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LAW 2012/23

DEPARTMENT OF LAW

DO CONSUMERS AND BUSINESSES
NEED A NEW ARCHITECTURE OF CONSUMER LAW?
A THOUGHT-PROVOKING IMPULSE

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DEPARTMENT OF LAW

*Do Consumers and Businesses
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A Thought-Provoking Impulse*

HANS-W. MICKLITZ

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ISSN 1725-6739

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Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

Abstract

The paper is a translation of the *Gutachten* prepared for the 69. *Deutschen Juristentag* to be held in September 2012. It pleads for a separate consumer law code outside private law codifications. The benchmarks are: rethinking the concept of the consumer (the vulnerable consumer and the consumer/customer), focussing beyond traditional consumer law on internet sales and on consumer services (telecommunications, energy, transport, financial services), integrating and developing a consistent approach to consumer law enforcement via individual and collective action, via ADR, courts and administrative bodies. The solution is seen in a movable system (*bewegliches System*) that allows for the connection of substantive rights and remedies to the different concepts of consumers, vulnerable, confident and responsible.

Keywords

Consumer protection, European consumer law, the notion of the consumer, internet sales, services, enforcement, remedies, ADR and ODR, collective remedies, role of regulatory agencies.

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GLOSSARY

AbzG (Abzahlungsgesetz)	German Hire Purchase Act
AGB (Allgemeine Geschäftsbedingungen)	General Terms and Conditions of trade
AGBG (Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen/AGB-Gesetz)	German Act on General Terms and Conditions of Trade
AMG (Arzneimittelgesetz)	Medicinal Products Act
AnsFuG (Anlegerschutz- und Funktionsverbesserungsgesetzes)	German Investor Protection and the Functionality Improvement Act
b2b	Business to business
b2c	Business to consumer
BAG (Bundesarbeitsgericht)	German Federal Labour Court
BaFin (Bundesanstalt für Finanzdienstleistungsaufsicht)	German Federal Financial Supervisory Authority
BGB (Bürgerliches Gesetzbuch)	German Civil Code
BGH (Bundesgerichtshof)	German Federal Court of Justice
BMELV (Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz)	Federal Ministry of Food, Agriculture and Consumer Protection
BMWi (Bundesministerium für Wirtschaft und Technologie)	German Federal Ministry of Economics and Technology
BNetzA (Bundesnetzagentur)	German Federal Network Agency
BVerfG (Bundesverfassungsgericht)	German Federal Constitutional Court
BVI (Bundesverband Investment und Asset Management)	German Federal Investment and Asset Management Association
BVL (Bundesamt für Verbraucherschutz und Lebensmittelsicherheit)	German Federal Office of Consumer Protection and Food Safety
CISG	United Nations Convention on Contracts for the International Sale of Goods
CRD	Consumer Rights Directive
DCFR	Draft Common Frame of Reference
ECJ	European Court of Justice
EGBGB (Einführungsgesetz zum Bürgerlichen Gesetzbuch)	Introductory Act to the German Civil Code
CESL (Gemeinsames Europäisches Kaufrecht)	Regulation on a Common European Sales Law

EGZPO (Einführungsgesetz zur Zivilprozeßordnung)	Introductory Act to the German Code of Civil Procedure
EnWG (Gesetz über die Elektrizitäts- und Gasversorgung = Energiewirtschaftsgesetz)	Energy Industry Act
EuGVÜ (Europäische Gerichtsstands- und Vollstreckungsübereinkommen)	Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (“Brussels Convention”)
EuGVVO (Verordnung über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen)	Council Regulation (EC) No 44/2001 on the Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters (“Brussels I” Regulation)
FernAbsG (Fernabsatzgesetz)	German Distance Selling Act
FinDAG (Finanzdienstleistungsaufsichtsgesetz)	German Act Establishing the Federal Financial Supervisory Authority
GasGVV (Gasgrundversorgungsverordnung)	Basic Gas Supply Ordinance
GfK	Growth from Knowledge
GWB (Gesetz gegen Wettbewerbsbeschränkungen)	German Act against Restraints on Competition
HGB (Handelsgesetzbuch)	German Commercial Code
InvG (Investmentgesetz)	German Investment Act
HTWG (Haustürwiderrufgesetz)	German Doorstep Selling Act
KapMuG (Kapitalanleger-Musterverfahrensgesetz)	German Capital Markets Model Case Act
MiFID	Markets in Financial Instruments Directive
ProdHaftG (Produkthaftungsgesetz)	German Product Liability Act
RBerG (Rechtsberatungsgesetz)	German Act on Legal Counselling
RDG (Rechtsdienstleistungsgesetz)	German Legal Services Act
Reisevertragsrecht	German Travel Contract Law
SchlichtVerfV (Schlichtungsstellenverfahrensverordnung)	German Mediation Services Procedural Regulation
SchuModG (Schuldrechtsmodernisierungsgesetz)	Act to Modernise the Law of Obligations
SGB (Sozialgesetzbuch)	German Social Security Code
SME	Small and middle-sized enterprises
StromGVV (Stromgrundversorgungsverordnung)	German Basic Electricity Supply Ordinance

TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TKG (Telekommunikationsgesetz)	German Telecommunications Act
TzWrG (Teilzeit-Wohnrechtgesetz)	German Part-Time Residential Rights Act
UKlaG (Unterlassungsklagengesetz)	German Injunctions Act
UWG (Gesetz gegen den unlauteren Wettbewerb)	German Unfair Competition Act
VKreditG (Verbraucherkreditgesetz)	German Consumer Credit Act
VSchDG (EG-Verbraucherschutzdurchsetzungsgesetz)	EC Consumer Protection Enforcement Act
VZBV (Verbraucherzentrale Bundesverband)	Federation of German Consumer Organisations
WpDVerOV (Verordnung zur Konkretisierung der Verhaltensregeln und Organisationsanforderungen für Wertpapierdienstleistungsunternehmen)	Ordinance on Defining the Code of Conduct and Organisational Requirements for Securities Service Providers
WpHG (Wertpapierhandelsgesetz)	German Securities Trading Act
ZPO (Zivilprozeßordnung)	German Code of Civil Procedure

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I. The Starting Point - Premises/Preconception/Basic Assumptions/Sets of Problems

1. Appraisal of the Rules Concerning Consumer Law

The evolution of German consumer law and the evolution of the German economy took place simultaneously. Although the birth of consumer law in Germany has generally been linked with the enactment of the *Abzahlungsgesetz* (Hire Purchase Act, hereafter AbzG) in 1894, it was intended as a measure to protect domestic workers only.¹ It was not until the creation of ‘the *Consumer Society*’ after the Second World War that consumer law developed into a coherent body of law.² The heyday of consumer law came in the 1970s and saw the arrival of broadly considered legal texts, the *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* (German Act on General Terms and Conditions of Trade, henceforth AGBG),³ the *Haustürwiderrufsgesetz* (German Doorstep Selling Act, henceforth HTWG), the *Arzneimittelgesetz* (Medicinal Products Act, henceforth AMG) (as a reaction to the Thalidomide crisis) and finally the law regarding travel package holidays which was incorporated into the *Bürgerliche Gesetzbuch* (German Civil Code, henceforth BGB).⁴

The highpoint in the evolution of consumer law was realised by the enactment of the Single European Act in 1986, which saw consumer law become an integral part of the policy concerning the completion of the Single European Market. In a period of less than 15 years a number of directives were enacted, which reshaped national contract law: Directive 85/374/EEC on Liability for Defective Products, Directive 85/577/EEC on Doorstep Selling, Directive 87/102/EEC on Consumer Credit, Directive 90/314/EEC on Package Holidays, Directive 93/13/EEC on Unfair Terms in Consumer Contracts, Directive 94/47/EC on Time-Shares, Directive 97/7/EC on Distance Selling, Directive 98/27/EC on Injunctions for the Protection of Consumer Interests, Directive 99/44/EC on the Sale of Consumer Goods and Associated Guarantees, Directive 2002/65/EC on Distance Contracts for Financial Services, Directive 2005/29/EC concerning Unfair Business-to-Consumer Commercial Practices, and Regulation 2006/2004 on Consumer Protection Cooperation. Although this evolution took place in the shadow of German civil law jurisprudence, it was disregarded for a long time. After Directive 93/13/EEC had initially provoked a debate about the interference (legitimacy?) of the EU legislative competence, the scholarly and political debate intensified as a consequence of the enacting of Directive 99/44/EC on the Sale of Consumer Goods and Associated Guarantees.

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¹ In this survey I will speak continuously of the consumer and the small business owners. This includes female and male consumers as well as female and male small business owners.

² In order to increase the readability, I only make direct references to judgments, documents and authors. Apart from this, the bibliography informs about the actual discussion.

³ Cf. Federal Law Gazette I 1976, p.3317.

⁴ The legal texts referred to in this document are the original German or English language versions as far as they are available.

Over a period of 15 years the German legislature followed a(n ad hoc?) policy/programme of special acts that only went so far as implementing or updating consumer law as influenced by Europe. These special acts, which surrounded the BGB like a wreath. The alterations were made discretely. The implementation of the Distant Selling Directive led to the inclusion of the concepts of consumer and entrepreneur in the BGB. *Flume* belonged to the minority, which bristled at this intervention in the systematic of the BGB. Directive 99/44/EC on the Sale of Consumer Goods and Associated Guarantees was not implemented until 31.12.2001. The federal government at that time exploited the rather hypothetical possibility of state liability due to a belated implementation of the Directive in order to clear the way politically for reform of the BGB that had been discussed over a period of twenty years. Henceforth German civil law scholarship's attention was drawn to the reorganisation of the general law of obligations and sales law. The politically mandated/backed integration of the consumer law acts into the BGB was disregarded to a large extent, with the exception perhaps of the AGBG. By these means the AGBG and the Doorstep Selling, Distance Selling, Time-Shares and Consumer Credit Directives were incorporated into the BGB and the *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (Introductory Act to the German Civil Code, henceforth EGBGB). Only the *Produkthaftungsgesetz* (German Product Liability Act, hereafter ProdHaftG) was conserved as a specific law, while the *Unterlassungsklagengesetz* (German Injunctions Act, henceforth UKlaG) was taken as the starting point for gathering, step by step, the procedural rules of the body of consumer law. By publishing the Green Paper to revise the *Consumer Acquis*⁵, the European Commission marked the beginning of a new stage of consumer legislation in order to improve, in accordance with the programme for "better regulation",⁶ the coherence of European consumer law. In this context a series of directives were revised: namely those on consumer credit (now Directive 2008/48/EC), time-sharing (now 2008/122/EC) and as recently as June 2011 those on doorstep selling and distance selling (which were merged into the Consumer Rights Directive 2011/83/EU). The process of revision remains ongoing. The revision of both Directive 90/314/EEC concerning package holidays and Directive 2009/22/EC on actions for injunction is imminent/pending?. Furthermore, the proposed Regulation on a Common European Sales Law (CESL)⁷ presented in October 2011 has brought about a premature end of the discussion about a European civil law. Other than the Draft Common Frame of Reference (hereafter DCFR) designed by the Study and Acquis Groups as a compact code of law, the most recent proposal comprises only the cross-border sales contract law, though this includes business to business (b2b) as well as for business to consumers (b2c) contracts. The need for coordination between the proposed rules for Internet sales and the *Consumer Acquis*, especially the Consumer Rights Directive 2011/83/EU as well as the Rome I and II Regulations, is only a logical consequence.

2. Dynamism of Consumer Law and Stability of the BGB

The incorporation of consumer law into the BGB was performed as a technocratic act. The control fell to the *Bundesministerium der Justiz* (Federal Government Department of Justice, henceforth BMJ).⁸ The discussion in the *Schuldrechtskommission* (Law of Obligations Commission) was focused on the question of the rules on legal action taken by an association (*Verbandsklage*) in the AGBG, if one incorporates the substantive part in the BGB, as well as on how to harmonize the general *Darlehensrecht* (loan law) and the provisions on *Sachdarlehen* (loan of fungible things) with the rules on consumer credit. This led to a unique attempt by the BMJ to merge and, thereby, to simplify the rules on doorstep selling, distance selling and e-commerce. But even for the resolution of this legal problem there was in the end neither the enthusiasm nor the political will.

⁵ COM (2006) 744 final.

⁶ http://ec.europa.eu/governance/better_regulation/index_de.html, last accessed 31.07.12.

⁷ COM (2011) 635 final.

⁸ The author himself was a member of the law of obligations commission, which was in charge of the integration of the specific consumer laws in the BGB.

At no time was there a political discussion on the soundness/sensibleness of incorporating consumer law into the BGB and its possible effects, neither within the scholarship between the different academic circles nor in the public domain; that is to say, in the Parliament or the media. Nevertheless, the integration of consumer law in the BGB was largely accepted, as a reconciliation of two enemy camps, namely, the advocates of the unity of private law and the supporters of a special law (re)solution. A similar philosophy can be found in the DCFR and also in the proposed CESL.

The author acts on the assumption that this integration succeeded only in a formal way and that, until now, a discussion about the reciprocal effects with regard to the content of consumer law has been lacking. He believes furthermore that such a discussion could be doomed to failure from the very outset, since both fields of law, the BGB and consumer law, differ essentially from each other. The problematic is old and has kept German legal scholars occupied for more than 100 years. *Gierke*,⁹ *Hedemann*¹⁰ und *Wieacker*¹¹ speak in a similar way:

Gierke: “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.” (emphasis by O. v. Gierke).

Hedemann in reference to the liability law: “The *revulsion is rather embodied by special laws*. Special laws are the true supporters of progress. (emphasis by Hedemann).”

Wieacker: “The social model which the BGB was based on is not only in our country completely out-dated, the private law was long ago flooded by public and social regenerations. A drawing of the nascent and forthcoming society of our country and of our continent in adequate jurisprudential systems and definitions is perhaps at present not yet possible – and yet it remains the second (the new foundation of the faith in law, H.-W. M.) urgent task of the private jurisprudence.”

All three authors are unified by the assumption that, metaphorically speaking, the BGB amounts to a heavy tanker ship which can change its direction in only a limited way and that needs time for every change of direction. In contrast to this, specific rules appear to be almost sailing boats which can change their direction quickly and easily, but which are exposed to wind and weather – that is to say political current – in a far stronger way. *Gierke*'s treatise aimed at the integration of the social question in the BGB, *Wieacker* calls for the theoretical penetration of the specific rules, especially with regard to their interlacing with the BGB, but leaves open the question as to whether a uniform civil legal system can be considered as a resolution.

On the level of appearances history is repeating itself or, in other words, the proportions between dynamic and stability have not changed. The consumer law presents itself as a turbulent field of law, submitted to continuous transformations, which furthermore do not originate from the centre of the German law or German politics, but ‘befall’ Germany via the European Union. On closer examination of the matters of the consumer law which are exposed to a continuous transformation, it becomes clear that the problem is not caused by the EU legislative authority with its ‘micro-management’, but by the rapid economic and social alterations influencing and characterizing the law. In other words: even without the EU the consumer law would be exposed to the constant and urgent need to adapt to alterations.

Thus the thesis adopted in the report can be put in a nutshell: the dynamic of the consumer law cannot be reconciled with the stability of the BGB. Hence the dropping of consumer law from the BGB is demanded and desirable. Behind this thesis lie fundamental assumptions and preconceptions, on the interaction of consumer law and the BGB respectively and about the political-social character of

⁹ Otto v. Gierke, 1889, p.13.

¹⁰ J.W. Hedemann, 1910, p. 87.

¹¹ Wieacker, 1967, p.620.

consumer law which clashes with a *system* and doctrines based on the BGB. Furthermore, there are suppositions about the Europeanization and internationalisation of consumer law, which conflicts with the national character of each civil legal order. Ironically, these processes undermine the protective character of the consumer law by ceding the concept of the Consumer to the Single European Market and the global market. Finally, a part of consumer law has to be discussed which links private law with public law rules, which consists not only of the sale of consumer goods but also of sector specific rules, which is dealt with in the category of the 'Consumer' and which combines substantive legal parameters with the mechanisms of law enforcement. These assumptions and preconceptions have to be unpacked.

3. Consumer Protection Law and Consumer Law

The genesis of consumer law lies in the idea of protection. The 'weaker party' who, according to the law, cannot confront the challenges of the consumer society became the paradigm of an era of legislation that started with the famous message of President *Kennedy* on the 15th March 1962.¹² During the course of the last 50 years consumer law has developed as a self-standing body of law, but the complexity of this development has not adequately been discussed in the scholarship. The fact that more than 50% of gross national income (of OECD countries? Of the world?) results from consumption highlights the strong economic background of the ascension of this new, unloved branch of law. During the initial period only the 'outsiders' of academia dealt with this material, supported by their view of private law as a *Wirtschaftsrecht* (Economic law), which authorizes state interventions to protect weaker parties from coercive contract clauses. It was formulated in terms of *Max Weber's* views on materialisation (*Materialisierung*) and the role of the legal system in making economic life more calculable. These scholarly discussions, infused with ideological undertones, only marginally grasped the judiciary, since it grappled with the adjustment difficulties of consumers in the changing economic order. Only when the *Bundesverfassungsgericht* (German Federal Constitutional Court, henceforth BVerfG) intervened and recognised the structural inferiority of the consumer in the *Bürgschaft* verdict,¹³ did the debate reach a public beyond the scholarly camps.

(a) The rise of consumer law

With the adoption of consumer law policies by the EU at the end of the 1970s and the beginning of the '80s came a sea-change. The breakthrough occurred with the so-called Sutherland Report,¹⁴ which discovered the Consumer as an actor in the completion of the Single European Market. The EU, however, has not only taken over the consumer law mantle, it has also changed the paradigm of consumer protection with regard to its content. The vulnerable consumer is no longer required for the realisation of the Single European Market. For this a more classical legal concept is required, a person that unifies characteristics which are consistent with the normative *Leitbild*, created by the European Court of Justice (henceforth ECJ). That is the ordinary circumspect, informed and attentive consumer. One might object that secondary law with regard to consumers is, in the jurisprudence of the ECJ, closer to the protection paradigm. The judges' obligation to pursue *ex officio* the rights of the consumer in case of dispute supports this argument.¹⁵ However, in the reformed legal acts, which

¹² See John F. Kennedy, Special Message to the Congress on Protecting the Consumer Interest, March 15, 1962 <http://www.presidency.ucsb.edu/ws/?pid=9108>, last accessed 31.07.12.

¹³ BVerfG, 19.10.1993 – 1 BvR 567/89; 1 BvR 1044/89 *Neue Juristische Wochenschrift* (NJW) 1994, 36.

¹⁴ The Internal Market after 1992: Meeting the Challenge. Report presented to the Commission by the High Level Group on the Functioning of the Internal Market.

¹⁵ ECJ Case C-240/98, ECR 2000, I-4941= NJW 2000, 2571 (*Océano Grupo Editorial SA*); ECJ Case C-168/05, ECR 2006, I-10421= NJW 2007, 135 (*Mostaza Claro*); ECJ Case C-40/08, ECR 2009, I-9579= *Europäische Zeitschrift für*

follow the dictum of maximum harmonization one can see an increasingly strong emphasis in the secondary law on the consumer who is willing and able to benefit from the ‘advantages of the Single European Market’¹⁶. This consumer resembles a small businessperson (*Kleinunternehmer*) rather than the vulnerable, weaker party who sparked the debate in the 1970s.

Nowhere does the importance of the change become more obvious than in the information paradigm that dominates present-day consumer law. The main instruments of German consumer law adopted in the 1970s, namely the HTWG, the AMG, the AGBG and the *Reisevertragsrecht* (German Travel Contract Law), did not focus on information as a measure of consumer protection. Rather, they emphasized the introduction of specific remedies such as the right of withdrawal, the right to claim damages for an incrementally developing defect, as well as new actions for injunction or compensation claims for loss of holiday enjoyment. The judiciary played a central role in this model. The EU legislative authorities have framed information, which businesses are obliged to place at the consumer’s disposal in a reversal of the ‘buyer/consumer beware’ principle. There is a continuous development of the obligation to inform, as can be clearly proven by comparing the original Doorstep Selling Directive 85/577/EEC to the Consumer Rights Directive 2011/83/EU, the original Consumer Credit Directive 87/102/EEC with the revised version 2008/48/EC or the original Time-Share Directive 94/47/EC with the amended version 2008/122/EC. The circumspet, informed consumer shall, by means of this information, be able to make a rational decision that is geared to the lower price and which shall sustain the Single European Market.

Contractual sanctions concerning the violation of the obligation to inform are generally not provided for in the directives. An exception can be found in the almost ubiquitous right of withdrawal. In Germany compliance with the inform duties are guaranteed by the similarly Europeanized *Gesetz gegen den unlauteren Wettbewerb* (German Unfair Competition Act, henceforth UWG) by means of an action for injunction. Contractual information duties without sanctions neither help the consumer nor hinder businesses. Consumers, as was known long before the empirical findings of the behavioural economics literature, either do not consider the information provided by the business before conclusion of contract at all or, at best, do so in a selective way. Should it emerge afterwards that they did not receive certain information, they will realise that they have no individually enforceable rights against the business based on the lack of the required information. From the point of view of the businessperson information duties represent considerable expense. Depending on the subject matter at issue they can be transformed into exemption clauses, for example in instructions for use. In this way protection by means of information mutates into the exact contrary. From a functional point of view, coercive pre-contractual information duties can be considered as building blocks for standardising consumer contracts. The EU legislative authority followed this course by presenting a completely harmonized right to withdrawal but, apart from this, it has failed in its quest to initiate the elaboration of European *Allgemeine Geschäftsbedingungen* (General Terms and Conditions of Trade, henceforth AGB) under the patronage of the Commission.¹⁷ Even without a serious political discussion on the use of information to manage consumer attitudes, the developments continue vigorously, which is costly for businessmen and inefficient for consumers. The original concern, the protection of the weaker party, can only be accommodated to a very limited extent within this model.

As long as the directives favoured minimal harmonization, the Member States were free to introduce protection instruments beyond the use of information. This theoretical power with regard to the

(Contd.) _____

Wirtschaftsrecht (EuZW) 2009, 852 (*Asturcom Telecomunicaciones SL/ Christina Rodriguez Nogueira*); ECJ Case C-243/08, ECR 2009, I-4713= NJW 2009, 2367 (*Pannon GSM Zrt.*).

¹⁶ As to the language see the Lisbon Declaration 2000 http://www.europarl.europa.eu/summits/lis1_de.htm, continued in Europe 2020 Com (2010) 2020 3.3.3010.

¹⁷ Art.13 (as of September 2011) formulates under the heading Development of European Model Contract Terms as follows: Within three months of the entry into force of this Directive, the European Commission shall set up a Group of Experts to assist the European Commission in developing model contract terms based on and complementary to the Common Sales Law of the European Union as well as foster its practical application.

consumer contract law was exercised to a very limited extent by Germany. The directives were implemented to a large extent without any change. No specific remedies for violations of the obligation to inform were ever seriously considered. National leeway has been narrowed since 2002 due to the preference for maximum harmonization seen in the Doorstep Selling, the Distance Selling, the Time-Sharing and the Consumer Credit Directives. The draft CESL aims, via the opt-in mechanism, at a maximum harmonization of the AGB and sales law – something which the Commission did not manage to address during the legislative procedure for the Consumer Rights Directive (CRD). The normative *Leitbild* of the circumspect consumer is applied, through maximum harmonization, to more and more fields of national consumer law. A correction of this model can only be effected by national courts which, with the help of blanket clauses, can take into consideration the circumstances of the persons concerned.

(b) The fall of consumer *protection* law

The triumph of consumer *law* has sealed the fate of consumer *protection* law. The normative *Leitbild* of the informed consumer opens the way for a dematerialisation of the consumer law which correlates with a re-formalisation. The scholarly concentration on consumer law which can be observed not only in Germany heralds a de-politicisation of a whole field of law. The Law and Economics movement, which is becoming more and more successful in Germany, fits in seamlessly in the dismantlement of the protection model. The movement is scientifically furthered by a generation of scholars who, without taking into consideration the *zeitgeist* of the '70s and corresponding to the predominant mainstream, are replacing social protection with *ökonomischem Effizienzdenken* (thinking in terms of economic efficiency). I don't want to be misunderstood. This pursuit deserves plaudits and support as far as certain consumers are concerned, specifically those who, as a consequence of their education and economic resources, are able to satisfy the concept of *ökonomischen Effizienzdenkens*. The Internet savvy generation of the first decade of the 21st century can hardly be compared to the housewife model of the 1950s. Consequently, there may in fact be a considerable percentage of consumers that satisfy the modern approach, so vehemently privileged by the EU.

Nevertheless, the weaker party will sustain, since there will always be people who cannot process the available information and that claim protection for different reasons. The upgrading of the consumer law to a market behaviour law, which seems to fit far better in the BGB than a genuine protection right, creates space for a new layer of law beneath the normative *Leitbild*. This insight is as old as the law. In the Roman law it took the form of the *ius aequum*, in the Common Law it was the principle of equity, and in the BGB it is represented by *Treu und Glauben* (loyalty and good faith). At least with regard to AGB the ECJ adheres to the necessity of the protection of the weaker party. The European legislative authority has, meanwhile, recognized this adjustment and created a backup category by introducing the concept of 'vulnerable consumers'. Thirty years ago this translation would have been interpreted as a pleonasm, since the consumer was per se vulnerable. Today there is a message hiding behind the doubling-up. The consumer is not per se vulnerable: only particular groups deserve and need protection.

4. Assets of Consumer Law

The substance of consumer law as it results from the interaction of the EU law with the German law can be divided, from a systematic point of view, into a general and a special part. In a manner similar to the general law of obligations in the BGB, the general part deals with contractually unspecific requirements which apply to sales agreements as well as to service contracts. The special part defines demands for specific contract types and comprises liability law. Consequently, the general part contains the contractually relevant rules on unfair commercial practices, the rules on the manner in which a contract is concluded – including direct- and distance-selling, as well as the control of AGB.

Within the special part rank Purchase Contracts, Travel Contracts, Time-Share Contracts, Consumer Credit and Product Liability.

(a) Contracts for services

The following point of view does not take into consideration the manifold rules on the performance of services which were also initiated by the European Union. Since the adoption of the Single European Act the European Union has, in several steps, deregulated the markets for telecommunications and postal services, for electricity and gas, for air, train, ship and bus transport – all while urging the Member States to privatise former state monopolies. The relevant directives and regulations govern market access for competitors. The aim is to establish competition in these markets. Only on/at? the last level of liberalisation has the EU grappled with the rights of the ultimate customers. The European capital market, created on advice from the EU, also figures among the regulated markets. Again the rights of private investors are not the centre of attention, but are contained in the legislative acts, especially in Directive 2004/39/EC. The ‘Services’ Directive 2006/123/EC creates horizontal requirements with regard to the performance of services which are not sector specifically arranged. A variety of manual services are included. The rights of the consumer are affected by the Services Directive in a number of ways. The possibility provided in Art. 26 to entrust standard bodies with the elaboration of standards for services is of particular importance. Technical standards developed by standard bodies intervene deeply into the contract law of Member States. In fact they take the form of standard terms, AGBs. Health services, which were excluded from the Services Directive, can be found in Directive 2011/24/EC on the application of patients’ rights in cross-border healthcare.

The Study Group had dealt with the harmonization of services.¹⁸ However, the proposed rules, which encroached on the DCFR, excluded from its advised scope all those fields which the EU had worked upon with regard to the opening of markets. This is even more surprising since the authors of the study explicitly pursue the aim of developing general rules based on specific service contract types – they analyse construction, processing (repairing, cleaning, maintenance), storage, design, information services (for example, credit worthiness checks on potential contract partners) and treatment. The German legislative authority implemented the demands of EU law by creating sectoral rules. The consequence is a barely manageable plethora of rules, which do not pursue a consistent approach, since the legislative authority simply reacts every time to demands from Brussels. The dynamic of the development of law beyond the BGB formulated by *Gierke/Hedemann/Wieacker* also proves to be true after the *Schuldrechtsmodernisierung* (modernization of the law of obligations). The adaptations of contracts for work and services resulted from changes to the term ‘defect’ as well as from the altered warranty provisions of the sales law. The modern law on service contracts, not only in relation to b2c, however, can be comprehended only by a synopsis of the sector specific regulations whereby the rules of the BGB represent, at best, blanket clauses.

(b) Legal redress¹⁹

From a European perspective, consumer law contains not only substantive but also procedural rules about the individual and collective legal redress. The scope of EU law is considerable, but far more difficult to navigate and to structure, because it consists of non-binding recommendations, directives and directly applicable regulations. This disorganisation can be explained to a large extent by the EU’s lack of competence to regulate the enforcement of EU law. Upon approval by the ECJ²⁰ the EU

¹⁸ M. Barendrecht/Ch. Jansen/M. Loos/A. Pinna/R. Cascao/St. v. Gulijk, *Service Contracts (PEL SC)*, 2007.

¹⁹ In referring to the term ‘legal redress’, the author seeks to focus on a wide concept of which legal protection (Rechtsschutz) only represents a part.

²⁰ ECJ Case C-359/92, ECR 1994 I- 3683 = EuZW 1994, 627 (Germany v. Council).

legislative authority used the expanded competence of the Art. 114 TFEU (former Art. 95 TEU) to define not only the substantive content of consumer law but also the demands concerning law enforcement. The EU's competence in cross-border judicial cooperation in civil matters, initially introduced by the Treaty of Amsterdam was recently expanded by the Treaty of Lisbon.

Recommendations 98/257/EC on out-of-court settlements of consumer disputes and 2001/310/EC on consensual resolutions of consumer disputes contain practical requirements for consumers' rights enforcement on an individual basis. In *Alassini*²¹ the ECJ declared as binding the seven minimum requirements that Recommendation 98/257/EC formulated for an out-of-court settlement of consumer disputes which mandatorily precedes the legal procedure: namely impartiality, transparency, effectiveness, independence, legality, representation and fairness. Special requirements with regard to the arrangement of the out-of-court settlement of disputes can be found in the sector specific legislation: in network industries under the Electricity Directive 2009/72/EC and the Gas Directive 2009/73/EC (Art. 3 (13) and Art. 3 (9), respectively), the Directive 2009/136/EC on Electronic Communications Networks and Services (Art. 34), and the 3rd Postal Services Directive 2008/06/EC (Art. 19 (6)); passenger rights²² under the Denied Boarding Regulation (EC) 261/2004, Regulation (EC) 1371/2007 on rail passengers' rights, Regulation (EU) 1177/2010 on the rights of passengers when travelling by sea and inland waterway, Regulation (EU) 181/2011 on rights of passengers in bus and coach transport; while in the domain of financial services in the Markets in Financial Instruments Directive 2004/39/EC (henceforth MiFID) (Art. 53 (1)), the Consumer Credit Directive 2008/48/EC (Art. 24); as well as concerning the field of cross-border cooperation in the framework of the Consumer Protection Cooperation Regulation (EC) 2006/2004 (Art. 17 (1) lit. c)) and the application of patients' rights in cross-border healthcare in Directive 2011/24/EU (Art. 6 (3)).

