University Press, 2005, at 2. See also Cass R. Sunstein, “Behavioral Analysis of Law”, (1997) 64 *U.Chi.L.Rev* 1175-1195.

<sup>687</sup> Christine Jolls, Cass R. Sunstein, Richard Thaler, “A Behavioral Approach to Law and Economics”, (1998) 50 *Stan. L. Rev.* 1474.

<sup>688</sup> Russell B. Korobkin and Thomas S. Ulen, “Law and Behavioural Science: Removing the Rationality Assumption from Law and Economics”, (2000) 88 *Cal. L. Rev* 1056.

<sup>689</sup> Christine Jolls, Cass R. Sunstein, Richard Thaler, “A Behavioral Approach to Law and Economics”, (1998) 50 *Stan. L. Rev.* 1475.

<sup>690</sup> Despite the appealing insights into human behaviour, behavioural economics is not beyond dispute. Other objections aside, behavioural economic is, first, under sharp criticism due to its antitheoretical character. Law and behavioural science lacks a single, coherent theory of behaviour. The movement’s current lack of concern about this shortcoming identifies law and behavioural science as a species of legal pragmatism. See Richard A. Posner, “Rational Choice, Behavioral Economics and the Law” (1997) 50 *Stan. L. Rev.* 1471-1550. Moreover, a second objection to that approach is that conventional economics

People display bounded rationality, bounded willpower, and bounded self-interest. In the words of ROBERT FRANK,<sup>691</sup> (1) we often make systematic cognitive errors that prevent us from discovering which choices will best promote our interests; (2) even when we can discern which choices would be best, we often have difficulty summoning the willpower to execute them; and (3) we often pursue goals that appear inconsistent with self-interest, narrowly understood'. Most of these bounds can be and have been made part of formal models.

Bounded rationality, an idea first introduced by HERBERT SIMON,<sup>692</sup> refers to the obvious fact that human cognitive abilities are not infinite and that human mind is bound by external constraints.<sup>693</sup> The term bounded rationality captures the insight that

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has the advantage of simplicity and parsimony. By contrast, a behavioural perspective offers a more complicated and unruly picture of human behaviour and perhaps that picture will make prediction more difficult, precisely because behaviour is more complicated and unruly. Cf. Russell B. Korobkin and Thomas S. Ulen, "Law and Behavioural Science: Removing the Rationality Assumption from Law and Economics", (2000) 88 *Cal. L. Rev.* 1489.

<sup>691</sup> Robert H. Frank, "Departures from Rational Choice: With and Without Regret", in Francesco Parisi and Vernon Smith (eds.), *The Law of Economics of Irrational Behavior*, Stanford University Press, 2005, at 13.

<sup>692</sup> Herbert A. Simon, "A Behavioral Model of Rational Choice", (1955) 69 *The Quarterly Journal of Economics*, 99-118, notes that 'because of the psychological limits of the organism (particularly with respect to computational and predictions ability) actual human rationality-striving can best be an extremely crude and simplified approximation of the kind of global rationality that is implied, for example, by game-theoretical models'.

<sup>693</sup> The traditional view is that there are two unrelated set of bounds to the human mind: purely external constraints and purely internal constraints. Because they are unrelated, bounded rationality has been understood in two opposing ways. First, it has been seen as the attempt to make optimal choices given the demands of the world, which has led to the notion of optimization under constraints (e.g. John Conlisk, "Why Bounded Rationality?", (1996) 34 *Journal of Economic Literature*, pp 669-700). Second, bounded rationality has been interpreted as the suboptimal outcome of a limited cognitive system, leading to a list of cognitive illusions (Matthew Rabin, "Psychology and Economics", (1996) 36 *Journal of Economic Literature* 11-46). There is a third view, known as the study of ecological rationality. This view proposes that the external and internal bounds may actually be linked. In Gigerenzer's view, bounded rationality is the study of the match between cognitive heuristics and structures of environments. See Gerd Gigerenzer, "Is the Mind Irrational or Ecologically Rational?", in Francesco Parisi and Vernon Smith (eds.), *The Law of Economics of Irrational Behavior*, Stanford University Press, 2005, at 39 and Vernon L. Smith, "Constructivist and Ecological Rationality in Economics", (2003) 93 *The American Econ. Rev.* 465-508. This idea had already emerged in Herbert A. Simon, v.g. "Theories of Decision-Making in Economics and Behavioral Science", (1959) 49 *The American Econ. Rev.* 273, claiming that, '[w]e shall examine some theories of decision making that take the limitation of the decision-maker and the complexity of the environment as central concepts.'

actors often take short cuts in making decisions that frequently result in choices that fail to satisfy the utility-maximization prediction.<sup>694</sup> The departures from the standard model can be divided into two categories: judgment and decision-making. Actual judgments show systematic departures from models of unbiased forecasts, and actual decisions often violate the axioms of expected utility theory. In his work ‘Maps of Bounded Rationality’,<sup>695</sup> DANIEL KAHNEMAN offers a unified treatment of intuitive judgment and choice, where the guiding ideas are that most judgments and most choices are made intuitively; and that the rules governing intuition are generally similar to the rules of perception.

According to KAHNEMAN, there are two models of thinking and deciding, which correspond roughly to the everyday concepts of reasoning and intuition.<sup>696</sup> A general property of perceptual systems is that they are designed to enhance the accessibility<sup>697</sup> of changes and differences. Perception is reference-dependent: the perceived attributes of a focal stimulus reflect the contrast between that stimulus and a context of prior and

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<sup>694</sup> Herbert A. Simon, “Rational Decision Making in Business Organizations”, in Leonard Green and John H. Kagel (eds.), *Advances in Behavioral Economics*, vol. 1, Ablex Publishing, 1987, p. 32. Two concepts are central to the characterization of bounded rationality: search and satisfaction. If the alternatives for choice are not given initially to the decision makers, then they must search for them. Hence, a theory of bounded rationality must incorporate a theory of choice.

<sup>695</sup> Daniel Kahneman, “Maps of Bounded Rationality: Psychology for Behavioural Economics”, (2003) 93 *The American Econ. Rev* 1449-1475.

<sup>696</sup> Daniel Kahneman, *ibidem*, pp 1451-1452, elucidates that reasoning is done deliberately and effortfully, but intuitive thoughts seem to come spontaneously to mind, without conscious search or computation, and without effort. The operations of cognitive system intuition are fast, automatic, effortless, associative, and often emotionally charged; they are also governed by habit, and are therefore difficult to control or modify. The operations of cognitive process reasoning are slower, serial, effortful, and deliberately controlled; they are also relatively flexible and potentially rule-governed. The perceptual system and the intuitive operations generate impressions of the attributes of objects of perception and thought. These impressions are not voluntary and need not be verbally explicit. In contrast, judgments are always explicit and intentional, whether or not they are overtly expressed. Thus, reasoning is involved in all judgments, whether they originate in impressions or in deliberate reasoning. The label ‘intuitive’ is applied to judgments that directly reflect impressions.

<sup>697</sup> The technical term for the ease with which mental contents come to mind is accessibility. Accessibility is a continuum, not a dichotomy, and some effortful operations demand more effort than others. Some of the determinants of accessibility are probably genetic; others develop through experience. The acquisition of skill gradually increases the accessibility of useful responses and of productive ways to organize information, until skilled performance becomes almost effortless. Daniel Kahneman, *ibidem*, at 1453.



concurrent stimuli.<sup>698</sup> The judgments that people express, the actions they take, and the mistakes they commit depend on the monitoring and corrective functions reasoning, as well as on the impressions and tendencies generated by intuition.

A major source of differences between actual judgments and unbiased forecasts is the use of rules of thumb,<sup>699</sup> such as the availability and representativeness heuristics<sup>700</sup> that lead us to erroneous conclusions. The term availability has been used to explain distorted frequency or probability judgements. People tend to conclude, for example, that the probability of an event (such as a car accident) is greater if they have recently witnessed an occurrence of that event than if they have not.<sup>701</sup> The representativeness

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<sup>698</sup> I am following Daniel Kahneman, *ibidem*, at 1454. Regardless of discipline or orientation, most behavioural sciences operate according to some form of a Stimulus-Organism-Response (S-O-R) model—essentially, an input-output model with the important distinction of having the mind of the individual intervening between the input and the output. The external factors impinging upon the individual (including price and price changes, but also word-of-mouth conversations, the influence of packaging, advertising, the ‘atmospherics’ of the retail environment, etc) are termed stimuli, the individual is termed the organism and the output (which includes but is not limited to purchase or even to overtly observable behaviour) is termed response. All or virtually all the concepts and variables that populate social science theory can be classified as being either stimulus factors, organismic factors or response factors. See Jacob Jacoby, “Is it Rational to Assume Consumer Rationality? Some Consumer Psychological Perspectives on Rational Choice Theory”, 6 (2000) *Roger Williams U. L. Rev.* at 89.

<sup>699</sup> Daniel Kahneman and Amos Tversky, “Judgement under Uncertainty: Heuristics and Biases”, (1974) 185 *Science* 1124-1131, show that shortcuts and rules of thumb are predictable. While the heuristics are useful on average (which explains how they become adopted), they lead to errors in particular circumstances. This means that someone using such a rule of thumb may be behaving rationally in the sense of economizing on thinking time, but such a person will nonetheless make forecasts that are different from those that emerge from the standard rational-choice model.

<sup>700</sup> We use the term heuristic with the meaning that it got with the cognitive illusions. A heuristic could per definition only result in bad judgements, and every single demonstration was negative. In fact, the term heuristics and bias become almost synonymous and are used interchangeably. But the term heuristics refers to the cognitive process that generates a decision. A model of heuristics describes the steps of this process. See Gerd Gigerenzer, “Is the Mind Irrational or Ecologically Rational?”, in Francesco Parisi and Vernon Smith (eds.), *The Law of Economics of Irrational Behavior*, Stanford University Press, 2005, p. 41.

<sup>701</sup> Christine Jolls, Cass R. Sunstein, Richard Thaler, “A Behavioral Approach to Law and Economics”, (1998) 50 *Stan. L. Rev.* 1478.

heuristic refers to the tendency of actors to ignore base rates and overestimate the correlation between what something appears to be and what something actually is.<sup>702</sup>

In respect of actors' decision-making, they make their decisions based on bias, such as overconfidence and self-serving bias, hindsight bias, the present-biased preference, and anchoring and adjustment that do not maximize their expected utility. The overconfidence bias is the belief that good things are more likely than average to happen to us and bad things are less likely than average to happen to us. Even when actors know the actual probability distribution of a particular event, their predictions as to the likelihood that such an event will happen to them are susceptible to this bias.<sup>703</sup>

The term hindsight bias describes the tendency of actors to overestimate the *ex ante* prediction that they had concerning the likelihood of an event's occurrence after learning that it actually did occur. The present-biased preference relates that when considering trade-offs between two future moments, present-biased preferences give stronger relative weight to the earlier moment as it gets closer.<sup>704</sup> Finally, research on the phenomenon of anchoring and adjustment demonstrates that probabilistic assessments are often flawed because actors fail to adjust sufficiently their assessments from pre-existing cognitive anchors.

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<sup>702</sup> Russell B. Korobkin and Thomas S. Ulen, "Law and Behavioural Science: Removing the Rationality Assumption from Law and Economics", (2000) 88 *Cal. L. Rev.* 1086. Fallacies attributed to representativeness heuristics include the 'hot hand fallacy', the gambler's fallacy, and the base-rate fallacy. The hot-hand fallacy in basketball refers to the intuition of fans and coaches that players tend to get 'hot' after having scored a few times in series. The intuition is that after a series of *n* hits, the player's probability of another hit will increase (and that of a miss will decrease), whereas statistical evidence suggests that nothing changes). The gambler's fallacy refers to playing the roulette wheel. The intuition is that after a series of *n* 'reds', the probability of another 'red' will decrease (and that of a black will increase). According to the base-rate fallacy, people typically estimate the posterior probability of an event from the base rate, the hit rate (sensitivity) and the false positive rate, and conservatism (to rely only on base rates or to overweight base rates). See Gerd Gigerenzer, "Is the Mind Irrational or Ecologically Rational?", in Francesco Parisi and Vernon Smith (eds.), *The Law of Economics of Irrational Behavior*, Stanford University Press, 2005, at 44.

<sup>703</sup> Russell B. Korobkin and Thomas S. Ulen, "Law and Behavioural Science: Removing the Rationality Assumption from Law and Economics", (2000) 88 *Cal. L. Rev.* 1091.

<sup>704</sup> Ted O'Donoghue and Matthew Rabin, "Doing It Now or Later", (1999) 89 *The American Econ. Rev.* 103.

Further, some decision-making strategies, as complexity and ambiguity do not maximize expected utility. The limits of human cognitive ability make utility-maximizing behaviour physically impossible in complex situations. Ambiguity, on the other hand, concerns the consequences or content of decision alternatives.<sup>705</sup>

The consequence of bounded rationality is that individuals make particular decisions in ways that are not utility maximizing for them (even though the time and effort saved by using heuristics might enable them to maximize their global utility). Just as unbiased forecasting is not a good description of actual human behaviour, expected utility theory is not a good description of actual decision-making. In 1979, KAHNEMAN and TVERSKY proposed a descriptive theory of decision-making that they called prospect theory.<sup>706</sup> Actors may make boundedly rational decisions for somewhat different reasons. In some cases, actors faced with a decision might aim to make a satisfactory choice - one that meets a specified aspiration level - rather than one that maximizes their utility. For the decision-maker, such intentional satisfying behaviour is often quite sensible in light of both the costs of obtaining and processing the information necessary to make maximizing choices and the cognitive limitations of human beings that often render utility-maximization physically impossible.<sup>707</sup>

One fundamental insight of prospect theory, known as the ‘framing’ effect, is that actors’ choices under conditions of uncertainty depend not only on the absolute expected values of the competing options but also on the direction in which those options deviate from a baseline, or reference point. When decision options are

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<sup>705</sup> Ambiguity also arises in the situation where the actor does not know what outcome will result from his possible choices, but he knows the possible distribution of outcomes. In this circumstance, the value of choosing heads is uncertain, but the probability of each result, given the choice of heads, is known precisely. Ambiguity of this sort does not prevent the actor from making choices that maximize his expected utility. Russell B. Korobkin and Thomas S. Ulen, “Law and Behavioural Science: Removing the Rationality Assumption from Law and Economics”, (2000) 88 *Cal. L. Rev.* 1077.

<sup>706</sup> Daniel Kahneman and Amos Tversky, “Prospect Theory: An Analysis of Decision Under Risk”, (1979) 47 *Econometrica* 263.

<sup>707</sup> Christine Jolls, Cass R. Sunstein, Richard Thaler, “A Behavioral Approach to Law and Economics”, (1998) 50 *Stan. L. Rev.* 1076.

perceived as gains relative to the reference point, individuals are risk averse; that is, they prefer more certain options to gambles with the same expected value. But when decision options are perceived as losses relative to the reference point, the same individuals will be risk-seeking; that is, they will prefer a gamble to the certain option when both have the same expected value.<sup>708</sup>

Nevertheless, judgment and behaviour are affected not only by the relationship of decision options to baseline reference points but also by their relationship to temporally separated behaviour.<sup>709</sup> This positive effect of past choices on current ones can result from at least three somewhat different phenomena, that KOROBKIN and ULEN define as habits, traditions, and addictions. Actors often repeat behaviour (or repeatedly choose the same goods or services) out of habit, as a way of reducing the costs of decision-making. Repetition of behaviour is, in this way, used as a heuristic device. Whereas behaviour that results from force of habit can be viewed as heuristic based, behaviour that is driven by tradition can be seen as closely related to the *status quo* bias. Addictions, like traditions, result when the fact that an actor has engaged in behaviour in the past makes him more likely to engage in that behaviour in the future because the past behaviour makes current behaviour more pleasant. From one vantage point, an addiction is just a particularly powerful species of tradition.

In addition to bounded rationality, people often display bounded willpower. This term refers to the fact that human beings often take actions that they know to be in conflict with their own long-term interests.<sup>710</sup> Behavioural research shows that people's judgments about their future experience at the time of decision can be mistaken, in the sense that people are sometimes unable (even apart from the sorts of informational issues recognized by conventional economics) to assess what the experience will

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<sup>708</sup> Russel S. Korobkin and Thomas S. Ulen, "Law and Behavioural Science: Removing the Rationality Assumption for Law and Economics", (2000) 88 *Cal. L. Rev.* 1105.

<sup>709</sup> *Ibidem*, at 1114.

<sup>710</sup> Jon D. Hanson and Douglas A. Kysar, "Taking Behaviouralism Seriously: the Problem of Market Manipulation", (1999) 74 *N.Y.U.L. Rev.* 630-749.

actually be like.<sup>711</sup> Thus, for example, people appear not to predict accurately the consequences of becoming seriously ill or disabled.<sup>712</sup>

Finally, people are boundedly self-interested. I assume this term to refer to an important fact about the utility function of most people: they are concerned about the well-being of others, even strangers in some circumstances, and this concern and their self-conception can lead them in the direction of cooperation at the expense of their material self-interest.<sup>713</sup> The notion of bounded self-interest is distinct from simple altruism, which conventional economics has emphasized in areas such as bequest decisions. Self-interest is bounded in a much broader range of settings than conventional economics assumes, and the bound operates in ways different from what the conventional

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<sup>711</sup> People are sophisticated where they foresee that they will have self-control problems in the future, or are naïve, and do not foresee these self-control problems. Ted O'Donoghue and Matthew Rabin, "Doing it Now or Later", (1999) 89 *The American Econ. Rev.* 104.

<sup>712</sup> Christine Jolls, Cass R. Sunstein, Richard Thaler, "A Behavioral Approach to Law and Economics", (1998) 50 *Stan. L. Rev.* 1543.

<sup>713</sup> Christine Jolls, Cass R. Sunstein, Richard Thaler, "A Behavioral Approach to Law and Economics", (1998) 50 *Stan. L. Rev.* 1545. I might recall here the distinction between the concepts: sympathy and commitment made by Sen. Sympathy corresponds to the case in which the concern for others directly affects one's own welfare. The behaviour based on sympathy is in an important sense egoistic, for one is oneself pleased at others' pleasure and pained at others' pain, and the pursuit of one's own utility may thus be helped by sympathetic action. It is action based on commitment rather than sympathy which would be non-egoistic in this sense. While sympathy relates similar things to each other – namely, welfares of different persons – commitment relates choice to anticipated levels of welfare. Commitment involves choosing an action that yields a lower expected welfare than an alternative available action. In the terminology of modern economic theory, sympathy is a case of 'externality'. On the other hand, commitment does involve, in a very real sense, counterpreferential choice, destroying the crucial assumption that a chosen alternative must be better than (or at least as good as) the others for the person choosing it, and this would certainly require that models be formulated in an essentially different way. It should be noted that the characteristic of commitment with which Sen is most concerned is the fact that it drives a wedge between personal choice and personal welfare, and much of traditional economic theory relies on the identity of the two. According to Sen, the main thesis has been to accommodate commitment as a part of behaviour. Commitment does not presuppose reasoning, but it does not exclude it; in fact, insofar as consequences on others have to be more clearly understood and assessed in terms of one's values and instincts, the scope for reasoning may well be expanded. Amartya K. Sen, "Rational Fools: A Critique of the Behavioural Foundations of Economic Theory", (1977) 6 *Philosophy and Public Affairs*, pp 317-344.

understanding suggests. People act in accordance with social norms, because they value fairness, and because they contribute to public interest.<sup>714</sup>

In respect of European Consumer Law, it simultaneously provides the paradigm (the rational consumer) and the remedies. Community consumer policy encompasses a variety of measures that assume consumers' bounded rationality and bounded willpower, such as Directives on unfair terms and on unfair commercial practices; the provision of a right to withdrawal; and several measures against over-indebtedness.

With respect to standard form contracts, non-drafting parties are boundedly rational decision-makers. Economic theory suggests that the proper policy response to this question is greater use of mandatory contract terms and judicial modification of the unconscionability doctrine to better respond to the primary cause of contractual inefficiency.<sup>715</sup>

In respect of the right to withdrawal, it is provided for in several Directives. For example, Article 6 of Directive 1997/7/EC, on the protection of consumers in respect of distance contracts, establishes that, '[f]or any distance contract the consumer shall have a period of at least seven working days in which to withdraw from the contract without penalty and without giving any reason (...)'.<sup>716</sup> In *Heininger*,<sup>717</sup> the Court ruled that:

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<sup>714</sup> Russell B. Korobkin and Thomas S. Ulen, "Law and Behavioural Science: Removing the Rationality Assumption from Law and Economics", (2000) 88 *Cal. L. Rev.* 1135.

<sup>715</sup> See Russel Korobkin, "Bounded Rationality, Standard Form Contracts, and Unconscionability", (2003) 70 *U. Chi. L. Rev.* 1203 -1295.

<sup>716</sup> See also Article 6 of Directive 2002/65/EC concerning the distance marketing of consumer financial services (OJ 2002 L 271/16) and Article 14 of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers (OL 2008 L 133/66). See Chapter III of the Proposal Directive on consumer rights, setting up a general right of withdrawal for distance and off-premises contracts. Annex I provides for a standard withdrawal form.

<sup>717</sup> The Court had to assess the following situation. In 1993, by a contract ('the loan agreement'), Mr and Mrs Heininger took out a loan in the sum of DM 150 000 from the bank in order to finance the purchase of a flat. The loan was secured by means of a 'Grundschuld' (charge on the property) in the same amount. By an action brought in January 1998, Mr and Mrs Heininger revoked their declaration of intent to enter into the loan agreement. They claimed that, on several occasions, an estate agent known to them and acting on a self-employed basis as agent for the bank, called uninvited at their home, and there

### *Dimensions of property*

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1. Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises is to be interpreted as applying to a secured-credit agreement such as that in point in the main proceedings, with the result that the right of cancellation provided for in Article 5 of that directive is available to a consumer who has entered into a contract of that type in one of the cases specified in Article 1. 2. Directive 85/577 precludes the national legislature from imposing a time-limit of one year from the conclusion of the contract within which the right of cancellation provided for in Article 5 of that directive may be exercised, where the consumer has not received the information specified in Article 4.

Finally, considering the global situation of consumers, household over-indebtedness has been considered an important issue at European level.<sup>718</sup> Recently, Commission Regulation 215/2007<sup>719</sup> implemented Regulation 1177/2003<sup>720</sup> of the European Parliament and of the Council concerning Community statistics on income and living conditions (EU-SILC) as regards the list of target secondary variables relating to over-indebtedness and financial exclusion.

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induced them to purchase the flat in question and to enter into the loan agreement. They maintained that he did not inform them of their right of cancellation. Mr and Mrs Heininger sought an order that the bank reimburse to them the sums paid by way of capital and interest and refund to them the costs they incurred in connection with the execution of the loan agreement. They further sought a declaration that no rights accrued to the bank under the loan agreement. In Case C-350/03, *Elisabeth Schulte and Wolfgang Schulte v Deutsche Bausparkasse Badenia AG*, [2005] ECR I-9215, the Court ruled that: “1. Article 3(2)(a) of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises must be interpreted as excluding from the scope of the Directive contracts for the sale of immovable property even where they are merely a component of an investment scheme financed by a loan for which the negotiations prior to the conclusion of the contract were held in a doorstep-selling situation, both as regards the contract for the purchase of the immovable property and the loan agreement serving solely to finance that purchase. (...) However, in a situation where, if the Bank had complied with its obligation to inform the consumer of his right of cancellation, the consumer would have been able to avoid exposure to the risks inherent in investments such as those at issue in the main proceedings, Article 4 of Directive 85/577 requires Member States to ensure that their legislation protects consumers who have been unable to avoid exposure to such risks, by adopting suitable measures to allow them to avoid bearing the consequences of the materialisation of those risks.

<sup>718</sup> For a historical excursion, see the Opinion of the Economic and Social Committee on “Household over-indebtedness”, OJ 2002 L 149/1.

<sup>719</sup> OJ 2007 L 62/8.

<sup>720</sup> OJ 2003 L 165/1.

My contention has applied, generally, to all consumers. In respect of property right-holders, the endowment effect, a feature of human preferences,<sup>721</sup> is an important element to take into consideration. It matters, first, when the property right-holder enters into a contract and default rules or legal standards are set,<sup>722</sup> (comprising both mandatory standards and binding self-regulation.)<sup>723</sup> KOROBKIN<sup>724</sup> explains that people resist deviating from default rules in contract negotiations, in part, due to the regret that parties might feel if they traded into a regime that has some chance of leaving them worse off. European policymakers should definitely take it into consideration.

Second, under the endowment effect,<sup>725</sup> the value of a piece of property to an individual increases as soon as the individual is actually given the property (against the 'basic independence' assumption, which presumes that economic agents evaluate commodities

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<sup>721</sup> Daniel Kahneman, Jack L. Knetsch and Richard H. Thaler, "Experimental Tests of the Endowment Effect and the Coase Theorem", (1990) 98 *Journal of Political Economy* 1325-1348.

<sup>722</sup> Daphna Lewinsohn-Zamir, "The Choice between Property Rules and Liability Rules Revisited: Critical Observations from Behavioral Studies" (2001) 80 *Tex. L. Rev.* 250, argues that liability rules might intensify the endowment effect. Consequently, they reduce the range of potential efficient transactions and lead to systematic undercompensation of entitlement owners. From an efficiency point of view, therefore, property rules should be preferred whenever feasible. On the contrary, Jeffrey J. Rachlinski and Forest Jourden, "Remedies and the Psychology of Ownership", (1998) 51 *Vand. L. Rev.* 1541. See also Richard R. W. Brooks, "Broken Elevators in the Cathedral", (2002) 97 *Nw. U. L. Rev.* 293.

<sup>723</sup> Cf. Hugh Collins, *Regulating Contracts*, OUP, 1999, p. 63. Self regulation also plays an important role on rule-making procedures in European Contract Law. Fabrizio Cafaggi, in "Self-Regulation in European Contract Law", (2007) 1 *European Journal of Legal Studies* claims that self regulation in the field of consumer law does not reduce the level of consumer protection. Cfr. <http://www.ejls.eu/index.php?id=1> [Last visited 31<sup>st</sup> December 2009]. Claiming that the relation between private market-oriented regulatory systems and the law is currently and potentially a very constructive one, see Kernaghan Webb, "Government, Private Regulation, and the Role of the Market", in *Law, Regulation, and Governance*, Michael Mac Neil, Neil Sargent, and Peter Swan (eds.), OUP, 2002, p. 253.

<sup>724</sup> The status quo bias suggests that when parties contract around a default term, the value of the difference between the alternative term and the default term must exceed (1) the parties' joint transaction costs; (2) the value to either party of not revealing information that must be revealed to contract around the default term, and (3) the parties joint preference for the status quo. See Russell Korobkin, "The Status Quo Bias and Contract Default Rules" (1997) 83 *Cornell L. Rev.* pp 665-666.

<sup>725</sup> I'm following Kevin McCabe, Vernon Smith and Terrence Chhorvat, "Lessons from Neuroeconomics for the Law", in Francesco Parisi and Vernon Smith (eds.), *The Law of Economics of Irrational Behavior*, Stanford University Press, 2005, pp 68-94.



independently of whether the agents own those commodities).<sup>726</sup> Because the endowment effect also results in actors' placing a higher value on goods they are selling than on goods they are buying, it is also referred to as the offer/asking gap or the 'willingness to accept (WTA)/ willingness to pay (WTP) gap'.<sup>727</sup> However it is labelled, the effect is a consequence of the fact that individuals tend to value losses more highly than equivalent gains (and thus wish to avoid 'losing' things more than they desire 'gaining' things of an equivalent value). This phenomenon is known descriptively as loss aversion.<sup>728</sup>

Social sciences have already taken into consideration the special relationship between people and things, the work of hybridization,<sup>729</sup> by which in some cases objects and humans become (for a while) one. There is a recognized sense of bondedness or unity (an identity feeling) with objects.<sup>730</sup> The appropriation work is described as aimed at processing an alien object in order to 'de-alienate' it (cognitive appropriation of the goods) and to absorb it into the social world of the holder (the internalization of the goods). The steps can also be expressed more generally as the recognition of goods external to our social lives, and their absorption emotionally into our personal lives. The

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<sup>726</sup> See Elizabeth Hoffman and Matthew L. Spitzer, "Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications", (1993) 71 *Wash. U. L. Q.* 59-114.

<sup>727</sup> I am following Russell B. Korobkin and Thomas S. Ulen, "Law and Behavioural Science: Removing the Rationality Assumption from Law and Economics", (2000) 88 *Cal. L. Rev.* 1108. The endowment effect is better understood as a specific application of a more general phenomenon, often known as the 'status quo bias.' Although there might be some unique attributes of ownership that make actors especially reluctant to part with items in which they enjoy property rights, the behavioural science literature indicates that actors tend to place a higher value on any state of affairs that they consider to be the status quo than they would place on that same state of affairs if it were not the status quo, regardless of whether property ownership is implicated.

<sup>728</sup> Owen D. Jones & Sarah F. Brosnan, "Law, Biology, and Property: a New Theory of the Endowment Effect", (2008) 49 *Wm. & Mary L.Rev.* 1935-1990 consider that loss aversion is unsatisfying as a theoretical foundation for endowment effect and provide a new theory of the endowment effect drawing on evolutionary biology: the endowment effect is an evolved propensity of humans and the degree to which an item is evolutionarily relevant will affect the strength of the endowment effect.

<sup>729</sup> Alex Preda, "The Turn to Things – Arguments for a Sociological Theory of Things" (1999) 40 *The Sociological Quarterly*, pp 358 ff.

<sup>730</sup> K. Knorr Cetina, "Sociality with Objects: Social Relations in Postsocial Knowledge Societies" (1997) 14 *Theory, Culture and Society*, p. 12.

first step is a process that entails several aspects. First, most goods incorporate the existing level of knowledge. When we consume goods we must learn to master the skills that relate us to them. Second, when a consumer is applying the demanded skills (in other words, is consuming the goods), he or she is also reproducing the skills. In a word, by utilizing goods, we first adopt them cognitively as goods for ourselves.<sup>731</sup>

Goods are loaded with emotional attachment. The interaction with goods does not leave us intact; if goods work well for our purposes, we will be content with them and invest our emotions in them. It can be assumed that the stronger our involvement with and commitment to some goods, the more significant the role they play in our daily social universe and the better the endowment effect. Thus, involvement and commitment to goods implies that goods are not merely indifferent objects of our consumption. Because they have the aura of ‘me-ness’, we are prone to take care of them.<sup>732</sup>

The endowment effect, thus, undermines one of the basic assumptions of the Coase theorem.<sup>733</sup> Much of the law-and-economics approach to property law is based on the insight of the Coase theorem that the assignment of property rights has no efficiency impact if transaction costs are low. The Coase theorem begins with the premise that, absent any impediment to trade, a legal right will be traded to the party who most values it, regardless of the law’s initial allocation of that right. This observation leads to two basic predictions about the law’s allocation of rights (in the absence of transaction costs)<sup>734</sup> - invariance and efficiency. According to the invariance thesis, the law’s initial allocation of rights cannot affect the ultimate distribution of rights. According to the

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<sup>731</sup> Ilmonen (1997): 38.

<sup>732</sup> For a legal analysis of how the property may become bound up with and individual’s personality to such an extent that the person regards property as part of herself, see Margaret Radin’s adaptation of Hegel’s theory of property, in “Property and Personhood”, (1982) 34 *Stan.L. Rev.* 957- 1015.

<sup>733</sup> R. H. Coase, “The Problem of Social Cost”, (1960) 3 *Journal of Law & Economics* 1-44. See Yoram Barzel, *Economic Analysis of Property Rights*, CUP, 1989, pp 2 ff.

<sup>734</sup> O. E. Williamson, “Transaction Costs and Property Rights”, *International Encyclopaedia of the Social & Behavioral Sciences*, 15840 -15845.

efficiency thesis, the law's allocation of rights cannot facilitate or impede an efficient distribution of rights.<sup>735</sup>

In such circumstances, any individual who accords a higher value to a given entitlement than the original owner will purchase it from the owner. From this follows the general principle that property law should seek to minimize transaction costs, as well as other, more specific corollaries, including the following: property rights should be clearly delineated, because uncertain title increases transaction costs; injunctions are the preferred remedies to damages unless transaction costs are very high, because injunctions clarify property rights (again, facilitating bargaining) and court-determined damages can be unpredictable; and property rights should often be assigned to the claimant who can transfer the right most cheaply.<sup>736</sup>

However, if simply giving one party the property causes the person to value it more than before, the original allocation becomes important: it changes people's preferences. If people value a commodity that they own much more than a commodity that they do not own, the allocation of a right might be stickier than the Coase theorem had assumed. The party who would have derived more value from it might not value it enough to acquire it from the person who in fact received it, so that even if transaction costs are zero, it is possible that property can be awarded inefficiently.<sup>737</sup> The endowment effect acts similarly to transaction costs.<sup>738</sup> It presents a barrier to the

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<sup>735</sup> See Jeffrey J. Rachlinski and Forest Jourden, "Remedies and the Psychology of Ownership", (1998) 51 *Vand. L. Rev.* 1546-1547.

