

**THE FATHERS
AND MOTHERS OF
CONSUMER LAW AND
POLICY IN EUROPE:
THE FOUNDATIONAL YEARS 1950-1980**

Edited by
Hans-W. Micklitz
Ewoud Hondius
Thom van Mierlo
Thomas Roethe



**The Fathers and Mothers
of Consumer Law and
Policy in Europe
The Foundational Years
1950-1980**

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Ewoud Hondius, Thom van Mierlo and Thomas Roethe

Published by
European University Institute
Via dei Roccettini 9
I-50014 San Domenico di Fiesole (FI)

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ISBN: 978-92-9084-782-3
doi:10.2870/392562

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I. A historical document

Hans-W. Micklitz

The book owes its origin to the sudden passing away of my mentor and friend Norbert Reich in 2015, the father of the consumer law in Germany. My Dutch colleagues and friends, Ewoud Hondius and Thom van Mierlo pushed me into action. Thanks of the ERC funds I was able to sponsor a conference held in June 2017 on the father and mothers of consumer law in Europe. The idea was to bring together all those who significantly contributed to the development of consumer law in their home countries and in the EU. Nearly everybody we invited made it to our getting together. A round table of observers concluded the conference. The papers and documents should be made available to the public at large. That is why we have opted for an e-book version.

The invitees were given rather loose instructions in the form of four open worded questions (see III. Letter of Invitation), the emphasis was laid on free speech, memories and crucial events. In order to keep the particular style of the conference in place, we decided to record the speeches and to transcribe them together with the discussions. The speakers were given the opportunity to react to the transcript. Guido Alpa, Ludwig Krämer and Jules Stuyck sent papers with references. All oral presentations and the discussions over the two days

are available online at <https://soundcloud.com/european-university/sets/the-fathers-and-mothers-of-consumer-law-and-policy-europe-1950-1980-conference-1-2-june-2017>

It was a long way down from the conference in June 2017 to the publication of the book. The back and forth between the editors and the speakers, the need for consent of recording and publishing, took much more time than expected. Luckily we made it thanks to our joint commitment to the project. We would like to thank in particular Theodosia Stavroulaki who transcribed all the records and Anna Maria Nowak who accept the burden to communicate with the speakers and to introduce all the corrections. Jacqueline Gordon and Matteo Zennaro from the EUI Communications Service did the final lay-out. We are happy to present the book to the public and we hope for strong reactions by all those who share this fascinating experience of the founding years of consumer law in the Member States and the EU.

Florence June 2019

Hans-W. Micklitz, Ewoud Hondius, Thom van Mierlo, Thomas Roethe

II. Preface

Ewoud Hondius, University of Utrecht

1. *Gaius, Magna carta and the Discours préliminaire*

In 150 a C, the Roman jurist Gaius published his *Institutiones*. Never again has this book been surpassed as a commentary of private law. Every author of a treatise on private law is indebted to the structure of this book which was written nearly two millenia ago.

England may not have a written constitution, it does have *Magna carta*, 'the greatest constitutional document of all time', as Lord Denning has described it. Not everyone is fully in agreement with this praise. As Lord Dyson, a successor of Lord Denning as Master of the Rolles, reminds us, we should not praise the Charter for creating trial by jury. It did not. Nor should we think of Magna Carta as the basis of the great writ of habeas corpus. It was not. But Magna Carta did require justice to be local; that judges should know the law and that only judges sit in judgment.

Finally, in 1801, Portalis, wrote the famous *discours préliminaire* to the *Code Napoléon*. One of his best known quotes runs as follows: 'Un code, quelque complet qu'il puisse paraître, n'est pas plutôt achevé, que mille question inattendues viennent s'offrir aux magistrats. Car les lois une fois rédigées demeurent telles qu'elles

ont été écrites. Les hommes, au contraire, ne se reposent jamais ; ils agissent toujours : et ce mouvement, qui ne s'arrête pas, et dont les effets sont diversement modifiés par les circonstances, produit, à chaque instant, quelque combinaison nouvelle, quelque nouveau fait, quelque résultat nouveau'.

How did Gaius arrive at his *Institutiones*: was he assisted by slaves or a good library? How did Magna Carta achieve its fame as the Constitution of England? And to what extent did Portalis make use of the *droit commun* and the *droit écrit* in writing his *Discours préliminaire*? How we would love to find the answers to these and other questions concerning the coming about of famous historical documents. For the time being, it is unlikely that we shall invent new methods to find out about legal history: a DNA for historical facts is not in the making.

But for some areas of the law, there may be a partial solution to the lack of historical data. For those domains of the law which only came into existence half a century ago, it should still be possible to find out the details of their coming into existence. The methodology to be used is that of oral history: invite the authors involved to tell from memory how their domain developed. This technique should be used in due time, or else the pioneers concerned will have passed away. In this volume of essays, it is precisely the oral method which has been used to elicit commentaries as to the coming into existence of consumer law. Already some of the founding fathers and mothers of consumer law – Kjersti Graver, Norbert Reich, Bernd Stauder – have passed away. Therefore, the time has come to apply the oral method now. By the late twentieth-century, none of the pioneers will be around.

2. *When did it begin: big bang or creeping consumerisation?*

There is a widespread assumption that consumer law all started on 15 March 1962. On that day President John Fitzgerald Kennedy

famously delivered his special message to the congress of the USA. ‘Consumers, by definition, include us all’, are the well-known opening words. Four basic rights were enumerated by Kennedy: the right to safety, the right to be informed, the right to choose, and the right to be heard. The ensuing history is well known. Not in America but in Europe did Kennedy meet with success. First it was the Council of Europe which did the groundwork, as Ludwig Krämer reminds us in this book. And then - when that organisation, for budgetary reasons, had to withdraw from the area of consumer protection – the European Union took over and arrived at a Preliminary programme. This resulted in an enormous number of directives and some regulations of the European Union. By the end of the twentieth century, nobody could deny that a full-fledged consumer law – albeit in a haphazard way – had come into existence.

Was President Kennedy the real inventor of consumer law? Among legal historians there has always been a difference of opinion. One may argue that Kennedy’s speech did not come out of the blue: it was preceded by much earlier legislation as this book will show. Government agencies had been set up before and books had been written. However, no one will express a doubt that the special message provided the impetus for the rapid growth of consumer law in the later part of the twentieth century.

3. *The oral method further explained*

When an oral method is used, various more refined methodologies may be utilised. The most common one will be for a researcher to conduct interviews with the pioneers concerned. Another method, used in the case of consumer law, is to bring pioneers together and hope that out of the community the truth will emanate. Recollection by some will bring out memories of others. It is this technique which is at the basis of this volume. The founding fathers and mothers, carefully selected in advance, were invited to a two-day conference at the European University Institute in Fiesole, which should be thanked for

its generosity. The speeches by the pioneers were taken down and are now presented in this volume.

4. *Some methodological drawbacks*

The oral method does not only offer advantages to the historian. At least two disadvantages may be discerned. First, the recollection of a pioneer may over the years have become somewhat misty. We must not forget that we request people to go back fifty years or more in time. Not only will their recollection not always be fully 100%, present-day tools such as the internet, e-mails and even photocopies will be absent for this era. In the second place, pioneers may willfully or unwillfully give a wrong impression of their own role. The reader may think that I am accusing some pioneers about over-emphasizing their own role, but actually the example which springs to my mind is that of a European Commission official who was instrumental in setting up the European Consumer Law Group but in this volume downplays his role therein. Fortunately, other pioneers are there to correct the picture.

These drawbacks must be acknowledged, but a partial remedy is available by looking into supplementary written data, when available.

5. *Content of consumer law*

Any present-day commentary of consumer law will deal with general issues, such as the definition of the consumer notion, the purpose of their protection, its main techniques. It will also take into account the most important substantive notions, such as consumer sales, services, misleading advertising, product liability, comparative testing, etc. Administrative law is increasingly playing a role, as of course are constitutional and procedural issues as well as infrastructural notions.

This rather prosaic approach of consumer law has also elicited criticism. Some early-day consumer law activists have even switched to environmental law, which in their view was in a better position to

improve the situation of mankind. Meanwhile, whereas consumer law admittedly still is mainly geared to improving the economic position of the individual consumer, the notion of consumer concerns has gained popularity. This among others raises the question to what extent consumers of garments should focus on the ways these garments are produced in dangerous circumstances by under age workers in third world countries. And are consumer strikes allowed to achieve a change of position by traders?

Of quite a different nature is the question what should be considered consumer law. Should transactions as between small and big traders be so considered? And what about medical law? And rent of dwellings?

6. *The future of consumer law*

By the end of the 2010s, the government of one of the EU Member States declared consumer law to be ready. All major bottlenecks to a fair deal for consumers allegedly had been taken care of by the legislature. Likewise, a German author declared that consumer protection could be considered a temporary emancipatory movement which by now can gradually be withdrawn. The sheer number of European directives and regulations makes it highly unlikely that a dismantlement of consumer law is close. Whatever may happen, the future of consumer law, as was remarked by one of the pioneers in this volume, is not the subject-matter of this book, but – who knows? – of a sequel (?).

III. Letter of invitation

First Stage The Formative Years – 1960 until the late 1980s

E. Hondius/H. W. Micklitz/Th. van Mierlo/Thomas Roethe

26-07-2016

Background

Consumer law and policy in Europe dates back to the 1960s. In the aftermath of the 1962 declaration of John F. Kennedy, the western European democracies started to develop their national variant of consumer law and policy, strongly interconnected with the rise of the consumer society and the welfare state, respectively in the EU. However, also in the then communist middle and Eastern European states, consumer policy and law gained ground and led to the adoption of consumer laws. It is this state of the formative years that attracts our attention. They could be distinguished and kept separated from the years of transformation through Europeanisation and globalization in the 1990s. This is what we call the second step and what we will leave for a separate initiative.

The overall intellectual design is inspired by the approach chosen in the two books edited by B. Hepple and Thilo Ramm, later B. Hepple and B. Veneziani who had initiated a comparative research on the

making and the transformation of labour law, which is inspiring in its design and historical approach on a comparative basis.

- B. Hepple, (ed.), *The Making of Labour Law in Europe, A comparative Study of Nine Countries up to 1945*, 1986 (Hart)
- B. Hepple/B. Veneziani (eds.), *The Transformation of Labour Law in Europe, A Comparative Study of 15 Countries 1945-2004*, 2006 (Hart)

The following authors do not focus on a neat comparison of consumer law, but on legal fields (Bourdieu), which gives way for an interdisciplinary approach, one which includes political scientists and historians. There is little research available from outside law. I would draw the attention in particular

- Frank Trentman <http://www.bbk.ac.uk/history/our-staff/academic-staff/professor-frank-trentmann>
- Claudius Torp *Konsum und Politik in der Weimarer Republik and on the political legitimation of consumption in the 20th century.*
- H.-G. Haupt/C. Torp (Hg.), *Die Konsumgesellschaft in Deutschland 1890-1990*, 2009

The approach could be used as a pattern for initiating a research group to develop a design that fits to consumer law, certainly not 28 countries, that is unmanageable, but maybe a good selection depending of who is interested. Both books provide for an interesting design that could be tested in its applicability for a comparative research on consumer law.

The first step – uniting the fathers and mothers of consumer law and policy in Florence 1-2 June 2017.

In 2014, Ewoud Hondius argued in favour of commissioning biographies of the first generation European consumer lawyers. A short summary of his plea (see full text in annex 1):

Biographies of great lawyers are not as prevalent in Europe as in the United States. In some areas of law, consumer law being one of them, biographies are even completely missing. A project of commissioning biographies (why not at the, EUI he asks) should start without delay, since the main actors are now still around. The author lines up a number of lawyers from Germany, France, Italy, the UK, the Nordic countries, Belgium, Switzerland, Austria and the Netherlands, as examples of the consumer law founding family. As for biographers, he is not thinking of professional journalists, but of academics, in other words, people who are not necessarily schooled in writing biographies, but have some knowledge of the subject matter.

The founding fathers and mothers of consumer law are now in their Golden Years. Thus, the decisive first step is to preserve their memories of the pivotal 1970s. That is why we would like to invite them all to Florence at the EUI to speak about their memories. Each of them would be given 30 minutes. In order to have a loose structure, we restricted ourselves to posing some questions of a general nature, that might serve as a source of inspiration for you:

- Which were the major actors in your country who got consumer law and policy on the national agenda, and which actors played a minor role?
- Was consumer law in your country seen as a separate new branch of law, or was it to be incorporated in civil law?
- Was the system that was build up in your country partially based on foreign examples, and if so, which one? And what about your system - has it been followed abroad?
- How did your country position itself in the early years of Europeanisation of consumer law, and how did you position yourself?

We really do not expect you to give the precise answers to all these questions. You might even think that these are the wrong questions, or you would like to raise particularities from your country. The conference concludes with an interview session, led by historians and political scientists involved in the project.

The whole conference will be recorded and the speeches will be transcribed. These documents are meant to be made publicly available and be put on the EUI website. They serve a two-fold purpose:

- EUI professor Thomas Roethe, following the method of 'objective Hermeneutics', will use the interviews as material for socio-legal research, in which he will reconstruct historical patterns in the MS, linked to their legal traditions, and confront these with the growing needs of the post-war-consumer for codification of his rights in the European context.
- Thom van Mierlo, who is a consumer dialogue expert, is ready to put the memories against the role played by what is now called the European Economic and Social Committee, A bridge between Europe and organised civil society. It will take the form of a series of interviews with key players, not only from market parties but also from EESC's national counterparts. Personal notes and stories of the interviewees could add flavour to that all.

The following fathers and mothers will be invited from the European Member States and from the European Commission. Emphasis is put on the formative years not only in the West but also in the East and at the Commission level. The overall aim is to bring the key personalities together not to be complete or politically correct.

- Austria: Maria Reiffenstei, Maria.Reiffenstein@sozialministerium.at
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IV. Programme

Thursday 1 June 2017

14:00 – 15.30

European Commission - Ludwig Krämer

Belgium/European Union - Thierry Bourgoignie

Denmark - Benedicte Federspiel on Consumer Organization

16:00-18:00

Austria - Maria Reiffenstein

Belgium - Jules Stuyck

Czech Republic - Luboa Tichý

Denmark - Børge Dahl

Friday 2 June 2017

10:00 - 11:30

Finland - Thomas Wilhelmsson

France - Henri Temple

Germany - Klaus Tonner

12:00 - 13:30

Greece - Elisa Alexandridou

Ireland - Alex Schuster

Italy - Guido Alpa

14:30 - 16:00

Luxemburg - Bob Schmitz

Poland - Ewa Łętowska and Aneta Wiewiorowska-Domagalska

United Kingdom - Iain Ramsay

16:30-18:00

Roundtable: Hans-W. Micklitz, Niklas Olsen, Thomas Roethe, Claudius Torp and Thom van Mierlo

V. Welcome speech

Hans-W. Micklitz

I would like to warmly welcome you all at our castle. We moved from a villa to a castle, a castello villa as it called, and you can easily recognize this is the case. I am really happy that you all made it to Florence and that we have the chance to engage in our own history because I think that's the point. We are part of this consumer history and that is we try to save the information of our lives so to say in the consumer law and consumer societies over these years. There are a number of reasons why we are all sitting here altogether. One reason is certainly Thom who together with Ewa (Łętowska) who could not come for health reasons was initiating and pushing me to do something. The other reason is that Nobert (Reich) died so out of the blue. I thought that we want to meet together before it is too late so to say. I asked also Jean Calais whether he would like to come but he does not travel any more, so there are limits due to age.

OK so about the purpose: we want to record everything. As I wrote you, the records will be made available, the spoken word, but we will also transcribe the speeches. That requires that we all speak loudly and when you give your presentations, may be you also give your name first that allows us to reconstruct who said what in the end. You also need to speak into the micro. Unfortunately, the acoustics

in these old rooms are quite terrible. Whenever you interact use the micro and please I do not know the technical reasons but only two people can speak at the time. I think that's it what I would like to say. We have allocated a slot of 20 min for each presentation so that there is some room for asking questions but also for asking questions back. I think most of you know each other so I am wondering, I think there is no need to make a roundtable and to lose time on this. There is time over the day and tomorrow to talk about the past or the future. We will have an aperitivo in the Grotte (Villa Salviati), which is where you more or less arrived. I do not know if you have seen the Grotte. It is quite unique, we will walk over (for the aperitivo). Then we will have dinner in the garden and there will be a bus shuttle that will bring you to your hotel. When you have questions Claudia (de Concini) is here and Claudia will stay most of the time. OK. That's everything from my time.

We have built a certain order. In the first session the idea is that we talk about Europe. We start with Europe. We have Ludwig (Krämer) and Thierry (Bourgoignie, and Benedicte from the consumer organization side. Then we have the countries. A couple of old friends are joining us later, Guido Alpa will come tonight and also Henri Temple will arrive later, sb else? And please some of you asked me why you have not chosen sb from this country or from that country. We did our best to invite all the old mothers and fathers so to say and I think we did not miss anybody. If you do not find a face here that would have come to your mind, the reason might in all probability be that the person is simply not able to come. So for instance just to give an example I invited Ulf Bernitz but he could not come because he has an important event, where the families are meeting.

Thank you, Ludwig, I just pass on it to you.

VI. Contributions

1. Ludwig Krämer, European Commission

The Treaty on the European Community (EEC Treaty), which entered into force on 1 January 1958, mentioned consumers only in a very marginal way, in Articles 39 and 40 EEC Treaty (now Articles 39 and 40 TFEU) on agricultural policy and in Articles 85 and 86 EEC Treaty (now Articles 101 and 102 TFEU) on competition policy. In the early years, the European Commission tried to get national associations, groupings or cooperation bodies accustomed to organize themselves at European level- which obviously was easier for vested interest groups - car producers, pharmaceutical companies, food producers - than for citizens, workers or other civil society groupings. The Commission strongly favoured the establishment of European-wide associations or committees in all areas of societal life. In 1962, it assisted in the establishment of a Contact Committee for Consumers, where emerging European consumer, family and cooperative organizations as well as three European trade unions assembled to discuss the impact of the EEC on consumers. Diverging interests, scarcity of human and financial resources and communication problems prevented that this committee ever reached common positions on consumer interests in the EEC or became a significant voice at European level. The Committee dissolved itself in 1972.

European and global developments in the 1960s - the Paris disturbances of 1968, student revolts in the USA, Japan, Latin America and several European countries - and a growing awareness of the

impact of excessive market economies on the well-being of society, progressively led to the awareness that the EEC could not aim at economic growth alone, but needed to consider its impact on citizens. In 1968, the Commission installed a very small administrative unit on consumer protection in its competition directorate-general. This unit, consisting of three persons¹, had no impact on the daily administrative business of the competition department, the Commission or the EEC as a whole.

In 1972, it successfully blocked, for the first time, the internal Commission procedure on a proposal for a directive on cosmetic products, because the Commission's draft based almost entirely on suggestions from the cosmetic industry. The changes which it obtained, made the Commission itself aware of the necessity and the potential of using consumer protection arguments in its attempt to harmonize national standards for products and services.

The real birthday of consumer policy at EEC level was on 15 October 1972, when the first ever meeting of the Heads of State and Governments of nine EEC countries took place in Paris². The final statement of that meeting declared, words which are still valid today: "Economic expansion is not an end in itself. Its first aim should be to enable disparities in living conditions to be reduced. It must take place with the participation of all its social partners. It should result in an improvement in the quality of life as well as in standards of living. As befits the genius of Europe, particular attention will be given to intangible values"³. The EEC institutions were, among other things, requested to elaborate a consumer protection programme with concrete measures in favour of consumers.

1 At the head of the unit acted Léon Klein (France), assisted by Jacques Brard (France) and Monique Coquette (Belgium).

2 Denmark, Ireland and the United Kingdom were to join the EEC as of 1 January 1973. The Paris Conference constituted the solemn inaugural meeting of this enlarged EEC.

3 Commission, Sixth General Report, Luxembourg 1972, p.8.

The Commission used this request to restructure its services and set up, in early 1973, an Environment and Consumer Protection Service (SEPC according to its French acronym) which it placed under the responsibility of a Vice-President of the Commission. The basic idea was that the activities of the different Commission departments - internal market, agriculture, transport, competition etc. - should be, on the one hand, checked as to their compliance with the EEC Treaty, by the Commission's Legal Service, on the other hand, as regards their aspects of environmental and consumer protection, by the newly created SEPC. This concept, however, did not work. It met the stiff opposition and was successfully blocked by the powerful existing directorates-general on agriculture, internal market, competition etc. which did not wish to see their activities challenged or questioned by considerations of environmental or consumer protection.

The first years after 1973 were marked by the attempt to consolidate and strengthen the Consumer Service (in the following: Consumer unit) and to integrate officials from the three new EEC Member States Denmark, Ireland and the United Kingdom. The substantive work followed three main lines: the setting up of an advisory body for consumers, the elaboration and adoption of a consumer policy action programme and the attempt to insert the consumer protection dimension into the work of the EEC as a whole and in particular the European Commission.

In 1973, the Commission established a Consumer Consultative Committee (CCC) to replace the dissolved Consumer Contact Committee⁴. The new body was to advise the Commission, either on request or on its own initiative, on all questions that were of interest to consumers. It grouped delegates of European consumer (Bureau Européen des Consommateurs, BEUC), family (Comité des Organisations Familiales de la Communauté européenne, COFACE) and cooperative organizations (EUROCOOP), as well as trade union

4 OJ 1973, C 283 p.18.

representatives (Confédération européenne des Syndicats, CES), together with a number of independent experts. As the CCC's members had a very different social and economic background - cooperative representatives defended trade interests, trade union representatives were hardly interested in consumer questions at all, etc - the cooperation concentrated quickly on the members of BEUC and its national member organizations. The Committee met four times a year. Its work progressed slowly, with an output of about one opinion or position per month⁵. The impact of these opinions on, for example on the EECs agricultural policy or other sectors was not significant. However, the CCC brought together representatives of the national consumer and citizens movements to discuss EEC initiatives and problems that also were of interest to the citizens in the different Member States. In this way, it contributed to spread the message that the EEC was not only an undertaking for "big business" - a rather far-spread impression of the socialist, communist and left-wing political and societal forces at that time - but that it also was relevant for the famous "man (woman) in the street"⁶. Its innovative right to issue opinions on its own initiative - such a right was normally not given by the Commission to consultative or scientific committees - led it to publicly criticize for example parts of the common agricultural policy which constituted a rather new tone in the discussions on European integration.

The consumer movement in Member States, to the extent that it had organized itself in consumer associations, was, in the early 1970s not really interested in the development of European integration.

5 In a publication of 1985, this author listed 97 opinions and 29 resolutions of the CCC between 1973 and 1985, see L. Krämer, EWG-Verbraucherrecht, Baden-Baden 1985, p.49.

6 The trade unions never overcame this prejudice and were unable to see in the European integration anything else than the attempt of capitalism to organize itself. It is one of the great errors of the European integration to have left aside the social dimension of integration and buy the silence of trade unions with funds for vocational training rather than positively associate them with the integration activities. Neither Europe nor the trade unions profited from that omission.

The first priority for many organizations was comparative testing of products and services which allowed the creation of income - unless there was generous State funding such as in Germany, which made the consumer movement dependant on (German) policies. A limited knowledge of foreign languages and of other civilizations and cultures contributed to this reserved attitude of national consumer organizations towards the EEC.