These two recommendations are amended by a number of rules to improve *cross-border* law enforcement. These are not consumer law specific rules, but manifest a larger scope of application as regards the person concerned: Directive 2002/8/EC to improve access to justice in cross-border disputes by establishing common minimum rules relating to Legal Aid for such Disputes; Regulation 1896/2006/EU creating a European order for payment procedure, Regulation 861/2007/EU establishing a European Small Claims Procedure; and Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters. Directive 2009/22/EC on Injunctions for the Protection of Consumers' Interests and the Regulation 2006/2004 on Consumer Protection Cooperation regulate the *collective* protection of the consumer. The efforts of the Commission to create a European collective action for damages have not yet led to a concrete result.

In addition, on the procedural side, the German legislative authority uses a selective legislative technique (*punktueller Gesetzgebungslogik*) which is characteristic of the law on service contracts. Paradigmatic for the unsystematic approach of the German legislative authority is the fate of the procedural part of the former AGBG. As a consequence of the integration of the substantive rules in the BGB, the legislative authority relocated the rules on actions for injunction to a separate law, the UKlaG. Over the years the same UKlaG became a collecting pond for collective remedies applicable to consumers. But even the UKlaG does not draw a complete picture. Without the rules of the *Rechtsdienstleistungsgesetz* (German Act on Legal Services, henceforth RDIG) and the *Kapitalanleger-Musterverfahrensgesetz* (German Capital Markets Model Case Act, henceforth KapMuG), the right of collective redress cannot be understood. Under pressure from EU law, Germany created agencies for regulated markets, such as the *Bundesnetzagentur* (German Federal Network Agency, henceforth BNetzA). Apart from protecting the functioning of markets, these organisations pursue (or rather, are forced to pursue) more and more collective consumer interests (dual protection function – *doppelte Schutzfunktion*), thereby clearing the way for an administrative enforcement of the consumer contract law. The same applies for the cross-border law enforcement

²¹ ECJ Case C- 317/08, ECR 2010, I-2213 = EuZW 2010, 550 (Rosalba Alassini/Telecom Italia SpA).

²² Website of the European Commission DG Transport <http://ec.europa.eu/transport/passenger-rights/de/index.html>.

with which the *Bundesamt für Verbraucherschutz und Lebensmittelsicherheit* (German Federal Office of Consumer Protection and Food Safety, henceforth BVL) was entrusted. These agencies are put in charge of building-up adequate dispute settlement bodies as required by EU law, thereby taking on a quasi-judicial function. To put it bluntly, there are as many rules as there are sector specific stipulations emanating from the EU legislative authority. There is no structuring of the multifaceted proceedings and mechanisms, on the European as well as on the national level.

5. Consequences of the Europeanization of Consumer Law

The most tangible consequence of the Europeanization of consumer law results from the continuous shifting of the competences from the Member States to the European Union. The magic formula which appeased the interests of the Member States and the EU Commission was the concept of minimum harmonisation. It permitted the EU legislative authority to create minimum standards with regard to the field of consumer law, a common platform. At the same time Member States maintained the possibility to keep or introduce higher protection standards. The ECJ agreed to this approach in *Buet*²³, *di Pinto*²⁴ und *Ausbanc*.²⁵ However, in *Gysbrechts*²⁶ it subjected the expanded national standards to a rigid control of proportionality.

(a) Maximum harmonisation and loss of competences

The crucial turning point to a maximum harmonisation resulted from the Lisbon Strategy set out by the European Council in 2000, by which the *ökonomische Effizienzdenken* mutated into the dominant European ideology. It cleared the way for the Consumer Policy Action Plan 2002-2006 which for the first time identified the aim to change gears in European consumer law – from minimum to maximum harmonisation. The directives adopted from this time on in the core area of consumer law pursue this dictum. The parameters concerning the law on service contracts are more heterogeneous. Whereas the financial services law under the MiFiD Directive 2004/39/EC, the Denied Boarding Regulation (EC) 261/2004 and the Services Directive 2006/123/EC determine maximum harmonized standards, the Electricity Directive 2009/72/EC and the Gas Directive 2009/73/EC, Directive 2009/136/EC on Electronic Communications Networks and Services and the 3rd Postal Directive 2008/06/EC merely define minimum standards.

Maximum harmonization results in a rigid and final competence transfer to the EU. As regards the scope of the fully harmonized consumer law, the EU has regulatory sovereignty over its parameters. Changes to the fully harmonized law depend exclusively on whether the European Commission utilizes its right of initiative. A certain adjustment of this isolated position results from the inter-institutional agreement between the European Parliament and the European Commission which grants a right of initiative to the European Parliament. Legal conflicts will focus on the question, if and to what extent a European rule precludes national ones. However one should not ignore decisions of the ECJ, which determine a Member States' baseline (minimum standards) and have a similar preclusive effect. In this context *Putz/Weber*²⁷ is of special interest as an example of the more recent case law. The catalogue of ECJ decisions which encroach deeply upon national ideas and conceptions is long. By amending the directives, revisions of the jurisprudence are possible. For example the Consumer

²³ ECJ Case 382/87, ECR 1989, 1235 = Entscheidungen zum Wirtschaftsrecht (EWiR) 1989, 887 (head note).

²⁴ ECJ Case C-361/89, ECR 1991, I-1189 = Zeitschrift fuer Europarecht, Internationales Privatrecht und Rechtsvergleichung (ZfRV) 1992, 57.

²⁵ ECJ Case C-484/08, EuZW 2010, 500.

²⁶ ECJ Case C-205/07, ECR 2008, I-9947 = EuZW 2009, 115.

²⁷ ECJ Joined Cases C-65/09, C-87/09 = NJW 2011, 2269.

Rights Directive 2011/83/EU has clarified (?) *Heiniger*²⁸ as well as *Messner*²⁹. Clearly observable is the tendency of Directives 2008/48/EC and 2011/83/EC to refer to problems already dealt with within the recitals to ? in order to draw the ECJ's attention to possible guidelines to solve potential conflicts.

In order to define the scope of the partly or fully harmonized consumer law, the ECJ hearkens back to methodical principles, for the use of which it was sharply criticised. In *Putz/Weber* the ECJ did not consult either the systematic context of the respective wording or the legislative history in interpreting the legislation, but rather reasoned its decision by pointing to the wording and the *effet utile* of the directive. The legislative history does not rank amongst the maxims of interpretation approved by the ECJ, due to the lack of access to the sources of European legislation. The ECJ barely acts on a systematic basis, which may be the consequence of the patchwork character of European private law. Already in *Heiniger* the ECJ had unsettled the German civil law scholarship by arguing that a right that does not have an expiry period can be enforced for an unlimited time. The ECJ acted in a similar way in *Quelle* and *Messner*. *Putz/Weber* blends in seamlessly. The Directive on the Sale of Consumer Goods and the Distance Selling Directive (which was abrogated in the meantime) both grant remedies to the consumer without burdening him/her with costs. So the text says. The recitals of both Directives could not contribute to clarify cases of doubt. Thus in the past silence and omission were often the appropriate answer.

(b) Reactive consumer law policy

The indirect consequences of the transfer of competence for the existence and legitimacy of a national consumer (law) policy are less visible. The Federal Republic of Germany had already outsourced consumer law policy-making to Brussels by the end of the 1970s, more specifically in the course of the discussion about the elaboration of a Product Liability Directive. One of the noteworthy exceptions is the field of collective law enforcement. Here, where the European Union has no competence, the Federal Republic of Germany has developed its own approach.

The European Commission works with 4-5 annual plans, in which it reveals its proposed activities and submits the latter to the European Parliament for approval. The present strategy covers the period 2007-2013³⁰ as adopted by the European Council on 30.5.2007.³¹ To put it bluntly, the Federal Government waits until the Commission uses its right of initiative and presents its proposals in a Green Paper, then in a White Paper and finally in a published Proposal. The history of the swing from minimum to maximum harmonization of consumer law, especially, shows that the Commission pursues the mandate chartered by the Lisbon Council in a stringent way. The intermediate Green and White Papers, which were the result of costly inquiries serve legitimizing purposes and rehearse arguments to support the option already chosen. The legal history of the Consumer Credit and the Consumer Rights Directives proves that only the European Parliament presents a real counter-balance to the European Commission. The governments of the Member States, communicate vertically with Brussels, but do not interact in a horizontal way among each other in order to develop counter-strategies or alternatives. The familiar accusation against Brussels – that a given consumer law rule is the fault of the European Commission or the EU – is a half-truth. All Member States, including Germany, bear joint responsibility for the final rules, even if they are not in accordance with national conceptions of the role of consumer law. The situation is of course different if a member state has its way; in this case each government considers the success to be its own.

²⁸ ECJ Case C-481/99, ECR 2001, I-9945 = NJW 2002, 281, the unlimited right of withdrawal has been reduced to 1 year in case of lacking instruction.

²⁹ ECJ Case C-489/07, ECR 2009, I-7315 = NJW 2009, 3015, the gratis right of withdrawal for Internet sales was replaced by the obligation to payment of indemnity concerning the use before devolution of the cancellation time limit.

³⁰ COM (2007) 99 final.

³¹ http://ec.europa.eu/consumers/overview/cons_policy/doc/coun_res_epsco_en.pdf

In sum, the efforts of the European Commission to configure (manipulate?) legal relations of consumers by counting on non-legally binding instruments have not attracted the political attention they deserve. The EU's guiding documents, such as those on 'governance', self-regulation, co-regulation, new forms of alternative dispute settlement,³² and collective redress, with the aid of the Member States under the initiative of the European Commission, all remain largely disregarded by political and legal commentators. This is a regrettable situation since broad adjustments may occur in these fields which could greatly change consumer law as we know it.

6. Recasting Consumer Law as Special Law

This report pleads for the reshaping of consumer law into a special law which includes a part dedicated to an ordinance according to the model of the French '*Code de la Consommation*'. Several Member States have approved this form of codification, including Austria with the *Konsumentenschutzgesetz* (consumer protection law), the Nordic countries Denmark, Finland and Sweden as well as the Romanic countries France, Italy, Portugal and Spain. Only the Netherlands has, like Germany, integrated consumer law into the *Wetboek* (Civil Code) which was fundamentally reformed during a long process of discussion in the democratic fora. As far as the Member States dispose of their own consumer protection law, they limit themselves to a compilation of rules. The only serious attempt to design consumer law in a theoretically new way, especially with regard to its references under private law, took place in France in the 1980s. Then, the so-called *Commission de la Refonte*,³³ similar to the Code Civil made a claim for intellectual leadership in Europe. This process, and a parallel movement in Belgium, failed due to a lack of political support.

The heavy tanker BGB cannot keep up with the dynamics of the agile consumer law. By means of a special law, the social character of consumer law can be illustrated more clearly and maintained more easily; rules which are influenced by public law are easier to integrate; and modern forms of the law on service contracts which can be found in several acts can be merged. Finally, procedural rules on the arrangement of the individual, collective, judicial and administrative courses of redress are more readily combined with substantive rules of consumer law. The petition concerning a breakup of the consumer law with the BGB makes it necessary to penetrate the matter of the consumer law in a theoretical way and to combine the consumer law with the BGB. Such an undertaking would permit us to better determine the significance of the consumer law and to formulate a pro-active consumer policy which is capable of arousing the public's interest in Europe.

³² For example enforcement package, MEMO/09/312 Brussels, 2 July 2009.

³³ Proposal for a new consumer law, Report of the 'Commission de la Refonte' of Consumer Law to the Secretary of State at the ministry of Economy, Finances and Budget responsible for Budget and Consumer Affairs, 1985.

II. Consumer Law in the System of the BGB

1. Consumer Law as 'Social Oil'

The temptation to draw a line between what *O. v. Gierke* and *A. Menger* refer to as the absence of a drop of 'socialist oil' in the BGB and the integration of consumer law into the BGB in the course of the modernization of the law of obligations is huge. One hundred years after the entry into force of the BGB one of its birth defects would be corrected. The formal law of the BGB would be boosted on a value basis by substantive protective rules in favour of the consumer and – not to forget – of the tenant.

The reality is more difficult and complex. At the centre of the former discussion was a matter which is referred to nowadays as *Arbeitsrecht* (labour law) and which, by 2002, was also not integrated into the BGB. In those days (the early 1900s?) labour law only appeared on the BGB's radar in the form of a few formal rules for services contracts which excluded, in particular, collective labour law. After the First World War the discussion focused on the term *Wirtschaftsdemokratie* (economic democracy) and the significance of the *Wirtschaftsverfassung* (economic constitution), a notion which was influenced greatly by the work of *O. Sinzheimer* and was subsequently adopted by the Freiburg School, which is today closely associated with ordoliberalism. A central concern of ordoliberalism is the enforcement of measures to combat the abuse of private economic power, which left unchecked restrains the autonomy of weaker parties to a contract.

Against this background one can understand why the Ordoliberals dealt with the shady side of AGB as early as the 1930s.³⁴ The justification of the control of AGB lies in the restriction of private autonomy, not in the use of private power, the abuse of which was to be controlled by antitrust law. Those political and theoretical discussions did not touch the structure of the BGB. The most important stakeholder in the 20th century became the judiciary, which aligned the deficits of the formal architecture of the BGB in a new way by means of an activist jurisprudence which gave the BGB a social face. *Wieacker*³⁵ retraced this evolution with regard to the BGB, and *D. Hart* did so in relation to the control of the AGB. The AGBG codified this approach in 1976. Under this approach private power as a legitimate starting-point for the control of unfair contract clauses was therefore no longer of any significance.

Despite, or because of, this quasi-neutral approach (means setting aside the power dimension), the control of AGB through the courts developed into 'the' instrument with the help of which a 'social' element was implemented in the BGB. Even to this day the courts produce circa 500 decisions per year, counting both individual claims and those taken by associations. This has resulted over the course of 30 years in more than 15,000 decisions which have deeply shaped the legal relations between the parties. From the point of view of consumer law, the disentanglement of collective and individual protection is important since this separation reduces the social impetus of the AGBG/AGB Law. The approach developed in the case law of an extremely client-hostile interpretation (*kundenfeindlichste Auslegung*) of a contract clause affected by a legal action taken by an association leads to a 'phantom control'. This is due to the fact that the client-hostile interpretation as a criterion is, in respect of individual contract relations, irrelevant or at least of secondary importance. The cleavage is further widened by the as-yet-unresolved problem of the extension of binding legal force to actions taken by an association concerning ineffective clauses in individual disputes.

³⁴ L. Raiser, *Recht der Allgemeinen Geschäftsbedingungen* 1935.

³⁵ *Wieacker* (1967), p. 516.

The integration of the HTWG, the *Fernabsatzgesetz* (German Distance Selling Act, henceafter FernAbsG), the *Teilzeit-Wohnrechtgesetz* (German Part-Time Residential Rights Act, henceafter TzWrG) and the *Verbrauchercreditgesetz* (German Consumer Credit Act, hereafter VKreditG) into the BGB resulted not only in the transfer of many legal provisions to the BGB, but also the creation of a considerable jurisprudence. The importance of private consumption to the national economy gave rise to the belief that the necessary drop of social oil had entered the BGB through the modernisation of the law of obligations. Two reasons confirm this intuition. There was neither political discussion in the German Bundestag nor interdisciplinary dialogue between private and consumer scholars. Such a discussion would have been necessary to endow the Act with greater legitimacy. The second reason lies in the lack of emphasis on the possible repercussions of the integration of consumer law on the structure and the concept of the BGB. According to the dominant academic opinion the coercive rules of consumer law confine the autonomy of contract. This perspective supposes a specific comprehension of the relationship between the general rule = freedom, and the exception = limitation. The conceptual design of a social law of obligations would not only require the substantiation (*M. Weber*) of some specific rules of contract law, a debate about the foundations of the BGB would also have been necessary. The BVerfG had initiated a reorientation in its *Bürgerschaft* (suretyship) and *Handelsvertreter* (Commercial Agent) decisions. Politics and legal scholars disregarded the advice and, like 100 years ago, ceded the social question of the BGB finally to the judiciary.

2. Consumer Law as Foreign Matter in the BGB

(a) Formal integration

The rules of consumer law can be found in the BGB in three different places. The rules concerning the concept of the consumer and the entrepreneur, §§ 13, 14 BGB, rank first in book 1, paragraph 1, title 1. They can be found under the heading of ‘Natural persons, consumers, entrepreneurs’. In book 2, division 1, title 1 ‘Duty of performance’ 241a BGB, ‘Unsolicited Performance’ was introduced. In division 2 there are the rules concerning the ‘Drafting contractual obligations by means of standard business terms’, §§ 305 et seqq. BGB. The separation between b2b and b2c can be found in § 310 BGB, which does not mention the consumer in its heading. Division 3, title 1, subtitle 2 contains rules which regulate ‘Particular types of sale’, §§ 312 et seqq. BGB, while division 3, title 5, subtitle 2, covers the ‘Right of withdrawal in consumer contracts’.

The most detailed rules are those in division 8 on ‘Particular types of obligations’, itemized according to sales, loans, contracts of work and labour and similar contracts. Title 1, subtitle 1 regulates sales contract law, subtitle 3 the ‘purchase of consumer goods’ §§ 474 et seqq. BGB, title 2 ‘Time-share agreements, contracts relating to long-term holiday products, brokerage contracts and exchange system contracts’ §§ 481 et seqq. BGB, title 3, subtitle 1 loan contracts, chapter 1 the ‘general provisions’ and chapter 2 the ‘Special provisions for consumer loan contracts’, §§ 491 et seqq. BGB. These are completed by subtitle 2 ‘Financing assistance between an entrepreneur and a consumer’ §§ 506 et seqq. BGB and subtitle 3 ‘Instalment supply contracts between an entrepreneur and a consumer’ § 510 BGB. Title 9 consists of consumer relevant service, work and labour contracts. Subtitle 2 is dedicated to the ‘Package travel contract’ §§ 651a et seqq. BGB, title 11 refers in § 661a BGB promises of prizes, title 12, subtitle 3, chapter 1 and 2 to the ‘Contract for the management of the affairs of another; §§ 675 et seqq. BGB.

By taking into consideration the parameters of European consumer law, the following tabular comparison can be made. The BMJ has desisted from declaring each time the rule of EU law that shall be implemented by means of a specific rule in the BGB. Instead a general hint by way of a footnote is given at the beginning of the paragraph. This method to refer to the origin of the respective rules does not really help the inexperienced lawyer.

§§ of the BGB	Directives
§§ 13, 14	85/577/EEC (door step), 87/102/EEC (credit), 93/13/EEC (AGB), 94/47/EC (time-sharing), 97/7/EC (distance selling), 99/44/EC (sale)
§§ 241 et seqq.	97/7/EC (distance selling)
§§ 305 et seqq.	93/13/EEC (AGB)
§§ 312 et seqq.	85/577/EEC (door step) and 97/7/EC (distance selling), Art. 10, 11 and 18 2001/31/EC (e-commerce)
§§ 355 et seqq.	85/577/EEC (door step), 94/47/EC (time-sharing), 97/7/EC (distance selling)
§§ 433 et seqq.	99/44/EC (sale)
§§ 481 et seqq.	94/47/EC (time-sharing)
§§ 488 et seqq.	2008/48/EC (consumer credit)
§ 651	99/44/EC (sale)
§§ 651a et seqq.	90/314/EEC (package holiday)
§ 661a	-
§§ 675 et seqq.	97/5/EC (cross-border transfer) Art. 3 to 5 98/26/EC (effectiveness of invoices in payment and accounting systems)

This table has been created according to the revision of the BGB of 24th July 2010. By taking into consideration the subsequent changes made – specifically to §§ 305 et seqq. BGB, 312 et seqq. BGB, 433 et seqq. BGB in the course of the adoption of the Consumer Rights Directive, the §§ 481 et seqq. BGB in the course of the adoption of the Time Share Directive 2008/122/EC,³⁶ the §§ 488 et seqq. BGB in the course of the adoption of the Consumer Credit Directive 2008/48/EC³⁷ and the §§ 675 et seqq. BGB in the course of the adoption of the Payment Services Directive 2007/64/EC³⁸ – the dynamic of consumer law can be seen in a very explicit way. The BGB will continuously remain a building site, if the consumer law stays there. Even this image is not complete, however, since the table does not contain the upcoming implementations in the law on service contracts beyond the BGB.

(b) Discrepancies and inconsistencies

The concept of the Consumer and the Entrepreneur, which specifies the scope of application can be found in the first book of the German Civil Code and underlines the central importance of this new status-related field of law. The majority of the substantive rules were included according to the

³⁶ Amending Act Federal Law Gazette I of 24.01.2011, p. 34.

³⁷ Act concerning the rearrangement of the rules about the right to withdrawal and to return of 29.July 2009, Federal Law Gazette I of 3August 2009, p. 2355.

³⁸ Act concerning the rearrangement of the rules about the right to withdrawal and to return of 29.July 2009, Federal Law Gazette I of 3.August 2009, p. 2355.

systematic logic of the BGB, i.e. unsolicited performances under the title concerning the duty to perform, the specific types of contracts separated according to sales, service or work and labour contracts according to the context. On closer inspection the positioning emerges as a pure coincidence, since in the course of the modernization of the law of obligations some paragraph numbers in the BGB were freed up. This applies to the AGB Law,³⁹ the rules on particular types of sales as well as to Time-Sharing contracts. Some of the positioning has proved to be convincing whereas others, like for example §241a, have given rise to serious discussions. In this vein, it seems quite severe that the rules on consumer credit have been forced into the straightjacket of the lending law. To achieve this target, and to keep the loan of fungible things in its place, consumer credits were first reduced to the status of a loan (covering also fungible things) and then extended in a second step to credits.

Systematic difficulties were caused by the integration of European rules which are not restricted to the consumer, but which amplify the concept of the consumer beyond § 13 BGB. However, the founder of a new business §§ 511, 512 BGB - who is not covered by the EU law on consumer credit - is not among these persons. The first site of fracture can be found with regard to the rules on particular types of sales. The relevant parameters are formulated not only by the two Directives 85/577/EEC and 97/7/EC (replaced by the Directive 2011/83/EU), but also the E-Commerce Directive 2001/31/EC. The problems multiply with regard to the law on package travel contracts, since the Traveller is not identical to the Consumer. Business men can also be covered by the protective rules of the §§ 651a et seqq. BGB, since the purpose of the trip, professional or private, is irrelevant for the scope of those provisions. Thus, §§ 675c et seqq. BGB do not speak of a consumer and an entrepreneur, but of payment service providers and payment service users. The latter can be an entrepreneur as well a consumer. A similar problematic can be observed with regard to the law on financial services, telecommunications, energy, postal services and the transport of persons. The client can be a consumer as well as an entrepreneur.⁴⁰

By penetrating deeper into the many legal issues, it becomes increasingly obvious that consumer law is still an alien concept in the BGB. The status-linked conception of the consumer law collides with the *Allgemeinheitsanspruch* (claim to generality) of the BGB. The inclusion of the relevant rules in the general and specific law of obligations remains to a large extent selective. The incompatibility becomes obvious with regard to the consumer loan contract law, the TzWrG and the *Zahlungsdienstevertrag* (payment services contract). After more than 30 years the existence of the law on package travel contracts in the BGB no longer gives rise to astonishment. A systematic presentation of the general rules of the BGB and the specific rules of the consumer law still does not exist, maybe with two exemptions, the sales and the AGB Law.

With regard to rules on AGB, this problematic does not occur, since the AGB Law applies equally to b2b and b2c transactions and since it can, due to its amplitude and depth, be considered to be the substantive core of the social law of obligations. The founding fathers of the AGBG insisted on the fact that it should not be regarded as mere consumer protection law. They therefore rejected attempts to interpret the feature of 'providing AGB' as an element of the businessperson's economic superiority vis-à-vis the consumer. Ironically the broad personal scope, which has changed the BGB on the whole, represents at the same time its weakness. AGB Law provides no information on the specificities of the interaction between individual and substantive courses of redress, notwithstanding the inclusion of the rules of the UKlaG. The meshing of the sales law was a relatively easy process since it is a field of law that has been dogmatically elaborated over the course of one hundred years so it cannot be compared to the continuously developing credit law, to name only one example. From an economic point of view

³⁹ Today the former AGBG has been integrated into § 305 et seqq BGB. Instead of the well-known term of General Terms and Conditions, the BGB refers to Standard Business Terms.

⁴⁰ Compare under III.4.

the sales law covers only 30% of all contracts. The real problems of the consumers in the year 2011 can be found in the law on financial services, telecommunications and energy.⁴¹

A visible outer sign of the divergence of the fields of law is the continued further development of commentaries on the former specific acts, with the peculiarity that these specific acts have turned into subsections of the BGB. A systematic analysis of the research agendas of German law faculties would probably confirm this picture in many respects. The integration of the consumer law in the BGB has not led German legal scholars to reconsider or redirect their energies. In scholarship the special character of the rules on consumer law in the BGB has been seamlessly preserved. The specificities of the law on service contracts, though enormously important in practice, are deemed irrelevant for a basic legal training.

3. Vibrancy of the Law Concerning Consumers in b2b

(a) AGB control of b2b

The AGBG of 1976 included the protection of businessmen as well as consumers against unfair AGB. By this approach the legislative authority implemented, over the course of decades, a type of judicial control of AGB for which there was no prior model in Europe. The dual protection model should safeguard a differentiated treatment for b2b-AGB and b2c-AGB. In fact the courts used the blanket clause as a means to transfer the black- and grey-list condemnation approach to the field of b2b. This practice did not remain unnoticed, but was for a long time was accepted without widespread complaint, with the exception of some gnashing of teeth, perhaps.

As a consequence of the discussion on the DCFR, which envisaged a differentiated dealing of the control of AGB in the field of b2b and b2c, the wind started to change in Germany. On the respective backgrounds one can only speculate. There are no valid empirical inquiries about the potential effects of a homogeneous control approach, in Germany or in wider Europe. Nevertheless the differentiated control approach of the DCFR caused an increasingly widespread policy debate, especially in Germany. The professional journals of the day published estimations of the potential negative consequences of the limitation of the freedom of contract based on the experiences of companies and their attorneys. The arguments presented can be reduced to a common denominator. The AGB-control of b2b contracts practised by the courts created a Procrustean bed, from which companies could only escape by contracting under a foreign law, for example under Swiss law which to date does not include an AGB-control. The jurisprudence is blamed having needlessly transferred the AGBG, usually – though inaccurately – seen as having been designed as a law on consumer protection, to the field of b2b. Only very occasionally are there voices that warn against a hasty change of the legal position. The heated discussion has led to the bon mot: ‘All against Graf (Count) von Westphalen.’⁴²

⁴¹ Consumer Scoreboard, available at: http://ec.europa.eu/consumers/strategy/docs/2nd_edition_scoreboard_en.pdf, last accessed 31.07.12.

⁴² Friedrich Graf von Westphalen is a German legal scholar and lawyer. He is considered to be a pioneer in the field of AGB Law. According to his point of view, the AGB control is not restricted to b2c contracts, but also applies to b2b transactions. This is inter alia due to the fact that the principle of Treu und Glauben (§ 242 BGB) does not grant the right to the user of AGB to impose his will on the contract partner. Graf von Westphalen argues furthermore that the legislator is aware of the difference between consumers and entrepreneurs, since the AGB control of a b2b transaction focuses on non-liability clauses. His opponents counter with the argument that a b2b situation lacks the inferiority of one of the contract partner which is characteristic for b2c constellations.

The amendment proposed by the German business community resembles the line of the DCFR and the proposed draft regulation on a CESL. Article 86 CESL formulates under the headline ‘Meaning of “unfair” in contracts between traders’ as follows:

In a contract between traders, a contract term is unfair for the purposes of this Section only if: (a) it forms part of not individually negotiated terms within the meaning of Article 7; and (b) it is of such a nature that its use *grossly* deviates from good commercial practice, contrary to good faith and fair dealing. (Emphasis H.-W.M.)

The conceptual difference between the CESL and the legislative initiative lies in the diverging circle of addressees. The latter treats all companies equally, the former distinguishes between small and medium-sized enterprises (SME) on the one hand and large companies on the other. The reduced control rule only applies if on one side at least one medium-sized company participates – meaning it does not apply if two large companies conclude a purchase contract. To be precise, the CESL provides a three-step graduation: b2c complete control → b2b reduced control → b2b without control, i.e. beyond the scope of the text.

The differentiation proposed by the CESL leads to the right direction, but maybe not to the appropriate solution. The crucial question to be dealt with is the issue of who benefits from a liberalization of the AGB controls. The use of AGB entails the displacement of risks, typically through a standardized form. The consumers are protected, since according to the prevailing opinion their contractual freedom is limited either because they are not willing or able to negotiate individual AGB. In fact, and contrary to the idea that private power is controlled by the forces of competition, the unequal distribution of the chance to negotiate in b2c situations plays a very concrete role. In its *Bürgschaft* decision, the BVerfG reminded the *Bundesgerichtshof* (German Federal Court of Justice, henceforth BGH) of the structural inferiority of the consumer. Are things really that different if economically unequal partners face each other in the field of b2b? The SMEs that conclude contracts with large scale companies do not seem to be the potential beneficiaries of the regained freedom. In its *Handelsvertreter* decision,⁴³ the BVerfG has pointed out the limits of the freedom of contract with regard to b2b.

Another issue presents itself. The average informed consumer, so favoured by European consumer law, can move skilfully in the business environment and so differs only partly from an entrepreneur who has to deal with comparable challenges. Those who appreciate the lowering of protection standards should distinguish between the addressees concerned. A division of consumers on the one hand and entrepreneurs on the other hand does not correspond to the social and economic realities, on either side.

(b) Sales law for b2b

As early as 2001, fears arose that the “big solution” in the new version of the §§433 et seqq. BGB could pose considerable problems for entrepreneurs. In particular, the apprehension centred on the creation of common sales law for consumer contracts as well as for contracts between businesses. Mandatory consumer law became the norm. What unsettled the entrepreneurial business were statements of the legislative authority according to which “the *consumer* contract, that is the contract between an entrepreneur and a consumer is the typical manifestation of a contract governed by the law of obligations.”⁴⁴ That implies that the legislative authority has not sufficiently acknowledged b2b interests, but has rather created a “non-business related sales law”.

⁴³ BVerfG 81, 242 = NJW 1990, 1469.

⁴⁴ Bundestagsdrucksache 14/6040, p. 91, there under 4: „Der Verbrauchervertrag, das heißt der Vertrag zwischen einem Unternehmer und einem Verbraucher, ist die typische Erscheinungsform des schuldrechtlichen Vertrags“.

