



EUI Working Papers

LAW 2012/03

DEPARTMENT OF LAW

THE EXPULSION OF THE CONCEPT OF PROTECTION FROM
THE CONSUMER LAW AND THE RETURN OF SOCIAL
ELEMENTS IN THE CIVIL LAW
– A BITTERSWEET POLEMIC

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*The Expulsion of the Concept of Protection from the Consumer Law and the Return
of Social Elements in the Civil Law*

– A Bittersweet Polemic

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EUI Working Paper **LAW** 2012/03

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ISSN 1725-6739

© 2012 Hans-W. Micklitz

Printed in Italy

European University Institute

Badia Fiesolana

I – 50014 San Domenico di Fiesole (FI)

Italy

www.eui.eu

cadmus.eui.eu

Abstract

Consumer law started in the 1960s and 1970s as consumer protection law, meant to compensate for the risks and deficiencies of the consumption society which led to an enormous increase. The target of the first generation of national consumer law were the weak consumers, those who could not cope with the increased choice and the resulting risks. The argument here presented is that the European Union by taking over consumer legislation gradually but steadily changed the outlook, from consumer protection law into consumer law. The weak consumer is not the one who is needed for the completion of the Internal Market. This is the famous average consumer which governs today's normative design of the consumer law making and enforcement. However, the shift in paradigm does not set aside the need to strive for legal rules that cover the weakest in the society.

Keywords

Consumer law, private law, European private law, the average consumer, the weak consumer

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THE EXPULSION OF THE CONCEPT OF PROTECTION FROM THE CONSUMER LAW AND THE RETURN OF SOCIAL ELEMENTS IN THE CIVIL LAW – A BITTER SWEET POLEMIC

Introduction

The following contribution has been written in honour of Franz-Jürgen Säcker, an eminent German scholar who became famous when he managed to launch the establishment of the so-called Münchener Kommentar des Bürgerlichen Gesetzbuches. This commentary, currently in its 6th edition, is meant to combine theoretical conceptions with practical proposals for the interpretation of the respective provisions in the German BGB. I met FJ Säcker in that context. This little essay is meant to highlight the changes which result from the integration of consumer law into the German BGB in 2002. The theme of my little essay is whether and to what extent the integration managed to insert into the German BGB the missing ‘social oil’ so famously advocated for by O.v. Gierke as early as in 1889. Its importance reaches far beyond German law and might therefore be of interest to all those who are working on an appropriate legal design meant to protect the weak parties in private law relations.¹

I. Setting the Scene

I became acquainted with Franz-Jürgen Säcker at the end of the 1990s, when he called me to ask if I wanted to undertake the annotation of the § 13 *et seq.* of the General Terms and Conditions Act (AGB-G) in the upcoming fourth print run of the Münchener Kommentar. I agreed immediately and was very pleased. In those years the legal spectrum of the German civil law teacher was still in relatively good shape. On the one hand, there was the BGB in its sublime abstract beauty, while on the other hand there were the many widespread special acts, including the one on the consumer law. Due to its central importance for legal practice, the AGB-G had succeeded in being entered into the Münchener Kommentar as well as into various special acts of the consumer law. In this much the Münchener Kommentar was far ahead of its time – that is the political development – since it also included consumer law. The legislative picture changed in the year 2000 when in the course of the transposition of the distance selling directive 97/7/EG into German law the §§ 13, 14 were inserted into the BGB. One did not have long to wait for the next step. In the course of the reform of the law of obligations major parts of the “substantive” consumer law were inserted into the BGB. Only the Products Liability Act was ignored. The AGB-G was divided, with the substantive part being integrated into the BGB while the procedural regulations were relocated to the Injunctions Act (UKlaG). The new modern, or perhaps post-modern, world of the German civil law teacher changed fundamentally almost overnight – or rather over the summer of 2001. Consumer law and the BGB now formed a single entity, at least from an external perspective. The Münchener Kommentar changed its appearance as well. The procedural regulations of the AGB-G, the former § 13 *et seq.*, were removed from the Münchener Kommentar on the BGB and transferred into the Münchener Kommentar regarding the code of civil procedure (ZPO) – and, in a manner of speaking, I was transferred with it.