As the consumer unit had to organize the meetings of the CCC and its numerous working groups, it developed good relations to the individual CCC members, in particular with those representing the BEUC, and with the secretary generals of the different European CCC member organizations. This ensured the keeping in touch with consumer policy orientations, strategies and priorities within the Member States and also allowed concerns and susceptibilities which only existed in one or in few Member States to be fed into the discussion at EEC level.

The existence of the European Economic and Social Committee (EECOSOC) did not help much to promote consumer interests. EECOSOC was dominated by employers' and employees' organizations, with consumers - one or two members of some 300 - belonging to a third group which assembled farmers, traders, insurers etc. The EECOSOC was thus unable to formulate meaningful consumer protection positions and did not constitute a competitor to the CCC⁷. Furthermore, the EECOSOC only adopted positions and opinions on formal Commission legislative proposals and strategic documents⁸,

7 Another aspect which needs to be mentioned here, is the fact that, according to the EEC Treaty - and this has not changed until the present time (Article 13(4) TEU) - the EECOSOC was to advise also the Commission. In practice, however, the Committee reacted almost entirely only after the Commission had made a formal proposal for legislation or another activity. It completely abandoned its advisory tasks vis-à-vis the Commission.

8 Legally, the EECOSOC had always had the task also to advise the Commission, see the present Article 13(4) TEU. However, in practice, the EECOSOC only advised the Council.

while the CCC gave opinions *before* the Commission had formally adopted a proposal. This factual division of work prevented contacts, controversies and jealousies.

The consumer protection action programme was to a considerable extent inspired by Council of Europe resolutions in this area⁹. The Council of Europe had taken up the subject of consumer protection since the 1960s and progressively developed recommendations and resolutions in this regard. It also tried to develop international binding agreements in some areas affecting consumers, based on detailed comparative law research, such as on product liability and unfair consumer contract terms. But the activities on consumer agreements were not really successful, as the differences among the States were too big and participating countries were not inclined to bind themselves through international conventions. Since the end of the EEC transition period 1969, the EEC became more and more a competitor in law-making, pushing the Council of Europe more into the direction of the protection of human and social rights, minorities protection and citizens rights.

The EEC consumer protection programme¹⁰, following the Council of Europe, established five basic “rights” of consumers, the right to health and safety, the right of protection of economic interests, the right to redress, the right to information and education and the right to representation (the right to be heard). These rights had first been developed by the Council of Europe and were proclaimed by the EEC without too much attention being paid to a precise definition

9 The EEC and the Council of Europe had agreed some forms of cooperation, subsequent to which the EEC Commission participated in working group meetings of the Council of Europe as observer. See generally Article 230 EEC Treaty. A similar form of cooperation existed, on the basis of Article 231 EEC Treaty, with the OECD.

10 Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ 1975, C 92 p.1. This programme was followed, in 1981, by a second consumer policy programme, OJ 1981, C 133 p.1, which did not develop new concepts or initiatives.

or at least a detailed description of the rights' content. For each of the sectors concerned by the rights, some actions were proposed. However, such actions were announced vaguely: the programme did not declare that the EEC would adopt legislation, in order to realize the rights in this or that field. The Council resolution which adopted the programme, only declared that the principles were approved and that the Commission should come up, at a later stage, with appropriate proposals for measures. Politically, the existence of the programme was useful, as the Commission could indicate that a consensus among Member States existed to address this or that aspect; subsidiarity questions did not play any significant role in the discussions of the 1970s.

This general content of the proposed programme had made it politically easy for the European Parliament to give a positive opinion on it and for the Council to adopt the programme. Nevertheless, the emerging consumer protection administrations of the Member States considered it necessary to discuss the draft programme for more than eighteen months, weighing it word by word. This was also due to the fact that in particular France raised doubts as to the opportunity of consumer measures at EEC level, as such measures were not explicitly foreseen in the EEC Treaty.

At the end, the form of adoption of the programme - by a resolution rather than by a decision - clarified that the programme in itself was not legally binding, and that any future Commission proposal on EEC legislation would have to be assessed on its merits; the fact that a specific topic was mentioned in the programme, did not constitute any sort of legal commitment.

Overall, the consumer protection programme had the merit to exist. It brought for the first time issue of consumer protection to the level of the EEC as a whole and signaled that the approximation of national legislation should also take into consideration its impact on consumers. Of course, the programme was influenced

by the general priority of the time, i.e. to eliminate national barriers to trade (“negative integration”) rather than to try to develop specific EEC-wide standards (“positive integration”). As in the mid-1970s, no Member State had a national ministry that was specifically in charge of consumer protection¹¹, the support from the EEC capitals to lead an active European consumer protection policy was limited.

The consumer protection programme did not have a significant impact on the EEC policy. However, the proclamation of the five consumer rights became rather popular and influenced national and EEC consumer policy to a considerable degree. With the exception of consumer education - which was considered to come too clearly into the realm of national competences on consumer protection policies (subsidiarity)¹² - the rights are still visible in the EU consumer policy of the 21st century - and in those Member States which pursue a national consumer protection policy.

In substance, the consumer unit of the SEPC spent a considerable time in addressing issues of health and safety of consumers. The EEC had adopted, for food and industrial products, detailed work programmes and timetables to harmonize the national legislation¹³ which filled the Commission’s agenda and led to a greater weight of discussions on these topics than economic questions. The Commission and the Council had enumerated in the preliminary consumer protection programme a number of sectors which were of particular

11 Responsibilities for consumer affairs in the Member States were attributed to the Ministries of Economic Affairs, Trade, Industry, Justice or Social Affairs, with often joint responsibilities of different Ministries.

12 In the 1970s, discussions on subsidiarity did not take place at European level; the term “subsidiarity” was inserted into the European Treaties only in 1985, in the chapter on environment policy.

13 See in particular Council Resolution of 28 March 1969 on a general programme for the elimination of technical barriers to trade in industrial products and foodstuffs resulting from disparities between the positions laid down by law, regulation or administrative provision in the Member States OJ 1969, C 76 p.1, supplemented by Resolution of 21 May 1973, OJ 1973, C 38 p.1.

interest to consumers¹⁴. The Consumer unit saw it as its first priority to bring the consumer protection dimension into the discussions on these products between the EEC institutions and the Member States, as well as into the discussions with vested interest groups, for whom the defense of consumer interests often constituted a new element.

Participation in this work was extremely time-consuming, as some examples might illustrate. In the area of foodstuffs, EEC legislation was elaborated on additives to food. This included long positive lists on colouring agents, preservatives, antioxidants, emulsifiers, flavouring substances, solvents etc. The EEC Scientific Committee for Food prepared the work, but was not always able to keep pace with the pressure from the food industry which urged to see all additives that were admitted in one Member State also admitted in all other Member States. To such questions of authorization were added questions on labelling, the ban or restriction of heavy metals or other undesirable substances, residues of pesticides, irradiation and other treatment questions etc.

In the car sector, heated discussions took place at EEC level, whether cars should have to be equipped with head rests and safety belts. The car industry fought with emphasis for the making safety belts¹⁵ and head rests mandatory only for larger cars; it continuously questioned any studies or data on accident impacts¹⁶. Another big dispute concerned the question whether the presence of lead in petrol should be restricted or banned. The car industry argued that

14 See preliminary programme (fn 7, above), paragraph 16. These sectors concerned foodstuffs, cosmetics and detergents, utensils and consumer durables, cars, textiles, toys, dangerous substances, materials coming in contact with foodstuffs, pharmaceuticals, fertilizers, pesticides and herbicides, veterinary products and animal feeding stuff.

15 Safety belts were made mandatory in the EEC by Directive 77/541, OJ 1977, L 220 p.85.

16 Directives in the car sector in the 1970s were so-called optional directives which means that they only applied to transboundary trade. Within their territory, the Member States were free to provide for other provisions-or no provisions at all. The system of optional directives was abolished after 1985 (Single European Act).

lead-free petrol would ruin the European car industry and succeeded in slowing down the introduction of lead-free petrol until the year 2000¹⁷. Other issues concerned for example the question, when an aerosol had to be considered inflammable, when its content started to burn at 23°C or at 45°C. Such questions were discussed in several meetings with experts from governments and the interested industry and were highly time-consuming. The consumer department tried to find experts in Member States' consumer organizations, for example those who had made comparative tests, or academic researchers who had published on a specific topic. Generally, the factual support was small, though, also because consumer organizations normally did not have the necessary know-how.

For reasons of staff resources, the Consumer unit did not cover all sectors which it was requested to cover under the preliminary programme. It received practically no support on research results, tests, studies etc from national or European consumer organizations, which were in turn not either equipped for collecting data; nor were they too interested in the tedious procedure of EEC standard-setting. The consumer unit did not either have any network of bodies, academia, research institutes or others which could supply information on specific or horizontal questions. Therefore, it concentrated on food issues, cosmetics, cars, toys, standardization of prepackages and textile labelling. Neither the Consumer unit of the Commission nor the European consumer groups or the CCC showed a particular interest in participating in the work on pharmaceutical products, pesticides¹⁸, electrical goods, veterinary products or detergents; the

17 The first directive to reduce the lead content of petrol was Directive 78/611, OJ 1978, L 197 p.19, the last one Directive 98/70, OJ 1998, L 358 p.58. The breakthrough for drastic EEC measures on lead-free petrol came in 1985, when Germany - for environmental reasons (Waldsterben) - and the United Kingdom - for consumer protection reasons (consumer health problems from traffic emissions)- joined forces.

18 In order to illustrate the length of procedures and the difficulty for the Consumer unit to be represented, the example of pesticides may be quoted: the Commission proposal for a directive in this area dated from 1969; it was adopted in 1991, see Directive 91/414, OJ 1991, L 230 p.51.

issues of dangerous chemicals, quality of drinking or bathing water or hazardous wastes were left to the environmental unit of SEPC.

Overall, the consumer units direct impact on the text of the different pieces of legislation was limited. However, already its presence in the different expert groups contributed to the fact that the final outcome of the Commission legislative proposals- perhaps less of the Councils final decisions- was not altogether aligned to the wishes and preferences of trade and industry groups¹⁹. Support to the defense of consumer interests came in particular from the Danish experts or representatives, to a less continuous degree also from the Netherlands and German experts.

Scarce staff resources and the fact that the officials in the consumer unit were trained in law, political science and general consumer information questions rather than in biology, chemistry or other natural sciences and that their vision of European integration as well as their ambition was limited, also had as a consequence that the consumer unit did not even consider to develop, in areas of health and safety, horizontal EEC legislation on its own, for example as regards consumer product safety, the labeling of foodstuff or textiles or on cosmetic products. Such initiatives were left to the Commission directorates-general for agriculture, internal market or industry which did, quite naturally, not necessarily have consumer interests and needs primarily in mind.

1. Economic interests of consumers

In the areas concerning the economic interests of consumers, the Commission - and, logically, not either the European Parliament or the Council - had not developed a programme to eliminate barriers to trade or harmonize national legislation. Fair trading issues - in a broad sense - were strongly influenced by a voluminous comparative

¹⁹ Examples are the EEC legislation on cosmetic products, but also on head-rests and safety belts for cars or the additives to food.

law study which the German Max-Planck-Institute had elaborated since the mid-1960s²⁰. However, it was left to the different Commission directorates-general which topic they would pick up out of this unfair competition sector or other parts of law, and try to elaborate EEC-wide provisions. The insurance sector, for example, had an agenda of its own, strongly influenced by the German and later the British national insurance industry. The banking sector, in contrast, did not see itself affected by the European integration policy and did not develop initiatives of its own to approximate national legislations; German saving banks (Sparkassen) played a particularly regressive role in this.

The consumer unit's relation to other departments or administrative units of the Commission, outside the health and safety sector, was very limited, already for reasons of lack of personal resources - and of language problems²¹. They concentrated on the internal market (unfair competition) department and the Legal Service, also, because many Commission departments were convinced anyway that in their daily activities, they also considered the general interests of consumers/citizens, and that the consumer unit - without specialized, detailed knowledge of the different files - was rather disturbing than helpful.

The relationship with Member States administrations mainly took place during expert meetings between the Commission and the national Governments to discuss the action programme or prepare legislation. Few Member States had specialized consumer departments and where such consumer units existed, they were understaffed and marginalized by stronger trade and business-oriented administrative departments. Contacts with Government experts on

20 E.Ulmer a.o.: *Das Recht des unlauteren Wettbewerbs in den Mitgliedstaaten der Europäischen Wirtschaftsgemeinschaft*. München-Köln 1965 et seq.

21 The leading persons in the consumer department in the 1970s and the begin of the 1980s came from the United Kingdom, Ireland and Denmark, who had limited knowledge of foreign languages and had not worked in (ministerial) administrations before.

product liability and unfair contract terms were established via Council of Europe working groups. On consumer credit, an official from the internal market department and of the consumer unit made visits to all capitals, in order to discuss draft versions of the future proposal for a directive and to establish contacts.

The European Parliament was mainly interested, in the 1970s, in concrete legislative proposals, less in discussions on consumer policies or strategies. Contacts with deputies were thus very limited. The same applied to contacts with members of the EECOSOC, for the reasons mentioned above. The consumer unit regularly attended expert meetings of the Council of Europe and the OECD, where consumer protection questions were discussed, but took, overall, limited advantage of these meetings.

The EEC consumer protection programme suggested to promote the protection of the economic interests of consumers, by fixing a number of priority areas which should be addressed:²² - consumer credit; - false or misleading advertising; - unfair commercial practices²³; - product liability; - range and quality of consumer products.

The enumeration of these areas did not mean, though, that the administrative responsibility for the different files was attributed to the Consumer unit within the Commission. Rather, the majority of file leadership - in particular consumer credit, misleading advertising, and product liability - continued to be under the responsibility of the Commission Directorate General for Internal Affairs which had a staff of about ten times as numerous as the Consumer unit.

For all measures which were signalled in the programme, the legal basis for an action at EEC level was arguable. Article 100 EEC Treaty

22 Preliminary consumer protection programme (fn.7, above), paragraphs 18 to 31.

23 This area was sub-divided into unfair contract terms, door-to-door sales, premium offers, unsolicited goods and services, and labelling, see preliminary consumer protection programme (fn.7, above), paragraph 24.

(now Article 114 TFEU) provided for measures in order to approximate legislation to allow the “establishment and functioning” of the common market. Whether, for example, measures on consumer credit or door-step selling complied with this criterion was often enough contested in the European Parliament and in literature; some authors argued that there was no common market for consumers, so that Article 100 did not constitute a legal basis for measures. The Commission, though, argued that it would not be reasonable to organize the establishment and functioning of a market for trade and industry and their products and services, but ignore consumer interests. Therefore, it based its proposals for legislative measures almost completely on Article 100 EEC Treaty which, until 1985, required unanimity in the Council. This legal basis was never contested before the Court of justice.

The Commission’s proposal for a directive on consumer credit²⁴ owed much to the reform of consumer credit law which the United Kingdom had undertaken in the 1970s. For continental Europe the departure from hire-purchase legislation and the approach on all forms of credit, whether linked to the purchase of a product or not, was a new approach; Italy and Greece even had practically no legislation on hire-purchase or consumer credits. It took the national administrations about eight years to organize themselves, proceed with the necessary consultations and discussions and agree on the substance. The proposal limited itself to establish a number of basic requirements as regards advertising, the contract form and content, information obligations for consumers and public surveillance obligations. It favoured a broad approach to consumer credit and included credit intermediaries, but excluded mortgages and other form of credit on immovable property. It required a written form of the credit contract and asked the creditor to indicate the effective costs of the credit, a measure which was heavily combated by the financial industry²⁵.

24 Commission, OJ 1979, C 80 p.4. After significant amendments, this proposal was adopted as Directive 87/102, OJ 1987, L 42 p.48.

25 In 1998, Directive 98/7, OJ 1998, L 101 p.17, introduced a uniform calculation

The proposal for a directive on misleading advertising²⁶ took more or less up the concept of German advertising legislation. The Commission text, based on Article 100 EEC Treaty, also covered unfair advertising which met with objections from the powerful advertising industry in the United Kingdom, where unfair advertising did not constitute an undesirable practice. The Commission proposal did not define misleading or unfair advertising, but gave some indications on the possible content of these terms. It suggested to allow, within certain limits, comparative advertising. It asked Member States to introduce legislation to fight misleading and unfair advertising and to provide, as a rule, some public control of misleading advertising.

The legal basis of the proposal - Article 100 EEC Treaty - was only marginally put in question, as satellite television and other upcoming electronic communication means were evidence of (the possibility of) transboundary advertising campaigns. Several Member States, in particular the United Kingdom, contested the necessity of national regulatory provisions and backed a system of voluntary self-control by the industry, without significant public control. Consumers and consumer organizations in practically all Member States did not participate in the discussions of the directive proposal. They voiced their concern with regard to misleading advertising, but did not have concrete drafting proposals to offer. Nor did they have a strong position with regard to national implementation measures, the enforcement of the provisions and public controls of advertising.

The Directive which was finally adopted²⁷, reflected thus the interests of the advertising industry in having general clauses and vague terminology and obligations, rather than constituting a true piece of consumer protection legislation. The consumer unit had no

method for the effective interest rate.

26 Commission, proposal for a directive on misleading and unfair advertising, OJ 1978, C 70 p.4.

27 Directive 84/450, OJ 1984, L 250 p.17.

alternative to present, also as apparently, no Member State at that time had detailed legislation on advertising.

Also the Commission's proposal for a directive on product liability was based on Article 100 EEC Treaty²⁸. Its content was to a very large extent taken over from a draft Convention on product liability which the Council of Europe had discussed. This Convention never was ratified by a sufficient number of Contracting Parties and thus did not enter into force - probably also, because the EEC Member States preferred a discussion- and final decision- at EEC level. One decisive point was also that the draft Convention also included the liability of the producer for development risks which industry - supported in particular by the German government - opposed very strongly.

The Commission wanted in particular to avoid following the example of the United States, where producers were held liable, when they brought a product on the market that was "unreasonably dangerous" and caused damage. Following in this the Council of Europe's work, the Commission developed a definition of "defective product" which was to lead to the strict liability of the producer²⁹. The producer should also be held liable for the so-called development risks which referred to damage which, at the time of marketing of the product, was not foreseeable. The liability of the producer was to cover death and personal injury and economic damage suffered by consumers.

How arguable the legal discussions on legislation at EEC level sometimes were at that time, might be illustrated by the fact that the Legal Committee of the European Parliament rejected the Commission proposal with the argument that there was no legal basis for it in the EEC Treaty. When the Commission announced that liability for

28 Commission, Proposal for a directive on the producer's liability for defective products, OJ1976, C 241 p.9.

29 See Commission proposal, Article 6 according to which a product is defective, when it does not offer the safety which one is entitled to expect in view of all circumstances.

development risks would be excluded from the text, the Legal Committee - and later the Plenary of the European Parliament - accepted Article 100 EEC Treaty as a legal basis³⁰.

Overall, it took the Council nine years of discussions, before the Commission proposal finally was adopted in 1985, excluding the producer's liability for development risks³¹.

A proposal for a directive on doorstep selling - officially: on contracts negotiated away from business premises - was elaborated by the SEPC itself and adopted by the Commission in 1977³². Conceptually, it owed a lot to provisions which had been introduced at national level in the Netherlands. It started from the reflection that typically contractual negotiations which took place away from business premises, were begun at the initiative of the seller, not of the consumer. In order to counterbalance the element of surprise which was inherent in such negotiations, the consumer was to be granted a cooling-off period within which he could withdraw from the contract which he had concluded.

Again, it took the Member States a long time, before they were able, in 1985, to agree to the proposal³³. The concept of a contractual cooling-off period was new and even revolutionary to most EEC Member States which were accustomed to the sacrosanct character of contractual obligations which could not be changed. It was the first piece of EEC legislation which gave, in the area of civil and/or trade law, specific rights to a group of citizens, in order to take account of their vulnerable situation.

30 See for further references L. Krämer (fn.4, above), p.307.

31 Directive 85/374 on liability for defective products, OJ 1985, L 210 p.29.

32 Commission proposal, OJ 1977, C 22 p.3.

33 Directive 85/577 to protect the consumer in respect of contracts negotiated away from business premises,, OJ 1985, L 372 p.31.

These four directives formed the core of activities of the Consumer unit of the SEPC between 1973 and 1986. The activities were guided by a number of concepts which were, in the beginnings, not clearly elaborated and conceptualized, but which won precision during the discussions and negotiations at EEC level and within the Member States.

The first of these concepts was the realization that the consumers were to be regarded and treated as a group of its own and needed specific provisions to protect their interests. For the Consumer unit the question, whether “consumers” were to be mentioned alone or whether also small businesses or craftsmen were to be mentioned next to consumers, was of secondary importance. In Council, the opinion finally prevailed that it was preferable to legislate only with regard to consumers, as the delimitation between “small” and not so small professional activities would become too complicated-also in view of countries such as Greece, Italy and the accession countries Spain and Portugal.

The next basic issue concerned the legal basis of consumer legislation. There was a consensus that Article 100 EEC Treaty was a more appropriate legal basis than Article 235 EEC Treaty (the present Article 352 TFEU), because in all areas - credit and advertising, product liability and doorstep contracts - there was some difference in the national legislation which might impair the free circulation of goods and services. However, the use of Article 100 EEC had the disadvantage that up to the arrival of consumer policy issues, the approximation of national legislation had the effect that the national legislation was completely substituted by the EEC legislation; thus any protection measures for consumers that existed in the national legislation, were lost.

In these circumstances, two Danish representatives of consumer organizations, Liz Grohs and Benedicte Federspiel, launched in early 1973 the idea of consumer legislation being minimum legislation which

should allow Member States to maintain or introduce at national level legislation which gave better protection to consumers. This idea was taken up by the Consumer unit and successfully bargained first with the internal market Directorate-General, then with the Commission, and then with the Council. The minimum character of consumer legislation is now laid down in Article 169 (4) TFEU³⁴. It needs to be clarified, though, that minimum clauses progressively also became acceptable under Article 100 EEC Treaty (now Article 114 TFEU) for other than consumer protection matters. Thus, for example, Directive 2010/63 on the protection of animals used for scientific purposes³⁵ contained a minimum clause; the above-mentioned Directive 85/374 on product liability³⁶ provided that the producer of a defective product was to be liable for the damage caused, but allowed Member States to limit this liability to a specific sum, in order to protect business interests. And even into agricultural directives, minimum clauses have found their way³⁷.

A common feature of all four above-mentioned directives is that subsequently, they were amended and enlarged in their field of application. Indeed, it was clear right from the beginning to the Consumer unit that a consistent and coherent consumer protection legislation could not be achieved at once. And the discussions on the different legislative proposals by the Commission³⁸ formed and clarified the ideas of the Consumer unit, of the Commission, of the Member

34 See however now Directive 2011/83 on consumer rights, OJ 2008, L 304 p.64. This Directive is based on Article 114 TFEU and explicitly excludes the right of Member States to maintain or introduce more protective provisions for consumers.

35 Directive 2010/63, OJ 2010, L 334 p.17.

36 Directive 85/374 (fn.31, above), Article 16.

37 See, for example Directive 2008/120 laying down minimum standards for the protection of pigs, OJ 2008, L 47 p.5.

38 See on the details of the negotiations concerning the scope, legal basis, content etc of these four directives L.Krämer (fn.4, above), p..345 (consumer credit), p.188 (misleading advertising), p.306 (product liability), p.172 (doorstep contracts); N.Reich - H.W Micklitz, *Europäisches Verbraucherrecht*, 4th ed. Baden-Baden, 2004 p.735 (consumer credit), p.281 (misleading advertising) p.1031 (product liability), p.539 (doorstep contracts).