In practice there is no evidence to confirm these apprehensions. If anything, there is a dysfunctional interaction between b2b and b2c concerning the regulation of recourse of the entrepreneur § 478 BGB, but not how it was predicted by the critics. If a defective product (*mangelhafte Sache*) is sold to a consumer, the latter can refer back to his rights under § 437 BGB. From the point of view of the legislative authority, the ultimate seller who obtained the product from the supplier or producer shall not bear the costs of the subsequent cure (*Nacherfüllung*). In compliance with § 478 (1) BGB, the latter is not only granted an easier course of action according to the general sales law claims, but also has an autonomous possibility of recourse under § 478 (2) BGB. From the very outset this method of seeking recourse was exposed to considerable criticism, although the main issues did not revolve around the application of the rule itself, but its avoidance. Through the implementation of § 478 (4) and (5) BGB the protection of the consumer was imposed on the entrepreneurial business. The compensation mechanism can only be avoided by means of a contractual agreement – subject to § 307 BGB - , if the ultimate seller entitled to recourse is granted “another form of compensation of equal value”, § 478 (4) 1 BGB. To this day one does not know what is meant by this.

According to Directive 99/44/EC, the German legislative authority would only have had to guarantee a right of recourse to the ultimate seller when the consumer had invoked their own rights against him, as was agreed by most of the Member States. There are vague indications of motives in the legislative materials but there is a marked lack of court decisions on the point. The idea behind the rule to guarantee the “protection of the often weaker dealers” is not convincing. The detachment of an independent and autonomous contract design in the b2b sphere is given up in favour of a rule which supports the ‘strong’ intermediate dealer (usually one of the big supermarkets) in enforcing his recourse claims against the ‘small producer’. The instrumentation of consumer protection at the expense of an intermediate dealer could have been avoided, if the legislative authority had been willing to grant an implied warranty claim to the consumer against the producer of defective products, as it is the case in some Nordic countries.

III. Concept of the Consumer

The history of private law as part of *Wirtschaftsrecht* (Economic law) shows how, time and again, new status-related rules are formulated which experience an initial bloom before being deconstructed. The most recent example is the legal concept of the ‘merchant’. When introduced at the end of the 19th century, it annulled the entrenched structures of the commercial guilds. Nearly 100 years later the EU law contrasts the static term of the merchant with the dynamic legal concept of the service provider. Not least because of this, the implementation of the few remaining contractual rules of the *Handelsgesetzbuch* (German Commercial Code, henceforth HGB) in the BGB was considered in the course of the modernisation of the law of obligations.

At first glance there seems to be a parallel between the rise and fall of consumer law. The protection of the weaker party mutates in the consumer society of the post war years into the legal concept of the consumer. EU law transforms the vulnerable consumer into the circumspect market-citizen (*Marktbürger*) and blurs the boundaries between him and the merchant. Is the fate of the consumer similar to that of the merchant? Does he survive as an increasingly vague legal concept or, as the merchant, artificially formalised and detached from economic realities, which sweep over *consumer* law as an episode in the history of the private law?

The central counter-argument has its origins in the mix of the political, economic and social determining factors. Over the last 50 years, society has granted a different social position to the consumer and this is reflected in the legal system. Economists take account of this by exposing the problems of the legal concept of the consumer who not only consumes but also produces. From a sociological point of view we observe a continuously more differentiated society, in which even the legal concept of the consumer seems to be a broad church, which neither accords with social realities – differentiated protection models in consumer law - nor with the economic realities – sectoral splitting in the law on service contracts.

1. The ‘Dignity’ of the Consumer

A charming radio-feature during the summer of 2011 dealt with the ‘dignity’ of the consumer, a choice of words that makes lawyers feel uncomfortable, since it overrates the consumer linguistically and attributes a constitutional dimension to him. In the first story, a young family, a couple with a new-born child, decided to change his nutrition. The mother bought biologically produced milk, cheese, sausages and bread. She relied on the labelling of the goods as well as on information which she downloaded via the Internet. The mother arrived at the conclusion that she could not cope with the information provided as she did not understand the scientific jargon, or the information provided spoilt the biological added value. The second story dealt with a young couple who, 14 days before their holiday, wanted to quickly buy a digital camera. The male partner declared himself competent and searched for appropriate models via the Internet. The punch line of the story is that the young man found out quickly that the information on the Internet was either addressed to experts – to which he did not belong – or that the insights provided by other consumers were not very helpful since they amounted to mere *clichés*. Finally he decides to buy a camera from a neighbourhood shop, which ‘takes nice photos and does not cost more than 300 €.

This radio-feature focuses pointedly and skilfully on the question of how far requirements of the legal system and actual behaviour diverge. In the 1990s and the first decade of the 21st century, Behavioural Economics literature examined issues which, in the 1970s and ‘80s, were concerns of *Rechtstatsachenforschung*, socio-legal research including thorough fact finding. However, the latter dealt with the behaviour of the consumer in an overly restricted (and contemporary) way. Fine

graduations of the consumer behaviour are discussed:⁴⁵ (1) the rational decision-making consumer; (2) the seduced consumer; (3) the status-seeking consumer; (4) the politically active consumer citizen and (5) the ecological, social and cultural responsible consumer. The prototypes caricatured in the radio show can immediately be assigned. The young mother falls into several categories. She wants to act in a rational and informed way (1); she wants to meet ecological requirements (5); maybe she even wants to deliver a political message (4). The purportedly technically competent buyer makes efforts that a rational decision would, no more and no less (1).

It is very difficult to transfer the knowledge of Behavioural Economics to a legal system, since the law would not only have to renounce its general validity, but also its normative claim as a guide to societal behaviour. Nevertheless, its knowledge is not without significance for the future of consumer law. The paradigm first declared by the OECD and now accepted by the EU is that of 'empowerment'. The consumer shall be equipped with the tools necessary to take his role in the market. The connection of this paradigm with the 'capability doctrine' of A. Sen results in considerable consequences for the distributive justice realised – or not realised – by the market. Apart from the narrow legal discussion, economics and social sciences today set the tone with regard to legal policy. The reference to the vulnerability of the subdivision does not bear fruit. Certainly one can argue about the five fine graduations. There is a clear tendency to differentiate and to approach actual behaviour of the consumer and the normative concept. Normative requirements can lose their legitimacy if they can no longer be met by the addressees of the legal rule. The pure information model is insufficient in any case, that is if one wishes to maintain/guarantee the protective character of consumer law.

2. Normative Concepts and Social Realities

The *Wissenschaftlicher Beirat Verbraucher- und Ernährungspolitik* (the Scientific Advisory Board on Consumer and Food Policies) at the *Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz* (Federal Ministry of Food, Agriculture and Consumer Protection, hereafter BMEVL),⁴⁶ in its statement of December 2010, declared itself in favour of a triad of terms. According to the debate, conducted in English, a distinction has to be made between the 'circumspect', the 'vulnerable' and the 'responsible' consumer.⁴⁷ The potential for normatively anchoring outcomes on these distinctions was a reason in favour of choosing this triad.

(a) The circumspect and the responsible consumer

The *circumspect* consumer, since the change of paradigm in the Lisbon Strategy, has been chosen by the European Commission as a point of reference in the recitals of the Consumer Rights Directive. He serves as the justification for the interventions made by the EU. His trust in the Single European Market ought to be strengthened. From the point of view of the behavioural sciences, a slightly different connotation comes with the term circumspect consumer. The circumspect consumer is the one who trusts in the neat procedure of the transaction, who relies on the businessperson and the honesty of the latter. His motives do not have to be honourable. Reasons like time pressure, priorities or a lack of interest are sufficient. From an empirical point of view most consumers are circumspect consumers. Their attitude and behaviour can only be partly changed by empowerment and education.

⁴⁵ Reisch, The Place of Consumption in Ecological Economics, in: Lucia A. Reisch & Inge Røpke, (Eds.) The ecological economics of consumption, Edward Elgar Series Current Issues in Ecological Economics. Cheltenham, 2004, p. 223; Howells, The Potential and the Limits of Consumer Empowerment by Information, *Journal of Law and Society*, (32) 2005, 349.

⁴⁶ The author was member of the BMEVL from 2002 to 2011, with 6 of these years as chairman.

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http://www.bmelv.de/SharedDocs/Downloads/Ministerium/Beiraete/Verbraucherpolitik/2010_12_StrategieVerbraucherpolitik.pdf

The normative equivalent of the circumspect consumer is the *responsible* consumer. The circumspect consumer of EU law disposes of the instruments necessary to make a responsible decision, or shall in terms of a better functioning of the Single European Market. This concept underpins the legal system. In reality the responsible consumer appears very rarely. With regard to Internet consumers, and to the behaviour of the younger generation in general, there is an increasing group which seriously utilises the possibilities provided by the legal system. The conception of the responsible consumer is open to a wide range of values. The applicable law focuses on the market actor who opts for the cheapest price; however, responsibility can be enriched by ecological, social and political values.

The actual and legal difficulties of the applicable consumer law result from the link between the circumspect and the responsible consumer. They are conceptually merged, so to speak. The circumspect consumer is de facto and legally absorbed by the circumspect and responsible consumer. On this point EU law and national law diverge. EU law obliges the consumer to contribute to the realisation of the Internal Market. The point of reference of the European legal system is not a territorial market or a territorial state in which the consumer trusts, the point of reference is the Internal Market itself. The White Paper on the completion of the Internal Market has politicised the consumer. The consumer has come to be detached from his familiar national context. The consumer is, in terms of EU law, the consumer-citizen. It is incumbent upon him to support, promote and expand the Single European Market. This is a political task that goes beyond the simple purchase decision in individual cases. In the national law this process of transformation is less visible. The citizenship dimension of consumer law is not as apparent, since market and state exist side by side, although some transformations can be observed. They can be seen in the liberalized and former state-owned services. The state as the authority responsible for the provision of services of general (economic) interest (Träger der Daseinsfürsorge) retreats behind mostly private companies, whose behaviour is monitored by market supervisory agencies which the consumer does not perceive as being identical to the 'state'.

(b) The vulnerable consumer

By this I mean a group of consumers which cannot, or can no longer, cope with the requirements of the modern consumer society. These consumers run the risk of being isolated from social and economic life, be it by over-indebtedness, illness or a lack of possibilities to communicate. This also includes the growing problem of "social deprivation" (*Versorgungsarmut*). This group of consumers was once the focus of the national consumer policies of the 1960s and '70s. It was exactly this political movement that concentrated on the right to protect the weaker. Consumer policy and consumer law policy will always try to integrate this group of vulnerable consumers. In the Lisbon Strategy, the EU mentioned for the first time explicitly the existence of different types of consumers. It speaks of humans 'living below the poverty line and in social exclusion'.⁴⁸ If one determines poverty as a criterion, in Germany alone this comprises 3 million people, depending on how it is defined. It is another question whether or not poverty can be taken as being on a par with social exclusion or whether social exclusion starts far earlier. One positive effect of the Lisbon Strategy is that it drew the public attention not only to social exclusion, but it also focused, in an indirect way, on the problem of a consumer law lacking protection. The Scientific Advisory Board formulates the credo as follows:

Modern consumer policy thus also has a socio-political dimension: improved information and market transparency are of little help to vulnerable consumers when it comes to leading a self-determined life. It is rather the targeted promotion of infrastructure and intelligent, realistic schemes for providing advice that enable consumers to participate independently in economic and

⁴⁸ COM (2010) 2020 3.3.2010, http://www.europarl.europa.eu/summits/lis1_en.htm, last accessed 31.07.12.

social life. If one declares inclusion and social participation to be the objective then one also has to take care of “vulnerable consumers.”⁴⁹

The legalization of this new type of consumer is closely linked to second generation liberalization in the energy and telecommunication markets. As long as the organisation of the provision of services of general (economic) interest, the so-called *Daseinsfürge*, remained the responsibility of the state, the supply of telephone, post, electricity and gas was granted to everybody. The liberalization, and eventual privatisation, urged by the European Commission after the adoption of the Single European Act entailed the creation of new structures. The guarantee of supply for everybody was added to the concept of universal services. This obligation not only refers to the vulnerable consumers, but includes them in its protective realm. For the first time the concept appears in Directive 2002/22/EC on universal services and users' rights relating to electronic communications networks and services (Universal Service Directive).

Art. 1 (1) of the Universal Service Directive aims at ensuring the availability throughout the Community of good quality publicly available services through effective competition and choice and further, aims to deal with circumstances *in which the needs of end-users are not satisfactorily met by the market*. According to the 7th recital, the Directive's focus is to ensure the *same conditions [of] access, in particular for the elderly, the disabled and for people with special social needs*. In the Internal Market in Electricity Directive 2003/54/EC and the Internal Market in Natural Gas Directive 2003/55/EC, the so-called second generation of the liberalization of the energy markets, the European Commission coined the notion of the ‘vulnerable customer’, translated into German as ‘*schutzbedürftiger Kunde*’, a problematic mistranslation.⁵⁰ Directive 2009/140/EC has not changed the terms defined in Directive 2002/21/EC Art 2. For the first time disabled persons are granted special rights in Art. 7 of amended Universal Service Directive 2009/136/EC. With regard to the energy market, the legal position is different. In view of the increasing problems of social exclusion as a consequence of the liberalization of the Single European Market the EU has tightened its approach. However the EU leaves it to the Member States to substantiate the term of the vulnerable consumer, Art. 3 (7) Directive 2009/72/EC.

The conceptual differentiation in Directive 2005/29/EC on Unfair Commercial Practices can also be considered to belong to the border areas of traditional contract law understanding. Interestingly the Directive does not speak of the ‘vulnerable consumer’, but of ‘consumers whose characteristics make them particularly vulnerable’ to unfair commercial practices. This term is taken to include consumers with characteristics such as ‘*age, physical or mental infirmity or credulity that render them susceptible*’.⁵¹ The law does not define the ‘normal addressee of advertisement’, who in the Directive is spoken of as an ‘average consumer’. The Nordic countries in particular were against a legal definition of the average consumer. As a compromise the Directive, in the 18th recital, sets down that the case law of the ECJ will guide the elaboration of this normative concept.

The German legislative authority has chosen the easy route by integrating the specifications of the Telecommunication and Electricity/Gas Directive in the respective sector specific laws, without having regard to the common starting point which led to the renewed differentiation in consumer protection. According to §§ 86 in conjunction with §§ 78 of the *Telekommunikationsgesetz* (German Telecommunications Act, henceforth TKG), the consumer is entitled to the provision of universal services (*Anspruch auf Grundversorgung*), which can be subjected to the reservation of a bond. The “vulnerable consumer” in the field of the energy market does not play a significant role in the

⁴⁹ <http://www.bmelv.de/SharedDocs/Downloads/EN/Ministry/Trusting-Vulnerable-Responsible-Consumer.pdf>, last accessed 31.07.12.

⁵⁰ Compare Art.3 (5) Directive 2003/54/EC and Art.3 (3) 2003/55/EC, ‘vulnerable consumer respectively vulnerable customer’.

⁵¹ Compare Directive 2005/29/EC Art.5 (3) ‘particularly vulnerable’.

cornerstones (Eckpunkten) of the *Bundesministerium für Wirtschaft und Technologie* (German Federal Ministry of Economics and Technology, henceforth BMWi) proposals on the 2011 *Gesetz zur Neuregelung energiewirtschaftsrechtlicher Vorschriften* (Act Amending Energy Law related Provisions) which amended the *Energiewirtschaftsgesetz* (German Energy Act, henceforth EnWG) and serves as the transposition of both Directives 2009/72/EC and 2009/73/EC. The same can be said of the recently adopted draft law of the Federal Government.⁵² This lack of interest appropriately reflects the standpoint of the scholarly discussion. The vulnerable consumer belongs to the German social law (*Sozialrecht*).⁵³ Art. 5 (3) of Directive 2005/29/EC was implemented by § 3 (2) 3 UWG which focuses on the prohibition of unfair commercial practices, without tackling the issue of its relationship with the definition of the consumer given in § 2 UWG.

3. Expansion and Restriction of the Concept of the Consumer

Status-based rules have a huge attractiveness, provided they promise a privileged treatment in the relevant field of law. They link objective features; the status – however it may be defined – with the *in concreto* applicable rules of the substantive law. Status-based rules create a presumption of conformity with the substantive ones in favour of the status privileged, which can be confirmed or disproved. The evolution and the differentiation of status-based protection rights characterize the post-modern society and economy. Private law disintegrates in status-based rules of employees, tenants, consumers, insurance policy holders, disabled persons, women and children. It produces and provokes everybody who is concerned by an economic or social injustice to search for his own status which promises a ‘better’ treatment.

The Bürgschaft decision reflects this problematic. The discussion focused on the effectiveness of personal suretyships between family members. But what is a family? Can the term be determined according to the parameters of German law? What about same-sex civil partnerships? If these civil partnerships can be assigned to the notion of family of the Bürgschaft decision, as far as they are registered, why can’t we also add unregistered partnerships, if they appear to be permanent? Finally, what is the difference between the reasons that cause the BVerfG to protect family members, but not lifelong friends, that might be emotionally involved to the same degree as family members? The expansion of the protection status leads in the end to the dissolution of the status itself. If the legislative authority or the courts give in to the status-seeking of persons in search of protection, they enforce the generalizing effect of the law. In the end, there only remain a few particular cases where the decision does not refer to status-based factors. Status-based language has thus become the *lingua franca* of the abolition of individuality in the law. Consumer law seems to evade this logic, especially with regard to the argument that the changing society requires a differentiated treatment.

(a) Expansion

By formulating § 13 BGB, the German legislative authority referred to EU law. The consumer is defined in a negative way through features that he does *not* have rather than positively, as in the Swiss law, through features he actually has. Unsurprisingly, a set of controversial questions deal with the term of the consumer, which are all characterized by attempts to draw a dividing line between those who remain consumers and those who no longer fall under the category of consumers. The directives set the determining factors. Even if EU law tends more and more towards maximum harmonisation of the substantive rules, the same cannot be said with regard to the determination of the personal scope.

⁵² Bundestagsdrucksache 17/6365 of 29.6.2011.

⁵³ The German Sozialgesetzbuch (Code of Social Law, henceforth SGB) embraces laws on social security and services, vocational training, procurement of employment and kindred matters.

In *Buet*,⁵⁴ *di Pinto*⁵⁵ and *Doc Morris*⁵⁶ the ECJ has confirmed that the Member States retain the possibility of expanding the term ‘consumer’ within the limits of the principle of proportionality. Thus the image of the consumer is dazzling.

A first complication deals with the question of whether consumers can be natural persons only or also legal persons and, if legal persons are included, whether these can be commercial ones or only those which do not pursue commercial purposes. In *Idealservice*⁵⁷ the ECJ deprived legal persons of consumer status. At the same time, the Directive 2002/65/EC on Distance Contracts for Financial Services, in its 29th recital, granted the right to the Member States to include non-profit organisations within its scope. This message becomes even clearer by reading the 13th recital of the Consumer Rights Directive 2011/83/EU. In Malta, the responsible minister decides the parameters of consumer on a case-by-case basis, so it remains to be seen whether it also includes legal persons. In Italy, Romania, Austria, Belgium, the Czech Republic, Denmark, Greece, Hungary, Slovakia and Spain legal persons can be treated as consumers. The German law seems to be clear, since the wording only speaks of natural persons as consumers. Nevertheless, there are good reasons to include non-profit associations in the scope of protection, insofar as they do not pursue mainly commercial purposes.

The key issue of the second group is the debate about the distinction between commercial/ autonomous professional purposes and non-commercial/ non autonomous purposes. In *Gruber*⁵⁸ the ECJ set strict standards within the scope of Art 13 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (Brussels Convention). In the case of a mixed contract the jurisdiction over consumer contracts applies only if the professional and commercial purpose is of such marginal importance that it plays a completely subordinate role in the business concerned. The ECJ justifies the strict interpretation of the Brussels Convention rules on jurisdiction over consumer contracts by procedural efficiency reasons.⁵⁹ These considerations cannot be transferred to substantive consumer protection law without attention being paid to the obligatory character of consumer protection rules. The legal treatment of mixed contracts presented one of the issues in the discussion about the DCFR. In the end, Art.I.-1:105 (1) of the DCFR drafts the term more openly than *Gruber*:

A “consumer” means any natural person who is acting *primarily* for purposes which are not related to his or her trade, business or profession.

A similar discussion came up with regard to the Consumer Rights Directive 2011/83/EU. After a long period of twisting and turning the Directive adheres to the *acquis*, but includes an open clause in the 17th recital, which enables the Member States to implement the DCFR. The BGH has not yet adopted a position with regard to the problematic of the mixed purpose.

The main focus is on discussions about the inclusion of employees, of founders of start-up companies, of secondary gainful activities outside one’s regular employment, of sideline businesses from outside the industry as well as about the treatment of board members of legal organisations. First, the BVerfG⁶⁰ and the *Bundesarbeitsgericht* (German Federal Labour Court, henceforth BAG)⁶¹ have made it clear that in German case law an employee, in his capacity as such, is indeed a consumer. In

⁵⁴ ECJ Case 382/87, ECR 1989, 1235 = EWiR 1989, 887 (guiding principle).

⁵⁵ ECJ Case C-361/89, ECR 1991, I-1189 = ZfRV 1992, 57.

⁵⁶ ECJ Case C-322/01, ECR 2003, I-14887 = NJW 2004, 131.

⁵⁷ ECJ Joined Cases C-541/99 and 542/99, ECR 2001, I-9040 = NJW 2002, 205.

⁵⁸ ECJ Case C-464/01, ECR 2005, I-439 Nr. 39, 41, 46 = NJW 2005, 653.

⁵⁹ ECJ loc cit.

⁶⁰ BVerfG NJW 2007, 286.

⁶¹ BAG NJW 2005, 3305. Recently BAG Neue Zeitschrift für Arbeitsrecht (NZA) 2006, 423; BAG, NZA 2008, 1004; BAG NJW 2010, 2827.

Benincasa the ECJ had to decide about the consumer characteristics of a future franchisee during the conclusion of the franchise contract. A person can only be considered a consumer if he concludes a contract without reference to, and independently of, any present or future professional or commercial activity or target.⁶² The BGH has, meanwhile, decided this question in the opposite way.⁶³

Only in the credit law is the founder of a start-up company treated as a consumer. The BGH rejected an enlargement of the HTWG,⁶⁴ and later of the AGB Law,⁶⁵ before it specified its legal opinion in a third decision. Transactions taken with the aim of deciding whether to found a business are not to be regarded as *founding activities*, and are therefore covered by the notion of a consumer.⁶⁶ Activities which only serve the determination of the economic background, and thus the preparation of the decision to start up a new business, cannot be considered to be businesses “in the course of the start of an independent professional or business activity”.

There are no decisions of the higher courts concerning the legal classification either of secondary gainful activities (*Nebenerwerbstätigkeit*) outside of one’s regular employment or of sideline business from outside the industry. From a French legal point of view this kind of business lacks a direct reference to professional activity. The purchase of a photocopier by a clergyman for his church can serve as an example.⁶⁷ In *di Pinto*⁶⁸ the ECJ denied the applicability of consumer law, although this did not play an important role since the ECJ went on to confirm the minimum harmonisation nature of the Doorstep Selling Directive.

As to the inclusion of board members in the consumer category, case law is relatively bountiful. According to the consistent jurisprudence of the BGH the managing director of a *Gesellschaft mit beschränkter Haftung* (company with limited liability, henceforth GmbH) who concludes a contract in his own name can generally be considered to be a consumer in terms of § 13 BGB.⁶⁹ The more recent jurisprudence has accepted this explicitly in the case of an employment contract of an externally hired (non-shareholding) managing director (*Fremdgeschäftsführer*) with a GmbH,⁷⁰ as well as in situations where a prospective sole shareholder or managing director obtains a loan to buy shares,⁷¹ and where the founder of a new start-up takes up a loan in his own name in the context of his future activity as a directing manager of a GmbH.⁷²

(b) Restriction

The CESL would eliminate this plethora of different approaches with one blow – as far as the applicable scope is concerned. In particular, the CESL not only slightly changes the *acquis* standard definition in its Art. 2 (f), but also aims at maximum harmonisation. Employees would no longer be within the scope of the consumer law, and a differentiated treatment of founders of a start-up in case of the existence of AGB would no longer be possible. Nor would the CESL cover a loan given to a

⁶² ECJ Case C-269/95, ECR 1997, I-3767 = Zeitschrift für Wirtschafts- und Bankrecht (WM) 1997, 1549 (*Benincasa./Dentalkit*).

⁶³ BGH NJW 1994, 2759.

⁶⁴ BGH NJW 1994, 2759.

⁶⁵ BGHZ 162, 253 = NJW 2005, 1273.

⁶⁶ BGH NJW 2008, 435.

⁶⁷ Cour de Cassation Civ. Ire. 3. 5. 1988, Bull. Civ. I No.125.

⁶⁸ ECJ Case C-361/89, ECR 1991, I-11189 = ZfRV 1992, 57.

⁶⁹ BGHZ 133, 71, 77 et seq.; 133, 220, 223; BGH NJW 1997, 1443; 2000, 3133, 3135 et seq.

⁷⁰ BAG NJW 2010, 2827.

⁷¹ OLG Celle, Der Betrieb (DB) 2010, 2161.

⁷² OLG Stuttgart, Gesellschafts- und Wirtschaftsrecht (GWR) 2009, 352 (guiding principles).

founder of a start-up, since the latter is not covered by its scope. This would restrict all states that treat legal persons or companies as consumers, especially the French practice of applying consumer protections to a business's ancillary enterprises operating outside their normal sector.

How can the discussion about the scope of the § 13 BGB be related to the distinction between the circumspect, the vulnerable and the responsible consumer? The problem constellations share a common thrust: the concerned parties want to be under the protection of § 13 BGB, although they pursue entrepreneurial activities on different scales. They belong to the group of circumspect and/or responsible consumers. The opposite perspective, the applicability of § 13 BGB on the vulnerable consumer is considered to be natural. The ruptures can be seen in the outsourcing of the protective rules with regard to the law on service contracts. The 'vulnerable consumer' of the telecommunications and energy law does not find an anchor in the BGB. But this is only one side of the coin. It is far more difficult to find an answer to the question of whether and to what extent the case law in everyday practice sticks to the concept of the vulnerable, the circumspect or the responsible consumer. Similarly, there remains the question of how exactly it manages to differentiate between the different groups when such is explicitly required, as for example in the UWG or the law on service contracts. Solid empirical data do not exist. One hypothesis might be that the pressure of the normative concept of the responsible consumer leads to an internal division amongst consumers. On the one hand, there are the vulnerable consumers that have to search for protection beyond the BGB. On the other hand, there are the consumers who are normatively charged with being responsible – which in reality also encompasses the biggest existing group, i.e. the circumspect consumers.

4. Consumers and Customers

The evolution of the understanding of the terms "consumer" and "customer" is essential for the determination of the scope of the European and German rules. It not only affects the rights of the individual but also the powers of intervention of regulatory authorities such as the BNetzA, the *Bundesanstalt für Finanzdienstleistungsaufsicht* (German Federal Financial Supervisory Authority, hereafter BaFin) and the *Bundesbank* (German Central Bank). This is the reason why the terms consumer and customer are not/ cannot be congruent. The point of reference of customer protection is the regulated markets. The differences start with linguistic usage. The contractual partner of the company is not the consumer but an electricity customer, a telephone customer or a banking customer. As a consequence of liberalisation the contractual and communicative structures have altered. The bilateral state-customer relation has changed into a trilateral one, state-company-customer. More precisely, it is even a fourfold relation, since the state does not act on its own behalf anymore, but through its market supervisory agencies. Another important difference has to be taken into consideration. The relations between companies and customers are established on a lasting basis. Long term contracts (*Dauerschuldverhältnisse*) differ fundamentally from one-off market transactions. They create a 'relationship' – often in the hope of creating customer loyalty – which affects the content of contracts and the remedies available to the parties.

The notion of a customer is wider than that of the 'consumer'. The confusion of the two terms, and the legal rules associated with them, reflect a conceptual uncertainty which is linked with the transitory nature of regulated markets. Liberalisation and privatisation take place in small steps. Markets exist, but are not really completely developed. The financial services sector can only partly claim a special role, revolving around the aim of creating a European capital market. The former customer becomes a private investor, a borrower and a guarantor. His role adapts. The notion of a customer continues to tenuously hold this triad together.

(a) Telecommunications

The Directive, and the corresponding national implementing measures, in the field of telecommunications distinguish between different telecommunications services using groups of

persons. As such specifically mentioned are: “user”, “consumer”, “subscriber”, “end user” and “customer”. The basis of the terms is found, for the field of European directives, in Art 2 of the Framework Directive 2002/21/EC. In Directive 2009/136/EC the terms seem to be used in a random way. That makes it more difficult to exactly understand the legislative content of the rules and to emphasize it correctly in light of the interpretation. Article 1 of the Directive 2009/136/EC amends, *inter alia*, Art 20 (1) 1 of the Universal Service Directive 2002/22/EC. According to the wording of the rule (“consumer and other end users”) the term “end user” shall be understood in terms of the Framework Directive. The generic term includes “consumer” as well as other natural persons and “businesses”.⁷³ In stark contrast, Art. 21 (1) 1 of the amended Universal Service Directive speaks of *end users and consumers*.⁷⁴ The term ‘customer’ is neither defined in the Framework Directive nor in the Universal Service Directive. On top of this the German and the English version are not identical.

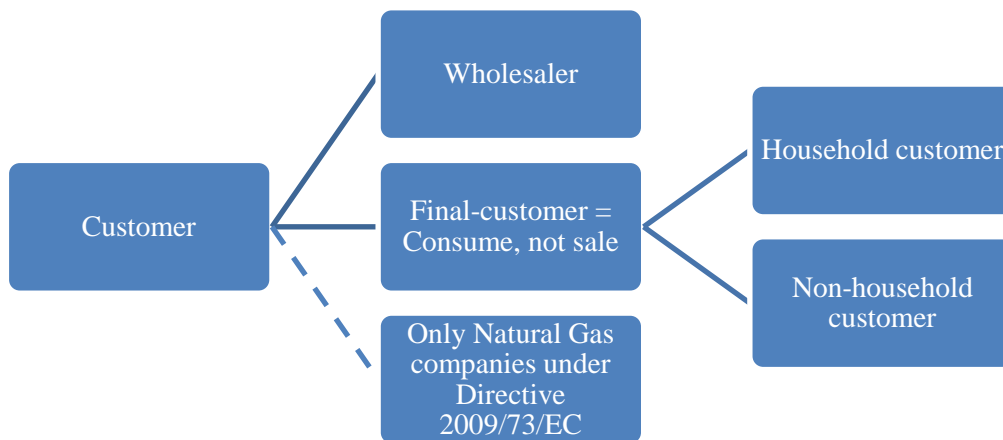
The TKG mainly adopted the terms word for word. In its § 3 (8) it defines the end user as “a legal entity or a natural person not operating a public telecommunications network or providing a publicly available telecommunications service.” According to the TKG, the end user serves as the generic term for all natural persons, thus also for consumers. The term ‘subscriber’ in § 3 (20) TKG is taken from Art. 2 lit. k) of the Framework Directive 2002/21/EC. Similarly to the Directives, the term ‘customer’ also remains vague in the TKG. A determination of the term does not take place, even though the 3rd part of the TKG (§§ 43a et seqq.) is given the headline “Customer Protection”. Before the enactment of the amended version of the TKG (“TKG-Novelle” or TKG-2004) the §§ 43a et seqq. of the TKG spoke of subscribers, whereas today one also mentions the consumer and the end user. The objectives given for the draft law concerning the amendment of the TKG show that the German legislative authority does not question the term customer. On page 5 the draft refers to the “new requirements claimed by Europe to protect *customers*” (emphasis by H.-W. M.). With that in mind the legislative authority points, *inter alia*, to the 32nd recital of the Directive 2009/136/EC.