The facts of this integration act are well-known to all German civil law teachers. Less attention was paid to the consequences of the integration of the consumer law into the BGB and the simultaneous relegation of the procedural part of the AGB-G. We shall look first at this reassuring/disturbing aspect

¹ The paper has been written prior to the adoption of the draft regulation on a common European sales law. For the particular purpose of the essay no updating is needed.

of the development – reassuring perhaps for the majority of my colleagues, but disturbing for me. On the level of mere appearances there was no significant change. To borrow the imagery of Berthold Brecht: Mister Keuner meets an old friend that he hasn't seen for a long time. The latter welcomes him with the words: "You have not changed at all". "Oh!" said Mister K and turned pale. And so everything took its course. The relevant commentaries of the BGB integrated the consumer law *nolens volens* and authors were found for the annotations. Alongside this, there are most notably those journals which dedicate themselves to specific sections of the consumer law. This applies especially to the AGB-G, which was relabelled as the General Terms and Conditions law, but also to the consumer credit law which is now called consumer loan law. Even the little UKlaG has forged a path for itself, although it has not yet (?) been deemed worthy of a real upgrading in the form of a special journal. The consumer jurisprudence was emancipated. A younger generation of civil jurists devoted an increasing amount of their attention to consumer protection. They no longer came purely from the point of view held by the consumer movement of the 1960s and 70s, but rather they devoted their scientific attention to the consumer law as one of several debatable sections of the civil law. Gradually the perspective shifted. Indeed, in 2010 the first ever Professorial Chair was created for consumer law – not consumer protection law – which was supported as foundation-endowed chair for 5 years by the Federal Ministry of Consumer Protection, Food and Agriculture.

I am not concerned with questions of appearance, however. My request applies to certain issues that are worrying me, and perhaps not only me. I would like to pursue the question which impact the integration of the consumer law into the BGB had: whether or not it really amounted to the knitting together of elements that belong together, whether in 2002 the legislature actually created a kind of "social civil law" dreamt of since the days of Otto von Gierke, or whether it used the integration to undertake a completely different development which changes the social character of the consumer law in the medium term. Is the result that the consumer protection law has turned into a consumer law "without protection"? And indeed, some 40 or 50 years after the emergence of the consumer law, who cares?

Similarly, what of the role played in this process by the jurisprudence, by the juridical practice, or indeed by the legislature which has changed the makeup of the general institutional conditions by means of the integration into the BGB? Without conducting a historical review of the special private law in general and the consumer law in particular one cannot accomplish this task. Those on the inside are aware of how the changes came about. The consumer protection law is submitted to a rapid alteration. Symbolic of this shift is the way in which the shortened English-language title of the monograph written by myself and Norbert Reich on European consumer law changed from being "Understanding Consumer Protection Law" in 2003 to "Understanding EU Consumer Law" in the 2009 revision.

The short history of the consumer protection law tends towards its end. Consumer protection as a policy tool has created a modern market right adapted to the functional conditions of our globalised world. Yet consumer protection is increasingly being reduced to a set of rights in which the aim of the 1960s consumer politics, to guarantee the protection of the weaker in the consumer society – today we speak of information society –, gradually disappears out of sight. As consumer protection law becomes consumer law, so the weakest market participant is replaced with an omnipotent multinational market actor. This consumer more closely resembles a private small business owner than the parties protected under the normative approach, which furthered the development of the consumer protection law in the Member States. So the addressees are now the "Klinsmanns and Bosmans", and no longer "the small man" on the street. The driving force behind this process is the EU which, since the end of the 1970s, has promoted legislative developments in furtherance of creating a single European market and which increasingly and more and more aggressively favours a consumer right which neglects the protection of the weaker market actor. Is that a reason to be alarmed? I think so, yes.

But this is only one half of the story. I have already specified it in several papers and my work has met with growing approval, at least within the “consumer circle” – to borrow a phrase from Ernst Steindorff.² In this respect I will confine myself to dealing with the more recent developments (II). More exciting are the consequences of erasing from the consumer law the idea of protecting weaker market actors. I would like to point out that a new consumer protection law is developing, again outside of the BGB, but that the “good old BGB” retains a central importance for the protection of the weaker market actor, especially when one accepts that the post-modern consumer law and the protection of weaker parties are not identical. Briefly, I would like to disturb the peace (III). Franz-Jürgen Säcker has always dealt with modern developments, even if he opposed them in an argumentative way. The dynamic of the economic and political development cannot be delayed by the petrification of legal forms. The development continues and here I count on the interest of Franz-Jürgen Säcker, especially as regards the consumer law with which he has, up until now, only been rather marginally engaged with.

² Limits of the EC-competences, 1990.

II. The Decline of the Consumer Protection Law or the Transformation of the Consumer Protection Law into a Right for Private Small Business Owners

In 1889, Otto von Gierke wrote in a clairvoyant way on the relation of special rights and the nascent BGB:³

“One obtains two systems ruled by completely different spirits: one system of the common civil law in which the pure private law is reflected, and an abundance of special rights in which the public law is embittered by and intermixed with private law rules. On the one hand, a vital, democratic and socially-inspired law while on the other there is an abstract and individualistic stencil that has been fossilised in static dogmatism.”