States, of consumer organizations, the academia and the public at large, a process which included the “learning by doing”. All four directives were subsequently significantly amended: the consumer credit directive³⁹ was replaced, in 2008, by a new directive which, among other issues, fixed a lower and upper limit of the credit amount and introduced a fourteen days- cooling-off period within which the consumer could withdraw from the credit agreement, without giving reasons⁴⁰. Directive 84/450 on misleading advertising⁴¹ was last amended in 2005 when in particular the provisions on comparative advertising were fine-tuned and further detailed⁴². Directive 85/374 on product liability⁴³ was further specified in particular by jurisprudence from the EU Court of Justice and by Directive 1999/34 which deleted a legal exemption of liability caused by agricultural products⁴⁴. Directive 85/577 on doorstep contracts⁴⁵, finally, was replaced by a general directive on consumer rights which, among other issues, generalized a right of withdrawal within fourteen days from distance or off-premises contracts⁴⁶.

2. Other issues

The EEC price provisions, in particular those of the Common Agricultural Policy and the Customs Union, were not accessible to the Consumer unit. The only activity which the Consumer unit could deploy and deployed actually was the attempt to ensure a transparent price labelling of products. It elaborated a directive on the unit price

39 Directive 87/102 (fn.24, above).

40 Directive 2008/48 on credit agreements for consumers, OJ 2008, L 133 p.66.

41 Directive 84/450 (fn.27, above).

42 Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market, OJ 2005, L 149 p.22.

43 Directive 85/374 (fn.31, above).

44 Directive 1999/34 amending Directive 85/374, OJ 199, L 141p.20.

45 Directive 85/577 (fn.33, above).

46 Directive 2011/83 (fn.34, above).

labelling for foodstuff⁴⁷ which was based on Article 235 EEC Treaty (now Article 352 TFEU); this legal basis demonstrated the existing conviction of the Council that measures to protect consumers had no real legal basis in the EEC Treaty. The Directive imposed the indication of the price per liter or g/kg of prepacked food. A later directive on the price indication for non-food products was then based on Article 100a (the present Article 114 TFEU)⁴⁸. Both directives contained numerous exceptions and were, at a later stage replaced by a general directive on price labelling for products⁴⁹.

Next to the four consumer core directives mentioned above, the Consumer unit was busy in participating in the work of other Commission departments on the harmonization of national legislation. These activities concerned in particular advertising issues for specific products - food, alcoholic drinks and tobacco, pharmaceuticals, toys -, product labelling, accident data collection, data protection, industrial standardization, insurance contract terms, car insurance and legal aid insurance, and the consumer in the internal market (passport, driving license, health or postal services).

The Consumer unit itself started work on unfair contract terms and package holiday terms. In this and in other legal work it was greatly supported by the Consumer Law Group, a group of academics from the different Member States which were interested in the work on consumer protection and which were convened at the initiative of the Consumer unit. The Group met regularly, organized comparative studies and proposed legal, often enough innovative ways to approach consumer protection measures at EEC level. The intellectual input of that Group to the thinking of the Consumer unit cannot easily be

47 Directive 79/581 on consumer protection in the indication of prices for foodstuff, OJ 1979, L 158 p.19.

48 Directive 88/314 on consumer protection in the indication of prices for non-food products, OJ 1988, L 142 p.19.

49 Directive 98/6 on consumer protection in the indication of the prices of products offered to consumers, OJ 1998, L 80 p.27.

overestimated. It gave valuable scientific background to the Consumer unit, as in the period of time under discussion (1973 to 1986) academic interest in the protection of consumers was limited - also because research contracts from public or private sources were scarce in consumer matters.

Activities in the remaining areas were limited. Consumer information was considered to be sufficiently covered by labelling of products and services. There was not even a consideration to look at a general measure on free access to information or greater transparency of public authorities. As regards consumer education, the Consumer unit started several initiatives to generate education material for consumer education at school. However, these initiatives soon faded away, as there was a limited interest on this subject in Member States, subsidiarity objections were raised more and more frequently and the linguistic problems, linked with traditional education concepts proved to be major obstacles.

Consumer participation issues were largely left to the consumer organization themselves. The Commission was of the opinion that the establishment of the Consumer Consultative Committee was sufficient, and did not wish to interfere with the decision-making processes at the level of the Member States. Questions on consumer access to justice finally were left to agreements on private international law concluded between the Governments of Member States, though the agreements which were concluded, referred to the law applicable to contracts, not to questions on access to the courts⁵⁰.

3. Concluding remarks

The first period of deployment of a consumer policy at European level, ended with the conclusion of the Single European Act in early

50 Article 220 EEC Treaty provided for the possibility to conclude law agreements between EEC Member States. The international agreement concluded was replaced, in 1998, by Regulation 593/2008 on the law applicable to contractual obligations, OJ 1998, L 177 p.6.

1986 which saw the inclusion of a section on consumer policy into the EEC Treaty. During this period, the administrative and legal foundations were laid to ensure the establishment and functioning of a consumer protection policy at European level: a consumer administrative unit within the European Commission, a Committee in the European Parliament which dealt - next to environmental and human health matters - with consumer questions, a Consumer Consultative Committee which enabled the continued presence of consumer organization representatives at European level, and two consumer protection programmes which laid the basis for structured, concrete and legally binding measures in favour of consumers. This infrastructure was more than the great majority of Member States had installed at national level.

It goes beyond the objective of the present contribution to assess the evolution of the EU consumer policy beyond 1985. Only some aspects of the period before 1985 will be indicated which may have had some impact on the further development of EEC consumer policy.

As regards the consumer unit of the Commission, it had won, in the 1970s and the begin of the 1980s, some recognition within the Commission administration. Its presence in numerous meetings with Member States experts - mainly at the level of the Commission and much less in meetings of the different Council working groups - made the institutions, the lobby groups and the general public aware that there was a consumer dimension in the policy of European integration which had to be taken into consideration; European integration was not just an undertaking for big business.

The consumer unit was hopelessly understaffed to cover all consumer-related aspects of EEC law and policy that were actively pursued by the Commission and, subsequently, by the other EEC institutions. It had no strong defender within and outside the European Commission. Interests of trade and industry, the establishment of a common internal market and the preservation of the privileges of

the agricultural sector prevailed and even when a choice had to be made within the Environment and Consumer Protection Service on staff attribution or other questions, the interests of the environmental sector were given priority. In contrast, it could not be argued that the staff policy during this period deliberately placed officials at the top of the Consumer unit, who were more committed to other interests than the promotion of a consumer protection policy. The lack of financial resources was not either a significant problem.

The consumer organizations which acted at European level, were not of a significant support. It turned out that the only organization which tried to defend and promote consumer interests, was the BEUC (Bureau Européen des Unions des Consommateurs), a European umbrella organization of national consumer organizations. BEUC organized in the early 1980s a boycott of beef meat that contained hormones and succeeded to obtain a general, EEC-wide ban of such hormones in meat - which continued to exist in 2018. BEUCs national organizations, though, with the exception of the representatives of Denmark, the United Kingdom and the Netherlands, turned out to be in their large majority more occupied with internal national problems, including fund-raising, than having any vision for the consumer aspects of European integration.

The family organizations were not concerned to get too closely involved in consumer protection issues, but concentrated more and more on issues of social interest - though there were not many such issues at EEC level. The cooperative movement in a number of countries was first of all active as a trade organization ("COOP"), and soon concentrated on trade-related issues. And the trade unions had considerable reservations with regard to the EEC as such which they saw as an emanation of capitalism. This reservation was reflected in their attitude towards consumer protection issues, which the trade union representatives only half-heartedly supported. Not one single

initiative in the sector of consumer protection saw the trade unions as authors.

The Member States Governments did not have specific ministries for consumer affairs. Consumer questions were dealt with in particular by departments of economic affairs, trade, or justice. The prevailing impression in practically all Member States - perhaps with the exception of Denmark - was that an official anyway had to represent the general interest in his/her negotiations at EEC level, and this general interest included the consumer interest, so that no specific consideration to consumer positions was necessary.

To this general approach towards a consumer protection policy at EEC level was added the priority that the national and the European Commission policies attached to the establishment and functioning of a European common (internal) market. Food law and the elimination of technical barriers to trade for non-food products had absolute priority and the larger aspects of a car market which also served consumers, of public transport considerations, of fair and loyal trading, appropriate consumer information and participation did not play a significant role in the political reflections or discussions. Consumer protection issues were considered a collateral issue to accompany the more relevant work, with as little zeal as possible. The British approach to favour voluntary self-regulation and to leave it to the market to deal with consumer problems as regards health and safety and the economic interests of consumers, gained more and more influence at European level, also because the English language progressively became the dominant language in day-to-day negotiations and discussions. The famous French 19th century statement that between the strong and the weak the freedom oppresses and the law makes free⁵¹, did not find much echo in the European institutions.

51 Henri Lacordaire (1802-1861): «Entre le fort et le faible, entre le riche et le pauvre, entre le maître et le serviteur, c'est la liberté qui opprime et la loi qui affranchit».

In this general climate, the Single European Act was concluded in early 1986 which introduced a new period in the history of European consumer protection policy.

Questions and Answers

Hans Micklitz: Ludwig, I have one question to you: could you remember what was the link between the Council of Europe and the European Commission, how did they work together? Because at that time the Council of Europe was still quite an important trendsetter when I recall product liability also before the EU came into that field. So do you remember? Could you perhaps say a bit on this?

Ludwig Krämer: yes, I went for quite some years to the Council of Europe meetings myself; on liability on unfair term contracts and on other issues. The Netherlands in particular but also Denmark were quite active in the Council of Europe meetings. Netherlands chairing frequently these working groups in particular in the area of consumer protection. What the Commission did practically, came in, participated in the discussions and then took over the ideas, which had been elaborated in the Council of Europe to make binding EU legislation - because this was an aspect where the unanimity provision of the Council of Europe had difficulties to get ahead. The Member States, the contracting parties of the Council of Europe were not too keen to have too many conventions in this area of consumer protection. But the Commission played a very strong role at that time at European level. So when there was a Commission proposal mostly it was in one way or another adopted by the Council (of Europe). Though we also had an unanimity clause on liability, our colleagues from the internal market were quite keen to say we will not go very far in this area. If you think for example of the provision on consumer damage it is extremely narrowly defined in the environmental liability directive. This was the gift, if you so wish, or the concession that the European

Commission made in order to be able to take over and to get MS approval of making European legislation rather than an international Council of Europe Convention. In retrospect, I would say, to a large extent what has happened was some sort of stealing the ideas from the Council of Europe and bringing them to the European level by saying we can make a union area or an internal market with the common level playing field and not being too fair to leave the priority in time to the Council of Europe. But this is how the political game was.

Hans Micklitz: and what was the relationship with the OECD? Because at least my preconception is that a lot of the consumer policy came from the USA and channeled via the OECD to Europe. So at that time you had a lot of papers from OECD. And I was just wondering what was the relationship between the Commission and OECD?

Ludwig Krämer: well, your general perspective, I cannot confirm. The OECD was strongly influenced by the USA. This is true. They have 1/3 of the budget that means 1/3 of the staff and the English language was prevailing. They played a very dominant role. But you should not forget that the USA internationally are not represented by a consumer department. They do not have such a thing. They are represented either by the trade department or by the foreign affairs department. And they are more interested in free trade than consumer protection. So if you then add that Japan tried at that time to play quite a considerable role in the OECD, these two big trading forces slowed down whatever they could. So we had a lot of discussions under the presidency of (Lars Broch ?) from Norway on consumer protection issues but without much success. Well discussion papers, it was useful to be there but I do not remember in the consumer area of any paper which has led to any Community initiative in consumer protection area.

Thom van Mierlo: I could add on the Dutch contribution to the cooling off period in the European directive on doorstep selling. Indeed it was a Dutch idea, from the first real consumer act in our country in

1973. It was a time that the Dutch government became really active in promoting consumer interest. In many other fields than door step selling, quite some political discussions arose on how to shape it in national law. That has taken a lot of time. Not so, thus for doorstep selling. Mr Joop Koopman, perhaps you can remember him, was very active in the Council of Europe, its consumer group, in promoting the idea of a cooling off-period at a European level and it has worked out well. In many other fields the Dutch were no frontrunners in European consumer law, but that's another subject.

Hans Micklitz: maybe I can collect (questions) and then we stop.

Claudius Torp: I was just wondering about the meat boycott you mentioned at the very end. Maybe you could expand a little bit on that because I recently got interest in scandals as pacemakers on interventions in consumer policy and I was wondering if that was sort of an isolated incident in 1980 or who were the actors who put that on the agenda. Where media or scientists important in that respect. This caught my attention.

Thomas Wilhelmsson: Well we are going to speak about consumer law from the perspective of different countries but it would be nice to hear about the other perspective; what was your impression in the EU? Were there countries that were especially active or other countries who were opposed? Which were the players among the different nations in the EU at that time for consumer protection?

Lubos Tichy: I am interested in the phenomenon of consumer organizations. When did they come into being? When were they born? Was that a spontaneous development on the level of civil society? When did they begin to be founded by the state? By the public funding? And I guess the situation was not quite equal in Member States. Maybe awareness of the consumer protection was higher maybe in Germany and maybe lower in Italy or in other MS at that time, at the very beginning but interestingly enough you describe a situation

as a very broad I would say there are some products where there is this disbalance between consumers and business but there are situations may be in water that there is no disbalance. Everybody may be affected by this. Business or consumers as well. Is there any difference in the attitude of consumer organizations towards these various aims and various products?

Ludwig Krämer: The first issue with the meat scandal it happened that parents in the Italian kindergarten discovered that children of 6 years developed breasts. So they made a storm and this got immediately the attention of the Italian public and in Italy people blocked the consumption of beef meat. And those organizations who were open to this kind of protest. The Dutch called for action, the German said absolutely no way we veto beef. The UK was passive. These were then the countries. But of course, the media took it and there was an enormous concern of the media – the result of the consumer organizations plus the media and I presume there were other instances also was that the beef market in Europe broke completely down. For three weeks, the Commission could not sell anything. It had to take large quantities of beef on stock and try to sell it two years later. But the consumers said we will not give in until there is ban of the hormones. And finally, the agriculture administrators accepted this issue which was the first and last time that such a thing had happened. So it was really private initiative in Italy which I found very admirable to be frank.

As regards countries who were active and who were less active I mentioned deliberately that the consumer movement owes something in my understanding to the 68 rebellion of students. This was a young movement, by young organizations and young persons inside the movements. So the activity, the French consumer organization, was rather left wing. The Italian organization was not too well organized. This created problems in Italy. As I said the Germans were absolutely state dependent, the Dutch (consumer organization) were quite ac-

tive in this area. The Belgian Test Achats with a lot of comparative testing, which was completely financially independent, which was a remarkable issue and was ready to fight for better food and for better quality of products. With regard to states, governments did not really like to take consumer aspects, they took it when the public pressure became too big. Sorry I forgot Denmark. She (Benedicte) will talk on her own. But Denmark had influence on the government and the Danish government was open to consumer protection issues so I think driving countries in the European Union at that time were the Netherlands, Denmark, and well that's it. But it was a popular movement and Governments did not wish to openly speak up openly against that. So the other were not opposed or silently opposed but not objecting formally. It took therefore three years for the consumer protection program to be adopted between the proposal and the adoption. It took about five years for the door step selling directive to be adopted so it was delayed and delayed and it was final adopted but there were no keen drivers perhaps except from the 2 countries, the Netherlands and the Denmark. Well to some extent, Belgium also. But here we will talk on that.

With regard to consumer organizations I have already said the essential thing that the financial independence was a very strong issue and the Netherlands, Belgium, France, to some extent the UK also were independently enough not to sing the song of their masters, who financed them, but to raise their own voice and they had sufficient room of man oeuvre to do so. The European Consumer Organization Association (BEUC) played relatively a good harmonizing role by overcoming these German obstacles and also overcoming the fact when one member state was not too heavily involved in these issues. As regards products I would not see not even in water that consumers and industries went on the same .. in lobbying. The environmental department and water and environment issues made it because there was very limited interest from industry in water issues so they were not opposed, they did not deal with that. And the consumer organi-

zations I have not seen one single paper on bathing water, drinking water, the pollution of water or other aspects. This might be due to the question of resources of consumer organizations – I do not deny that. But the problem was that there was nothing. And I cannot say that I have seen any document on... Because the industry said well let's make it for big cars, Mercedes, for BMW, for big Citroens, but the small cars Fiat or Peugeot, Renault they should not even have safety belts. This is for the big cars. Nobody from consumer organizations took this social element back and tried to say we need this uniform legislation for smaller cars and for the less rich people.

Elisa Alexandridou: I would like to put a question for the Consumer Law Group that many of us used to be members for years and years and I think we did a good job. Why do you think the Commission has stopped financing the law group? Was it only a matter of sort of money or it was something deeper? They did not want to have an organization being so much in favor only of consumers?

Ludwig Krämer: Well you should perhaps understand the mentality of an official: he earns the same money whether he works or whether he does not work. And this is a very fundamental aspect because also the Consumer Law Group required initiative, activity from an official, it required cooperation with the lawyers and if you don't have the sense for doing that you just do your daily job and you don't think of what this group could do usefully in the future. I share your assessment of the work of the law group. If you look into what has been produced over the years I think it is very sorry and very sad that this work group faded away but there was not enough pushing on the European Commission Staff. The staff itself may be jealous of not being in the group of not being too much caught it or come to give us a speech or come to this and that exotic place and be our guest of honor. All these things play a role. You have to take initiative in order to relaunch the money for the Law Group – if you don't do that you get the same salary but the Law Group is out. So it

has never been spoken out explicitly why the money was withdrawn but you should also (not) forget that the people who decided inside the consumer department were not lawyers. They were not lawyers, they did not see necessarily the usefulness of this aspect and all this bundle of things-perhaps carry (...) say a word in a moment because he was very much for years in the driving seat of also publishing these things. I remember that one of the conditions right from the beginning was that the Law Group can assemble but it has to deliver a product every year or every meeting so that there is something black or white that you can show to the officials, non-lawyers. I think that at a certain moment this has also faded away so it has contributed all this mixture of elements and reasons. Not very satisfactory answer but I have no better.

2. Thierry Bourgoignie, Belgium/European Union

Dear Colleagues, it is really something exceptional to meet you all of us together here. Thank Hans. It is really great idea. I know it was shared by some other colleagues. Thanks a lot.

I was not exactly sure what was expected from us so I prepared something on my own. I hope that will meet your expectation, Hans. I did try to identify what were the key features which at least could explain my own investment in the field of consumer protection, and/or our common investment in this field in the 70s-80s. So my remarks will be very subjective, as they will reflect my own assessment. I will refer to a lot of documents, a lot of names which had a decisive impact on my own thinking, on my own investment and commitment to the consumer law and policy area but of course this overview on the past will remain incomplete. So don't feel offended if your name does not appear. It is just that I have tried to identify some key elements. Also I will not deal with Belgium since Jules will tell us more about Belgium this afternoon.

First to be mentioned is the Consumer Law Group. When going through all my archives I found the minutes of the first meeting of the Law Group. This was in London in January 1977. Ludwig Kramer had invited five or six consumer lawyers to attend a so - called «world» conference which was not at all a world conference, but a US conference trying to lobby the European institutions. The message was

‘please do not work on product liability’ and do not do what we have done in the US, look at this Frankenstein monster which is the product liability story in the US. That was the purpose of the conference and we were five – six consumer lawyers attending the conference against more than 300 business lawyers making the case against product liability. So we had to fight a lot. In the evening we met in the basement of the premises of the conference and we decided to act as a group in order to be more efficient in our interventions on the second day of the conference and future lobbying. It did work quite well, so we decided to repeat the experience and also to meet in Brussels regularly to lobby the European Commission.

David Tench prepared a two page document making the case for the establishment of such a law group. The first meeting was held in Brussels on 30 March 1977. The topic selected was product liability, on which the Group delivered its opinion in December 1977. Who was present in London? As far as I remember, four people present in this room today: Børge Dahl, Benedicte Federspiel, Ludwig Krämer and myself. And a few representatives of consumer organizations from the Netherlands, Belgium (Hans de Coninck) and UK (David Tench).

The Law Group played an essential role as it became the forum where to meet and exchange information, opinions, experience and ideas. It helped in consolidating personal contacts and building common opinions on initiatives taken or envisaged by the European Commission which were likely to affect consumer interests. Consumer law and policy during the formative years was really a joint adventure.

One key feature of the Consumer Law Group was that it connected academics with representatives of consumer associations or state consumer institutes. The goal was to try to share a common approach about the need for social changes, the role of law and the status of consumer law, to share common concepts and to deliver a joint opinion more likely to have an impact on policy-makers. Another

key element was that the Group helped us in thinking international, or at least regional, i.e. European.

It can be said that there was quite a consensus among us on the need to empower consumers on the market place, on the need to develop or to promote a social vision of consumer protection policy. Do not forget that we in the 1970s welfare state was predominant, and the main responsibility to protect consumers lied on the State. This social dimension of consumer policy was actually promoted and further explored by a lot of academic works. Just to mention a few of them: the « market failure theory», first presented by Norbert Reich and Klaus Tonner in 1976, then Gustavo Ghidini here in Italy. In 1984, Iain Ramsay published a discussion paper for the UK Office of Fair Trading where he insisted on the social policy rationales for consumer protection. Concepts such as market deficits, fairness, distributive justice, participative governance were discussed at large. The need to organize, represent and defend the collective interest of consumers and to form a countervailing power on the economic scene were also developed by many, including Mauro Cappelletti and Galbraith.

Also, one should remember that in the early 70s and 80s, the idea that consumers should benefit from some fundamental consumer rights emerged and well received. First proclaimed by US President John Kennedy in 1962, it was then proclaimed and expanded in several international documents, among which the charter of consumer protection of the Council of Europe in 1973, the EC preliminary programme for consumer protection in 1975 and of course the UN guidelines for consumer protection adopted in 1985. Also, some countries going from dictatorships to democracy included consumer rights in their own constitution, as Spain and Portugal did in the early 70s. All this gave consumer law and policy a very strong legal basis, even constitutional grounds.

While all of us were willing to correct market imbalances, to have the market functioning not to the detriment but to the benefit of

consumers, we probably did not share the prospect of changing the paradigms of market economy as such. Apart from some words from N. Reich, G. Ghidini or myself, where the capitalist type of market society was indeed questioned, the consensus was more to change the way the market operated.

There was also a consensus among us, I think, about the role of law, i.e. law perceived as a tool for social change. Law was not only to make the market better operating, but it had to bring major social changes in society. Hence consumer law had to contribute to such social changes. This was referred to and developed namely by Christian Joerges and Gunther Teubner as «reflexive» or «responsive» law. I did use the concept of «adaptive law» in my thesis in 1988. Jean Calais in France did use the concept of «droit fonctionnel». The need for a multidisciplinary vision of society combining politics, economics and sociology had a significant impact on legal thinking in the area of consumer protection and the development of consumer law and policy.