Should one put the heading of the 3rd part (Customers Protection) in contrast with, for example, the new § 43a (1) TKG, this raises the question of whether the customer is not merely an independent legal subject. “Consumers and, on demand, other end users” have to be provided under the contract with transparent and complete information with regard to particular portions of the contract. The legislative authority also considers an end user who is not a consumer in terms of § 13 BGB to be worthy of protection. That corresponds to the endeavours of the EU to bring the so-called small- and medium-sized enterprises (SME) more and more under the protection of specific regulatory instruments that were developed with regard to consumers. The most recent development is the CESL, which also deals with the problems faced by the SME in cross-border legal relations “with larger companies.” The European legislative authority considers both SMEs and very small businesses to be on the same level as consumers and insists pursuing the “Union policy of helping SME benefit more from the opportunities offered by the internal market.” The customer presents a new category between the consumer and the businessperson. Consumer (protection) law thus becomes customer protection law.

⁷³ Recital Number 28 of the Directive 2009/136/EC: “Given the increasing importance of electronic communications for *consumers and businesses* [...]” (emphasis by the author).

⁷⁴ Recital Number 46 of the Universal Service Directive 2002/22/EC.

(b) Energy



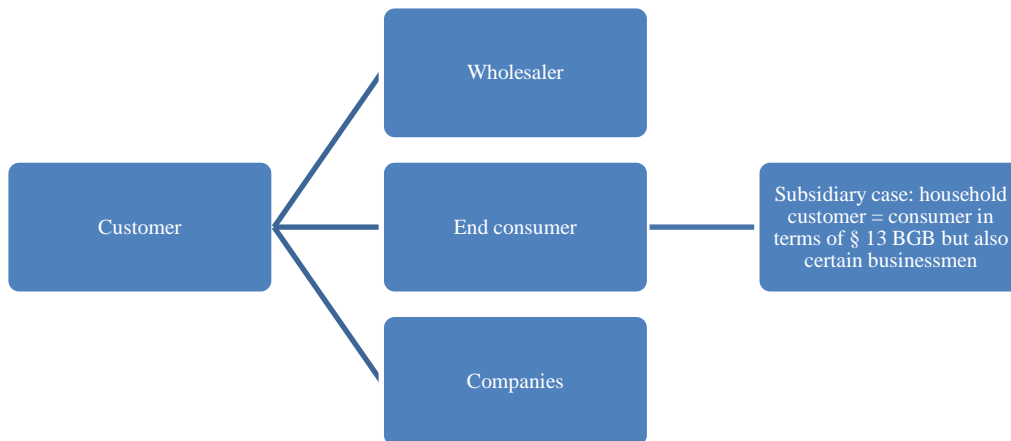
Article 2 of both of the Directives forming the so-called Third Internal Energy Market Legislative Package contains definitions for their respective purposes. A "customer" means both a wholesale or final customer, as per Art 2 (7) of the Electricity Directive 2009/72/EC and Art 2 (5) of the Natural Gas Directive 2009/73/EC. The Natural Gas Directive also considers a natural gas undertaking to be a customer.

The definition of the final customer is characterized by the fact that he does not sell gas or electricity, but uses it himself. Thus one can distinguish between final customers as household customers and non-household customers. The household customer is, according to the definitions of the Directives, the 'classical' consumer. The Natural Gas Directive 2009/73/EC defines the household customer as "a customer purchasing natural gas for his own household consumption", the Directive 2009/72/EC as "a customer purchasing electricity for his own household consumption, excluding commercial or professional activities." The private and the commercial consumer can be found in the 1st recital of both Directives. The notion of the commercial consumer refers to the non-household customer, since he consumes as well, but not for private purposes. Non-household customers also consume energy, but this is not sufficient to be a *consumer*. In the 3rd recital consumer and suppliers are confronted with suppliers (*Anbieter*) and customers.

With a view to the AGB problematic in the field of b2b and the statements made in reference to the telecommunications market, recital 42 of the Directive 2009/72/EC (electricity) is of importance, since it extends consumer protection instruments to protection-worthy persons that are not necessarily consumers in terms of § 13 BGB.

By the *Gesetz zur Neuregelung energiewirtschaftlicher Vorschriften* (Act Amending Energy Law related Provisions) of 26.06.2011⁷⁵ the *Energiwirtschaftsgesetz* (Energy Industry Act, henceforth EnWG) was changed. Similarly to the TKG, there is a definition of the terms essential for the law in § 3 EnWG. Unlike the TKG, the EnWG contains a definition of the term 'customer'. Customers are defined as "wholesalers, final consumers and companies which buy energy". The rule implements Art. 2 (5) of the Internal Market in Electricity Directive 2003/54/EC and Art. 2 (24) of the Internal Market in Natural Gas Directive 2003/55/EC. End consumers are, according to § 3 (25) EnWG, (n)atural and legal persons which buy energy for their own consumption. The term was chosen by the German legislative authority instead of the European notion of the final customer. The term of the customer in

⁷⁵ Federal Law Gazette 2011, I number 41, p. 1554.



the EnWG cannot be compared to the one in the TKG. Instead of the customer, it is the term household customer which encompasses other protection-worthy persons besides the consumer in terms of § 13 BGB. Household customers are all end consumers that buy energy *mainly* for their private consumption in the household or for their own consumption for *professional, agricultural or commercial purposes* which shall not exceed an annual consumption of more than 10 000 kilowatt hours.

Businessmen operating on a small scale are placed on equal footing with consumers. The direct consequence is that companies that are considered to be household customers in terms of the EnWG benefit from the right to basic supply (*Anspruch auf Grundversorgung*) in terms of § 36 EnWG. The extension of the term household customer entails that each rule that applies to household customers automatically includes businessmen. One example are the §§ 40, 41 EnWG which, *inter alia*, deal with the minimum conditions for invoices and contracts of power supply companies with end consumers. The fact that, from the point of view of the legislative authority, these persons are equally worthy of protection justifies a restriction of the freedom of contract by means of coercive rules, §§ 40 et seqq. EnWG.

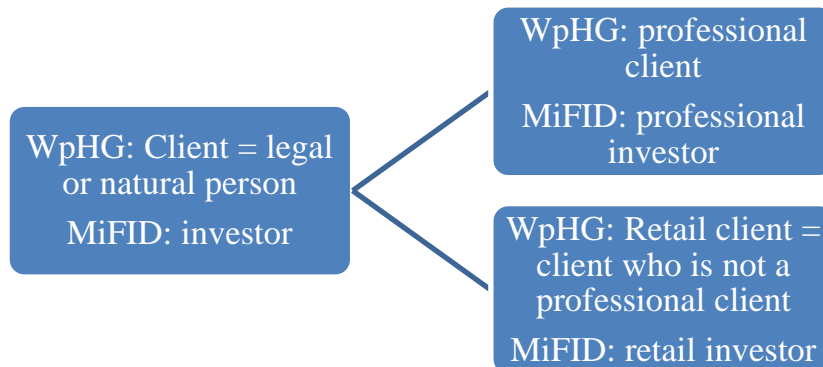
(c) Protection of investors

The *Wertpapierhandelsgesetz* (German Securities Trading Act, henceforth WpHG) does not contain any reference to the term “consumer”. The generic term is the client which goes back to Art. 4 (1) 10 of the MiFID. A “client” can be a legal or natural person, which is to say also the consumer, § 31a (1) WpHG. Within the term client, one distinguishes between the “professional client” and the “retail client”. Retail clients are clients which are not professional clients, cf. § 31a (3) WpHG. This negative differentiation corresponds to Art. 4 (1) 12 MiFID, whereas the latter does not speak of private clients, but of small investors.⁷⁶ A client is also a retail client if his activity is organized in a professional way. The term ‘professional client’ is defined in § 31a (2) 1 WpHG. Sentence 2 names the different types of legal personalities that qualify, along with two specific natural persons covered by the term.⁷⁷ Retail clients can be classified as professional clients upon application or determination of the investment services enterprise, cf. § 31a (7) 1 WpHG. As a consequence of such a reclassification, they will lose the protection of certain rules of the WpHG – something which the investment services enterprise has to point out, § 31a (7) 4 WpHG. A classification as professional client is only possible if the retail client has “the experience, knowledge and expertise to make an investment decision in general or with

⁷⁶ Recital 31 of the MiFID.

⁷⁷ Art. 31a (3) (2)(1)(g) WpHG: exchange traders and commodity derivatives dealers.

respect to a specific type of transaction, and if he is capable of adequately assessing the risks involved”, cf. § 31a (7) WpHG. Conversely, professional clients can also agree with the investment services enterprise on a treatment as retail client, cf. § 31a (6) 1 WpHG. Thus a consumer in terms of § 13 BGB can even cover a professional client under the WpHG.



The term investor used in the English version of the MiFID can be subdivided into ‘retail’ and ‘professional’ investors,⁷⁸ whereas the term customer is rarely mentioned. Indeed, although the term customer appears more than a hundred times in the German version, in the English version it features only twice. In Art 53 (1) of the MiFID, meanwhile, the consumer appears under the headline ‘Extra-judicial mechanism for investors’ complaints’.

5. Inclusion of Third Parties

In § 13 BGB a tight connection is established between the natural person, the conclusion of a legal transaction and the purpose of the transaction. Thus “third parties” can only be integrated in the scope of protection of § 13 BGB if they themselves participate in the conclusion of a legal transaction which is undertaken for something other than commercial or professional purposes. For the third party it can be of essential importance whether he is qualified as a consumer who can use the protection rights granted by special rules or whether he is qualified as a businessperson who cannot benefit from this special treatment. Should the consumer use an agent to conclude the legal transaction, this raises the question whether the agent must also be a consumer if the principal wants to refer to § 13 BGB or whether the consumer characteristics of the agent are irrelevant. Connected contracts (*verbundene Rechtsgeschäfte*, § 358 BGB), in which the conclusion of one transaction is linked with the conclusion of a second, attracted great interest - for example with regard to purchases on credit, finance-leasing, and lending and hedging businesses. Here the discussion focuses on consumer law since there is the question of whether both legal transactions have to fall under consumer law in order for the term ‘consumer’ to apply. A third constellation adds the ‘third party beneficiaries’ to the scope of the term consumer. These parties are also part of the scope of protection of the consumer, for example with regard to package holiday contracts.

In *Dietzinger*⁷⁹ the ECJ affirmed that a suretyship can only be included in the scope of the Doorstep Selling Directive if the primary debt is also a consumer contract. In *Berliner Kindl* the ECJ corrected its jurisprudence so that the discussion has become largely obsolete with regard to its European dimension.⁸⁰ The BGH⁸¹ has filled this void, so that even suretyships for commercial loans are covered by the consumer protection rules.

⁷⁸ Cf. Recital number 31.

⁷⁹ ECJ Case C-45/96, ECR 1998, I- 1199 = NJW 1998, 1295.

⁸⁰ ECJ Case C-208/98, ECR 2000, I-1741 = NJW 2000, 1323.

⁸¹ BGH Zeitschrift für Wirtschaftsrecht (ZIP) 2006, 363, 346 et seqq.

Should the consumer use an agent who provides his services as a commercial or autonomous professional activity, this latter may be considered to be a legally independent intermediary who pursues his own financial interests by concluding the legal transaction. Up until now the case law dealt with situations in which the consumer-seller uses a used-car dealer as his agent when selling his car. The problem lies, however, not with the protection of the represented consumer (i.e. the seller), but in the protection of the buyer who thinks they are contracting with the dealer, which in reality is not the case.⁸² The *Rostocker Landgericht* (Regional Court, henceforth LG) qualified a contract, in which the consumer was represented by a businessperson to conclude the contract, as a consumer contract.⁸³

Controversy arises in situations where the consumer gives a mandate to contract in his name to a representative on the doorstep and, subsequently, the latter applies for a property loan in the name of the consumer. By way of the mandate obtained on the doorstep the consumer shall be contractually linked to the lender through the intermediary. Due to the submission of the *Bremer Oberlandesgericht* (Higher Regional Court, henceforth OLG) the ECJ had to take a stand on this situation in *Crailshaimer Volksbank*,⁸⁴ although it dealt with the issue strictly from the point of view of whether the bank is liable for the negligence of the intermediary. Thus much the discussion focuses more on agents retained by businessmen.⁸⁵

Where the consumer assigns his rights to a businessperson, the *Shearson Lehmann Hutton*⁸⁶ decision should be taken into consideration. According to this decision it is not possible to extend the consumer scope of the Brussels Convention and the “Brussels I” Regulation to include a company acting as the assignee of the claims of a private individual. Whether this approach should be applied to the Directives on consumer law is a question that can only be solved by submitting it to the ECJ.

Should the beneficiaries of a contract concluded by a consumer be third parties, this raises the question whether these third parties can also be considered to be consumers in terms of § 13 BGB. According to the Package Holiday Directive 90/314/EEC, the consumer should have the benefit of the protection introduced by this Directive irrespective of whether he is a direct contracting party, a transferee or a member of a group on whose behalf another person has concluded the contract. This is of particular relevance to family members participating in the holiday because German law – via the legal construct of a contract for the benefit of third parties (*Vertrag zugunsten Dritter*, cf. §§ 328 BGB et seqq.) – grants them an independent contractual claim. Whether or not the third party beneficiary can be placed on an equal footing with the acting consumer, is a question that, beyond travel law, has to be solved according to the principles of the contract for the benefit of third parties.

6. Groups of Consumers and Democratic Participation

Usually one does not search for the realisation of democratic participation and effective legal protection in the BGB. Democratic participation means the inclusion of consumers in the legislative procedure, not only on the parliamentary level, but especially on the sub-legislative level, on which the legal requirements are set by regulations and administrative ordinances. Usually the decision about the correct level of democratic participation is a question of constitutional and administrative law. The right to participate and the right to redress belonged from the very beginning to the core of national as well as European consumer policy. A collective component inheres in the consumer law, which led to attempts during the *Gründerzeit* to move towards a theory-driven parallelization of consumer and labour law. A discussion on the possibility of including consumers in the administrative regulatory

⁸² Cf. BGH NJW 1988, 1378 et seqq., 1379; BGH NJW 2005, 1039.

⁸³ LG Rostock Neue Zeitschrift für Miet- und Wohnungsrecht (NZM) 2007, 370.

⁸⁴ ECJ Case C-229/04, ECR 2005, I-9273 = NJW 2005, 3555.

⁸⁵ The BGH did not answer this question, BGH NJW 2000, 2269.

⁸⁶ ECJ Case C-89/91, ECR 1993, 139.

process or decision-making procedure, or even as part of a co-determination or social partnership process, has never really taken place. If anything, the question in Germany focused on whether and to what extent consumer organisations - besides trade associations - should be enabled to participate in the enforcement of the laws on market behaviour like the AGB Law and the UWG. Here the trade associations fill a gap by taking over quasi-state competences.

From this point of view it is the market, rather than the society or the state that is the reference point of consumer law and policy. A different direction has been taken in Portugal, Spain and Greece. There, consumer protection plays an important role in the democratisation process. Similar phenomena can be seen in the Central and Eastern European Countries. The anchoring of consumer protection in the constitution is a visible expression of?, but an entirely different kind of self-conception. The consumer is not only a market actor but a political citizen.

European consumer policy can be divided into two phases. In the first phase, the 1970s and early '80s, when the European Commission limited itself to coordinating the regulatory welfare state activities of the Member States. The Single European Act made it possible to comprehend consumer policy as an integral part of the ultimate objective of the completion of the Single European Market. This policy, introduced in the middle of the 1980s, led to an essential change of the orientation of consumer policy. The downside is the focus on the normative concept of the consumer. The upside only appeared when the reorientation started to take effect. The consumer became a market-citizen. The European Commission has shown the Member States how an open consultation can be organised in a legislative procedure. The technical possibilities of the Internet have enabled civil society to participate. Their participation serves to add legitimacy. Here it is not the place to discuss to what extent the European Commission has succeeded, or may ever succeed, in creating legitimacy. What counts is the opening of the consumer policy to deeper political participation, with regard to both law-making and law enforcement.

IV. Substantive Consumer Law – Sales and Services

Overall, presentations of consumer law are characterised by the problems of regulating market access by the EU and national legislative authorities. The problematic division between private and public law is maintained in spite of the basic questions of a modern consumer law. Only the procedural consumer law has, thanks to the light shed upon it by the work of *Harald Koch*,⁸⁷ found its place in the interaction with substantive law. Of the variety of possible fields which are suitable for a systematic examination, I have chosen two areas which paradigmatically present the recent developments in consumer law. Firstly, I take the Internet sale as it is prototypical of the dynamic and circumspect consumer; and, secondly, universal services, which highlight the diversification of the circle of addressees, ranging from the businesses to vulnerable consumers.

The Internet sale represents the nearly complete Europeanization of a field of contract law, in which only the key ideological questions remain based on national law, whereas ‘everything that is practically relevant to the consumer’ is regulated by EU law. The dominant concept with regard to Internet sales is the market-citizen who faces the challenges of globalisation and considers them to be a chance to optimize his lifestyle. The Internet purchase contract is the basic form of an economic transaction. The parties are the dominant actors. The state limits itself to interventions in the private autonomy of the businessperson in order to restore the autonomy of the consumer. The unity of the branch of law and its historic anchoring in traditional samples permits a comparatively homogenous structure of law, which can be integrated in the ideological categories of the BGB without major incompatibilities. Internet sales law appears to be a technical field of law. What is often ignored is that the EU, by encouraging Internet sales, privileges a certain marketing method, which has not only economic but also social and political consequences. In particular, local economic structures may disintegrate causing social relations to dissolve.

Universal services include all those areas of the society and the economy without which the consumer cannot participate in the normal economic, social and political life. These include – according to EU law – contracts concerning energy, telecommunications, Internet, post, as well as finances and health since they assume an identical function for the economy and society. In all those domains the state is omnipresent, either as the one who made these services originally available for the consumer or, following a process of liberalisation or (partial-) privatization, in the form of a sector specific supervisory authority that at least indirectly intervenes in the contracting process. This mixture of responsibilities and competences on regulated markets will not change in the foreseeable future. The heterogeneity of this branch of law is rendered even more complicated by the fact that there is no common reference - or starting-point for this area of regulation. The market-citizen only appears here, however, in tandem with the small businessperson. These terms are both distinct from the vulnerable consumer, a legal concept first created as a desired by-product of the waves of liberalisation and privatization. At the same time, and beyond the universal services, the vulnerable consumer also appears with regard to Internet sales as the ugly duckling of the economically and legally styled consumer-superstar, so to speak. Any attempt at classification and assignment in this field of law becomes difficult. Any attribution to known categories of the national law not only entails a shortening of the factual connection but also a degree of de-politicization. Nowhere else does the political dimension of the Internal Market project become clearer than in the law on universal services. The German legislative authority keeps faith with a sector specific approach to legal implementation. An unfortunate consequence is a lack of either cross-sector references or an in-depth examination of the relationship between the sector specific rules and the BGB.

⁸⁷ Harald Koch, *Verbraucherprozessrecht : verfahrensrechtliche Gewährleistung des Verbraucherschutzes (Legal Procedures for Consumers)*, Heidelberg: C.F. Muller (1990).

1. Competitive and Social Contract Law

To understand the dynamic of these branches of law, one has to be conscious of the motor that is driving this development. With the agreement of the majority of Member States already obtained, the EU legislative authority, when drawing up its own laws, can afford to disregard national legal structures such as the subdivisions into private and public law, or the traditional boundaries between contract, unfair commercial practises and administrative law. Similarly the distinction between private and public responsibilities in the drafting of contracts, and between private and administrative law enforcement have fallen somewhat by the wayside. Instead the EU legislative authority elaborates rules that are necessary for the design of the Internet sale and the regulated markets, to complete the Internal Market and strengthen competition, respectively. The limits on its competences determine the approach. The technical tool is regulatory law, mostly in a mandatory form, whether the real addressee of the rules is the businessperson, the consumer, the Member States or the national market supervisory authorities. This jumble of rules poses big challenges to the legal systems of all Member States, especially to those which, like Germany, have devoted themselves to systematisation and coherence as being more than a mere political programme.

The instrumentation of the Internet sale and the law on universal services cannot only be seen in the confusing external manifestations of the rules but also in their substance. The expulsion of the protective device from consumer law leads to a reorientation of consumer law. Consumer law is no longer part of the welfare state's social context, but bound to the continuously progressing European integration process. The exclusion and reintegration of the consumer law reveals itself by a double shift within the contract model. As far as the market citizen and/or small businessman functions as a reference point, the configuration of a competitive contract law seems to be correct. In contrast to this, social contract law applies if a vulnerable consumer is concerned.

Competitive contract law not only requires competitive parties on both sides, with the consumer-market citizen and the businessperson-market citizen both being equipped with identical complementary characteristics. It also forces a quasi-Brechtian 're-programming' of the regulatory instruments and of their underlying values. The competitive contract law does not aim at social justice, the protection of weaker parties or social redistribution, but at the creation and safeguarding of access justice, i.e. justice through access, not access to justice (*Zugangsgerechtigkeit*). This term stems from Catholic ethics and includes two essential elements: breaking down barriers that limit access to, and participation in, the market-based project of European integration; and strengthening the consumers' position with a view to enforcing their rights. Against this background, it is unremarkable that access to the market has a prominent position in EU law, in particular taking centre stage in the jurisprudence of the ECJ on the market freedoms. A similar importance is attached to it in the directives and regulations on consumer law as well by Art. 36 of the EU's Charter of Fundamental Rights. Once access to the market is open, the regulated contract rules have to provide competitive functions. The guiding principle of the competitive contract law is not *pacta sunt servanda*, but *pacta sunt in efficientiam*. We are now in a time of extensive pre-contractual information that starts already in the pre-sale promotional period and allows for informed price and quality comparisons. Similarly, the relatively uncomplicated possibilities to revoke and cancel contracts serve to increase the pressure on the parties. The consumer can change suppliers should he find a better offer, whereas the businessperson shall face the challenges with a better price and quality competition. From such a point of view the blacklists pushed by the EU, such as for example on prohibited trade practices or unfair contract clauses, gain a new and different function. They serve less the creation of fair results than the process of market consolidation, in order to exclude undesirable competition which could reduce confidence in the markets. This kind of regulatory logic goes a long way to explaining the instruments originating from EU law. Indeed an essentially different understanding of the private law system is beginning to emerge. Commissioner *Reding* describes this evolution by saying⁸⁸ that the optional

⁸⁸ Speech of 3.6.2011 in Leuven.

instrument – i.e. the CESL – focuses on designing efficient contract relations, but not on finely chiselled dogmatic disputes that require yet more discussion by scholars and courts.

The contours of a social European contract law are not yet clearly recognizable. At any rate, the vulnerable consumer represents a legal concept which is able to give a renewed thrust to the social consumer law. So far it appears in different shapes only as a substantive part in the law on universal services and on unfair commercial practises, not however in the directives on the revision of the consumer *acquis* or in the CESL. From a conceptual point of view, the vulnerable consumer as a point of reference of the national law seems to be a quite flexible entity since Member States – in the light of the openness of the term consumer – are free to shape the contours of the vulnerable consumer or to leave it to the national courts to differentiate in concrete situations between the circumspect, the responsible and the vulnerable consumer. In the applicable law, the first key elements become visible. For this group the right of access to the conclusion of a contract is essential. Furthermore they are granted affordable prices that are not identical with the going market rate, and even in case of insolvency, they have a right to guaranteed supply of services.

2. Internet Purchases – Quality Assurance through the Consumer Rights Directive

From an EU law point of view, the regulation of Internet purchases, as embedded in the Internal Market perspective, is determined by a variety of directives, namely: the Directive 93/13/EC on Unfair Terms in Consumer Contracts as implemented by §§ 305 et seqq. BGB; the Directive 97/7/EC on Distance Selling (now Directive 2011/83/EC) as implemented in §§ 312 et seqq. BGB; the Directive 99/44/EC on the Sale of Consumer Goods and Associated Guarantees as implemented in §§ 433 et. seqq. BGB; the E-Commerce Directive 2000/31/EC as implemented in the contractually relevant part in § 312e BGB; and the Unfair Commercial Practices Directive 2005/29/EC as implemented in the Act Amending the Unfair Competition Act (UWG) of 2008. Last but not least, there are also the CESL rules which cover the conclusion of contract, the purchase and the online sales of consumer goods.

EU law does not provide a self-contained set of rules which can be integrated coherently. More important for the analysis of the substantive law on Internet sales is the interaction between, and the variety of the rules which pursue the overarching goal of the Internal Market. Briefly, four branches of law are concerned: rules on market access, rules on market behaviour, rules on the contract itself, and rules governing remedies.

(a) Access

The traditional understanding of a purely private conception of Internet sales assumes that everybody has access to the Internet and also has enough money (§ 279 BGB old version – you have to have money) to pay for the services of Internet providers. The access problematic mixes technical with legal aspects.

The consumer can only have access if the technical possibility of access exists at his place of residence. According to the ambitious plans of Commissioner *Kroes* for the period to 2020, set out in the framework of the *Digital Agenda for Europe*, 100% of households shall be provided with Internet with a speed of at least 30 Mbps; while 50% shall have very fast Internet with a speed of more than 100 Mbps.⁸⁹ The Federal Government of Germany adopted in 2009 its so-called *broadband strategy (Breitbandstrategie)* that pursues two targets: on the one hand broadband Internet (= > 1 Mbps⁹⁰) should be available nationwide by 2010, while by 2014 some 75% of German households should be

⁸⁹ SEC (2011), 708, published on 31.05.2011, available under:

www.ec.europa.eu/information_society/digital-agenda/scoreboard/docs/scoreboard.pdf

⁹⁰ There is no single answer to the question of at which speed an Internet connection can be qualified as broadband.

provided with Internet with at least 50 Mbps.⁹¹ According to data from the Federal Government 98.5% of German households were provided with broadband Internet by the end of 2010, amounting to an increase of 6.5 percentage points.⁹²

The expansion of broadband technology is linked with enormous costs for the network operators. Depending on the scope, the estimated cost of the expansion of the so-called “next generation” networks for Germany range from € 36 to € 117 billion. For this reason the German legislative authority created § 9a TKG to stimulate investments in broadband roll-out.⁹³ In the infringement proceeding against the Federal Republic, the ECJ declared, unsurprisingly, on 3.12.2009 the incompatibility of the rule with the common regulatory framework for electronic communications.⁹⁴

The liberalisation of the telecommunications market began with the access problematic and remains entangled by it. To make competition possible where, for technical and/or economic reasons, alternative providers cannot compete against the big network operators (de facto: the incumbent in Germany, Telekom), special regulatory procedures have been introduced, such as the procedure according to §§ 30-38 TKG. Alternative providers can, in return for payment, use the local loop of the former (monopoly) provider, which makes the access to the consumer possible. Among the EU-25 countries plus Norway and Iceland, the German user fee of € 10.20 per month ranked 23rd.⁹⁵ Higher user fees, amongst the EU-25, can only be found in Luxemburg, Finland and Ireland. In Poland a comparable provision leads to a monthly user fee of € 5.35. Overcoming the cost of connecting the customer’s address with the loop network represents the central competition problem of the telecommunications sector

In the course of the implementation of Art 3 (1) of Directive 2009/136/EC the question arose as to whether, and to what extent, § 78 TKG grants consumers a right of access to broadband . Decision makers are, however, well aware of the risk of exclusion faced by people unable to connect to the Internet, and the consequences of this on their chances of economic and political participation. Conclusions, however, were not drawn. European law on telecommunications does not provide clear stipulations. The same can be said for the political strategy of the Lisbon Declaration of March 2000⁹⁶ as well as for the responses of the EU Commission in the *Monti* Report.⁹⁷ The reference to Art. 36 of the EU Charter of Fundamental Rights might help, as it guarantees EU citizens the right to access ‘services of general economic interest’. Therefore, access to the Internet would have to be qualified as a ‘service of general economic interest’ and Art.36 of the Charter would have to be interpreted as a subjective right. Even if the first obstacle were to be circumvented by the ECJ’s case-law, the overcoming of the second hurdle lacks judicial support at the national and the European level. In any case, Art. 36 of the Charter is open to such an interpretation, as per Art. 52 (2) of the Charter.

⁹¹ Paper *Broadband Strategy of the Federal Government*, 2009, p. 8, available under: www.bmwi.de/Dateien/BBA/PDF/breitbandstrategie-der-bundesregierung,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf.

⁹² Response of the Federal Government to a brief enquiry, 29.12.2010, Bundestagsdrucksache 17/4348, p. 8.

⁹³ Cf. Bundestagsdrucksache 16/2581, p. 1.

⁹⁴ ECJ C 424/07, ECR 2009, I-11431 = EuZW 2010, 109 (Commission v. Germany).

⁹⁵ Results of the International tariff comparison concerning the subscriber line (TAL), published in the Official Journal of the Federal Network Agency 7/2011, notification number 183/2011.

⁹⁶ http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/de/ec/00100-rl.d0.htm

⁹⁷ A New Strategy for the Single Market: At the Service of Europe’s Economy and Society, 9.5.2010; statements of the EU Commission, COM (2010) 608 final 11.11.2010, COM (2010) 603 final 11.11.2010.

(b) Contractual arrangements, contract conclusion and the information paradigm

Formally there is a clear division of competences between the BGB and the relevant Directives: The rules concerning offer and acceptance in the BGB remain untouched, whereas the pre-contractual and the post-contractual phase are subject to EU law. This dogma can be found in the recitals of the respective directives. Their pragmatic importance is however significantly reduced, since it is very difficult in the pre-contractual phase to draw the limits between unfair commercial practises and contract law and since the consumer in the post-contractual phase can use his right of withdrawal to avoid his obligations.

The pre-contractual phase can be divided into the first unspecific contacting by means of (general) advertising, the specific address of individual consumers by means of (targeted) advertising and the contract negotiation phase by means of the transmission of pre-contractual information. The closer the conclusion of the contract gets, the higher the legal requirements regarding the transmission of information become. The Directive 2005/29/EC completely harmonised the first two stages, Directive 2011/83/EU the third input stage and subjected it to the information paradigm.

Even the *first* stage sees increased requirements regarding the transmission of information in comparison to previously applicable standards of the UWG. The key to understanding can be found in Art. 7 (1)-(3) of Directive 2005/29/EC containing the prohibition of misleading omissions, implemented in § 5a UWG. It forces the advertiser to reveal ‘material information’ already at this early point, however without specifying what such information is. What can be considered to be material has ultimately been determined by the ECJ.