As is well-known, the BGB only incorporated the famous drop of “socialistic oil”⁴ in the shape of general terms which constituted the starting point of the 20th century jurisprudence establishing the protection of the weaker market actor. The evolution of the jurisprudence concerning the examination of the general terms paradigmatically reflects this development. The rise of the consumer law in the 1970s revived the old conflict between the pure, neutral system of the private law designed under the BGB and the political, public law-influenced special private law. In hardly any other European Member State was the legal field dominated by such ideological, acrimonious and scientific discussions. Special private laws and the unity of the private law were irreconcilably opposed to each other. The German private law scholarship was divided once again into two camps: on the one side, the grubby urchin of the consumer protection law, with the advocates of the pure private law doctrine on the other. The courts refrained from entering into the conflict since they had to deal with the real things of life for which such theoretical and ideological discussions are of minor importance. However, when the Federal Constitutional Court delivered its infamous Personal Security judgement⁵ in 1993, the debate concerning the „structural inferiority“ of the consumer law and the consequences for the private law was briefly revived once again. After all, it amounted to a matter of the relationship between constitutional law and private law, in other words to the significance of the private law society. Yet the integration of the consumer law into the BGB in 2000 and 2002 took place comparatively harmoniously. Only a few voices in the literature turned vehemently against the realisation of von Gierke’s dream of the fusion of formal private law with substantive protection law. The collective attention of the German civil law scholarship focused instead on the potential interferences with the BGB in line with the reform of the law of obligations.

What had happened? Had the German civil law scholars adopted the conviction that structural social protection is a necessary condition for the functioning of the market economy? Alternatively, had the German civil law science got involved in “phoney wars” regarding the necessity or refusal of essential reforms of the law of obligations? Or was it simply due to the fact that the integration of the consumer law into the BGB was implemented as a technocratic formal act? As is generally known, the German legislature had neither the will nor the force to tie this integration to a reform of the German consumer law. Many occasions presented themselves and there was no lack of proposals, but not even a coherent systematisation of the individual sections was successfully undertaken. Rules on door-to-door selling and distance selling were not harmonised. Where a formal integration was achieved, as for example with regard to the consumer credit law, it turned out to be to the detriment of the coherence of the field of law according to the unanimous opinion of all concerned. The legislator’s amateurish work is

³ O. v. Gierke, *Die soziale Aufgabe des Privatrechts*, 1889, p. 13.

⁴ O. v. Gierke speaks in a contemporary way of the drip of socialist oil, not social oil, as was often spread.

⁵ BVerfGE 89, 214.

especially obvious in the UKlaG, the so-called Injunctions Act. This law embraced – and still embraces today – all procedural regulations of the consumer law which could not be situated elsewhere. The result of this legislative reluctance is an amputee. In a way that cannot be excused or explained, the law reflects the insecurity, ambiguity and reluctance of the legislature when dealing with the collective legal protection, the extension of which Franz-Jürgen Säcker took a firm stand against.⁶ One cannot impede it. The camps migrate either to England or, in the case of collective legal protection, to the Netherlands. Competition between legal systems is already taking place. While the German facilities – in the words of Dieter Hildebrandt “stand dort Deutschland” – are simply stashed away.

The formal technocratic integration of the special consumer law into the BGB by way of a knee-jerk reaction stems from its own individual logic. A scientific, or even democratic, parliamentary debate on the consequences of this integration – of the kind that kept the Netherlands occupied for decades when reforming the “wetboek” – was never on the cards. The prospect of triggering State liability due to a delayed transposition of the directive concerning the sale of consumer goods hung over the issue like the sword of Damocles and left no time for broad political discussions. Directive 99/44/EG thus provided an engine for the modernisation of the law of obligations. The old conflicts concerning the significance of the special private law had to be solved within the BGB. In the end, the result amounted to a great legal sleight of hand. But were there arguments, were there discussions, were the consequences of the delayed integration of the “socialistic oil” reprocessed in a scientific way? In my opinion there were not.

Instead one can observe two evolutions during the last 10 years. On the one hand, the consumer law within the BGB was scientifically isolated or maybe even ignored. The civil law scholarship dealt with the consequences of the reform of the law of defective performance or the law of limitation to a far stronger degree than it did with the adjustment of the system of values that had been integrated into the BGB by the incorporation of the concept of the protection of the weaker market participants. To that extent the German reform could be a sign of what is to come for developments in European law as regards competition between the best civil law systems, because in fact they anticipated the later European evolution. Indeed, even the DCFR finds it difficult to cope with the values which stand behind an “academic” project on the European civil law. From a scientific point of view, a certain amount of academic attention has also been paid to the §§ 13, 14 BGB. In particular, they gave rise to a chain of dissertations and State doctorates. Only sporadically, however, did these papers go beyond the narrow frame of the relation of consumer private law and private law. Instead of these rather marginal academic debates, by far the more important theme as regards the content of the consumer law proved to be the debate concerning the realisation and necessity of a European private law launched by the European Commission at the beginning of this millennium. It provided large parts of the (German) civil law science with a platform from which to reform the consumer law - a reform, which I interpret retrospectively as the turning point on the road to the consumer law “without protection”. To clarify: I do not insinuate that my colleagues pursued this objective “intentionally”, since this “postmodern” philosophy corresponds all too much to the Zeitgeist which does not provide a lot of space for social questions. Thus, the return of the consumer into the BGB could be undertaken. To use a facile and inoffensive modification of the bon mot of Alexander Kluge: it amounted to “consumer in the circus dome of the BGB”. I do not seek to disguise that my agitation is not shared by the majority of my colleagues in the German civil law scholarship. Indeed, unlike me, they might lean back rather satisfied, since the scare seems to be over.