The illusion of access to justice also had an impact on our vision of law. The research project and comparative works lead by Mauro Cappelletti on the access to justice movement, that was run here to Fiesole, gave us strong evidence that law was simply not working, was not effective; and that consumer protection on paper would just bring illusory protection to consumers.

Personally, I was quite interested by developing this entrepreneurial approach, making the case that lawyers were essential actors but there were other actors which had to play a role, specially of course non-governmental associations having consumer protection as their objective. Consumer law was indeed important but had to be seen as part of a broader consumer movement.

Law enforcement was seen as a key issue and members of the judiciary were encouraged by several research projects and academic

works to adopt a proactive vision of their role. At a time when consumer legislation was either inexistent or uncomplete or abstract, judges were asked to be proactive in their interpretation function. And they did so.

During the formative years, consumer law had to be admitted and held as a valid discipline. Consumer law had to put forward and proclaim its specificity, to free itself from the scope of the traditional categories of law such as competition law and contract law. Legal tools and concepts departing from traditional law have been promoted in consumer law, such as cooling-off periods, unfair terms in consumer contracts, unfair commercial practices, strict liability and class, group or collective action. New redress systems were encouraged and alternative dispute resolution schemes encouraged (Kjersti Graver).

At an important meeting in Bremen in the early 80s, the role of soft-law mechanisms was discussed as part of the «consumer-business dialogue». The conclusion was that hard law was to be preferred to soft law. Soft law could not be an alternative to consumer protection legislation. There could be a regulatory mix, those were the words used by Nohbert Reich, or I spoke about soft approach to hard law.

On the basis of all the above suggested ideas, first consumer legislation started to be adopted. Sweden was the first to adopt a piece of law, then Denmark, Belgium and so on. Also very important to notice that as early as 1981, France started the lead in developing consumer codes. The French Commission de Refonte du Droit de la Consommation led by Jean Calais Auloy did work for years in the 80s on the codification process of consumer laws and rules. Belgium followed in 1990 with the installation of the Commission Royale pour la codification du droit de la consommation. Then the Netherlands and Portugal later on.

Another key feature of those formative years is that we started thinking regional. Law transfers, legal transplants and comparative law had an accelerating effect on the development of both European and national legislation. First major comparative study was edited by Norbert Reich and Hans Micklitz in 1980. This was the last volume of a series of books about consumer law in EC countries. Such studies had a spill over effect accross Europe and also helped in harmonizing consumer laws among EEC/EC member countries. Cross reference and reciprocal influence among scholars was common. As an example, when the French Commission de refonte was installed in 1981, Jean Calais-Auloy invited me to be a member as foreign expert, which helped me in convincing the Belgian authorities to do the same exercice at the end of the 80s. I invited Ewoud Hondius to be a member of the Belgian Commission de codification, which encouraged Ewoud to do the same in the Netherlands.

During these formative years, law integration was also a goal, especially on the European scene. Just a few dates; 1972 (Summit Brussels calling for «Europe with a human face»); 1973 (UK and Denmark, which both had already developed consumer protection systems, including a adopted a consumer law, join the EC); 1973 (Charter from the Council of Europe); 1975 (First EC preliminary programme of action for consumer protection); 1985 (product liability directive). Also in 1985, publication of European Commission White Paper completing the Internal Market, which included a chapter 28 devoted to consumer protection (note that in a first draft of this paper, chapter 28 was missing as consumer protection policy had simply been forgotten!); 1986 (Single European Act which introduces consumer policy in the Treaty).

Hans-W. Micklitz: If you want to have a couple of questions, you have to come to an end.

Just to apply the entrepreneurial analysis at the European Community level, main actor was the European Commission; while there

were there very few people interested, these few people were extremely motivated and cooperative with consumer lawyers in universities and consumer associations. There was great synergy among all actors. Critics and demands for reforms coming from consumer lawyers were actually helping EC officials in charge of consumer affairs in their work. As to the European Parliament, it was in favour in principle of such topics that were close to the citizens' needs. And the ECJ also had an extremely positive role in those years with the famous *Cassis de Dijon* case.

A final key feature that characterizes the formative years and that I would like to mention was the existence of strong University research teams in most European countries that were devoted to consumer law and policy: Montpellier, Louvain La Neuve, Bremen, Hamburg, Utrecht, Roma and so on. These, as well as the Law Group, did invest a lot in publications and training events such as seminars and conferences. Just to mention the *Journal of Consumer Policy*, the *European Consumer Law Journal*, CDC (Louvain-la-Neuve) series of books, first summer school at Louvain-la-Neuve in 1990, etc.

Questions and comments

Jules Stuyck: What I wanted to say is that Ludwig has been very brief about himself, very modest and there was a question of Elisa on the European Consumer Law Group and why it stopped. Well, when it existed it was thanks to one person.

Ludwig Krämer: I have one point that is perhaps more a comment than a question. What I see with the consumer law and I alluded to that already earlier is that it just moved away from taking into consideration the general interest of consumption of the individual interest in transport. The individual interest in state aid issues or in agriculture or in fisheries. It concentrated a bit and in my opinion too much on questions of civil law which might be due to the fact that there were

civil lawyers over represented. But the influence of the consumer movement into the whole policy, we see today, has successfully being marginalized and the same problem exist with the trade unions which have let themselves buy out by the European Institutions. Today we have the result in the Brexit referendum other objections and in other grass root objections to integration because the social groups consumers and workers if you so wish, did not manage to organize themselves positively at European level.

Thom van Mierlo: Did you mention the Bremen conference of 1983 on the consumer entrepreneurs dialogue? And that soft law was not so enthusiastically being welcome? because I can remember that in the same year Mr. Hilkins was rapporteur for the European Social and Economic Council and he published a report on the consumer dialogue and he also gave some examples of things that were working well. Can you elaborate a little but about what the role of the EC in those days on the consumer? Because I am interested in the consumer dialogue between the stakeholders having worked for the social economic council for many years.

Bob Schmitz: I have a comment on the comparative law side which I think unfortunately we have not drawn the lessons until today. Maybe in the academic world because I am still active in consumer law and I find it pathetic than even today, even the countries which have the same legal tradition, eg France, Luxemburg and Belgium, we still at the practical level fail when we discuss amendments new legislation, or many .. in terms of enforcement or discussion on remedies. Honestly this is all very kind, very nice all this work and references in the academic world of the comparative efforts to understand each other and to open minds with each other but unfortunately even today in the year 2017 I must say, how we try to fix the rules about the digital world to adjust the existing national rules and European, we absolutely fail even to get clusters, clusters of the same legal tradi-

tion and nobody is really supporting this and I have been saying this for thirty years and I don't know, it is just pathetic.

Hans-W. Micklitz: Let me make a general remark because this also came up in several emails I received from you. If I find the resources, I will organize a second conference on let's say on the consolidation and decline of consumer law, but this event is really about the formative years here. We are discussing about prospects, dreams and whatever.

Thierry Bourgoignie: On the consumer dialogue, I don't know, maybe Ludwig knows better than I do, if there was any kind of official position from the European Commission on this at that time. I know that there was a lot of discussion when we were starting discussing a new directive or they were asking us to help them in preparing some new draft of directives this question always came on the table. Should we adopt regulation? Should we have a provision? Or could we just develop some kind of soft law mechanism? I think that the Bremen conference was extremely important because it was clear from the Bremen conference that where they had some experiences, they failed. So there was no trust from consumer lawyers, from consumer movement, there was no trust in developing this as a main tool for consumer protection. It could be there as a complementary tool but not the main tool. That was the message that we sent to the European Commission in 1984. I don't know I cannot tell you, I know that because of the Official Fair Trading arrangements and because of soft law mechanisms used in the UK. Most of the officials in the Commission at that time were from the UK. They were looking at those but at least it was clear that they did not to develop (soft law); first was with the banks recommendations, but that came later also with the dispute settlements. They were forced to recognize that those voluntary tools did not succeed. That is all I can tell you.

Just to answer very quickly, I was going to answer that, I do not share your opinion. I think that during the formative years the 70s

and the 80s there was a lot of influence across at least Belgium and France for example. Because the people were the same. We were the same actors really trying to develop the legislation in both countries. Now the situation has changed totally but this is the topic of another meeting. Just to comment on what Ludwig said and then I will finish. I fully share Ludwig's general opinion that during these formative years most impact was given to information of consumers not enough to regulation, not enough to protection and access to justice. Because even among us we were not enough to really make consumer law an autonomous, really independent category of law. That's it.

3. Benedicte Federspiel, Denmark

When Denmark entered the EU together with the UK and Ireland in 1973 the new Member States got some money so that 7 people, I think, from each country could go on a longer study trip to the Commission. I was chosen to go together with officials and people from industry as a representative of consumers. At that time consumer policy and consumer protection was actually a political priority in Denmark and quite a lot was being done in the field of consumer law.

On arrival I said that I wanted to go and talk to the consumer department. The Commission officials were quite bewildered: Who is that? What did you call it? Consumer? At that time no such thing existed as we have just heard. It was a mixture of putting consumers and the environment together. Consumer matters were not seen as something of interest. The only one interested was Ludwig Krämer and the importance of what he has been doing in the development of consumer law in the EU can not be overestimated. He was about the only one. Some of the other staff were hardly working. I was asking, isn't he not coming? No, he is only coming on Tuesdays and Thursdays, oh I see. And some were leaving at 14.00 because they were living in the Netherlands and they had to go back and it took a long time. One guy came in once per month – not to work for his salary but to collect money from other people because he was selling stuff

to them and they would make a long list. These were the officials working in this department, no wonder nothing much happened.

This was really terrible. I was so shocked and I told my British friends, I told everybody, you have to do something about this, you simply have to do something. And something was actually done. The guy that came in once per month in order to collect money disappeared and the guy who lived in another country and was there maybe 2 days per week got sucked. I really enjoyed this because there is nothing so bad as to have officials who are really doing nothing while pretending they are doing everything. Ludwig was doing honestly everything. It was a wonder that anything happened at all because they were not eager and they were not interested. And as so many people have said here in their speeches, the development of consumer law depends on the personalities, the people who are really interested, the people who really think it is important.

Having said that, I do not agree with all the many negative things that Ludwig said about consumer organizations not doing this and that. It is very difficult to talk about consumer organizations. They are so different in the various European countries. The Danish consumer organization is the oldest one in Europe, number two in the world. It was founded in 1947 and we have certainly been working ever since. It was founded as a protest against government policy after the war allowing for the import of luxury goods that people could not afford to buy instead of everyday items needed for ordinary life. Actually, the prime minister that was conservative said, I can see a point, you are right, we have to do something about it and he really did something. So in 1947 it was started that the citizens could go and tell a tale which was understood and made a difference. And it is absolutely fair to say that the Danish Consumer Council has a strong position and voice in Denmark that has for many years now been used to promote the consumer interest.

It is difficult to compare to the countries that have almost no consumer organization. It was mentioned about the trade unions that were members also of the Consumer Consultative Committee at that time and they were not interested in consumer matters at all. But they had no competition in their own country from consumer organizations because there were not any and if there were any they were very weak. If we talk about Spain and Portugal, of course there was no consumer organization. It did not exist at that time, it was not possible for political reasons. To day the situation has changed in those countries. To day, however, the situation is very difficult in the Eastern European countries. In some of these countries they have a consumer organisation with just 1 employee while we in Denmark have 100. They have 1 employee to do everything which is rather close to not having a consumer organization in that country.

So you cannot generalize and criticize about why they did not do this and why they did not do that. They all did what they could which was quite different from country to country depending mainly on a big difference in resources. It has been suggested that some consumer organisations got money from government and then they did not want to criticize anything. I promise you this has never been the case in Denmark. We work for the people in promoting consumer interests regardless and is being respected for doing exactly that. So you do not come and tell anybody that we are bought by anybody and that we could not say what we wanted or that we hesitated. Maybe this happened in some countries but it does not happen to all countries. Therefore it is quite difficult to generalize and say this is how consumer organizations did not do this or they did not do that. Consumer organizations are very very different and their strengths are different.

It was also mentioned that some countries' consumer organizations are actually thinking of earning money for themselves, to themselves, money down in the pocket to themselves. I am sorry to

say that this is true. We know of so-called consumer representatives sitting in their own board and getting special money which was put into banks in other countries and so on. I know very very well it is correct. But, certainly this is the odd exceptions. So you cannot say this is what consumer organizations did. Because they are so different. In Norway, for example, the consumer chairman and the board of directors were elected by the government. In Denmark this would be unthinkable, simply not doable. You simply cannot talk about consumer organizations as being one and the same thing because they are very very different.

Having said that I would like to talk about what we did to strengthen the position of consumers. We are talking now about the 1970s. The 70s was a super era for consumer organizations in the Nordic countries. In our country it was a big push from consumer organizations and from government. It was agreed that we had to do something so the big parts of consumer legislation were actually made in the 70s, things that had not been heard of in the other countries. Consumer ombudsman and consumer complaints board, just to mention a couple of examples. In Norway, Sweden and Denmark and later in Finland there is a very well-functioning system of addressing things. But it does not exist in other countries so it is difficult to say that this is how consumer organisations do and it is quite right that some organizations are not.

I remember the UK with one of the major organizations which never dreamt of touching anything that was remotely close to environment because that was dirty, environment was only for left wings. It is true. We had to say, okay, you are not dealing with environment, we are sorry but we have been dealing with all of it for years and we cannot see that it is a problem. But certainly, in the UK it was really a big big problem. Just that shows how very very different the organizations were. You could also see in the Netherlands and Denmark there is only one organization, oh so you have monopoly.

No, actually we have been allowed to be the consumer organization because we are doing what the consumers want or we would not exist. That's the point. We are earning good money now but we are certainly also getting money from the public purse. We keep saying to the Commission that they ought to be able to create systems so that the eastern European consumer organizations will get up at a certain level because we have to remember that in the EU consumer legislation is up for a vote in the Council and if governments don't have anybody in their own country that will push them and tell them you should do that, then nothing happens. They don't have to do anything. So it is very very important for my organization that the organization in Slovenia or elsewhere is healthy because otherwise we may not get the consumer legislation we want. So it does not come by itself. Yes, the family organizations, the trade unions and the consumer organizations were part of the original set up in the 70s. The family organizations were just sticking into their own family organization ideas. We did not have a problem because we are an umbrella organization having family organizations as members and, at the same time, we are an organization of individuals with a member's magazine.

On EU level a consumer action program was adopted in the 70s. I remember they made this lovely action programs and they were very very proud. The Commission promised that they would make a new action program, I think, every two years or something like that. But the consumers were saying, you have not done anything of all you should from the first program so you cannot just start a new program when you have not done that so that did not work that well.

Product liability, that is something that we discussed. That was one of the big issues because product liability was a big problem in the industry and of course the situation in the United States, we should not get anything that terrible. And product liability, they started actually in the Commission to work with it. Product liability was re-

ally a very difficult and complicated thing to work with because the industry was so much against it. In Denmark and this had nothing to do with the color of the Government we were always informed of what was happening so I knew what was happening, I saw the drafts of the papers from the Commission, I got them from the Ministry of Justice, I got the drafts, which was unthinkable at that time that people would. That was in 1985 and I was speaking at a conference in Germany and I was almost being killed by somebody because I had been speaking about some secret papers, no transparency there, and I said secret? I got them from the Danish Ministry of Justice and it was for everybody open. This also shows the difference of how the consumer organizations were really involved in creating the consumer policy at that time.

The Consumer Law Group, I do understand to some extent understand that the Commission had this output idea that we had to come up with at least one opinion or something per meeting. We actually did because we knew otherwise we could not meet.

Looking ahead towards the next years and not just the formative years it is not being less important or easy to fight for the consumer interest. Deregulation and burdens for industry are the new buzzwords and political priorities. It is for instance argued to be an administrative burden for a company to put on a product what is in it and things like that are on lists every month to deregulate. I know that because I am member of the Committee for the proposals to deregulate in the EU. All of these things are consumer questions and you all know, I think, you have heard about refit, the initiative of the European Commission to evaluate the existing consumer law directives. In such a climate it is not easy to improve consumer protection in EU. It is all about deregulation and not making more regulation. Actually consumer organizations have said that the Commission is doing less and less. The European consumer organization has pointed to specific things that ought to be done which are needed, that everybody agrees

about – in vain, because that means that you are putting onto the burden. So there is a big difference between the formative years and what is happening now.

Consumer policy is about that the citizens are first and foremost. Consumer protection initiatives on EU level may be of interest for all citizens, also those who might be tired of the EU. Because what do they give us? So when writing to a minister I argue that this is something you could give to everybody. This is something, which means that the citizens will not be tired and go Brexit. It is on this background very depressing that at the moment consumer organizations that need to be supported have a lot of problems in order to get the things done.

Just a short remark about soft law. I do not like soft law, I am sorry to say, because I know how the consumer organization are in all the countries – how would you expect them, each of them, in their own countries to negotiate soft law with industry? And it certainly does not work on a European level. Take the Recommendation on Banking, yes all the Danish banks did it because we went back home and we said, yes you do it now. But the Commission, after two years they had Dutch firms to find out that the banks were not doing as it was said in the Recommendation. So they had to introduce proper legislation, thank you, but it took at least two to three years to do it. They could have done it in the first place. So soft law may be fine, it works in the advertising field and in the UK, I am sure it does, it works very well in Denmark because if we make soft law together maybe with the consumer ombudsman and the related industry they do not stand the chance to cheat on that. But I do not know how that will happen in the other countries so it is very complicated at European level, but it comes back every year that we talk about soft law because it is so nice and industry loves it.

Even in the interpretation of EU consumer legislation by the EU Court of Justice the consumers may be taken by surprise by bad

decisions such as when they decided who are ordinary consumers in the marketing practices field, that was a very very lousy decision that they made against the consumers.

Questions

Hans-W. Micklitz: If you have questions be sure that your questions is just between the coffee break.

Ludwig Krämer: I see your remark Benedicte on consumer organizations more as compliment, I have only spoken about European level. If you think of the Consumer Consultative Committee of 1973 we had COFACE the family organizations that they did not deal with consumer protection. We had Euro Coop which assembled the co-operatives, the German cooperatives with 5 billion euros turnover per year which were considered consumer organizations. We had the Italian French communist trade union organization, that was another trade union organization. These four organizations practically were not supportive. You mentioned in Denmark that your organization tries to be active. Certainly these 4 organizations in my perception were sitting and waiting that something was brought to them and this was why I made these critical remarks. I would not go further, thank you.

Thom van Mierlo: You said that self - regulation does not lead to any results. Coming from the Netherlands I would like to note that in our country it works very well. You did not mention it so that is why I mention it for the whole group. That we have a dialogue in tens of sectors of industry and trade with consumer organizations participating heartfully and making good results so for the whole group for Europe I would like to say.

Benedicte Federspiel: It works very well in Denmark because we are strong and therefore it is being respected but it may not work in Estonia.

Thom van Mierlo: I just wanted to say that the Netherlands is one of the examples of countries in which it works. It is part of our tradition to have self - regulation in the Netherlands.

4. Maria Reiffenstein, Austria

Thank you Hans, thank you very much for your invitation. I was really honored to be invited in this circle. Perhaps I am the only one here that was never a member of the European Consumer Law Group and from many of you I heard a lot from different colleagues (interruption). Yes so I am really happy to get faces to the names I heard a lot from. The next is that having listened to the first round I have to apologize for my first slide, perhaps it is a little bit provocative but I was so impressed by the political argumentation when I read about the history of our Consumer protection Act in 1979 when the Parliamentarians talked and discussed in Parliament. What I put here from bourgeois law law to social law that is a quotation of one parliamentarian before the consumer protection law was adopted in the plenary session. For the German speaking people in German they say: „Übergang vom bürgerlichen Recht zum sozialen Recht“.

But a bit later you might understand why I chose the translation of bourgeois for bürgerlich. In 1979 Austria introduced consumer policy as a modern specialized branch of law and the second thing is what I said I have to apologize because when I listened to your contributions so far I may say perhaps I am not right but I am curious to hear from you what your views are on that.

You can read here that I stated that the consumer policy in Austria going far beyond the standards of most European countries at that time. I just wanted to state that because the quotation „from the bourgeois law to the social law” inspired me for saying that; so don't take it as an academic statement. I would like to talk first about the 70's about the political background, about the major players, and institutions, also the characteristics of the market, what was regarded as consumer protection at that time and finally the consumer protection act in 1979, on which I will focus a little bit more in detail. Then I will continue with the 90s up to now, the accession to the European Community at that time and its impact on Austria and its role in the European union today. Finally, where do we stand now.

So coming back to the political background, in the 1970s, I listened very carefully to what Ludwig Krämer said about the 68 movement, I was astonished about that roots. In Austria, it was happening that in 1970s the socialist government came after a conservative period. That was very important for the further developments of consumer policy. The government policy statement in 1975 (the socialist government lasted for 13 years) - today that is difficult to believe. This government policy statement in 1975 said that mass production leads to the increased use of standard contract terms instead of individually negotiated contracts and that was the main reason for the need of new provisions for standard contracts, for statutory warranty and also for advertising.

Furthermore, it was important at that time when I read about it I saw that we had a more ideological focus in the political discourse than today. In the Parliamentarian discussions it was talked about law as the superstructure in the Marxist sense above the economic situation. And it was mentioned that Germanic law, the old Germanic law was the expression of feudalism, the Roman law was the expression of early capitalism, freedom of contracts is based upon the ideas of French revolution and now it comes: consumer law corresponds

to mass production society. So that was for the Socialist Party the key argument for seeing a need for new law. One quotation of Bruno Kreisky the chancellor within this period of 1970-1983 'not only labour is exploited, the market itself exploits people' and I think that this is very modern quotation until today.

Who were the major players in these times? Again, within the socialist governments there were two ministers who were really strong, influential personalities and that was on the one hand the minister of trade who established in the 70s, I did not find out the exact day but it must have been mid of 70s, the first administrative unit within the ministry of trade and industry and the other one was the minister of justice, who was also famous for a modern family reform and a modern criminal law at that time and also here consumer protection fits in very well.

Social partnership: we heard about that also already at the European level. Social partnership in Austria is partly until today, but at that time was much stronger, had an extremely strong influence on policy making. Social partnership in Austria meant two sides. So on the employees' side the chamber of labour and the trade unions, and on the employers' side, chamber of commerce and chamber of agriculture. The chamber of labour and the trade unions were the driving players in favor of consumer protection. In that respect, the situation in Austria was different than at European level because not only the chamber of labour also the trade unions were interested in consumer protection at that time. That also changed today.

The next institution I want to mention is VKI the association for consumer information. I think many of you know the abbreviation, there are different pronunciations, VKI. The VKI is a real child of social partnership. It was founded in 1959, then it was called Verein für Einkaufsberatung- association for giving advice for consumption. In 1961 it was created as association for consumer information. VKI is up to now a very very strong partner in enforcing consumer law, in

partnership with the Ministry, the Unit I am working with. This is what I forgot to say. Perhaps I should have mentioned that at the beginning. I am the head of the directorate within the Ministry of social affairs and consumer protection. So we are in this Ministry since 2003, before that we belonged to several other ministries also of environment. I am civil servant in the Ministry since 1990.

Back to the VKI: At that time VKI had four ordinary members - the social partners and the Republic of Austria who is an extra ordinary member. That is perhaps a bit strange feeling for many of you. The Republic of Austria used to provide financial subsidies as high as the membership fees payed by the social partners. That has changed today. The Republic of Austria pays much more. Since 2017 the chamber of labour is the only ordinary member. So we still have an extraordinary member, but the other members left the association for different reasons.