The *second* stage aims at the so-called invitation to purchase, Art. 7 (4) of Directive 2005/29/EC. The implementation in § 5a (3) UWG is problematic from a EU law’s point of view, since the legislative authority has translated ‘purchase’ by ‘transaction’ and ‘invitation’ by ‘offer’. The embedding in the German terminology blocks the new ways in which the Directive is going. In *Konsumentombudsmannen*⁹⁸ the ECJ found the occasion to take a position on what is meant by an invitation to purchase. It is no coincidence that the reference stems from Sweden, since the information approach is very pronounced there meaning that the reference is meant to test the potential of the Directive 2005/29/EC to require relevant and precise information from the advertiser at the second pre-contractual stage. The ECJ focussed on the question of the conditions under which the use of entry-level prices (“from-prices”) in advertising is legal. It is well known that consumers find it very difficult to obtain the extremely advantageous offers advertised in such an outstanding way. The ECJ gave short shrift to the concerns of the Swedish *Ombudsmannen*; thus the use of entry-level prices is sufficient for the acceptance of an invitation in terms of Art. 2 lit. i). An invitation does not necessarily require there to be an actual opportunity to purchase, or for the communication to appear in proximity to or at the same time as such an opportunity.⁹⁹ In contrast to its decisions concerning sales promotion measures,¹⁰⁰ the ECJ leaves considerable leeway to the Member States. It would not be surprising if the *Marknadsdomstolen* (Swedish Market Court) would judge the concrete variant of entry-level pricing as misleading.

In the *third* input stage, the contract negotiation phase, it is usually incumbent upon the buyer, which is to say the consumer, to gather the information which he considers necessary for the purchase decision. The Internet purchase follows different rules. The Directive and the BGB define it as a distance selling transaction, as a contract between absent parties, which is concluded by means of distance communication, § 312b (1) and (2) BGB. Since there is no possibility of having a close look at the product, the Directive 97/7/EC immediately reversed the information procurement obligation. It

⁹⁸ ECJ 12.5.2011, Case C-122/10, *Gewerblicher Rechtsschutz und Urheberrecht (GRUR)* 2011, 930.

⁹⁹ ECJ loc cit, paragraph 27 et seq., 32.

¹⁰⁰ ECJ Joined Cases C-261/07 and C-299/07, ECR 2009, I-2949 = EuZW 2009, 370 (*VTB-VAB*); ECJ Case C-304/08, ECR 2010, I-217 = NJW 2010, 1867 (*Plus Warengesellschaft*); ECJ Case C-540/08, EuZW 2010, 947 (*Mediaprint*).

is now up to the Internet supplier to electronically send detailed information to the consumer before the conclusion of the contract (Art. 246 (2) EGBGB), which can be complemented in written form by the Internet supplier during the performance of the contract, and at the latest at the time of delivery (Art. 246 (3) EGBGB). The Consumer Rights Directive 2011/83/EU adopted in June 2011 has, at the price of maximum harmonisation, further improved the legal position of the consumer.

(c) Right to information, right of withdrawal, warranty rights

The Europeanisation of the remedies applicable to Internet purchases accompanies the consumer from from the pre-contractual to the post-contractual stage, from the first contacting by means of an unspecific advertisement to the claim for damages. The concept is first revealed in light of the competitive contract law model. An objection might be that EU law also distinguishes between the law on unfair commercial practises and contract law, so there is a lack of continuum (*N. Reich*) in the Internet purchase because the remedies must be analysed in the context of their respective branches. With regard to the purchase of consumer goods, it is typically the ECJ which reminds the Member States' courts of the completely different starting point of the EU law and which follows implicitly the model of competitive contract law.

From a German point of view the single consumer has no individual rights in the *first* and *second* phase of contacting by advertising. Under pressure from Germany, the EU Commission has abandoned the proposal, described in the Green Paper, to include the consumer in the system of legal redress of the Directive 2005/29/EC, means granting him individually enforceable rights.¹⁰¹ Traditionally there remains only the possibility of an action for injunction by means of § 8 UWG, although in view of the explicit flagging of consumer protection as an objective of the German law on unfair commercial practises, one must query why the UWG is not considered to be a so-called *Schutzgesetz* (protection law) which would entitle the consumer to claim compensation, § 823 (2) BGB.

With regard to the *second* step there remains the unsolved problem of whether Art. 7 (4) of Directive 2005/29/EC grants the consumer a subjective legal position in accordance with the *Francovich* doctrine.¹⁰² The 15th recital might support such a reading. In order to justify a subjective right, a requirement to provide information has to be derived from Art.7. Subjective enforceable rights provided by the secondary law might intervene in the national contract law. References to the impracticability of such a right can be considered to be paradigmatic for the lack of willingness to think through the system of legal protection from a European perspective. The strength of the EU law lies in its creative destruction (*Schumpeter*).¹⁰³

The *third* step, the contract negotiation phase, is characterized by national contractual remedies. The directives leave it to the Member States to decide whether and how they sanction a lack of provision of the mandatory remedies. In Germany, actions for injunction take a prominent position, although the consumer is granted the possibility to refer to the remedy of *culpa in contrahendo* (*cic*)¹⁰⁴. The vulnerability of the information paradigm becomes clear as we explore the weak link of individual legal redress. The violation of the detailed information obligations remains largely without consequence in civil law. The reason lies in the overwhelming number of duties which hinders the matching of obligations with adequate remedies. *De lege lata* a distinction could be made between more and less important obligations and the consumer could be granted a claim to cancel the contract by means of the remedy of *cic*. That would correspond to an expansion of the right of withdrawal.

¹⁰¹ COM (2002) 289 final 18.

¹⁰² ECJ Joined Cases C-6/90, C-9/90, ECR 1991, I-5357 = NJW 1992, 165.

¹⁰³ Capitalism, Socialism, Democracy, 1942.

¹⁰⁴ The remedy of culpa in contrahendo is a liability for the breach of duty prior to contract, cf. § 311 (2) BGB.

Another variant would be, according to the French model, to declare as ineffective any contracts which have been concluded in violation of material information obligations.

Once the contract is concluded, the consumer can refer to his right of withdrawal. This remedy was introduced in the Distance Selling Directive according to the model of doorstep selling transactions and implemented in the §§ 355 et seqq. BGB (*Widerrufsrecht*). The consumer is granted the possibility to withdraw from the old contract without consequences and to pursue a better offer. This is competitive contract law *par excellence*. With the help of contract law, the ECJ has expanded the right of withdrawal in *Heininger* and *Messner* in order to strengthen competition. In accordance with the DCFR, the Directive 2011/83/EU has amended this line of case law to the detriment of consumers and of a new understanding of the function of contract law, thereby solidifying the antiquated approach of the BGB.

The control of the AGB follows well-established patterns. In the case of an Internet purchase there is the peculiarity that clauses deemed to be unfair maybe characterised by a supranational context. Associations with legal standing might want to consider the ECJ's instructions for Member States, which is to consider the consequences of the respective contract terms for the Internal Market.

Should the product purchased over the Internet be defective in terms of § 434 BGB, the remedies set out in §§ 437 et seqq. BGB apply. The Directive 99/44/EC follows the graduated system of the warranty rights, which can be explained by the fact that Germany made its agreement to the Directive dependent upon this system. What was really new was the extension of the seller's duty to "[...] procure the thing (product) for the buyer free from material and legal defects" even to advertising claims made by the producer. However, this rule has not yet achieved practical importance. The discussions about the system of warranty rights came up again during the legislative work concerning the CRD. The Commission had favoured the idea to grant the consumer free choice between the four warranty rights. However, the Commission did not succeed, which is largely due to heavily attacked maximum harmonisation, which finally led to the exclusion of the sales law and the AGB Law from the CRD. In the *Feasibility Study* the consumer's right to choose reappears in Art. 133. Art. 106 and 114 correspond to the Directive 99/44/EC. The draft also provides for claims for damages, cf. Art. 159 et seqq.

(d) Right to gratuitous reconstitution of the condition according to contract

With two decisions the ECJ intervened deeply in the German system of warranty rights. The first decision concerned a test case under terms of the former § 3 (8) of the *Rechtsberatungsgesetz* (RBERG – Legal Councelling, now replaced by the Act on Legal Services) which was initiated by the *Verbraucherzentrale Bundesverband* (Federation of German Consumer Organisations, henceforth VZBV). Both decisions focus on the right to have goods brought into conformity with the contract *free of charge*. The consequences of the interaction are far reaching, since they question one of the foundations of German warranty law: the assumption that contractual claims of damages must be based on negligence.

In *Quelle*¹⁰⁵ the ECJ, upon referral from the BGH, had to decide whether the seller, where defective goods are brought into conformity via replacement, may require compensation from the consumer for usage of the original goods, which were not in conformity with the contract. The decisive message can be found in paragraph 33 of the decision: "Thus it follows from the wording of the Directive, as well as from the related *travaux préparatoires*, that the Community legislature intended to make the 'free of charge' aspect of the seller's obligation to bring goods into conformity an essential element of the protection afforded to consumers by the Directive." The ECJ links the wording of Art. 3 (3) Directive 1999/44/EC to the overall aim of the completion of the Internal Market, for which the EU finds its

¹⁰⁵ ECJ Case C-404/06, ECR 2008, I-2685 = NJW 2008, 1433.

competence in Art. 95 EC (today Art. 114 TFEU). The target is not consumer protection itself, but its instrumentation for the aims of the Single Market. The burden resulting from the rise in price of the products is considered to be secondary by the ECJ. Should this decision be transferred to a cross-border context, its scope and function will become clearer – especially when it is linked to Art. 3 (4) of Directive 1999/44/EC, which imposes the necessary costs, particularly the cost of postage, labour and materials, on the seller. Here we encounter a problem that caused much controversy between the European Parliament and the Council. Article 3(4) CRD enables Member States to allow for a consumer to be charged with return fees of up to €50 in the case he exercises his right to withdrawal.

*Putz/Weber*¹⁰⁶ does not correspond to the system of the German warranty law (Gewährleistungsrechts), since it abolishes negligence as a prerequisite for a claim of compensation. In the case at issue the consumer tried to obtain reimbursement of the costs of the replacement of the defective goods. The BGH submitted two questions to the ECJ,¹⁰⁷ (1) whether the use of the term ‘replacement’ in Article 3(2) of the Directive may imply the existence of an obligation not just to deliver goods in conformity with the contract of sale, but also to replace the defective goods and therefore to remove them. Furthermore, the obligation to take account of the nature and the purpose of the goods, laid down in Article 3(3), combined with the obligation to bring the goods into conformity, could suggest that the obligation on the seller to replace the goods includes not only the delivery of goods in conformity, but also the removal of the defective goods to allow the use of the replacement goods in a manner consistent with their nature and purpose; (2) whether Article 3(3) § (1) & (2) of the Directive are to be interpreted as precluding a national statutory provision under which, in the event of a lack of conformity of the consumer goods delivered, the seller may refuse the type of remedy required by the consumer when the remedy would result in the seller incurring costs which, compared with the value the consumer goods would have if there were no lack of conformity, and with the significance of the lack of conformity, would be unreasonable (absolutely disproportionate)?

The ECJ affirmed the first question against the opinion of Advocate General *Mazak* and, with regard to the second question, granted the Member States the possibility to determine an adequate upper limit in order not to unduly burden the seller. The answer to the first question is decisive for the context. The ECJ did not perform its usual comparison of the laws of the Member States that necessarily involves value judgments (*wertende Rechtsvergleichung*). Instead, it interprets the Directive autonomously and in a functional way. Like in *Quelle*, the ECJ refers to the wording of the ‘free of charge’ aspect of the seller’s obligation to bring goods into conformity (paragraph 46). Art. 3 (4) is said not to be opposed to this interpretation, since it lists the necessary costs for bringing the goods into conformity in a merely illustrative way (paragraph 50). It deals only in an indirect way with the role and function of a possible failure to correctly perform contractual obligations on the part of the seller or buyer (paragraph 56).

Germany is one of the few states that connect the existence of a claim for compensation to the existence of negligence. Even the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG) does not provide for such a prerequisite. Dogmatically the judgment might not fit in the system of the BGB. The ECJ resurrects the question, discussed already in the course of the reform of the law of obligations in the 1980s, on the role and function of negligence in contractual claims for damages. The judgment fits in the long line of ECJ decisions on Member State liability and on antitrust injuries which require only a ‘sufficiently serious breach’.¹⁰⁸ Likewise *Putz/Weber* constitutes a starting point for discussing of the action for injunction in the AGB Law and the UWG. In both laws, quasi-compensatory claims to remedial action are lacking. § 10 UWG allows for skimming off ill-gotten gains from unlawful advertising but is bound to ‘intent’ on behalf of the

¹⁰⁶ ECJ Joined Cases C-65/09, C-87/09, NJW 2011, 2269.

¹⁰⁷ Paragraph 20, 22, 23.

¹⁰⁸ ECJ Case C-453/99, ECR 2001, I-6297 = EuZW 2001, 715 (*Courage*); ECJ Case C-295/04, ECR 2006, I-6619 = EuZW 2006, 529 (*Manfredi*).

advertiser. § 2 UKlaG offers possibilities for extending the action of injunction in line with *Putz/Weber*.¹⁰⁹

(e) Payment by debit or credit card

Internet purchase contracts bring with them the necessity to agree on the manner of payment. Should the business transaction remain in the national context, a debit transfer authorisation from a current account is possible, while in the case of cross-border transactions the processing can be regularly made with the help of one of the common credit cards. During the preparatory work concerning the Payment Services Directive 2007/64/EC, consumer organisations had opted for the introduction of a *chargeback system* based on the model of the *US Electronic Transfer Act*. Under that system, the consumer has the possibility to instruct the card issuer to reverse the debited payment, usually in case of a fraudulent transaction but also where the product is simply defective. The discussion stalled early in the elaboration of the proposal and has never led to concrete proposals. The German legislative authority would have had the possibility to pick up this concept in the implementation rules of the §§ 675 et seqq. BGB. In fact, the consumer/businessperson/card-issuer triangle is based on contractual rules which have, especially in the case of a reverse transaction, led to an extremely complex and barely manageable line of jurisprudence.

3. Contracts on Universal Services

The aim of the discussion here is to develop, from the point of view of the consumer, a structure for the different branches of law whereby a systematisation and cross pollination of the law of universal services becomes possible. The aim is to find a connection line between the electricity customer, the telephone customer, the television customer, the passenger, the Internet user, the consumer borrower, the small investor and even the patient. Each of the sectors is influenced by EU law and each features a conflict situation of public and private law rules.

(a) Access

All the relevant sectors are characterised by their regulated markets, which entail controls on market access and competition. Should the state no longer provide these activities, a problem of access would occur almost automatically. This problem can be of a technical, competitive and/or social nature. Competitive and social obstacles dominate the analysis. Competitive obstacles result mostly from the fact that providers offer services on the market which endanger the established competitors. Social obstacles can appear in different shapes. One can distinguish between two kinds: to the first category belong the consequences which arise from the fact that competitors with special offers are excluded from the market so that the consumer cannot benefit from them; while in the second category one deals with situations in which the consumer is *de facto* and *de iure* excluded from access, since he does not dispose of the resources necessary to demand them.

Since the EU is the driving force behind the competitive restructuring, it is not surprising that EU law defines the parameters of access, of the competitors and the market participants. From the point of view of the consumer, these various rules can be divided into general and sector specific parameters. Amongst the general rules is access to the Internet. In the information society access to the internet is key. Having access to the Internet has become indispensable in the modern economy. This makes it even more important that neither EU law nor German law guarantees users access to broadband. Of equal importance is access to a bank account. After years of discussion, in July 2011 the EU adopted the Recommendation 2011/442/EU which, however, stops short of granting the consumer a *right* to a bank account. German and EU law are thus aligned, to the disadvantage of the vulnerable consumer.

¹⁰⁹ Concerning the collective claim for damages, V.3.

Sector specific market access rules concretize the economic freedoms under the Treaty. Whether primary or secondary law is relevant depends on the degree of Europeanization. Often it has been the ECJ which, through a dynamic and sometimes controversial line of case law, has paved the way for adopting secondary legislation, e.g. Directive 2011/24/EU on patients' rights in cross-border healthcare.¹¹⁰ A review of the case law throughout the different fields of law, however, does not result in a uniform picture. Unsurprisingly the more liberalised sectors are more clearly delineated. The armchair football fan is a beneficiary. He is guaranteed access to the transmission of the World Cup on public television as it is an event of major importance to society¹¹¹ as well as to cost-effective cross-border access to the transmission of the English Premier League in his favourite pub.¹¹² The cable television customer can also rely on the fact that the network operator grants other broadcasters access to their local transmitters, albeit only as far as the transmission is necessary to ensure media diversity.¹¹³ It is, however, unclear whether the conclusion of a contract for the provision of a broadband Internet access can be made dependent on a contract for telephone services. The ECJ confirmed that the Framework Directive 2002/21/EC and the Universal Service Directive 2002/22/EC formulate only minimum standards, so that the Member States benefit from leeway to prevent such tying contracts. At the same time, the ECJ refers to Directive 2005/29/EC which does not justify a *per se* prohibition.¹¹⁴ There is no legal precedent that sets parameters for electricity customers. In *Sabatauskas*¹¹⁵ the question of the access of private customers was not raised.

The flip side of a right of access derived from the EU law, be it primary or secondary, is the obligation imposed on the service provider to conclude the contract.¹¹⁶ The interventions into the parties' private autonomy are especially large as consumers are deemed to be persons who *have to* gain access to energy, access to a telephone (not Internet), access to particular radio and television transmissions. And all this is done without taking into consideration whether the consumer is actually able to pay for the service. The EU rules on access are complemented by the UN Convention on the Rights of Persons with Disabilities 2006, which the EU has joined.

(b) Price transparency, price adequacy and price control

In the market economy price levels are set by the market. This applies in principle also to universal services. With the liberalisation of the telecommunications and energy markets regulated prices have been replaced by market prices. An exemption exists with regard to the target group of vulnerable consumers, who cannot pay the market price. The EU law requires, under the terms of the Universal Service Directive 2002/22/EC, the provision of a connection to the public telephone network at an 'affordable price' (recital 8), and the provision of a defined minimum set of services to all end-users at an 'affordable price' (recital 4). Meanwhile, Directive 2009/72/EC speaks in recital 45 of 'reasonable

¹¹⁰ ECJ Case C-158/96, ECR 1998, I-1931 = NJW 1998, 1771 (*Kohll*); ECJ Case C-120/95, ECR 1998, I-1831 = NJW 1998, 1769 (*Decker*); ECJ Case C-372/04, ECR 2006, I-4325 (*Watts*).

¹¹¹ ECFI, 17.2.2011, Case T-68/08, ECR 2011, I-nyr (*FIFA./Kommission*), based on Art.3 a) Directive 89/522/EEC – Television Directive, Art.49 TEU Freedom to provide services, Art.10 ECHR.

¹¹² ECJ 4.10.2011, Joined Cases C-403/08 and C-429/08, ECR 2011, I-nyr (*Football Association Premier League et al v. QC Leisure et al. And Karen Murphy v. Media Protection Services Ltd.*), based on Art. 56 TFEU Freedom to provide services.

¹¹³ ECJ Case C-336/07, ECR 2008, I-10889 = K&R 2009, 249 (*Kabel Deutschland Vertrieb*) based on Art.31 Directive 2001/22/EC.

¹¹⁴ ECJ 11.3.2010, Case C-522/08, ECR 2010, I-nyr, Rn.31 (*Telekomunikacja Polska*), cf. *Namysłowska* GRUR Int. 2010, 1033.

¹¹⁵ ECJ Case C-239/07, ECR 2008, I-7523 Nr. 47 = EuZW 2009, 12 (*Julius Sabatauskas*), Advocate General (AG) *Kokott* Nr.35, 38.

¹¹⁶ ECJ Case C-64/06, ECR 2007, I-4887 (*Cesky Telcom*); ECFI Case T-289/03, ECR 2008, II-81 Nr. 186, 187 (*BUPA./Europäische Kommission*).

prices' and in recital 50 of 'fair prices'. In principle, and according to the EU law, Member States can choose whether they pursue the targets by introducing special social tariffs – as for example France – or whether they loosen controls over prices, but subsidize the individual consumer. Germany has relaxed the price controls. The compensation for the economically weak consumers is effected by the rules of the *Sozialgesetzbuch* (German Social Security Code, henceforth SGB).

The relaxing of price controls has led to a fierce debate about continuously increasing energy prices. The judicial discourse on gas prices caused public furore. It took place in several stages. The *Kaufrechtssenat* (BGH's Civil Senate on sales law) started in 2007 by subjecting the 10 percent price increase to a 'reasonable and equitable' test according to § 315 BGB.¹¹⁷ This was followed by the drumbeat of the *Kartellrechtssenat* (BGH's Civil Senate on antitrust law) in 2008,¹¹⁸ which avoided the difficult market power test under the *Gesetz gegen Wettbewerbsbeschränkungen* (German Act against Restraints on Competition, henceforth GWB) and instead subjected the price alignment clauses at issue to an AGB control according to § 307 BGB. In 2009 the BGH's *Kaufrechtssenat* adopted this approach in two landmark decisions¹¹⁹ and has confirmed it since.¹²⁰ By virtue of these decisions the German Supreme Courts have *de facto* stopped the gas companies' policy of increasing prices for end consumers via price alignment clauses. This success prompted the consumer organisations of Hamburg and of North Rhine-Westphalia (NRW) to file a joint test case to pursue claims assigned by consumers. On 24.10.11 the LG Hamburg ordered EON (the appeal is pending) to pay €75,000.¹²¹ The litigation run by the NRW consumer organisation, was referred to the ECJ on the 9.2.2011. The BGH wants to know whether Article 1(2) of Directive 93/13/EEC is to be interpreted as meaning that contractual terms concerning price variations in gas supply contracts with consumers who are to be supplied outside the general obligation to supply gas and on the basis of the general freedom of contract (special customers) are not subject to the provisions of the directive if, in those contractual terms, the statutory provisions which apply to standard-rate customers within the framework of the general obligation to provide a connection and supply gas are incorporated unchanged in the contractual relationships with special customers.¹²²

The bank sector features various discussions about the legality of so-called ancillary price clauses (*Preisnebenabreden*) in AGB. The jurisprudence of the BGH is not very helpful to practitioners or lower courts.¹²³ The main criterion of control is the principle of transparency and/or § 309 (5) BGB.¹²⁴ In contrast the *House of Lords* refused in principle to assume control of bank charges.¹²⁵ Unlike the BGH, the *House of Lords* does not distinguish between the practice of controlling prices prohibited by English law and EU rules on transparency. This is the second decision of the *House of Lords* concerning Directive 93/13/EEC which would have required a reference to the ECJ.¹²⁶

¹¹⁷ BGHZ 172, 315 = NJW 2007, 2540.

¹¹⁸ BGHZ 176, 244 = NJW 2008, 2172.

¹¹⁹ BGHZ 182, 41 = NJW 2009, 2627; BGHZ 182, 59.

¹²⁰ BGH NJW 2011, 1342; BGH NJW 2011, 2501.

¹²¹ In contrast to the Federal Supreme Court (BGH), the Higher Regional Court (OLG) Hamburg considers a complementary interpretation of the contract to be legal, so that the outcome of the case is open.

¹²² BGH WM 2011, 850. Case C-92/11, Reference for a preliminary ruling lodged on 28 February 2011 - RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.

¹²³ BGH WM 2011, 1329 (account management fee).

¹²⁴ BGH WM 1997, 2300 to § 309 number 5 BGB.

¹²⁵ Judgment, 25.11.2009, Office of Fair Trading (Respondents) v. Abbey National plc & Others (Appellants), Michaelmas Term (2009) UKSC 6 on appeal from (2009) EWCA Civ 116.

¹²⁶ Judgment of the House of Lords of 25 October 2001, The General of Fair Trading v. First National Bank plc, (2001) UKHL 52.

(c) Quality and information

The quality of a service is determined by competition. This applies as long as there is competition that leads to differentiations in quality. On many of the markets relevant here there are state regulators which intervene, unknown to customers, in order to lay down quality requirements. Whether the telephone customer can or cannot demand telecommunications services via faster and more efficient broadband, implies the prior existence and technical accessibility of such a service. The same applies to the wish of the electricity customer to obtain only green electricity, but not from a nuclear power plant. Similar factors are at play when it comes to E-Banking.

For universal services as defined by the EU law, such as telecommunications, energy or postal services, the quality requirements are found in the respective directives. They remain relatively vague in the field of energy, since both Directives 2009/72/EC (electricity) and 2009/73/EC (natural gas) repeatedly mention the maintenance of 'high standards' for everybody. In contrast, there are more concrete requirements with regard to telecommunications and postal services. Under Art 5 (1) of Directive 2002/22/EC, customers have the right to a comprehensive directory which must be updated regularly and at least once a year, to be registered in and to be informed of such a directory (Art. 25), and to receive a free copy of their invoice (Annex I(A)a). Meanwhile, Art. 3 of the 3rd Postal Directive 2008/06/EC guarantees a mail delivery and collection on five working days, as far as there are no extraordinary geographical conditions, as well as the delivery of packages of up to 20 kilograms. The right to be registered in the subscriber directory was implemented in § 45m TKG, the right to a free itemized bill in § 45e (2) TKG; the right to the provision of a subscriber directory in printed form can be found in § 78 (1), (2) 2 TKG.

Universal services are standardized mass services. In the field of telecommunications and energy the EU even grants customers – not only the end consumers – the right to a contract: found in Annex I of Directives 2009/72/EC (electricity) and 2009/73/EC (natural gas) and implemented in § 36 (1) 1 EnWG, which applies to electricity and gas supply contracts; Art. 20 of the Universal Services Directive 2002/22/EC (telecommunications), duly implemented in § 78 (1) TKG. Additionally, there are other pieces of legislation where detailed parameters were created on the content of these contracts, such as in the *Stromgrundversorgungsverordnung* (German Basic Electricity Supply Ordinance, henceforth StromGVV)¹²⁷ and in the *Gasgrundversorgungsverordnung* (Basic Gas Supply Ordinance, henceforth GasGVV),¹²⁸ which are based on § 38 (1) EnWG. These requirements are so detailed that they could be easily changed – along the lines of the *Muster-Widerrufsbelehrung* (model withdrawal policy drawn up by the BMJ) – into a standard contract. The insights of behavioural economics highlight the essentially more efficient nature of state-run authorisation procedures for standard or model contracts, primarily due to increased cost-effectiveness for all parties– something which had, nevertheless been discredited by EU law.

The financial sector ranks – as we understand it – among the universal services, but looks quite different. The problem of quality is solved by referring to pre-contractual information rules. The terms of EU law – especially Annex II (5) of the Consumer Credit Directive 2008/48/EC, as implemented in § 491a BGB in conjunction with Art. 247 EGBGB, and Art. 19 et seqq. of Directive 2004/39/EC, as implemented in § 31 et seqq. WpHG – overwhelm clients with standardised pre-contractual information. Just as in telecommunications and energy, an option to improve transparency and to render decision making behaviour more rational would be to transform pre-contractual information into standardised contracts. This is only possible as far as product independent information is concerned. Standardisation would require national criteria for the classification of securities. Such a

¹²⁷ Ordinance of 26.10.2006 (Federal Law Gazette I number 50 p. 2391).

¹²⁸ Ordinance of 26.10.2006, (Federal Law Gazette I number 50 p. 2391).

possibility was discussed in the aftermath of the financial market crisis, but dismissed immediately.¹²⁹ In the *Anlegerschutz- und Funktionsverbesserungsgesetzes* (German Investor Protection and the Functionality Improvement Act, henceforth AnsFuG),¹³⁰ the German legislator stuck to a purely informative approach. Since April 2011, investment service providers must furnish a potential investor with a brief and easily understandable ‘information sheet’ in good time before the conclusion of contract, § 31 (3a) 1 WpHG. This document is restricted to two A4 pages and is not subjected to any state-run quality control. Through drastic reduction – the basic booklet for a *Lehmann Brothers* special purpose vehicle ran to 97 pages – the knowledge of the investor should be improved. Implicitly it is assumed that the information can be summarized on two, or under particular circumstances, on three pages and that the investor is thereby in a position to make a more informed, and therefore better, decision.

(d) Continuity

EU law obliges the Member States to ensure that universal services are continuously provided. Only in case of force majeure is an interruption legal, according to Art. 3 (3) of 3rd Postal Directive 2008/06/EC and Art. 23 of Universal Services Directive 2002/22/EC for electronic telecommunications – implemented in § 85 TKG. The parameters for ensuring energy supply are clearer. Whereas Art. 3 (5) of Directive 2003/54/EC once declared: *Member States shall take appropriate measures to protect final customers, and shall in particular ensure that there are adequate safeguards to protect vulnerable customers, including measures to help them avoid disconnection*, today Art. 3 (8) of Directive 2009/72/EC states: *Member States shall take appropriate measures, such as formulating national energy action plans, providing benefits in social security systems to ensure the necessary electricity supply to vulnerable customers, or providing for support for energy efficiency improvements, to address energy poverty where identified, including in the broader context of poverty*. Member States are required to take measures to combat energy poverty, which they have to report to the Commission according to Art. 3 (15). That was exactly what was missing up to now. There are no parallel rules with regard to financial services and Internet services.

With regard to energy poverty, the BMWi Key Issues Paper (*Eckpunkte zum EnWG*) claims that the SGB rules are sufficient to protect the consumer.¹³¹ Even today disconnections would be subject to strict legal requirements and to a control of proportionality according to § 19 *StromG*. The payment of energy costs can be assumed by the social assistance authorities as part of a person’s social assistance allowance under §§ 36, 27, 27a of SGB XII (*Sozialhilfe*) or their unemployment/social benefit in accordance with § 22 (8) SGB II (*Arbeitslosengeld II / Sozialgeld*). The only improvement coming about through the implementation of the Directive is the granting of an authorization (but no obligation) to the BNetzA to gather information “in the context of the disconnection of household clients”¹³² to meet the notification requirements of the EU law.

Consumer organisations draw another picture. The number of end-users unable to pay their bills (with a risk of disconnection) is high, with the VZVB for instance claiming that there are 800,000 such

¹²⁹ Statement of the Scientific Advisory Board for Consumer and Nutrition Policy at the BMELV, concerning the quality of the financial consulting of private investors, 2009. Available at: http://www.bmelv.de/SharedDocs/Downloads/Ministerium/Beiraete/Verbraucherpolitik/2009_11_Finanzberatung.pdf?_blob=publicationFile, last accessed on 31.07.2012.

¹³⁰ Federal Law Gazette 2011, I number 14, p. 538 of 7.4.2011.

¹³¹ BMWi, key issues concerning the EnWG amendment 2011 of 27.10.2010, p.7.