<sup>736</sup> See Russell B. Korobkin and Thomas S. Ulen, "Law and Behavioural Science: Removing the Rationality Assumption from Law and Economics", (2000) 88 *Cal. L. Rev.* 1109.

<sup>737</sup> Charles R. Plott and Kathryn Zeiler, "The Willingness to Pay-Willingness to Accept Gap, the 'Endowment Effect', Subject Misconceptions, and Experimental Procedures for Eliciting Valuations", in (2005) 95 *The American Economic Review* 530-545; Cass R. Sunstein, "Behavioral Analysis of Law", (1997) 64 *U. Chi. L. Rev.* 1177.

<sup>738</sup> Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral", (1972) 85 *Harvard Law Review* 1089-1128, asserted that the law can address the problems associated with collective action through judicious choices between types of legal remedies. By articulating a concept of entitlements which are protected by property, liability, or inalienability rules, Calabresi and Melamed suggest that appropriate remedies can avoid transaction costs. Susan Rose-Ackerman, "Inalienability and the Theory of Property Rights", (1985) 85 *Colum. L. Rev.* 931-969,

reallocation of property rights from an owner to another party who can put those rights to more valuable use. Consequently, in some situations it might be more efficient to leave property rights somewhat unclear, in an effort to prevent an endowment effect from taking hold. If the endowment effect causes lower-valuing owners to refuse to sell

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developed rationales (economic analysis, citizenship and distributive justice) to clarify the legitimate uses of inalienability rules. Calabresi and Melamed failed to address the question of deciding whether legal protection via a property or a liability rule should be conferred to holders of a particular sort of assets, or why. See Richard A. Epstein, "A Clear View of the Cathedral: The Dominance of Property Rules", (1996) 106 *Yale L. Journal* 2091-2120. The very strong set of practices in legal systems suggests that the choice between property rules and liability rules is often decided at a very high level of theoretical abstraction, where insufficient attention is paid to the specific institutional context in which the set of rules displaces the other (The author claims that the choice between property and liability rules should normally be resolved in favour of the former to preserve the stability of possession and social expectations that are necessary for the growth of any complex social order).

Subsequent scholarship has refined the Coase/Calabresi approach to rights and remedies by introducing considerations on strategic barriers to trade. Ian Ayres and Eric Talley, "Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade", (1995) 104 *Yale L. J* 1027- 1117, proposed that liability rules tend to induce people to reveal their preferences and make efficient trades, more so than property rules. Ian Ayres and J. M. Balkin, in "Legal Entitlements as Auctions: Property Rules, Liability Rules and Beyond", (1996) 106 *Yale L. J.* 703-751, extended this analysis, demonstrating that legal rules that enable parties to take and then retake commodities create a kind of auction, thereby increasing the likelihood that a commodity will be left in the hands of the party who most values it.

Louis Kaplow and Steven Shavell, in "Property Rules versus Liability Rules: An Economic Analysis", (1995) 109 *Harvard Law Review* 713-788, and by Krier and Schwab have described the consequences of inaccurate measurement of damages. These two papers agree that inadequate measurement of damages can be a problem for the law and economics framework, although they disagree on the resolution of this problem. Kaplow and Shavell argued when transaction costs are low, parties will tend to bargain under liability rules as well as under property rules and may reach outcomes superior to those reached under property rules; and when transaction costs are high and bargaining is impossible, property rules may lead to better outcomes than do liability rules. By contrast, James E. Krier and Stewart J. Schwab, "Property Rules and Liability Rules: The Cathedral in Another Light", (1995) 70 *N.Y.U.L. Rev.* 440-483, concluded that liability rules are superior when the danger of transaction costs is high and that property rules are best when the danger that the courts will improperly value harm is high. They also argued that these two circumstances frequently coincide, leading to indeterminacy.

According to Jeffrey J. Rachlinski and Forest Jourden, "Remedies and the Psychology of Ownership", (1998) 51 *Vand. L. Rev.* 1150, these recent contributions add considerations other than transaction costs to the law and economics analysis, but encouraging efficient trade remains the paramount goal of this framework. Coase and Calabresi have converted discussions on the appropriate allocation of rights and choice of remedies into a discussion of how the law can best encourage trade. But implicit in all this work is the assumption that the parties have fixed preferences for commodities. The allocation of rights can alter what people are willing to trade inasmuch as this allocation affects their total wealth. Also, a right is probably more valuable if it is protected by a property rule than by a liability rule. Beyond these caveats, however, the law and economics framework assumes that people's preferences are exogenous - they do not depend upon either the law's allocation of rights or on the legal remedy that the law provides to protect those rights. The authors demonstrate in their studies that the endowment effect sometimes depends upon legal remedies.

entitlements to higher-valuing purchasers, damage remedies may be more efficient than injunctive relief because the former permits the higher-valuing purchaser to take the entitlement by paying the market price for it.

Finally, the endowment effect suggests that, even when transaction costs are low, policymakers concerned with efficiency should attempt to allocate property rights to their most efficient user due to the reduced likelihood of efficient reallocations.<sup>739</sup>

It is important to note that the endowment effect is usually described as a resistance to parting with a commodity, and ownership does not reflect a change in the value of a commodity to its owner; it does not mean that ownership increases the value of a commodity to its owner.<sup>740</sup> In respect of the rational behaviour of a property right-holder, neuroeconomics,<sup>741</sup> however, goes further in the understanding how individuals actually view property and how their perception of property affects behaviour. The heterogeneity already observed indicates not only that people place different values on the same piece of property (as neoclassical analysis would agree) or that the value may change dependent upon circumstances (as behavioural economics assumes) but also that the way in which the notion of ownership is processed by different people can be quite different. This is not merely a difference in the amount of utility assigned to a piece of property; instead, the entire concept may be different. Property may have different values in different contexts, because it may also mean different things to the same person in different contexts. For instance, some may view it as a resource to be shared, and others may view it entirely in a non-cooperative way.<sup>742</sup>

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<sup>739</sup> B. Korobkin and Thomas S. Ulen, “Law and Behavioural Science: Removing the Rationality Assumption from Law and Economics”, (2000) 88 *Cal. L. Rev.* 1110.

<sup>740</sup> Jeffrey J. Rachlinski and Forest Jourden, “Remedies and the Psychology of Ownership”, (1998) 51 *Vand. L. Rev.* 1553.

<sup>741</sup> Neuroeconomics is the study of how the embodied brain interacts with its external environment to produce economic behaviour. Kevin McCabe, Vernon Smith and Terrence Chorvat, “Lessons from Neuroeconomics for the Law”, in Francesco Parisi and Vernon Smith (eds.), *The Law of Economics of Irrational Behavior*, Stanford University Press, 2005, pp 68-94.

<sup>742</sup> *Ibidem*, at 82.

All the afore-mentioned insights of economics offer a number of lessons that should be taken into consideration by European policymakers.

#### 2.4. The average consumer

I will now devote my attention to the average consumer paradigm. The average consumer is taken as a template in European Consumer Law. The concept of average consumer has been developed by the Court, first, as a criterion to assess where measures aimed at protecting consumers could be justified under Article 28 of EC Treaty; second, in cases related to misleading advertising; and thirdly, in assessing whether a trade description or the name of a product might mislead the consumer or create confusion.

First, in a number of cases concerning the extent to which domestic measures allegedly aimed at protecting consumers could be justified on the grounds of the mandatory requirements or were to be considered as an unlawful barrier to trade, contrary to Article 28 (ex 30) of EC Treaty, domestic legislation for the protection of consumers was found by the ECJ to be exceedingly strict in that it was aimed at protecting even the weakest and more vulnerable consumers. In a series of judgments, the Court refused to accept measures aimed at protecting the consumer whose intelligence is less than average.<sup>743</sup>

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<sup>743</sup> According to Stephen Weatherill, *EU Consumer Law and Policy*, 2005, p. 59: '[t]he Court has therefore concocted a framework within which Member States are allowed room to explain why they have special needs that dictate a need for unusually strict rules. When one inspects the lazy, even absurd, submissions advanced in support of trade-restrictive rules in cases such as *Cassis de Dijon*, *Walter Rau v. de Smedt* and *Mars*, one may be tempted to conclude that the chief problem here is not the Court's willingness to address justifications advanced by Member States, but rather the Member States' persistent failure to engage constructively in consideration of what degree of regulatory protection a consumer requires in an integrating European market'. See also Jules Stuyck, "European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or beyond the Internal Market?" (2000) 37 *CMLRev* 392.

### *Dimensions of property*

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In *Pall Corp.*,<sup>744</sup> the Court was asked whether the use of the symbol <sup>(R)</sup>, which indicates that trade mark is registered, would mislead consumers if the trade mark is not registered in the country in which the goods are marketed. The Court ruled that even assuming that consumers, or some of them, might be misled by the <sup>(R)</sup>, that could not justify so considerable an obstacle to the free movement of goods, since consumers are more interested in the qualities of a product than in the place of registration of the trade mark.

In *Clinique*,<sup>745</sup> the Court was asked whether a national measure which prohibits the importation and marketing of a product classified and presented as a cosmetic on the ground that the product bears the name ‘*Clinique*’ is necessary to satisfy the requirements of consumer protection and the health of humans. The Court considered that the use of the word ‘*Clinique*’ on a cream may lead the more gullible consumer to believe that it has permanent effects, but may not mislead an average, well-informed consumer. Accordingly, a domestic law that prevents the marketing of cream under that name may be found to be overprotective and contrary to Article 28 (ex 30).

In *Mars*,<sup>746</sup> the Court considered the compatibility with Community law of a national measure that prohibited the importation and marketing of a product lawfully marketed in another Member State, whose package units were increased in quantity during a short publicity campaign and the wrapping marked ‘+10%’, on the ground that that presentation may induce the consumer into thinking that the price of the goods offered for sale is the same as that at which the goods had previously been sold in their old presentation, a circumstance which would have the consequence that, in the event that the trader increased the price, the consumer could be the victim of deception within the meaning of the national law applicable, or, in the event that the price was not increased,

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<sup>744</sup> Case C-238/89, *Pall Corp.*, [1990] ECR I-4827.

<sup>745</sup> Case C-315/92, *Verband Sozialer Wettbewerb eV v. Clinique Laboratories SNC*, [1994] ECR I-317, pp 21-24.

<sup>746</sup> Case C-470/93, *Verein gegen Unwesen in Handel und Gewerbe Köln V v. Mars GmbH*, [1995] ECR I - 1923.

the offer would meet the consumer's expectation but might entail a breach of the prohibition of imposing prices on retailers enacted by the same national law, on the ground that the new presentation, owing to the fact that the band marked '+10%' occupies more than 10% of the total surface area of the wrapping, would give the impression to the consumer that the volume and the weight of the product had been increased to an extent greater than indicated. The Court's rule was clear: reasonably circumspect consumers may be deemed to know that there is not necessarily a link between the size of publicity markings relating to an increase in a product quantity and the size of that increase.

The *Buet* case<sup>747</sup> is a noteworthy exception. It may be recalled that the Council Directive of 20 December 1985 on the protection of consumers in respect of contracts negotiated away from business premises,<sup>748</sup> required Member States to ensure that consumers had the right to cancel a contract of sale concluded at their home, and Article 8 did allow the State to adopt or maintain more favourable provisions to protect consumers. The French Law No. 72-1137, on the protection of consumers with respect to canvassing and to selling at private dwellings, prohibited canvassing for the purpose of selling educational material. The Court of Justice considered: '[i]n those circumstances it is permissible for the national legislature of the Member State to consider that giving consumers a right of cancellation is not sufficient protection and that it is necessary to ban canvassing at private dwellings'.<sup>749</sup>

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<sup>747</sup> Case 382/87, *Buet v. Ministère Public*, [1989] ECR 1248.

<sup>748</sup> OJ 1985, L 372/31.

<sup>749</sup> The Court ruled that: '12. In that respect canvassing at private dwellings exposes the potential customer to the risk of making an ill-considered purchase. To guard against that risk it is normally sufficient to ensure that purchasers have the right to cancel a contract concluded in their home. 13. It is necessary, however, to point out that there is greater risk of an ill-considered purchase when the canvassing is for enrolment for a course of instruction or the sale of educational material. The potential purchaser often belongs to a category of people who, for one reason or another, are behind with their education and are seeking to catch up. That makes them particularly vulnerable when faced with salesmen of educational material who attempt to persuade them that if they use that material they will have better employment prospects. Moreover, as is apparent from the documents, it is as a result of numerous complaints caused by such abuses, such as the sale of out-of-date courses, that the legislature enacted the ban on canvassing at issue. 14. Finally, it needs to be stressed that since teaching is not a consumer product in daily use, an ill-considered purchase could cause the purchaser harm other than



The second situation where the Court reasons on the basis of an average consumer in cases related to misleading advertising. In the *Nissan Case*<sup>750</sup> the ECJ ruled that:

[i]t is for the national court, however, to ascertain in the circumstances of the particular case and bearing in mind the consumers to which the advertising is addressed, whether the latter could be misleading in so far as, in the one hand, it seeks to conceal the fact that the cars advertised as new were registered before importation and, on the other hand, that fact would have deterred a significant number of consumers from making a purchase, had they known it.

In *Yves Rocher*,<sup>751</sup> the Court was asked where a law which prohibits an undertaking established in a State, carrying on mail order sales by catalogue or sales brochure of goods imported from another Member State, from using advertisements relating to prices in which the new price is displayed so as to catch the eye and reference is made to a higher price shown in a previous catalogue or brochure. The Court considered that consumers would not be misled by that kind of advertising.<sup>752</sup>

Finally, the Court makes use of the average consumer paradigm in assessing whether a trade description or the name of a product misleads the consumer or creates confusion amongst consumers. Trade mark owners typically use their marks to distinguish their products and services from others on offer. They assume an association in consumers' minds between origin and good value or quality.<sup>753</sup> The Court had to assess the risk of

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mere financial loss that could be longer lasting. Thus it has to be acknowledged that the purchase of unsuitable or low-quality material could compromise the consumer's chances of obtaining further training and thus consolidating his position on the labour market'. See also Case 286/81, *Oosthoek* [1982] ECR 4575.

<sup>750</sup> Case C-373/90, *Criminal Proceedings against X*, [1992] ECR I-131 at 15.

<sup>751</sup> Case C-126/91, *Schutzverband gegen Unwesen in der Wirtschaft e.V. v Yves Rocher GmbH* [1993] ECR I-2361.

<sup>752</sup> See para 17.

<sup>753</sup> See William Cornish & David Llewelyn, *Intellectual Property*, 5<sup>th</sup> ed., Sweet & Maxwell, London, 2003, p. 571. This fact is related to the three functions of a trade mark: origin function, quality or guarantee function and investment or advertising function.

confusion in cases such as *Gut Springenheide and Tusky*<sup>754</sup> and *Verbraucherschutzverein eV v. Sektkellerei G.C. Kessler GmbH und Co.*<sup>755</sup>

The average consumer is not an exclusive to the ECJ. Recently, the Directive on unfair commercial practices expressly took the average consumer paradigm. Recital 18 read as follows:

(...) In line with the principle of proportionality, and to permit the effective application of the protections contained in it, this Directive takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices.

It should be underlined that the average consumer test is not a statistical test. National courts and authorities will have to exercise their own judgment, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average

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<sup>754</sup> Case C-210/96, [1998] ECR I-4657. *Gut Springenheide* marketed packed under the description ‘six-grain — 10 fresh eggs’. According to the company, the six varieties of cereals in question accounted for 60% of the feed mix used to feed the hens. A slip of paper enclosed in each pack of eggs extolled the beneficial effect of this feed on the quality of the eggs. The Bundesverwaltungsgericht had doubts regarding the interpretation of Article 10(2)(e), of Regulation No 1907/90, which allowed packs to bear statements designed to promote sales provided that they were not likely to mislead the purchaser. The Court identified as the reference consumer, the ‘average consumer who is reasonably well-informed and reasonably observant and circumspect’ (para 31).

<sup>755</sup> Case C-303/97, [1999] ECR I-00513, paras. 32 and 38.. In *Sektkellerei Kessler*, Kessler produced Sekt from French wine of the ‘Chardonnay’ grape variety and has been marketing it for about 60 years under the name ‘Kessler Hochgewächs’, a description protected in Germany as a trade mark since 7 June 1950. Since 1986, the description ‘Riesling Hochgewächs’ had been protected in Germany, and might be applied only to wines meeting certain quality criteria and made exclusively from grapes of the ‘Riesling’ variety. The Verbraucherschutzverein applied to the Landgericht (Regional Court) for an injunction restraining Kessler from continuing to market its sparkling wines under the description ‘Hochgewächs’ on the ground that it was likely to lead consumers to believe, wrongly, that the wine was made from ‘Riesling’. The Court ruled that: ‘Article 13(2)(b) of Council Regulation (EEC) No 2333/92 of 13 July 1992 laying down general rules for the description and presentation of sparkling wines and aerated sparkling wines is to be interpreted as meaning that, for the prohibition laid down by that provision to be applied, it is not sufficient to determine that a brand name which contains a word appearing in the description of one of the products mentioned in that provision is, in itself, likely to be confused with that description. It is also necessary to establish that use of the brand name is in fact likely to mislead the consumers concerned and thus affect their economic behaviour. In that respect, it is for the national court to refer to the presumed expectations in regard to that information on the part of an average consumer who is reasonably well informed and reasonably observant and circumspect’.

consumer in a given case. This Directive also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. Article 5(3) adapts the adjustable benchmark to persons ‘who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee’. In that case the average consumer ‘shall be assessed from the perspective of the average member of that group’.

Finally, the EU Consumer Policy Strategy 2007-2013 states that,<sup>756</sup> ‘[t]he greater empowerment of consumers has also led to greater responsibilities for them to manage their own affairs. While many can benefit, the most vulnerable are less well-equipped – and the growth in consumption by children and ageing population are increasing the number of more vulnerable consumer’.

In respect of the policy option related to the choice of the consumer paradigm, between the average and the vulnerable consumer, the European policymakers face two problems in choosing the latter: legal uncertainty and the dilemma of difference.

One objection to the vulnerable or weak consumer paradigm is that, despite the fact that the vulnerable consumer was introduced to lessen the rigidity of the average consumer test, it lacks practical and logical foundations. Two problems can be identified. Firstly, how to set in each particular case who the concrete consumer is? Shall the legislature and the judge attain to a concept of national consumer? Or shall factors such as age and education be taken into consideration? And secondly, is it to be considered reasonable to require a trader to attune its commercial practices to a consumer who is particularly susceptible to a commercial practice for reasons like age, mental infirmity, or credulity?<sup>757</sup> The arbitrariness of the vulnerable consumer notion introduces uncertainties in the assessment by the national authorities and may dissuade traders

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<sup>756</sup> Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, COM (2007) 99 final.

<sup>757</sup> Rossela Incardona and Cristina Poncibò, “The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution” (2007) 30 *Journal of Consumer Policy* 29.

from engaging in interstate commerce if they wish to avoid unpredictable and necessarily subjective regulatory entanglement.<sup>758</sup>

The Commission's proposal of the Directive on unfair commercial practices<sup>759</sup> comprised a definition of the 'average consumer', quoting the established jurisprudence of the ECJ for the first time in a European rule. In the Council, discussions took place whether the definition should imply the consideration of the different '*social, cultural or linguistic factors*' of the Member States which the ECJ only mentioned in *Estée Lauder*.<sup>760</sup> The Directive, however, does not include a definition, but only mentions the 'social, cultural and linguistic factors, as interpreted by the Court of Justice' in its eighteenth recital.<sup>761</sup> It is up to the practitioner to assess the individual market practice, whether it is honest or not, according to the different type of consumers.<sup>762</sup>

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<sup>758</sup> *Ibidem*.

<sup>759</sup> COM (2003) 356.

<sup>760</sup> In Case C-220/98, *Estée Lauder*, [2000] ECR I-117, the question concerned the marketing of a cosmetic product under a name which incorporated the term 'lifting'. The Court considered that, 'in order to determine whether a particular description, trade mark or promotional description or statement is misleading, it is necessary to take into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect (...) In order to apply that test to the present case, several considerations must be borne in mind. In particular, it must be determined whether social, cultural or linguistic factors may justify the term 'lifting', used in connection with a firming cream, meaning something different to the German consumer as opposed to consumers in other Member States, or whether the instructions for the use of the product are in themselves sufficient to make it quite clear that its effects are short-lived, thus neutralising any conclusion to the contrary that might be derived from the word 'lifting'. (...) Although, at first sight, the average consumer - reasonably well informed and reasonably observant and circumspect - ought not to expect a cream whose name incorporates the term 'lifting to produce enduring effects, it nevertheless remains for the national court to determine, in the light of all the relevant factors, whether that is the position in this case' (see paras. 27-29).

<sup>761</sup> On the average consumer concept, see Rossela Incardona and Cristina Pocibò, "The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution", (2007) 30 *J Consum Policy* 21-38.

<sup>762</sup> Consequently, a clarification is left to preliminary rulings by the ECJ. See Christian Handig, "The Unfair Commercial Practices Directive - A Milestone in the European Unfair Competition Law?", (2005) *EBLR* at 1125.

### *Dimensions of property*

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The second problem the European policymaker must face is the dilemma of difference:<sup>763</sup> the choice between an ‘assimilationist model’, which emphasizes the extent to which consumers are all alike, and an ‘accommodation model’, which seeks to create special rights on the basis of real differences. It should be kept in mind, nevertheless, that the vulnerable consumer concept is a paternalistic notion which attenuates the difficulties present in the average consumer standard.

According to MARTHA MINOW,<sup>764</sup> ‘[t]reat equals equally’ requires a judgment about the respects in which two things are equal and what it means to treat them equally. But this brings about the following dilemma:

By taking another person’s difference into account in awarding goods or distributing burdens, you risk reiterating the significance that difference and, potentially, its stigma and stereotyping. But if you do not take another person’s difference into account – in a world that has made that difference matter – you may also recreate and re-establish both the difference and its negative implications. If you draft or enforce laws you may worry that the effects of the laws will not be neutral whether you take difference into account or ignore it.

Attempts to secure legal equality have generally pursued either an assimilationist model or an accommodation model.<sup>765</sup> Protection for vulnerable consumers might reiterate

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<sup>763</sup> As an extension of the critique of the ideal of liberal neutrality, the ‘dilemma of difference’, as expressed by Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law*, CUP, 1990, pp 19 ff, poses a distinct challenge to liberal ideology: must any attempt to address ‘difference’ under the liberal ideas of equality, impartiality, and toleration necessarily perpetuate injustices and do violence to those categories and classes not traditionally recognized as within the norm? This issue has been raised particularly (though not exclusively) in recent feminist jurisprudence. For the claim is now that the pursuit of ‘justice’ through the bourgeois legal form (e.g. general law aimed at guaranteeing equal rights) necessarily devalues difference and does violence to individuals, groups and practices that deviate from the established norm. The dilemma of difference, which has been most extensively discussed in recent feminist jurisprudence, is inextricably entwined with the fundamental principle of legal equality. See also Thomas Wilhelmsson, “Consumer Law and Social Justice”, in Iain Ramsay (ed.) *Consumer Law in Global Economy – National and International Dimensions*, Ashgate, 1997, pp 222 ff.

<sup>764</sup> *Ibidem*.

<sup>765</sup> See Kenneth Baynes, “Deliberative Democracy and the Limits of Liberalism”, in *Discourse and Democracy: Essays on Habermas’s Between Facts and Norms*, René von Schomberg and Kenneth Baynes (eds.), SUNY Press, 2002, p. 26: ‘One response has been to resist the language of sameness and difference altogether and to pursue a critique of law from the point of view of domination instead.’

differences instead of promoting legal equality. European policymakers should take it into consideration.

### 3. Framing up the core concept of the European consumer: *volent non fit injuria*?

The foregoing reflections served the purpose of introducing the category of the European consumer as a market actor. The overall emphasis of European policies has always been placed on market integration and the Community consumer is confined to the marketplace.<sup>766</sup> Despite the criticism, the confident, informed, rational and average European consumer is the chosen paradigm: a market player, to be taken into consideration as an active element in the establishment of the single market.<sup>767</sup> The consumer is stimulated to shop across the borders, and conceived as an economic actor vital in constructing the single market.<sup>768</sup>

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However, once the problem is framed in this manner, that is, not as a problem of judgements of sameness and difference per se, but as a critique of the underlying norms and criteria guiding them, attention shifts to the process through which those norms and criteria guiding them have been defined. And here, I think, the strength of Habermas's approach emerges: the effort to secure equal rights and the protection of law for each citizen must go hand in hand with efforts to secure the exercise of the public autonomy of all citizens. Public and private autonomy mutually suppose one another and must be jointly realized to secure processes of legitimate lawmaking. With this model in view, one could then take up the suggestion of some feminists that the point is not for the law to be 'blind' to difference, nor to fix particular differences through the introduction of 'special rights', but 'to make difference costless'.

<sup>766</sup> See Hans-W. Micklitz, "An Expanded and Systematized Community Consumer Law as Alternative or Complement?", (2002) *EBLR* 591, and Gareth Davies, "Competition, Free Movement and Consumers of Public Services", (2006) *EBLR* 101.

<sup>767</sup> Norbert Reich, "Economic Law, Consumer Interests and EU Integration", in Norbert Reich, Hans-W. Micklitz, Peter Rott, *Understanding Consumer Law*, 2009, p. 48, sets the core consumer notion under Community law as the passive market citizen.

<sup>768</sup> The White paper on the integration of EU mortgage credit markets (COM (2007) 807 final) underlies that measures which facilitate the cross-border supply and funding of mortgage credit are essential to achieve a competitive and efficient EU mortgage credit market (the integration of EU mortgage credit markets is central to a more efficient functioning of the EU financial system both at the wholesale and the retail level as well as the EU economy as a whole). See Adetunji Omole, "A Single European Union Mortgage Credit Market: Manifestly an Illusion or a Reality Just Around the Corner?" (2007) *EBLR* 1143-1180.

### *Dimensions of property*

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To summarize the argument so far, the definition of the European consumer has a dynamic character (consuming is an *actus* not a *status*), and is subjected to a finalistic criterion.<sup>769</sup> Consumers are to be protected within the limits of their economic activity, while playing a certain role in a specific relation with a professional, without a special competence and are normally less powerful social and economically.<sup>770</sup>

The European legal regime connotes two main premises. First, the Community institutionalizes procedures and conditions of communication between consumers and businesses. Second, information and rationality support consumers' choice. The market shall, hence, enable substantial and effective consumer autonomy. I will elaborate on this and conclude that a new metric for evaluating the costs and benefits of European regulatory options is needed.<sup>771</sup>

The market institutionalizes procedural communication between consumers and businesses. Consumers are offered a crystal-clear set of market options and they should control the final decision, as it is showed by *e.g.*, the Directive on prices,<sup>772</sup> and, more

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<sup>769</sup> Mário Tenreiro, in "Un Code de la consommation ou un code autour du consommateur? Quelques reflexions critiques sur la codification et la notion du consommateur", in Ludwig Krämer, Hans-W. Micklitz, and Klaus Tonner (eds.), *Law and Diffuse Interests in the European Legal Order: liber amicorum Norbert Reich*, Nomos, 1997, p. 354, argues for a Code of Consumption as a Code '*autour du Consommateur*' instead of a '*Code de Protection du Consommateur*'. The recent Italian *Codice del Consumo* (dl 206, of the 6<sup>th</sup> September 2005) emphasizes the economic function of the activity rather than the player, the consumer itself.

<sup>770</sup> Paulo Mota Pinto, "O Anteprojecto de Código do Consumidor e a Venda de Bens de Consumo", (2005) 7 *Estudos de Direito do Consumidor* 267.

<sup>771</sup> See Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O'Donoghue, Matthew Rabin, "Regulation for Conservatives: Behavioral Economics and the Case for 'Asymmetrical Paternalism'", 151 *University Pennsylvania Law Review* 1251. On the constitutional asymmetry between policies promoting market efficiencies and policies promoting social protection and equality, see Fritz W. Scharpf, "The European Social Model: Coping with the Challenges of Diversity", (2002) 40 *JCMS* 645-670.

<sup>772</sup> Recital 6 of Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ 1998 L 80/27, reads: '[w]hereas the obligation to indicate the selling price and the unit price contributes substantially to improving consumer information, as this is the easiest way to enable consumers to evaluate and compare the price of products in an optimum manner and hence to make informed choices on the basis of simple comparisons' (emphasis added). Forced and coerced choices (desperate exchange, as labelled by Walzer, *Spheres of Justice*, 107) are the enemy of human choices. The main problem for the development of the human personality is the character of the choices made and not the exchange of goods and services for

recently, by Directive 2002/65/EC on the distance marketing of consumer financial services.<sup>773</sup>

The consumer is empowered by the Community and is charged even in fields where the decision-making process is particularly complex, such as food safety.<sup>774</sup> There are many reasons why insecurity regarding consumer choice is growing.<sup>775</sup> Nevertheless, the consumer is considered an autonomous, empowered and self-sufficient subject with particular objectives, who strives towards them and who believes that the best way to do so is to act on the basis of a goal-specific, instrumental rationality. Choice is a category

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money in the market. See Robert E. Lane, "Market Choice and Human Choice", in *Markets and Justice, Nomos XXXI*, John W. Chapman and J. Roland Penncock (eds.), NYUP, 1989, p. 244.

<sup>773</sup> Recital 3 of 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, reads: '[w]ithin the framework of the internal market, it is in the interest of consumers to *have access without discrimination to the widest possible range of financial services available in the Community so that they can choose those that are best suited to their needs*. In order to safeguard freedom of choice, which is an essential consumer right, a high degree of consumer protection is required in order to enhance consumer confidence in distance-selling.' (emphasis added)

<sup>774</sup> Regulation 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed, empowers the consumer through adequate labelling: '[t]he labelling of products enables the consumer to make an informed choice and facilitates fairness of transactions between seller and purchaser' (Recital 17); '[c]lear labelling facilitates informed choice and precludes potential mislead of consumers as regards methods of manufacture or production' (Recital 21). For a general overview, see Debra Holand and Helen Pope, *EU Food Law and Policy*, Kluwer Law International, 2004, p. 110 ff, and Damian Chalmers, "'Food for Thought': Reconciling European Risks and Traditional Ways of Life", (2003) 66 *The Modern Law Review* 532-562.

<sup>775</sup> According to Ilmonen, it should be mentioned, first, the average layman's knowledge of the origin, component materials, and functionality of commodities has decreased, while the technical complexity of production processes has increased and markets have been globalized. Second, the more unstable the (global) markets are in terms of prices, the more special offers there are, and the more the markets are characterized by superficial variation among goods, the more difficult it is for consumers to know, let alone compare, the prices of goods. Third, the growing emphasis on design, the promotion of brand images and new methods of packaging make rational calculation difficult when making choices. Fourth, because other consumers participate more and more in the final production of the commodities, they may also influence transaction costs in unforeseeable ways. For example, the success of package tours depends not only on the services and helpfulness of their guides but also on other participants on a tour, on their experienced pleasantness, activity or passivity in relationship to other participants, their curiosity about travelling, etc. See Kaj Ilmonen, "Sociology, Consumption and Routine", in Jukka Gronow and Alan Warde (eds.), *Ordinary Consumption*, Routledge, 2001, at 18.



of action, and, autonomy is realized through an ambivalent process: the possibility to choose not to choose.<sup>776</sup>

In a competitive market, only informed choices lead to efficient choices ensuring maximization of consumers' interests. The consumer is considered able to process information and thereby to make rational choices about available products and services. Within the information available, the consumer must choose optimally, in order to achieve the best result. Information and rationality are strongly connected: the perception that consumers should be provided with the best information available and are expected to make a subjectively optimal choice is fairly widespread. Information is the means to achieve the desirable end: a rational choice. The benchmark is, normally, the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors (as interpreted by the Court of Justice and assumed *e.g.* in Directive on unfair commercial practices).

The regulatory function of private law - the ability of private law instruments to address market failures, as been put forward by CAFAGGI and WATT<sup>777</sup> - is at the core of governance system. To exercise effective consumer choice, consumers need to have options and the ability to choose among them, but consumer choices gain further emphasis in determining producers' product strategies.<sup>778</sup> In order to succeed, new

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<sup>776</sup> Roberta Sassatelli, "Tamed Hedonism: Choices, Desires and Deviant Pleasures", in Jukka Gronow and Alan Warde (eds.), *Ordinary Consumption*, Routledge, 2001, pp 95 ff. The author explores this issue by coming back to Albert O. Hirschman's Exit, Voice and Loyalty. Hirschman conceived of product-exit as a fundamental structural device within the modern consumption sphere. When close substitutes for an unsatisfactory product are available, as in current markets, consumers may well safeguard their interests, at least in short term, without resorting to any interest articulation or 'voice'. Exit however is much more than a 'market failure recuperation mechanism', more than 'the operative instrument through which competition should work'. It also defines the framework within which consumer practices obtain value: it is a key component of the narratives used in contemporary society to legitimize consumer practices, evaluating their worth and propriety. Such narratives in fact typically require that customers may come back to renounce any specific item that may once have wanted, and even that they can abandon the idea of choosing any commodity within the relevant product category.