The consumer protection at governmental level, I said already, so in the 70s, this small unit in the ministry was created, also an advisory council on consumer policy, chaired by the ministry, composed again by the social partners and several other ministries. This advisory council had the function of exchanging views and of creating soft law at that time. Especially in the field of advertising they found some agreements also for banks how they advertise loans, for people, environmental claims as well, that was in the 80s. Later on in the 1990s they made model standard terms for travel agencies and hotels. They (the model standard terms) still exist today but they play a minor role; for instance, the amount of cancellation penalties for travel contracts was fixed in these standard terms.

So what is regarded as consumer protection in these times; what I often read in older papers is that consumer needs must be satisfied. That was already mentioned by previous speakers. Therefore the main goals were safe products (ervices were not so prominent at that time), also transparency especially in the field of misleading

advertising, and of course affordability also that was mentioned regarding comparative testing. The VKI did product tests and they gave information and advice, not only legal advice but also technical advice. At that time you could go with your carpet or with your cloth which was damaged in the textile cleaner and ask VKI: was that the fault of the service provider or was it my own fault? Then you got advice on that.

The main legal areas were concentrated in administrative law. It was food law, trade law, competition law that was also partly civil law of course but not only and price indication law. The civil law was of minor importance. The Hire Purchase Act existed already since the 19th century, later integrated into the Consumer Protection act and of course the old civil code of from 1811, the use of that was not really given.

In the previous discussion we talked about the administrative v. civil law. In the 1990s we saw that administrative law was very difficult to enforce. The administrative structures are slow, the consumer has no influence on the Authority, he or she cannot force the authority to act. Therefore civil law was more and more regarded in our view for a more effective consumer protection way. The economic and societal background as I mentioned partly before, had changed. The increase of mass production led to the fact that citizens were seen more and more as consumers, misleading, aggressive, complex and intransparent marketing methods, they were very common at that time, were on the rise. Hire purchase contracts were very prominent because people did not have so much money. They paid in installments, regulated already in the Hire Purchase Act which contained a right of withdrawal for doorstep sales at that time. Finally, the lack of access to justice, mentioned already by the parliamentarians as one reason for the Consumer Protection Act, legitimised the action for injunction.

Hans asked for the forerunners of consumer law in our countries and again from the parliamentary discussion when the Consumer Protection Act was developed, I was surprised that not the Kennedy Declaration (1962) was mentioned, but only the Recommendation of the Council of Europe from 1976 and from that especially the Recommendation to members states to regulate standard contract terms. So that seems to be one of the most important reasons for promoting consumer law. The government policy statement I mentioned already and then of course Austria always looked to their German neighbor and their law. The German general contract terms act which was adopted in 1976. That was for sure an important forerunner for the Austrian Consumer Protection Act. The Austrian Hire Purchasing was amended in 1961 and integrated into the Consumer protection act.

The Unfair Competition Act (unlauterer Wettbewerb in German), the amendment from 1971 was the first amendment where it was very clear that competition law is also focusing on consumer aspects. Therefore misleading advertising was stated for the first time in 1971. The action for injunction existed already in that law. If the German General Contract Terms act or the Unfair Competition Act was more a forerunner I cannot say.

I summarized a few of the arguments used by the socialist and the conservative party. The socialist party and that I want to stress again, this aspect of lack of access to justice, I was really impressed that this modern aspect was already there at that time. It focused on to values of the French revolution. You can say that access to justice has to be independent of income, of education and of social status.

The conservative party which agreed to the Consumer Protection Act, stated, that it is not needed for 99% of the traders, it is needed for the so called sharks. This argumentation is very modern until today. The conservative party and the commercial side agreed to something but stressing the fact that it is only needed because there are some exemptions of really rogue traders and that most of

the traders are fair and diligent. Then the freedom of contract must be respected, we all know that. That was also very much stressed at that time. The argument that we must not have American conditions, consumerism should not be introduced, did not change until now. We can hear that in 2017 in the same way.

Very quickly we have the B2C scope that is clear, but we also have this so called *Gründungsgeschäfte* which means the B2B contracts, if the contract involves the establishment of the business. We have the right of withdrawal for door step sales. We have rules on down payment for contract instalments. This is perhaps a bit exceptional but it does not exist anymore. That means that with contracts of payments in instalments it was stated that there was a minimum amount which the consumer had to pay at the beginning, so that he does not get the impression that he can afford it and then runs out of money. Unfair standard contract terms, statutory warranty on the civil code. The action for injunction at that time applied only against unfair standard contract terms, the extension to illegal practices that was according to the implementation of the injunctions directive later on. It is important to recall that the Consumer Protection Act contained rules amending the civil code. We had in addition a general clause about unconscionable standard contract terms. Until today it is the most important reference in actions for injunctions which allows to declare terms void.

I have to come to the accession of Austria to the union in 1995. Austria became member of the EEA already in 1994 without a referendum. In 1995 we had the EC referendum with a clear majority. What was really important was the fact that consumer protection was a policy area in its own right, in the EU. Institutionally it was very helpful as it made the consumer policy in Austria much more important. We could go to Brussels and negotiate. There was this council working group on information and protection of the consumer. It was clear that we also had to be there and negotiate and that helped a lot. The

implementation of the *acquis* required minor changes because we really had done much before. Nowadays I would say Austria's role is rather defensive in the negotiations. We have the problem that business and industry representatives are more and more critical. That might have to do with the fact that Austria is very very successful in enforcing the law and the more the business sector is against promoting consumer law.

Here I put a slide for all these terms. You will know very well, which are the arguments most used by the business side. The main thing is no additional burden on business. Business says we want full harmonization, we want no gold plating, we have to respect subsidiarity and so on. I think the limited economic growth and unemployment is an important point that was not mentioned until now. They are the main arguments from business side which are challenging the improvement of consumer rights and create much difficulties in our daily life. Thank you and sorry for being late.

Questions

Hans-W. Micklitz: Maybe one question.

Ludwig Krämer: In 1970s there was a big discussion in Europe, whether the Alps should be traversed by motorway or tunnel. Was this a consumer problem in Austria?

Maria Reiffenstein: No. Because environmental organizations are rather strong in Austria and consumer organizations need their resources to solve many problems they have themselves.

Ludwig Krämer: The noise which it caused, the health problems for the population are direct consumer problems.

Maria Reiffenstein: One question, which problem would you mention which is important but consumer policy should not deal with? In

the last run everything has an effect on consumers. But consumer policy has not the resources to deal with all problems.

5. *Jules Stuyck, Belgium*

This presentation follows the questionnaire drafted by the organisers. It is preceded by a short introduction about the historical and systemic context of Belgian consumer law and policy, putting the answers to the questions into context.

Introduction

While the consumer movement emerged in the late 1950ies, like in (most of) the other EU Member States, consumer policy law in Belgium developed as from the (early) 1970ies. Measures to protect consumers, including information duties, had already been taken decades before, especially since the 1930ies (and some, such as the regulation of auctions, even earlier: 1846), but those measures always served another major purpose, often the protection of small shopkeepers (if not local traders against foreigners) and sometimes they were tools to realise higher objectives of economic policy (in particular income and price policy) or the protection of the vulnerable consumer (in other words a social objective: the protection of

income⁵²).⁵³ The aim of protecting consumers against expenses the authorities believed to be detrimental to their interests was also underlying the first “modern” consumer protection law of 1957 on instalment sales and loans (fixing e.g. the maximum duration of the instalments). Interestingly, even in “modern times” of consumer policy, in 1974 (in the aftermath of the first oil crisis and the ensuing hyper- inflation), the government launched an information campaign to make consumers price sensitive. The reason was that through the mechanism of automatic price indexation – which still exists today – higher prices meant higher costs for businesses that already suffered from the recession.⁵⁴

There was also another line of legislation originating (long) before the 1970ies: laws on the presentation, quality and safety of foodstuffs that aimed at avoiding fraud, guaranteeing the quality of agricultural products, fairness in commercial transactions and/or the protection of human health. On 24 January 1977 an Act was adopted on the protection of the health of consumers with regard to foodstuffs and (some) other goods (such as tobacco, detergents and cosmetics). On the basis of that Act many royal decrees on specific foodstuffs have seen the light (often with the aim to transpose EC, later EU, directives).

With the exception of the law of 1957 on instalment sales and loans, “consumer law” before the 1970ies was a pure matter of public law.

52 See e.g. the Royal Decree n° 61 of 13 January 1935 : a prohibition of premium offers, which served several purposes: guaranteeing price transparency in the interest of consumers, but also and prominently the protection of traders selling the goods that were offered for free by other traders, and, finally, the protection of consumers against themselves, i.e. against the temptation to purchase of “unnecessary” goods so as to receive attractive gifts. The prohibition of premium offers was in other words also a measure of protection of the income of vulnerable citizens in times of economic crisis.

53 See J. Stuyck –H. Swennen – R. Van den Bergh, *Als het nodig is zeg ik het je wel...*, *Consumentenbescherming door de overheid in België*, Berchem/Amsterdam, Maarten Kluwer, 1978, p. 13.

54 *Ibid.* , p. 15-16.

Infringements of the provisions of the laws mentioned above were criminal offences. General provisions of private law, in particular the Civil Code, e.g. the provisions on defects of consent, gave a general and basic protection to the weaker contract party, but these provisions were very seldom applied in the context of purchases by consumers. In contrast, while rules to protect tenants of houses for residence, were only introduced in 1991, the Civil Code contained, since the first part of the 20th century, provisions to protect tenants of agricultural land (1927) and those of retail trade premises (1930), against termination of tenancy.

Private law, or rather private law remedies, emerged in consumer law with the first comprehensive law on commercial practices in 1971. The Trade Practices Act (TPA) 1971 codified and modernised existing laws on consumer information (in particular indication of price and quantity of goods) and sales promotions (auctions, clearance sales, premium offers) and brought it together in one law with the general clause on unfair competition, that had been the subject matter of another law of 1935 transposing Article 10bis of the Paris Convention.⁵⁵ The TPA 1971 also extended to most of the infringements of its provisions the action for a cease and desist order before the president of the commercial court (according to the procedure applicable to actions for interim relief), that existed since 1935 with regard to acts of unfair competition. The TPA contained provisions to protect consumers against misleading advertising, which could be seen as the *per se* prohibition of a specific act of unfair competition. As for other provisions that were relevant to consumers, in case of infringements, an action for a cease and desist order could be brought by all persons with a direct interest (competitors and individual consumers alike), trade associations, the Minister of Economic Affairs

⁵⁵ See J. Stuyck, *Handelspraktijken*, 4th ed., Mechelen, Wolters Kluwer, 2015, p. 3-4.

and by consumer organisations. This generous standing model still exists today.

Apart from those contained in the 1957 law on instalment sales and loans, *substantive rules of private law* to protect consumers only saw the light as from the 1980ies, in particular, but not always, on the occasion of the implementation of EC Directives: on off premises sales in the 80ies and on unfair contract terms, distant sales, consumer sales in the 90ies. It should be noted that the Trade Practices and Consumer Protection Act 1991 (hereafter: TPCA 1991) already contained a general clause on B2C unfair commercial practices and a per se prohibition of inertia selling (both introduced much later at the EU level by Directive 2005/29 on B2C unfair commercial practices; hereafter: UCPD) as well as rules on unfair contract terms and distant selling (introduced at the EU level respectively in 1993 by Directive 93/13/EEC and in 1997 by directive 97/7/EC).

The injunctions Directive of 1998 (98/27/EC) was not an issue for this country. Consumer organisations already possessed the right to bring actions for injunctive relief since the TPA 1971 (see para 5 above). The transposition of the Directive broadened standing to recognised entities from other Member States.

In 1971 the TPA was the major consumer law, not least because of its central remedy: a generalised action for a cease and desist order, also for consumers (in addition to criminal sanctions for most of its provisions). The action for a cease and desist order could (and can) be brought in case of breach of any legal provision (such as competition law, foodstuff law, safety of goods, etc..) in the course of a trade where it causes harm to other traders or to consumers.⁵⁶ Today most infringements of consumer law provisions are still criminal offenses, but, for lack of prosecutions, criminal cases in this

56 Cass. 2 May 1985, *Revue de droit commerciale belge*, 1985, p. 631; see J. Stuyck, *Handelspraktijken*, p. 198 et seq.

field are rare. The TPA 1971 was replaced by the Trade Practices and Consumer Protection Act (TPCA) 1991 which maintained the substantive and procedural provisions of the TPA 1971, including provisions of contractual consumer protection which that Act contained (see para 6 above). The TPCA 1991, and its later amendments, improved the level of contractual consumer protection, in particular as a result of laws transposing consecutive EC directives. This legislation was again modernised in 2010 with the Market Practices Act (MPA) 2010. In 2014 the substantive rules of the MPA 2010 were incorporated in book VI of the Code of Economic Law, whereas the rules on enforcement were incorporated (and extended to the whole field of economic law) in book XV (criminal enforcement) and XVII (actions for a cease and desist order).

A peculiarity for Belgium until rather recently was the implicit (and sometimes even the express) coalition between the small shop keepers associations and consumer organisations to maintain restrictions on sales promotions. An example of an open coalition was the joint Manifesto of these organisations to maintain the prohibition of premium offers before the adoption of the TPA 1971. Later, at the time when the UCPD (Directive 2005/29/EC) had to be implemented in Belgian law, consumer organisations did not oppose, and one could say even tacitly supported, the maintenance of the prohibition of joint offers, that was obviously contrary to the Directive and was later condemned by the CJUE (in its first judgment on the UCPD).⁵⁷ Today Test-Achats (Belgium's only pure consumer association) seems to be less in favour of restrictions on sales promotions. It should also be admitted that Belgium has only reluctantly abolished (as a result of judgments of the CJEU) and, sadly, has maintained, where it could, regulations that restrict the freedom of commerce by maintaining strict requirements for the access to certain trades and professions,

⁵⁷ Judgment of 29 April 2006, C-261/07 and C-299/07, VTB-VAB, EU :C :2009 : 244.

rules on sale promotions etc..) while these regulations can hardly be seen as necessary in the general interest. EU legislation (such as the UCPD and the Services Directive 2006/123) have forced Belgium to abandon a certain number of these restrictions.

Competition rules have been introduced in 1993 (the competition rules of the EU were however rather actively applied by Belgian courts since the 1960ies). The same year the price regulations existing since 1945 was relaxed. In 2014 price regulation has been repealed, except for medicines. The policy of the Belgian Competition Authority today suggests that tackling cartels in the area of consumer goods is one of its main priorities.

1. Which were the major actors in your country who got consumer law and policy on the national agenda, and which actors played a minor role?

Neither political parties nor statesmen played a significant role in the development of consumerism in Belgium. Federal competence in the area of consumer policy has systematically been conferred on the Minister of Economic Affairs (while reforms of the Civil Code, which in the area of consumer law, only occurred so far with regard to the implementation of the Consumer Sales Directive, is a competence of the Minister of Justice).

The spectacular increase in consumption in the late 1950ies and the 1960ies, the US example (Ralph Nader, the Kennedy declaration and subsequent laws) and the discourse on the “consumption society” were the matrix for consumer advocacy and it gave a boost to private consumer organisations. Already in 1957 a small group of volunteers, inspired by the US and the British example, created the only still existing genuine Belgian consumer association, known as Test-Achats/Test-Aankoop.⁵⁸ In 1959 it published the first issue of

58 In the early years there was one other specialised consumer organisation Ufidec/Vivec VIVEC the feminine union for consumer information and defence) publishing

its magazine with comparative product testing (cf Which in the UK in 1957). In 1960 Test-Achats was one of the founding members of BEUC, the European Consumer Organisation.

The government did not actively support the movement, but provided for a framework for consultation. In 1964 the Consumer Council (Conseil de la Consommation, Raad voor het Verbruik) was established by law: a consultative committee with representatives from businesses and consumers. Consumers were represented by cooperative societies, women organisations, the League for Large and Young families and Test-Achats/Test-Aankoop. Some of these organisations had a strong link with workers organisations. Test-Achats is totally independent. The Consumer Council still exists today with a comparable composition. Other consultative committees, in which trade unions are represented directly, as well as industry and trade had and have more impact on the policy of the government.

Later the government became somewhat more active. Instead of continuing financing occasional campaigns of a consumer educative character it allowed the creation of CRIOC/OIVO (Centre de recherche et d'information des consommateurs/ Onderzoeks- en Informatiecentrum van de Verbruikersorganisaties) by granting it a yearly subsidy. CRIOC was a private law non-profit organisation managed by the consumer organisations represented in the Consumer Council. Its task was to do research for consumer organisations and to inform consumers (and to represent consumers, but in practice CRIOC never played that role). For the government it was also a way to subsidise indirectly consumer organisations. In March 2015 CRIOC went bankrupt as a result of the withdrawal of the subsidies. It was replaced by AB-REOC/ BV-OECO (Association belge de recherche

comparative tests and informing consumers more general on consumption. Other women organisations, cooperatives and the Family League are still active in consumer information (see for an overview in 1975: "Défense et représentation des consommateurs (II)," *Hebdomadaire CRISP*, 1975/34 (n° 700); but today Test-Achats is the only organisation in Belgium publishing comparative tests..

et de l'expertise pour associations de consommateurs/ Belgische Vereniging voor Onderzoek en Expertise voor de Consumentenorganisaties). This association is incorporated by twelve organisations that are active in the field of consumer protection, the trade unions and workers associations, Test-Achats, the Family League and the sickness funds. Its budget is only 500.000 euro a year.

Several individuals, such as judges, civil servants and academics played an important role in the development consumer law. To name just a few: judge (first in the Brussels court of first instance, later in the Court of Appeal of Brussels and finally in the Supreme Court, the Cour de Cassation) Ivan Verougstraete, senior civil servant (in the Ministry of Economic Affairs) Robert Geurts and last but not least, professor Thierry Bourgoignie and his Centre de droit de la Consommation at the Université Catholique de Louvain in Louvain-la-Neuve. Paul Nihoul, Bourgoignie's successor, who was director of the CDC until recently has been appointed judge in the General Court of the EU in October 2016. Eric Balate, who started as an assistant of Bourgoignie, is now a practising lawyer acting regularly for consumer organisation and the government in consumer cases. Jacques Laffineur, who has been working at the CDC and is a practising lawyer is still a researcher at the UCL in consumer law (he is one of the members of the editorial board of DCCR). Recently Anne-Lise Sibony (who publishes regularly i.a. in the field of consumer law and behavioural sciences) moved from the University of Liège to the Université Catholique de Louvain. At the KU Leuven Gert Straetmans, now professor at the University Antwerpen and Evelyne Terryn, now professor at KU Leuven, defended their ph d in consumer law respectively in 1997⁵⁹ and 2005.⁶⁰ The former Study Centre for Consumer Law of the KU leuven is now part of a broader institute: Consumer Competition and Market (active in the field of consumer law and competition law). At the University of

59 G. Straetmans, *Consument en Markt*, Kluwer, 1998.

60 E. Terryn, *Bedenk tijden in het consumentenrecht*, Antwerpen, Intersentia, 2008.

Ghent Reinhard Steennot, of the Financial Law Institute, is a leading scholar in consumer law; notably specialised in consumer financial law. A few years ago Gert Straetmans and Reinhard Steennot created the Interuniversity Centre for Consumer law of the Universities of Ghent and Antwerp.

Lawyers within consumer organisations also contributed to the development of consumer law. Again, to name just of few: Hans De Coninck (Test-Achats), Françoise Domont (idem) (who defended a ph d on consumer credit and vulnerable consumers with Thierry Bourgoignie in 1991) and Pierre Dejemeppe (centre coopératif de la consommation and later consumer expert in the cabinet of the Minister of Economic Affairs). The president director of BEUC, Monique Goyens started her career as a researcher at the CDC of the UCL.

In 1988 DCCR (originally DCR) (*Droit de la Consommation/ Consumentenrecht*) was launched as an independent bilingual legal journal with the administrative support of Test-Achats. Later it was published by the Centre de droit de la consommation of Thierry Bourgoignie (one of the founder of the magazine). Since several years the journal is published by a publishing house (Larcier), but the editorial board remains independent. The journal has gained its place among Belgian quality legal journals. The members of the editorial board are, like before, mainly academics (specialised in different fields of the law) some of whom are practitioners, lawyers, and there are some members from consumer organisations and public service. Shortly afterwards the CDC of Louvain-la-Neuve also launched the *Revue européenne de droit de la consommation*, now bilingual (*European Journal of Consumer Law*). When Paul Nihoul was appointed judge in the General Court of the EU (September 2016) Christophe Verdure became editor in chief.

What could have been a major step in the development of Belgian consumer law was the creation, in 1987, by the then Minister of Economic Affairs of the *Commission d'étude pour la réforme du droit*

de la consommation/ Studiecommissie voor de hervorming van het consumentenrecht (CRDC- SHC). The creation of that Commission was inspired by the French Commission de refonte du droit de la Consommation, chaired by Jean Calais-Auloy. The (CRDC- SHCR) was chaired by Thierry Bourgoignie. Its members were academics (including one Dutch professor, Ewoud Hondius), judges (including Ivan Verougstraete) and civil servants (including Robert Geurts). It held regular meetings from 1987 to 1995. Thierry Bourgoignie presented his Report to the Minister in 1995 in two languages.⁶¹ The Report proposed the adoption of a Consumer Code with the following structure with an explanatory memorandum:

Preliminary Title: definitions; Book I : Rights and obligations of consume in general. Title I: consumer information, Title II: Sales promotions and commercial practices. Title III: contract terms Title IV; prices, Title V: Credit Title VI: conformity and safety of goods and services, Book 2: Remedies and enforcement (including collective agreements, the establishment of a Bureau d'aide aux consommateurs;⁶² an « action d'intérêt collectif » to obtain damages for consumers and collective consumer contracts).

If post 1995 legislation has sometimes been influenced by the Proposal, the adoption of it as such, or parts of it, has never been contemplated by the public authorities.

Although consumer law was not seen and still is largely not seen as a separate branch of the law by policy makers there has been a de facto growing concentration of consumer protection rules in one Act: the TPCA 1991 and later the MPA 2010, now Book VI CEL, with rules not only on commercial practices, but also contractual protec-

61 The French version: Propositions pour une loi générale sur la protection des consommateurs. Rapport de la Commission d'Etude pour la réforme du droit de la consommation, Ministère des affaires étrangères, September, 1995.

62 cf the « Aide juridique aux consommateurs » movement around Bourgoignie: Th. Bourgoignie – G. Delvax – F. Domont-Naert – C. Panier, L'aide juridique au consommateur, Buylant, Brussels, 1981.

tion: distant selling, off premises sales and unfair contract terms, with the exception of the transposition of the Consumer sales Directive: in Civil Code)

The evolution at the academic level shows an increasing interest for consumer law. In the past ten to fifteen years specific courses on consumer law have seen the light in Belgian universities. In the field of research and education in the field of consumer law an important second generation of academics emerged: Christine Biquet (U Liège), Paul Nihoul, Andrée Puttemans (ULB), Gert Straetmans, Reinhard Steennot, Evelyne Terry, and others and even a third generation with notably Bert Keirsbilck, KU Leuven, Anne-Lise Sibony, Catherine Delforge (FU Saint Louis Brussels) and others).