What had happened? For a long time, European private law was more or less equated with consumer law. The expert discussion was consistently reserved to the “consumer circles”. Not until the enacting

⁶ F. J. Säcker, Vertragsfreiheit und Schutz vor Diskriminierung, ZEuP 2006, 1.

of Directive 93/13/EEG concerning the control of abusive clauses in consumer contracts, and notably Directive 99/44/EEG that stirred up the distrust of the civil law scholars throughout Europe, had the EU started to harmonise core areas of the national civil law. In 2001 the European Commission, under pressure from the European Parliament, presented the European academic public with a Green Paper.⁷ By then it was no longer a question of the realisation of a European consumer law, but of the realisation of a European contract law, or even of the codification of an all-embracing European civil law. Here one required inputs other than those of the researchers within the European consumer circle. The whole shooting match was at once up for debate: the idea and the realisation of a European civil law under the roof of which Europe could and should unify. The scholarly debate on the question, if such an undertaking can be realised at all in a post-national state, never made it as far as the parliamentary level as the European Commission conducted itself in a typically bureaucratic and pragmatic way. Is the imp who harboured ill thoughts reincarnated in a German professor 100 years later: “Honi soit qui mal y pense!?”?

As a follow-up to the Europe-wide debate prompted by the Green Paper, the European Commission created a research pool in 2005, constituted by members of the autonomous Study Group under the direction of Christian van Bar and the members of the Commission-appointed Acquis Group, under the direction of Hans Schulte-Nölke. The Study Group represented the European civil law scholarship and its approach was comparative, while the Acquis Group represented the European contract law expertise, and thus de facto and de jure the consumer contract law scholarship. The starting point was the *acquis communautaire* of the European private law, that is to say the contents of the European consumer law. In 2008 and 2009, respectively, these teams signed off on the Draft Common Frame of Reference, a fully-fledged European civil law opus which unified the work of the Study and Acquis Groups into one text and combined dispositive contract law with compulsory consumer regulations. By the change of competences within the European Commission, from DG Sanco to DG Justice in 2009, or in terms of persons from Commissioner Kuneva to Commissioner Reding, the European Commission had reasserted the prerogative of action. Currently 18 experts, amongst them 14 that participated in the DCFR, are working on the elaboration of an optional instrument, which should comprise no more than 150 articles, and which can be chosen by the parties to a contract as the 28th legal order.⁸ The threads of coordination converge in the hands of Dirk Staudenmayer, who already played an important role within DG Sanco.

So far, so good. But the reader might ask what role this evolution in Europe, which has yet to lead to any concrete results, has to do with the claimed reorientation of the consumer law into a “protective right without protection”? I would say a lot; perhaps it even plays a crucial part. This transformation disturbs me. The EU was not only the impulsive force with regard to the evolution of the consumer law, the EU also left her own special mark on the consumer law. Consumer protection, consumer politics as well as consumer law in the Member States inextricably involve the rise of the social welfare state. Although the Member States differ in their basic approach, they were united in their objective that the consumer should be considered as the weaker market actor requiring legal protection by means of compensatory regulations mostly in the form of compulsory laws. If we set aside the question of whether this aim was ever achieved, it remains clear that consumer protection of the 1960s and 70s followed a predominantly social target. The weakening of the emphasis on protecting consumers on the national level was mirrored by the adoption of the consumer protection remit by the European Commission, a process which began slowly and prudently in the second half of the 1970s before fully hitting its stride with the adoption of the 1986 White Paper on the accomplishment of the single European market. The European Commission thereby discovered modern consumer protections,

⁷ KOM (2001) 398 endg.

⁸ See the website of the DG Justice http://ec.europa.eu/justice/policies/consumer/policies_consumer_intro_en.htm.

or rather the concept of the consumer as an important market actor, who played and still plays a central role with regard to the accomplishment of the single European market. Yet this consumer, or rather the concept that stands behind this consumer, is no longer the weak, underprivileged consumer in need of protection. Such a concept would be dysfunctional for the realisation of the single European market. With a weak consumer in need of protection, a single European market is not feasible. A single European market needs an active, informed and adroit consumer; in short one that is a normative optimised, omnipotent consumer. It is precisely this concept that the European Court of Justice (ECJ) has developed in its jurisprudence concerning the fundamental freedoms and pursued with varying stringency in the interpretation of secondary legislation. The European Council tightened this ideology in the Lisbon Declaration of 2000.⁹ Henceforth the consumer shall take advantage of the economic benefits of the single European market by using the Internet in an active way. From the perspective of the protection of consumers, the triumphal march of the consumer law in the EU amounts to a Pyrrhic victory since the consumer law has lost its “protection” system.