<sup>777</sup> Fabrizio Cafaggi and Horatia Muir Watt, 2007. *The Making of European Private Law: Regulation and Governance Design*. European Governance Papers (EUROGOV) N-07-02, <http://www.connex-network.org/eurogov/pdf/egp-newgov-N-07-02.pdf>.

<sup>778</sup> EU Consumer Policy Strategy 2007-2013, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, COM (2007) 99 final: 'a

investments must be recognized and valued by consumers. Successful investment in highly engineered goods (the sort of investment favoured by coordinated market economies) requires that customers recognize and favour the higher quality that results. Successful investment in radically new kinds of products (the sort of investment favoured by a liberal production system) requires consumers to be willing to take on the risks of being early adopters of new products. This means that institutions that mediate product risk and product information matter to consumer choice.<sup>779</sup> Consumer choice, on the other hand, takes full account of price, but also of variety, quality and innovation<sup>780</sup> – individuals are oriented to personal preferences. The goal of European consumer policy (as law of the market) can be defined as to provide a context for the possible transformation of consumer's preferences in response to businesses' proposals. It needs to be framed in terms of a procedural rationality rather than a substantive rationality: the concern is more with how decisions are made than with what decisions are made.<sup>781</sup> Consumers must retain their necessary autonomy; they are free to choose. The substantial validity of the choice is not assessed, for the way individuals exercise their autonomy is not under scrutiny.

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stronger consumer dimension is needed to improve the functioning of consumer markets. Final outcomes for consumers in economic and non-economic terms are the ultimate arbiter of whether markets are failing or succeeding in terms of citizen's expectations'.

<sup>779</sup> More recently, scholars have noted that the dynamics identified by George Akerlof ("The Market for 'Lemons': Quality Uncertainty and the Market Mechanism", (1970) 84 *The Quarterly Journal of Economics*, 488-500) in the second-hand market also characterize markets for new products. See Gunnar Trumbull, *Consumer Capitalism*, 2006, pp 4-7.

<sup>780</sup> Neil W. Averitt and Rober H. Lande, in "Using the 'Consumer Choice Approach to Antitrust Law", (2007) 74 *Antitrust L. J.* 175-264, propose an antitrust paradigm based on consumer choice approach, because it recognizes that consumers do not just want competitive prices – they want options. The Commission has created a new tool to monitor consumer markets: a scoreboard which takes account not only of prices and the safety of products, but also of consumer satisfaction. See Communication from the Commission of 29 January 2008 - Monitoring consumer outcomes in the single market: the Consumer Markets Scoreboard [COM(2008) 31 final - Not published in the Official Journal, in [http://europa.eu/legislation\\_summaries/consumers/consumer\\_information/110140\\_en.htm](http://europa.eu/legislation_summaries/consumers/consumer_information/110140_en.htm) [last visited 31<sup>st</sup> December 2009]

<sup>781</sup> For the application of this distinction in economics, see Herbert A. Simon, "On How to Decide What To Do", (1978) 9 *Bell Journal of Economics* 494, and "Rationality as Process and as Product of Thought", (1978) 68 *American Econ. Rev.* 1-16. About choice and transparency, already Geraint Howells and Thomas Wilhelmsson, *EC Consumer Law*, Ashgate, 1997, pp 306 ff.

Individuals' sphere of action is circumscribed solely by their material means and the rationality with which they could deploy their market power. Citizens constitute themselves in a performatively referential manner. Rather than consumer sovereignty,<sup>782</sup> the power to decide, the consumer has autonomy: the power to decide wrongly. Information plays, nevertheless, a large role as an enabling condition of institutionalized exercise of private autonomy; the latter is brought about and continuously sustained by the former.

Autonomy has two major aspects. The first is that of self-definition. It is the thought that what we are is, in significant respects, what we become through successive choices during our lives, that our lives are a continuous process of self-creation. At least to a significant degree, one is what one is making oneself through the conduct of one's life. The second aspect is that autonomy is valuable only if one steers a course for one's life through significant choices among diverse and valuable options. The underlying idea is that autonomous people had a variety of incompatible opportunities available to them

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<sup>782</sup> Frank Trentmann, "The Modern Genealogy of the Consumer, Identities, Meanings and Synapses", in John Brewer and Frank Trentmann, *Consuming Cultures, Global Perspectives*, Berg, 2006, p. 45, relates that the concept of 'consumer sovereignty', which William Hutt, a British economist teaching in South Africa, began to circulate in the mid-1930s, was introduced to explain the favourable mechanisms of social harmony and political consent in a market society in which consumers were able to exercise their power through demand. In a totalitarian society, producers were dependent on the state and constrained by regulations and identifiable networks of power. In a functioning market society, by contrast, producers were dependent on consumers, a diffuse and far less identifiable group. There were echoes here of an older critique of vested interest that united Free Trade liberals with eighteenth-century writers. This diffuseness, Hutt argued, was a vital precondition for social harmony and political legitimacy in a complex and dynamic modern society. In short, producers who lost out in a market society or had difficulties in adjusting to changing tastes and demand found it much more difficult to pin their grievances on a particular social group or the state. Consumer sovereignty mixed a sense of freedom for consumers with an atmosphere of restraint for producers; Hutt was clear that this freedom often was little more than an illusion and that much consumption was not the result of short-term rational choices but of long-term routines and traditions. Consumer sovereignty might not necessarily make for the maximum allocation of resources, Hutt argued, but it did favour conditions of political consent and a minimum base of toleration. Effectively, this was an argument that fused consumer power with civil society, updated for an age of ideologies; consumer sovereignty taught people to learn to live with difference. The state and producers did not seek to steer or dictate consumption but accepted that society was a mixed of different, even conflicting, tastes and preferences. The argument for 'consumer sovereignty' did not even require that consumers knew what was best for them. It was the acceptance that mattered. Consumer sovereignty diffused potential conflict between interest and ways of life.

which would have enabled them to develop their lives in different directions. That points to a connection between autonomy and pluralism.<sup>783</sup>

The foregoing reflections served the purpose of introducing a consequential change in the adopted pattern for policymakers.<sup>784</sup> What insights are to be integrated or incorporated? Information supports autonomy, but the information paradigm overtly failed in home loans policy and in the overindebtedness issue.

I suggest that the Community should not deal with the European consumer in an excessively paternalistic manner.<sup>785</sup> European consumers take autonomous decisions and because of that, and to that end, they are considered rational. The rationality of the European consumer is the root of an autonomous decision. The Community has shifted away from the final decision, the concrete consumer choice, and the inherent justice/fairness of the contract. The European consumer is provided with necessary

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<sup>783</sup> Joseph Raz, *Ethics in the Public Domain, Essays in the Morality of Law and Politics*, Clarendon Press, Oxford, 1994, p. 104. Freedom of contract does not constitute an end in itself, but is a means for an autonomous and concrete search of personal interests. See Sousa Ribeiro, *O Problema do Contrato, As Cláusulas Contratuais gerais e o Princípio da Liberdade Contratual*, Almedina, Coimbra, 1999, pp 98-99.

<sup>784</sup> Jules L. Coleman in “Corrective Justice and Property Rights”, p. 137 wrote that, ‘[t]he very idea of tying together autonomy in the formulation and pursuit of individual projects and goals with the framework of property rights suggests some constraints on the kinds of property rights schemes that are justifiable. They must provide individuals with an adequate range of opportunities and with the capacities of successfully pursue them (other things being equal). The scheme of norms, cannot, moreover, be incompatible with the concept of autonomy.’ According to Jürgen Habermas, *Between Facts and Norms, Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg, MIT, 1998, p. 417, the normative intuition that private and public autonomy reciprocally presuppose each other informs public dispute over the criteria for securing the equal autonomy of private persons, that is, criteria that specify what material preconditions of legal equality are required at a given time. These criteria also determine when a regulation results in formal legal discrimination or welfare-state paternalism. A legal program proves to be discriminating if it is insensitive to how actual inequalities have side effects that in fact restrict the use of equally distributed liberties. And it proves to be paternalistic if it is insensitive to the freedom-restricting side effects of the state’s compensations for those inequalities.

<sup>785</sup> In this way bounded rationality pushes toward a sort of anti-antipaternalism – a skepticism about antipaternalism, but not an affirmative defence of paternalism. Christine Jolls, Cass R. Sunstein, Richard Thaler, “A Behavioral Approach to Law and Economics”, (1998) 50 *Stan. L. Rev.* 1541. Cass R. Sunstein, “Disrupting Voluntary Transactions”, in *Markets and Justice, Nomos XXXI*, John W. Chapman and J. Roland Pennock (eds.), NYUP, 1989, p. 284 ff, identifies a number of settings in which voluntary transactions should be disrupted even if there is no harm to others.

information and can communicate in the market autonomously and rationally.<sup>786</sup> As HANS MICKLITZ puts it,<sup>787</sup> it is not so much justice, in the sense of distributive justice, but fairness that Community consumer law seeks to guarantee. Fairness provides for an open-textured process in which the parties of a contract must enforce their rights in order to get justice.

This is not a blind assumption, though. As MARTIJN HESSELINK wrote, Europe is re-connecting with citizens through consumer policy.<sup>788</sup> Only by reinforcing the mechanisms for overcoming information asymmetries and bounded rationality, European policymakers comply with the mandate to ensure consumer protection as a basic right. The mandate is to ensure optimal choices without autonomy being at stake. That means to help consumers to make the choices they would have made for themselves – a libertarian proposal that aims to skew consumers’ decisions, without infringing freedom of choice.

Soft or asymmetric paternalism divides consumers in two types: those who are boundedly rational and those who are fully rational. A policy is asymmetrically paternalistic if it creates large benefits for those people who are boundedly rational while imposing little or no harm on those who are fully rational (and involving low implementation costs).<sup>789</sup> Restraints on contractual freedom are intended to protect the

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<sup>786</sup> Hans-Wolfgang Micklitz, “Consumer Rights”, in Antonio Cassese, Andrew Clapham, Joseph Weiler (eds.), *Human Rights and the European Community: the Substantive Law*, Baden-Baden, Nomos, 1991, already suggested a European right to safety. The institution of such a right would presuppose a balance between the manufacturers’ and the users’ viewpoint. According to the Author, the formula ‘safety the consumers are entitled to expect’ (assumed by the Product Liability Directive) would reflect these types of interests.

<sup>787</sup> Hans-W. Micklitz, “An Expanded and Systematized Community Consumer Law as Alternative or Complement?” (2002) *EBLR* 592. Litigation in the courts plays a prominent and ever growing role in this context, and “Unfair Commercial Practices and Misleading Advertising”, in Norbert Reich, Hans-W. Micklitz, Peter Rott, *Understanding Consumer Law*, 2009, pp 82-84.

<sup>788</sup> Martijn W. Hesselink, “European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?”, (2007) 3 *ERPL* 345 ff.

<sup>789</sup> Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O’Donoghue, Matthew Rabin, “Regulation for Conservatives: Behavioral Economics and the Case for ‘Asymmetrical Paternalism’”, 151 *University Pennsylvania Law Review*, p. 1219. As wrote by Christian Joerges, in “European Challenges to Private Law: on False Dichotomies, True Conflicts and the Need for a Constitutional

freedom of those whose freedom they restrict. Soft paternalism, as an independent liberty-limiting principle, is morally uncontroversial.<sup>790</sup> The restriction of substantially self-regarding conduct is permissible while necessary to enable autonomous and rational communication in the market.

Legal rules that prohibit action on the grounds that it would be contrary to the actor's own welfare, on the contrary, are paternalistic. ANTHONY KRONMAN<sup>791</sup> believes that paternalism is not only permissible but morally required. A standard or principle for evaluating paternalistic arguments in particular cases must be provided. Liberty is restricted to bind oneself by making a legally enforceable promise. Hard paternalism sanctions intervention in spite of the substantially autonomous nature of an individual's conduct. In contrast to soft paternalism, hard paternalism does not enable or empower consumers to make more informed decisions. Instead, hard paternalism is aimed at overriding consumers' decision. Hard paternalism does not help the consumer to make an informed choice – it eliminates the choice.<sup>792</sup>

Instead of counteracting autonomy, soft paternalism actually helps to promote and to protect it. It is not a true liberty-limiting principle; rather, the work of reconstruction is linked up with functional approaches: equality among citizens.<sup>793</sup> Citizens are able to

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Perspective”, (1998) 18 *Legal Stud.* pp 161-162, European interventions are, thus, ‘concerned with exactly those asymmetries in private relationships which legal systems have traditionally affirmed or sought to remedy’. The ‘constitutional dimension of issues such as the delineation of the realm of private autonomy and the protection of basics and inalienable rights is simply irrefutable’.

<sup>790</sup> Thaddeus Mason Pope, “Counting the Dragon’s Teeth and Claws: The Definition of Hard Paternalism”, (2003) 20 *Ga.St.U.L.Rev* 661. See also James Gordley, “Morality and Contract: The Question of Paternalism”, (2006) 48 *Wm. & Mary L. Rev.* 1743.

<sup>791</sup> Anthony T. Kronman, “Paternalism and the Law of Contracts” (1982) 92 *Yale L.J.* 763-798. Eyal Zamir, in “The Efficiency of Paternalism”, (1998) 84 *Va.L.Rev* pp 229-286, proves that efficiency analysis provides a central justification for paternalism.

<sup>792</sup> Thaddeus Mason Pope, “Monstrous Impersonification – A Critique of Consent-Based Justifications for Hard Paternalism”, (2005) 73 *UMKC Law Review* 685.

<sup>793</sup> Geraint Howells and Thomas Wilhelmsson, *EC Consumer Law*, Ashgate, 1997, p. 319, already pointed equality perspective lacking as an active and essential element in the consumer policy of the Community, and, in this respect, Community consumer law has forgotten the weak and the vulnerable consumers.

achieve goals that they would not achieve by their own. Therefore, autonomy reaches its maximum potential.

In respect of property right-holders, and the risk of loss aversion, concrete measures can be suggested. As PLOTT and ZEILER have demonstrated, comparative experiments demonstrate that WTP-WTA gaps are sensitive to experimental procedures. By implementing different procedures the phenomenon can be turned on and off. When a full set of controls is implemented, the gap is not observed.<sup>794</sup> It opens, therefore, a full range of options for EC policymakers, namely, with respect to education, information requirements and rights of withdrawal and effective redress.

The success of a European consumer policy has depended, so far, on the interplay among institutionalized deliberative and constituted (strong and weak) public opinions.<sup>795</sup> For example, the Commission considers that involvement of consumer organizations in EU policies is a key element of producing better and more effective consumer protection regulation. At European level, the European Association for the Coordination of Consumer Representation in Standardisation (ANEC) and the *Bureau Européen des Consommateurs* (BEUC) are federations of national consumer organizations, which develop policy positions and defend consumer interests. The Transatlantic Consumer Dialogue (TACD) is a forum of US and EU consumer organisations which develops joint consumer policy recommendations with the US government and the European Commission to promote consumer interest in EU and US policy-making and in global issues.

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<sup>794</sup> Charles R. Plott and Kathryn Zeiler, “The Willingness to Pay-Willingness to Accept Gap, the ‘Endowment Effect’, Subject Misconceptions, and Experimental Procedures for Eliciting Valuations”, in (2005) 95 *The American Economic Review* 530-545.

<sup>795</sup> Miguel Poiars Maduro, “Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights”, (1997) 3 *European Law Journal* 73 derives from the character of free movement as a political right, the open character of the European Economic Constitution. The economic model and powers of which will, therefore, be the result of a discursive process. European Union will develop a particular form of legitimacy, based on a concept of democracy given eminently by the existence of a public domain of free discussion.

The European Consumer Consultive Group (ECCG) is the Commission's main forum to consult national and European consumer organisations.<sup>796</sup> It gives an opinion on Community matters affecting the protection of consumer interests; advises and guides the Commission when it outlines policies and activities having an effect on consumers; informs the Commission of developments in consumer policy in the Member States; and acts as a source of information and sounding board on Community action for the other national organisations.

Regulatory, scientific and advisory committees are of great importance in the process of EC policy-making that is often heavily technocratic.<sup>797</sup> Although such committees might endanger the overall legitimacy of Community decision-making, they are considered to have created a framework for co-operative and deliberative multi-level policy-making.<sup>798</sup>

Policymakers on consumers' protection must decide how autonomy must be conceived and implemented in a given context. They should compromise discourses among the economic despotism and decentralized actions of self-interested individuals in the market. In the nexus of reciprocal references, autonomy shall be traced back to the effectiveness of a technical rule and frame individual strategic action. In the market, conceived as a communicative framework of intersubjective interactions, the

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<sup>796</sup> See Commission Decision 2003/709/EC of 9 October 2003, OJ L258/35.

<sup>797</sup> Renaud Dehousse, "Misfits: EU Law and The Transformation of European Governance", in Christian Joerges and Renaud Dehousse (eds.), *Good Governance in Europe's Integrated Market*, 2002, at 228. For a classification of committees, see Ellen Vos, "The Rise of Committees", (1997) 2 *European Law Journal* 212.

<sup>798</sup> See Christian Joerges and Jürgen Neyer, "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology", (1997) 3 *European Law Journal* 273-291. Joseph W. Weiler, "Epilogue: 'Comitology' as Revolution – Infranationalism, Constitutionalism and Democracy", in Christian Joerges and Ellen Vos (eds.), *EU Committees: Social regulation, Law and Politics*, Hart, Oxford, 1999, conversely, claims that comitology is a microcosm of the problems of democracy, not a microcosm of the solution: '[t]he Habermasian noble ideal of deliberation has validity only if assimilated to the Jewish ideal of the Messiah – one fervently believes that the Messiah will (future tense) come; the One that actually comes is always false. Comitology is just another run on the mill illustration of this truism.' It should be pointed out, however, that deliberative supranationalism rests upon contingent conditions and comitology is a normatively imperfect institutionalization of co-operative problem-solving. See Christian Joerges, "'Deliberative Political Processes' Revisited: What Have we Learnt About the Legitimacy of Supranational Decision-Making" (2006) 44 *JCMS* 796.



interlocking of conflicting interest positions is assumed. The market is a space for recognized differences, where individual interests involved have an equal and effective opportunity to be known.

Specifically, in respect of property right-holders protection, the authority of the Community is stronger. But it should also be underlined that the protection of fundamental rights may mandate specific policy decisions.<sup>799</sup> In CAFAGGI and WATT's words: '[t]he linking of fundamental rights with policies not only makes governance issues very relevant for European Private Law, but also implies institutional choice concerning the "if" and the "how" of harmonisation'. The market presupposes the existence of private property rights but it is also a communicative infrastructure, where property rights obtain full-existence. By being in the market, a vast and complex communication network, individuals are within a framework where one is judged by one's choices and actions.<sup>800</sup>

Private autonomy takes on the form of a legally guaranteed freedom of choice. The market institutionalizes the ensemble of conditions that both enable and limit.<sup>801</sup> EC Law, as market law, sets up the enabling conditions of exercising substantial autonomy. As a provider of enabling structural conditions, the market must respect and reinforce the subjective autonomy of actors - the autonomous and decentralized decisions of self-interested individuals in a certain sphere of action. The individual is provided with spheres of action and autonomy is tailored to choice activity and the strategic pursuit of

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<sup>799</sup> Fabrizio Cafaggi and Horatia Muir Watt, 2007. *The Making of European Private Law: Regulation and Governance Design*. European Governance Papers (EUROGOV) N-07-02, <http://www.connex-network.org/eurogov/pdf/egp-newgov-N-07-02.pdf> [last visited 31<sup>st</sup> December 2009]

<sup>800</sup> According to Fabrizio Cafaggi and Horatia Muir Watt, 2007, *ibidem*, '[t]he relationship between regulatory law, consumer contract law and conventional private law is very important. To trace the boundaries between these different bodies of law is not purely an intellectual exercise: it is relevant in order to identify monitoring and enforcement devices. Consequently, the relationship affects the remit of the supervisory function in at least two different ways: a) identifying the relevant supervisory institutions for adequate implementation; b) defining the techniques employed to monitor compliance with EPL at the national level'.

<sup>801</sup> Kenneth Baynes, "Deliberative Democracy and the Limits of Liberalism", in *Discourse and Democracy: Essays on Habermas's Between Facts and Norms*, René von Schomberg and Kenneth Baynes (eds.), SUNY Press, 2002, p. 17.

individual interests. EC Law must, thus, assume a commitment with participants' individual autonomy and sovereignty.

Autonomy in the choice among market options has been proceduralized, by empowering consumers with adequate information. Nevertheless, insecurity concerning consumer choice is growing. The paradigm of the confident, informed, rational and average consumer wipes out the singularities of the concrete individual-consumer. Consumers display bounded rationality, bounded self-interest and bounded willpower. To exercise an effective and autonomous choice, consumers need to have the ability to choose among distinct options. The approach favoured by a substantial autonomy requires an intervention that provides the adequate context for a substantive rationality. Such an intervention, however, shall not impair individual freedom or legal certainty. Policies should be asymmetrical: they shall create benefits for those who are boundedly rational while imposing little or no harm on those who are to be considered fully rational. This way, the tension between autonomy and vulnerability is absorbed; the context for autarchy is set. This distinction provides the basis for a new standard in the assessment of the costs and benefits of regulatory options. As JOHN RAWLS wrote, 'persons are at liberty to do something when they are free from some constraints either to do it or not to do it'.<sup>802</sup>

Implications for the function of consumers' protection policy should be explored. I suggest that concepts such as the vulnerable and weak consumers should be taken as an open criterion, where *ad hoc* rationalizations should have a space to arise. As EVERSON and JOERGES once wrote, 'consumer law is surely dedicated to ensuring that the act of consumption is not only safe, but it is also one which is fair to consumer expectations'.<sup>803</sup>

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<sup>802</sup> John Rawls, *A Theory of Justice*, Harvard University Press, 1971. See also Max Stirner, *The Ego and Its Own*, Rebel Press, London, 1982, on a radical individual anarchy.

<sup>803</sup> EUI WP, 2006/47, p. 6. So far, the image prevailing in Community law does not meet the expectations of many consumers in the Union. See Walter Van Gerven, "Harmonization of Private Law: Do We Need It?" (2004) 41 *CMLRev* 510.

*Dimensions of property*

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“MCCCCXXI 19 Junij audito magnifici et potentes domini, domini priores et vexillifier iustitie, qualiter vir perspicacissimi intellectus et industriae et inventionis admirabilis Filippus Ser Brunelleschi, civis florentinus...”

Florentine patent of 1421<sup>804</sup>

## Chapter V – Conflict between a Property of a Coporeal Things and an Intellectual Property Right

### *Introductory note*

As it was mentioned in Chapter One, intellectual property is at the heart of the modern economy, which gives rise to a number of situations where a conflict might exist<sup>805</sup>

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<sup>804</sup> Apud Giulio Mandich, “Le privative industriali veneziane”, (1936) 34 *Rivista di Diritto Commerciale*, pp 513-514.

<sup>805</sup> I will not inquire specifically into the problem of compatibility between computer programs and hardware. The EU’s computer program Directive (Council Directive 91/250/EEC, of 14 May 1991 on the legal protection of computer programs, OJ 1991 L 142/22 and the recent Directive 2009/24/EC of the European Parliament and of the Council, of 23 April 2009, OJ 2009 L111/16) harmonizes EC copyright protection. Computer programs are protected by copyright if they are ‘original’. There is no conflict between properties when goods infringe an intellectual property right. I am referring, first, to counterfeit goods, namely goods, including the packaging thereof, bearing without authorization a trade mark which is identical to the trade mark validly registered in respect of the same type of goods, or which cannot be distinguished in its essential aspects from such trade mark, and which thereby infringes the rights of the holder of the trade mark in question under Community law or the law of the Member State where the application for action by the customs authorities is made, any trade mark symbol (logo, label, sticker, brochure, instructions for use, guarantee document) whether presented separately or not, in the same circumstances as the goods referred to in the first indent, or packaging materials bearing the trade marks of counterfeit goods, presented separately in the same circumstances as the goods referred to in the first indent. Secondly, I am referring to pirated goods, namely, goods which are or embody copies made without the consent of the holder of the copyright or neighboring rights, or of the holder of a design right, whether registered under national law or not, or of a person duly authorized by the holder in the country of production, where the making of those copies infringes the right in question under Community law or the law of the Member State in which the application for action by the customs authorities is made. See Regulation (EC) No 3295/94 (OJ 1994 L 341/8) laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods as amended by Council Regulation (EC) No 241/1999 of 25 January 1999 (OJ 1999 L 27/1). Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of

between property of a corporeal thing and an intellectual property right.<sup>806</sup> The fact that intellectual and physical property should be treated identically in the law raises the fundamental question of how to achieve the proper balance between the provision of enabling conditions and the imposing of limits to distinct properties. That will be the next object of my inquiry.

The market is a communicative framework, and the market system, by providing the context for the possible transformation of individual preferences, constitutes itself as a method of social coordination. The European market is built on pragmatic considerations. On one hand, it provides the enabling structural conditions to the flow of communicative actions among economic actors, who should have an equal and effective opportunity to make their own choices according to their own preferences. On the other hand, it provides the ensemble of conditions, *sc.* actionable claims that protect against unpermitted interventions. I will try to provide the adequate setting and background to that understanding.

A conflict of properties is particularly like to arise in the field of ownership of a motor vehicle. Ownership of a motor vehicle is often linked with consumption, when the acquirer is a private person, acting for purposes outside his trade or profession, and acquires the vehicle from a professional. In that situation, the acquisition might fall

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intellectual property rights (OJ 2004 L 157/45) set both provisional and precautionary measures (Article 9) and measures resulting from a decision on the merits of the case: corrective measures (Article 10), injunctions (Article 11) and alternative measures (Article 12). Alexander von Mülendahl, in “Enforcement of Intellectual Property Rights – Is Injunctive Relief Mandatory?”, (2007) 4 *IIC* 380 argues that the ECJ clearly favours a general rule which obliges the courts to grant injunctive relief unless there are circumstances specific to the case which would allow a conclusion that further infringements will not occur.

<sup>806</sup> In Continental usage, intellectual property is referred to the protection of works of authorship. I will use the expression intellectual property as it was adopted by the explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303/17): intellectual property covers not only literary and artistic property but also *inter alia* patent and trademark rights and associated rights. Such a scope has international acceptance (*v.g.* in the title of the WIPO and in the Agreement on Trade - Related Intellectual Property Rights including Trade in Counterfeit Goods (TRIPS), which forms part of the GATT round completed in April 1994). Intellectual property protects applications of ideas and information that are of commercial value. See William Cornish & David Llewelyn, *Intellectual Property*, 5<sup>th</sup> ed., Sweet & Maxwell, London, 2003, p. 6 (who notice that a characteristic shared by all types of intellectual property rights is that they are essentially negative rights), and Stephen L. Carter, “Does it Matter Whether Intellectual Property is Property?”, (1992) 68 *Chi.-Kent L. R.* 715-723.

under the Directive on consumer goods and guarantees. But, from initial shopping until the end of the vehicle's life, the owner of the car might need to replace damaged or worn out spare parts of the car, such as fenders or exhaust pipes. Motor vehicles are consumer durables which at both regular and irregular intervals require expert maintenance and repair. Once the vehicle is in operation, the owner might need to find parts that are compatible with the car. I am referring to spare parts, that can be either mechanical or aesthetic, if they allow the principal product to perform its normal function or help to create the appearance of the principal product.<sup>807</sup>

Given the size of owners' expenditure on repair and maintenance, it is important to ensure that they can choose between different alternatives and be provided with good quality services which thereby contribute to vehicle safety and reliability. And at this point, the distinct interests of the different owners might clash. On one hand, there is the interest of the owner of the car, the corporeal thing, in buying safe but cheaper products. On the other hand, there is the principal producer who claims to be the intellectual property holder of a design right that encompasses spare parts,<sup>808</sup> and claims the control of the distribution through authorized car dealers and repair shops. If the spare part is protected by an intellectual property right, then the supply is limited to parts produced by the right-holder, or which are produced with his permission. The exclusive right

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<sup>807</sup> I am following Jens Schovsbo, "As If Made for Each Other - Intellectual Property Rights and Protection of Compatible Products", (1998) 5 *IIC* 531. Spare parts should be distinguished from accessories, such as a GSM hand-free installation, a radio set or a CD player, a steering wheel. Similarly, an alarm system installed in a car after the vehicle has left the vehicle manufacturer's production line has to be considered as an accessory. The relationship between a principal product and accessories is not so close as between a principal product and a spare part: the latter often fit several models or types of principal products. Accessories can be necessary for the normal use of the principal product, and are often meant to be consumed when the owner uses the principal product. However, accessories may also increase or expand the ways in which the owner may use the principal product, e.g. a telephoto lens. The increase can also be of a more personal character, e.g. the sporty steering wheel of a car. The producers of accessories are often different from the principal producers. In many cases accessories are marketed without competition from the producer of the principal product. Spare parts should also be distinguished from parts that are necessary to ensure a connection to another part or service, such as receivers and decoders. The part (e.g. a receiver) must 'understand' the special codes, the so-called 'interfaces' of a television programme, for example, which may be broadcast within a cable television network. The receiver has no value in itself. The precise nature of the interface is often fixed as a standard. A receiver is only compatible with the network if it conforms to the standard.

<sup>808</sup> The protection of spare parts gave rise to many discussions. For a general overview, see Friedrich-Karl Beier, "Protection for Spare Parts in the Proposals for a European Design Law", (1994) 6 *IIC* 840-879.

restricts competition by creating an artificial or legal monopoly. The owner of the car must buy a spare part that is exactly the same as the one whose design the law protects; the design right therefore requires him to buy the spare part from the original or an authorized producer.

As is well known, the Court had to the occasion to address such a situation in *CICRA v Renault*,<sup>809</sup> and *Volvo*.<sup>810</sup> The Court decided these cases, though, purely under the field of competition law, that is within the relationship between suppliers of motor vehicles and spare parts in their contractual and day-to-day business relationship with other businesses.

In the former, *CICRA* was a trade association comprising a number of Italian undertakings which manufactured and marketed bodywork spare parts for motor vehicles, and *Maxicar*, a member of *CICRA*, asked an Italian Court to declare that the protective rights in respect of ornamental designs of which Renault was the proprietor were void, in so far as they relate to spare parts for the bodywork of cars, such parts having no intrinsic aesthetic value of their own, and, on the other, a declaration that the manufacture and marketing of non-original spare parts must not constitute an offence under the national legislation on unfair competition. By way of counterclaim, Renault had sought a declaration that the plaintiff companies had infringed its protective rights. The Italian Court considered, first, that protective rights in respect of an ornamental design for the car bodywork parts were in conformity with Italian law. However, it considered that the exercise of the exclusive rights deriving therefrom appeared, in this instance, to be contrary to the provisions of the Treaty, and asked for a preliminary ruling. The Court ruled that,

the authority of a proprietor of a protective right in respect of an ornamental model to oppose the manufacture by third parties, for the purposes of sale on the internal market or export, of products incorporating the design or to prevent the import of such products

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<sup>809</sup> Case 53/87, *Consorzio italiano della componentistica di ricambio per autoveicoli and Maxicar v Régie nationale des usines Renault* [1988] ECR 6039.

<sup>810</sup> Case 238/87, *AB Volvo v Erik Veng (UK) Ltd* [1988] ECR 6211.

manufactured without its consent in other Member States constitutes the substance of his exclusive right.

An exclusive right was not considered, in itself, an abusive method of eliminating competition. Nevertheless, it might be prohibited, if

it gives rise to certain abusive conduct on the part of an undertaking occupying a dominant position such as an arbitrary refusal to deliver spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model remain in circulation, provided that such conduct is liable to affect trade between Member States.

In the latter, *AB Volvo*, the proprietor in the United Kingdom of a registered design for the front wings of Volvo series 200 cars, had instituted proceedings against *Veng* before the High Court for infringement of its sole and exclusive rights. *Veng* imported the same body panels, manufactured without authority from Volvo, and marketed them in the United Kingdom. The High Court referred three questions to the Court under Article 177 of the EEC Treaty for a preliminary ruling on the interpretation of Article 86 of the Treaty with a view to determining whether the refusal by the proprietor of a registered design in respect of body panels for motor vehicles to grant a licence for the import and sale of such panels may, in certain circumstances, be regarded as an abuse of a dominant position. The Court considered that,

an obligation imposed upon the proprietor of a protected design to grant to third parties, even in return for a reasonable royalty, a licence for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right, and that a refusal to grant such a licence cannot in itself constitute an abuse of a dominant position.<sup>811</sup>

Further, it recalled that,

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<sup>811</sup> Para 8.



the exercise of an exclusive right by the proprietor of a registered design in respect of car body panels may be prohibited by Article 86 if it involves, on the part of an undertaking holding a dominant position, certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation, provided that such conduct is liable to affect trade between Member States.