With the growing complexity of consumer contract law (unfair terms, distant selling, consumer finance, etc..) this field of the law has become increasingly important for practising lawyers, especially those advising businesses, but also lawyers that assist consumers (e.g. on unfair contract terms or consumer guarantees before the justices of the peace or other courts). Commercial practices remain largely a matter of litigation between businesses (linked to IP and unfair competition and to a lesser extent to competition law). Test-Achats has conducted a certain number of collective actions, especially in the field of unfair contract terms and more recently, since the entry into force of rules to that effect (Code of Economic Law: 2014) by class actions (especially in the transport sector)

2. Was the system that was built up in your country partially based on foreign examples, and if so, which one? And what about your system has it been followed abroad?

While at the present stage Belgian consumer law is largely a transposition of EU directives, initially it was inspired by developments in neighbouring countries. Belgian law on unfair competition, with its general clause regarding honest business practices (Paris Union

Convention), followed the German example (of the *Gesetz gegen unlauteren Wettbewerb* of 1909).⁶³ Like in Germany, the courts widened progressively the protective aim of the general clause, *i.e.* by taking into account the general interest and the interests of consumers (e.g. by relaxing the strict attitude vis-à-vis comparative advertising).

The TPA 1971 granted standing to consumer organisations to bring actions for a cease and desist order for infringements of the consumer protection provisions of the Act (price indication, misleading advertising and regulated commercial practices). The TPCA 1991 introduced a general clause prohibiting acts that are contrary to honest business practices and are liable to cause a prejudice to consumers (while the traditional general clause on unfair competition prohibits acts that are contrary to honest business practices and are liable to cause prejudice to one or more other businesses). This general clause was inspired by the Nordic model (see already the Swedish *Marknadsföringslagen* 1970).⁶⁴ The TPA 1991 extended the standing of consumer organisations (and the Minister of Economic Affairs) to bring actions for a cease and desist order to infringements of the general clause. The Minister has not often used this possibility.

French law also influenced consumer law in several respects. First Belgian regulations with regard to sales methods and methods of sales promotions, such as public sales, pyramid schemes, premium offers, itinerant sales, sale at a loss, etc. more or less followed the French example. Second the French example was also followed with respect of enforcement by way of criminal sanctions. Third French law also influenced the approach to unfair contract term (e.g. the delegation to the King to regulate contract terms in specific sectors).

63 See J. Stuyck, "Consumer Protection and Fair Competition – One Fight?" in *Droit de la Consommation – Konsumentenrecht – Consumer Law. Liber Amicorum Bernd Stauder* (sous la direction de L. THÉVENOZ – N. REICH), Nomos/Schultess, 2006, p. 497 et seq.

64 J. Stuyck, « Inleidend gedeelte » in J. Stuyck & E. Balate (eds) *Pratiques du commerce & Information et Protection du consommateur*, Centre de droit de la Consommation, Brussels, Story Scientia, 1988, p. 21.

The Explanatory memorandum of the TPCA of 1991 expressly mentions that the provisions on unfair contract terms, i.e. the first Belgian legislation in that area (before Directive 93/13/EEC) were influenced by Dutch and German (ablack list and general nullity sanction) and French legislation (see above).⁶⁵ Although the general pre-contractual information obligation, introduced by the MPA 2010 (check) was based on existing case law⁶⁶ the influence of French law cannot be denied.

Although (in the pre- digital age) Belgian consumers were amongst the less active in purchasing at a distance, Belgium adopted very early rules on distant selling. These rules influenced the Community legislature (Directive 97/7/EC).⁶⁷ Certain provisions of the Belgian law on commercial practices Influenced Dutch law.⁶⁸

3. Was consumer law in your country seen as a separate new branch of law, or was it to be incorporated in the existing law system?

In his phd Thierry Bourgoignie has argued forcefully for the recognition of consumer law as a separate branch of the law.⁶⁹ Later, in their respective ph d theses, Gert Straetmans⁷⁰ and Evelyne Terryn⁷¹ defended a more market oriented approach to consumer law. Today consumer law has become a rather important branch of the law. The most important subjects of research are commercial practices, consumer contract law, consumer credit and remedies.

65 E. Dirix, « De bezwarende bedingen » in J. Stuyck – P. Wytinck, *De nieuwe wet handelspraktijken*, Brussels, Story, 1992, p.

66 P. Wolfcarius, « Les clauses abusives » in *Les pratiques du commerce et l'information des consommateurs*, Editions du jeune Barreau, Bruxelles, 1991, p. 117.

67 B. De Nayer, « Vente à distance et télématique grand public : état de la question et développements récents » in J. Stuyck – E. Ballon (eds), *Verkoop op afstand en telematica*, Deurne, Kluwer, 1997, p. 104.

68 See (Hondius – Rijcken, *Handboek Consumentenrecht*, 2015).

69 Th. Bourgoignie, *Eléments pour une théorie du droit de la consommation*, Brussels, Story-Sceintia, 1988 ; see also the same author : « Characteristics of Consumer Law », *J. Cons. Pol.* 1992, p. 293 et seq.

70 *Consument en Markt*, Kluwer, Antwerp, 1998.

71 *Het herroepingsrecht van de consument* (commercial edition E. Terryn, *Bedenktijden in het consumentenrecht*, Intersentia, Antwerp, 2008).

The present Code of Economic Law (2014) integrates existing laws in the field of consumer law, such as the MPA 2010 (see above) and the Consumer Credit Act and introduced new provisions on ADR (implementing the ADR Directive 2013/11). Even if the Code has certain characteristics of a codification, and book VI on “market practices” regroups an important part of the core of consumer law (general pre-contractual information duty, unfair commercial practices, unfair contract terms, distant selling and off premises sales and some other provisions), consumer law as such is not codified. There is not a real structural and systematic approach to consumer law and important parts of it are outside the CEL (such as consumer sales, product safety, product liability).

4. How did your country position itself in the early years of Europeanisation of consumer law, and how did you position yourself? The development of consumer law in your country, how did it interact with the development of (consumer) protection in) the internal market? If applicable: before and after your country joined the EU?

Belgium can be seen as one of the pioneers in the contractual field: e.g. consumer credit (Act of 1957), unfair terms and distant selling, with protective rules before EU directives imposed their introduction. On the other hand Belgium has been very reluctant to accept that obstacles to free movement resulting from (false) consumer protection had to be removed (first under free movement of goods and services – including comparative advertising -, later the UCPD, see VAB judgment mentioned above). It is submitted that the main reason for this attitude was the strong pressure from small shopkeepers associations. All other consumer law directives were more or less correctly implemented in Belgian law. Most of the changes brought improved to a significant degree the level of consumer protection. In the field of commercial practices and comparative advertising the (late) transposition of directives meant a break with the past.

I am not sure this is relevant, but I have always supported the improvements of the level of contractual protection, be it that I have on occasion criticised the overregulation and sometimes too harsh sanctions of Belgian law. On the other hand, I have been criticising heavily since decades, the strict rules on sales promotions, (joint offers, sale at a loss, indications of price reductions etc.), i.e. long before the UCPD and its interpretation by the CJEU force Belgium to abandon these rules (or to amend them). In my opinion, these rules are not only unjustified obstacles for the internal market but they do not serve at all the consumer interest. They are at most “*Mittelstandsgesetzgebung*” a genre in which Belgium is a champion, together with Austria. The small shop keepers have a strong lobby with a focus on this type of issues. Consumers, even if often they would be against such rules (e.g. the still existing pre seasonal clearance periods during which for certain goods no price reductions may be announced), have more diffuse interests. Politicians know that.

Questions and answers⁷²

Thierry Bourgoignie: one comment about the consumer code: of course as I was chairing this for many years, I do not like to hear that it was not successful. We failed in one thing: the format, the idea was to have one coherent set of legislation or consumer laws being together because for me that was the starting point to confirm the autonomy of consumer law. I wanted to have a code not because the code is nice but because I thought that that was the tool to emphasize that consumer law was separate from contract law, from competition law. On this we failed. On substantive matters I think the code had a lot of influence. Actually, all chapters but one were introduced in the ten years after the adoption of the draft safety law, the revision

72 Jules Stuyck replaced his transcript by a written contribution. There might be a mismatch between the presentation and the discussions.

of the trade legislation, the credit law, so everything was revised and most of the provisions that were included in our draft were finally adopted, except one, access to justice. Only very recently, the collective, finally we had a collective action. We already pleaded that in the 1980s. So for me it was a success story. It was a long, too long process but finally, after I see now from distance it was useful.

Jules Stuyck: I do not want to contradict, I think you are absolutely right, on the other had you would appreciate that many of the provisions now in the trade practices act in the various fields that you have mentioned are transposition of European directives, where we hardly had any choice. I remember also the discussion also that we had on comparative advertising because that was the only point on which we had no consensus within the Commission, and I think you were against the comparative advertising, I was for a comparative advertising and finally Belgium had to abandon the prohibition of comparative advertising because of European directive of 1977 and that happened in 1999. I can give other examples but I think that you are right that it certainly had an influence. The work was not for nothing. But of course the reality of life is that Europe maybe is stronger than a study commission in Brussels.

Hans Micklitz: but Jules isn't it the trade practices law a kind of a general code in a way?

Jules Stuyck: let me put it this way, as I said before most of the consumer protection rules, in particular the implementation of directives, you will find them in what is now called book six of the code of economic law which is actually the old trade practices act which has been put into book six. Because there is no code of economic law, there is no coherence. There are some general principles, but it is not really a code. Left alone book six is not a code. But it is all the different aspects of consumer law except for consumer sales which is in the civil code. There is of course one binding factor and this is very famous and I did not have the time elaborate on that in more

detail but I will say a few words on that: that is the action for cease and desist which in Europe they call injunctions. This is something which is very old in Belgian law since 1935 and since 1991 consumer organizations can bring an action for cease and desist order in cases of unfair commercial practices, in case of unfair contract terms and any other things. But the only consumer organization in Belgium that is able to handle this is and also the class action which we have now, we have a monopoly, like a legal monopoly, for Test-Achats to bring class actions. But we are the only one that we have the means, the resources, to bring actions for cease and desist orders in fields they prioritize, so I am not sure this is a democratic organization because the members that are by the magazine and they do not voice what they would like Test-Achats to do but they will probably act where they think that they can perhaps gain new members and so on so it may be democratic in that sense but I have some doubts. There is actually only one consumer organization that actually today bring actions in certain fields and they do a good job, for example insurance policies, they often act in that field, that is the binding factor I would say, the cease and desist order and the standing is very easy and you can attack violations of any law there is, if it brings prejudice to the consumer interest, you can act, then it is actionable.

Bob Schmitz: Just a brief on the consumer code and with respect to Thierry's presentation, because on the list you presented on the countries which we are discussing, there are two countries that are missing and that they have adopted consumer codes in the marketing and contract law, which are Luxemburg and Italy, but the point is that they were not actually involved, we Luxemburg of course we look particularly in France, which is not the code it is ... but again unfortunately you prepared your work in Belgium, I was part of the Luxemburg group it was not used either, so probably it was a missed opportunity but clearly today Italy and Luxemburg 2011 so basically very few talk about it but actually we have it. Of course I will mention it in my presentation.

6. Luboš Tichý, Czech Republic

First of all, thank you very much Hans Micklitz for the invitation and I feel really honoured to be in the circle of the veterans in the best sense of the word. The veterans of the consumer law and consumer policy here. Now in order to try to exhaust my topic and not to exhaust the audience I will read in old fashioned way for you some remarks on the situation in the Czech Republic.

The aim of my paper is to provide an overview of consumer law in one of the post-communist countries, now Member State of the European Union. Therefore, at first, I will describe the situation, approach of the communist legal order's to the issue, which can be currently treated as a potential area of consumer law. The term "consumer" began to appear in the last years of the communist era in Czechoslovakia, in the 1980's; although, it was a case of conceptual confusion. However, this perspective even has not expired with the political and social changes in my country. Paradoxically enough, it seemed that it will sustains for the next decades. Thus, we can talk about a sort of post-communist inheritance also in consumer protection.

Now, as to the content of my paper. In the following part, I will discuss the development of legislation and judiciary practices regarding the consumer protection. Afterward, I will focus on the activity

of consumer organizations. Finally, I will target some of the relevant problems in the current situation of consumer law in my country.

First, the history: If we want to understand the concept of consumer policy and consumer law in a slightly complex manner, it is necessary to look back onto as I said the communist era, when the status of citizen was reformed into the status of working member of the society, cared for by the state and its socialistic organizations. This was the concept.

It found its manifestation even in the legal order, namely, and even finally, in the Civil Code of 1964, whose ideological base, unlike its predecessor from 1950 which abolished the Austrian ABGB, has abandoned the characteristic expression in accordance with the above-mentioned concept. Classical legal institutions of law of obligations with grounds in Roman Law were substituted by the term “service”. Even the to-date contract of sale was a service in this concept. The legal relationship based on providing the service between the socialistic organizations and working people (see citizens) became a new category in the civil law. The relationship qualitatively differs from the relationship typical for obligations, because the socialistic organizations “fulfil an important social duty by distributing social product.” Including “the consonant interest of citizen and organization” the specific aspects had to be reflected by special provisions in the Civil Code. This was a big difference even towards Poland or compared to for example Hungary. In the particular case of the new type of service - a shop sale – it meant that “the organization was obliged to care of the outlet to be properly supplied by goods, which consumers (*sic*) requested, as the justified requests of the citizens might be properly and continuously satisfied”. By 1986, the Commentary to the Civil Code emphasized that the organization providing a service and the citizen being provided for the service, have mutually equal positions.

Until now, the predominant paradigm recognizes the continuity aspect within the consumer protection, following the law of the communist regime. The idea comes from the above-depicted adjustment in the Civil Code, which was oriented only at the relationship between the organization and the citizen, and therefore creates an impression of a sort of Consumer Code. Yet the impression disregards the basic difference in ideology and the economic conditions in particular. The situation of permanent shortage in the state-controlled economy, when the demand highly exceeded the offer, made every buyer content just considering the fact that he or she could himself be satisfied even at the minimal level – in colloquial words “by buying at least something.” From an ideological point of view, providing the citizen’s protection by the state, which was the greatest guarantor of satisfying citizens’ concerns, was conceptually excluded. That makes the crucial difference between the situation within the market economy, where the consumer is protected against “damage by excess” (surplus) or market “failure.”

There is no surprise that, in the Czech Republic, the term “consumer,” respectively including his/her protection, is strongly ideologically connotated, while being affected as well by an essentially different concept. This latter concept originates from liberal economic ideology, based *inter alia* on the belief of the omnipotent power of the market and by which the market relationships, competition included, should be regulated with the smallest amount practicable. That leads to dissatisfaction with regulations even in the sense of consumer protection. Thus, the area of consumer protection is ruled by a specific schizophrenic situation. This inconsistency of the situation including a lack of education even among superior court judges, induces several nearly embarrassing misunderstandings. Until 2000, according to the then Civil Code, a consumer was not even considered a legal person. It is explicable by the fact that the term “consumer” was not incorporated into the Czech legal order from the private law area, but through the Act on Consumer Protection from 1992. Thus, based on

an administrative law concept. This additionally leads to an unbearably wide interpretation of the term “consumer.” Consumer protection is perceived even in the areas where legal rights (regulations) tend to protect against the dangers threatening any person without regard to his market status. Even common protections related to pharmaceuticals, water, air, etc. is considered as consumer protection. That leads to the situation where provisions based on public law regulation, which serves to common protection, are considered as consumer protection as well. Consumer protection is said to be a diffusional phenomenon (see Norbert Reich etc); meanwhile, its apprehension in the Czech consumer policy and legal doctrine can be described by the diffusional approach.

Now about its legislation, its organization, and others. As was said, the first rule on consumer protection was the Act on Consumer Protection, thus a public law norm. The Act assessed the important conditions for undertaking related to consumer protection, public administration tasks, consumer warranty, and warranty of consumer association. This Act, was amended 30 times until now and *inter alia* prohibited discrimination of consumers sales, dangerous products etc. Until the Czech Republic accessed to the European Communities, the private law directives were partly transformed into the Civil Code, and partly were transposed into special acts – which were cases of product responsibility, time shares, travel contracts, and consumer credit. In 2012, the new Civil Code was approved. It contains the provisions of the former act on travel contracts, time sharing, and product liability. The only private law rule beyond the Civil Code is currently the Act on Consumer Credit. The transposition was controlled by the European Commission rather neglectfully within the pre-accession screening; even some of the fundamental defects and mistakes of the transposition were tolerated.

The organization of the legislative work which is also I think an important part of the Czech picture. The fact that consumer protection

is in the competence of the Ministry of Industry and Trade is one of the typical inconsistencies in the Czech legislative work. The number of departmental civil servants focusing on consumer law decreased in certain periods to five (5) persons (*sic*). Moreover, the Ministry and the employees themselves are educated based on public law, and as a consequence of which the legislative work significantly suffers.

Now about the Consumer Protection Organizations. The situation in this field is quite specific in a certain way maybe compared to Poland and other former communist or socialist countries. On the one hand, civil initiatives are primarily focused on general (administrative) protection. On the other hand, the consumer organizations are not so active in the scope of civil law, which is definitely more difficult because of the requirement of specific knowledge, as we would presume. The development of organizations depends on the political situation, especially on the Minister of Industry and Trade. In the last decades, the political situation has been fluctuating. As we can see, numerous initiatives similar to consumer organizations were relatively evolving at the end of the 1990s during the social democratic government. The number and significance of these initiatives vigorously decreased during the right-wing governments after 2006. Above that, the importance of initiatives has not increased after 2014, when the Minister of Industry and Trade was appointed by social democrats. The efficiency of the consumer organisation initiatives is conditioned by public funding, which is relatively uncertain and very limited. The system of funding is based on grants, for which the initiatives organization have to apply, and their granting is uncertain. In addition, payments can be delayed.

Teaching consumer laws, which is part of consumer policy, is not in the center of the interest. Consumer law is not taught in the administrative law curriculum and it is just partly taught in civil law in a limited scope. Scholarly discussions in the field of consumer law,

i.e. in the scope of civil law, are very rare and they are unpopular among the public.

Now, the very last part if I am allowed to speak. First of all the procedural issues. A class action as a main instrument for procedural prevention in consumer protection law is still an unknown phenomenon in my country. Unfair Provisions in Contracts, Unfair terms in contracts: It is up to consumers to admit the validity to a contract, including contracts with unfair clauses, which shall be invalidated by operation of law, according to the Civil Code. Consumer Loans: The scope of abuse because of poor public awareness of the particular grave in the area of consumer loans. As the courts held usury interests in the amount of 29% to be illegal, with reasoning that the price of the service is not subject to control. Similarly, the courts did not penalize banks for unfair arbitration clauses in loan agreements since the banks appointed the sole arbitrator according to these terms. No case I can see pending on product liability before the Czech Courts. This is also very strange. Protection of Personal Data: The legislation on so-called debtor consumer registers pursuant to the Consumer Protection Act is absolutely absurd and unconstitutional. For the purpose of protection of entrepreneurs, especially banks, the creditors (entrepreneurs) are allowed the banks to inform each other about the identification data of consumers, conditions of their solvency, payment discipline and credibility. So it is sad thank you for attention.

Questions

Hans-W. Micklitz: I have a question to you: Thomas Roethe, and then after 1990 after the German unification, we did a lot of studies in the former GDR and what we learned and that would be my question: in the GDR the starting point of consumer protection was the law that was adopted in the late 1970s, early 1980s I do not remember exactly. The law was saying that a meter has 100 cm and not 97. I am not joking. The story behind it was IKEA because IKEA decided

to produce furniture in the GDR that was so substandard that it could not be imported anywhere. I am wondering, to what extent you had laws on measurement that were bringing the socialist times near to market requirements. Because we learned that a number of countries of the former communist countries adopted similar laws.

Luboš Tichý: There was no IKEA in the former Czechoslovakia, therefore may be no reason for that.

Aneta Wiewiórowska-Domagalska: I was quite intrigued by what you said that the Commission not really checking the transposition before the accession because in Poland we had a completely different story. We were pushed without mercy especially on the implementation on the unfair contracts terms directive. The Commission's approach has an impact on how next directives transposed in Poland so the Commission was really really trying to get into detail without actually understanding what the problem was or that the transposition was actually correct.

Conference participants: I have a comparative question because I am very curious if the Czech Republic shares the same experiences as the Polish experience with consumer law v. social and economic transformation after 1989 because before 1989. I would say, we had a quite well-developed doctrine of protection of customers in the market without the concept of consumer, so without the EU law, without all of these axiological and structural background behind. After 1989 we started to transpose EU law of course and all this story happened in every member state but the transformation cost like a short of shift of the overall axiology of private law. So Courts, legal scholars, started to think about the market in a truly liberal sense and liberal sense I mean in the 19th century meaning. So after 1989, we started to have very well developed consumer law but a very underdeveloped consumer law axiology. Was it also the case for the Czech Republic or not?

Luboš Tichý: First of all, I was very surprised to know in the 1980s in the 20th century one developed the notion of competition under the socialist economy. No market and still the competition, that is curious to me. The consumer law was introduced in 1992 but the implementation of this law was very slow and this inter alia under the influence of the ideology of Klaus' party, with a very liberal attitude to the economy and its development, actually blocking or neglecting the notion of consumer in the 1990s. This is that I can tell you.

7. Børge Dahl, Denmark

We have a saying in Denmark: What has not been ridiculed in a newspaper cartoon does not really matter.

In our basement over the washing machine we have placed a cartoon. On the cartoon you see a washing machine and a woman. Through the glass of the washer you see a man. The text first states that the Complaints Board for Household Appliances has issued a warning against unqualified repair work. Then follows a speak of the woman: "What repairman did you get hold of, Børge? When I press the button for colored wash I get the TV news." The cartoon was brought in the leading Danish newspaper on May 28th, 1980. We thus know for sure that consumer policy was something being taken seriously at that time in Denmark.

When I studied law at the University of Copenhagen from 1966-1972, consumer law was not a subject on the curriculum. The consumer was not even a subject playing a role in the text books on classical subjects such as contract law, sales law and unfair trade and competition law.

At the same time, it was obvious that ordinary people in their capacity of consumers of goods and services were in great need of protection. As a 1968 student of law you did not have to be among

those fighting on the barricades in the streets to understand the shortcomings of law based on ideas and principles of long gone centuries such as caveat emptor and freedom and sanctity of contract. It was easy to see not only the need for social change but also for a fundamental reform of law ensuring justice for consumers on the market. If you took an interest in the functioning of law and justice it was quite obvious that the position of the consumer was quite weak and needed improvement through law.

The time was ripe for the development of consumer law as a field in its own right. Globally, consumer policy had got a tremendous foundation with President Kennedy's historic address to the US Congress on 15 March 1962. He stated that consumers by definition include us all – yet consumers are the only important group whose views are often not heard. He outlined a vision of four consumer rights – the right to safety, the right to be informed, the right to choose and the right to be heard which are still among the fundamental principles of consumer policy to day.

As early as 1947 we had in Denmark got The Consumer Council as an organization for the promotion of consumer policy. The Consumer Council was instrumental in paving the way for consumer protection. Consumer law really got wind under the sails in the 1970's.