Focussing on the *Zeitgeist*, at least, we can say that I do not agree with Franz-Jürgen Säcker. According to the perspective stemming from around the beginning of the second millennium, the European-inspired consumer laws, and thus the corresponding regulations of the BGB, are sustained by exactly this “European *Zeitgeist*” on the legislative level and, increasingly since the 90s, in the jurisprudence of the ECJ for good or for bad. The German courts are inspired by this philosophy as well. The corresponding jurisprudence of the Federal Court of Justice concerning scrap deals, which harmonises in a strange way with the parameters of the ECJ, testifies to this. Whereas the ECJ had avoided a fundamental judgement in favour of the consumer, the Federal Court of Justice exercised a kind of modified control of violations of *bonos mores* which only found remedies in some striking individual cases. It is one thing to decide a single door-to-door selling in favour of a consumer, or to set aside legally dubious contract clauses, but it is a totally different issue to help consumers concerned with scrap property in a “structural” way. From a theoretical point of view, the European-inspired “consumer law without protection” provides an open goalmouth for the conceptual design of a modern European contract law, of which the civil law scholars in Germany and throughout Europe are taking advantage. Consumer protection law became consumer law, while the protection of the weak became the protection of the ordinary informed and attentive consumer, and the consumer protection law expertise turned into consumer law scholarship. This new spirit has also found its way into the *Münchener Kommentar*. Space constraints deny us the opportunity for theoretical discussions in long preliminary remarks. Rather an annotation of the law is called for, not the reconstruction and deduction of political coherences which are reflected in the law itself. One by one, the formal freedoms of contract are being restored while the material freedom of contract that Max Weber had in mind is being called into question. It now appears that the freedom of contract could be reduced again to a formal freedom to “take it or leave it”. Nowhere is it clearer than in the European Commission’s favoured opt-in model. Since consumers would only have the choice between following the seller’s defaults and abandoning the transaction, the freedom of contract, so to speak, is exercised by the trader instead of the consumer. Problems anyone?

Now one might argue that such an opt-in model can adequately guarantee the protection of the weaker parties, especially if the model’s foreseen standards of protection are high enough. I do not seek to contest this, but the shift in perspective is still conspicuous. The high value placed on the concept of autonomy of contract as materialised in the 1970s – the concept that the consumer should be able to decide in an informed and competent way – is abandoned in favour of an economic efficiency paradigm. The precise objective is, as we learn from the 2010 Commission Green Paper,¹⁰ to reduce

⁹ http://www.europarl.europa.eu/summits/lis1_en.htm.

¹⁰ KOM (2010) 348 endg.

the transaction costs of traders whose access to the single European market is blocked or hindered because they have to adhere to 27 national legal systems with diverging protection standards. From the point of view of the European Commission, it amounts to a near-perfect combination of protection and efficiency. Protection is provided for, but in mind is the active internet consumer, who diligently searches for the cheapest provider and orders products regardless of all territorial, social and linguistic limitations. By way of a side note, I would like to mention that through such considerations the European Commission promotes a particular kind of sales which has an unavoidable negative effect on local providers and social structures at neighbourhood level.

I would, however, like to take the liberty of making another comment on the relation between consumer law in the BGB and European private law. It should be remembered that the European Commission had the original objective of completely harmonising the core areas of consumer contract law – protection against abusive clauses in consumer contracts and protections concerning the sale of consumer goods – by means of a proposed directive regarding the rights of consumers,¹¹ but failed in realising this due to the resistance of the European Parliament and Council. A complete harmonisation should serve the same objectives as the optional instrument – a market-optimised adjustment of the consumer law that no longer allows national variations or additions – and thus reduces the transaction costs of companies. The opt-in model, actually favoured by the European Commission, which seems certain to obtain the assent of the European Parliament, can now only fail due to either a lack of an adequate legal basis or the lack of majority support from the Member States, or both. Even if this evolution is endorsed by many, one should not ignore the flip-side of this policy. Should the opt-in model function, in that it is accepted by the companies, it would mean that consumers only have an opt-out possibility – that is buying next door instead of buying via internet – and so, in effect, a European Internet sale contract law designed by the Study Group and the Acquis Group and approved by a committee of 18 experts would, in one fell swoop, render obsolete the national sale contract law, the corresponding national consumer law as well as Article 6 of the Rome I Regulation. De jure neither the national law nor the Rome I Regulation is affected, but de facto the “chosen” EU contract law could and, from the point of view of the European Commission, should supersede the national law. This is fatally reminiscent of the discussion about the significance of the minimum harmonisation. The European Commission’s favoured de facto total adjustment should at least give cause for serious concern amongst civil law scholars.