Much debate was provoked by these decisions, much of it due to the negligible attitude of the Court towards consumers. In fact, although independent repairers claimed to provide spare parts at a lower price. Nevertheless, the Court did not take it into consideration.

From the principal producers' point of view, spare parts involve special costs. First, costs relating to storage, since they must maintain a large inventory of spare parts, for both new and older models. The principal producer has a legal obligation to sell the vehicle free from defects in material while it was being made, and to arrange for the repair to put any defect right free of charge.<sup>812</sup>

Moreover, the ability of the principal producer to repair and maintain his product ('after-sales service') is important for maintaining customer goodwill. Producers of non-original parts are not concerned with customer goodwill. These producers can therefore make only the most profitable parts, those in demand owing to their character ('crash parts') or their distribution (current models). This enables them to keep their costs below those of the principal producer. Further, the producer of non-original parts is also a free rider. He benefits from the goodwill the public associates with the principal product, which the principal producer has developed by investing in service (both pre-

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<sup>812</sup> The warranty does not cover damages if the owner fails to service or maintain the vehicle according to the instructions of the producer (normally defined in the owner's manual). The same applies if failures are caused by any modification, bodywork alterations, or fitting of an accessory to the car.

and post-sales), advertising, and so on.<sup>813</sup> A special form of parasitic behavior is related to the quality of the spare part. If the quality of the non-original spare is poor, this may damage the goodwill of the principal product. Claims regarding quality are often central to the principal producer's defence of the high prices of its original parts.

Principal producers also usually claim that the development of the original parts requires large investments in research and development and that the quality of the part is often hidden in the selection of the materials or in tests. According to this argument, the higher price of original parts merely reflects higher costs of production.<sup>814</sup>

The Directive on the legal protection of designs,<sup>815</sup> adopted ten years after those decisions, in 1998, failed to harmonize completely the Member States' laws on spare parts. The issue was so controversial that agreement on a common solution could not be reached. Article 14 of the Directive requires Member States to retain, for the time being, 'their existing legal provisions relating to the use of the design of a component part used for the purpose of the repair of a complex product so as to restore its original appearance' and 'to introduce changes to those provisions only if the purpose is to liberalize the market for such parts'.<sup>816</sup> The Directive set out that a component part of a complex product may be registered as a design if, after being incorporated into the complex product (a product which is composed of multiple components which can be replaced permitting disassembly and reassembly of the product), it remains visible during normal use of the latter (Article 3(3)). However, under Article 7(2) no design

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<sup>813</sup> I am following Inge Govaere, *The Use and Abuse of Intellectual Property Rights in E.C. Law*, Sweet & Maxwell, 1996, p. 221.

<sup>814</sup> See Jens Schovsbo, "As If Made for Each Other - Intellectual Property Rights and Protection of Compatible Products", (1998) 5 *IIC* pp 517-518.

<sup>815</sup> Directive 98/71/EC on the legal protection of designs, OJ 1998 L 289/28. For the drafting history of the Directive, and the proposed solutions for the spare parts issue (namely, the three-year scheme and the compulsory licensing scheme), see Uma Suthersanen, *Design Law in Europe*, Sweet & Maxwell, London, 2000, pp 98-101.

<sup>816</sup> The Designs Directive does not oblige national legislatures to acknowledge that parts of complex products are in principle capable of design protection, according to Recital 19. See Annette Kur, "'Freeze Plus' Melts the Ice - Observations on the European Design Directive", (1999) 6 *IIC* 623.

may subsist ‘in features of appearance of a product which must necessarily be reproduced in their exact form and dimensions in order to permit the product in which the design is incorporated or to which it is applied to be mechanically connected to or placed in, around or against another product so that either product may perform its function’ (the ‘must fit’ exception). The effect of these provisions is that visible spare parts are protectable unless they are caught by the ‘must fit’ exception, which is concerned with functional, rather than aesthetic necessity.<sup>817</sup> The owner of a car has, thus, to buy those spare parts from the original or an authorized producer. In Regulation 6/2002, on Community designs,<sup>818</sup> corresponding provisions are contained in Articles 4(2) and 8(2).

Motor vehicle and spare parts manufacturers distribute their products through networks of distributors (dealers), and, together with other undertakings, operate networks of authorized repairers. Such a distribution or repair network consists of a bundle of similar vertical agreements between the manufacturer and the individual distributors or repairers. Regulation 1400/2002<sup>819</sup> sets the distinction between original spare parts and spare parts of matching quality. Original spare parts are those which are of the same quality as the components used for the assembly of a motor vehicle and which are

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<sup>817</sup> On 14 September 2004, the Commission published a proposal (Proposal for a Directive of the European Parliament and of the Council amending Directive 98/71/EC on the legal protection of designs SEC (2004) 1097 COM/2004/0582 final) to amend the Design Directive (98/71/EC) by introducing a repairs clause. According to the proposal, must-match parts of complex products would remain eligible for protection under Article 2, but their manufacture and distribution for repair purposes by others would be admissible, provided that the conditions set out in Article 14 were fulfilled.

<sup>818</sup> OJ 2002, L 3/1. For a general overview, see Alexander Bulling, Angelika Langöhrig, and Tillman Hellwig, “The Community Design: A New Right of Design Protection for the European Community”, (2004) 86 *J. Pat & Trademark Off. Soc’y* 111-133.

<sup>819</sup> Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ 2002 L 203/30. According to Jules Stuyck, “EC Competition Law after Modernisation: More than Ever in the Interest of Consumers”, (2005) 28 *Journal of Consumer Policy* 15, the new block exemption is an example of legislation which has been elaborated after extensive lobbying by not only the industry but also consumers. That the consumer’s voice was effectively heard seems to be the result of two important factors: the conflicting interests within the industry (manufacturers and dealers) and the high symbolic value of cars which induces European policy makers time and again to regulatory hyper-activism regarding car prices and competition in the car market. This may show that the consumer matters as an immediate beneficiary of competition policy or other policies when the political implications are sufficiently apparent.

manufactured according to the specifications and production standards provided by the vehicle manufacturer for the production of components or spare parts for the motor vehicle in question. This includes spare parts which are manufactured on the same production line as these components. It is presumed, unless the contrary is proven, that parts constitute original spare parts if the part manufacturer certifies that the parts match the quality of the components used for the assembly of the vehicle in question and have been manufactured according to the specifications and production standards of the vehicle manufacturer. Spare parts of matching quality means exclusively spare parts made by any undertaking which can certify at any moment that the parts in question match the quality of the components which are or were used for the assembly of the motor vehicles in question.<sup>820</sup>

The example above illustrates how the interest of the intellectual property holder and the interest of the owner are often in conflict, although intellectual and physical property should be treated identically in the law.<sup>821</sup> How EC Law is to solve the conflict touches upon the question of property as a fundamental right (that I have dealt with in Chapter 2), and the protection of the holder of a property right over a thing. These two strands of my research will be tied together to come to a coherent vision, where intellectual property rights will be drafted more tightly. Restrictions on intellectual property rights have already been grounded on instruments for the achievement of a European market, namely free movement and free competition. The Court of Justice, particularly, has subordinated the exercise of intellectual property rights to the rules on free movement and to the rules on competition. Consumers, thus, will benefit indirectly from the economies of scale of a single market undivided by legal barriers to inter-state trade afforded by national laws for the protection of intellectual property and from the restrictions on the exclusivity of intellectual property rights.

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<sup>820</sup> See 23-26. For comparison, see Regulation 123/85 (Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, OJ 1985 L 16/24), 6-8, and Regulation 1475/95 (Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements OJ 1995 L 145/25) 6-8.

<sup>821</sup> See Frank H. Easterbrook, "Intellectual Property is Still Property?", (1990) 13 *Harv. J. L. & Pub. Pol'y* 118.

In the next chapter, I will, firstly, recall that despite some EC harmonization measures and international conventions concerning intellectual property rights, it is still for the national authority to regulate the rights and obligations of the intellectual property right-owner. Secondly, I will describe how the ECJ built up the restrictions on intellectual property rights, both under the free movement of goods and competition rules, and how they prove to be insufficient to solve the problem at stake – the conflict between properties. Finally, I will turn to the institutive moment of an intellectual property right and propose that lawmakers shall determine the scope of rights before displaying regulatory decisions, in order to avoid normative inconsistencies. The grant of an intellectual property right cannot abridge or set aside entirely the interests of the owner of the corporeal thing.<sup>822</sup> This is a matter for legislation, rather than for adjudication.<sup>823</sup> Normative consistency must be obtained from the proper agency of property rights, for an appropriate balance of all relevant interests is needed. The intellectual property right shall only take precedence in so far as, otherwise, the typical owner's prerogatives would be curtailed.<sup>824</sup>

## **1. The grant of intellectual property rights**

Intellectual property rights are territorial rights. Despite some EC harmonization measures and international conventions concerning intellectual property rights, it is still for the national law to regulate the rights and obligations of the intellectual property right owner.

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<sup>822</sup> According to William Cornish, *Intellectual Property – Omnipresent, Distracting, Irrelevant?*, Clarendon Law Lectures, OUP, 2004, p. 114, '[i]n searching proportion, one is claiming that there will be countervailing interest – of new competitors as well as of consumers – which need to be brought into account in shaping the reach of legal rights. It is vital to resist the sanctimony of property language, let alone higher, absolutist ideas, when it is deployed in order to claim that there is little or no room for mediating such conflicts'.

<sup>823</sup> I am referring to legislation and adjudication as methods of decision. See Duncan Kennedy, *A Critique of Adjudication*, Harvard University Press, 1997, pp 26 ff, on the debate of normative theory.

<sup>824</sup> Herman Cohen Jehoram, "Prohibition of Parallel Imports through Intellectual Property Rights", (1996) 5 *IIC* 498.

The Court has not always inquired where the grant of an intellectual property right was justified. For instance, *Keurkoop v Nancy Kean Gifts*<sup>825</sup> was concerned with the Uniform Benelux Law on Designs, that would give an exclusive right to the first person to file a design, without persons other than the author or those claiming under him being entitled, in order to challenge such exclusive right or defend an action for an injunction brought by the holder of the right, to contend that the person filing the design is not the author of it, the person who commissioned the design from him or his employee. According to Article 3, the exclusive right to a design is acquired by the first person to file it without it being necessary to inquire whether that person is also the author of the design or a person entitled under him. The reason for the rule was to be found in the function of the right to design in economic life and in a concern for simplicity and efficacy.<sup>826</sup> Furthermore, by virtue of Article 15 of the Uniform Benelux Law on Designs, any person or body concerned, including the public prosecutor's department, could claim that the rights attached to the registration are null and void by contesting, in particular, the novelty of the product in the territory concerned. They could not, on the other hand, allege that the person filing the design was not the author, the person commissioning him or his employer. The Court decided, first, that such legislation constituted legislation for the protection of industrial and commercial property for the purposes of Article 36 of the Treaty. And, second, that, 'in the present State of its development Community law does not prevent the adoption of national provisions of the kind contained in Uniform Benelux Law'.<sup>827</sup> Similarly, in *Magill*,<sup>828</sup> the Court accepted the existence of a copyright in the programme listings produced as part of the

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<sup>825</sup> Case 144/81, [1982] ECR 2853.

<sup>826</sup> By virtue of the rules laid down in Article 5, the author of the design could, during a period of five years, claim the right to its registration and could at any time claim to have the registration annulled.

<sup>827</sup> For criticism, see David Keeling, "Intellectual Property Rights and the Free Movement of Goods in the European Union", (1993) 20 *Brook. J. Int'l L.* Pp 132-133. Still in the field of design rights, in *CICRA v Renault*, and in *Volvo v. Veng*, the Court did not examine the issue of the objective justification of protective rights in respect of ornamental designs for car bodywork components.

<sup>828</sup> Joined Cases C-241 and 242/91, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* [1995] ECR 743. William Cornish & David Llewelyn, *Intellectual Property*, 5<sup>th</sup> ed., Sweet & Maxwell, London, 2003, p. 755.

activity of broadcasting, and afforded to RTE and ITP an exclusive right to publish their weekly television programme listings.

On the contrary, in *Industrie Diensten Groepe v Beele*<sup>829</sup> the Court required justification for a national rule against slavish information. The Court decided that the rules of the Treaty did not prevent a rule of national law which applies to domestic and imported goods alike, from allowing a trader, who for some considerable time in the Member State concerned has marketed a product which differs from similar products, to obtain an injunction against another trader restraining him from continuing to market in that Member State a product coming from another Member State in which it is lawfully marketed but which for no compelling reason is almost identical to the first-mentioned product and thereby needlessly causes confusion between the two products. In *Thetford v Fiamma*,<sup>830</sup> the Court enquired whether the contested rule of United Kingdom patent law (the so-called ‘50-year rule’) could constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States, within the meaning of the second sentence of Article 30. The Court also required justification for a designation of origin<sup>831</sup> and for a national rule on video rental rights.<sup>832</sup>

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<sup>829</sup> Case 6/81, *BV Industrie Diensten Groep v J.A. Beele Handelmaatschappij BV*. [1982] ECR 707.

<sup>830</sup> Case 35/87 [1988] ECR 3585. The Court ruled that ‘pursuant to Article 36 restrictions on imports or exports justified on grounds of the protection of industrial and commercial property are permissible provided that they do not constitute a means of arbitrary discrimination or a disguised restriction on trade between the Member States. In that regard it need merely be stated, in the light of the documents before the Court, that the exclusive right granted by the national legislation to the proprietors of protective rights in respect of ornamental models for car bodywork components may be enforced, without distinction, both against those persons who manufacture spare parts within national territory and against those who import them from other Member States, and that such legislation is not intended to favour national products at the expense of products originating in other Member States.’ (para 12)

<sup>831</sup> Case 12/74, *Commission v. Germany* [1975] ECR 181, para 16: ‘they [Member States] are nevertheless prohibited by the second sentence of Article 36 from introducing new measures of an arbitrary and unjustified nature whose effects are, for this reason, equivalent to quantitative restrictions. This is precisely the case where a national legislature grants the protection provided for indications of origine on appellation which, at the time when such protection is granted, are merely generic in nature’; and Case C-3/91, *Exportur SA v LOR SA and Confiserie du Tech SA* [1992] ECR 5529: ‘Articles 30 and 36 of the Treaty do not preclude the application of rules laid down by a bilateral convention between Member States on the protection of indications of provenance and designations of origin, such as the Franco-Spanish Convention of 27 June 1973, provided that the protected names have not, either at the time of the entry into force of that Convention or subsequently, become generic in the country of origin.’

A direct consequence of the competence of Member States in granting property rights is that the nucleus - *specific subject-matter* - of the exclusive right recognized by national law must remain intact and cannot be curtailed by the activity of the judicial and legislative organs of the Community.<sup>833</sup>

The criterion of the ‘specific subject-matter’ was drawn by the Court in order to assess restrictions on intellectual property rights. It had already appeared in *Deutsche Grammophon v Metro*,<sup>834</sup> but it was not until 1974 that the Court explained what it meant by ‘specific subject-matter’, in *Centrafarm v Sterling Drug*<sup>835</sup> and *Centrafarm v Winthrop*.<sup>836</sup>

In *Centrafarm v Sterling Drug*, concerned with patents, the Court ruled that,

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<sup>832</sup> Case 158/86, *Warner Brothers and Metronome v Christiansen*, [1988] ECR 2605: ‘consideration must be given to the emergence, demonstrated by the Commission, of a specific market for the hiring-out of such recordings, as distinct from their sale. The existence of that market was made possible by various factors such as the improvement of manufacturing methods for video-cassettes which increased their strength and life in use, the growing awareness amongst viewers that they watch only occasionally the video-cassettes which they have bought and, lastly, their relatively high purchase price. The market for the hiring-out of video-cassettes reaches a wider public than the market for their sale and, at present, offers great potential as a source of revenue for makers of films. (...) However, it is apparent that, by authorizing the collection of royalties only on sales to private individuals and to persons hiring out video-cassettes, it is impossible to guarantee to makers of films a remuneration which reflects the number of occasions on which the video-cassettes are actually hired out and which secures for them a satisfactory share of the rental market. That explains why, as the Commission points out in its observations, certain national laws have recently provided specific protection of the right to hire out video-cassettes. (...) Laws of that kind are therefore clearly justified on grounds of the protection of industrial and commercial property pursuant to Article 36 of the Treaty’ (see paras. 14-16).

<sup>833</sup> See David T. Keeling, *Intellectual Property Rights in EU Law*, OUP, 2003, p. 63, explains that the words ‘specific subject-matter’ are intended to translate the French ‘objet spécifique’. In this context the word objet in French appears to have a double meaning. On the one hand, it has a purely descriptive meaning: it describes the core of essential rights granted to the proprietor of a patent, trademark or some other form of intellectual property. But it also has a meaning akin to the English word ‘objective’ or ‘purpose’: it refers to the policy aims pursued by the legislation which created the intellectual property right. Thus the expression ‘objet spécifique’ describes what rights are granted to the owner of intellectual property and it indicates why those rights are granted. In the English translation only the first meaning survives; the second meaning is entirely lost.

<sup>834</sup> Para 11: ‘(...) Article 30 [36] only admits derogations from that freedom to the extent to which they are justified for the purpose of safeguarding rights which constitute the specific subject-matter of such property’.

<sup>835</sup> Case 15/74, [1974] ECR 1147, paras. 8 and 9.

<sup>836</sup> Case 16/74, [1974] ECR I 183, para 8.



[i]n relation to patents, the specific subject matter of the industrial property is the guarantee that the patentee, to reward the creative effort of the inventor, has the exclusive right to use an invention with a view to manufacturing industrial products and putting them into circulation for the first time, either directly or by the grant of licences to third parties, as well the right to oppose infringements.

In *Merck v Stephar and Exler*<sup>837</sup> the Court set out that, ‘the substance of a patent lies essentially in according the inventor an exclusive right of first placing the product on the market.’<sup>838</sup>

And, in *Generics*,<sup>839</sup> the Court ruled that the specific subject-matter of that property includes, in particular, ‘allowing the holder a monopoly of first exploitation of his product’. It decided that,

the right of the proprietor of a patent in respect of a manufacturing process for a medicinal product to oppose the use by another person of samples of medicinal products manufactured in accordance with that process for the purpose of obtaining a marketing authorization falls within the specific subject-matter of the patent right in so far as such samples have been used without the direct or indirect consent of the patentee.<sup>840</sup>

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<sup>837</sup> Case 187/80, *Merck v Stephar and Exler* [1981] ECR 2063, para 10.

<sup>838</sup> For a patentee, the patent is the chance to cash in upon the first marketing of products under monopolistic conditions. When products are circulated in a country where patent protection has not been obtained, such monopolistic conditions are absent. On the other hand, if the patentee decides to cash in on his patent not by marketing patented products himself or with his consent, but rather to sell the patent to someone else who subsequently markets the products, then the patentee has obtained his reward and should not be able to object to parallel importation of products that were marketed without his consent under a patent he previously owned and sold. See Christopher Heath, “Parallel Imports and International Trade”, (1997) 5 *IIC* 627.

<sup>839</sup> Case C-316/95, *Generics BV v Smith Kline & French Laboratories Ltd*, [1997] ECR I – 3929.

<sup>840</sup> In that connection, moreover, it may be noted that both Article 25 of the Community Patent Convention (OJ 1989 L 401, p. 10) and Article 28 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (‘TRIPS’, OJ 1994 L 336, p. 214) confer the right to prevent third parties not having the consent of the proprietor of the patent from, *inter alia*, using the product obtained directly by the process which is the subject-matter of the patent. In the present case, to preclude application of a national rule providing for the right indicated above would in fact allow an encroachment on the monopoly of first exploitation of the product as referred to in the preceding paragraph. See para 20.

As regards trade marks, in *Centrafarm v Winthrop*<sup>841</sup> the Court ruled that, in relation to trade marks,

the specific subject-matter of the industrial property is the guarantee that the owner of the trade mark has the exclusive right to use trade mark, for the purpose of putting products protected by the trade mark into circulation for the first time, and is therefore intended to protect him against competitors wishing to take advantage of the status and reputation of the trade mark by selling products illegally bearing that trade mark.

The damage done to the reputation of a trade mark may, in principle, be a legitimate reason, within the meaning of Article 7(2) of the Directive, allowing the proprietor to oppose further commercialization of goods which have been put on the market in the Community by him or with his consent. In *Bristol-Myers Squibb*, the Court held as follows:<sup>842</sup>

Even if the person who carried out the repackaging is indicated on the packaging of the product, there remains the possibility that the reputation of the trade mark, and thus of its owner, may nevertheless suffer from an inappropriate presentation of the repackaged product. In such a case, the trade mark owner has a legitimate interest, related to the specific subject-matter of the trade mark right, in being able to oppose the marketing of the product. In assessing whether the presentation of the repackaged product is liable to

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<sup>841</sup> Case 16/74, [1974] *ECR* 1183, para 8. For criticism, with respect to under what circumstances the distribution of repackaged and rebranded genuine goods constitutes trademark infringement, see Friedrich-Karl Beier, “The Doctrine of Exhaustion in EEC Trademark Law - Scope and Limits”, (1979) 1 *IIC* 20-51. For a general overview, see Ilanah Simon, “How Does ‘Essential Function’ Doctrine Drive European Trade Mark Law? - What Is the Essential Function of a Trade Mark?”, (2005) 4 *IIC* 401-420. See also Case C-349/95, *F. Loendersloot Internationale Expeditie v George Ballantine & Son Ltd and Others*, [1997] *ECR* I- 6227, para 22.

<sup>842</sup> See also Case C-337/95, *Christian Dior v Evora*, [1997] I- 6013, para 43; Case C-115/02, *Administration des douanes et droits indirects v Rioglass SA and Transremar SL*, [2003] *ECR* I-2705, para 25; and Case C-348/04, *Boehringer Ingelheim KG and Others v Swingward Ltd and Dowelhurst Ltd*, [2007] *ECR* I-3391. In Case C-143/00, *Boehringer Ingelheim and Others*, [2002] *ECR* I – 3759, the Court ruled: ‘the change brought about by any repackaging of a trade-marked pharmaceutical product - creating by its very nature the risk of interference with the original condition of the product - may be prohibited by the trade mark proprietor unless the repackaging is necessary in order to enable the marketing of the products imported in parallel and the legitimate interests of the proprietor are also safeguarded’ (para 34).

damage the reputation of the trade mark, account must be taken of the nature of the product and the market for which it is intended.<sup>843</sup>

The exclusive rights conferred by a trade mark are listed in Article 5 and 6 of Directive 2008/95/EC.<sup>844</sup> The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade: (a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered; (b) any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public (the likelihood of confusion includes the likelihood of association between the sign and the trade mark). Member States may also provide that the proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade any sign which is identical with, or similar to, the trade mark in relation to goods or services which are not similar to those for which the trade mark is registered, where the latter has a reputation in the Member State and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark. It may be prohibited, *e.g.*, affixing the sign to the goods or to the packaging thereof; offering the goods, or putting them on the market or stocking them for these purposes under that sign, or offering or supplying services thereunder; importing or exporting the goods under the sign; or using the sign on business papers and in advertising.

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<sup>843</sup> Para 828. See also Case C-349/95, *F. Loendersloot Internationale Expeditie v George Ballantine & Son Ltd and Others*, [1997] I- 6227, paras. 24-25.

<sup>844</sup> Directive 2008/95/EC, of the European Parliament and of the Council of 22 October 2008, to approximate the laws of the Member-States relating to trade marks, OJ 2008 L 299/25. Before, it was ruled by Directive 89/104/EEC, of 21 September 1988, OJ 1989 L40/01 (On it, see *inter alia*, Lutz G. Schmidt, “Definition of a Trade Mark by the European Trade Marks Regime - A Theoretical Exercise?”, (1999) 7 *IIC* 738-752) Similarly, Articles 9 to 12 of Regulation 207/2009, of 26 February 2009, on Community trade mark (repealing Regulation 40/94, of 20<sup>th</sup> December 1993). With respect to trade names, the Court ruled that the specific subject-matter is the protection of the proprietor against the risk of confusion. So, Articles 28 and 43 of the EC Treaty ‘do not preclude a provision of national law which prohibits, where there is a risk of confusion, the use of a trade name as the specific designation of an undertaking’. See case C-255/97, *Pfeiffer Großhandel GmbH v Löwa Warenhandel GmbH*, [1999] ECR I – 2835

The trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade, his own name or address; indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of the service, or other characteristics of goods or services, the trade mark where it is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts, provided he uses them in accordance with honest practices in industrial or commercial matters.

In respect of copyrights,<sup>845</sup> the Court came closer to an adequate definition of the specific subject-matter of copyright in *Warner Brothers and Metronome v Christiansen*,<sup>846</sup> where it stated, without using the concept ‘specific subject-matter’, that the two essential rights of the author, namely the exclusive right of performance and the exclusive right of reproduction, are not called in question by the rules of the Treaty. In *Phil Collins*,<sup>847</sup> the Court gave a complete definition of the specific subject-matter of copyright:

The specific subject-matter of those rights, as governed by national legislation, is to ensure the protection of the moral and economic rights of their holders. The protection of moral rights enables authors and performers, in particular, to object to any distortion, mutilation or other modification of a work which would be prejudicial to their honour or reputation. Copyright and related rights are also economic in nature, in that they confer

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<sup>845</sup> In *GEMA*, (Joined Cases 55/80 and 57/80, *Musik-Vertrieb membran v GEMA* [1981] ECR 147, paragraph 12), the Court had ruled that, ‘whilst the commercial exploitation of copyright is a source of remuneration for the owner, it also constitutes a form of control of marketing, exercisable by the owner, the copyright management societies and the grantees of licences. From this point of view, the commercial exploitation of copyright raises the same problems as does the commercial exploitation of any other industrial and commercial property right’ (para 21); and in *Deutsche Grammophon*, the Court decided that, ‘in principle the protection of the specific subject-matter of a copyright entitles the copyright-holder to reserve the exclusive right to distribute the protected work’ (para 13). Finally, in *Magill* (Joined Cases C-241 and 242/91, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* [1995] ECR 743), the Court ruled that ‘the exclusive right of reproduction forms part of the author’s right’.

<sup>846</sup> Case 158/86 [1988] ECR 2605.

<sup>847</sup> Joined cases C-92/92 and C-326/92, [1993] ECR I-5145.

the right to exploit commercially the marketing of the protected work, particularly in the form of licences granted in return for payment of royalties.<sup>848</sup>

The exclusive right to authorize or prohibit rental and lending, the right to remuneration, the right to authorize or prohibit the fixation of their performances (fixation right), the right to authorize or prohibit the direct or indirect reproduction, the right to authorize or prohibit broadcasting and communication to the public, and the distribution right are also mentioned in Council Directive 2006/115/CE.<sup>849</sup> The Directive on certain aspects of copyright and related rights in the information society refers to rights of reproduction, of communication to the public, of making available to the public other subject-matter, of distribution. And Directive 2001/84/EC enjoins that the resale right is for the benefit of the author of an original work of art. Computer programs (including their preparatory design material) are to be protected by Member States as literary works, by copyright. Articles 4 and 5 of the Directive on the legal protection of computer programs list the acts that the right-holder is entitled to do or to authorize.<sup>850</sup>

In respect of design law, only in *CICRA v Renault* and *Volvo v Veng*, did the Court dictate that the right of the proprietor of a design to prevent third parties from manufacturing, selling, or importing products incorporating the design was part of the ‘very subject-matter’ or ‘substance’ of the right. It was in *Maxicar* that the Court for the first time gave an express definition of the specific subject-matter of design rights - the authority of a proprietor of a protective right in respect of an ornamental model to oppose the manufacture by third parties, for the purpose of sale on the internal market or

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<sup>848</sup> See para 20.

<sup>849</sup> OJ 2006 L376/28.

<sup>850</sup> See Directive 2001/29/EC, of the European Parliament and of the Council of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society, OJ 2001 L167/10; Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001, on the resale right for the benefit of the author of an original work of art, OJ 2001 L 272/32; Directive 91/250/EEC, on the legal protection of computer programs, list the acts that the right-holder is entitled to do or to authorize, OJ 1991 L 122/42. Reto M. Hilty, “Intellectual Property and the European Community’s Internal Market Legislation - Copyright in the Internal Market”, (2004) 7 *IIC* 760-775 reflects upon whether the existing Directives reflects a correct weighting in view of today’s challenge to copyright and if a selective harmonization is an adequate form of legislation to establish the internal market in Europe.

export, of products incorporating the design, or to prevent the import of such products manufactured without its consent in other Member States.<sup>851</sup>

According to Article 12 of Directive 98/71/EC on the legal protection of designs,<sup>852</sup> the registration of a design ‘shall confer on its holder the exclusive right to use it and to prevent any third party not having his consent from using it. The afore-mentioned use shall cover, in particular, the making, offering, putting on the market, importing, exporting or using a product in which the design is incorporated or to which is applied, or stocking such a product for those purposes’. The same reading can be found in Article 19 of Regulation on Community Designs.<sup>853</sup>

To sum up, Article 295 imposes Community neutrality in respect of national property systems, that is, the system that determines for each object at any time which individuals have access, and for what purposes. The Court has always respected this competence, restricting its adjudication to the exercise of intellectual property rights (by opposition to the granting of those rights). Meanwhile, European legislation set the process of harmonization of national rules concerning the extent and the scope of protection of intellectual property rights.

It is within this framework that I have been sketching how the specific subject matter of various intellectual property rights came to be defined under European law. I will now turn to the restrictions that have been imposed.

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<sup>851</sup> Case C-23/99, *Commission v. French Republic*, [2000] ECR I – 7653. *In casu*, the Court had to determine whether the right of the proprietor of a protected design of spare parts to prevent third parties from putting in transit, without his consent, products incorporating that design also form part of the specific subject-matter of his right. See paras. 39 and 42.

<sup>852</sup> OJ 1998 L 289/28.

<sup>853</sup> Regulation 6/2002, on Community designs, OJ 2002, L 3/1. For a general overview, see Alexander Bulling, Angelika Langöhrig, and Tillman Hellwig, “The Community Design: A New Right of Design Protection for the European Community”, (2004) 86 *J. Pat & Trademark Off. Soc’y* 111-133.

## **2. Restrictions on intellectual property rights under EC Law**

Intellectual property rights are not absolute rights.<sup>854</sup> As already noted, there are few fields in which the decisions of the European Court may have brought about more changes and deeper interferences with national law than in the area of intellectual property.<sup>855</sup> I will analyse the restrictions grounded on free movement and on competition.

### **2.1. Intellectual property rights and the free movement of goods and services**

The conditions and scope of the protection granted to property rights are geographically limited to the territory of the Member State and may vary from one Member State to another. The unfettered exercise of intellectual property rights can restrict free trade between Member States. The principle of territoriality and the territorial protection of exclusive intellectual property rights conflict with the Community principle of free movement of goods and services. First, the holder of an intellectual property right may have objective reasons to avoid the importation of goods which he himself put on the market in another Member State, *v.g.*, due to the supply/demand *ratio*, the need to invest in publicity and the existence of intellectual property protection.<sup>856</sup> Second, the holder

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<sup>854</sup> As noted by Christophe Geiger, “‘Constitutionalising’ Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union”, (2006) 4 *IIC* 371- 406, more and more voices are arguing against a law that is considered to be ‘overprotective’ and the consequences of which on both the economy and on common welfare are regarded increasingly as rather negative. According to these opinions, we face a bizarre paradox: intellectual property rights, which are designed to stimulate intellectual activity and to provide incentives for creativity, are increasingly becoming obstacles to innovation and to social progress. The author claims that ‘constitutionalising’ intellectual property could represent an effective tool to check these tendencies of overprotection and to help this field of law recover the legitimacy that it seems to have lost. Such ‘constitutionalisation’ could indeed be helpful in identifying certain solutions for the interpretation and the adaptation of these laws and in guaranteeing an equitable balance of the interests involved in the near future.

<sup>855</sup> See Ulrich Loewenheim, “Intellectual Property before the European Court of Justice”, (1995) 6 *IIC* 829. For a survey of theories that European legal commentators had developed to define fields in which national laws regarding commercial and industrial property apply independently of the Treaty, see Roberto Casati “The ‘Exhaustion’ of Industrial Property Rights in the EEC: Exclusive Manufacturing and Sales Provisions in Patent and Know-How Licensing Agreements”, (1978) 17 *Colum. J. Transnat’l L.* 316.