Of importance was also the close relationship with our Scandinavian and Nordic neighboring states with a common history and common values. From the 1950's we had a growth of Nordic cooperation on consumer issues in pace with the consumer policy development within the individual countries. In 1958 the governments of the Scandinavian countries established a Permanent Committee for Consumer Affairs which later became an organ under the Nordic Council. It was a Committee composed of government officials and representatives of consumer organizations. In 1968 the Committee published a report "Consumer Legislation in Denmark, Finland, Norway and Sweden". Annexed to the report are a number of statements of the Committee,

among other things urging the governments of the Nordic countries to start work on a special consumer sales law and issue regulation on doorstep selling and a right of withdrawal.

For the development of consumer law in Denmark it was crucial that the government in 1969 established a Consumer Commission to evaluate the consumer's general position and need for protection in the market as the basis for the formulation of an up-to-date consumer policy. The Commission was composed of government officials, neutral experts and in careful balance representatives of business and consumer organizations. It issued four reports, one in 1971 on labelling and marking, one in 1973 on marketing practices, Consumer Ombudsman and Consumer Complaints Board, one in 1975 on the legal position and protection of the consumer and one in 1977 on consumer information and consumer policy.

Product Liability became my way into consumer matters and consumer law. I wrote during my last year as a law student a thesis on product liability published as a book of 559 pages in 1973. On the first page I point "to the explosive development within technology and science, manifested not only by the production of atomic bombs, jet planes, rockets and satellites, but also by a complete change in the market for consumer goods. The rapid development in the market for ready-made consumer goods with its constant introduction of new articles has affected our consumption pattern. Today many people are older than the types of goods they use. The pattern of our consumption has been fixed prior to the appearance of the goods, but nevertheless this pattern decides our selection among alternative possibilities in connection with the purchase as well as the use of the goods. The fact that the goods are younger than we are means that we use them without being fully aware of the risks involved". This, of course, is stating the obvious but it was not that obvious back then.

A main finding of my product liability study was that the Danish courts had developed a rule according to which any link in the chain of production and supply, a product had followed, was liable not only for their own faults but vicariously liable for faults committed in previous links in the chain of production and supply. On this rule I wrote: “It is obviously a major advantage to the consumer that he can hold the supplier responsible. This applies, in particular, in connection with imported products ... If the consumer had a claim only against the link in the chain where the fault was committed he would, in many instances, have to run *fra pillar to post* with his claim. In view of the trend towards increasing specialization and the consequently growing need for cooperation, the question at issue should not be which single link in the chain was too weak but whether the chain, as a whole, was strong enough. In order for a link in the chain not to be able to evade responsibility by “passing the buck”, some sort of vicarious liability will be required.”

After having finished my law studies in 1972 I got a scholarship at the University of Copenhagen enabling me to spend 1973-1974 abroad – first at Freiburg University in Germany, next at Cambridge University in England. It was a great pleasure to have immediate library access to the actual writings in German and English on consumer matters such as an article of Eike von Hippel, “Grundfragen des Verbraucherschutzes”, in *Neue Juristischen Wochenschrift* from 1972. And an even greater pleasure to get acquainted with the book of Gordon Borrie and Aubrey Diamond, “The Consumer, Society and the Law”.

In an article from 1972, in one of the many German *Festschriften*, I especially noticed the following sentence: “Die Gesetze entstehen auf Grund von Erfahrungsmaterial; sie sind nicht zukunfts-, sondern günstigenfalls gegenwarts-, meist aber vergangenheits-orientiert.” (Müller Lutz in “Festgabe für Hans Möller”, 1972). In my translation: Legislation is based on experience; legislation is not oriented to-

wards the future, legislation is at best oriented towards the present, mostly, however, legislation is oriented towards the past. I put that sentence on top of an article on consumer protection from 1973. The article contained sections with headings like “The legal objectives of consumer policy”, “Protection against aggressive and manipulative sales forms”, “Protection against unreasonable contract terms”. A main point in the article was the need to combine civil law and public law in redressing the various consumer problems in order to have a comprehensive, harmonic and integrated system of protection in which rules without any connection does not stand next to or maybe even against each other but are based on a common conception and goal. It was thus argued that in the field of contract terms judicial control cannot stand alone, but has to go hand in hand with protective mandatory legislation and preventive administrative control.

Later that year I published an article on the work of the Consumer Commission in the field of marketing practices. My conclusion was that the proposals of the Commission did not give consumers special protection but aimed at protecting consumers on equal footing with business enterprises. I quoted the Commission for saying that their proposals were based on an understanding according to which business and consumers in almost all cases had a common interest in good marketing practices. I urged the Commission, if its future work had to be based on a similar assertion, to provide proof.

Nevertheless, the reports of the Consumer Commission were very important for the development of Danish Consumer Law. In 1975 we got as a result of the work of the Consumer Commission the Consumer Ombudsman and the Consumer Complaints Board which are still today important institutions in the protection of consumers in Denmark. The Consumer Ombudsman legislation went into force on May 1st, 1975. I participated in the work in the institution in 1975 but returned to University at the beginning of 1976. Shortly after I established consumer law as a course – as I recall it was in

the autumn of 1977 that consumer law for the first time was on the curriculum at a Danish university.

At the same time, I was secretary for a committee under the Department of Justice that should deal with the problems of consumer sales. The report of the committee from 1978 led in 1979 to the insertion of a special chapter on consumer sales in the existing Danish Sale of Goods Act. I became furthermore a legal consultant to the Consumer Council where *Benedicte Federspiel* was a leading person. The Council was really successful in getting consumer policy on the national agenda. Denmark's Radio had at the time and for quite some years a consumer programme five minutes to eight in the morning. I was associated with the programme as a legal adviser answering questions in the programme on the legal rights of consumers or shortcomings of existing legislation as the case might be. It was a very popular programme – the number of channels was rather limited in those days. What was really important was that whatever I said to be the law was absolutely correct, neutral and objective. Influencing the development of the law through such a programme depended on the selection of the stories and problems of the daily life of consumers.

In 1976 I joined a loosely organized group of researchers in economy, law and behavioral sciences composed of people interested in increased interdisciplinary cooperation in Danish consumer research. Most of the participants came from other fields than law. The group organized two seminars in 1976 and as a result a book was published in 1977. One of the editors of that book was *Folke Ölander*. He was one of the three founders of *Journal of Consumer Policy* in 1977, a position he held until 2005. In 1980, I co-edited a book on consumer research – also a result of the collaboration in the broad field of consumer research. In that book I wrote together with Folke Ölander an introduction “Consumer research – what is that?” It was of great value to get together with people from quite different fields and get

quite different knowledge and learn about quite different methods of research. You cannot develop law without understanding of the reality with which the law is concerned. An interdisciplinary approach may be very helpful in analyzing many problems in the consumer as well as many other fields.

As mentioned, most of the participants came from other fields than law. However, one of the general subjects in the 1980-book was consumer complaints with a contribution by *Peter Møgelvang-Hansen* who from that time certainly is an actor of importance in the Danish consumer law field. But consumer law has not been an area of special interest in the university world. In Denmark, we have never had a professorship in consumer law. I myself became in 1981 professor of business law and director of the Law Department at the Copenhagen Business School.

Nordic lawyers with an interest in consumer law did come together in the 1970's. "Consumer Law in the Nordic countries" is a publication from one such occasion, a seminar in 1978 also arranged by the Committee for Consumer Affairs under the Nordic Council. The seminar was a project that I was responsible for. A contributor from Sweden was Ulf Bernitz from Stockholm University. It is from similar occasions in those years that I know my good friends, Thomas Willhelmsson from Finland, and Kai Krüger from Norway.

In 1973 Denmark became a member of the EEC as it then was. Denmark took as chair of the Council in the second half of 1973 a leading role in the development of EEC's first consumer policy programme adopted in 1975. In a commentary to the programme that I wrote in 1978 I dealt with the problems of legal basis in the Treaty for the development of consumer law inside the Community. This, of course, is to day only of historical interest. The consumer policy programme meant quite a lot for the development of consumer law in Europe in the 1980's and later on.

I became the author of the Danish contribution of the series “Consumer Legislation in the EC Countries” and am very grateful for in this way having got new friends, many of them present here to day. I still remember when I first met Norbert Reich and Hans Micklitz and had the pleasure after a good days work to read good night stories to Norberts children waiting for dinner and enjoying a pleasant night in good company. Norbert is certainly to be missed to day.

I became the university member from Denmark in the EC Consumer Law Group, Benedicte being the consumer organization member from Denmark. This group and its Commission-anchor, Ludwig Krämer, has undoubtedly meant a lot for the development of consumer law. The discussions, the mutual understanding, the arguments – no, this is not possible according to the BGB, but no, this is quite the opposite of the Code Civile, listen, we have recently a judgment from the Court of Appeal, etc. It was great enlightenment and great fun.

Ludwig Krämer made sure that we as a group actually produced something worthwhile the costs of the meetings. Many of the reports we fought about have been of importance for what came out in the end either in the EU or back home. It was no surprise that Ludwig wrote the leading textbook on EC consumer law.

In Denmark the first book on Danish Consumer Law in Danish was published in 1986 by Palle Bo Madsen and Anne-Dorte Bruun Nielsen, both at the University of Aarhus. It was certainly a pioneering work, very reliable and very well written.

In the 1980's I was member of a number of committees preparing legislation to protect the consumer in various fields such as the sale of real estate, villas and flats, consumer services and legal aid.

As a result of the work in such committees and the Consumer Committee consumer law in Denmark has developed partly as a separate field of law with special institutions to protect the consumer such as the Consumer Ombudsman and the Consumer Complaints Board,

partly as integrated in the existing system of law. The latter is especially the case as regards the introduction of protectively mandatory civil law statutes concerning various types of consumer transactions. Even when such rules may be found in a separate statute the rules are developed with the general rules and principles as background.

In the development of Danish consumer law the similar development in the other Nordic countries has been a great source of inspiration and vice versa. In 1985 I wrote together with Peter Møgelvang-Hansen a book on consumer guarantees and arranged a Nordic seminar on the use of guarantees in the marketing and selling of goods and services. The seminar report is just another proof of how close the Nordic collaboration in the development of consumer law has been.

One could easily talk about a Nordic model of consumer protection and consumer law even though it later on has been greatly influenced by EU-consumer policy measures, not always fitting easily into our existing system and not always leaving room for the level of protection that already existed or was needed. Recent development, however, is after I left the university world and business and consumer law to become a justice of the Danish Supreme Court in 1996. I therefore rest my case.

Questions and answers

Niklas Olsen: I hesitated a bit, I teach history at the University of Copenhagen, thanks for the very interesting talk, I have many questions I will just pose one which might go to all of the talks in fact. So the question would be where were at all the economists about the debates on consumer law? Were economics and economic thought a source of inspiration, we heard about Galbraith earlier in the talk, where they partners to collaborate with the people to counter-argue, with no contact at all I would be really interested to hear a reflection on that.

Børge Dahl: from my experience there were some organized interdisciplinary groups back the 70s, one or two had a great number of economists and I think that the reason why there were so many at that time was because there was money in research foundations to be put in this area of consumer economics. So this was not something that was a lasting interest, it was an interest that was graded because there was a priority in the area. This does not mean that you could not find one or two at my age consumer economists who have worked at that subject. (..) would be a name. I cannot speak about other countries.

Hans-W. Micklitz: I will give you my view on this. The Journal of Consumer Policy was established in 76. There were two economists and one lawyer, so that was quite forward looking. But with regards to Germany, maybe we can discuss it tomorrow. But consumer policy if any was much more related to socio legal research, the sociological dimension so to say. Economics came in only in Germany very slowly via law and economics, so in the mid 80s it started.

Thierry Bourgoignie: It is not a question, it is a comment on this; my own experience when developing consumer law and policy. I was desperately looking for economists thinking in the same way that we as most economists were interested in marketing practices and try to better understand how the consumers better behave so that they could target better their policy. Also when I was working in the US in my master program that were the time you had the critical legal studies movement and Calabresi and then you had Posner and the Chicago school and obviously we were strongly against the law and economics approach very suspicious about this approach, that is for sure.

Ludwig Krämer: For the European level we were desperately looking for economists who were interested in consumer law. I remember I had to give a study on planned obsolescence of products, a typical economic subject but I could not find anybody and that for years so

certainly from the early 70s until the early 80s no economist was ever interested in these small consumer problems. They were interested in the unfair marketing thing from the industrial or trade department.

Iain Ramsay: just on the law and economics, there was a small book in England I think by Dennis (..) who wrote on competition but I agree with Thierry since I spent time in North America. The law and economics movement originally got off the ground in 1970s with Posner which was Chicago and Calabresi who was more in the middle of the road and initially the law and economics movement was a critique of regulation so what I was trying to do and I will speak about it tomorrow was to develop a law and economics approach that would justify a different form of regulation. But I think economists in general might they focus on competition and not so much on consumer protection at that time.

Jules Stuyck: I had the same experience as what Thierry and Iain have explained. Actually in the 1970s we read about law and economics and I remember that in 1970s I was at that seminar at Lund University in Sweden and you had Posner and Calabresi and some of the other big guys. I was there because I knew a law professor in Lund and this was an economics seminar it was about these issues. I do not remember exactly the topic but I had to speak there and it was certainly something in the area of consumer law but probably indeed also connected with markets and competition law. Indeed if you look at the UK those days you will have studies on competition and perhaps in relation with consumers. But economists in general did not have a keen interest in consumer problems as a research subject. I think this is quite right.

Iain Ramsay: Can I add one point? The consumer policy is much about information, economics of information which was very undeveloped. George Stiglitz wrote an article in 1961 saying information is the slum dwelling of economics. That was the article that started

off the economics of information. Economists had not developed that sophisticated ideas about information in the 60s early 70s.

Alex Schuster: So first to echo what Iain said about economists being more interested in competition policy than in consumer law, certainly it was my experience and I co teach a course on economic and legal aspects of competition policy in ... My co teacher is a professor from the School of Economics. The Law School occasionally allows a brilliant economics student under the LLM course. Last year I was lecturing EU consumer law on the notion of what is a consumer, intelligent, perceptive and informed. One of the students in the class raised his hands and he said I know you have heard of behavioral economics, isn't there more scope for intervening behavioral economics into the Court's jurisprudence on informed consumers? So I ended up supervising him for an LLM. I do not supervise him now but he is going to do a PHD to look at this interaction between the notion of the consumer from legal perspective and behavioural economics. So I think there is scope for that to happen but it has not happened to a huge degree yet.

Bob Schmitz: I am a bit hesitant because I might say something that is stupid. I remember at European level some time ago they were researching on the consumer detriment. In my view this somehow faded away. I cannot even remember it was in some of the communications and the papers. If my memory is correct I lost completely sight of what happened with this research project, if that was picked up. I just missed it out the following up but the issue was on the table and I do not know how that ended up.

Alex Schuster: I don't want to talk just about Ireland but because you asked that question. In 2005 the consumer strategy group produced a report on Irish consumer protection called make consumers count and there were economists involved in the strategy group as well as well as lawyers and they did a chapter on consumer detri-

ment. It has not been completely buried but the Courts struggle to get out of the grave. Thanks.

Iain Ramsay: Can I add on the consumer detriment? The Office of Fair Trading made some studies on the consumer detriment and they tried to measure it and they needed to do that in order to justify regulation and I am not sure of the exact date of the study but it might have inspired the European study.

Hans-W. Micklitz: that was a nice cross cultural question I think we could agree that economics did not really play a role in the founding years of consumer law and policy. Consumer protection was much more regarded as a social problem and what is the role of law to react to this social problem. So thank you for this first day, thank you very much.

8. *Thomas Wilhelmsson, Finland*

Well, dear friends, first I want to thank Hans for inviting us today to this conference. This is really a good idea, even though I feel a little awkward by being kind of the object of research here. If I understood you correctly the aim of the conference is to let the oldies tell their stories before they die. I feel a little bit awkward by that approach, but I will do my best to follow your recommendations and speak about the formative years of the Finnish and Nordic consumer law. I think during these years quite quickly the Nordic countries adopted a relatively advanced position. The Nordic consumer law was considered quite radical and efficient. I don't want to get into any competition; it seems that every one of us thinks that our own law was radical at that time. But I don't think we need to compete on that issue.

Hans-W. Micklitz: Thomas, I am still waiting for this and I am telling this to my students that I am waiting one of my colleagues to say that my legal order is really the worst legal order. You know, all the others are better, but we are really down. We have 28 best orders.

Thomas Wilhelmsson continues:

At least I can admit that I was not personally very fond of consumer law at the beginning. I made my doctoral thesis on insurance law with the main approach *ideology critique* and my main theme was

to show that the rules that protected the insured were in fact there because of pressure of the insurance companies. I have also written some pieces on consumer law as the ideological defense of capitalist consumer societies, so I was not that eager at the beginning. Having got to know all the interesting consumer lawyers all around Europe and in the world I was caught by this idea of what consumer law could do as well and not just make false ideologies.

In the Nordic countries it has been assumed that the Nordic countries had a fairly advanced consumer protection legislation quite early. It was due to two things: a) favorable societal and political conditions: consumer law was understood as an integral part of the welfare state project in our countries and that had a very broad political support in the sense that it crossed the lines between different political parties; b) but it was also facilitated by a relatively low grade of internal resistance from law itself and from the legal profession. That I would attribute to the fact that we have this special Nordic instrumentalist approach to law without having a civil code that locks our thinking into the systematics. Systematics is not very important for Nordic law and that really made it much easier to introduce new concepts. At the same time Nordic law is fairly instrumental in the legal engineering sense of American law. The consumer protection legal engineering was not something horrific to lawyers. Of course there was some resistance. I remember I heard that one of the most influential private law professors at the time used to say that consumer law is private law for the trash. That was his attitude. So you could find these attitudes, but that was more on a personal than systematical level.

I think (as a Finn) that when we get a task we want to fulfill it precisely. As Hans wrote to us and gave us four questions, I thought I would answer to those four questions.

The first question was about the main drivers of consumer law in our country.

In many countries consumer organizations were strong drivers. That was not the case in Finland at all. We had no strong consumer movement. We had two consumer associations which were very weak. So in fact when the legislator had to discuss with civil society about the law drafting, the partners were really the labor unions. And even one of the consumer organizations was financed and established by the labor unions. So it was the labor unions who were discussing partners, if any. But clearly the development in our country was driven by the legislator and, to be more concrete, not even by political parties so much, but by public servants mainly in the Ministry of Justice. This was really an administration project which in the Ministry of Justice produced a proposal for comprehensive consumer protection in the beginning of the seventies. After that the government bill and the law were adopted in 1977. So the driving force was the law drafting department of the Ministry of Justice lead by public servants.

We had a quite politicized administration at that time. Many public servants had a link to a political party, which fortunately is not the case any more. But at that time it was normal. So the law drafting department was led by a social democrat, Antti Kivivuori, and it was considered relatively active and very radical. Bourgeois press called it the red drafting machine. Indeed, that was often the used phrase for the law drafting department of the Ministry of Justice - the red drafting machine. The group that proposed this consumer protection legislation consisted of three social democratic public servants Antti Kivivuori himself, Jyrki Tala and Gerhard af Schultén (who became later the first consumer ombudsman) and one person belonging to the centrist Swedish People's Party, Leif Sevón (who later became judge at the European Court of Justice and President of the Supreme Court in Finland). The preparatory work was started by a social democratic Minister of Justice. So you could say that this was a social democratic project, but this does not mean that in the political sphere it was purely social democratic. There was a broad political consensus on the issue. In the parliament the bill was

finally passed with the vote 172 to 4. In fact the social democratic government had collapsed before the bill was brought to the Parliament. It was a centrist minority government that brought the bill to the Parliament. So there was a broad political consensus. There was some political debate only concerning details like the rules on municipal consumer advice. There were rules in the first proposal that in each municipality there should be consumer advice centers and that obligation was made voluntary for the municipalities by the centrist government, but in the parliament it was returned to an obligatory form, as an obligation for the municipalities. So these kinds of small political issues were discussed, but the main parts were accepted by (almost) all parties.

I was at that time finishing my thesis but I was very closely connected with these people because the four persons that I mentioned all had academic background. I worked at our department of private law at that time where most of them had worked as well. Then in 1979 I myself joined the drafting machine so I had the opportunity to draft new rules on consumer credit and some other issues and I could tell a lot of stories from that time – quite an interesting time of course. For instance, we made a comprehensive proposal for drug liability – then we had a right wing minister, who did not like regulation, so what he did was he convened the actors in the field and said: now you have to make a voluntary scheme, if you don't, we make legislation. So we have a very good “voluntary” scheme still in force in Finland for drug liability. I also prepared, with Leif Sevón, a new Act on interest for delayed payment when we discovered from some old Swedish Market court practice the concept of social force majeure. I suggested that we should have a rule on that in the Act on interest. We managed to get through a rule saying that interest on delayed payment could be mitigated if it was due to unemployment, illness, divorce and similar reasons. That was kind of a start of an interesting journey making this social force majeure concept an established concept of the Finnish consumer protection law.

Well, that's about the drivers and the driving forces of the red drafting machine.

Second question: where did we get our inspiration?

Well, our public servants got the inspiration. It is easy to answer. In Finland consumer law was clearly inspired by the Nordic community, by the Nordic law. Particularly much was taken from Sweden, which was a few years ahead of us in this context. Many of the basic solutions like the consumer ombudsman, the general clauses etc. were taken from Swedish law. And of course other countries were studied as well. But such important documents as the UN principles were very rarely cited, they did not really have a strong impact on the discussion. Of course some things were taken from the EC as well, like the door step selling rules in the Consumer protection act. We also had a proposal for products liability legislation based on the then EU proposals. But one could say that in general the Nordic countries learned from each other and they genuinely created a Nordic model of consumer protection with the consumer ombudsman in the center, which was much inspired by other ombudsman constructions of similar kinds in the Nordic countries. This Nordic model was of course much studied around the world and had some influence also on EC legislation.

As you wanted to have some anecdotes about what happened I may tell one anecdote about the Nordic influence. Sometimes in the beginning of the 1990s I was sitting in my office and then a young man knocked on my door and stepped in and said: 'well hello, I am an Estonian law student and I have been designated a task of writing a new consumer protection legislation for Estonia (that was the time when young people really had influence in Estonia) and I heard that you know something about consumer protection, could you help me?' I got what I had in English and I gave it to him. A few years later I met him in Estonia and then he was the first Estonian consumer ombudsman based on the consumer protection legislation.

The third question you posed was how the consumer law was introduced in the system and the question whether it should be regarded as Sonderprivatrecht as the Germans would say or a part of general private law.

That issue never reached any prominent place on the Nordic agenda. As I mentioned at the beginning, in the instrumentalist, anti-metaphysical Nordic model, systematics is not considered very important, so that was not any key problem. We think the placement of the rules is more a question of practicality than of any deep structure of legal thinking. So, it was very easy to combine, in the Consumer Protection Act, pieces of private law and public law and bring the legislation forward. In fact this lack of interest in legal systematics is very well illustrated by the fact that all the Nordic countries - even though we think we have a very similar system - have adopted different systematical approaches. In Finland we have a general Consumer Protection Act – you can call it a Consumer Code even though comparative scholars never mentioned this as one of the consumer codes. Most of the rules of consumer protection are gathered in one Consumer Protection Act regulating contract terms, sales, services, marketing etc. Product liability and product safety are apart but the rest is in one act. In Sweden they have different acts on marketing, consumer sales etc., they have chosen to have different legislative acts for each issue. In Norway again for instance consumer sales is a part of the general sales act. So we have the same rules but in different places, and we do not consider it as any problem whatsoever.