The dark side, in my opinion at least, of this beautiful new world of the optional instrument only appears when one turns one’s attention to the interaction of substantive regulations and law enforcement – something which plays a crucial role with regard to the consumer protection. By enacting the AGB-G in 1976, the German legislature embarked upon a ground-breaking process of evolution. The combination of substantive regulations with adequate individual and collective legal means was the inspiration for the enacting of laws in the Member States, in the EU and far beyond. The splitting of the AGB-G into a substantive part, which was moved to the BGB, and a procedural part, which was incorporated into the UKlaG, stands paradigmatically for a disruption of the fundamental context of substantive and procedural law. Unfortunately, however, the Münchener Kommentar followed the demands of the legislature. Franz-Jürgen Säcker strongly endorsed my effort to conserve the unity of the AGB-G, at least in an academic way, by way of annotating the procedural law in the second volume. Alas, our efforts were in vain. Since then collective legal protection, in the shape of injunction suits under the General Terms and Conditions Act, has become significantly less important. Certainly this is not entirely due to the breakup of the procedural part. Consumer associations, which carry the lion’s share of the burden of law enforcement, also play a part in this evolution. However, this evolution is primarily symptomatic of the lack of impetus on the part of the

¹¹ KOM (2008) 614 endg.

German legislature in claiming a cutting edge in Europe by modernising the procedural rules. The 30th anniversary celebrations in Berlin befitted a funeral rather than a fresh start for the new millennium.

The European academic debate, and especially its discussion of the optional instrument, already features an identical flaw. For this reason it neglects one of the essential advantages of the European (consumer) contract law, which stands out, because in the corresponding regulations there are not only substantive protection standards, but also some distinct parameters concerning the forms and means of the law enforcement. Substantive questions were combined with the organisation of the law enforcement in neither the Study Group nor the Acquis Group. Collective law enforcement was completely excluded. For this reason a complete branch of discussion, upon which many legal orders in Europe and worldwide are focussed, was pruned. One would have expected that, given the European Commission's ever-increasing interest in the regulation of transnational and web-based transactions, the expert committee would have dealt with the individual enforcement of the rights granted by the optional instrument. This could not be further from the truth, as both the expert committee and the European Commission seem to feel that consumer law consists exclusively of substantive regulations. That having been said, it is well known that the European Commission has long endeavoured to assist the development of informal methods of mediation. The two forms of mediation which dominate the discussion today are called Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR). They did not capture the imagination or attention of the expert committee, although the European Commission recently published an extensive study concerning arbitration boards and mediation bodies in the Member States.¹²

Considerations with regard to ODR are still in their infancy. But where is the group of experts which dedicates itself to exploring this problem? The man on the street knows that "to have a right and get one's right are two different things" (this does not sound quite right in English). All discussions about access to justice and the enforcement of rights, which had political resonance even in the 1980s and 90s, seem to have been forgotten. What use is even the finest optional instrument, if there is a lack of adequate mediation mechanisms? The European Commission's mantra-like reference to existing forms of mediation is not very helpful, since Brussels avoids tackling the central questions: Who can guarantee that the mediation mechanisms function in practice, and by what means? Who controls the actors? What roles are to be played by the trade associations, consumer organisations or even the national supervisory authorities? Who is there to support the consumer if the mediation is decided in his favour on paper, but nothing happens in practice? The legal and political discussion of the 1970s brought the law down to earth and so fulfilled the old promise of the 1920s. But now, in the era of internet business, the hard facts vanish literally into thin air. Do we end up with a consumer law not only without protection, but also a consumer law without – or with greatly reduced – law enforcement?

¹² http://ec.europa.eu/consumers/redress_cons/adr_study.pdf.

III. The Perpetual Return of the Protection of the Weaker Parties or How the BGB Could Still Become as Powerful as it Should Be

Legal history has taught us that formal consolidations create new legal forms that react to the necessity to take care of those who do not have access to the legal system for whatever reason. So it happened in Ancient Rome by means of the *ius aequum*, in the common law by means of equity and in the BGB by means of good faith. Looking back on history, one does not need a lot of imagination to foresee a further evolution, in one form or another, in the protection of the weaker parties outside of the EU's optimised model of the sales law internet contract. For many this may sound alarming, but for me it has a comforting affect.