<sup>856</sup> See Inge Govaere, *The Use and Abuse of Intellectual Property Rights in E.C. Law*, Sweet & Maxwell, 1996, p. 15.

of a intellectual property right may want to prohibit the importation of goods that have been lawfully marketed in another Member State by a third party, *e.g.*, if in that other state intellectual property protection could not be obtained, or had not been applied for, or had expired.

If the owner of the intellectual property right were allowed to invoke his right in order to oppose the importation and sale of goods which were lawfully on the market in another Member State, that would amount to a measure equivalent in effect to a quantitative restriction on imports with the meaning of Article 28 of the Treaty.<sup>857</sup> The compatibility of the measure with the EC law would, then, depend on whether it could be justified under Article 30 of the Treaty.<sup>858</sup>

It was for the ECJ to establish the proper balance between the requirements of free movement and the protection of intellectual property. First, to assess the balance between free movement of goods and intellectual property rights, the ECJ developed two criteria: the dichotomy between the existence and the exercise of intellectual property rights and, the subject-matter of the right.

The ECJ has set up, first, the dichotomy between the existence and exercise of the right to establish the balance between the requirements of free movement and the protection of intellectual property. The existence of the right should be guaranteed by the Treaty, whether by Article 30 or by Article 295, but the exercise of the right might be limited by the prohibitions laid down in the Treaty.

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<sup>857</sup> In Case 78/70, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG*, [1971] ECR 487, the Court ruled: '[a]mongst the prohibition or restrictions on the free movement of goods which it concedes Article 36 refers to industrial and commercial property' (para 11).

<sup>858</sup> In *Hag II*, Case C-10/89, *SA CNL-SUCAL NV v HAG GF AG*, [1990] ECR I-3711, the Court ruled that: 'Articles 30 and 36 of the EEC Treaty do not preclude national legislation from allowing an undertaking which is the proprietor of a trade mark in a Member State to oppose the importation from another Member State of similar goods lawfully bearing in the latter State an identical trade mark or one which is liable to be confused with the protected mark, even if the mark under which the goods in dispute are imported originally belonged to a subsidiary of the undertaking which opposes the importation and was acquired by a third undertaking following the expropriation of that subsidiary'. See also René Joliet in collaboration with David T. Keeling, "Trade Mark Law and the Free Movement of Goods: The Overruling of the Judgment in Hag I", (1991) 3 *IIC* 303-318.



The distinction between existence and exercise dates back to *Consten and Grundig*:<sup>859</sup>

(...) Article 222 confines itself to stating that the ‘Treaty shall in no way prejudice the rules in Member States governing the system of property ownership’. The injunction contained in Article 3 of the operative part of the contested decision to refrain from using rights under national trade-mark law in order to set an obstacle in the way of parallel imports does not affect the grant of those rights but only limits their exercise to the extent necessary to give effect to the prohibition under Article 85(1).

Two notes shall be mentioned. Firstly, it should be noted that the Court did not use the term ‘existence’ in that judgment; instead it used the expression ‘grant’. It was not until *Parke Davis*<sup>860</sup> that the Court first spoke of the existence of the right. Secondly, the existence/exercise dichotomy was born in the context of a case which focused on the competition rules of the Treaty. Its applicability in the context of the rules on the free movement of goods was confirmed five years later in *Deutsche Grammophon v Metro*,<sup>861</sup> where the Court of Justice did not confine itself to answering the questions referred to by the national court but went on to examine the situation in the light of Articles 29 and 30 of the Treaty. In the course of establishing the principle of the exhaustion of rights, the Court observed that:

(...) it is nevertheless clear from that Article that, although the treaty does not affect the existence of rights recognized by the legislation of a Member State with regard to industrial and commercial property, the exercise of such rights may nevertheless fall within the prohibition laid down by the Treaty, although it permits prohibitions or restrictions on the free movement of products, which are justified for the purpose of protecting industrial and commercial property, Article 36 only admits derogations from

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<sup>859</sup> Joined Cases 56 and 58/64, [ESE] *ECR* 299, para 365.

<sup>860</sup> Case 24/67 [ESE] *ECR* 55.

<sup>861</sup> Case 78/70, [1971] *ECR* 487. Whereas the distinction was referred to, almost ritualistically, in virtually every judgment in the field between 1971 and 1982, the formula first used in paragraph 11 of *Deutsch Grammophon* does not occur in any judgment after *Coditel II*. See David T. Keeling, *Intellectual Property Rights in EU Law*, OUP, 2003, at 55.

that freedom to the extent to which they are justified for the purpose of safeguarding rights which constitute the specific subject-matter of such property.<sup>862</sup>

However, as pointed out earlier, the most useful element in the existence/exercise dichotomy is that it serves as a reminder that limitations imposed by Community law on the exercise of an intellectual property right must not destroy the substance of that right. In order to determine when the exercise of an intellectual property right is contrary to the Treaty provisions on the free movement of goods, a supplementary criterion was necessary. The Court adopted, then, the specific subject-matter of the right criterion, despite some inroads in the legitimate exercise<sup>863</sup> and the essential function criteria,<sup>864</sup>

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<sup>862</sup> Para 11.

<sup>863</sup> If the concept of specific subject-matter is not going to provide a general test for determining when the exercise of an intellectual property right is compatible with the free movement of goods, an alternative criterion must be sought. It seems that the ECJ, in Case *Keurkoop v Nancy Kean Gifts* proposed an alternative: ‘Article 36 is thus intended to emphasize that the reconciliation between the requirements of the free movement of goods and the respect to which industrial and commercial property rights are entitled must be achieved in such a way that protection is ensured for the legitimate exercise, in the form of prohibitions on imports which are ‘justified’ within the meaning of that article, of the rights conferred by national legislation, but is refused, on the other hand, in respect of any improper exercise of the same rights which is of such a nature as to maintain or establish artificial partitions within the common market. The exercise of industrial and commercial property rights conferred by national legislation must consequently be restricted as far as is necessary for that reconciliation’ (para 24). That passage was based largely on one that appeared in Case 119/75, [1976] ECR 1039, *Terrapin v Terranova*: ‘[o]n the other hand in the present state of Community Law an industrial or commercial property right legally acquired in a Member State may legally be used to prevent under the first sentence of Article 36 of the Treaty the import of products marketed under a name giving rise to confusion where the rights in question have been acquired by different and independent proprietors under different national laws. In such a case the principle of free movement of goods were to prevail over the protection given by the respective national laws, the specific objective of industrial and commercial property rights would be undermined. In the particular situation the requirements of the free movement of goods and the safeguarding of industrial and commercial property rights must be so reconciled that protection is ensured for the legitimate use of rights conferred by national laws, coming within the prohibitions on imports “justified” within the meaning of Article 36 of the Treaty, but denied on the hand in respect of any improper exercise of the same rights of such a nature as to maintain or effect artificial partitions within the common market’ (para 7). Ulrich Loewenheim, at that time, considered that Terranova decision had clarified the essential principles of the relationship between trademark law and Community law. See “Trademarks and European Community Law”, (1978) 5 *IIC* 427. The same passage was quoted approvingly by the Court of First Instance in the *Magill* judgments (see paras. 25, 52, and 54). On this decision, see Andreas Reindl, “The Magic of Magill: TV Program Guides as a Limit of Copyright Law?”, (1993) 1 *IIC* 60-82. The opposition between legitimate exercise of a right and improper or abusive exercise also appears in *EMI Electrola v Patricia Im-und Export* (Case 341/87, *Basset v SACEM* [1989] ECR 79, para 8). For criticism on this criterion, see Inge Govaere, *The Use and Abuse of Intellectual Property Rights in E.C. Law*, Sweet & Maxwell, 1996.

<sup>864</sup> In Case 62/79, *Coditel*, [1980] ECR 881 para 14 the Court ruled: ‘[t]hese facts are important in two regards. On the one hand, they highlight the fact that the right of a copyright owner and his assigns to require fees for any showing of a film is part of the essential function of copyright in this type of literary

in order to establish the proper balance between the requirements of free movement and the protection of intellectual property rights.

The question of the restrictions on property rights grounded on free movement of goods is strictly related to the exhaustion rights principle.<sup>865</sup> According to that principle the owner of an intellectual property right cannot rely on that right in order to prevent the further marketing of goods which he has placed on the market anywhere in the European Community. The principle of Community-wide exhaustion was implicit in the *Consten and Grundig* judgment<sup>866</sup> and was expressly established as a principle of Community-wide exhaustion on the basis of the Treaty provisions on the free movement of goods in *Deutsche Grammophon v Metro*.<sup>867</sup> It has, then, been assumed in secondary legislation concerning trade marks,<sup>868</sup> copyrights,<sup>869</sup> design rights,<sup>870</sup> topographies of semiconductor products,<sup>871</sup> plant variety rights.<sup>872</sup>

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and artistic work (...)' . And in *Magill* Cases, the Court decided that: 'the Court of First Instance took the view that, while it was plain that the exercise of the exclusive right to reproduce a protected work was not in itself an abuse, that did not apply when, in the light of the details of each individual case, it was apparent that that right was being exercised in such ways and circumstances as in fact to pursue an aim manifestly contrary to the objectives of Article 86. In that event, the Court of First Instance continued, the copyright was no longer being exercised in a manner which corresponded to its essential function, within the meaning of Article 36 of the Treaty, which was to protect the moral rights in the work and ensure a reward for the creative effort, while respecting the aims of, in particular, Article 86. From this the Court of First Instance concluded that the primacy of Community law, particularly as regards principles as fundamental as those of the free movement of goods and freedom of competition, prevailed over any use of a rule of national intellectual property law in a manner contrary to those principles (*ITP* judgment, paragraph 56).' (para 28).

<sup>865</sup> Theory of exhaustion is generally considered to be a creature of German law. The paternity of the exhaustion theory is ascribed to the German jurist Joseph Kohler. The word 'exhaustion' (*Erschöpfung* in German) seems, however, to have been first used by the German *Reichsgericht* in a number of judgments in the early years of the twentieth century. See, *inter alia*, David T. Keeling, *Intellectual Property Rights in EU Law*, OUP, 2003, p. 75.

<sup>866</sup> Joined Cases 56 and 58/64, [ESE] ECR 299, para 365.

<sup>867</sup> Case 78/70, [1971] ECR 487. See also Case C-337/95 *Parfums Christian Dior v Evora* [1997] ECR I-6013, paragraphs 37 and 38, and Case C-63/97 *BMW v Deenik* [1999] ECR I-905, para 57.

<sup>868</sup> Article 7 of Directive 2008/95/EC (and already in Directive 89/104/EEC) and Article 13 of Council Regulation 207/2009.

<sup>869</sup> Article 4(2) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society; Article 4 of Directive 91/250/EEC on computer programs.

It is assumed that disparity between national laws on intellectual property law may give rise to restrictions on intra-Community trade, and the exercise of these rights might contribute to artificial partitioning of the markets between Member States.<sup>873</sup> The Community exhaustion principle means that rights conferred to a property right-holder are exhausted in relation to goods which have been put on the market in the Community by the proprietor or with his consent.<sup>874</sup> The law considers it desirable to grant the

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<sup>870</sup> Article 21 of Regulation 6/2002, and Article 15 of Directive 98/71/EC.

<sup>871</sup> Article 5, n. 5, of Directive 87/54/EEC.

<sup>872</sup> Article 16 of Council Regulation 2100/94/EC, of 27 July 1994, on Community plant variety rights, OJ 1994 L 227/1.

<sup>873</sup> Oliver C. Brändel, “Misuse Under Community Law in the Exercise of National Industrial Property Rights (Art. 36 EEC Treaty)”, (1981) 3 *IIC* 313-314, claims that the term ‘artificial partitioning of markets’ is, at first, nothing more than a handy slogan suited to obscure the longing for a precise comprehension, called for under the rule of law, of facts constituting misuse. As long as Community law recognises national exclusive rights of territorial nature within the frame of their ‘specific subject matter,’ the exercise of any of these rights is capable of ‘partitioning’ the national markets of the Member States. Furthermore, any limitation of the natural freedom of action created by means of the legal system in an ‘artificial’ limitation. Therefore, these criteria - without further clarification - do not help in practice.

<sup>874</sup> The meaning of the expression ‘with his consent’ has been questioned to the Court several times. See Guido Westkamp, “Intellectual Property, Competition Rules, and the Emerging Internal Market: Some Thoughts on the European Exhaustion Doctrine”, (2007) 11 *Marq. Intell. Prop. L. Rev.* 299. Hanns Ullrich, “Patents and Know-How, Free Trade, Inter enterprise Cooperation and Competition Within the Internal European Market”, (1992) 5 *IIC* 592, noticed that, if the exhaustion rules do not apply to imports of products sold in the country of exportation on the basis of a compulsory licence, then this is not because the owner did not consent to such first sale - the compulsory licence substitutes the consent and makes the sale lawful - but disregarded because admitting such imports would preempt a public-policy decision which the importing state must be free to take by its own sovereign judgement. About the exhaustion effect on compulsory licenses, see Paul Demaret, “Industrial Property Rights, Compulsory Licences and the Free Movement of Goods under Community Law”, (1987) 2 *IIC* 161-191. In *Dubois & Fils*, (Case C-173/98, *Sebago Inc. and Ancienne Maison Dubois & Fils SA v G-B Unic SA*, [1999] *ECR* I-4103.), the Court was asked whether there is consent when ‘the trade-mark proprietor has consented to the marketing in the EEA of goods which are identical or similar to those in respect of which exhaustion is claimed or if, on the other hand, consent must relate to each individual item of the product in respect of which exhaustion is claimed’. In *Davidoff* (Joined cases C-414/99 to C-416/99), the Court ruled that consent may be implied ‘where it follows from facts and circumstances prior to, simultaneous with or subsequent to the placing of the goods on the market outside the European Economic Area which, in the view of the national court, unequivocally demonstrate that the proprietor has renounced his right to oppose placing of the goods on the market within the European Economic.’ With respect to the burden of proof, in case *Van Doren + Q* (Case C-244/00, *Van Doren + Q. GmbH v Lifestyle sports + sportswear Handelsgesellschaft mbH and Michael Orth*, [2003] *ECR* I-3501), the Court held that, ‘[a] rule of evidence according to which exhaustion of the trade mark right constitutes a plea in defence for a third party against whom the trade mark proprietor brings an action, so that the existence of the conditions for such exhaustion must, as a rule, be proved by the third party who relies on it, is consistent with Community law’. Nevertheless, ‘the requirements deriving from the protection of the free movement of goods enshrined, inter alia, in Articles 28 EC and 30 EC may mean that this rule of evidence needs to be

proprietor of an intellectual property right a monopoly position as a reward. However, it should be entitled to exploit his monopoly position once only.<sup>875</sup> The limitation on the exercise of the intellectual property holder's rights precludes the right-holder from continued control over the product in favour of the free movement of goods throughout the Community.<sup>876</sup>

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qualified. Accordingly, where a third party succeeds in establishing that there is a real risk of partitioning of national markets if he himself bears that burden of proof, particularly where the trade mark proprietor markets his products in the European Economic Area using an exclusive distribution system, it is for the proprietor of the trade mark to establish that the products were initially placed on the market outside the European Economic Area by him or with his consent. If such evidence is adduced, it is for the third party to prove the consent of the trade mark proprietor to subsequent marketing of the products in the European Economic Area'. Similarly in Case C-405/03, *Class International BV v Colgate-Palmolive Company and Others*, [2005] ECR 8735, pp 74-75. See Stefan Enchelmaier, "The Inexhaustible Question - Free Movement of Goods and Intellectual Property in the European Court of Justice's Case Law, 2002-2006", (2007) 4 IIC 462. In Case 341/87, *EMI Electrola v Patricia Im- und Export and Others* [1989] ECR 79, the Court assessed the situation where a previous consent had existed but the right has expired. The Court ruled that, "Articles 30 and 36 of the Treaty must be interpreted as not precluding the application of a Member State's legislation which allows a producer of sound recordings in that Member State to rely on the exclusive rights to reproduce and distribute certain musical works of which he is the owner in order to prohibit the sale, in the territory of that Member State, of sound recordings of the same musical works when those recordings are imported from another Member State in which they were lawfully marketed without the consent of the aforesaid owner or his licensee and in which the producer of those recordings had enjoyed protection which has in the mean time expired'. In case C-348/04, *Boehringer Ingelheim KG and Others v Swingward Ltd and Dowelhurst Ltd.*, [2007] ECR I-3391, the Court clarified that the stipulation, in a contract of sale concluded between the proprietor of the trade mark and an operator established in the EEA, of a prohibition on reselling in the EEA does not mean that there is no putting on the market in the EEA within the meaning of Article 7(1) of the Directive and thus does not preclude the exhaustion of the proprietor's exclusive rights in the event of resale in the EEA in breach of the prohibition.

<sup>875</sup> D. Perrott, "When is Exhaustion Exhausted? – Intellectual Property on the Global Scale", (1978) 12 *B.L.J.* 50. According to Meg Buckley, "Licensing Intellectual Property: Competition and Definitions of Abuse of a Dominant Position in the United States and the European Union (2003) *Brook. J. Int'l L.* 820, the doctrine of Community exhaustion illustrates the way in which EC law emphasizes the need for integration, instead of protecting investments and the incentive to innovate through the protection of intellectual property rights.

<sup>876</sup> See Leslie Gail Williams, "Aspects of Intellectual Property Law in the European Community", (1992) 16 *Hastings Int'l & Comp. L. Rev.* 528. See also Valentine Korah, "The Interface between Intellectual Property and Antitrust: the European Experience", (2001) 69 *Antitrust L.J.* 805, and Eleanor M. Fox, "Parallel Imports, The Intrabrand/Interbrand Competition and the Hidden Gap Between Intellectual Property Law and Antitrust", (2001) 25 *Fordham Int'l L. J.* 986, claims that EC rules on internal-market exhaustion and on parallel imports are *ad hoc* tools, dependent upon fortuities, by which governments can sometimes put a lid on price without calling the intervention price control.

Following HANNS ULLRICH:<sup>877</sup>

the Community exhaustion principle is not based on the fact that by putting the - protected or not protected - products on the market, the right owner 'consents' to free trade or otherwise relinquishes his right, but that in so doing he benefits from the advantages of the Common Market. Put more generally the principle is based on the rationale of the Common Market, which is to integrate national markets by a duty of Member States to admit all products to free circulation which are lawfully put into commerce somewhere in the Community unless the safeguard of an overriding public interest, such as those mentioned in Article 36 - i.e. the safeguard of well-functioning industrial property protection -, justifies an exception.

The arguments proffered against regional exhaustion are well-known.<sup>878</sup> International exhaustion is desirable from the point of view of promoting free trade and granting consumers access to cheaper goods. Consumers object to paying high prices for products they can buy from the parallel importer at a lower price.<sup>879</sup> International exhaustion regimes are certainly the most consistent with the goal of free trade because they seek to give consumers in all countries where demand exists equal access (or as close as possible) to goods, regardless of their origin country, and let the market decide on the price.<sup>880</sup> The resale of goods by parallel importers leads to increased intra-brand

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<sup>877</sup> Hanns Ullrich, "Patents and Know-How, Free Trade, Inter enterprise Cooperation and Competition Within the Internal European Market", (1992) 5 *IIC* 592. Irene Calboli, "Trademark Exhaustion in the European Union: Community-wide or International? The Saga Continues", (2002) 6 *Marq. Intell. Prop. L. Rev.* 47-90, nevertheless, claims that the Community is not totally opposed to international exhaustion.

<sup>878</sup> About the controversy under the TRIPS Agreement, see S. K. Verma, "Exhaustion of Intellectual Property Rights and Free Trade – Article 6 of the TRIPS Agreement", (1998) 5 *IIC* 534-567.

<sup>879</sup> See Ansgar Ohly, "Trade Marks and Parallel Importation - Recent Developments in European Law", (1999) 5 *IIC* 513, and David T. Keeling, *Intellectual Property Rights in EU Law*, OUP, 2003, p. 142. Against the application of exhaustion doctrine to pharmaceutical products, see Aoife Nic Lochainn, "Parallel Importing of Pharmaceuticals in the EU: a Case for Exceptional Treatment of Pharmaceuticals as Regards Application of Doctrine of Exhaustion of Intellectual Property Rights", (2005) 5 *U.C. Dublin L. Rev.* 103-130.

<sup>880</sup> Kimberley Reed, "Levi Strauss v. Tesco and E.U. Trademark Exhaustion: A Proposal for Change", (2002) 23 *Nw. J. Int'l L. & Bus.* 158. The author claims for the adoption of a hybrid system, similar to the United States. For economical considerations on international exhaustion, see Christopher B. Conley, "Parallel Imports: The Tired Debate of the Exhaustion of Intellectual Property Rights and Why the WTO Should Harmonize the Haphazard Laws of the International Community", (2007) *Tul. J. Int'l & Comp. L.*

and inter-brand competition throughout the world, which in turn leads to a reduction in consumer prices.<sup>881</sup> Manufacturers, on the other hand, point to various reasons why the price differential is justifiable and should be supported by a trade mark which prevents parallel importation internationally. They may have to invest more in order to launch and maintain a product in the higher-priced market; or it may be of different, superior quality there; or it may not be put on the less developed, cheaper market in the first place if parallel importation is the consequence: ideas of quality guarantee and investment protection underlie such pleas.<sup>882</sup>

The Court has already been asked if Community law precludes a Member State from retaining international exhaustion in its legislation. In *Silhouette*,<sup>883</sup> the exhaustion of a trade mark was at stake. Hartlauer and the Swedish Government claimed that Article 7 of Directive 89/104/EEC did not comprehensively resolve the question of exhaustion of rights conferred by the trade mark,<sup>884</sup> thus leaving it open to the Member States to adopt

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204. For a general overview, Margreth Barrett, "The United States' Doctrine of Exhaustion: Parallel Imports of Patented Goods", (2000) 27 *N. Ky. L. Rev.* 911-984.

<sup>881</sup> According to Beatriz Conde Gallego, "The Principle of Exhaustion of Rights and Its Implications for Competition Law", (2003) 5 *IIC* 484, developing countries might be inclined to adopt the international exhaustion rule, thereby opening their markets to cheaper products. However, for them it may be even more important that other industrialised countries recognise the international exhaustion principle, since this would necessarily have positive effects on their export opportunities.

<sup>882</sup> William Cornish & David Llewelyn, *Intellectual Property*, 5<sup>th</sup> ed., Sweet & Maxwell, London, 2003, p. 730.

<sup>883</sup> Case C-355/96, *Silhouette International Schmied GmbH & Co. KG v Hartlauer Handelsgesellschaft mbH*, [1998] *ECR* 4799. For criticism, see Lisa Harlander, "Exhaustion of Trademark Rights Beyond the European Union in Light of *Silhouette International Schmied v. Hartlauer Handelsgesellschaft*. Toward Stronger Protection of Trademark Rights and Eliminating the Gray Market", (1999) 28 *Ga. J. Int'l & Comp. L.* 267-292. The author claims that a policy of non-exhaustion after an international first-sale should only govern where a likelihood of confusion exists as to the source or quality of the imported merchandise. This solution would properly balance the interests of trademark law – protecting consumers against confusion and protecting the goodwill of businesses. Also Jochen Pagenberg, "The Exhaustion Principle and 'Silhouette' Case", (1999) 1 *IIC* 24 ff.

<sup>884</sup> On the influence of the Trade Mark Directive in the significance of trade mark exhaustion, see Florian Albert and Christopher Heath, "Dyed But Not Exhausted - Parallel Imports and Trade Marks in Germany", (1997) 1 *IIC*, pp 25-28. According to Ansgar Ohly, "Trade Marks and Parallel Importation - Recent Developments in European Law", (1999) 5 *IIC* 520, the cases discussed above rest on a balance of interests: the trade mark owner has the right to ensure that goods sold under his mark are genuine and unaltered, and he has the right to protect his goodwill. On the other hand, the Community law principle of free movement of goods requires that the parallel importer must be able to sell his goods. To ensure this,

rules on exhaustion going further than those explicitly laid down. The Court, nevertheless, took the view that such an interpretation was contrary to the wording of Article 7 and to the scheme and purpose of the rules of the Directive concerning the rights which a trade mark confers on its proprietor:

In that respect, although the third recital in the preamble to the Directive states that ‘it does not appear to be necessary at present to undertake full-scale approximation of the trade mark laws of the Member States’, the Directive none the less provides for harmonisation in relation to substantive rules of central importance in this sphere, that is to say, according to that same recital, the rules concerning those provisions of national law which most directly affect the functioning of the internal market, and that that recital does not preclude the harmonisation relating to those rules from being complete.<sup>885</sup>

The Court referred to the first recital in the preamble to the Directive – that noted how disparities on trade mark laws applicable in Member States may impede the free movement of goods and freedom to provide services and may distort competition within the common market, so that it was necessary, in view of the establishment and functioning of the internal market, to approximate the laws of Member States – and to Recital 9, that considered fundamental, in order to facilitate the free movement of goods and services, to ensure that registered trade marks enjoy the same protection under the legal systems of all the Member States, but that this should not prevent Member States from granting at their option extensive protection to those trade marks which have a reputation. In the light of those recitals, the Court decided that Articles 5 to 7 of the Directive must be construed as embodying a complete harmonization of the rules relating to the rights conferred by a trade mark. Accordingly, the Directive could not be interpreted as leaving it open to the Member States to provide in their domestic

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the Court adopts what is essentially a proportionality test: the importer may make the product marketable, but he must not interfere with the trade mark owner’s rights more than strictly necessary to achieve this task.

<sup>885</sup> Para 23.



law for exhaustion of the rights conferred by a trade mark in respect of products put on the market in non-member countries.<sup>886</sup>

More recently, in *Laserdisken*,<sup>887</sup> copyright protection was in issue. Laserdisken and the Polish Government argued, essentially, that Article 4(2) of Directive 2001/29 leaves it open to the Member States to introduce or maintain in their respective national laws a rule of exhaustion in respect of works placed on the market not only in the Community but also in non-member countries. The Court did not accept that interpretation:

According to the twenty-eighth recital in the preamble to Directive 2001/29, copyright protection under that directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community. According to the same recital, that right should not be exhausted in respect of the original of the work or of copies thereof sold by the rightholder or with his consent outside the Community. 24. It follows from the clear wording of Article 4(2) of Directive 2001/29, in conjunction with the twenty-eighth recital in the preamble to that directive, that that provision does not leave it open to the Member States to provide for a rule of exhaustion other than the Community-wide exhaustion rule.<sup>888</sup>

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<sup>886</sup> The Swedish Government objected that since the Directive was adopted on the basis of Article 100a of the EC Treaty, which governs the approximation of the laws of the Member States concerning the functioning of the internal market, it could not regulate relations between the Member States and non-member countries, with the result that Article 7 is to be interpreted as meaning that the Directive applies only to intra-Community relations. The Court reminded that Article 7 is not intended to regulate relations between Member States and non-member countries but to define the rights of proprietors of trade marks in the Community. Anyway, the Community authorities could always extend the exhaustion provided for by Article 7 to products put on the market in non-member countries by entering into international agreements in that sphere, as was done in the context of the EEA Agreement.

<sup>887</sup> Case C-479/04, *Laserdisken ApS v Kulturministeriet*, [2006] ECR I-8089. See also Case C-16/03, *Peak Holding AB v Axolin-Elinor AB*, [2004] ECR I – 11313.

<sup>888</sup> Paras. 23-24. About the influence of Community law in Dutch law, that had practised until 1996 the system of international exhaustion, see Herman Cohen Jehoram, “Prohibition of Parallel Imports through Intellectual Property Rights”, (1996) 5 *IIC* 496. The Minister of Economic Affairs recalled before the Parliament that parallel importers contended that international exhaustion stimulates competition and that thus consumer prices are driven down. It was, however, still questionable, the Minister considered, whether these importers pass on the price advantage to the consumers. It is striking that before 1996,

Consumer protection was referred to in this judgment. Laserdisken claimed that by adopting Directive 2001/29, the Community disregarded Article 151(1) EC, according to which the Community is to contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore; and Article 153(1) EC, that provides *inter alia* that, in order to promote the interests of consumers and to ensure a high level of consumer protection, the Community is to contribute to promoting their right to information and education. The Court, nevertheless, found that those provisions were referred to either expressly or in essence by a number of recitals in the preamble to that directive, without paying much attention to the arguments there made.

To conclude, by accepting a regional exhaustion principle, the Community has managed to reach a balance between the grant of intellectual property rights and the functionalisation of those rights to the market. Whether consumers' interests should be considered autonomously, thus, remains an open question.<sup>889</sup> I will turn now to restrictions on intellectual property rights grounded on competition rules.

## **2.2. Intellectual property rights and competition rules**

Intellectual property rights are exclusive rights as they entitle the right owner to prohibit certain acts of third parties. The exclusive nature of intellectual property rights affects the competitive nature of a given market, because third parties are precluded from a part of the market to which they would otherwise have free access.<sup>890</sup> The extent to which a

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when the now so highly praised international exhaustion was in force in the Netherlands, consumer prices were also relatively high. And recent research had proven that the prices of CDs have not risen as a result of the disappearance of parallel imports from third countries. On the other hand, the Minister also objected to the thesis of industry that universal exhaustion would undermine it. That had also not been the case before 1996, when industry was still subject to international exhaustion. All the economic arguments for one or the other thesis were evenly hard to prove.

<sup>889</sup> See Norbert Reich, "Economic Law, Consumer Interests and EU Integration", in Norbert Reich, Hans-W. Micklitz, Peter Rott, *Understanding Consumer Law*, 2009, p. 53.

<sup>890</sup> Josef Drexel explains how intellectual property rights as such neither guarantee the right-holder a monopoly in the economic sense nor a minimum of market power, in "The Relationship Between the Legal Exclusivity and Economic Market Power: Links and Limits", Inge Govaere and Hanns Ullrich (eds.), *Intellectual Property, Market Power and the Public Interest*, Peter Lang, 2008, p. 18.

right-owner can effectively prevent competition is largely dependent on the type of intellectual property right concerned and in particular whether substitutable products are on, or may enter, the market, which do not infringe the right. The differences in conditions and scope of protection offered in the various Member States create further distortions to competition in the European market.<sup>891</sup>

The question of the relation between intellectual property rights and competition law is a debatable one.<sup>892</sup> However, EC competition policy and intellectual property rights are widely recognized as complementary components of a modern industrial policy.<sup>893</sup> Intellectual property law and competition law share the common purpose of promoting innovation and enhancing consumer welfare. Intellectual property law provides incentives for innovation and its dissemination and commercialization by establishing enforceable property rights for the creators of new and useful products, more efficient processes, and original works of expression. The antitrust laws promote innovation and

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<sup>891</sup> Inge Govaere, *The Use and Abuse of Intellectual Property Rights in E.C. Law*, Sweet & Maxwell, 1996, 14.

<sup>892</sup> The intersection of the two fields offers an example of what Calkins has labelled 'equilibrating tendencies', that is the inclination of courts to adjust substantive, procedural, and remedial rules to correct apparent flaws in any single rule of law. Stephen Calkins, "Summary Judgement, Motions to Dismiss, and Other Equilibrating Tendencies in the Antitrust System", (1985) 74 *Geo. L. J.* 1066. Other approaches are acceptable. William E. Kovacic & Andreas P. Reindl, in "An Interdisciplinary Approach to Improving Competition Policy and Intellectual Property Policy", (2004) 28 *Forham Int'l J.* 1062-1090, advocate an approach that would have the competition policy and intellectual policy communities correct the flaws in their own regimes that cause destructive inter-system distortions. For a comparative analysis, see Sara M. Biggers, Richard A. Mann, Barry S. Roberts, "Intellectual Property and Antitrust: A Comparison of Evolution in the European Union and United States", (1998) 22 *Hastings Int'l & Comp. L. Rev.* 209-290, and more recently Heike Schweitzer, "Controlling the Unilateral Exercise of Intellectual Property Rights: A Multitude of Approaches but No Way Ahead? The Transatlantic Search for a New Approach", EUI Working Paper 2007/31.