¹³² BMWi, key issues concerning the EnWG amendment 2011 of 27.10.2010, p.7.

people every year in Germany.¹³³ Criticism is levelled against the high percentage of energy costs with regard to the total budget and the partly high costs of the disconnection itself (up to 100 €). Alarming figures have also been reported by several new Member States. Further data is provided by a campaign called Energy-Savings Check for Households with Low Income (*Stromsparcheck für einkommensschwache Haushalte*) maintained by the German Caritas Association with the German Federal Ministry for the Environment, Nature and the German Federal Association of Energy and Climate Protection Agencies (*Bundesverband der Energie- und Klimaschutzagenturen*).¹³⁴

(e) Change of suppliers

All regulated markets are based on the idea that competition can put pressure on the suppliers to improve price and quality of the services. This option is only available to the circumspect and responsible consumers or private end-users. Only these groups can be assumed to be potentially willing to switch providers. The group is small. It is well known that 60% of European citizens have never thought of changing their supplier,¹³⁵ even though there is an exceptional level of dissatisfaction with service providers in the field of fixed networks.¹³⁶ That said, the EU legislative authority continues to undertake regulatory efforts in the fields of telecommunications and energy in the hope of increasing competition by means of contract law. The German implementation laws show that although the horse can be brought to the water, we have yet to discover how to make him drink. There seems to be no approach to speed up competition actively and beyond the specifications of the EU.

Telecommunications: To make consumers use the existing possibilities of more cost-efficient telecommunications, there are three conditions to meet: the long duration of the contracts has to be reduced to a reasonable level, the necessary current information has to be transparently and independently compiled and made available for consumers, and the process of switching the provider has to function in a seamless way.

Directive 2009/136/EC clarifies, in Art. 30 (5) 1 (which corresponds to § 309 (9) a BGB), that the Member States have to avoid an initial minimum contract period of more than 24 months in the interests of the consumers. Furthermore, Art. 30 (5) 2 engages the national legislative authorities to grant the consumer the possibility of concluding contracts for telecommunications services with an initial minimum contract period of one year. The text of the Directive is literally implemented by § 43b (2) TKG (henceforth TKG-N (new)),¹³⁷ under the considerable influence of the ECJ decision concerning § 9a of the old TKG,¹³⁸ meaning there is no benefit to the consumer. According to the wording of the rule, providers would be free to offer an overpriced contract for each of their products with a duration of up to twelve months. This would fulfil their obligations under § 43b (2) TKG-N. Obviously this cannot be the purpose of a directive purporting to stimulate the motivation of consumers to switch, as is reflected by recital 47 of Directive 2009/136/EC.

¹³³ VZBV, Verbraucherzentrale Bundesverband (2008). *Eckpunktepapier des Verbraucherzentrale Bundesverbandes zur Energiearmut einkommensschwacher Haushalte*.
http://www.vzbv.de/mediapics/eckpunktepapier_energiearmut_14_04_2008.pdf, last accessed on 31.07.2012.

¹³⁴ <http://www.caritas-germany.org/74849.html>

¹³⁵ Special –Eurobarometer 362 of the EU Commission: E-communications household survey, summary, July 2011, p.11, available under: www.ec.europa.eu/public_opinion/archives/ebs/ebs_362_sum_de.pdf, last accessed on 31.07.2012.

¹³⁶ Stiftung Warentest *test* 2007, 41 et seqq.

¹³⁷ Draft of a law concerning the change of telecommunication rules of 2.March 2011, available under: www.bmwi.de/BMWi/Redaktion/PDF/Gesetz/referentenentwurf-tkg-2011,property=pdf,bereich=bmwi,sprache=deutsch,rwb=true.pdf.

¹³⁸ Cf. Statement of the Scientific Study Group for Regulation Questions at the Federal Network Agency concerning the TKG-amendment, 9.5.2011, p.1, available under: www.bundesnetzagentur.de/SharedDocs/Downloads/DE/BNetzA/Bundesnetzagentur/WAR/StlgnTKG_Novellepdf.pdf?__blob=publicationFile, last accessed on 31.07.2012.

Any customer contemplating changing his tariff or switching to another provider of telecommunications services will first want to inform himself. The information published by the service providers is subjected to the provisions of § 45n TKG, so that in theory there should be a firm basis for comparison. However, in fact these services are provided via the Internet by price comparison services that are not subjected to any kind of control. The independent and up-to-date service provided by the *Stiftung Warentest* is – if only marginally – subjected to a charge. The BNetzA refers to consumer organisations. The terms of § 45n (2) TKG-N states that the publication obligations shall serve to ensure the availability of “transparent, comparable, sufficient and current information”. The rule might lead to an institutionalised price comparison service by the BNetzA. The competence for this was created in § 45n (7) TKG-N. As far as the concrete design of the price comparison is concerned, § 45n (7) sentence 3 proposes introducing interactive tools on the BNetzA’s website. But this does not present an *obligation* of the BNetzA, it is no more than a subsidiary *competence*.

Changes in the field of mobile communications are mostly of technical-administrative nature. Art. 31 guarantees that the participant can maintain his number, implemented in § 46 TKG-N, which does not distinguish between mobile communications and fixed networks. To increase the preparedness of consumers to switch, the process of switching has to function smoothly. According to a 2007 reader survey of the *Stiftung Warentest* with 7,700 participants,¹³⁹ 40% of the respondents that had made the decision to change providers, had had problems with the process of switching, of which 46% were solved. Consumers reported that the responsibility for the problems was moved back and forth between the old and the new provider and that a solution was not developed in a constructive way.

Under § 46 (1) 2 TKG-N network operators and service providers have to ensure that a change of providers can be performed within one working day. In contrast to Directive 2009/136/EC, the new rule has a clearly wider scope of application, since it refers generally to the change of providers. Until the “new” connection is switched on, the “old” connection has to be preserved for the customer, § 46 (1) 1 TKG-E. The “old” provider obtains a fee which corresponds to the contractually agreed price with a 50% reduction, § 46 (2) 1 TKG-N. However, the customer has a kind of leverage as the right to the fee depends on the successful conclusion of the change of the providers, § 46 (2) 4 TKG-E. Another possibility would have been to define an upper limit, in accordance with *Polska Telefonia Cyfrowa*.¹⁴⁰

The inclusion of § 46 (8) TKG-N can be partly considered to be a direct reaction to the decision of the BGH,¹⁴¹ which rejected a contract holder’s right to termination due to an compelling reason under § 314 (1) 1 BGB and § 626 (1) BGB. Meanwhile, § 46 (8) 3 TKG-N grants the consumer a special right to terminate the contract in case of a lack of availability of the agreed service at his new place of residence.¹⁴² Should the service be available at the new location, the provider must, according to § 46 (8) 1 TKG-N, allow the consumer to “take” the contract “along”. The provider can require an adequate fee for expenses linked with the change, § 46 (8) 2 TKG-N.

Energy: In a slightly changed form, the legal questions linked to the change of provider reappear. In the market for energy, customers’ keenness to switch is not particularly pronounced. The most up-to-date data result from the so-called “Growth from Knowledge (GfK) Energy Tracking”.¹⁴³ Some 20,000 households were consulted with regard to proposed or performed changes of providers and tariffs on the electricity and gas markets. According to the survey, about 4.5 million households in

¹³⁹ In the journal *test* 2007, 41 et seqq.

¹⁴⁰ ECJ Case C-99/09, EuZW 2010, 577 (*Polska Telefonia Cyfrowa*).

¹⁴¹ BGH WM 2011, 81.

¹⁴² Local Court (AG) Lahr of 10.12.2010, Zeitschrift für das gesamte Schuldrecht (ZGS) 2011, 143: equally LG Koblenz of 23.02.2011, Az 12 S 246/10.

¹⁴³ Press release of the GfK-group of 17 August 2011, available at: www.gfk.com/group/press_information/press_releases/008503/index.de.html, last accessed on 31.07.2012.

Germany changed their energy provider in the first half of 2011. The willingness of consumers to change is clearly more pronounced on the electricity market than on the gas market. About 70% of those who performed a change decided to take up a fixed price tariff with a contractual obligation of up to 12 months. More than 50% of those who changed the provider received a bonus from their new energy provider. Two thirds of new contracts were concluded via the Internet.

Neither Energy Directives set maximum contract durations. Under annex I (1) the supplier has to inform the customer about the duration of the contract. According to the survey, the duration of the contract does not seem to be a problem. Price transparency and comparability are determining factors in consumers' decision to use their right to switch to a more cost-effective tariff or to another provider. Binding requirements to produce price transparency in the pre-contracting phase do not exist, in contrast to the telecommunications market. The clarification of tariffs and prices is individualised, cf. Directive 2007/79/EC annex I (1) c. Nevertheless, recital 45 could be read as allowing the price transparency measures be fulfilled through the presentation of tariffs on websites or in other kinds of advertising (perhaps following the example the financial products information sheet referred to above). The implementation law of 26th July 2011¹⁴⁴ does not pick up this target. The new version of the §§ 40, 41 EnWG refers exclusively to the transparent presentation of invoices, consumption-based billing and contracts. The competence granted to the BNetzA (§ 40 (7) EnWG) and the BMWi (§ 41 (5) EnWG) to enact further rules does not provide any assistance.

The consumer who searches for a favourable tariff has to revert to a comparison portal on the Internet. In recognition of the role of the Internet, the GfK study has a headline "Internet is the number one source of information" and elaborates that "*tariff calculators make it much easier to switch: enter an energy consumption estimate and the postcode, and the system generates a selection of the cheapest suppliers.*"¹⁴⁵ A recent report in the ZDF programme *Wiso* proved the contrary.¹⁴⁶ In spite of entering identical variables, different comparison portals showed completely different results. These comparison portals receive a commission for each contract procured by them. The *Verivox*¹⁴⁷ scandal has made customers conscious of the ties between comparison portals and providers. There are no clear legal specifications for these portals, neither with regard to their independence from power supply companies nor concerning the criteria used to calculate the most favourable tariff.

The EU's second legislative package on common rules for the internal market in electricity and natural gas was introduced in 2003 with the aim of facilitating suppliers in entering new markets and enabling more consumers to change amongst them. Experience showed that energy providers often complied only hesitantly with customers' requests and charged high fees for the change.¹⁴⁸ One of the few representative surveys was executed in 2008 by the *Verbraucherzentrale Niedersachsen* (Consumer Organisation of Lower Saxony) under the title of "Problems in Switching between Energy Providers by Consumers in Niedersachsen."¹⁴⁹ According to this survey one in every four consumers is dissatisfied with the process of changing providers. Amongst those questioned, 56% succeeded in changing, 38% had no problems at all, but only 5% managed to change within a month. The political response can be found in Art. 3 (3) of Directive 2009/72/EC, which, in conjunction with Annex I (1) e, grants the customer the right to change *for free* and, in (5), provides for this to occur within a period of three weeks. The legal basis for the supply with electricity is in § 20 (1) 1 StromGKV. According to § 1 (1) 2 StromGKV this rule becomes part of the contract that provides basic services to the

¹⁴⁴ Federal Law Gazette 2011 I, p.1554.

¹⁴⁵ http://www.gfk.com/group/press_information/press_releases/008503/index.en.html, last accessed on 31.07.2012.

¹⁴⁶ Available at: wiso.zdf.de/ZDFde/inhalt/9/0,1872,8354345,00.html?dr=1, last accessed on 31.07.2012.

¹⁴⁷ Cf. www.handelsblatt.com/unternehmen/handel-dienstleister/verivox-skandal-bringt-web-portale-in-verruf/4626330.html?p4626330=all, last accessed on 31.07.2012.

¹⁴⁸ Austrian Consumer Protection Action Plan 2010-2013.

¹⁴⁹ Available under: www.verbraucherzentrale-niedersachsen.de/mediabig/66601A.pdf, last accessed on 31.07.2012.

consumer. According to Art. 3 (5) a) and Art. 3 (6) a) of Directive 2009/72/EC, this period has to be reduced to three weeks, as implemented in § 20a (2) EnWG.

The administrative-technical side of the process of switching was dealt with in the BNetzA's so-called *Geschäftsprozesse zur Kundenbelieferung mit Elektrizität* (GPKE - Business Processes for Supplying Customers with Electricity) of 11 July 2006¹⁵⁰ alongside their 2007 *Geschäftsprozesse und Datenformate beim Wechsel des Lieferanten bei Belieferung mit Gas* (GeLi - Business Procedures for Change of Suppliers in the Gas Sector).¹⁵¹ The tightly regulated process of changing is, in the opinion of the *Verbraucherzentrale Niedersachsen* (Consumer Organisation of Lower Saxony) on the electricity market, a "relatively complex process."¹⁵²

Finances: The possibility to change the provider also exists with regard to banks and financial services providers. According to Italian law consumers can even transfer their loans *for free* to another bank in order to obtain better interest rates.¹⁵³ The Italian banks sought to combat the gratis transfer with unfair market practices.¹⁵⁴ Due to a targeted examination of the market, initiated by *Altroconsumo* (one of the largest Italian consumer organisations), the Italian Competition Authority found that the banks deprived consumers of their right to transfer a loan from one bank to another or, even if they acquiesced to the transfer, they charged a fee. The fines levied on the four banks amount to nearly €2 million euro.

(f) Advice of an intermediary

The EU specifications with regard to insurance intermediaries in the MiFID Directive 2004/39/EC – along with Directive 2002/92/EC on insurance mediation and Consumer Credit Directive 2008/48/EC – brings about, in the medium term, a professionalization, since EU law encourages higher levels of professional training to meet the requirements of cross-border services. The main topic is the necessity of an investor- and object-oriented advice approach. The clearest stipulations result from Directive 2004/39/EC. Nevertheless, the EU rules do not help in the end because the liability for incorrect advice is outsourced to the law of the Member States. In the aftermath of the *Lehman Brothers* collapse it appeared that the EU wanted to increase the requirements with regard to the consultancy sector. This did not yet happen.

Defective information and consultation on financial markets are not problems *specific* to the financial crisis. The insight is 50 years old.¹⁵⁵ Commission-based incentives and sales guidelines stood, and continue to stand, in direct conflict with the interests of the private investor. Like in every b2c business, when the consumer is active on the financial markets there is an asymmetry of information between him and the businessperson (intermediary/issuer). The central problem is that the consumer lacks the necessary financial knowledge to correctly assess the often very complicated financial

¹⁵⁰ Available at: www.bundesnetzagentur.de/cIn_1911/DE/DieBundesnetzagentur/Beschlusskammern/1BK-Geschaeftszeichen-Datenbank/BK6/2006/2006_001bis100/BK6-06-009/BK606009_Einheitliche%20Gesch%C3%A4ftsprozesse%20und%20Datenformate_NavNode.html, last accessed 31.07.2012.

¹⁵¹ Available at: http://www.bundesnetzagentur.de/DE/DieBundesnetzagentur/Beschlusskammern/1BK-Geschaeftszeichen-Datenbank/BK7-GZ/2006/2006_001bis100/BK7-06-067/Beschluss_BK7-06-067_Id11201pdf.pdf?__blob=publicationFile, last accessed on 31.07.2012.

¹⁵² Cf. the Study "Problems concerning the change of the electricity provider in Nedersachsen" of 2008, available under: www.verbraucherzentrale-niedersachsen.de/mediabig/66601A.pdf.

¹⁵³ Art.8, D.L. 31 Gennaio 2007, n.7.

¹⁵⁴ 7.8.2008, ID PS 1191.

¹⁵⁵ Statement of the Scientific Advisory Board for Consumer and Nutrition Policy 2009, http://www.bmelv.de/SharedDocs/Downloads/Ministerium/Beiraete/Verbraucherpolitik/2009_11_Finanzberatung.pdf?__blob=publicationFile, last accessed on 31.07.2012.

products relative to his own needs. Attempts to compensate for the existing information asymmetry between the businessperson and the consumer cannot be considered to guarantee effective consumer protection. However, the legislative activities point exactly into this direction. A 2008 study on behalf of the BMELV arrives at the following finding:¹⁵⁶

The recently implemented Directives 2004/39/EC and 2002/92/EC [...] lead to a huge effort for the suppliers whereas the consumers gain a rather small increase in security. The reason is, apart from an insufficient consideration of interdependency and incentive mechanisms, a blind spot in the German regulation tradition: the consumer in the decision process. He is supplied with more and more information, but no instruments, support or guidance on how to cope with it. More product information does not correspond to more consulting quality and certainty of action.

A move to combat these abuses came on 1.1.2010 with the introduction of § 34 (2a) WpHG that investment services enterprises must always take, in writing, the minutes when providing investment advice to retail clients. Clients are to be provided with a copy of the minutes, on paper or in another durable medium, without undue delay after the advice and, in any case, prior to the conclusion of a transaction based on the advice. The same applies for insurance intermediaries since May 2007. Furthermore, § 14 (6) of the *Verordnung zur Konkretisierung der Verhaltensregeln und Organisationsanforderungen für Wertpapierdienstleistungsunternehmen* (Ordinance on Defining the Code of Conduct and Organisational Requirements for Securities Service Providers, hereafter WpDVerOV) concretises the mandatory content of the minutes. They now have to include, among other things, the reason and the duration of the consultation, the personal situation of the client and the recommendations made by the consultant. The practical benefit for the “structurally inferior consumer” is not estimated to be very high.

According to the Stiftung Warentest report with the eye-catching headline “*The disgrace continues – the tested banks (Die Blamage geht weiter – Banken im Test)*”¹⁵⁷ the situation was still “miserable” in 2010. Due to the incorrect, incomplete or fragmentary nature of minutes given to clients, the BaFin introduced, in the Spring of 2011, legal proceedings were taken against six German financial institutions, whose identities were not made public.¹⁵⁸ The scope of the fines can amount to €50,000. A deterrent effect cannot be achieved this way. The Scientific Advisory Board for Consumer and Food Policy called for the reversal of the burden of proof with regard to negligence of the consultant but, although this was picked up by the *Bundesrat*, the project could not prevail. The private investor who pretends to have suffered from insufficient and ‘defective’ consultation is left to rely on himself, particularly since he is excluded from the participation of a collective action under the KapMuG.¹⁵⁹

(g) Remedies

EU directives rarely refer to the remedies to be provided. One of the few clear rules can be found in Art. 30 (4) of Directive 2009/136/EC. According to this provision the Member States have to provide appropriate sanctions against companies, including the obligation to compensate participants, if the transmission of the telephone number is delayed or if the transmission is misused through them or on behalf of them, cf. § 46 (2) TKG-E. Article 3 (7) of Directive 2009/72/EC contains a clearly weakened variant in that Member States are to ensure that eligible customers can indeed change easily to a new supplier. Meanwhile, § 20a (4) 1 EnWG provides the customer, in line with the EU law, with a claim

¹⁵⁶ *Habschick/ Evers* Requirements on Financial Intermediaries – more quality, better decisions, study on behalf of the Federal Ministry for Nutrition, Agriculture and Consumer Protection, 2008, available under: www.bmelv.de/cae/servlet/contentblob/379922/publicationFile/21929/StudieFinanzvermittler.pdf, at p.149, last accessed on 31.07.2012.

¹⁵⁷ *Finanztest* 8/2010, p.25 et seqq.

¹⁵⁸ Notification of the Stiftung Warentest of 27.5.2011, available at: www.test.de/themen/geldanlage-banken/melding/Beratungsprotokolle-Sechs-Bussgeldverfahren-4242848-4242850/, last accessed on 31.07.2012.

¹⁵⁹ BGH NJW 2009, 513; BGH v.4.12.2008, III ZB 97/07; BGH WM 2011, 110.

for damages against the network operator and/or the energy supplier for losses due to a delayed changeover.

A special position is taken by EU passenger law, which has turned into an independent field of law governed by its own remedies, laid down in four Regulations (the Denied Boarding Regulation (EC) 261/2004, Regulation (EC) 1371/2007 on rail passengers' rights, Regulation (EU) 1177/2010 on the rights of passengers when travelling by sea and inland waterway, Regulation (EU) 181/2011 on rights of passengers in bus and coach transport). Article 7 of the Denied Boarding Regulation grants air passengers a right to compensation in case the flight is cancelled. In the case of delays below the threshold of five hours the passenger has a right to care (meals, refreshments, communication facilities and, if appropriate, hotel accommodation), as per Art. 9. Should the delay exceed five hours, he can claim reimbursement of the full cost of the ticket or an alternative means of transport, Art. 8. In *Sturgeon*¹⁶⁰ the ECJ obliged the airline company to pay compensation in case of a delayed arrival of three hours. The ECJ justifies the decision by arguing that a passenger who is exposed to a huge delay is in the same situation as the person whose flight was cancelled. The parallels to *Putz/Weber* are obvious. The ECJ develops its own European approach which breaks away from national constructions.

The Universal Services Directive 2009/136/EC on electronic telecommunications services, as well as Directive 2009/72/EC on electricity, require the supplier to inform the customer about possible compensation rules in case of non-compliance of the contractually agreed service quality, cf. Art. 30 (1) f for telecommunications and Annex I (1) b for electricity. Both rules have been implemented in the TKG-E and EnWG, respectively. Specific contractual sanctions for the violation of these information obligations are not provided. Fines are possible according to § 9 of the *EG-Verbraucherschutzdurchsetzungsgesetz* (EC Consumer Protection Enforcement Act, henceforth VSchDG), but only in case of non-compliance with the instructions of the "competent authority" mentioned in § 5. Similarly, § 5 deals with infringements of the Regulation (EC) 2006/2004 on Consumer Protection Cooperation, which refers back to specific rights in the consumer *acquis*. Moreover, there is the possibility to seek a remedy under the *cic* or to apply for injunctive relief to prevent anti-competitive conduct.

The EU legislative authority requires liberalisation, but did not succeed in enforcing privatisation in the course of the "Third Package" to further liberalise European energy markets that entered into force on the 3rd September 2009. As a consequence, the legal relations between the consumer and the provider of universal services do not necessarily come under the private law regime. Especially in situations where the incumbent has been entrusted with the task of providing universal services, there are still residual traces of the previous public law relations. Illustrative of are the liability privileges from which some such companies continue to benefit. Typically there would be a rule (*Ausschlussregel*) to explicitly limit a company's liability due to gross negligence (in the field of energy) or for delays in compliance.

¹⁶⁰ ECJ, Case C-402/07, ECR 2009, I-10923=NJW 2010, 43; BGH NJW 2010, 2281.

V. Individual/Collective and Judicial/Administrative Law Enforcement

1. Individual Law Enforcement before the Courts

The civil system for enforcing the rights of consumers is based on a type of model which comes close to that of the circumspect and responsible consumer. This type of consumer is aware of his rights and knows that the judicial system is open to him. But the vulnerable consumer is also taken care of, since the state supports him professionally and financially in asserting his rights. This distinction is appropriate to illustrate the reality of a typical consumer purchase in a fairly correct way. The picture changes considerably with regard to Internet purchases and universal services.

(a) Practical relevance of judicial legal redress

Germany does not dispose of certified statistics concerning the correlation between the object of dispute of consumer law and the amount of court disputes. Nevertheless it appears that the majority of judicial disputes focus on classic once-off consumer purchases. Internet sales fit within this image to a certain extent. However the legal disputes only reach the German courts whenever a German (or German-resident) consumer and a German (or German-resident) business come into conflict.

In contrast, cross-border Internet sales, strongly encouraged by the EU, rarely reach German courts. The finely graduated triad, established by EU law, of the international jurisdiction of the courts, the determination of the applicable law and cross-border enforcement, serves only to discourage the circumspect and responsible consumer from attempting to uphold his rights in a cross-border context. The court system is open to him but the unpredictability of the complicated legal questions, which represent high hurdles even for the normal lawyer, and not least the considerable costs of a cross-border prosecution,¹⁶¹ lead to a search for alternatives beyond judicial legal protection. These are mediation, alternative dispute resolution (ADR), or European Small Claims Procedure – all of which are themselves characterized by EU law.

Disputes that reach a court also seem to be the exception rather than the rule in the field of universal services. Thus, the value of endowment life insurance was disputed for years. According to one academic survey, endowment and retirement insurance plans (which continue to be popular today) allegedly caused private investors to lose €160bn between 2001 and 2010 because they failed to maintain their long-running commitments until maturity¹⁶² – the blame for which has to be attributed, at least in part, to mis-selling on the part of the insurance broker. The *Lehmann Brothers* collapse did not lead to a flood of law suits either. The situation on the gas market, meanwhile, is different. The massive price increases following liberalisation led to hundreds of complaints by those concerned, as well as to representative actions (*Sammelklagen*) brought by the Hamburg and NRW consumer organisations to pursue claims assigned by consumers.¹⁶³ The travel law and law on passengers' rights also play a specific role. Obviously people are easily frustrated by small delays and the willingness to complain in view of the principally consumer-friendly case law is high. Apart from these exceptions, forms of out-of-court conflict resolution are predominant, not only with regard to the fields of gas,

¹⁶¹ Of *Freyhold/Gessner/Vial/Wagner* (Eds.) *Cost of Judicial Barriers for Consumers in the Single Market*, 1995 <http://www.fryvial.de/Publications/egi-2.pdf>, last accessed on 31.07.2012.

¹⁶² *Oehler*, Bei Abschluss: Verlust? Das Ende vom Anfang einer Vorsorge: Milliarden Schäden durch fehlgeleitete Abschlüsse von Kapitallebens- und Rentenversicherungen, http://www.vzhh.de/versicherungen/151189/Oehler_Studie_Paper.pdf, last accessed on 31.07.2012.

¹⁶³ <http://www.vzhh.de/energie/30047/eon-muss-75000-euro-zahlen.aspx>, last accessed on 31.07.2012.

electricity and telecommunications, but also in financial services. Their development is vigorously promoted by the EU.

(b) The necessity to materialise procedural law

Beyond special consumer protection instruments, the effective protection of consumers through procedural law depends on the national procedural law taking their concerns into account. The daily conflict of consumers and businesses before German courts does not receive the attention it deserves due to the veil of doubt cast by new forms of law enforcement.

The §§ 12 et seqq. of the *Zivilprozeßordnung* (German Code of Civil Procedure, henceforth ZPO) are based on the principle of the protection of the defendant, the principle of “*actor sequitur forum rei*”. A person that becomes involved in a judicial procedure, without any action on his own part, shall benefit from the protection of his domestic forum. To encourage the consumer to exercise the rights attributed to him, jurisdictional rules need to be tilted in his favour. The structural inferiority of the consumer established by the BVerfG also has to be compensated for by procedural law. If, in the substantive law, specific consumer rights (for example the right of withdrawal according to § 355 BGB) distort contract parity (*gestörte Vertragsparität*), this also has an effect on the procedural level. The systematic separation of the substantive claim and procedural enforcement is, with regard to consumer rights, overshadowed by the necessity of an effective consumer protection, and so a *materialisation of the procedural law* (Rösler) is required. Both are mutually dependant and influence each other, as can be seen especially with regard to cases in a cross-border context.¹⁶⁴

The proximity of the place of jurisdiction to the plaintiff is also essential for the consumer in the domestic arena. The German civil procedural law has many shortcomings in this regard. It was not for nothing that *Mankowski* finished a review of judgments under § 29c ZPO during 2002¹⁶⁵ by referring to the lack of a general jurisdiction rule in favour of consumers. This finding is nearly ten years old and still there is no special place of jurisdiction for consumers in the ZPO, in stark contrast to Art. 32 of the Swiss Civil Procedure Code.¹⁶⁶ Only for the right of withdrawal in a doorstep selling contract¹⁶⁷ does § 29c ZPO provide for a special jurisdiction, an anomaly for which there is no obvious explanation in view of the substantive parallelism of consumer credit, timesharing and distance selling.

The BGH¹⁶⁸ has expanded the scope of the jurisdictional protections for consumers but a consistent line of reasoning is not recognizable. By its judgement of 13.4.2011 the BGH fixed the place of performance for the claim of cure according to § 439 BGB to wherever “the seller at the time of the emergence of the contractual obligation had his residence or maintained his commercial undertaking (§ 269 (2) BGB).”¹⁶⁹ So it gives stones to the consumer instead of bread. To enforce his claims, the consumer has to file a suit, in case of doubt, at the place of residence of the businessperson according to § 29 (1) ZPO. In so-called third country situations, § 29 (1) ZPO has to be interpreted harmoniously with Articles 15 and 16 of the “Brussels I” Regulation, which sets the place of jurisdiction for

¹⁶⁴ BGH NJW 2006, 230 et seqq.; BGHZ 153, 82, 99 = NJW 2003, 426 concerning § 661a BGB.

¹⁶⁵ EWiR 2002, 579 concerning BGH 9.4.2002 = BGHZ 150, 264.

¹⁶⁶ Available in English at: <http://www.admin.ch/ch/e/rs/2/272.en.pdf>, last accessed on 31.07.2012.

¹⁶⁷ § 26 of the Distance Learning Protection Act (Federal Law Gazette 2000, 1670) establishes a special place of jurisdiction.

¹⁶⁸ BGH NJW 2003, 605 concerning the inclusion of the *cic* in § 29c ZPO.

¹⁶⁹ BGH NJW 2011, 2278.

consumer claims at the consumer's place of residence.¹⁷⁰ That is in line with the EU Commission's plan to use the "Brussels I" Regulation principally in third country situations.¹⁷¹

(c) Jurisdiction and arbitration agreements

From the point of view of the consumer, agreements on jurisdiction are fraught with the danger that the mandatory place of jurisdiction is set somewhere other than the consumer's place of residence (§§ 12, 13 ZPO). In the scope of application of the "Brussels I" Regulation, agreements on jurisdiction are illegal before the emergence of a dispute and, even after the emergence, they are subjected to strict conditions, cf. Art. 17 "Brussels I" Regulation. Should the international prorogation comply with the ZPO, the protection of § 38 (2) 1 ZPO applies in favour of the consumer.

If jurisdiction clauses are introduced to the detriment of the consumer through AGB, Annex I (q) of the Unfair Contract Terms Directive 93/13/EEC will apply. For the control of local or international jurisdiction clauses by means of the Unfair Contract Terms Directive, the ECJ had opened a door with *Océano*,¹⁷² which was further expanded in the *Pannon* decision.¹⁷³ According to this line of case law, jurisdiction clauses are not only illegal, but the national judge is also obliged to test ex officio the effectiveness of such clauses under the Unfair Contract Terms Directive.¹⁷⁴ However, it is still unclear which concrete standard of control should be used by the national court.

By choosing arbitration, consumers lose the possibility of recourse to judicial review. Should they be faced with arbitration proceedings, they often remain passive.¹⁷⁵ The control of arbitration clauses in consumer contracts is essential to protect consumers. In Germany, arbitration agreements are prohibited within the scope of the WphG, § 37h. Otherwise the formal requirement of § 1031 (5) ZPO shall ensure the protection of the consumer. In *Mostaza Claro*¹⁷⁶ the ECJ left the final decision on the legality of arbitration clauses to national law, but held that national courts seized of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even where the consumer has only pleaded that invalidity in the course of an action for annulment. The rule on the loss of the right to file objections in § 1027 ZPO has to be construed in accordance with the Directive. However, time-limits are legally valid, as the ECJ made clear in *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*¹⁷⁷. In *West Tankers*¹⁷⁸ the ECJ expanded considerably the domestic courts' duty to test arbitration clauses by finding that the question of the effectiveness of such clauses falls, as a preliminary question, under the scope of the "Brussels I" Regulation in spite of the wording of Art. 1 (2) d.

¹⁷⁰ BGHZ 188, 85 = NJW 2011, 1962.