In fact, this evolution already got off the ground long ago, but not a lot of attention was paid to it by the academic or political circles. The Acquis Group, and particularly the expert committee, and to a lesser extent the Study Group, seemed to be fixated on contracts of sale concluded over the Internet. In the short time available I would like to limit myself to five parameters which point to an increase in the safeguarding of weaker parties: (1) to the first signs in the ECJ's case law of a guarantee of the protection of the weaker parties, (2) to the breakup of the services contract law, (3) to the emergence of a European social contract law beyond the consumer law, (4) to the transformation of the consumer law into a right of the private and professional small business man and (5) to the possibility of helping weaker parties to assert their rights by means of the BGB, completely without the consumer rhetoric.

(1) The reader may ask why the ECJ appears precisely at this important juncture. The justification is reflected in the fact that, to the detriment of many civil law scholars, the ECJ persistently pursues a constitutional approach towards the private law and thus creates a basis for the protection of the weakest actors. The crucial vehicle of this evolution is the anchorage of the protection against discrimination in the civil law. Should the ECJ's judgement in *Test Achats* follow the Opinion of Advocate General Kokott,¹³ a control of secondary rules using the Charter of Fundamental Rights as a benchmark would be possible and, indeed, necessary. For many civil law scholars this idea amounts to a nightmare. As to its importance, *Test Achats* could equal the function of the bail-out judgement of the German Federal Constitutional Court. But the ECJ often puts up a good fight in other topics as well, since it does not always focus on the dynamic and well-informed consumer. The *ex officio* jurisdiction concerning the control of abusive clauses in consumer contracts,¹⁴ which indeed still lacks clear outlines, and the development of legal protections with regard to the consignment of deficient goods¹⁵ all point to an evolution which has not yet come to a standstill. The question of where the evolution goes depends, last but not least, on whether or not consumer associations change from being the "free rider" of EU law to a "repeat player".

(2) Remarkable evolutions have occurred with regard to the law regulating the services sector. Indeed the Study Group also dealt with service contracts, but at the same time excluded wide fields of important types of contract. The model of the service contract upon which the Study Group focussed¹⁶ greatly resembles the paradigm of the law of the services sector of the 19th or, at best, the 20th century, which was based on the distinction between success- and service-orientated contracts. The Acquis Group was assigned to compile the *acquis communautaire* of the European contract law. The modern

¹³ GA Kokott, 30.9.2010, EuGH, Rs. C-236/09 – Test Achats, n.vv.

¹⁴ H. Schebesta, Does the ECJ know European Law? A note on ex officio application after Asturcom ERPL 2010, 847.

¹⁵ EuGH, Rs. 404/06 Quelle, Slg. 2008 I-2685 and EuGH, 3.9.2009, Rs. C-489/07 Messner Slg. 2009 I-n.vv.

¹⁶ M. Barendrecht/Ch. Jansen/M. Loos/A. Pinna/R. Cascao/St. v. Gulijk, Service Contracts (PEL SC), 2007.

law of the services sector – beyond time-sharing, all-inclusive tours and rudimentary consumer credit - obviously did not belong to it, even though services account for 70 % of the EU gross national product. That is why it is not surprising that the rules of the DCFR, and therefore also the rules of the optional instrument, are based on the model of a contract of purchase which even at the time of the coming into force of the BGB had ceased to correspond to reality. Where are all the relevant contract rules which the EU adopted in the field of financial services, energy, transport, telecommunication and postal services? Admittedly, in terms of von Gierke, these are largely matters of public law rules. But the corresponding directives and acts also include several relevant contract rules.

The list can be extended arbitrarily. Should not distribution contracts, subvention contracts and contracts concerning public procurement belong to the Acquis too? And finally, where is the influence of the primary law on the Acquis, especially with regard to the law of the services sector? Many of these services are offered via the Internet. But do we already have contract relevant rules for these modern forms of services? Does an evolution occur in the law of the service sector which we already know from labour law? Is the BGB yet again out-dated?

(3) A mere glance at the different services directives is all that is required to see that the EU – at least in its method of regulation – also assumes the role of protecting the weaker parties. The MIFID directive and the third generation of telecommunication, gas and electricity directives created a new species of regulation – universal services that are aimed at guaranteeing access to relevant services for those who cannot assert themselves on the market as the idyllic world of the EU consumer law prescribes. Significantly these regulations do not mention a consumer, but speak of a “user” or a “client”. The directives distinguish clearly, or at least more clearly than the European consumer law, between different potential addressees. For example, they speak of “disadvantaged customers”.¹⁷ Why has the EU not adopted the English formula of the “vulnerable consumer”, of the violable consumer? Suffice it to say that the negotiations have been conducted in English? The disadvantaged consumer is not necessarily identical to the vulnerable consumer.

I would like to prevent a possible misconception. I do not claim that it is possible to transform the widespread regulations into a coherent system. If we follow Luhmann, the differentiation of society cannot be restored. This would imply that contractual regulations always have to be adjusted to the context of the likes of energy, telecommunication, financial services and transport law. But even such a result does not release the civil law scholarship from the duty to pay full attention to the services contract law. In the research conducted in the run up to the drafting of the DCFR this, admittedly exhausting, work is nowhere to be found.