<sup>893</sup> Karl-Heinz Fezer, "Trademark Protection under Unfair Competition Law", (1988) 2 *IIC* 192-215, v.g. claims that the scope of protection of the right in a trademark is defined both by trademark law and the law against unfair competition. Unfair competition law protects the advertising value of the mark against unfair competition by impairment. Bruce Abramson, "Intellectual Property and the Alleged Collapsing of Aftermarkets", (2006) 38 *Rutgers L.J.* 415, defends that the notion that antitrust and intellectual property are both consumer-focused bodies of law is an important step toward reconciliation.

consumer welfare by prohibiting certain actions that may harm competition with respect to either existing or new ways of serving consumers.<sup>894</sup>

### ***2.2.1. The objectives of European competition policy***

Competition rules seek to promote effective and undistorted competition in the market, so as to achieve a more efficient allocation of resources.<sup>895</sup> One of the principal objectives of competition law is to achieve economic efficiency, both productive and allocative in the market. Competition between firms is the basis of a free market, because such competition is believed to deliver efficiency, low prices, and innovation. Productive efficiency is considered on the production side of the market. It pertains where a producer manufactures products and services at the lowest possible cost.<sup>896</sup> On

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<sup>894</sup> Josef Drexler, “Intellectual Property and Antitrust Law - IMS Health and Trinko - Antitrust Placebo for Consumers Instead of Sound Economics in Refusal-to-Deal Cases”, (2007) 7 *IIC* 793. Intellectual property legislation such as patents, copyright and design laws pursue this aim by offering a period of exclusive rights to intellectual property holders as a reward and incentive to innovation and investment. Modern competition law attempts to keep markets innovative by maintaining effective competition on markets by preventing foreclosure of markets and maintaining access to markets. See Steven D. Anderman and Hedvig Schmidt, “EC Competition Policy and IPRs”, in Steven D. Anderman (ed.) *The Interface Between Intellectual Property Rights and Competition Policy*, 2007, at 37. According to Warren S. Grimes, “Counterproductive Incentives for Innovation? - Exclusionary Conduct in the Sale of an IP Product”, (2005) 2 *IIC* 214-225, an intellectual property holder’s use of product integration, tying, or exclusive selling techniques should be judged by the same standards as any other seller’s use of these distribution restraints. The fundamental rule should be to limit an intellectual property holder’s reward to the intrinsic merit of the intellectual property product. Supplementary tests may help decision-makers reach the correct decision. These tests include assessing a reasonable intellectual property holder’s expectation from an *ex ante* perspective; determining whether the distribution restraint eliminates consumer choices available before the intellectual property grant of exclusivity; and examining whether the distribution restraint exploits consumer information gaps. Daryl Linn, “Beyond Microsoft: Intellectual Property, Peer Production and the Law’s Concern with Market Dominance”, (2007) 18 *Fordham Intell. Prop. Media & Ent. L. J* 299, on evidence that needs for economic rewards are changing. As noticed by Michael Lehmann, “The Theory of Property Rights and the Protection of Intellectual and Industrial Property”, (1985) 5 *IIC* 525-540, the theory of property rights, however, demonstrates that intellectual and industrial property rights are, as a rule, only temporary or specific competitive restrictions which in the long run serve to improve the wealth of a competitive society: they are artificially produced competitive restrictions for the encouragement of competition and the production of goods which are particularly desired by society.

<sup>895</sup> Alison Jones & Brenda Suffrin, *EC Competition Law - Texts, Cases and Materials*, 3<sup>rd</sup> ed., OUP, 2008, 1-2.

<sup>896</sup> So long as no single producer can increase price beyond marginal cost – because doing so might lead some of its customers to look for a cheaper source of supply or attract potential competitors to enter the market – each producer has an incentive to supply more efficiently in order to increase marginal revenue, a tendency which acts over the long term to force all producers towards the most efficient mean of production. Economic theory suggests that this increases the overall wealth of society because it

the contrary, allocative efficiency is concerned with the demand side of the market. It occurs when consumers obtain a product or service they desire at the price they are willing to pay. Accordingly resources are always allocated to the highest value uses.<sup>897</sup> It is believed that allocative efficiency is in the interest of consumers resulting in lower prices, better product quality and ultimately mere choice.<sup>898</sup>

The question of what concerns competition law should encompass in addition to efficiency is ultimately a matter of political choice. When competition authorities should intervene in the markets is a matter of policy.<sup>899</sup> As regards EC law, the concept of effective competition is to be taken into consideration. First, under the EC Merger Regulation the grounds for the prohibition of a merger are that it would ‘significantly impede effective competition’ - Article 2(3).<sup>900</sup> Second, the ECJ also refers to a concept of effective competition.<sup>901</sup> The ECJ defines a dominant position for the purposes of

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minimises unnecessary resources to be extended on production. See Maher M. Dabbah, *EC and UK Competition Law*, CUP, 2004, p. 7.

<sup>897</sup> Moreover, prices are constrained on the supply side to the ‘marginal cost’ of production (the cost each additional unit of production including sufficient returns to justify the producer’s capital investment but no more). This pertains because competing producers always have an incentive to produce one more unit of production so long as the price of each unit (the ‘marginal revenue’) exceeds marginal cost (*i.e.* demand exceeds supply). In such a ‘seller’s market’, the producer faces both actual competitors (who undercut one another to attract customers) and potential competitors (who might enter the market attracted by a prospect of ‘supra-competitive prices’, *i.e.* prices above marginal cost). Thus the price tends always to converge with marginal cost. Moreover, there is no incentive for any producer to limit output because he or she alone cannot influence supply when other rational actors will simply move in to meet demand. Hence, the producer will continue to produce as long as price is equal to the prevailing marginal cost.

<sup>898</sup> Maher M. Dabbah, *EC and UK Competition Law*, CUP, 2004, at 7.

<sup>899</sup> Alison Jones & Brenda Suffrin, *EC Competition Law - Texts, Cases and Materials*, 3<sup>rd</sup> ed., OUP, 2008, p. 41. See also Philip Lowe, “Competition Policy as an Instrument of Global Governance”, in Mario Monti, Prinz Nikolaus von und zu Liechtenstein, Bo Vesterdorf, Jay Westbrook, and Luzius Wildhaber, *Economic Law and Justice in Times of Globalisation – Festschrift for Carl Baudenbacher*, Nomos Verlag, Baden-Baden, 2007, p. 491, qualifying competition as an instrument of public policy. See David J. Gerber, *Law and Competition in the Twentieth Century Europe: Protecting Prometheus*, OUP, 1998, pp 389 ff, on the changing roots of EU competition law.

<sup>900</sup> The previous regulation also employed the concept of ‘effective competition’. See Richard Whish, *Competition Law*, 6.<sup>th</sup> ed., OUP, 2009, pp 17-18.

<sup>901</sup> With a slight depart in *Metro*, in 1976, where the Court ruled that, ‘[t]he requirement contained in Articles 3 and 85 of the ECC Treaty that competition shall not be distorted implies the existence on the market of workable competition, that is to say the degree of competition necessary to ensure the

Article 82 as involving an undertaking's power to 'prevent effective competition being maintained on the relevant market'. For example, in the *Bananas Case*,<sup>902</sup> the Court ruled that, '[t]he dominant position referred to in Article 86 relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers'.<sup>903</sup>

More recently, in *Glaxo*:<sup>904</sup>

it should be noted at the outset that the competition referred to in Article 3(1)(g)EC and Article 81 EC is taken to mean effective competition, that is to say, the degree of competition necessary to ensure the attainment of the objectives of the Treaty. Its intensity may vary to an extent dictated by the nature of the product concerned and the structure of the relevant market. Furthermore, its parameters may assume unequal importance, as price competition does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be given.

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observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market. In accordance with this requirement the nature and intensiveness of competition may vary to an extent dictated by the products or services in question and the economic structure of the relevant market sectors' (para 20). In its pure economic sense, the term 'workable competition' stands for the idea that competition should not be pursued as an end in itself. See R. B. Bouterse, *Competition and Integration – What Goals Count?*, *EEC Competition Law and Goals of Industry, Monetary, and Cultural Policy*, Kluwer Law and Taxations Publishers, 1994, p. 25. Many of the fundamental notions of this theory were already presented by Chamberlin in 1933 (and recalled in E. H. Chamberlin, "Product Heterogeneity and Public Policy", (1950) 40 *American Econ. Rev.* pp 85-92; and Donald H. Wallace, "Monopolistic Competition and Public Policy", (1936) 26 *American Econ. Rev.* 80). In 1940, it was elaborated and christened by J. M. Clark (J.M. Clark, "Toward a Concept of Workable Competition", (1940) 30 *American Econ. Rev.* 241-256). Nevertheless, the posterior analysis did sharply depart from the view of the first writers (see, for all, Stephen H. Sosnick "A Critique of Concepts of Workable Competition", (1958) 72 *The Quarterly Journal of Economics* 380-423).

<sup>902</sup> Case 27/76, *United Brands*, [1978] ECR 207, para 2.

<sup>903</sup> Also in *Hoffmann-La Roche*, Case 85/76, [1979] ECR 461, para 38: '[t]he dominant position thus referred to related to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers'.

<sup>904</sup> Case 168/01, *GlaxoSmithKline Services Unlimited v Commission*, [2006] ECR II- 2969, para 109.

The Court returned to a concept of competition as ‘the level of competition necessary to attain the objectives of the Treaty’.<sup>905</sup> That is to say, EC competition law uses economic analysis as a tool in the application of competition law, but the context of that law is the aims and objectives of the Treaty of Rome.<sup>906</sup> In EC law the achievement of efficiency has to leave room for other considerations. It cannot be the sole goal of EC competition policy because competition is part of the overall scheme of Community policies and has to interact with them. It cannot be divorced from them entirely and pursue Chicago-style efficiency in isolation from its context. Economic analysis may provide the tools but the end to which the tools are used depends on the type of society the Community is trying to achieve. Hence, EU competition rules should not be read in isolation but rather in conjunction with several other important Articles of the Treaty, namely Articles 2 to 4.

The Preamble of the Treaty states that Member States recognize, *inter alia*, ‘that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition’. Article 2 states that the Community ‘shall have as its task, establishing a common market and an economic monetary union and by implementing the common policies or activities referred to in Articles 3 and 4’.<sup>907</sup> Article 3, on the other hand, provides that:

1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

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<sup>905</sup> From this perspective, competition is seen as a form of rivalry between entities on a market. The interesting question is what level of rivalry we want to have and what form we want this to take. To a certain extent an answer to this question can be inferred from the economic objectives that we attribute to competition. One of these objectives is consumer welfare. See Hans Vedder, “Competition Law and Consumer Protection: How Competition Law Can Be Used to Protect Consumers Even Better –or Not?” (2006) *EBLR* 84.

<sup>906</sup> Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 2<sup>nd</sup> ed., Oxford, 2007, and Alison Jones & Brenda Suffrin, *EC Competition Law - Texts, Cases and Materials*, 3<sup>rd</sup> ed., OUP, 2008, p. 38.

<sup>907</sup> Original Article 2 of the Treaty stated: ‘The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of the Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it’.

- c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital; (...)
- g) a system ensuring that competition in the internal market is not distorted; (...)
- h) the approximation of the laws of Member States to the extent required for the functioning of the common market; (...)

Further, Article 4(1) states that, for the purposes set out in Article 2, ‘the activities of the Member States and the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein, the adoption of an economic policy which is based on the close coordination of Member States’ economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition’.

Competition policy has been included in the list of Community activities set out in Article 3 since the inception of the Community in 1958. It was embedded in the Treaty right from the start as a set of wider policy goals oriented towards the objective of European economic integration.<sup>908</sup> That is to say, EC competition law is enforced in a special context, namely a wider system designed to eliminate barriers between countries and enhance the creation of a single market. The Treaty of Rome created fundamental freedoms – the free movement of goods, free movement of capital, free movement of labour and freedom of establishment and services – , in order to establish an internal market, principally through the abolition of barriers erected by the Member States. The draughtsmen of the Treaty realized at the time that these freedoms could not be secured if such barriers were simply replaced by restraints imposed by and resulting from the behaviour of private firms, because either type of restraint could jeopardise this goal. Consequently, competition law provisions incorporated in the Treaty have taken an important role that can be considered usefully alongside EC law relating to those fundamental freedoms.<sup>909</sup> A good example of the use of competition rules in advancing

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<sup>908</sup> See Alison Jones & Brenda Suffrin, *EC Competition Law - Texts, Cases and Materials*, 3<sup>rd</sup> ed., OUP, 2008, pp 35-36; Massimo Motta, *Competition Policy: Theory and Practice*, 2003, pp 16-29, and Stephen Martin, “Competition Policy”, in *The Economics of the European Union*, Mike Artis and Frederick Nixson (eds.), 4<sup>th</sup> ed., OUP, p. 106.

<sup>909</sup> Maher M. Dabbah, *EC and UK Competition Law*, CUP, 2004, p. 9. Competition and free market rules have similar objectives: the freeing of trade between Member states from restraints imposed by either



the single market was the adoption of the afore-mentioned block exemption Regulation on motor vehicle distribution in 2002. The Regulation allows the dealers and manufacturers less leeway than the previous Regulation, because the Commission was concerned that they were still acting to maintain price differentials in different Member States.<sup>910</sup>

It should be strongly emphasized that the role of competition policy as an instrument of single market integration is absolutely crucial to any understanding of EC competition law. It differentiates EC law from any system of domestic competition law, whether in the Member States, the USA or elsewhere. EC competition law serves two masters, the ‘competition’ one, and (even more demanding) the imperative of single market integration.<sup>911</sup>

In the general philosophy of the EU, competition is also seen as a key factor in enhancing consumer welfare.<sup>912</sup> Competition enforcement ultimately serves consumer

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private or public sources. See also D. G. Goyder, *EC Competition Law*, 4<sup>th</sup> ed., OUP, 2003, p. 265; Ferrari Bravo and E. M. Milanesi, *Lezioni di diritto comunitario*, II, Editoriale Scientifica, Napoli, 2002, p. 14; Mark Furse, *Competition Law of the EC and UK*, 5<sup>th</sup> ed., OUP, 2006, p. 6.

<sup>910</sup> The Competition Commissioner, Mario Monti, said of the new Regulation [Commission’s XXXIInd Report in Competition Policy (Brussels, 2003), foreword: [t]he Commission also needs to play its role as an initiator of change where markets do not function satisfactorily in the light of the Treaty objectives. The adoption in July of the new exemption regulation for motor vehicle distribution can serve as a concrete example. It is high time we had a genuine single market in cars, *for the benefit of consumers* but also in the interests of the competitiveness of European industry. A review had clearly shown that the market integration pursued by old regulation applicable to the sector had not been achieved to the extent hoped for, and that consumers were receiving their shares of the benefits deriving from the exempted restrictions. Thus, a new system has been put in place to give a fresh boost to market integration, so that consumers can benefit from better prices, wider choice and improved services (emphasis added).

<sup>911</sup> See Giorgio Monti, *EC Competition Law*, CUP, 2007, pp 18-19.

<sup>912</sup> See Karl M. Meessen, in Ulrich Loewenheim/ Karl M. Meessen/Alexander Riesenkampff, *Kartellrecht, Kommentar*, vol I: Europäisches Recht, Beck, München, 2005, p. 191; and Thomas Wilhelmsson, “Cooperation and Competition Regarding Standard Contract Terms in Consumer Contracts”, (2006) *EBLR*, at 49. The Court has on occasion explicitly referred to the consumer interest in securing free competition in accordance with Article 81 (ex 85) CE. See Joined Cases 40-48, 50, 54-56, 111, 113 & 114/73, *Coöperatieve Vereniging “Suiker Unie” UA and others v Commission of the European Communities*, [1975] *ECR* 1663: ‘[t]he practices in this case did not in any way result from independent decisions by the producers concerned but were concerted between them because they knowingly substituted for the risks of competition practical cooperation between them which culminated in a situation which did not correspond to the normal conditions of the market, even taking account of its special nature, and allowed Netherlands producers to maintain positions which they had established to the detriment of effective freedom of movement of the products in the common market and of the freedom of

welfare directly, for example, by prohibiting abuses of monopoly power in *inter alia* consumer markets, and indirectly, by safeguarding a certain level of effective competition.

Article 81 provides for a two-tier analysis of agreements between undertakings. First, an agreement between undertakings must be scrutinized to see whether it infringes Article 81(1). If it does, it must then be determined whether or not the agreement meets the criteria set out in Article 81(3). Article 81(1) may be declared inapplicable to any agreement which contributes to improving the production or distribution of goods<sup>913</sup> or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not impose on the undertakings concerned restrictions which are vital to the attainment of these objectives and afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. The four criteria set out by Article 81(3) are cumulative; they

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consumers to choose their suppliers' (para 191). In Case 172/80, *Gerhard Züchner v Bayerische Vereinsbank AG*, [1981] ECR 2021: 'the criteria of coordination and co-operation necessary for the existence of a concerted practice in no way require the working out of an actual 'plan' but must be understood in the light of the concept inherent in the provisions of the Treaty related to competition, according to which each trader must determine independently the policy which he intends to adopt on the common market and the conditions which he intends to offer to his customers' (para 191). Also the Commission Guidelines on the Application of Article 81(3), issued in 2004 (OJ 2004 C101/97), insisted on the role of Article 81 in promoting consumer welfare (cf. para 13). Jules Stuyck, "Patterns of Justice in the European Constitutional Charter: Minimum Harmonization in the Field of Consumer Law", in Ludwig Krämer, Hans-W. Micklitz, and Klaus Tonner (eds.), *Law and Diffuse Interests in the European Legal Order: liber amicorum Norbert Reich*, Nomos, 1997, pp 279-280: '(...) I do not believe, as a matter of principle, that in order to take into account consumer interests, the law should necessarily develop patterns which go beyond market rationality. In general the market takes care of the consumer interest. Since the market may often not work, as a result of monopolies, dominant positions and cartels, the European Communities and its Member States have enacted competition rules. There is no doubt that the consumer is the first beneficiary of an effective competition policy'. See also Jules Stuyck, "EC Competition Law After Modernisation: More than Ever in the Interest of Consumers", (2005) 28 *Journal of Consumer Policy*, at 26; Lucas de Leyssac and Gilbert Parléani, *Droit du marché*, PUF, 2001, p. 116; and Alexander Riesenkampff/ Stefan Lehr, in Ulrich Loewenheim/ Karl M. Meessen/Alexander Riesenkampff, *Kartellrecht, Kommentar, vol I: Europäisches Recht*, Beck, München, 2005, p. 1094.

<sup>913</sup> Although Article 81(3) does not make specific reference to services, services are covered by analogy. See Commission Guidelines on the application of Article 81(3), para 48 (and v.g. *Commission Decision Assurpol*, of 14 January 1992, OJ 1992, L 037, p. 16; *Commission Decision Cégétel + 4*, of 20 May 1999, OJ 1999, L 218, para 14; *Commission Decision British Interactive Broadcasting*, of 15 September 1999, OJ 1999, L 312, para 1; *Commission Decision UK Network Sharing Agreement*, of 30 March 2003, OJ 2003, L 200, para 59; *Commission Decision T-Mobile Deutschland*, of 16 July 2003, OJ 2004 L 075, para 32).

must all be satisfied if the agreement is to benefit therefrom.<sup>914</sup> The exceptions rule applies for as long as the four conditions are met and they cease to apply when that is no longer the case.<sup>915</sup>

As regards the notion of consumer, the Guidelines confirmed that:

the concept of ‘consumers’ encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession. In other words, consumers within the meaning of Article 81(3) are the customers of the parties to the agreement and subsequent purchasers. These customers can be undertakings as in the case of buyers of industrial machinery or an input for further processing or final consumers as for instance in the case of buyers of impulse ice-cream or bicycles.<sup>916</sup>

In respect of the concept of benefit,<sup>917</sup> it includes all the advantages deriving from better quality of the products, service and service conditions to consumers, or lower prices. Improvement of production and distribution of products, a wider range of products

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<sup>914</sup> See, for all, Case T-528/93, T-542/93, T-543/93 and T-546/93, *Metropole télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v Commission of the European Communities*, [1996] ECR II-649, para 86, and Case T-65/98, *Van den Bergh Foods Ltd v Commission of the European Communities*, [2003] ECR II - 4653, para 144.

<sup>915</sup> Commission Guidelines on the application of Article 81(3), para 40. The onus is on the undertaking or undertakings invoking the benefit of the exception. See Case T-69/01, *JCB Service v. Commission* [on Appeal Case C-167/04 P], 162, and Case T-168/01, *GlaxoSmithKline Services Unlimited v Commission of the European Communities*, [2006] ECR II-2969, para 235.

<sup>916</sup> Commission Guidelines on the application of Article 81(3), para 84 and annex 1.20. See, e.g., Commission Decision 91/329/EEC, of 30 April, para 37: ‘[t]he Nuclear Energy Agreement forms part of the reorganization of a system which has hitherto been monopolistic. The benefit to consumers, both industrial and private, derives from the gradual introduction of competition into the system. It is notable that premises whose demand exceeds 1 MW are already free to choose their supplier; after four years this threshold will be reduced to 0,1 MW and after eight years totally phased out’. In the sense that Article 81 (3) refers to those economic actors in a downstream relation to the parties to the agreement in general, see Richard Whish, *Competition Law*, 6<sup>th</sup> ed., OUP, 2009, p. 158.

<sup>917</sup> On this see Karl M. Meessen, in Ulrich Loewenheim/ Karl M. Meessen/Alexander Riesenkauff, *Kartellrecht, Kommentar*, vol I: “Europäisches Recht”, Beck, München, 2005, p. 191.

(wider choice for consumers) are also advantages.<sup>918</sup> This provision is broad, accepting agreements which promote technical progress, and/or promote economic progress.

Finally, according to the Commission Guidelines, the concept of ‘fair share’ implies that the passing on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article 81(1). In line with the overall objective of Article 81 to prevent anti-competitive agreements, the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement; the advantage has to be objective.<sup>919</sup> If such consumers are worse off following the agreement, the second condition of Article 81(3) is not fulfilled.<sup>920</sup> The positive

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<sup>918</sup> See Decisions of the Commission RANK/SOPELEM, of 20 December 1974, OJ 1975 L 29/20, paras. 24 ff (improving the quality of the products, service and service conditions to consumers; a more extensive and technically more advanced range of products; *Rockwell/Iveco*, of 13 July 1983., OJ 1983, L 224, para 19 (as technologically advanced products are offered, the requirements of truck users are taken into account as far as possible in the design of axles, a beneficial effect on truck consumer prices is also to be expected); in *BBC Brown Boveri*, of 11 October 1988, OJ 1988 L 301, paras. 68-72 (more films are shown in the Germany language); in *Moosehead/Whitread*, of 23 March 1990, OJ 1990, L 100/32, 36 f (a wide choice); in *KSB/Goulds/Lowara/ITT*, of 12 December 1990, OJ 1991, L 19/25, para 34 (improvement in the quality, improvement in operating characteristics); in *EUROTUNNEL*, 13 December 1994, OJ 1994, L 354, para 66, (increased competition); in *Simulcasting*, of 8 October 2002, OJ 2003, L 107, para 58 (easier and wider access to a range of music by means of the available simulcasts. Access to their favourite radio and/or TV music programmes without the technical constraints, a wide range of music will still be available in the future); in *Visa International*, of 24 July 2002, OJ 2002, L 318, para 17 (the encouragement of improvements in the system [...], in the interest of all users of the system).

<sup>919</sup> See Commission Decision *Quantel*, of 27 July 1992, OJ 1992, L 235, para 9 and Commission Decision *Stichting Certificatie Kraanverhuurbedrijf and the Federatie van Nederlandse Kraanverhuurbedrijven*, of 29 November 1995.

<sup>920</sup> In the application of the principles set out below the Commission will have regard to the fact that in many cases it is difficult to accurately calculate the consumer pass-on rate and other types of consumer pass-on. Undertakings are only required to substantiate their claims by providing estimates and other data to the extent reasonably possible, taking account of the circumstances of the individual case. Commission Guidelines on the application of Article 81(3), n. 94. On several occasions the Commission has held that an agreement failed to yield a fair share of any resulting benefits to consumers. See *Re VBBB and VBVB Agreement* (Decision *VBBB und VBVB*, of 25 November 1981, OJ 1982, L 54/36 (upheld on appeal Cases 43/82 and 63/82 *VBVB v. Commission* [1984] ECR 19, in paras 54-56); *Screensport/EBU* (OJ [1991] L63/32, paras. 72-73); in *Re VNP and COBELPA* (OJ [1977] L 242/10, para 3). Further in Richard Whish, *Competition Law*, 6<sup>th</sup> ed., OUP, 2009, p. 158. In *JCB*, (Commission Decision of 21 December 2000, OJ 2002, L 69/1) the Commission considered that, ‘[t]he combination of territorial exclusivity with the prohibition on selling to unauthorized distributors, which may compete with official distributors, and exclusive purchase of parts for official distributors prevents or restricts the development of the market for maintenance, repair and provision of spare parts under optimum safety conditions’ and the obligation for official distributors in France and Italy, to purchase machines or spare parts exclusively from their national JCB subsidiary, prevents the pass on to the consumer of lower purchasing costs. Moreover, the

effects of an agreement must be balanced against and compensate for its negative effects on consumers.<sup>921</sup> When that is the case consumers are not harmed by the agreement. Moreover, society as a whole benefits where the efficiencies lead either to fewer resources being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources.<sup>922</sup> It is not required that consumers receive a share of each and every efficiency gain identified under the first condition. It suffices that sufficient benefits are passed on to compensate for the negative effects of the restrictive agreement. In that case consumers obtain a fair share of the overall benefits.<sup>923</sup> If a restrictive agreement is likely to lead to higher prices, consumers must be fully compensated through increased quality or other benefits. If not, the second condition of Article 81(3) is not fulfilled.<sup>924</sup> The degree of residual competition, and the market structure, will definitely interfere with the pass-on to consumers.<sup>925</sup>

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application of unfavourable financial conditions depending on the geographic destination of sales is not beneficial to consumers either, while the differences in prices are not dependent on costs or objective economic differences, but face artificially homogeneous prices throughout territories for the same range of JCB products. Similarly, agreements or concerted practices fixing resale prices or discounts are not beneficial to the consumer, who can no longer take advantage of price differentials for identical products in the EC.'

<sup>921</sup> Case C-238/05, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL* '(...) In order for the condition that consumers be allowed a fair share of the benefit to be satisfied, it is not necessary, in principle, for each consumer individually to derive a benefit from an agreement, a decision or a concerted practice. However, the overall effect on consumers in the relevant markets must be favourable'.

<sup>922</sup> Commission Guidelines on the application of Article 81(3), para 85 and annex 1.20.

<sup>923</sup> Commission Decision *KEWA*, of 23 December 1975, OJ 1976, L51/15 (2).

<sup>924</sup> Commission Guidelines on the application of Article 81(3) EC para 86 and annex 1.20. In Case 26/76, *Metro I*, [1977] ECR 1875, the Court had ruled: 'regular supplies represent a sufficient advantage to consumers for them to be considered to constitute a fair share of the benefit resulting from the improvement brought about by the restriction on competition permitted by the Commission. Even if it is doubtful whether the requirement in this connexion of Article 85(3) can be said to be satisfied by the assumption that the pressure of competition will be sufficient to induce Saba and the wholesalers to pass on to consumers a part of the benefit derived from the rationalization of the distribution network, the grant of exemption may, however, in the present case be considered as sufficiently justified by the advantage which consumers obtain from an improvement in supplies' (para 48). See also Commission Decision *Stichting Baksteen*, of 29 April 1994, OJ 1994, L131/15; *Reims II*, OJ 1999, L 275/17, and Commission Decision *Synthetic Fibres*, of 4 July 1984, OJ 1984, L 207/17. It was to the Commission to balance the advantages and the disadvantages of the agreement. In *Natursteinplatten*, Commission Decision of 16 October 1980, OJ 1980, L 318/32, the Commission has considered that the advantages of the association were not sufficient to counterbalance the serious disadvantages which arose for dealers and

Since 1 May 2004, the notification system set up in Regulation 17 has been abolished and Article 81 (3) can be applied either in individual cases by the European Commission (the European Commission has to apply Article 81(3) in all cases where an Article 81 infringement decision is adopted),<sup>926</sup> a national competition authority (NCA)

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consumers, in particular through the exclusion of price competition. And in *Ford Werke AG*, the Commission, in balancing the improvement in distribution of cars resulting from the agreement - and the share in those advantages allowed to consumers - against the disadvantages in all the legal and economic circumstances, found that Ford Germany's distribution system did not allow adequate competition at the distribution level, because it was no longer possible to buy RHD Ford cars in Germany at the very significantly lower German prices, and so, the competitive pressure in the United Kingdom was significantly reduced. See Commission Decision of 16 November 1983, OJ 1983, L 327/31: 'consumers should be free to purchase Ford cars where ever they wish within the Community and, unless there are strong reasons to the contrary, Ford dealers should be able and free to deal in substantially all important Ford car versions especially those which are produced by the Ford Group company which supplies them. In general it is a prerequisite of an exemption that dealers and consumers should enjoy these freedoms and that an enterprise should not take steps to prevent customers in one Member State from obtaining its products in another Member State. This is the more so when the only purpose of these steps is to prevent competition between authorized dealers and to protect higher price levels' (para 43). And in *Fedetab*, Commission Decision of 20 July 1978, OJ 1978, L 224/29, para 129, the Commission decided that the advantages which Fedetab and its members claimed to enjoy as a result of the existence of specialist wholesalers and retailers did not appear likely to compensate for the fact that the latter were currently placed at a disadvantage by being unable to choose which brands of cigarette they wished to sell or to limit the number of brands in the light of their own clients' preferences. See: '(131) The wholesalers and retailers who have the disadvantage of having to stock a large number of different brands find even more onerous the recommendation prohibiting terms of payment of longer than 15 days, a prohibition which can only increase overheads at every level of distribution with no advantage to the consumer. (132) The recommendation does not, therefore, lead to improvements in distribution which would offset the inherent restrictions of competition, or allow consumers a fair share of any benefit which might result.' On the contrary, in *X/Open Group*, Commission Decision of 15 December 1986, OJ 1987, L35/ 36, in the overall balance of advantages and disadvantages, the Commission accepted that the advantages involved in the creation of an open industry standard (in particular the intended creation of a wider availability of software and greater flexibility offered to users to change between hardware and software from different sources) easily outweigh the distortions of competition entailed in the rules governing membership and restricting access to the Group which are indispensable to the attainment of the objectives of the Group Agreement (para 42).

<sup>925</sup> In *SPO v Commission* Case T-29/92 [1995] ECR II-289, upheld on appeal to the ECJ Case C-137/95P [1996] ECR I-1611, SPO, a Dutch building association, appealed to CFI to overturn a Commission Decision (Building and construction industry in the Netherlands OJ [1992] L92/1, 135), refusing to grant an Article 81(3) exemption. Neither the Commission nor the CFI considered whether this aim could constitute a benefit for the purposes of the first limb of Article 81(3). The CFI upheld the Commission's reasoning that by restricting competition, the rules necessarily deprived consumers of any potential benefits arising from the arrangements. The Commission has decided differently where the intensity of competition in the market was likely to ensure the transmission of any benefits to customers, or where the customers themselves had indicated their approval of and enthusiasm for the agreement in question. See also *GEC Ltd and Weir Group Ltd Agreement* OJ [1977] L 327/26.

<sup>926</sup> It may also apply Article 81(3) when adopting commitment or non-infringement decisions (reg. 1/2003, article 9) or when providing 'informal guidance' (Commission notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) [2004] OJ C101/78.)

or a national court (whenever the applicability of an agreement with Article 81 arises, Article 81 (3) is directly applicable) or categories of agreements by way of block exemption.<sup>927</sup>

A similar reference to consumers can be found in Article 82 EC, under (b). According to this provision an abuse may consist of ‘limiting production, markets or technical development to the prejudice of consumers’. In order to assess the effects of anticompetitive conduct, the competitive harm inflicted on consumers should be considered. Conduct that harms consumer welfare, or harms consumer welfare more than it enhances efficiency, is considered exclusionary.

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<sup>927</sup> Prior to 2004, article 81(1) could be declared inapplicable to an agreement either by virtue of an exemption, granted on certain categories of agreement by virtue of Commission regulations (block exemptions) or, following notification, by individual exemption granted by the European Commission. Block exemption applying generally to vertical agreements (Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ 1999 L 336/21), vertical agreements and concerted practices in the motor vehicle sector (Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ 2002 L203/30–41), technology transfer agreements (Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ 2004 L 123/11), specialisation agreements (Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements OJ 2000, L 304/3), research and development agreements (Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements, OJ 2000 L 304/7), passenger tariffs on scheduled air services and slot allocation at airports (Commission Regulation (EC) No 1459/2006 of 28 September 2006 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices concerning consultations on passenger tariffs on scheduled air services and slot allocation at airports, OJ 2006 L272/3), agreements applying to computerised reservation systems (Commission Regulation (EC) No 3652/93 of 22 December 1993 on the application of Article 85(3) of the Treaty to certain categories of agreements between undertakings relating to computerized reservation systems for air transport services, OJ 1993, L 333/37), agreements in the insurance sector (Commission Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ 2003, L53/8), on liner shipping consortia (Commission Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies, OJ 2000 L 100/24. On horizontal agreements, Regulation (EEC) No 2821/71 of the Council of 20 December 1971 on application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices; Regulation (EEC) No 2743/72 of the Council of 19 December 1972 amending Regulation (EEC) No 2821/71 on the application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices. Regulation 1/2003 does not affect the validity and legal nature of block exemption regulations (Guidelines, para 2). Agreements falling within the ambit of one of the block exemptions are automatically exempt from Article 81(1) prohibition and the national courts are free to apply the terms of the block exemption should the validity of the agreement be raised before such a court. For a general overview, see Claus Dieter Ehlermann, “The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution”, (2000) 37 *CMLRev* 537-590.