¹⁷¹ COM 2010, 748 final Proposal for a Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 14.12.2010, p. 3.

¹⁷² ECJ Case C-240/98, ECR 2000, I-4941 = NJW 2000, 2571 (*Océano Grupo Editorial SA*).

¹⁷³ ECJ Case C-243/08, ECR 2009, I-4713 = EuZW 2009, 503 (*Pannon GSM Zrt*).

¹⁷⁴ ECJ loc cit, guiding principle 2.

¹⁷⁵ Cf. the case ECJ 6.10.2009, Case C-40/08, ECR 2009, I-9579 = EuZW 2009, 852 (*Asturcom Telecomunicaciones SL/Cristina Rodríguez Nogueira*).

¹⁷⁶ ECJ Case C-168/05, ECR 2006, I-10421 = EuZW 2006, 734.

¹⁷⁷ ECJ Case C-40/08, ECR 2009, I-9579 = EuZW 2009, 852.

¹⁷⁸ ECJ Case C-185/07, ECR 2009, I-663 = EuZW 2009, 215.

2. Individual Law Enforcement beyond Courts

The structures predetermined by the substantive law are reflected in the division between general rules that apply, in principle, to every contract and sector specific requirements. The variety of different forms, forums and responsible bodies may not only exasperate the consumer seeking advice and action. National rules stand beside European ones, while national or European horizontal rules have vertical equivalents – all of which can differ depending on the sector. Furthermore, approaches that are based on German law have to overcome the differences between ADR bodies that are shaped depending on the country origin. This chaos cannot be considered appropriate to offer the consumer a practicable and reasonable alternative to recourse to the courts, in the absence of sector specific rules.

(a) Out of court dispute resolution entities recognized by the *Landesjustizverwaltungen* (Land Departments of Justice)

The *Länder* (federal states) have the competence to create out of court dispute resolution entities (*außergerichtliche Gütestellen*)¹⁷⁹. The *Länder* are free to regulate their establishment and their activities since the federal government has not claimed its legislative powers in this field. Nevertheless, several federal laws refer to the entities established or recognized by the *Landesjustizverwaltungen* (Land Departments of Justice). Thus, the federal legislative authority allows the *Länder* to determine to which entities one can file an application for conciliation such that it qualifies as a ‘prosecution of rights’ and suspends the limitation period (§ 204 (1) 4 BGB) and which entities can certify settlements as ‘enforceable legal documents’ (§ 794 (1) 1 ZPO). Furthermore, since 1.1.2000 § 15a of the *Einführungsgesetz zur Zivilprozeßordnung* (Introductory Act to the German Code of Civil Procedure, henceforth EGZPO) authorises the *Länder* to provide mandatory out of court conciliation proceedings (*außergerichtliche Güteverfahren*)¹⁸⁰ for certain disputes. These shall serve to relieve the burden on the judicial system and to promote out-of-court dispute resolution. According to § 15a (1) 1 EGZPO, the *Länder*’s legislative authorities can make an attempt at out-of-court conciliation proceedings a condition for the bringing of an action. If no attempt is made, the action is to be dismissed as inadmissible. The attempt at out of court dispute resolution must have referred to the pending lawsuit. The *Länder* are allowed to restrict the scope of application of paragraph 1, but may not expand it beyond the domain of § 15a EGZPO. The mandatory out of court conciliation proceedings may be used for, among other things, proprietary disputes falling under the competence of the *Amtsgericht* (local court) with a monetary value of up to € 750 (§ 15a (1) 1, 1 EGZPO). Nevertheless, most of the *Länder*, with the exemption of Baden-Württemberg, have abolished mandatory out-of-court dispute resolution for these small matters, as in practice they often have only symbolic meaning.

The *Länder* have regulated the establishment and recognition of the out-of-court dispute resolution entities provided for by federal law in different ways. They often differ regarding their legal basis, the applicable Act and/or administrative ordinance, the entities’ authority and the pre-conditions for that authority, the mandatory character of the dispute resolution and/or the possibility to have the dispute resolution declared as enforceable. The different, and generally limited, quality requirements set down by the different *Länder* for these entities contrast with the Mediation Directive 2008/52/EC and Recommendation 98/257/EC.

¹⁷⁹ The translation of the term ‘außergerichtliche Gütestelle’ is based on the official English version of § 794 (1) 1 of the ZPO provided by the German BMJ, cf. http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p2628, last accessed on 31.07.2012.

¹⁸⁰ In contrast to the official English version of § 794 (1) 1 ZPO, § 204 (1) 4 BGB speaks of out-of-court conciliation bodies instead of out-of-court dispute resolution entities. For the official English version of the BGB, provided by the German BMJ, cf. http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0023, last accessed on 31.07.2012.

(b) Sector specific dispute resolution entities

The sector specific dispute resolution entities provided by the EU can be embedded in § 15a (3) EGZPO as well as in § 278 (5) 2 ZPO. As far as the *Länder* had implemented § 15a (1) 1, 1 EGZPO, the process in front of the dispute resolution entities provided for by the EU could replace litigation before an established or recognized out-of-court dispute resolution entity in cases of proprietary disputes with a monetary value of up to €750. An attempt at out of court conciliation before one of these sector specific entities is only mandatory in Baden-Württemberg.

Under § 278 (2) ZPO, in all first instance proceedings, oral hearings must precede an attempt at settling the litigation amicably through a conciliation hearing. Instead of this mandatory conciliation negotiation before the court according to § 278 (2), a court under § 278 (5) can propose out-of-court dispute resolution proceedings to the parties in appropriate cases. Each of the sector specific directives refers to the necessity or possibility of establishing out-of-court dispute resolution procedures for the settlement of disputes, Art 34 (1) of Universal Service Directive 2002/22/EC for the electronic communications sector; Art 83 (1) of Payment Service Directive 2007/64/EC; Art. 24 (1) of Consumer Credit Directive 2008/48/EC; Art. 19 (1) of the 3rd Postal Service Directive 2008/06/EC; Art. 53 (1) of MiFID 2004/39/EC; Art. 3 (13) of the Electricity Directive 2009/72/EC and Art. 3 (9) of the Natural Gas Directive 2009/73/EC. With regard to the scope of the MiFID and the Postal Service Directive the establishment of independent out-of-court schemes for the resolution of disputes is simply recommended to the Member States. Otherwise the Member States are obliged to establish out-of-court procedures. The authorities responsible for running the dispute resolution entities are not firmly determined. In principle Member States are free to decide whether they entrust the market supervisory agencies with this task, or whether they transfer it to another public agency or private body. In some directives one can find specific requirements concerning the independence of the agency, as in the Electricity and Natural Gas Directives. Here the Directive refers explicitly to ombudsmen or consumer organisations as examples. If an out-of-court settlement of a dispute between companies arises, the Electricity and Natural Gas Directives state that the task is to be transferred to the national regulatory authorities.

Similarly chaotic are the references to the design of the out-of-court dispute settlement schemes. One would assume regular references in the directives to Recommendation 98/257/EC. This is the case, albeit in different forms, for the Universal Service Directive 2002/22/EC (recital 47), MiFID 2004/39/EC (recital 61), Electricity Directive 2009/72/EC (Annex I (1) f), Natural Gas Directive 2009/73/EC (Annex I (1) f) and in the 3rd Postal Service Directive 2008/06/EC (recital 24). All other sector specific directives contain references to the design of the schemes which correspond to the seven guiding principles of Recommendation 98/257/EC. The Federal Republic of Germany does not pursue a uniform model. In the field of financial services and energy it has transferred the out-of-court dispute settlement schemes to the relevant trade associations, in the telecommunications sector it lies in the hands of the regulatory agency. Within the harmonised sectors the jurisprudence of the ECJ has to be considered. The seven principles of Recommendation 98/257/EC apply to all forms of out-of-court dispute settlement, independent of whether a given entity is established under the law of the federal government or one of the *Länder*. The Recommendation immediately provides clarification and guidance due to its quasi-binding nature as held by the ECJ in *Alassini*.¹⁸¹

Distance selling of financial services, consumer credit and payment services contracts: Under § 14 UKlaG the *Bundesbank* is entrusted with the out-of-court dispute settlement scheme for distance selling contracts for financial services, consumer credit and payment services contracts. For these three fields the BMJ has enacted rules of procedure in the form of the *Schlichtungsstellenverfahrensverordnung* (German Dispute Settlement Services Procedural

¹⁸¹ ECJ Case C-317/08, ECR 2010, I-2213 = Multimedia und Recht (MMR) 2010, 373 (*Rosalba Alassini/Telecom Italia SpA*).

Regulation, henceforth SchlichtVerfV). According to § 7 (1) SchlichtVerfV this competence is transferred to the respective trade associations: the *Bundesverband deutscher Banken* (Association of German Banks), the *Bundesverband Öffentlicher Banken Deutschlands* (Association of German Public Banks), the *Sparkassen- und Giroverband* (German Savings Bank Association) and the *Bundesverband der Deutschen Volksbanken und Raiffeisenbanken* (National Association of German Cooperative Banks). The transfer is only effective if the associations have created an appropriate entity and their rules of procedure have been authorised by the BMJ.¹⁸² The scheme has to correspond to the conditions in §§ 1-5 and 6 (1) SchlichtVerfV, apart from the following deviations regarding the requirements asked of the conciliators themselves:¹⁸³ The conciliators do not have to be employees of the *Bundesbank*; in the last three years before their appointment they must not have been employed by the association or a company belonging to the association; the appointment of conciliators does not involve the participation of the other associations; the appointment and the removal of conciliators is a matter for the responsible authority of the association.

Investment: § 143c (3) of the *Investmentgesetz* (German Investment Act, henceforth InvG) sets down that, in the event of disputes relating to provisions of the InvG, consumers may seek assistance from the dispute resolution entity established for the out-of-court settlement of consumer disputes by the *Bundesanstalt für Finanzdienstleistungsaufsicht* (Federal Financial Supervisory Authority). The *Bundesministerium der Finanzen* (Federal Ministry of Finance) may, according to § 143c (6), delegate the dispute resolution functions under subsection (3) to one or more appropriate private entities, if such private bodies are able to perform these functions more effectively. The out-of-court settlement competences were transferred to the *Bundesverband Investment and Asset Management* (German Federal Investment and Asset Management Association, henceforth BVI). The BVI is competent to handle the disputes of all companies that have agreed with its dispute resolution procedure. The BaFin remains competent for all disputes which do not fall under the responsibility of the BVI's scheme. The requirements on the procedure correspond largely to § 14 UKlaG.

Telecommunication: § 47a TKG enables the subscriber, in case of a conflict with a provider of telecommunications services for the public, to institute dispute resolution proceedings at the BNetzA. These proceedings can deal with violations of obligations regarding the §§ 43a, 45 to 46 (2) and § 84 TKG. The BNetzA provides a permanent dispute resolution entity for the initiation and conduct of the dispute resolution procedure. Decisions are made by a committee of conciliators. The committee consists of at least three conciliators, of which one is chairman and another is correspondent. Only employees of the BNetzA can be conciliators.

Gas and Electricity: With effect from 4.8.2011 the §§ 111a to 111c were inserted in the EnWG. The procedure to settle consumer complaints under the EnWG is structured on two levels: In case of complaints, "especially with regard to the conclusion of the contract or the quality of the businessperson's services (consumer complaints), which concern the connection to the supply network, the provision of energy as well as the measuring of energy", consumers must first address the concerned company. Consumers can seek the assistance of the conciliation body after having unsuccessfully tried to resolve the disputed matter with the utility once. The BMWi has, in agreement with the Federal Ministry for Consumer Protection (§ 111b (3) 1 EnWG), entrusted this competence to the newly established *Schlichtungsstelle Energie* (Consumer Conciliation Body for Energy) which is run by the relevant trade associations and the VZVB. The inclusion of § 111c EnWG serves to ensure that the conciliation procedure complements the abuse proceedings and supervisory activities undertaken by the BNetzA.

¹⁸² § 7 (2) SchlichtVerfV.

¹⁸³ The Federation of German Consumer Organisations (VZBV) has to be informed about the conciliators appointed. Within two months it can question their qualifications or impartialness, (§ 2 SchlichtVerfV).

3. Judicial Enforcement of Collective Consumer Rights/Interests

(a) Development and system of the collective legal redress

The legal enforcement of collective consumer rights in Germany is linked with the development of the action for injunction. Anchored in the UWG in 1965, after lengthy political debates in academia and in Parliament, actions for injunction were added to the former AGBG in 1976. Ever since then, they have been considered to be its leading export, in terms of legal redress models, in Europe and maybe beyond. The action for injunction is rooted deeply in the specific particularities of the federal structure of the organisation of law enforcement in Germany. Apart from Austria and Slovenia, none of the EU's Member States have delegated collective enforcement of the law on unfair commercial practises or AGB Law to trade or civil society associations. In all other Member States administrative regulatory agencies dominate.

The EU also increasingly characterises the structures of this body of laws which is reserved to the Member States. Whereas Directive 98/27/EC on actions for injunction had assigned a prominent role to civil society associations with regard to the enforcement of the collective consumer interest, as a consequence of Regulation 2006/2004/EC there was a shift away from consumer associations towards state agencies chosen by the Member States. This step led to the transformation of the BVL into a nation-wide consumer authority responsible also for cross-border disputes. The German legislative authority defended the German associational structure in the EU legislative procedure and secured the right to transfer competences to the VZBV and the *Wettbewerbszentrale* (German Centre for Protection against Unfair Competition). The residual responsibility of the BVL, justified by EU law, for cross-border law enforcement remains unaffected. According to the framework agreement concluded between the BVL and the associations the control competences are divided. Consumer associations look after infringements of AGB Law and unfair commercial practices (UWG), whereas the *Wettbewerbszentrale* has the competence for the UWG only.

Beyond the action for injunction, a considerable expansion of collective remedies has gradually taken place. Just before the adoption of the *Schuldrechtsmodernisierungsgesetz* (Act to Modernise the Law of Obligations, henceforth SchuModG), the BMJ inserted a paragraph – following the Austrian model – under which consumer organisations were offered the possibility to have individual consumers assign their claims to them in order to facilitate the organisations in introducing either a model claim (*Musterklage*) or a representative action (*Sammelklage*). Immediately after the adoption, there was a debate on when the provision of legal services to a third party by consumer organisations is ‘necessary in the interest of the consumer protection’ under § 3 (8) of the RBerG old version. The BGH¹⁸⁴ rejected the extremely conservative interpretation of the lower court, which wanted to restrict the rule to a few exceptional cases and has thus opened the way to both variants of law suits. With the suspension of the RBerG of 1935 it was made clear in § 8 (1) 4 of the *Rechtsdienstleistungsgesetz* (Legal Services Act, henceforth RDG) of 2007 that consumer organisations are allowed to provide legal services.¹⁸⁵ Furthermore, the amended § 79 (2) 3 ZPO authorises consumer centres and other publicly subsidised consumer associations to represent parties as attorneys-in-fact, where they are collecting claims of consumers in the context of their scope of responsibilities.

There are two further remarkable legislative acts from around the same time. After a debate spanning nearly 20 years, the grand reform of the UWG in 2004 saw the insertion in § 10 of the so-called “*Gewinnabschöpfungsanspruch*” (claim regarding the skimming or confiscation of unlawfully obtained profits). Consumer organisations, the *Wettbewerbszentrale* and some other organisations may lodge collective claims to profits made through deliberately unfair advertising. If awarded, the profits will flow back into the federal budget (*Bundshaushalt*). Around this time, the then

¹⁸⁴ BGHZ 170, 18 = NJW 2007, 593.

¹⁸⁵ Federal Law Gazette I 2007 p.2840.

Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz (Federal Ministry for Food, Agriculture and Consumer Protection, BMVEL, renamed BMELV in 2008) commissioned, on the initiative of Minister *Künast*, a report on collective actions that aimed at elaborating the options on the basis of an extensive and comparative examination. Early in the summer of 2004 the *Gesetzesvorschlag zur Regelung von Verbands-, Muster- und Gruppenklagen* (Proposal for an Act Governing Legal Actions taken by Associations, Test Cases and Group Proceedings, henceforth GVMuG) was presented by *Astrid Stadler* and the author of this opinion. The project remained purely academic. The red-green government did not take up the line of thought. Instead the BMJ, inspired by the mass claim (*Massenklage*) taken by approximately 17,000 aggrieved Telekom customers, elaborated the KapMuG which, after a short discussion, became effective for a period of five years. For the first time in Germany, there is the possibility to use a model case to clarify fundamental legal questions relevant to a group of pre-registered parties. In a second step, the parties to the proceedings can pursue their individual claims for damages. The expiry date has meanwhile been prolonged for two years to 30.10.2012.

On the European level the group proceedings have been on the agenda since 2006. In the realm of antitrust law the European Commission has presented a Green¹⁸⁶ and a White Paper¹⁸⁷ in 2006 and 2008, respectively, and even went as far as drafting a Directive on Damages Actions for Breach of EC antitrust rules, but this was withdrawn in October 2009. For consumer law there are two extensive studies which have been financed by the European Commission. However their scholarly value should be treated with caution, if only for methodological reasons. In 2008 the Commission presented a Green Paper, in which it outlines four potential options: no new EC action, cooperation between the Member States, a mix of policy instruments (including states improving alternative dispute resolution mechanisms and extending national small claims procedures to mass claims) and judicial collective redress procedures.¹⁸⁸ In October 2010 the Commissioners for Competition, Justice and Consumer Protection agreed on a common Action Plan, according to which a first genuine European draft should have been presented in 2011.¹⁸⁹ Little is heard of this anymore. Amongst academics there seems to be a sort of a minimum consensus which is based on two pillars: the introduction of an opt-in group action (opt-in *Gruppenklage*) and a legal action brought by representative associations to skim off illegally and unfairly obtained profits (*Verbands-Repräsentationsklage*). The Commission may well have similar ideas.

(b) Practical importance and problems

In 2007 the AGBG became 30 years old. On the occasion of this date the VZVB organised a celebration in Berlin, at which a representative of the former Ministry of Justice also gave a speech. The speaker roundly praised the successes of this body of law – without however embarking on a detailed inventory of the achievements. The study commissioned by the BMELV on the ‘Evaluation of the Efficiency of Collective Redress Mechanism’ only partly made up for this deficit. The authors *Meller-Hannich/Höland* had to examine actions for injunction in the AGB Law and the UWG with regard to their efficiency. The examination included the claim of confiscating unlawful profits (*Gewinnabschöpfungsanspruch*), as well as the representative action and model claim according to § 79 (2) 2, 3 ZPO and § 1 (3) 8 RBerG old version respectively. Thanks to this report, and the *Halfmeier/Rott/Fees* study on the efficiency of the KapMuG, there is extensive empirical data from which it is possible to draw a more precise picture of the German legislative landscape. Both reports

¹⁸⁶ COM (2005) 672 final and SEC (2005) 1732 working paper of the Commission’s Services.

¹⁸⁷ COM (2008) 165 final, 2.4. 2008 and SEC (2008) 404-406.

¹⁸⁸ Green Paper concerning collective law enforcement procedures for consumers COM (2008) 794 final.

¹⁸⁹ European Commission, Towards a Coherent European Approach to Collective Redress, Joint Information Note of Ms. Reding, Mr. Almunia, et Mr. Dali, SEC (2010) 1192, 5.10.2010.

are basically in favour of keeping the remedies examined. However, as is often the case with reports commissioned by public bodies, the more nuanced statements are found in the substantive analysis rather than in the conclusions.

The action for injunction is still the draught horse of collective redress in Germany. The most important actors are the *Wettbewerbszentrale* and the VZBV alongside a few active consumer organisations, particularly those in Berlin, Hamburg, NRW and Sachsen. Despite of the single protection mechanism, both fields of law should be considered separately. A comparative analysis of the collective redress provisions in the UWG illustrates Germany's and Austria's peculiar position. Lawyers appear too hasty in their willingness to draw conclusions on the efficiency of the system from the number of procedures and the network's density of courts. A comparative analysis raises doubts as to whether fines, as used in other Member States, would be a more efficient and effective tool than actions for injunction. The action for injunction in the AGB Law also suffers from the consumer organisations' lack of financial resources, which can hardly be reconciled with the obligation to guarantee an effective legal redress as imposed by the EU law. Further vulnerability lies in the completely failed attempt at interlocking injunctive and individual procedures. Hence in Poland decisions taken in abstract proceedings can have *erga omnes* effect.¹⁹⁰

The claim of confiscating or 'skimming off' of unlawful profits in § 10 UWG has unsurprisingly remained a mere paper tiger, as evidenced by the meagre nine decisions so far. The central problem lies in the burden of proving wrongful intent. Where the courts overcame this hurdle, they focused on the issue of whether the profits were made "to the detriment of" consumers in terms of § 10 UWG. Only once, in a procedure before the Stuttgart OLG,¹⁹¹ was an advertiser forced to hand over the profits gained – some €25,000 – to the federal budget. Leaving aside the judgement of the Hamm OLG,¹⁹² where one cannot exclude that the defendant wanted, permissibly, to benefit from a competitive advantage by producing in the Netherlands, there remain two interesting positive decisions of the Frankfurt OLG¹⁹³ to be considered. Awards made in such cases are generally small, and the EU would probably expect some improvements leading to more efficiency. In *Putz/Weber* the ECJ opened the way for coupling the action for injunctive of injunction to a remedial action (*Folgenbeseitigungsanspruch*) which does not require negligence.

The "*Einziehungsklage*", a special opt-in collective action, whereby consumer organisations can accumulate and lodge the claims of a large number of consumers may prove itself in individual cases. Whether the procedure before the Hamburg LG will be decided in favour of the consumer is currently not clear, since the Hamburg OLG is, in contrast to the BGH, willing to permit a supplementary interpretation contract which would undo the bundling. In any case, the management of the procedure requires an enormous organisational effort which has, as in Hamburg, to be financed by donations. A closer evaluation of the report of *Halfmeier/Rott/Fees* amplifies the impression that, without some basic changes to the procedural rules, this KapMUG mechanism might not be an appropriate model for collective redress. The German system of collective redress remains half-hearted, influenced by a mistrust of the increasingly prevalent American standards.

¹⁹⁰ AG *Trstenjak* 6.12.2011, Case C-472/10 (*Nemzeti*).

¹⁹¹ GRUR 2007, 435.

¹⁹² GRUR-RR 2008, 435.

¹⁹³ MMR 2009, 341; GRUR-RR 2010, 482.

(c) Consumer associations in the European civil procedural law

For contracts falling under its scope, Article 16 (1), (2) of the “Brussels I” Regulation, states that a consumer may bring proceedings where he is domiciled while any proceedings against a consumer may only be brought to the courts of the Member State in which the consumer is also domiciled. Art. 17 “Brussels I” Regulation protects the consumer against discriminatory jurisdiction clauses. As to collective redress, the “Brussels I” Regulation lacks the necessary teeth. It would appear necessary to extend the right in Art. 16 (1) to consumer organisations. Both the Regulation itself and the ECJ’s case law¹⁹⁴ seem opposed to this extension. The structural imbalance can only be eliminated if consumer organisations also have a privileged right to file a law suit. In case of criminal proceedings, Art. 5 (3) “Brussels I” Regulation applies in favour of the consumer organisations while, in case of contractual claims (for example of a wronged investor) the jurisdiction at the place of performance often leads to a foreign country, as per Art 5 (1) of the Regulation. In order to open the way for minor losses, where the idea of claims taken by associations has its place, the only possibility remains an extension of the Art. 16 (1) *de lege ferenda*.

4. Administrative Enforcement of Collective Interests

The liberalisation and privatisation of markets that were formerly dominated by state monopolies has led to the establishment of a completely new organisational structure. At the instigation of the EU the Member States established market supervisory agencies. In Germany, the BNetzA is responsible for energy and telecommunications, the BaFin for the financial market (banks and insurances), and the BVL for cross-border consumer litigations. The trend seems to be in favour of classical regulatory authorities, with the BNetzA and the BaFin *de facto* serving the protection of consumer concerns, even if this appears contrary to their self-conception and founding principles, respectively.

(a) Institutional consumer protection by the BaFin

The BaFin’s supervisory objectives do not revolve around consumer protection. Rather, it operates in the public interest.¹⁹⁵ In official statements it emphasizes that collective consumer protection is immersed in public interest and that it is not responsible for the special concerns of specific interest groups. But the contradictions increase in both a factual and legal way. The BaFin organises events with a special focus on out-of-court dispute settlement with regard to investment products. It is faced with a considerable number of individual complaints, which it must deal with whether it likes it or not. However, more weighty legal shifts have been caused by EU law, and also by the national legislative authority. The BaFin now controls the ‘General Rules of Conduct’ in §§ 31 et seqq. WpHG, which are based on Directive 2004/39/EC. These obligations also serve the collective interests of consumers, and they could even gain importance with regard to the protection of individuals. In so far, certain supervisory tasks are influenced by consumer law.

The German legislative authority continues to blur the boundaries between public and consumer concerns. The VSchDG,¹⁹⁶ implementing Regulation EC/2006/2004 of 27 October 2004, denominates the BaFin as the responsible agency according to § 2 (1) of the law. The BaFin shall contribute to the smooth functioning of the internal market, the quality and consistency of enforcement of the laws that protect consumers’ interests and the monitoring of the protection of consumers’ economic interests. It

¹⁹⁴ ECJ Case C-89/91, ECR 1993, I-139 = EuZW 1993, 224 (*Shearson Lehmann Hutton*), ECJ Case C-167/00, ECR 2002, I-8111 = NJW 2002, 3617 (*VKI./Henkel*).

¹⁹⁵ Cf. § 4 (4) FinDAG.

¹⁹⁶ Act of 21.12.2006, Federal Law Gazette I p. 3367, last amended by Art. 12 act of 24.11.2011 I 2302.

shall, according to Art. 4 (3) of the Regulation EC/2006/2004, “have the investigation and enforcement powers necessary for the application of this Regulation.” The Annex of the Regulation lists the ‘laws that protect consumers’ interests’ as including all the various Directives on consumer law. This is done in the interest of the BaFin, specifically so as to avoid transferring cross-border competences to the BVL, or indirectly to the VZBV. In the national context the BaFin operates in the public interest, but in the cross-border context it acts as a consumer protection agency.

The actual inclusion of consumers or their representatives in the decision procedures of the BaFin is still relatively weak. Consumer organisations participate in the BaFin’s Advisory Board, under § 8 (2) 3 of the *Finanzdienstleistungsaufsichtsgesetz* (German Act Establishing the Federal Financial Supervisory Authority, henceforth FinDAG), a panel which advises the BaFin on issues related to its supervisory duties and assists the BaFin in the further development of supervisory principles, § 8 (1) 1 FinDAG. In the Administrative Council, which monitors the management of the BaFin, there is no representative of the consumer interests. The private investor has, as of yet, no right to seek an administrative review against the BaFin¹⁹⁷ and in principle no claim for damages in case of a wrong decision emanating from it. The criteria for the existence of a subjective right are to be gathered from the EU law. The ECJ decision in *Peter Paul*¹⁹⁸ established high hurdles, which, however, have been reconsidered in light of the adoption of the Directive 2004/39/EC.

(b) Institutional consumer protection by the BNetzA

At first glance the work of the BNetzA is, in contrast to that of the BaFin, clearly consumer-oriented. The BNetzA has a large offer of services that seem to aim at the consumer: the “consumer telecommunications services”, the “consumer electricity/gas services”, the “consumer postal services”. It provides general information concerning the telecommunications market and offers, on the basis of the TKG, help to end customers who have difficulties with their telecommunications services provider. Consumers can report an abuse of telephone numbers and can ask the BNetzA to pursue the case. § 2 (2) 1 TKG shows that the BNetzA has to take consumer concerns into consideration as part of its regulatory activity: “Objectives of the regulation are the protection of the user, and especially the consumer interests in the field of telecommunications and the protection of the secrecy of telecommunications [...]”.

The BNetzA enforces European legislation that is designed to serve the consumer protection, for example the Roaming Regulation of 2007¹⁹⁹. The BNetzA is, according to Art. 7 (1) in conjunction with § 126 (1) TKG, obliged to create a high level of consumer protection²⁰⁰ with regard to the use of mobile communications networks within the EU. The Roaming Regulation II²⁰¹ aims in addition to reinforce consumer protection. It will regulate the fee for text messages which have been sent from beyond the EU to a public telecommunications network situated inside the EU, as well as wholesale prices for data connections of the mobile Internet.

However the BNetzA approaches consumer protection only as part of protecting the wider public interest. Although it is problematic from the point of view of European law, it is widely understood that consumers cannot enforce their rights against the BNetzA. Internal administrative instructions of the European Commission and of the European Regulators Group for electronic communications networks and services (BEREC) are implemented by the BNetzA. The BNetzA’s decisions are outside

¹⁹⁷ Cf. Administrative Court (VG) Frankfurt NJW 2011, 2747 et seqq.

¹⁹⁸ ECJ Case C-222/02, ECR 2004, I-9425 = NJW 2004, 3479 (*Paul*).

¹⁹⁹ Regulation (EC) 717/2007, Abl. L 171/32 of 29.6.2007.

²⁰⁰ Cf. Art. 1 (2) of the regulation and its recital 38.

²⁰¹ Regulation (EC) 5454/2009, Abl. L 167/12 of 29.6.2009.

the scope of judicial review.²⁰² This gap concerning legal redress is not closed by the BNetzA's task of settling disputes.

The BNetzA considers itself to be an intermediary between companies and end customers. Though the homepage of the BNetzA speaks of *consumer* services, this includes not only consumers in the classic sense of the term but also SMEs. The same applies to the abuse of telephone numbers. In taking decisions it takes into consideration the advice of consumer associations, § 45g (3) TKG (requirements on the systems and procedures to investigate the fee of rated connections which depend on the volume) and § 66b (4) 1 TKG (requirements on a price announcement).

²⁰² *Durner* Veröffentlichung der Vereinigung der Deutschen Staatsrechtslehrer (VVDSStRL) 70, p. 401, 410.

VI. Future of Consumer Law – Plea for a Movable System

This report aims at delivering food for thought. Thus the focus lies in outlining the guidelines of such a model and on formulating the principles which illustrate the function and scope of a proposed movable system.

1. The Scene

The static, cosy consumer protection law of the 1970s and '80s belongs to the past. The usefulness of the consumer – first for the Internal Market and later for globalisation – is deeply entrenched in the substance and the self-conception of this young field of law. The distortions manifest themselves in the extension of the concept of the consumer. The owner of a yacht²⁰³ cannot be compared to an electricity customer who cannot pay his bill and whose provider turns off the power. The dynamic Internet consumer, multilingual and linguistically competent, may be able to know and enforce his rights, even up to the point of abusing the legal position granted to him. The spectrum of the consumer ranges from the small businessperson – the customer – to the vulnerable consumer. One field of law can be prototypically assigned to every consumer: to the responsible, circumspect consumer the Internet sale; to the vulnerable consumer the universal services. But at the same time the responsible, circumspect consumer can be found in the universal services market and the vulnerable consumer completing sales over the Internet.