This is not about the details of the new services law. It is about the fact that the EU has, above and beyond the consumer contract law, created a wealth of regulations which, for good reasons, is closer to reality than the internet contract law. Here a new social contract law could emerge as a response to the consolidation of the consumer law. The Federal Republic of Germany has transposed these directives into national law and will do the same with regard to the third generation of the directives mentioned above. But this evolution takes place outside the BGB. The whole dynamic of the services law is scattered over a multitude of special regulations. This new services law, in the form of universal services, is far more committed to the protection of weaker parties than one would have predicted from the proposals of the Study Group, the Acquis Group, from the DCFR or from the foreseeable optional instrument. Otto von Gierke’s dream of 1889 may yet have its day in the sun. But is this evolution disturbing for a civil law scholar? Is it not rather about social law, about the protection of the Hartz IV addressee, and thus about legal questions that have no place in the BGB?

¹⁷ For example, Directive 2009/72/EU.

(4) From this perspective the integration of the consumer law into the BGB appears to be a failure, at least if one begins with the intellectual assumption that the accretion of the formal freedom of contract and substantive protection standards has been successful. According to the EU consumer approach one could reflect on whether this new consumer law within the BGB is rather a type of modern trade law, a commercial law for small and medium-sized businesses as well as for the private small business men. Such a perception would also permit us to deal in a proactive way with the problem that small and medium-sized business men often find themselves in the position of the consumer when face to face with big companies. From this point of view, the argument about the control of the general terms and conditions of small and medium-sized businesses appears in a different light. At any rate the European Commission assumes that the DCFR and the proposed optional instrument are primarily important for small and medium-sized businesses, concerning b2c as well as b2b contracts. This would be the anticipation of the adjustment of the category of small and medium-sized business to include competent consumers.

(5) The question now arises what tasks remain for the justice system in the realisation of the protections for weaker parties which the legislative authority has displaced from special regulations; which role the BGB can still play; whether the consumer protection and protection of the weaker parties will fall apart? I would like to limit myself to the potential role of the BGB. For I see here an old, but also new, task which can only be accomplished by resorting to the well-known instruments. For at least two years now the following, very imaginable, scenario circulates in discussions concerning the future of the European consumer law:¹⁸

A “consumer”, that is to say a consumer in terms of the definition of the DCFR, addresses “his” national law with the argument that he is not a consumer under the terms of this definition since he cannot fulfil the requirements the legal system places upon him concerning his intellectual capacity, he has no access to the internet, he cannot operate the internet, he can neither read nor properly understand English and thus he is not able to carry out a price and information comparison. He is a human being who needs protection.

Dogmatically there remain two possibilities: either the court in question includes this person in need of protection within the notion of the consumer, whereby the consumer gets a completely different meaning on the national level than on the European level, or the court discusses openly the parameters of the §§ 13, 14 BGB and concludes that the regulations are not applicable because the concerned person does not correspond to the European definition of a consumer, whereby there would be the possibility of resorting to the sweeping clause of the BGB. Being a “severe” case, the court would try to help the person concerned. And without doubt experts will be found to provide reasons in one direction or another. In light of the reasons mentioned, I would personally plead for the last alternative. The BGB could again step up to the plate, back to the role it played in the 20th century – that of providing a system to protect the weak, of course on an individual basis only, since a structural inferiority cannot exist in this sector. Such inferiority could be detected at the most with the help of statistics or other empiric data. The debate on the structural significance of the protection of the weaker can thus recommence.

¹⁸ I first heard of this scenario from F. Zoll at a conference in Manchester organised by Rainer Schulze and Geraint Howells in January 2010.

IV. A Short Conclusion

Some of my considerations are based on risk-taking, while some other issues may appear to be over-subscribed. In any case, I maintain that this essay features factual content. The legal questions reach far and deep. Can the EU create a social contract law at all? Are the universal services suitable as a point of departure? Should this task not be reserved to the national law? Could the social dimension of the consumer law be saved by transferring it into an independent set of rules? What does “social” mean in the post-modern context,¹⁹ and can the nation state still achieve something other than the welfare state of the 1960s and 70s? These questions of principle especially affect the organisation of the protection of the weakest actors throughout the legal system. We cannot get around the question of examining how much protection of weaker parties is feasible through the BGB, whatever it may look like in the future.

The optional instrument, should it come, will not be the end of the evolution of the European civil law, nor of the national civil law vis-à-vis the European civil law. We live in exciting times. I am sure that Franz-Jürgen Sacker will participate in the upcoming discussion as he has always done.

¹⁹ D. Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in D. Kennedy, *The New Law and Economic Development*, 2006, p. 19.

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