Efficiencies under EC Merger regulation<sup>928</sup> control are subject to the conditions that they: benefit consumers, result from the merger, and are verifiable. In making the appraisal of a merger, the following should be considered: the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition. The 'interests of the intermediate and ultimate consumers'<sup>929</sup> are mentioned in Article 2(1) amongst a large number of other interests that should be taken into consideration when appraising the compatibility of a notified merger with the common market. The only decisive appraisal criterion however – and that is confirmed by an extensive decisional practice – is whether the proposed merger significantly impedes competition, in particular as the result of the creation or strengthening of a dominant position.<sup>930</sup>

The relevant benchmark in assessing efficiency claims is that consumers will not be worse off as a result of the merger. To that end, efficiencies should be substantial and timely, and should, in principle, benefit consumers in those relevant markets where it is

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<sup>928</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ 2004 L 24/1.

<sup>929</sup> Alexander Riesenkauff/ Stefan Lehr, in Ulrich Loewenheim/ Karl M. Meessen/Alexander Riesenkauff, *Kartellrecht, Kommentar*, vol I: "Europäisches Recht", Beck, München, 2005, p. 1094; Michael Baron, in Eugen Langen/Hermann-Josef Bunte, *Kommentar zum deutschen und europäischen Kartellrecht*, Band 2, "Europäisches Kartellrecht", 10<sup>ed</sup>, Luchterhand, 2006, p. 954, § 190.

<sup>930</sup> Michael Baron, in Eugen Langen/Hermann-Josef Bunte, *Kommentar zum deutschen und europäischen Kartellrecht*, Band 2, "Europäisches Kartellrecht", 10<sup>ed</sup>, Luchterhand, 2006, p. 897, p. 65, § 45; Alexander Riesenkauff/ Stefan Lehr, in Ulrich Loewenheim/ Karl M. Meessen/Alexander Riesenkauff, *Kartellrecht, Kommentar*, vol I: "Europäisches Recht", Beck, München, 2005, p. 1073, 1076. Decision *Magneti Marelli/CEAC*, of 29 May 1991, OJ 1991, L222/38, para 16, and Decision *Procter&Gamble/VP Schickdanz*, of 21 June 1994, OJ 1994, L 354/32.



otherwise likely that competition concerns would occur. As efficiencies one might mention lower prices new or improved products or services.<sup>931</sup>

The incentive on the part of the merged entity to pass efficiency gains onto consumers is often related to the existence of competitive pressure from the remaining firms in the market and from potential entry. The greater the possible negative effects on competition, the more the Commission has to be sure that the claimed efficiencies are substantial, likely to be realized, and to be passed on, to a sufficient degree, to the consumer.<sup>932</sup> A sliding scale is also applied, *i.e.*, mergers with the greatest scope for causing consumer harm also require the most compelling evidence of counterbalancing efficiencies.

The fact that Article 81 and 82 refer in general to parties in a downstream relation to the undertakings involved in the agreement, or to the undertaking abusing its dominant position, instead of final consumers, clearly shows that these Articles are not about consumer protection.<sup>933</sup> Moreover, as Article 2(2) and (3) of the Merger Regulation make clear, the ultimate standard by which concentrations are judged is that of a significant impediment to effective competition, thus placing possible effects for consumer protection on the secondary level.

However, economic literature shows us that consumer welfare is at least one of the objectives of competition and indeed an important one. The benefits for consumers are often invoked in order to explain what competition law is all about.<sup>934</sup> This brings

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<sup>931</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, (2004/C 31/03), 79-80.

<sup>932</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, (2004/C 31/03). See Alexander Riesenkampff/ Stefan Lehr, in Ulrich Loewenheim/ Karl M. Meessen/Alexander Riesenkampff, *Kartellrecht, Kommentar*, vol I: "Europäisches Recht", Beck, München, 2005, p. 1094.

<sup>933</sup> Hans Vedder, "Competition Law and Consumer Protection: How Competition Law Can Be Used to Protect Consumers Even Better –or Not?" (2006) *EBLR* 87.

<sup>934</sup> Hans Vedder, *ibidem*, at 83; Lucas de Leyssac and Gilbert Parléani, *Droit du marché*, PUF, 2001, p. 17.

consumers into the picture of competition and with it comes the view that competition law is actually consumer protection legislation, since it furthers the interests of consumers. In fact, the link on the regulatory level between competition law and consumer protection is not to be found in the provisions on competition law, but in the so-called integration clause of Article 153(2) EC: '[c]onsumer protection requirements shall be taken into account in defining and implementing other Community policies and activities'.<sup>935</sup>

Consumer protection policies, on the other hand, also benefit effective competition.<sup>936</sup> Competition presupposes, among many things, that consumers are able to make rational choices in their purchasing decisions.<sup>937</sup> Such rational decision-making in turn requires that consumers have sufficient information and that they can judge this information so

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<sup>935</sup> Neil W. Averitt and Robert H. Lande, in "Consumer Sovereignty: a Unified Theory of Antitrust and Consumer Protection Law", (1996) 65 *Antitrust L. J.* 715-716, show that consumer protection and competition law ultimately support one another as two components of an overarching unity, consumer sovereignty. Consumer sovereignty is the state of affairs that prevails or should prevail in a modern free-market economy. It is the set of societal arrangements that causes that economy to act primarily in response to the aggregate signals of consumer demand, rather than in response to government directives or the preferences of individual businesses. The essence of consumer sovereignty is the exercise of choice. It is by choosing some goods or some options over others that consumers satisfy their own wants and send their signals to the economy. It is, therefore, critical that the exercise of consumer choice be protected.

<sup>936</sup> See Neil W. Averitt and Robert H. Lande, in "Consumer Sovereignty: a Unified Theory of Antitrust and Consumer Protection Law", (1996) 65 *Antitrust L. J.* pp 713-714: '[t]he antitrust laws are intended to ensure that the marketplace remains competitive, so that a meaningful range of options is made available to consumers, impaired by practices such as price fixing or anticompetitive mergers. The consumer protection laws are then intended to ensure that consumers can choose effectively from among those options, with their critical faculties unimpaired by such violations as deception or the withholding of material information.' Miguel Poiars Maduro, "Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights", (1997) 3 *European Law Journal* 74 describes competition and consumer protection laws as intimately related to, two sides of the same coin of consumer sovereignty and hence economic justice. According to Spencer Weber Waller, "Antitrust as Consumer Choice: Comments on the New Paradigm", (2004) 36 *Loy. U. Chi. L. J.* 631, the informed consumer ideal stands on the common ground between the goal of antitrust – the maintenance of an efficient, innovative competitive economy – and the goal of consumer protection – the avoidance of consumer deception or ignorance concerning the material features of products or terms of sale'. Caswell O. Hobbs, "Antitrust and Consumer Protection: Exploring the Common Ground", (2004) 72 *Antitrust L. J.* 1156.

<sup>937</sup> The two 'freedoms' – the freedom of producers to sell and the freedom of consumers to buy – are today fundamental core values that inform antitrust law, as well as a vast body of other commercial laws and regulations. See Thomas B. Leary, "Freedom as the Core Value of Antitrust in the New Millennium", (2000) 68 *Antitrust L.J.* 546, and Natalino Irti, *Persona e Mercato*, Laterza, Roma, 1998, p. 73-74.

as to determine to what extent a certain offer on a market meets their individual needs.<sup>938</sup> Rules that promote free choice, that improve transparency, protect consumers and monitor competition game. They are nuclear both for consumers and for competitors.<sup>939</sup> Effective consumer choice requires two things: options in the marketplace, and the ability to choose freely among them.<sup>940</sup> Competition law and consumer law complement each other and contribute to a better functioning of the market. Consumer protection offences are also matters of competitive significance.<sup>941</sup> Often, it is clear that a provision apparently aimed at protecting competition serves consumer protection goals. Rules on advertising, for example, are a fundamental regulator of competition,<sup>942</sup> but they constitute simultaneously a core instrument of

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<sup>938</sup> Hans Vedder, “Competition Law and Consumer Protection: How Competition Law Can Be Used to Protect Consumers Even Better –or Not?”, (2006) *EBLR*, at 85.

<sup>939</sup> Lucas de Leyssac and Gilbert Parléani, *Droit du marché*, PUF, 2001, p. 113. Considering consumer choice as ‘an extremely powerful and important tool for rationalizing antitrust policy’, Spencer Weber Waller, “Antitrust as Consumer Choice: Comments on the New Paradigm”, (2000) 62 *U. Pitt. L. Rev.* 535-544.

<sup>940</sup> Quoting Stephen Weatherill, “Consumer Policy”, in *The Evolution of EU Law*, Paul Craig & Grainne de Búrca (eds), Oxford University Press, 1999, p. 696: ‘[i]nsofar as EC consumer policy was built on the assumption that an integrated market will optimise consumer welfare, the effective application of the rules of the internal market game was a form of consumer policy. The core provision of the Treaty guaranteeing the free circulation of the factors of production, laid down in Articles 30, 52, and 59, challenged market fragmentation along national lines and expanded consumer choice. The Treaty competition rules fit the same pattern. They too were designed to prevent market distortion that would prejudice (ultimately) the consumer’.

<sup>941</sup> See Lucas de Leyssac and Gilbert Parléani, *Droit du marché*, PUF, 2001, p. 86, 87, 103 and 113. Also L. Ferrari Bravo and E. M. Milanese, *Lezioni di diritto comunitario*, II, Editoriale Scientifica, Napoli, 2002, at 126. According to Thomas B. Leary, “Competition Law and Consumer Protection Law: Two Wings of the Same House”, (2004) 72 *Antitrust L.J.* 1148: ‘[b]oth competition law and consumer protection law deal with distortions in the marketplace, which is supposed to be driven by interaction between supply and demand. Antitrust offences, like price fixing or exclusionary practices, distort the supply side because they restrict supply and elevate prices. Consumer protection offences, like deceptive advertising, distort the demand side because they create the impression that a product or service is worth more than it really is’.

<sup>942</sup> Cf. Gerhard Schricker, “Unfair Competition and Consumer Protection – New Developments”, (1977) 3 *IIC* 185 ff, and J. de Oliveira Ascensão, “Direito Civil e Direito do Consumidor”, (2006) 8 *Estudos de Direito do Consumidor* 38. For a deep historical incursion on this subject, see Nogueira Serens, “A Proibição da Publicidade Enganosa: Defesa dos Consumidores ou Protecção (de alguns) dos Concorrentes”, (1994) 37 *BCE* 63 ff. The prohibition of misleading advertising was already set in § 1 of UWG of 1896 (that corresponds to §3 of Law 1909), long time before the arrival of consumer protection in the legal agenda. At the beginning, the industrial capitalism did not considered advertising as a legal problem. By the last quarter of the nineteenth century, the market was dominated by oligopolistic enterprises, which tended to assume coalition agreements, in order to get a monopoly position in the

consumer protection. The purpose of the Directive on misleading and comparative advertising<sup>943</sup> is to protect traders<sup>944</sup> against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted (Article 1).<sup>945</sup> Simultaneously, rules on consumer protection also enhance and protect competition. The purpose of the Unfair Commercial Practices Directive<sup>946</sup> is to contribute to the proper functioning of the internal market and achieve

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market. Cartels would limit competition among parties in order to keep the highest possible prices in the market. Enterprises would, nevertheless, keep their autonomy. Although they were part of an agreement, sharing common interests, still they were competitors. If free advertising was allowed, enterprises would promote their own sales, jeopardising partners' positions. Of course, stronger restrictions to aggressive competition were necessary, namely, the prohibition of advertising, described as an unfair commercial practice and misleading to the consumer. With the advantage that a general prohibition would reach simultaneously parties of the price cartels and businesses in general. This reasoning, that the prohibition of misleading advertising protects consumers and promotes free competition, would give rise to the intervention of the legislator, for instance in Germany, with the Verordnung of 9<sup>th</sup> March 1932 and in France, with the Loi portant interdiction du système de vente avec primes ou tous autres titres analogues ou avec primes en nature, of 1951 (replaced by Article 29 of the Ordinance of 1<sup>st</sup> December 1986, as amended by Articles 23 to 25 of Decree of 29 December 1986). On this, Gerard Cas and Didier Ferrier, *Traité de droit de la consommation*, PUF, 1986, p. 294. Similarly, in the United States, case law followed the same patterns. See Thomas B. Leary, "Competition Law and Consumer Protection Law: Two Wings of the Same House", 72 (2004) *Antitrust L.J.* 1147.

<sup>943</sup> Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ 2007 L 376/21.

<sup>944</sup> See, *inter alia*, Recitals 3, 4, 8 and 9 of the Directive.

<sup>945</sup> The Commission's initial moves in the field of advertising dealt with the approximation of Member States laws on unfair competition. Consumer protection emerged only later, with the advent of new members such as the United Kingdom and Denmark who, at that time, had already developed consumer protection in the field of advertising, apart from classical ideas of unfair competition or passing-off among competition businesses. See Norbert Reich, "Protection of Consumers' Economic Interests by the EC", (1992) 14 *Sydney Law Review* 33. The argument will be found in recitals 5 and 7 of Directive 97/55/EC of European Parliament and of the Council of 6 October 1997, amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising.

<sup>946</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council. In 2001 the Commission launched two new proposals to harmonize the Unfair Competition Law: A Sales Promotions Regulation (Proposal for a Regulation concerning Sales promotions in the Internal Market, COM (2001) 546, amended proposal COM (2002) 585) and a 'Green Paper on European Union Consumer Protection' (COM (2001) 531 and a Communication from the Commission: Follow-up Communication to the Green Paper on EU Consumer Protection, COM (2002) 289). While the first is still under discussion, the Green Paper led to a Proposal for the Unfair Commercial Practices Directive and, ultimately, to the Directive, which has been adopted in May 2005. The 2001 Green Paper on Consumer Protection resurrected the idea of a general approach towards unfair trade practices (COM (2001) 531 final). A framework directive containing a general duty in relation to unfair commercial practices was identified as a possible basis for a

a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests.<sup>947</sup>

Turning back to the aims of European consumer policy, a distinct range of goals – besides single market integration – cannot go unnoticed. Competition policy has also been central to the development of other policies,<sup>948</sup> such as employment and foreign investment,<sup>949</sup> social considerations,<sup>950</sup> environmental issues<sup>951</sup> and even safety

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reform. The 2002 Follow-Up to the Green Paper provided feedback on the initial consultation and an outline of how a framework directive could be structured. Further consultation, including an Extended Impact Assessment, demonstrated – according to the Commission – that a directive harmonizing the Member States' rules on unfair commercial practices was the best policy option. After further consultation, the Commission finally adopted its original proposal in June 2003 (COM (2003) 356 final), which eventually led to the adoption of the UCPD in May 2005. For the history of harmonization of unfair commercial practices in the Community, see Antonina B. Engelbrekt, "An End to Fragmentation? The Unfair Commercial Practices Directive from the Perspective of the New Member States from Central and Eastern Europe", in Stephen Weatherill and Ulf Bernitz (eds.), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29*, Hart Publishing, 2007, pp 47-90. A general overview can be found in Hans-W. Micklitz, "Unfair Commercial Practices and Misleading Advertising", in Norbert Reich, Hans-W. Micklitz, Peter Rott, *Understanding Consumer Law*, 2009, p. 71.

<sup>947</sup> According to Recital (6) 'This Directive therefore approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which *directly harm consumers' economic interests and thereby indirectly harm the economic interests of legitimate competitors*' [emphasis added]. And in Recital (8): 'This Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices. Thereby, it also indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in fields coordinated by it.' In Stephen Weatherill and Ulf Bernitz' opinion '[t]he selected broader style of the UCPD is plainly more apt to permit regulatory and enforcement flexibility. It may be taken as a refreshingly new approach to tackling the general phenomenon of 'unfairness'. See Stephen Weatherill and Ulf Bernitz, "Introduction", in Stephen Weatherill and Ulf Bernitz (eds.), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29*, Hart Publishing, 2007, p. 5.

<sup>948</sup> According to Maher M. Dabbah, *EC and UK Competition Law*, CUP, 2004, at 9, another aspect of EC competition law is that its self-proclaimed political goals have meant a departure from the 'traditional' approach. Unlike systems of competition law in other jurisdictions, EC competition laws takes a 'European' regulatory approach and reflects cultures and values particular to the European continent. For a general overview, see Giorgio Monti, *EC Competition Law*, CUP, 2007, pp 89-123.

<sup>949</sup> See Commission Decision *Volkswagen*, of 23 February 1992, OJ 1993, L 20/14. The Commission also took note of the fact that the project constituted at the time the largest ever single foreign investment in Portugal: 'It is estimated to lead, inter alia, to the creation of about 5 000 jobs and indirectly create up to another 10 000 jobs, as well as attracting other investment in the supply industry. It therefore contributes to the promotion of the harmonious development of the Community and the reduction of regional disparities which is one of the basic aims of the Treaty. It also furthers European market integration by linking Portugal more closely to the Community through one of its important industries. This would not be enough to make an exemption possible unless the conditions of Article 85 (3) were fulfilled, but it is an element which the Commission has taken into account'.

considerations.<sup>952</sup> Competition laws which are aimed at the dispersal of power as a matter of ideology may favour small businesses and seek to protect them from big business. Instead of protecting competition the tendency may instead be to use competition rules to protect competitors. In some cases competition rules have been applied, for example, to protect or favour small or medium-sized enterprises or to protect competitors from the dominant firm's (efficient) low pricing, or to force a dominant firm to give access to resources it controls to a smaller firm in order to allow the latter to compete with it.

### ***2.2.2. The interface between intellectual property rights and European competition policy***

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<sup>950</sup> In *Simulcasting*, Commission Decision of 8 October 2002, OJ 2003, L 107/58, the Commission considered that Simulcasting would be put in a framework which ensured the proper remuneration of right-holders, that the effort of music producers would be duly rewarded and that therefore a wide range of music would be available in the future.

<sup>951</sup> In Commission Decision *KSB/Goulds/Lowara/ITT*, of 12 December 1990, OJ 1991, L 19/25, the Commission took into consideration that the advantages arising from the cooperation would benefit consumers at the very least through the improvement in the quality of water pumps. Moreover, two aspects of the new pumps, *i.e.* energy conservation and the fact that the fluids handled by the pump are not polluted, are environmentally beneficial; and in *CECED* (OJ 2000 L187/47), the Commission granted individual exemption to manufacturers of domestic household appliances, it noted that there would be both economic benefits to individuals and collective environmental benefits to society generally as a result of the agreement in question. In its Decision *DSD*, of 17 September 2001, OJ 2001, L 319/1, the Commission took into consideration that DSD sought to give effect to national and Community environmental policy with regard to the prevention, recycling and recovery of waste packaging, and that the Service Agreement it proposed was aimed at preventing or reducing the impact of waste packaging on the environment, thus providing a high level of environmental protection. In *Exxon/Shell* the mere avoidance of environmental risks was taken into consideration. See Commission Decision of 19 May 1994, OJ 1994, L 144/20: '(71) Moreover, the often superior performance of LLDPE over LDPE will result in improved products for consumer's use. It should also be noted that the reduction in the use of raw materials and of plastic waste and the avoidance of environmental risks involved in the transport of ethylene will be perceived as beneficial by many consumers at a time when the limitation of natural resources and threats to the environment are of increasing public concern.'

<sup>952</sup> *V. g.* Commission Decision *BMW Belgium NV and BMW Dealers*, of 23 December 1977, OJ 1978, L 46/33. Competition law is concerned with applying legal rules and standards to address market imperfections and to preserve, promote and sometimes restore market conditions conducive to competition. Maher M. Dabbah, *EC and UK Competition Law*, CUP, 2004, at 6.

In respect of intellectual property rights, European competition policy regulates, first, certain terms of bilateral intellectual property right licensing agreements, *i.e.*, technology transfer agreements, under Article 81 of the EU Treaty and Block Exemption 772/2004. An intellectual property right may be the subject of an agreement between undertakings, and such an agreement may prevent, restrict, or distort competition. The classical examples of agreements relating to intellectual property rights that are capable of restricting competition are licensing agreements and assignments.<sup>953</sup>

Second, competition policy under Article 82 of the EU Treaty has, in extreme cases, been used to restrict the abusive commercial conduct of individual owners of intellectual property rights, particularly where the intellectual property right protects a market standard or a *de facto* monopoly. Article 82 regulates the unilateral behaviour<sup>954</sup>

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<sup>953</sup> An assignment implies the outright transfer of ownership to another person. A licence merely implies that a person other than the owner is allowed to perform acts that would otherwise amount to an infringement of the owner's intellectual property right. In case *Parke, Davis v Centrafarm* (Case 24/67 [ESE] ECR 55), the Court ruled: '[a] patent taken by itself and independently of any agreement of which it may be subject, is unrelated to any of these categories, but is the expression of a legal status granted by a state to products meeting certain criteria, and thus exhibits none of the elements of contract or concerned practice required by Article 85(1). Nevertheless it is possible that the provisions of this article may apply if the use of one or more patents, in concert between undertakings, should lead to the creation of a situation which may come within the concepts of agreements between undertakings, decisions of associations of undertakings or concerted practices within the meaning of Article 85 (1)'. The Court specified in the *Centrafarm v. Sterling Drug* case (Case 15/74, [1974] ECR 1147) that Article 85(1) EC does not apply either to agreements or to concerted practices relating to intellectual property rights between undertakings that belong to a same concern, as a parent company or a subsidiary, if the following conditions are fulfilled. Namely, they form an economic unit, the subsidiary cannot determine freely its market behaviour, and the agreement merely concerns the internal allocation of tasks. It was confirmed subsequently that, as a general rule, Article 85 does not apply to such agreements. A few years later in *EMI Records Limited v CBS United Kingdom* (Case 51/75, [1976] ECR 811), the Court ruled: '[a] trade mark right, as a legal entity, does not possess those elements of contract or concerted practice referred to in Article 86(1). 27. Nevertheless, the exercise of that right might fall within the ambit of the prohibitions contained in the Treaty if it were to manifest itself as the subject, the means, or the consequence of a restrictive practice. 28. A restrictive agreement between traders within the common market and competitors in third countries that would bring about an isolation of the common market as a whole, which, in the territory of the Community, would reduce the supply of products originating in third countries and similar to those protected by a mark within the Community, might be of such a nature as to affect adversely the conditions of competition within the common market' (para 26). See also Case 258/78, *L.C. Nungesser KG and Kurt Eisele v Commission of the European Communities*, [1982] ECR 2015 para 28.

<sup>954</sup> As the ECJ ruled in *Michelin* (Case 322/81, [1983] ECR 3461), '[a] finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market' (para 57).

of one or, in certain cases, more undertakings, holding a dominant position (undertakings in a dominant position are, in essence, firms holding a substantial amount of market power in one or more of the markets in which they operate).

Article 82, however, does not prevent the mere creation or possession of a dominant position. As its wording clearly states, Article 82 only prohibits abuses<sup>955</sup> of such a dominant position. These abuses may consist in one of the four different actions listed in the second paragraph of Article 82. The conduct prohibited may be either exclusionary practices, customer exploitation, or both.<sup>956</sup> Exclusionary abuses are those practices, not based on normal business performance, which seek to harm the competitive position of the dominant company's competitors, or to exclude them from the market altogether.<sup>957</sup> In contrast to exploitative abuses, exclusionary ones may not have a direct harmful effect on the customers of the dominant firm, and may result in at least short-term benefits for them. Exploitative abuses, on the other hand, involve the attempt by a dominant company to exploit the opportunities provided by its markets strength in order to harm customers directly.<sup>958</sup>

The analysis of abuse under Article 82 involves three stages. First, the 'market' in which the alleged abuse occurred must be defined. Secondly, there must be a determination of whether or not the firm allegedly committing the abuse was 'dominant' in a market, whether or not it is in the market and whether the abuse

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<sup>955</sup> The authentic English text of the Treaty uses the single word 'abuse', but most of the other languages use the double concept of 'abusive exploitation', which might be thought to forbid harsh treatment of those with whom the dominant firm deals. See Valentine Korah, *An Introductory Guide to EC Competition Law and Practice*, 8<sup>th</sup> ed., Hart Publishing, 2004, p. 122.

<sup>956</sup> See Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 2<sup>nd</sup> ed., Oxford, 2007, 3.20-3.22, on the concept of abuse. The key concern of the Commission is with conducts which exclude competitors from the market. Conduct so aimed, or having such an effect, is likely to be condemned as an abuse, whatever form it takes.

<sup>957</sup> See Robert O'Donoghue, claiming for a 'limiting production test' to the prejudice of consumers as the adequate test for exclusionary conduct, in "Verbalizing a General Test for Exclusionary Conduct under Article 82 EC", in *European Competition Law Annual 2007*, Claus-Dieter Ehlermann and Mel Marquis (eds.), EUI, pp 327-358.

<sup>958</sup> Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 2<sup>nd</sup> ed., Oxford, 2007, 3.117 and 3.118.



occurred. Thirdly, the conduct complained of must be analysed to determine whether or not an ‘abuse’ was committed.

In determining the existence of a dominant position, it is first necessary to identify the relevant product and geographic markets.<sup>959</sup> In respect of the relevant market of intellectual property rights, if the product is complex, there is an element of discretion in deciding what is the relevant product. For example, in *Hilti v. Commission*, Hilti produced nail guns, cartridges and nails and sold them in a commercial package which is called a Power Activated Fastening System (PAFS). Hilti held that a patent for the gun and one for the cartridges strips, but none for the nails. The Commission decided that the relevant market was not the wall construction market in which the PAFS was a product. Instead, it chose to define each part of the package as a separate product and found that there were three separate markets. A narrow definition makes it easier to find dominance. This definition of market also influenced the issue of abuse. The tie-in with the unpatented nails was caught by Article 82 as a case of attempted leveraging of the patent protection going beyond the scope of the patent. This also occurred in *Hugin*, a case dealing with the spare parts for Hugin cash registers and in *Volvo*, where ‘new Volvo spare front wing parts’ were held to be a relevant market.<sup>960</sup> In respect of geographic markets, from an intellectual property perspective, competition authorities

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<sup>959</sup> The European Commission’s Notice on the definition of the Relevant Market (Commission Notice on the definition of relevant market power for the purposes of Community competition law [1997] OJ C372) uses an economic approach to define the relevant market. Paragraph 7 states that, ‘a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use’. When determining the relevant market both the ECJ and the Commission require consideration of its geographical reach. Paragraph 8 of the Commission Notice states: ‘The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area’. The geographic market is identified in relation to the area in which the product in question is marketed. Factors which can help distinguish one geographic market from another are cost of transport, the nature of the product and legal regulation.

<sup>960</sup> Meg Buckley, “Licensing Intellectual Property: Competition and Definitions of Abuse of a Dominant Position in the United States and the European Union (2003) *Brook. J. Int’l L* 803, and D. Anderman and Hedvig Schmidt, “EC Competition Policy and IPRs”, in Steven D. Anderman (ed.) *The Interface Between Intellectual Property Rights and Competition Policy*, 2007, p. 55

and the Court have accepted the state monopoly as the boundary of the relevant geographic market.

The second element to clarify is dominance. The classic definition of the nature of a dominant position within the meaning of Article 82 is contained in the ECJ's judgment in the *United Brands* case, where it was described as follows: a position of economic strength enjoyed by an undertaking<sup>961</sup> which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers.<sup>962</sup> Normally, abuses within the meaning of Article 82 can only be committed in the market where the dominant position is established. However, in special circumstances, a dominant undertaking may commit an abuse in neighbouring markets to those where it holds a dominant position.<sup>963</sup>

In order to understand the interface between Article 82 and intellectual property rights, it is important to distinguish between two types of single firm dominance: dominance of a market with real competitors existing in the market and dominance in the form of few if any real competitors, *i.e.*, a near monopoly. Examples of the latter are offered by markets where dominance takes the form of an industrial standard such as the MPEG component in DVD chips or Windows operating systems for Intel powered PCs.<sup>964</sup> The

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<sup>961</sup> Article 82 refers to abuses by 'one or more undertakings'. This wording implies that Article 82 is addressed not only to single dominant firms, but also to more than one undertaking holding together a dominant position. See J Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 2<sup>nd</sup> ed., Oxford, 2007, 3.93, and Giorgio Monti, "The Scope of Collective Dominance under Articles 82 EC", (2001) 38 *CMLRev* 131-157. In intellectual property field, this category of dominance is more relevant to cross-licensing relationships and technology or patent pools.

<sup>962</sup> Dominance is a position of considerable economic power held for a period of time by a firm/over customers and/or suppliers in a market. More specifically, it is the ability of a firm/s to restrict output and thus raise prices above the level that would prevail in a comparative market without existing rivals or new entrants in due time taking away its customers. Dominance is not an absolute concept but is a matter of degree. Market power may be found to exist to a greater or lesser extent, or for longer or shorter periods of time. Dominance is not synonymous with monopoly. See Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 2<sup>nd</sup> ed., Oxford, 2007, 3.25-3.26.

<sup>963</sup> *Ibidem*, 3.105-3.108. See also Notice on the application of the Competition Rules to access agreements in the telecommunications sector [1988] OJ C265/3, paras. 65-67.

<sup>964</sup> I am following D. Anderman and Hedvig Schmidt, "EC Competition Policy and IPRs", in Steven D. Anderman (ed.) *The Interface Between Intellectual Property Rights and Competition Policy*, 2007, p. 44.

mere existence of an intellectual property right is not presumed to be a barrier to entry. Since a market consists of goods that are substitutes for each other, it is only where the market is a single good market, *i.e.*, a market standard that the intellectual property right constitutes an absolute barrier to entry.

Finally, some attention should be devoted to the concept of abuse, that covers both exclusionary and exploitive practices by dominant undertakings. The concept of abuse:<sup>965</sup>

is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

The key element in defining exclusionary abuses by firms in a dominant position is the need to distinguish anti-competitive behaviour from the pro-competitive behaviour which the competitive rules are intended to foster. The first question to be considered is determining whether, for instance, the granting of volume rebates is the result of competition on the merits. Any firm will try to exclude its competitors from the market by performing more effectively than them. A firm only abuses its position when the exclusion of competitors is not the consequence of better performance.

The second specific element included in the definition of exclusionary abuse above is that the behaviour of the dominant undertaking ‘has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition’. The effect required by the definition can be either actual or potential. It appears that this should be understood as demanding that the behaviour in question be liable to alter the structure of the market, by weakening or eliminating competitors.

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<sup>965</sup> Case 85/76, *Hoffmann-La Roche*, [1979] ECR 461, para 91. See also Case 322/81, *Michelin*, [1983] ECR 3461, para 70.

There is no need, however, to prove that such an effect is substantial. Indeed, in markets where an undertaking holds a dominant position, competition is already weakened and any further modification of the market structure could strengthen the market power of this undertaking.<sup>966</sup>

Article 82 has been used to restrict practices of abusive pricing<sup>967</sup> by a intellectual property right owner and to control the conduct of a intellectual property right owner towards innovators who are downstream of an or protected industrial standard including refusals to deal, refusals to license, refusals to provide proprietorial software interface and tie-ins. Of course, in respect of excessive pricing of intellectual property rights, the difficulties of measuring unfair price in general under Article 82(a) are intensified when an assessment must be made of a fair return to innovators exploiting their intellectual property rights. The Court of Justice has accepted that there must be considerable room for a high return on intellectual property rights based on the amounts which right-holders have invested in order to perfect the protected right.<sup>968</sup>

However, Article 82(a) is not solely concerned with purely exploitive excessive pricing. Excessive pricing which has the effects of excluding competitors can also be abusive

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<sup>966</sup> Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 2<sup>nd</sup> ed., Oxford, 2007, 3.128-3.133.

<sup>967</sup> Case 40/70, *Sirena S.r.l. v Eda S.r.l. and others*: ‘As regards the abuse of a dominant position, although the price level of the product may not in itself necessarily suffice to disclose such an abuse, it may, however, if unjustified by any objective criteria, and if it is particularly high, be a determining factor’ (para 17). See Hanns Ullrich, “The Impact of the ‘Sirena’ Decision on National Trade Marks” (1972) 2 *IIC* 193-225. See also Case 24/67 *Parke, Davis and Co.*, [1968] *ECR* 55, and *Maxicar*, para 17.