The recourse to legal redress darkens the ideal world of a protection-related law concept, in which the courts are not only open to the responsible consumer but also have a nurturing and protective role, while out-of-court dispute settlement schemes are available to those who cannot find their way to the court. Fifty years after the pro-consumer message of President Kennedy,²⁰⁴ the consumer disposes of a bundle of remedies in theory, which stretch beyond the choice between a court and an out-of-court dispute resolution entity. Collective legal redress exists alongside individual redress, while administrative and judicial routes also coexist. The once-familiar assignments fade away. Amongst modern consumers all types of people are to be found, the client/customer, the responsible, the circumspect and the vulnerable consumer – sometimes that these characteristics can be found in the same person. Intermediary institutions have become more important due to this shift: consumer organisations and trade associations seek to gather the interests of the heterogeneous collective. Meanwhile, there are the courts that try to deal with the cases and state agencies, which in spite of a possibly restricted understanding of law, no longer limit themselves merely to securing the functioning of a market.

2. The Hypothesis

The blurring contours of the notion of the consumer have led, at an early stage, to the opinion that the BGB is more appropriate to filter out – by means of good faith – those who 'really' need protection. Should this idea be seriously considered, the abolition of 'notion of the consumer' would lead to the isolation of the BGB from the changing economic realities (the consumer society), political realities (Europeanization) and social realities (the transformation of the welfare state). On the other hand, each concept has to be able to adapt to the continuously changing paradigms of the notion of the consumer and the substance of the consumer law. The solution could lie in a *mobile system of rules and conceptual descriptions*, by means of which it would be possible to react specifically to the different

²⁰³ ECJ, Case C-99/96, ECR 1999 I-2799 = EuZW 1999, 727 (*Mietz*).

²⁰⁴ See <http://www.presidency.ucsb.edu/ws/?pid=9108>.

types of consumers. Such a system does not exclude the development of a logical coherent consumer law.

3. The Content

The determination of the personal scope of application represents the starting point. The present consumer concept has to be modified in two respects: it needs an extension with regard to small and very small businessperson, as he is not, or perhaps only with some reservations, different from the responsible consumer. The careful, but as yet incomplete, attempts to define the customer in the field of telecommunications, energy and financial services law offer some initial clues. But this upper layer of the consumer concept has to be realigned. The concept of the vulnerable consumer describes the tasks which are concerned, without making clear whether the particular vulnerability consists of economic or social weakness or both.

The fixation of the substantive scope of application requires an analysis of the law on service contracts that goes beyond the distinction, typical for the BGB, between service contracts and contracts to manufacture.²⁰⁵ A retreat to the safe haven of the sales contract no longer satisfies the economic realities. The DCFR had set signs, which however were not introduced in the political process. What is necessary is an inclusion of the rules concerning the Internet, postal services, financial services and transportation. Similarly, services of a traditionally social nature are increasingly exposed to economization, such as health and nursing services, and clearly show stronger links to consumer law. The whole law on service contracts is characterized by a situation of conflict between public and private rules. Currently private law rules are considered part of the sector-specific market functioning rules. The challenge lies in identifying the rules of private law in the individual sectors and interconnecting them. This is the only way to recognize the links between the sectors and to formulate principles which apply generally to a modern consumer law on service contracts, as proposed by the DCFR. The concept of universal services offers first clues for a multi-sectoral penetration of the matter.

The right to legal redress represents a genuine part of modern consumer law. The materialisation and the creation of procedures with regard to the substantive and procedural consumer law go side by side. The previous discussion focused on the traditional sample of individual redress by the courts. Beyond the established action for injunction, only collective legal redress attracted attention, mostly in form of an instinctive defensiveness. In this vein, the increasing forms of out-of-court dispute resolution schemes have been neglected. So too has the emerging field of administrative enforcement of consumer law, especially with regard to its private role in that this route of recourse remains closed to individuals. The retreat to the ZPO as the determining factor in matters of legal redress would only be possible at the price of the exclusion of all those fields of consumer law which are characterised by a particularly pronounced dynamic of the law (and the economy). The multiple splitting in individual/collective, judicial/extrajudicial, judicial/administrative is a faithful reflection of the divergent substantive consumer law. The increasingly important role of cross-border law enforcement only deepens the complexity.

Individual and collective remedies remain carefully sorted as the action for injunction in the UWG and AGB Law powerfully demonstrates. State-run market supervisory agencies, which intervene more and more often in law enforcement, have no rights to act before civil courts (!) in favour of consumers or to conclude out-of-court settlements on behalf of third parties. In this regard, there is a contrast with, and perhaps something to learn from, common law countries. Private law enforcement and administrative law enforcement remain different worlds. In contrast to the United Kingdom, civil

²⁰⁵ In contrast to the service contract featured in the §§ 611 et seqq. BGB, the contract to produce a work covered by the §§ 631 et seqq. BGB requires the party to bring about a particular result, e.g. to paint a portrait or to transport persons over a specified distance.

society and trade associations in Germany cannot force a state-run investigation. There is nearly no access to the information aggregated by the market supervisory agencies for the private individual and/or collective law enforcement. The out-of-court dispute resolution entities individualise the legal conflicts and make a clarification of collective legal questions impossible – even where it is urgently needed to ensure legal security. It is necessary to create links between these different fields and to give up traditional ways of thinking.

4. The Confrontation

The idea of a movable redress system is based on the idea that different rights and obligations can be assigned to different types of consumers. It picks up the considerations of *Th. Wilhelmsson*²⁰⁶ who distinguishes between six ‘welfarist directions’ in modern contract law to which one can assign different targets and instruments. Transferred to the framework of the notion of the consumer, there is a differentiation between the market-rational (1st variant) or the market-rectifying (2nd variant) welfare on the one hand; and the internal/external redistributing welfare (3rd/4th variant), that includes the need-orientation (5th variant), on the other. The first of these corresponds to the prototype of the responsible customer or consumer as one who adapts his conduct to the market, and trusts in the legislative authority’s measures aimed at improving the function of the market mechanism. The second relates to the prototype of the vulnerable consumer, which depends on a social redistribution to his favour, if he wants to participate to any great extent in economic and social life. This typology cannot be considered as rigid, but as permeable and dependent on the situation. The 6th variant has a special position, in that it covers other interests than those of the contract parties. This model is embodied by the consumer who does not take decisions based purely on price, but who focuses on aspects like the environment, the sustainable development or the human rights (for example the consideration of production conditions).

The interaction of national and EU law makes a first refinement of the structures possible. The concept of the informed consumer, as vehemently favoured by the EU law, can be found in market-rational and in market-rectifying welfare-models. The responsible consumer can be assigned to the market-rational model. The disclosure of information enables this group of consumers to exercise their rights. The circumspect consumer trusts in market-rectifying mechanisms, typically by being granted a minimum level of fairness by the legal system through mandatory rules that are only effective in one direction. Here EU law plays a dominant role and characterizes the national legal system usually by means of mandatory directives. The vulnerable consumer gradually appears in EU law and in national law. The national law permits corrections by means of the application of law through national courts in individual cases, but structurally asks the consumer, whenever he falls out of the economic system, to rely on social security schemes. A European social security scheme in the form of direct financial support does not exist. However, EU law defines a framework for the vulnerable consumer, beginning with status-related antidiscrimination rules, which aims at collective fairness but also works towards redistribution of wealth and opportunities in favour of the discriminated. The rules concerning universal services, which guarantee access to all participants, also belong to this complex. The vulnerability results from the economic and social necessity of access. Access for everybody represents a form of redistribution, which the providers have to face. On the last step stand those who depend on external financial aid to maintain their access.

The consumer-citizen, who *would like to* or *has* to contribute to the realisation of public values, does not represent the concept upon which the BGB is built. The phrase ‘would like to’ would assume that the consumer receives the necessary information about environmental sustainability or the conditions of production in a form that enables him to make a fact-based decision. Neither the law on unfair commercial practises nor pre-contractual obligations to inform, independent of their origin, represent

²⁰⁶ ELJ (10) 2004, 712.

at present a suitable legal framework. Even for the responsible consumer it is difficult to battle his way through the jungle of information. Reorientation of private law is arriving quietly, but the signs are becoming more and more visible. It amounts to the constitutionalisation of private law, and not only by way of the Charter of Fundamental Rights. The renewed discussion of the European economic constitution since the Lisbon Treaty, sees the EU grapple with a 'constitution' built around its own autonomous values. If decisions of national supreme courts and the ECJ are anything to go by, consumers and consumer law will once again have a pioneering role to play in the resolution of the new legal order's fundamental priorities.

5. The Differentiation in Substantive Law

The emerging differentiation, between the responsible consumer (including the small and very small businessperson) on the one hand and the vulnerable consumer on the other, is based on the idea that different orders of values can be assigned to the different categories. The responsible consumer, including the case of the client/small businessperson, requires a legal model which does not primarily guarantee social justice through redistribution, but especially ensures access to the market, to enable him to benefit from the advantages of the plethora of products and services on offer in an expanded European or global environment – a concept I call 'access justice' (*Zugangsgerechtigkeit*). In contrast to this, the vulnerable consumer is the addressee of social justice per se. As an individual, and indeed the weaker party on the market, he needs the protection of the legal system. Overall this is possible at the price of redistribution between different types of consumers, but also between consumers and companies.

The differentiated system of values represents the starting point for the establishment of a movable system of consumer protection. Both the responsible and circumspect consumers are more autonomous than the vulnerable consumer. The extent of the personal responsibility depends incrementally on the extent of autonomy, likewise the necessary and legitimate intervention by the state/the EU in contractual relations to guarantee access or social justice respectively. The burden on the consumer manifests itself in an obligation to use the information provided to him and, if necessary, to inform the business person of discernible deficits. Depending on the type of consumer, this burden is easier to bear. A higher degree of individual responsibility and self-reliance can be required from the responsible consumer than from the vulnerable consumer. Such a differentiation permits a flexible application of the abuse of rights doctrine – in line *Messner* where the ECJ recognised that national law may restrict rights from being used in a manner incompatible with important principles of civil law, such as good faith or unjust enrichment.

The ebbing and flowing of the responsibility of the consumer corresponds to the rising and falling responsibility of the businessperson. Where the individual responsibility of the consumer is higher, also the businessperson can look after himself. The situation is different where the consumer is not, or only in a limited way, able to fulfil the tasks that have been theoretically attributed to him by the legal system. The EU as a quasi-state cannot compensate for this deficit. It only can provide a social and legal framework that has to be completed by the Member States together with the companies. Entirely in line with the *Bürgschaft* decision of the BVerfG, the ECJ refers in *Viking* and *Laval* to the increased social responsibility of economically powerful institutions. Just as labour unions or sport associations, as parts of the civil society, are legally responsible for the economic impact of their activities on the fundamental freedoms, so companies, in further developing this line of case law, have to pursue their social obligations – especially when a structural dependence exists, as it is the case for the providers of universal services. In a society and an economy moving beyond the nation state, companies see their economic and social responsibilities growing in line with their operations. The responsibility logic, justified by the Fundamental Freedoms and expanded by the Charter of Fundamental Rights, represents an essential part of EU law and is formalised by references to it in the recitals of the directives. So the route to an interpretation of private rules in conformity with the Charter is principally open. *Habermas* created the philosophic and legal-theoretical bases for a horizontal mutual

linking of moral and positive law beyond the state. The doctrinal consequences have still to be developed.

In substantive law the distinction between different types of consumers leads to differentiated scopes and instruments of protection. For the responsible consumer, a reasonably prepared package of information, which is characterised by quality and not quantity, represents a central component of decision-making. For the vulnerable consumer the reversal of the information burden is not an effective protection mechanism. For a long time the written formalities for concluding contracts constituted an important protection for this group of people. With the expansion of the Internet and the waves of liberalisation initiated by the EU, this barrier does not exist anymore. The right of withdrawal serves the clever consumer, who can still withdraw from the contract after having made a price comparison. As regards the law on universal services, the right to switch between providers takes this function. The *Heiniger*-saga shows how unsuitable the right of withdrawal is in helping the vulnerable consumer. The right to change contractual partners does not help him, since it does not free him from being bound to the credit. A wider reproduction of mechanisms already present in the law on universal services is needed. The cornerstones are composed of the right to access and a minimum standard of service applicable to everybody, even when the consumer is unable to pay for the service. However, as contracts today are so highly standardized with regard to information obligations it would be better if the AGB control, as it is still designed for the circumspect consumer, were replaced by sample contracts that have been subject to prior checks. For this purpose a correction of the specifications made by the EU would be necessary.

In a movable system of consumer protection, the ability to consider diverging interests plays a central role, especially when higher-ranking rights, such as the Fundamental Freedoms, the *Grundgesetz* (German Constitution (GG)) and the Charter of Fundamental Rights, flow into the evaluation. The BVerfG has pointed the way in its *Bürgschaft* decision, while the ECJ has already chosen a similar path in *Gysbrechts*, *Alassini* and *Test Achats*.

By recourse to the types of the welfare state defined by *Th. Wilhelmsson*, a system becomes apparent, which is hereby prototypically transferred to the Internet sale and universal services contracts.

	Instruments Internet sale	Instruments Universal Service Directive	Type of consumer	Canon of obligations Consumer	Canon of obligations Business Man	MS / EU
Market-rational	Information Right to withdrawal Transparency	Information Change of provider Transparency	Responsible Consumer / Customer	Notification Directives 90/314 + 99/44	Low	EU
Market-rectifying	AGB-control Ex officio Compensation without fault	Standardisation through the obligations to inform	Responsible / Customer Circumspect	Harm reduction	Middle	EU
Internal-distributive	Control of collateral agreement on price	Price control Continuity	Circumspect/ Vulnerable		Middle	EU Art. 4 (2) 93/13 2009/7 2 + 73
External distributive		Access	Circumspect Vulnerable		High	EU
Need		Financial aids	Vulnerable		High	MS
Public values Sustainability Fundamental / Human Rights			Ecological Consumer		Ecological Business Man	EU / MS

6. The Differentiation with regard to Legal Redress

The differentiation of the addressees sheds new light on the arrangement of legal redress. Whereas substantive consumer law is arranged and redesigned with the EU as the driving force, the prerogative to act in the field of legal recourse is principally left to the Member States. The guiding model of the individualistic and responsible consumer that exercises his rights and, if necessary, goes to court, remained largely untouched in Germany. In the model of the movable system the vulnerable consumer has to address an out-of-court dispute settlement body. The state is, in the form of state-run market supervisory agencies or the BVL, responsible for the functioning of the dispute settlement bodies in the framework of the harmonised substantive law. Although English consumer law does not have the best reputation, it could serve Germany as an example for the design of the dispute settlement entities under state responsibility. From a cross-border point of view they represent the only realistic variant of prosecution, at least for Internet sales of small value.

The action for injunction, as the single most diffused and recognised form of collective legal redress, is used primarily for the benefit of the market, and only secondarily for that of the individual consumer. The consumer organisations and the *Wettbewerbszentrale* thus perform state-like competences. They shall ensure the functioning of the markets which is endangered by unfair and misleading commercial practices or by illegal AGB clauses, respectively. Even an extension of the action for injunction to the elimination of consequential effects would not alter the merits of this approach. The latter would clean up the market, comparable to a fine in the law on unfair commercial practises or in the telecommunications or energy sectors. On this first level, the distinction between the types of consumers plays only partly a role.

The situation is different, if one focuses on the target of ensuring *consumer protection* pursued by the action for injunction. The action for injunction as chilling or dissuasive mechanism is especially of use to the responsible and circumspect consumer, since it puts emphasis on the correctness of information contained in advertisements. But even here the lacking broad effect or the absence of any interlinking between the law on unfair commercial practises and AGB Law considerably reduces the consumer protecting added value.²⁰⁷ Effective means of legal redress look different. Measures which stimulate sales and market growth address primarily the vulnerable consumer. More problems arise regarding the waves of liberalisation so powerfully pushed by the EU law and the ECJ. Insofar as they do not serve protectionist goals, however, Member States are not precluded from applying national rules to protect vulnerable consumers. A consumer policy capable of tackling this problem, while combining collective consumer protection, the law on unfair commercial practises and contract law, has yet to be developed.

The lack of a possibility to free oneself, in an efficient and effective way, of the consequences of an unfair/misleading effect or of an invalid contract clause weakens the consumers' collective interests. This will remain the case until consumers can lay claim to the recover illegally gained profits. The claim of confiscating excess profits in the UWG has only a symbolic function. The dual functionality of the action for injunction combined with the claim to remedial action is reflected in its equally dual legal nature. Art. 47 of the Charter requires, throughout the scope of EU law, that there be effective means of legal redress, both in institutional terms as well as in the concrete arrangement of the remedies.

The initial stage of collective legal redress beyond the action for injunction can clearly be seen in looking at the heterogeneous complex formed by the *Einziehungsklage* (opt-in collective action), the model claim and the action for damages through the lenses of the differentiated notion of consumers. Prototypically the KapMuG represents a model that appeals to individual responsibility and self-reliance of the consumer who is able to articulate his interests and register his claims promptly. This model of a collective of individuals will, by its very nature, not reach the vulnerable consumer. Another authority is needed. From a German point of view, consumer organisations shall have to take up the slack. Under the KapMuG they have no legal standing and, even if they did, they could not guarantee that all consumers would be reached by the opt-in mechanism. To really protect this group, there only remains the much-maligned opt-out solution. The Nordic countries restricted legal standings, if they provide an opt-out solution at all, to the state-run consumer agencies in order to prevent abuses.

The only remedy in the applicable law which might be appropriate to include the interests of the vulnerable consumers, is the opt-in collective action (*Einziehungsklage*), less in the form of a collective lawsuit than in form of a model action, as for example *Quelle* has shown. However, this type of claim remains merely symbolic with regard to its effects, since it only has – at best – a factual, but certainly no broad legal effect. Theoretically there are also the state-run supervisory agencies, that is to say the BaFin, the BNetzA or the BVL, which could step in to protect the vulnerable consumer.

²⁰⁷ AG Trstenjak, 29.11.2011, Case C-453/10 (*Pereničová et. al.*).

However, the possible consequences would represent a ‘revolution in law’. State agencies would have to combine a) this consumer protecting function with their other task of b) ensuring the functioning of the market more generally. They would have legal standing and so be able to enforce the individual or collectively bundled interests of consumers in the course of negotiations with companies or, if necessary, before civil courts in cooperation with consumer associations. EU law continues to pressure Member States to redesign their state bodies as dual-agencies in order to take up this dual protection function (*doppelte Schutzfunktion*). Such a legal world cannot be imagined at present, even if the Nordic countries and the United Kingdom have already taken strides in this direction.

In contrast to substantive law, the movable system of legal redress is characterized by a set of open flanks, which cannot be safeguarded without interventions in the legal system. These revolve around the competences of state-run supervisory agencies, but also around the interaction between the state agencies and the consumer associations, the organisation of participation and influence, the division of (and the access to) information, the mutual taking over of responsibility for the responsible and vulnerable consumers, not only in the national, but also in the cross-border field.

	Individual	Collective	Judicial individual / collective		Administrative individual/institutional/collective		
Responsible Customer	X	Opt-in Self-organisation	X	Self-organisation		X	
Circumspect	X	Consumer organisation	X	Consumer Organisation		X	
Vulnerable		Opt-out Consumer Organisation	Out of court dispute settlement		X	X	X

VII. Theses

1. *Outsourcing*: The integration of consumer law into the BGB has succeeded only in a formal way. The dynamic of consumer law cannot be harmonized with the static of the BGB. Consumer law presents itself as a restless field of law, subjected to continuous changes, which furthermore do not emerge from the centre of the German law or German politics, but which ‘invade’ Germany via the European Union. Thus an outsourcing of the consumer law of the BGB is necessary and desirable. A number of Member States have agreed on this codification path, for example Austria with the *Konsumentenschutzgesetz* (Consumer Protection Act), the Nordic countries Denmark, Finland and Sweden, as well as the Romanic countries France, Italy, Portugal and Spain. Only the Netherlands have, like Germany, integrated consumer law in the *Wetboek* as part of a long-running process of democratic discussion leading to a fundamental reform of the code. As far as the Member States dispose of their own consumer protection law, they restrict themselves to a compilation of rules. This is not sufficient. The petition for an outsourcing of consumer law of the BGB includes the necessity of a theoretical examination of the core issues of consumer law and an interlinking of the consumer law with the BGB. Such a venture would make it possible to better determine the significance of consumer law and to formulate a pro-active consumer policy that is met with great interest in Europe.
2. *Independence*: The social character of consumer law can clearly be made more visible and easier to maintain. Rules influenced by public law can be more easily integrated; modern forms of the law on service contracts, which are found in various different laws, can instead be united in a special law; procedural rules on the arrangement of the individual, the collective, the judicial or the administrative legal redress can be connected with substantive rules of consumer law.
3. *Movable system*: The blurring contours of the consumer concept have led at an early stage to the opinion that the BGB should filter out – by means of good faith – those who ‘really’ need protection. Should this idea be seriously considered, the abolition of the notion of the consumer would lead to an isolation of the BGB from the changing economic realities (consumer society), political realities (Europeanization) and social realities (transformation of the welfare state). This would amount to a violation of the EU law’s constitutional task, Art. 3, 6, 12, 169 TFEU. Conversely, each of these notions must be able to react to the continuously changing paradigms of the consumer sphere and the substance of the consumer law. The solution could lie in a *movable system of rules* and *conceptual descriptions*, that are capable of reacting specifically to the different consumer images.
4. *The double consumer concept*: The current consumer concept has to be modified in two respects: it needs an extension with regard to the small or very small businessperson (for example start up firms), which does not differ from the responsible consumer or, if he does, it is only due to some reservations. The careful, but as yet incomplete, attempts to define the customer in the field of telecommunications, energy and financial services law, and the passenger in transport law, offer us some initial hints. But this upper layer of the consumer concept has to be realigned. The concept of the vulnerable consumer describes the relevant competences, but without making clear whether the particular vulnerability consists of an economic or social weakness or both.
5. *Sales and services*: The retreat to the safe haven of sales contracts no longer satisfies the economic realities. What is necessary is an inclusion of the rules concerning energy, telecommunications, the Internet, postal services, financial services and transportation. Furthermore, services of a traditionally social nature are increasingly exposed to economization, such as health and nursing services, and thus show stronger links to consumer law. The entire branch of law on service contracts is characterized by a situation of conflict between public and private rules. Private law rules are considered as belonging to the sector specific market functioning provisions. The challenge lies in identifying and then interconnecting the different private law rules across the individual sectors. This is the only way to recognize the links between the sectors and to formulate

principles which could apply generally as part of a modern consumer law, as proposed by the DCFR. The concept of universal services offers first clues for a multi-sectoral penetration of the matter.

6. *Individual/collective or judicial/administrative legal redress, respectively*: The materialisation and the creation of procedures with regard to substantive and procedural consumer law go side by side, Art. 47 Charter of Fundamental Rights. The previous discussion is focused on the traditional idea of the individual redress by the courts. In this vein, the increasing forms of out-of-court dispute settlement schemes have been neglected. So too has the emerging field of administrative enforcement of consumer law, especially with regard to its private role in that this route of recourse remains closed to individuals. The retreat to the ZPO as the determining factor in matters of legal redress would only be possible at the price of the exclusion of all those fields of consumer law which are characterised by a particularly pronounced dynamic of the law (and the economy). The multiple splitting in individual/collective, judicial/extrajudicial, judicial/administrative is a faithful reflection of the divergent substantive consumer law. The increasingly important role of cross-border law enforcement deepens the complexity. Individual and collective remedies remain carefully sorted, as the action for injunction in the UWG and AGB Law powerfully demonstrates. State-run market supervisory agencies, which intervene more and more often in law enforcement, have no rights to act before civil courts (!) in favour of consumers or to conclude out of court settlements on behalf of third parties. In this regard, there is a contrast with, and perhaps something to learn from, common law countries. Private law enforcement and administrative law enforcement remain different worlds. In contrast to the United Kingdom, civil society and trade associations in Germany cannot force a state-run investigation. There is nearly no access to the information aggregated by the market supervisory agencies for the private individual and/or collective law enforcement. The out-of-court dispute settlement bodies individualise legal conflicts and make a clarification of collective legal questions impossible – even where it is urgently needed to ensure legal security. It is necessary to establish links between these different fields and to give up traditional ways of thinking.
7. *Structure and conception of the movable system*: The idea of a movable protection system is based on the idea that different rights and obligations can be assigned to different types of consumers. It picks up the considerations of *Th. Wilhelmsson* who distinguishes between six ‘welfarist directions’ in modern contract law to which one can assign different targets and instruments. Transferred to the framework of the notion of the consumer, there is a differentiation between the market-rational (1st variant) or the market-rectifying (2nd variant) welfare on the one hand; and the internal/external redistributing welfare (3rd/4th variant), that includes the need-orientation (5th variant), on the other. The first of these corresponds to the prototype of the responsible customer or consumer as one who adapts his conduct to the market, and trusts in the legislative authority’s measures aimed at improving the function of the market mechanism. The second relates to the prototype of the vulnerable consumer, which depends on a social redistribution to his favour, if he wants to participate to any great extent in economic and social life. This typology cannot be considered as rigid, but as permeable and context-specific.
8. *Differentiated systems of values*: The emerging differentiation between the responsible consumer (includes the small and the very small businessperson) and the vulnerable consumer, is based on the idea that different values can be assigned to the members of the groups. The responsible consumer, the customer/businessperson included (depending on the situation), requires a legal model which does not primarily guarantee social justice through redistribution, but especially ensures access to the market, to enable him to benefit from the advantages of the plethora of products and services on offer in an expanded European or global environment – what I call ‘access justice’. In contrast to this, the vulnerable consumer is the addressee of social justice per se, in the EU context of the social market economy, Art. 3 (3) TEU. As an individual, and the weaker party on the market, he needs the protection of the legal system. Overall, this is possible at

the price of redistribution between the different types of consumers, but also between the consumers and the companies.

9. *Differentiated responsibilities*: The differentiated system of values represents the starting point for the establishment of a movable system of the consumer protection. Both the responsible and circumspect consumers are more autonomous than the vulnerable consumer. The extent of the personal responsibility depends incrementally on the extent of autonomy, likewise the necessary and legitimate intervention by the state/the EU in contractual relations to guarantee access or social justice respectively. The burden on the consumer manifests itself in an obligation to use the information provided to him and, if necessary, to inform the businessperson of discernible deficits. Depending on the type of consumer, this burden is easier to bear. From the responsible consumer a higher degree of individual responsibility and self-reliance can be required than from the vulnerable consumer. Such a differentiation also permits a flexible application of the abuse of rights doctrine – in line with *Messner* where the ECJ recognised that the national law may restrict rights from being used in a manner incompatible with important principles of civil law, such as good faith or unjust enrichment. The ebbing and flowing of the responsibility of the consumer corresponds to the rising and falling responsibility of the businessperson. Where the individual responsibility of the consumer is higher, also the businessperson can look after himself. The situation is different where the consumer is not, or only in a limited way, able to fulfil the competences that have been theoretically attributed to him by the legal system. The EU as a quasi-state cannot compensate for this deficit. It only can provide a social and legal framework that has to be completed by the Member States together with the companies. Entirely in line with the *Bürgschaft* decision of the BVerfG, the ECJ refers in *Viking* and *Laval* to the increased social responsibility of economically powerful institutions. Just as labour unions or sport associations, as parts of the civil society, are legally responsible for the economic impact of their activities on the fundamental freedoms, so companies, in further developing this line of case law, have to pursue their social obligations – especially when a structural dependence exists, as it is the case for the providers of universal services. The scope of the horizontal effect not only of civil rights and liberties, but also of the fundamental rights, on companies is on trial.
10. *Differentiated remedies*: For the responsible consumer, a reasonably prepared package of information, which is characterised by quality and not quantity, represents a central component to make a decision. For the vulnerable consumer the reversal of the information burden is not an effective protection mechanism. For them written formalities for concluding contracts constituted an important protection. The right of withdrawal serves the clever consumer, who can still withdraw from the contract after having made a price comparison. As regards the law on universal services, the right to switch between providers takes this function. The *Heiniger*-saga shows how unsuitable the right to withdrawal is in helping the vulnerable consumer. The right to change contractual partners does not help him, since it does not free him from his difficult situation. In *Schulte* the Commission rejected, without consequences, the separation of the existence of the right to withdrawal from the potential consequences on the credit transactions. Obviously, a wider set of redress means are needed, to some extent they can be found in the law on universal services. The cornerstones are composed of the right to access and a minimum standard of services applicable to everybody, even when the consumer is unable to pay for the services. However, as contracts today are so highly standardized with regard to information obligations it would be better if the AGB control, as it is still designed for the circumspect consumer, were replaced by sample contracts that have been subject to prior checks. For this purpose a correction of the specifications made by the EU would be necessary.
11. *Differentiated, integrated legal redress*: The guiding model of the individualistic responsible consumer, who exercises his rights and, if necessary, goes to court, may be correct for the responsible consumer. In the model of the movable system the vulnerable consumer has to address an out-of-court dispute settlement body. The state is, in the form of state-run market supervisory agencies or the BVL, responsible for the functioning of the dispute settlement bodies in the

framework of the harmonised substantive law. Although English consumer law does not have the best reputation, it could serve Germany as an example for the design of the dispute settlement bodies under state responsibility. From a cross-border point of view they represent the only realistic variant of prosecution, at least for Internet sales of small value. The lack of a possibility to free oneself, in an efficient and effective way, of the consequences of an unfair/misleading effect or of an invalid contract clause weakens the consumers' collective interests. This will remain the case until consumers can lay claim to the illegally gained profits. The initial stage of collective legal redress beyond the action for injunction can clearly be seen in looking at the heterogeneous complex formed by the opt-in collective action, the model claim and the action for damages in light of the paradigm of the differentiated consumer types. Prototypically the KapMuG represents a model that appeals to the individual responsibility and self reliance of the consumer who is able to articulate his interests and register his claims promptly. Five years of experience show the limits of this model. The only remedy in the applicable law which might be appropriate to include the interests of the vulnerable consumers, is the opt-in collective action (*Einziehungsklage*), or a model action. However, this type of claim remains merely symbolic with regard to its effects, since it only has – at best – a factual, but certainly no broad legal effect. Theoretically there are also the state-run supervisory agencies, which is to say the BaFin, the BNetzA or the BVL, which could step in to protect the vulnerable consumer. The possible consequences would represent a 'revolution in law'. Such a legal world cannot be imagined at present, even if the Nordic countries and the United Kingdom have already taken strides in this direction.

12. *Reorientation of policy*: The Federal Government and its Ministries, as well as the associations, have to participate far more in the different steps of the EU's legislative procedure. Statements should be prepared in English and be made publically accessible. State-run and private bodies of collective consumer protection should intervene more intensively in the supranational and inter-governmental elaboration of consumer relevant questions. In the absence of a uniform international or European law, consumer law specialists should perhaps turn to "soft-law" mechanisms which offer the possibility of avoiding complex questions of International Private Law while opening the door to increased participation of civil society associations concerned.

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