<sup>968</sup> For example, R&D costs are particularly applicable to intellectual property rights such as design rights and patents and perhaps informational copyright. In the case of other rights such as trade marks, the costs can include the expense involved in promotion, advertising, and systems of quality control. See Inge Govaere, *The Use and Abuse of Intellectual Property Rights in E.C. Law*, Sweet & Maxwell, 1996, cap. II. Even within the framework of competition law, there are strong arguments for a high return on products or processes protected by intellectual property rights. The return is not simply a reward to the individual inventor; it is also designed to act as an incentive for other inventors or originators to invest in innovation. It also includes an element to compensate for the failures of other efforts at commercial exploitation. From an intellectual property point of view, this incentive function of ‘just reward’ results in a figure which is established by what consumers and customers are willing to pay for the added value the intellectual property right confers on a product compared with another product which does not incorporate that right, in other words what the market will bear. Cf. D. Anderman and Hedvig Schmidt, “EC Competition Policy and IPRs”, in Steven D. Anderman (ed.) *The Interface Between Intellectual Property Rights and Competition Policy*, 2007, p. 52.

under Article 82 (a). In *Maxicar*, the Court referred to the fixing of prices at an unfair level as an alternative abuse to refusing to supply spare parts to an independent repairer. In that case, the Court's concern was with a pricing practice that was so high that it had the effect of discouraging independent repairers in a secondary market from ordering supplies and therefore functioned as a virtual refusal to supply.<sup>969</sup>

In respect of the refusal to supply,<sup>970</sup> Article 82 may be relevant when the property right-holder is in a dominant position and refuses to give licences to those wanting them. The cases arose as the Court in *Hugin* had confirmed that an undertaking may be dominant on the market for its own spare parts even if the primary product market is competitive. In *Volvo* and *Renault*, the question was if it constituted an abuse for a car manufacturer to refuse to license the design rights on its car parts to third parties wishing to manufacture and sell such parts.<sup>971</sup>

Article 82 also covers those cases where a company which holds a dominant position forces its customers to purchase the goods or services for which it is dominant together with other goods or services for which it is not (the first products or services are commonly referred to as the tying market and the second ones as the tied market). Such

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<sup>969</sup> In *SACEM II*, although the Court noted that the rates seemed high, it refused to rule on the issue of whether the rates were abusively high leaving that to the national court. See also Case 5/93, *Tremblay v Commission* [1999] ECR I-4695. Cf. D. Anderman and Hedvig Schmidt, "EC Competition Policy and IPRs", in Steven D. Anderman (ed.) *The Interface Between Intellectual Property Rights and Competition Policy*, 2007, p. 52.

<sup>970</sup> Heike Schweitzer, "Controlling the Unilateral Exercise of Intellectual Property Rights: A Multitude of Approaches but No Way Ahead? The Transatlantic Search for a New Approach", EUI Working Paper 2007/31, p. 28: 'Article 82 should be applied to unilateral refusals to license only in exceptional circumstances. Competition for the market can be an important part of the competitive process. To determine that exceptional circumstances under which competition law intervention is justified, guidance can be taken from the first two of the three criteria used in the telecommunications sector to decide when regulation is justified: there must be high, non-transitory barriers to entry; and the market must not tend towards competition in the medium term'.

<sup>971</sup> The Court held that a refusal to license was not per se an abuse, but might become so in certain circumstances. The car makers were given a choice: either they could license third parties, or they could retain their monopoly and ensure, *inter alia*, that they did not arbitrarily refuse to supply independent repairers, did not charge unfairly and continued to supply parts for old models. One way of looking at this is to see an order to license as a remedy for other abuses. For a comparison, see John M. Taladay and James N. Carlin, Jr., "Compulsory Licensing of Intellectual Property under the Competition Laws of the United States and European Community", (2001) 10 *Geo. Mason. L. Rev.* 443 – 457.

a practice might distort competition in the tied market by driving out of the market those providers who only sell tied products. Indeed, if most of the tied product consumers also need the tying product, they would inevitably obtain the tied product together with the tying one and would not need, therefore, to obtain the former from other suppliers.<sup>972</sup> From the perspective of the intellectual property right owner, bundling products together is simply one method of exploiting the intellectual property right. However, if the legal monopoly the intellectual property right owner coincides with marketing power amounting to dominance tie-ins create the risk that an intellectual property right owner may use them either to force customers to choose products they would rather not have or to exclude competitors and eventually foreclose competition in a second related market as the tie creates a competitive advantage for the intellectual property right owner, compelling competitors to have access to both markets if they are to compete on equal terms with the intellectual property right owner.<sup>973</sup>

To conclude, I would summarize the argument so far, by recalling that intellectual property is functionalized to the market through competition law. Intellectual property rights holders do not have a legal monopoly; rather, they are subject to restrictions on the exercise of their rights. Again, and similarly to what has been described regarding free movement of goods policy, European institutions have tried to reach a balance between the *potestas* of the owner and the needs of the market.

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<sup>972</sup> In *Tetra Pak II*, the ECJ interpreted commercial usage very narrowly – it is not enough that most firms in the market tie, if some do not. It seems so treat commercial usage as a justification, the burden of establishing which rests on the dominant firm, rather than as part of the definition of abuse. See Valentine Korah, *An Introductory Guide to EC Competition Law and Practice*, 8<sup>th</sup> ed., Hart Publishing, 2004, p. 140. Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 2<sup>nd</sup> ed., Oxford, 2007, 3.195. The classic example of tying in EC Competition case law is found in the *Hilti* case: *Eurofix-Bauco/Hilti* [1988] OJ L65/19; *Case T-30/89 Hilti AG v Commission* [1991] ECR II-1439; *Case C-53/92P Hilti AG v Commission* [1994] ECR I -667.

<sup>973</sup> Nevertheless, in many cases, bundling may have a clear commercial logic, especially in high technology industries, where the bundling often introduces a ‘new generation’ of products. For example, in the mobile phone industry – first generation: mobile phones, second generation: mobile phones with camera; third generation: phones with video link and music. Moreover, one of the main reasons for Microsoft’s tying of its Windows Media Player with its Windows platform was to maintain a strong position in the market for downloading content such as music. Steven D. Anderman and Hedvig Schmidt, “EC Competition Policy and IPRs”, in Steven D. Anderman (ed.) *The Interface Between Intellectual Property Rights and Competition Policy*, 2007, p. 52.

Free movement and competition mutually presuppose one another. The market includes all communication oriented by law, such that legal rules refer reflexively to the function of European integration. Each of these policies depends on supplies coming from the other. Only through the shared code of the market communication, each of these systems also concomitantly satisfies the functions of the other and thus maintains a relation to European integration. A European measure, in the service of market integration, must actually contribute to eliminating obstacles to the free movement of goods or to the freedom to provide services, to removing distortions of competition, and to protect consumers. Through the legal institutionalization of steering communicative networks, these systems remain anchored in the market.

The solution to our problem – the conflict between intellectual and physical property - however, cannot be found within the realm of those policies, or within consumer protection policy. In fact, the European definition of consumer as been built up as a transaction definition, according to which a consumer is a natural person who, in transactions covered by the legislation concerned, is acting for purposes which are not within his trade, business, craft or profession. In a foreseen conflict between property owners, the solution cannot depend on the role they play in a concrete transaction. On the contrary, the solution should be obtained upstream, in order to protect the interests of both property right holders.

### **3. Physical property and intellectual property: on the part of the market?**

I have outlined a situation where a conflict between properties concerning a specific thing might exist. There is, for instance, a conflict between the holder of the design right and the owner of the car, which is not mediated by a third party, namely a distributor. Between the distributor and the right-holder, the car producer, there is a direct commercial relation, to which competition rules apply. And between the property right-holder and third parties who want to import goods, free movement of rules apply. But

between the owner of the good and the holder of a property right, where a conflict might arise, EC law should have a word to say. How can we map out a solution?

As I have mentioned above, the question of the restrictions on intellectual property, in the context of its functionalisation to the market, has been heavily debated and the Court has juggled between the interests at stake. Nevertheless, the interests of consumers have not been taken into consideration when the Court assessed the intellectual property right protection. For example, in the *Maxicar* case both the car manufacturers and independent manufacturers claimed to be safeguarding the interests of consumers by obtaining, or challenging, design protection for bodywork components of cars. Neither the Court nor the Advocate General in their findings under Article 36 referred expressly to the effect that granting design protection to bodywork components of cars has on the consumer, *i.e.*, on the car owner. However, it is submitted that there is a causal effect which is far from negligible and therefore merits mention.<sup>974</sup>

On the contrary, basically two sets of arguments were put forward in the *Maxicar* proceedings which directly invoked consumers' interests. The first issue concerned the alleged indispensable relationship between design protection and quality/safety considerations. Renault maintained that spare parts manufactured by independent manufacturers are of a lower quality than those sold by car manufacturers. The refusal to grant design protection for spare parts, which in this particular case ensured a monopoly position, would therefore be tantamount to jeopardizing the consumer's interests. In other words, the argument goes that design protection on bodywork components is needed to safeguard the quality of the products and the safety of the consumers. The second matter was the impact that design protection for bodywork components has on the choice of, and the price paid by, consumers for those parts due to ensuing tie-in of spare parts upon purchasing a car.<sup>975</sup>

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<sup>974</sup> I am following Inge Govaere, *The Use and Abuse of Intellectual Property Rights in E.C. Law*, Sweet & Maxwell, 1996, p. 222.

<sup>975</sup> Inge Govaere, *ibidem*, p. 223.



Maxicar and CICRA pointed out that allowing this situation to occur through the use of design protection would entail several detrimental consequences for the car owner. First, a monopoly position means that monopolising prices can be charged. The price of spare parts could thus be increased up to the point at which car owners refrain from effecting further repairs. This might be an indirect method of prematurely eliminating certain types of older vehicles from the market in favour of the purchase of new vehicles. Secondly, conferring an exclusive right implies that potential competitors can be excluded from the market even though the intellectual property owner may not necessarily supply all possible spare parts himself. There are parts that could be sold separately, whereas the car manufacturers only sell whole units such as car doors. The non-availability of such smaller parts would thus lead to an increase in the price of the repairs.<sup>976</sup>

The Court did not take into consideration, autonomously, the interest of consumers when assessing the refusal to deal of Maxicar.<sup>977</sup> But, in my opinion, it should have

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<sup>976</sup> *Ibidem*, p. 227.

<sup>977</sup> In *IMS Health*, the ECJ had to decide whether the prevention of the emergence of a new product is a necessary requirement of the application of Article 82. IMS Health had developed a so-called brick structure for providing pharmaceutical companies with data on the sales of drugs in local markets in Germany. The brick structure divided Germany into 1860 sectors (bricks) covering a number of pharmacies. Pharmaceutical companies had cooperated in the development of the brick structure and did not want to work with different systems. Competitors of IMS Health, therefore, were only able to compete by using the same structure, but were barred from doing so by the copyright granted to the structure under German copyright law. Whereas the facts of IMS Health are in line with Magill as to the first issue of the existence of a merely potential or hypothetical primary market - the market for the licensed intangible good - IMS Health presents the harder case as to the requirement of the prevention of the emergence of a new product. Whereas the dominant TV stations did not offer comprehensive TV guides, IMS Health actually offers the specific service of collecting local data to the pharmaceutical companies. Although the ECJ leaves it to the referring court to decide, it is quite obvious that petitioners for the copyright license would just duplicate the service provided by IMS Health. Prior to the referral of the IMS Health case to the ECJ, the Commission tried to help competitors by granting interim relief, obliging IMS Health to grant the licence. Hereby, the Commission argued that in Magill the ECJ took the prevention of the appearance of a new product as only one example of 'exceptional circumstances'. In IMS Health, the ECJ, adopting the view proposed by the Advocate General, quite clearly indicates the consumer orientation of its reasoning. Article 82 EC may only be applied if the refusal to license 'prevents the development of the secondary market to the detriment of the consumer'. From this criterion, the Court, again joining the Advocate General, concludes that this requirement would only be fulfilled if the petitioner did not just duplicate the goods and services already offered on the market, but intended to produce new goods or services not offered by the owner of the right and for which there was a potential consumer demand. Neither the Court nor the Advocate General explains the underlying concept of the interest of consumers at the interface of competition law and intellectual property law. Consumer protection as such may be one goal among others when it comes to competition law. But usually the

done so. Whichever institution is called upon to regulate the common market should take into account the position and interests of all market agents (both producers and consumers).

However, consumer protection, as it has been developed by European regulators, does not constitute an adequate tool. In fact, a transactional definition of the consumer does not allow for a consistent and coherent approach. The distinction between the acquirer or the owner of a motor vehicle that is acting for purposes which are not within his trade, business, craft or profession and one who is not, is often theoretically flawed.

I would, thus, suggest a methodological turn. A resolution of the conflict within the framework of a legal system begs a conceptual question, and must, therefore, be found during the institutive moment of the rule creating a property right.<sup>978</sup> The strategy is, first, to define the scope of those rights in such a way that makes it possible to avoid the conflict. My hypothesis is that a solution is to be found in the agency of property rights. Property develops its own codes. Rights are not pre-given truths to be discovered but rather are constructions, linked up with functional approaches. The guarantee of the legal institution of property is personalized to the extent that individual rights of non-removal of abstract legal positions exist in connection with the start, the end, and the consequences of one's position as an owner.<sup>979</sup> Accordingly, the sphere of inviolability requires, firstly, from other individuals and the state a combination of negative obligations.

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interest of consumers is not cited by the European Courts and the Commission as the decisive criterion for the application of competition law. Therefore, reference to consumers is quite surprising in the context of Article 82. On the contrary, and in contrast to the Magill decision, consumers will not benefit from the IMS Health decision. In IMS Health, the pharmaceutical companies that requested the service of collecting data on the sales of drugs must be considered to be the consumers. Josef Drexler, "Intellectual Property and Antitrust Law - IMS Health and Trinko - Antitrust Placebo for Consumers Instead of Sound Economics in Refusal-to-Deal Cases", (2007) 7 *IIC* 788-808. Claiming that a correct analysis should be done internally, and turn to the core of the right, to its scope of protection. J. P. Remédios Marques, *Biotecnologia(s) e Propriedade Intelectual*, vol II., Almedina, Coimbra, 2007, pp 997-1001.

<sup>978</sup> See supra 77.

<sup>979</sup> Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers, OUP, 2002, p. 215.

Before formulation of property rights, an appropriate weighing and balancing of all relevant interests is thus in need, in order to avoid normative inconsistencies. In making explicit a property right, the regulatory decision encodes an overall assessment of the interlocking of different concrete interests and sends a heuristic message on the autotelic behaviour of subjects. EASTERBROOK displays three propositions about public policy in respect of property rights: to make rules clearer and to create property rights where now there are none, to make bargains possible, and to create bargaining institutions.<sup>980</sup>

Individual rights fix the limits within which a subject is entitled freely to exercise her will.<sup>981</sup> Therefore, the definition of property rights cannot be done acontextually, without regard to the balancing (identification, quantification, and comparison) of interests that has to take place in the context of the application of currently valid law.<sup>982</sup> A recursive relation exists between the scope of property rights and the communicational assessment of conflicting interests.

Property is not an anomic or limitless guarantee. Rather, as element of the legal order, it presupposes collaboration among subjects who recognize one another, in their reciprocally related rights and duties, as free and equal citizens, and together decipher the historical meaning of the permission. This mutual recognition is constitutive in a legal order from which actionable rights are derived.<sup>983</sup> The achieved agreement makes possible the coordination of actions and the weaving together of their consequences.

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<sup>980</sup> See Frank H. Easterbrook, "Who Decides the Extent of Rights in Intellectual Property?", in Rochelle Dreyfuss, Diane L. Zimmerman and Harry First (eds.) *Expanding the Boundaries of Intellectual Property – Innovation Policy for the Knowledge Society*, OUP, 2001, pp 411-412.

<sup>981</sup> Jürgen Habermas, *Between Facts and Norms, Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg, MIT, 1998, p. 82.

<sup>982</sup> On balance and conflicts of fundamental legal rights, see Lorenzo Zucca, *Constitutional Dilemmas – Conflicts of Fundamental Legal Rights in Europe and the USA*, OUP, 2007, pp 84 ff.

<sup>983</sup> *Ibidem*, 88. Jürgen Habermas, *Between Facts and Norms, Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg, MIT, 1998, pp 83-84. The legitimacy of law ultimately depends on a communicative arrangement: as participants in rational discourses, consociates under law must be able to examine whether a contested norm meets with, or could meet with, the agreement of all those possibly affected. Consequently, the sought-for international relation between popular sovereignty and human rights consists in the fact that system of rights states precisely the conditions under which the forms of communication necessary for the genesis of legitimate law can be legally institutionalized.

As a provider of enabling structural conditions, the market must respect the subjective autonomy of actors - the autonomous and decentralized decisions of self-interested individuals in a certain sphere of action. The individual is provided with spheres of action and autonomy is tailored to the strategic pursuit of individual interests. Proportionality is a mechanism of action coordination that requires the admitted interferences with individual's autonomy to be proportional. Before displaying a regulatory decision, the first question to be answered is what can be brought within the scope of a right.<sup>984</sup> Only this way, property remains anchored in the socio-political order. The essential core is, then, defined by what is left over after the balancing test has been carried out.

As HABERMAS wrote, the system of rights can be reduced neither to a moral reading of human rights nor to an ethical reading of popular sovereignty, because the private autonomy of citizens must neither be set above, nor made subordinate to, their political autonomy. The normative intuitions we associate conjointly with human rights and popular sovereignty achieve their *full* effect in the system of rights only if we assume that the universal right to equal liberties may neither be imposed as a moral right that merely sets an external constraint on the sovereign, nor be instrumentalised as a functional prerequisite for the legislature's aims. The co-originality of private and public autonomy first reveals itself when we decipher, in discourse-theoretic terms, the motif of self-legislation according to which the addressees of law are simultaneously the authors of their rights. The substance of human rights then resides in the formal conditions for the legal institutionalization of those discursive processes of opinion- and will-formation in which the sovereignty of the people assumes a binding character.<sup>985</sup>

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<sup>984</sup> On the initial choices of policy in a projected rule, see Robert S. Summers, *Form and Function in a Legal System – A General Study*, CUP, 2006, p. 188.

<sup>985</sup> Jürgen Habermas, *Between Facts and Norms, Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg, MIT, 1998, p. 104.

The protection of the property right-holder,<sup>986</sup> while an actor in the market, implies the recognition of a right to equal access to the market, and the autonomy of one's choices and actions. Any restriction to individual's autonomy shall be strictly necessary and proportional. The balancing outcome is a conditional preferential statement, a requirement to optimize the guarantee. In balancing conflicting interests, legal and practical consistency is the desired result.<sup>987</sup> Only such an outcome satisfies the conditions of mutual understanding, by fulfilling expectations from individuals, and might ground the acceptability of raised validity claims. Law often protects owners' freedom of action, but it also often protects the security set of interests on the other side and becomes a system for coordination of action within semi-autonomous concepts.<sup>988</sup>

Intellectual and physical property should be treated identically in the law.<sup>989</sup> But it raises the fundamental question of how to reconcile and protect distinct properties. Law making, insofar as it requires value judgments, is political.<sup>990</sup> Regulators must take all

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<sup>986</sup> Autonomy must be conceived abstractly. The discourse principle is intended to assume the shape of a principle of democracy only by way of legal institutionalization. The principle of democracy is what then confers legitimating force on the legislative process. The key idea is that the principle of democracy derives from the interpenetration of the discourse principle and the legal form. Habermas understands this interpenetration as a logical genesis of rights, which one can reconstruct in a stepwise fashion. One begins by applying the discourse principle to the general right to liberties – a right constitutive for the legal form as such – and ends by legally institutionalizing the conditions for a discursive exercise of political autonomy. By means of this political autonomy, the private autonomy that was at first abstractly posited can retroactively assume an elaborated legal shape. Hence the principle of democracy can only appear as the heart of a system of rights. The logical genesis of these rights comprises a circular process in which the legal code, or legal form, and the mechanism for producing legitimate law – hence the democratic principle – are co-originally constituted. Such a system should contain precisely the rights citizens must confer on one another if they want to legitimately regulate their interactions and life contexts by means of positive law. To arrive at the system of rights, then, we need the concept of legal form, which stabilizes behavioural expectations and the discourse principle, in light of which the legitimacy of legal norms can be tested. See Jürgen Habermas, *Between Facts and Norms, Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg, MIT, 1998, pp 121-122.

<sup>987</sup> See Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers) OUP, 2002, p. 106.

<sup>988</sup> Jane B. Baron, "The Expressive Transparency of Ownership", 2002) 102 *Colum. L. Rev.* 215.

<sup>989</sup> Guido Westkamp, "Changing Mechanisms in Copyright's Ontology – Structure, Reasoning and the Fate of the Public Domain", in Guido Westkamp (ed.), *Emerging Issues in Intellectual Property – Trade, Technology and Market Freedom: Essays in Honour of Herchel Smith*, Elgar, 2007, p. 56, illustrates how the application of ontology in intellectual property creates many more problems than in real property, dealing with 'things' as ontologically accessible entities.

<sup>990</sup> See Duncan Kennedy, *A Critique of Adjudication*, 1997, Harvard University Press, p. 27.

interests into consideration. In the example given above – the conflict between the owner of a motor vehicle and the holder of a design right - I would suggest a novel approach. Law-making bodies must consider the interest(s) of the owner of the corporeal thing in the overall assessment of granting an intellectual property right. In the regulatory decision of protecting spare parts by way of an intellectual property right, creating an artificial or legal monopoly, the lawmaker must autonomously assess consumers' interests. The grant of intellectual property rights cannot abridge or set aside entirely the interests of the owner of the corporeal things.

*Dimensions of property*

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“The trip is long. Some days I wish it were endless. Those are rare, precious days. Other days, I’m glad to know that there will be a last tunnel, where the train will come to a halt forever.”

Pascal Mercier, *Night Train to Lisbon*, p. 372.

## Conclusion: Regulatory Challenges

Property, as a legal institution, is essential to the enterprise of analyzing legal systems into coherent sets of interrelated rules. The last decades have presented an unusually lively and challenging period for property analysis. The mutation on the object of property rights and on the relation between the goods and contract endangers traditional and deep-rooted conceptions and should be taken into consideration in a stipulative definition of property. The idea that buttressed my inquiry was that property is becoming strongly linked to consumption, either directly, because we own mainly consumption goods, or indirectly, because the use of a thing depends on a further contract and the owner is necessarily a consumer. I have depicted property as a means of interactivity, interpersonality, intertextuality, and interdiscursivity. Property, I have argued, is in relation to contracts and is a means for the owner to establish relations with others. Such a definition of property profoundly changes our classic understanding of the concept. Property becomes increasingly dynamic, vigorous, and communicative. And this way, it steps in to fulfil the functions required by the multi-variable essence of the individuals. The legal consequences and the regulatory needs of such a change in the conception of property were, then, to be ascertained.

I have started by clarifying the competence of European law with respect to property rights. Article 295 of EC Treaty reads that the Treaty shall in no way prejudice the rules in the Member States governing the system of property ownership. That provision has a



specific political nature and a symbolic importance in imposing Community's neutrality in respect of property rights system of Member States. It does not refer to the civil rules concerning property relationships and it is not meant to be a Community guarantee of property as a civil right or as a constitutional entitlement before public authorities.

The concept of a property system encompasses a set of rules governing access to and control of material resources, namely, rules of acquisition, of protection, and of transfer. It is clear that Member States are free to draw, in each case, their property systems. Historically, this was the *raison d'être* of this provision. Article 295 must, however, be read in the context of a Treaty creating a Community and an internal market. A market system presupposes both a system of private property (the organizing idea of a private property system is that, in principle, each resource belongs to some individual) and freedom of contract, as legal mechanisms. As a consequence, Member States are only free to format their property systems, namely to nationalize or privatize enterprises, within the respect for those limits.

To conclude, it is up to Member States to decide upon the assignment of intellectual property rights, but the Community has competence to enact legislation, *e.g.*, that might imply Member States to change their rules on the transfer of risk in a contract of sale, on the legal regime of reservation of title, or to set up a unified system of conveyancing.

In respect of property as a fundamental right, it should be recalled that economic and property rights, including the right to property, the freedom to trade, and the right to choose and practise freely a trade or profession, are amongst the rights that have been expressly recognized by the Court as fundamental. The European Union is bound, according to Article 6(2) of EC Treaty, by fundamental rights, and Article 17 of the Charter of Fundamental Rights of the European Union reads that 'everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.' And that 'intellectual property shall be protected'.

Nevertheless, the protection of fundamental rights in the Community legal order has been almost entirely the product of ECJ's case-law. Since *Nold*,<sup>991</sup> where the Court identified as a source of human rights, for the first time, 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories – such treaties providing 'guidelines which should be followed within the framework of Community law' - referring specifically to the ECHR, the adjudicative process of fundamental rights depends upon communication and interplay among the ECJ, the ECtHR, and the Member States (through their common constitutional traditions). Similarly, explanations relating to the Charter of Fundamental Rights<sup>992</sup> clarify that the meaning and scope of the right are the same as those of the right guaranteed by the ECHR and the limitations may not exceed those provided for there.

Under the ECJ's case-law, restrictions to fundamental rights may be imposed provided that they correspond to objectives of general interest pursued by the Community, and do not constitute a disproportionate and intolerable interference which infringed upon the very substance of the rights guaranteed. It should be noted, however, that a general principle of compensation cannot be found in Community law. It has been contended that interferences with private property aiming at, *e.g.*, a common organization of the market, must not, with regard to the aim pursued, place a disproportionate burden on the individual. Payment of compensation to individuals for interferences with their property, in my opinion, should be considered a nuclear element in the assessment of the fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's property rights. I have suggested that to prevent the undermining of property rights necessarily implies the recognition of an inherent duty to pay compensation. The effective protection of property rights requires proportionality for the interference with the right. In several cases, such a proportionally

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<sup>991</sup> Case 4/73, *Nold v. Commission* [1974] ECR 491, para 8.

<sup>992</sup> OJ 2007 C 303/17.

can only be obtained through the payment of compensation to the owner deprived of his right.

Hence, a shift from consistency to integrity is need in ECJ case-law concerning property rights protection. The ECJ should, in my opinion, depart from the narrow line of past decisions in search of strict fidelity to principles conceived as more fundamental to the scheme as a whole, namely property rights protection.

The strong bondage between property and consumption – the owner is necessarily a consumer – and the relevance of contract as a functional imperative of property steadily increases the need to focus attention on the protection granted to a property right-holder when playing the part of a European consumer. I have outlined that the Community has mainly adopted a transactional notion of consumer, linked up with functional approaches, namely the build-up and functioning of the internal market, and giving little space to judicial law-making. European consumer law is purely market behaviour law; it does not strive for the concrete balance of the individual interests involved in each specific transaction and it is not meant to allow equitable *ad hoc* decisions. Further, as the property right-holder does not always bear the distinctive stamp of being a consumer, the protection granted, for instance, *e.g.* to the owner of a motor vehicle, might differ substantially.

Second, the pillars that support the construction of consumers' depiction may come in for criticism. Objections to the average consumer paradigm are grounded on the need to protect the vulnerable and weak consumers. Nevertheless, policy options on the choice of the vulnerable consumer paradigm are particularly likely to cause two problems: legal uncertainty and the dilemma of difference. The vulnerable consumer conception, first, lacks practical and logical foundations. Firstly, how do we ascertain in each particular case who the concrete consumer is? Shall the legislature and the judge attain to a concept of national consumer? Or shall factors such as age and education be taken into consideration? And secondly, is it to be considered reasonable to require a trader to attune its commercial practices to a consumer who is particularly susceptible to a commercial practice for reasons like age, mental infirmity, or credulity? In respect of

European policymakers, they may face the dilemma of difference: the choice between an assimilationist model, which emphasizes the extent to which consumers are all alike, and an accommodation model, which seeks to create special rights on the basis of real differences. The latter option risks to recreate and to re-establish both the difference and its negative implications. It should be kept in mind, nevertheless, that the vulnerable consumer concept is a paternalistic notion which attenuates the difficulties present in the average consumer standard.

The information paradigm, which underlines transparency as the main method of consumer protection and it is closely connected with the emphasis on party autonomy as an important value of the internal market, has also showed to be problematic. The Recommendation on pre-contractual information to be given to consumers by lenders offering home loans issued by the Commission in 2001,<sup>993</sup> did not manage to prevent the recent rise of mortgages delinquencies and foreclosures, due to inability of a large number of home owners to pay their mortgages as their low introductory-rate (sub-prime) mortgages reverted to regular interest rates, and the rise of owners finding themselves in a position of negative equity, namely with a debt higher than the value of the property. The information paradigm is, thus, more efficient when dealing with strong consumers and reckons on national consumer law and policy to support the weak consumers.

Thirdly, the paradigm of the confident consumer, who would engage in cross-border shopping, and by so doing would be an actor in the constitution of the internal market, also face some barriers. The main obstacles perceived by consumers are practical obstacles, such as language difficulties or difficulties in exchanging the product and getting it repaired. The paradigm of the informed consumer was not able to deal with such oddities.

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<sup>993</sup> Commission Recommendation of 1 March 2001 on pre-contractual information to be given to consumers by lenders offering home loans, OJ 2001 L 69/25.

Finally, the failure of the paradigm of the prudent and rational (circumspect) consumer should be a central issue for regulatory purposes. People display bounded rationality, bounded willpower, and bounded self-interest. In respect of specifically property right-holders, the endowment effect is an important element to be taken into consideration by European policymakers. It matters, first, when the property right-holder enters into a contract and default rules or legal standards are set, and secondly, to assess the value an individual gives to property.

Second, the endowment effect undermines one of the basic assumptions of the Coase theorem: that the assignment of property rights has no efficiency impact if transaction costs are low. However, if simply giving one party the property causes the person to value it more than before, the original allocation becomes important: it changes people's preferences. The endowment effect acts similarly to transaction costs. It presents a barrier to the reallocation of property rights from an owner to another party who can put those rights to a more valuable use. Consequently, in some situations it might be efficiency enhancing to leave property rights somewhat unclear, in an effort to prevent an endowment effect from taking hold. If the endowment effect causes lower-valuing owners to refuse to sell entitlements to higher-valuing purchasers, damage remedies may be more efficient than injunctive relief because the former permits the higher-valuing purchaser to take the entitlement by paying the market price for it. Finally, the endowment effect suggests that, even when transaction costs are low, policymakers concerned with efficiency should attempt to allocate property rights to their most efficient user due to the reduced likelihood of efficient reallocations.

The critical remarks made to the moulding of the European consumer paradigm place a central challenge to European lawmakers. I have, first, suggested that the Community should not deal with the European consumer in an excessively paternalistic manner. A policy is asymmetrically paternalistic if it creates large benefits for those people who are boundedly rational while imposing little or no harm on those who are fully rational (and involving low implementation costs). Restraints on contractual freedom are intended to protect the freedom of those whose freedom they restrict. The restriction of substantially self-regarding conduct is permissible while it is necessary to enable

communication in the market autonomously and rationally. Instead of counteracting autonomy, soft paternalism actually helps to promote and to protect it. Consumer protection policymakers must decide how autonomy must be conceived and implemented in a given context. They should compromise discourses among the economic despotism and decentralized actions of self-interested individuals in the market. In the nexus of reciprocal references, autonomy shall be traced back to the effectiveness of a technical rule and frame individual strategic action.

Second, in respect of specifically property holders, PLOTT and ZEILER have emphasised that comparative experiments demonstrate that WTP-WTA gaps are sensitive to experimental procedures. I have suggested, therefore, a full range of options for EC policymakers, namely, in what respects education, information requirements and withdraw rights and effective redress.

Thirdly, concepts such as the vulnerable and weak consumers should be taken as an open criterion, where *ad hoc* rationalizations should be given ample room.

Finally, in Chapter Five, I have underlined that the protection of fundamental rights may mandate specific policy decisions, in order to achieve the proper balance between the enabling and the limiting conditions of an effective exercise of distinct property rights. I, have, thus, addressed the question of situations where a conflict between properties might exist between a corporeal thing and an intellectual property right under the assumption that intellectual and physical property should be treated identically in the law. In my analysis, I took as an operative tool ownership of a motor vehicle.

Restrictions on intellectual property rights have been grounded on instruments for the achievement of an European market, namely free movement and free competition. But, in respect of conflict of properties, the regulatory approach, in my opinion, should be slightly different and imposes a shift of perspective. Property is a communicational system in the interlocking of conflicting interest positions. I have assumed that it always functions in particular social contexts and that property relations shall remain embedded in social practices and norms from which they arise. The concept of embeddedness can

be understood as the way in which property relates to other normative frameworks.<sup>994</sup> Only by reconciling competing normative considerations of political principle, during the institutive moment, adequate regulatory solutions can be achieved.

The regulatory strategy shall be, first, to define the scope of property rights – through an appropriate weighing and balancing of all relevant interests - in such a way as to avoid normative inconsistencies and practical conflicts. In the example given above – the conflict between the owner of a motor vehicle and the holder of a design right -, I have suggested that law-making bodies must consider the interest(s) of the owner of the corporeal thing in the overall assessment of granting an intellectual property right and that the grant of intellectual property rights cannot abridge or set aside entirely the interests of the owner of the corporeal things

The work of reconstruction I have undertaken is linked up with empirical explanations and functional approaches. By reconceiving property, and bridging concepts, I have attempted to improve understanding, to map out solutions, and increase coherence.

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<sup>994</sup> Similarly, for contract theory, see Hugh Collins, *Regulating Contracts*, OUP, 1999, 25.

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