I think to establish consumer law it was more important than systematic solutions that it was clearly established in teaching and academic work, because that played an important role in our system. I think some of the books we wrote did have a very strong impact on making consumer law a recognized part of our legal system. If you call us mothers or fathers of consumer law, I think if I would be a father in some sense, that would be through my basic book on

consumer protection in Finland which was published both in Finnish and in Swedish and was an obligatory part of our curricula for many years. So that really established consumer law in a way as a natural part of law. We had a quite vibrant school of many young doctoral students who made their theses in this area. In addition we had a Market Court which was very active and fairly radical. I had the opportunity to sit there for ten years and there we made decisions that went further than for instance the Swedish Market court did– I don't think we have time to go into these details here now. So the establishment of consumer law in Finland happened through active legislation supported by legal doctrine and by the specialist consumer law courts like the Market Court.

It was probably, or even clearly, against the Human rights convention to have this kind of Market Court without any appeal, but it made it possible to have a radical line. Later we discovered that it is not acceptable from the point of view of human rights, so now there is a right to appeal to the Supreme Court and that has domesticated the Market Court very much. So you win here you lose there, that's how the legal battle usually looks like.

If I return to the concept of social force majeure, that was something that was also established through some writings in legal doctrine. I had my social civil law writings. That was inspiring the Market Court to make new decisions on social force majeure which again inspired the red law drafting machine (I was not working there any more) to introduce social force majeure rules in the reforms of consumers' sales legislation as well. So the concept kind of grew in different directions through an interesting cooperation between legislation, practice and doctrine. If you want to look at the history of a concept, you always need to see the interrelations between all these players.

Final question: Europeanization.

I think at the beginning that was seen as a threat rather than an opportunity. Finland joined the EU like Sweden in 1995. As you have heard we were influenced by the EU already before that, but I think when we joined the general conception was that the Nordic consumer protection was on a higher level than what was attempted in the European Union. So there was quite a strong policy from the Nordic countries at that time to press to have only minimum rules in order not to have to bring down the rules on Nordic consumer protection. I think, as you know, that this worked quite successfully: most of the directives at that time were minimum rules.

In fact in Finland we adopted even the maximum product liability legislation without a threshold for small claims, because it was kind of absurd to introduce that threshold. But then we were forced when we joined EU to put in the threshold. However, practice and doctrines have in several ways tried to come around that unfortunate rule. In fact Finland is also the only European Union country in addition to Luxemburg (that does not have any production so this issue does not matter for Luxemburg) that has introduced the product liability directive without the development risk defense. So we don't have a development risk defense in Finnish law - and it has not been any problem whatsoever. Doctrine overrules some things.

So that is more or less what I have to say about consumer law.

Perhaps one thing – as I see Stefan Grundmann here - which does not really answer so much to the questions you posed, but relates to how we were involved in the consumer law drafting on EU level. I was personally participating in the first working group drafting the consumer sales directive – the first one, Geraint Howells was there and some others as well. I just want to mention this, because I see in literature that there have been some articles speculating, whether the international convention on sales was the model for the the consumers sales directive. I can say, yes it was, it clearly was a model. I was there and when we had our first meeting the Commission of-

officials had prepared a draft on consumer sales which was so poor that we all agreed that it could not even form the basis of further discussions. I suggested, seconded by Geraint as well, that as the sales convention was adopted by most European countries, it would be natural to start from that point of view and from that systematics. That was the background. I was personally attending the Vienna diplomatic conference where the CISG was adopted, so I had it in my head and we had recently adopted new sales legislation in the Nordic countries based on the convention. Related to this we had also introduced at the same time some amendments of consumer sales law and I thought that this would fit very well. So that is just a comment to European consumer sales law that these speculations on its roots in the convention are clearly correct.

But back to consumer law and policy I think that in Finland and in the Nordics as well the era of advanced consumer protection law is coming to an end. As you can see the Unfair Commercial Practices Directive for instance is a maximum directive. The Ministry of Trade and Commerce has taken over consumer policy in Finland. They do not have the same interest in consumer protection as in market protection, so I think nowadays the resistance against maximum directives or harmonization directives is much less clear than it was in the first years of consumer policy.

So these were my answers. Thanks for the initiative!

Questions

Klaus Tonner: The last information that you stopped the resistance against full harmonization is really bad. When we discuss about consumers sales law, then we have the discussion about longer limitation periods for life span products and we all are looking to the Nordic countries to have some experience in that field. What about that? But my real question to you concerns enforcement, a topic you

did not mention about the Consumer Ombudsman, a law in Finland some weeks ago that you now have a competition and consumer authority. Which is not new for some MS but is new for some western European MS to discuss in that direction. There is some discussion in my country too and I would like to ask you what do you think about that for most of the MS new development?

Jules Stuyck: Thank you Hans, thank you Thomas, I could make it, I heard most of what you said, perhaps I missed something and I heard you speaking about the social force majeure and I was wondering – perhaps you said it but I did not hear it, was this a general clause, or a statutory provision in different laws or is it a case law principle? Perhaps you could elaborate on that.

Aneta Wiewiórowska- Domagalska: Thank you, I wanted to ask also about the full harmonization and the opposition against it because I have witnessed 75% of the council meetings on the consumers' rights directive and I could say much about Scandinavian countries. They were radically opposing full harmonization claiming that that will lower the protection level so they would never agree to that unless all the others would take what they had. That was one of the reasons that the directive failed. So maybe unfair commercial practices is quite a specific case, somehow different that the other directives. Thank you.

Thomas Wilhelmsson: Thank you for the very good questions, I will start with the 2 years limitation period and the full harmonization. In fact, starting from the detail, when the Nordic Sales Acts were enacted, we did not have any maximum period in Finnish sales law. We had of course a reclamation period but not a maximum one year or two years. The Swedish, the Norwegians and the Danish had a one year period and that was extended to two years, in Finland we did not want to have any, we still don't have any maximum period. However, it has not had any practical, economic impact, contrary to what business interests claimed. This and other cases show that

lawyers always tend to exaggerate the economic consequences of the decisions.

As to full harmonization, yes as to the Sales Directive and the Unfair Contract Terms Directive these are still governed by the Ministry of Justice and there is still clearly strong resistance, for two reasons: not only because one does not want to lower the consumer protection level, but I think nowadays the strongest reason is that it would be a legal technical catastrophe to have a maximum private law directive in the core areas of contract law without harmonizing the rest (of private law). That would be bad law - just easy to say - so I think that this is why here there is strong resistance. But as to commercial practices, and many other issues where you don't have this argument, I think that perhaps there is some resistance, but there is much less willingness to use your negotiation points to promote consumer protection. You know in the EU game you have a certain amount of "points" you can use against the Commission, you cannot be against everything. You have to choose where you want to be against things. There are other things that our government considers more important nowadays. But as to sales and unfair terms I don't envisage any change of positions.

As to enforcement, to put together the Consumer Ombudsman and the competition authority, there was strong resistance from the consumer movement to this and I am personally very skeptical about it. It is fairly new, so it might be that (we) make greater fears out of things than the results will show. But it was not a solution that the consumer movement and the consumer lawyers were happy about, but we had a fairly right wing government – not very closely listening to what people in this area are saying at the moment.

As to social force majeure I think I tried to describe how it was a narrative that was based on many players. We had first introduced it in the Act on Interest, on interest for late payments, a clear rule on it, then we had a doctrine making it a legal concept. We had this

concept used by the Market Court and by the law drafting department when amending rules on consumer sales and consumer services. This again reinforced the discussion and we also had some Nordic interventions in the area. The Nordic council financed a project on social force majeure, which produced new material. So it was a story with many branches.

9. Henri Temple, France

So I am going to talk to you about the contribution of French law to the progress of consumer law. Almost everyone knows that France has been for a while – no longer now- for a while, a forerunner in consumer law and I am capable to describe the French consumer law in four periods. The first period with a huge 1905 Act on faults and falsifications, the ancestor of consumer law. The second time of consumer law in the 1970s with a strong influence of my university, University of Montpellier, Montpellier, and Professor Calais-Auloy of course. The third period of strengthening consumer law in our country from the 1980s – 1995 was the period of codification with the Code de la consommation and the fourth period is now, the actual period from 1995 to today. It is a period of confusion I think. And this period of confusion needs to my point on view a new reflection on European Consumer law.

The first period is very useful and interesting to go backward and consider this first in history act of consumer protection, the 1905 Act against frauds and falsifications. This Act is still in activity in some western European countries and it presents many peculiarities, worth to be described. This Act was initially dealing only with goods and foodstuff but lately mattered with services in 1978. All the goods and services are concerned. And it is applicable for relations between

industries or business and consumers but as well between two business companies, two professionals in business relationship. This 1905 Act, is interesting because it was coming from a strong demand from industry, strong demand from industry. When the industry today objects against consumer law it is nice to recall them you required this act because it was your interest to control the market and to ban frauds and all kind of falsifications and misleading. So today very often you hear this approach that consumer law is against industry. It is false, absolutely false.

The origin in our country but Switzerland, Italy, Belgium, probably Netherlands, but I am not sure, or Germany, not Spain, were involved demanding for such a legislation. So the origin of this legislation was the conference of ... in Geneva,⁷³ from the end of 19th century to the early years of 20th century. This 1905 Act introduces some new legal processes like never before: very specific criminal offences, different from the traditional criminal offences, like cheating for instance, and misleading. It organized plans and organized new administrations, government administrations against fraud which is still very efficient- a little bit less now because they need more personal means and money means, the missions of the Repression (des Fraudes probably HWM). It is a bit less strong than years ago. The 1905 Act is still included in the Code de la Consommation, the Consumer Code. This Act is a little less influence now because of the new duties of firms. The firms are supposed now to organize themselves, the self - control on their products.

The second period is coming late after the first one in the 70s, 1970-1980. The 70s have been a great advancement for consumer law in France. It is the golden age of consumer law in France. And the top influence of French law upon the making of the consumers' EEC law and my university under the authority of Professor Calais-

73 I (Hans Micklitz) assume that Henri Temple is referring to the conference in Montpellier organized in 1975 under the auspices of Jean Calais-Auloy.

Auloy played a very important role in this period. The great innovations of this period were first of all the two Acts. In fact it started with the December 1973 Act. This 1973 Act intends to regulate the market. For instance the necessary approval by commercial commissions implanting, creating new supermarkets is a control of new supermarkets creations. But the 1973 Act is famous because it allows consumers associations to plead, to sue in case of criminal offences. Very important and it is a way for consumers associations to make some money because at the end of the trial they can ask damages to the firms.

Let's stay to this important period from 1970s to the 1980s. Two main acts have to be mentioned. Two acts in 1978. The first act is dealing with consumer credit and is roughly the same system that has been introduced in EC law a year after (he refers to the Directive 87/102 on consumer credit). The most clever system of this credit act is the link between two contracts, the contract of credit and the main contract, which is generally a purchase. So if one of the contracts is void or null or cancelled the other one is cancelled as well; a link between the two contracts, the contract of credit and the contract of purchase. This is only a credit act for ordinary consumer purchases but in 1979 the legal philosophy was introduced in buying a house in operation. The same protection of the consumer has been offered to people who bought a house.

I come back to the 1978 Act on Credit. One of the effects is to harmonize all the banks the way to calculate the rates and interests. There was a great disorder when the consumer wanted to sign for consumer credit. He could never understand what bank was the cheaper one because they all did calculate the rates or interests on a different manner. There was a second act in 1978, even more important maybe, and innovating. This Act introduces in French law a new concept, the unfair terms of the contract or abusive clauses. The article of the Code says that in contracts concluded between

business and non-business or consumers, clauses that aim to create to the detriment of the non-professional or the consumer a significant imbalance between the rights and the obligations of the parties to the contract are unfair and unfair means that they cannot be imposed to the consumer. The contract is valid but this clause is inapplicable to the consumer. The clause is considered as being unwritten, never being written in the contract. Later, a few years after, the consumers associations were allowed to sue, to plead against the firms, to make these unfair terms suppressed from the contract and it is very efficient strength on the firms, because they are obliged to change all the forms and costs a lot.

Let's stay in the same golden age of consumer law in France, in the 1970s and the 1980s. To add one last thing: our master, Professor Professor Calais-Auloy and his team, we thought that the consumer law started to be a bit disordered. We need to have some main principles to make order in the legal body of consumer law. In the view to demonstrate the autonomy and the importance of this new branch of law, the Montpellier school proposed and it was followed to organize all the matter around some major principles, what we called, general mandatory obligation of the professionals. These general obligations are four, four main general obligations. The general obligation of information, which is the first paragraph in the consumer code, general obligation of information and in case there is a doubt in the mind of the judges, they can refer to these general principles which is leader and of higher authority on the other paragraphs. The second general principle, general obligation of conformity of the product and services, conformity to the contract and conformity to the different regulations. The third general principle, general obligation of safety, reduction is quite strange, probably unique in our legal system. Products and services must under normal conditions of use or under other circumstances not be a danger to the public health. To my comprehension it is the first example that a thing is the subject of an obligation in our law. Products and services must

and usually it is persons that must do something not products and services. But this peculiar way to deduct, to write the law add high efficiency. These general obligations have the advantage to be very clear and they organize all the matter around.

The third period from the 80s to 1995 is a period of consolidation and international diffusion. After years and years of setting up new legislation and introducing in French law the directives or regulations the matter started to be quite confused, more and more confused. It was so difficult to have an idea of what was the positive rule applicable to case. The Commission Professor Calais-Auloy, Professor Calais-Auloy and his team, proposed a new code, a new consumer code, which is well known as the Proposition de la Commission de la Refonte was never successful. This was a failure. Not because the project was bad. It was very good, it was very clear, but it was a political mistake because every article, every paragraph, had to be voted by Parliament. The Parliament was already in the hands of the lobbyists. So even when the new article, the proposed articles were slightly different of the previous acts, the Parliament refused to vote it under the pressure of the lobbyists. It was a political mistake.

That's why years after the Government tried another attempt to have a Code. The previous project was abandoned but it can still be considered as a model because it is short, clear and brief and efficient, very clever. The government said that we never have the probation of the parliament to vote such a cause. The government decided to make this, which is Consumer Code 1993 but this Consumer Code is only a codification at constant law. They just gathered previous acts or degrees without modifying anything. Just gathering the existing rules, and try to organizing them according to the various topics. We have been involved in this work. We regretted that the project of the Code was abandoned but we were involved in this codification and this codification made appear some contradictions because all these rules have been produced from 1907 to the end of the 20th

century. Then sb had the idea, we don't know exactly who to make a new codification. Here it is, last year! It does not change much things but it changes the number of the paragraphs so for us it is a real difficulty to understand what is the change of places. You know lawyers don't like such ridiculous cosmetic modifications because it requires a lot of useless work.

This period, was a period of international diffusion. Our legal innovations were diffused in several European countries and many other countries like Brazil and Lebanon and some African speaking countries and sometimes the influence of French law is global like in Brazil, or sometimes some parts of French law in Algeria, Morocco and some African countries like the Sahara. Of course the French law was quite often taken into account for reflection in EC Commission. For instance, the famous EU Regulation 178 -2002 on food safety.

Then I come to the last period, the year number 4, from 1995 to today. This period is a period of confusion. There are too many rules, and sometimes no link or contradiction between these different rules. Only one important innovation, during this last period, it is the action de group, the class actions acts of March 2014. This new act on class actions, action de group, is widely inspired by the project precognized by Professor Calais-Auloy and the Montpellier School twenty years before; apart from one point that the personal physical damages are excluded from the scope of these acts.

Today, when I am speaking, only six or seven class actions have been introduced by the course. A bit more but I am not sure that all are very active. It is along long lasting procedure. The real active procedures are less than ten. For a practitioner I am a practitioner as well, this makes consumer law more and more difficult to be applied and to be applied by lawyers in companies. Far too complicated and I plead sometimes for class actions against some companies and in front of me 3-4-5 solicitors so it is very difficult for consumers associations to have such litigations, such procedures.

In conclusion, I would like to answer to the question of the paper sent by Hans (the catalogue of questions).

Yes, I think that Professor Calais-Auloy, my master Professor at University of Montpellier and probably one of the most important academic personalities and the creator of a school of consumer law. *Second question*, that's why, we, I mean the French law, at the beginning, was not so influenced by foreign examples because we had the Montpellier School of consumer law.

Third question: now of course we don't play that prominent role because the EC Commission has taken the relais. We are now a bit submerged by the EU regulations. Third question, asked by Hans is can we consider that consumer law in France is a separate new branch of law? Yes, it is considered, it is separate, different, with its own mechanism, branch of law, with the Code. This is a new Code, it is very thick. You know that about thirty years ago, I resigned from the European Consumer law group and I told you why. I told you, and my position has not yet changed, that we should have been more involved as proactive force and not only to comment EU projects. Now UK is leaving. Can some other countries be inspired by the example of the UK and leave the EU or not? But it is question. The public opinion in several countries is wondering if is not too far and too much and should not change the rules in EU? My proposal is that we should have a new approach of consumer law in Europe. We should have a uniform code but only applicable in international relationships, no more to try to have uniform code applicable to the consumer in Scotland or in Greece or Portugal or Poland, but a code only dedicated to the international cases because it became a question on specialists. Consumer right, consumer law is not made for specialists. Thank was, this was my conclusion, thank you for your attention.

Questions

Bob Schmitz: Thank you Hans, I think It was quite interesting to listen to France immediately after Finland, because France is exactly the opposite: it is systematic and actually I have two quick questions: who has actually been the driver? I believe it is the University of Montpellier more than the many consumer organizations. But I would say that I even disagree with you because I believe in the latest phase actually new Universities are not really active. There have been quite significant developments, I only take two examples, it is the (...) Royal on the circular economy, for instance spare parts, we have the (...) which actually made a significant development and last but not least is the Law on the Digital Republic. The point is therefore that France is actually now going beyond the classical code of consumer law. Your country is one of the frontrunners. And I do not believe that it is the consumer organizations driving the agenda, that's quite significant and interesting to note. The big countries are actually taking the lead in circular economy and digital republic whatever the substance is.

Hans-W. Micklitz: Please make short questions!

Aneta Wiewiórowska- Domagalska: Thank you I will try to be short, I think we are now having a new opening and maybe this is very very symbolic what your new president said today or yesterday 'make our planet great again'. France is taking a lead and the Digital Republic Act is a great example that the legislative environment, the political environment is changing. So UK is leaving but France is staying, Germany is staying, I hope Poland is staying as well and I know we should talk about history but actually we are on the crossroads. OK I am stopping now.

Ludwig Krämer: My question is it really possible to say Professor Calais-Auloy in charge of the history of consumer law in France?

Thierry Bourgoignie: I think France was not alone. I think that one country decides to go to take the lead. I think that with the Com-

mission Professor Calais-Auloy there was a lot of input coming from the EU, from the EC and a lot of input coming from other countries, so it was kind of mix of .., it was coming from different sources. I think what was happening at that time in Brussels had also a very significant impact on the development of French law. My second comment very quickly. I was a member of this Commission Professor Calais-Auloy and I do not like when you say it was a failure. I don't think it was a failure. It was like in Belgium. It was a failure in terms of having a coherent system. But when the code of 1993 was adopted all the provisions came from the Professor Calais-Auloy proposals. Everything. So in terms of substantive law it was a big step forward. That was my comment.

Jules Stuyck: For the sake of time once again I will refrain from asking a question.

Henri Temple: Well I did not say that France is going to lead EU. I said that now probably (...)... Bob (Schmitz) feel secure. But I think that the public opinion changed and that now, how to explain that, I think we change period, century we are now in the 21st century and a lot of people feel abandoned by the European System. As a solicitor I had sometimes some between Spain and France, Spanish firm and French consumer or French consumer and German firms. It is so difficult to be solved. It can take years and years. I think we need a real federal consumer protection but restricted to the international relations. We don't have that. We need as well – you have international codes for this kind of troubles. Not with the terrible international private law, it can last years and years and when the law is lasting so long, it is no longer applied.

Hans-W. Micklitz: The future is another story. It is another conference it is another story.

10. Klaus Tonner, Germany

To speak as a German about Germany in the 1970s and 1980s means to speak about Norbert Reich. I have to mention that before I start because he is not with us any longer but I hope his spirit is in this room here and in the future of consumer law. If you Hans had a chance to ask him to come to this conference a possible answer of him might have been, that he is not interested in the past but in the future. But my task now is to go back to the past. I will focus on the 1970s, not so much on the 1980s, and I will leave completely the 1990s as I think you have more information about what happened in Germany in these decades.

1. Actors

1. German government

I am going to the actors. The main actor was the government. Consumer policy was a part of the welfare state policy of the 1960s and early 1970s with the starting point of the Kennedy message of 1962. Seven years after the Kennedy message in Germany a social democratic government came into office with Willy Brandt as Chancellor. Maria Reiffenstein yesterday mentioned Bruno Kreisky, the Austrian Chancellor. There were similar developments in the both German speaking countries. Together with the Swedish Prime

Minister Olaf Palme Brandt and Kreisky were the three leading social democratic politicians in Europe. All the three have much to do with the establishment of environmental protection law in the 1970s and with consumer law. The focus was more on environmental law than on consumer law. Consumer law was a bit later than environmental law and was quite separate from environmental law; sustainable consumption was not a significant topic. Consumer policy was a political topic, but the term of „consumer law” was not mentioned as such in the law; consumer protection was „hidden” behind the protection of the weaker party to the contract. As a legal term it was created by EC policy in the 1980s and 1990s.

In those days for which I have to speak today the term *protection* (emphasis added HM) was not questioned that it is part of consumer law. The new developing law was called „Verbraucherschutzrecht”, not „Verbraucherrecht”. The welfare state of the 1970s invented so to speak the consumer policy. In those days we were speaking about market failure. It was not questioned that the state – this is to say the national state- would be able to „repair” market failure. State failure came one decade later and was not on discussion in these days when consumer policy was developed.

Consumer policy was developed as national policy, though Germany was a member of the EC. Nevertheless, national and European consumer policy interfered very soon after the member states started their national consumer policy. There was a famous summit at the beginning of the 1970s, which can be regarded as the starting point of a European consumer policy, more than ten years before consumer policy became part of EC primary law, as Ludwig Krämer told us yesterday about European policy in this decade. The European level did not play an important role in the development of national consumer policy. The government was happy to have a new sector of policy. It was represented by a first program from 1971 which

proposed many legal instruments which partly were realized in the following years and partly were not.

2. Consumer Centers

The second actors were consumer centers (Verbraucherzentralen). Consumer centers were established in Germany in the 1950s and the debate in the 1970s about consumer policy we called them Hausfrauenvereine, Housewife-Associations, prominent for advisors and politicians that spoke about how to choose the right washing machine and how to shop a little bit cheaper than otherwise. Important questions of law were not discussed by consumer centres in the 1950s and 1960s. That changed drastically in the 1970s. The consumer centers (Verbraucherzentralen) changed into active fighters for consumer rights. Of course that was a slow process; I remember that there were 4 consumer centers in Germany - we called them 'Viererbande': Hamburg, Bremen, Lower Saxony (Niedersachsen) and Baden-Württemberg, who were in the forehand to change the role of consumer centers to fight for consumer protection by better law.

It is important to realize that at that stage all these consumer centers were financed and got their budget from the government - from the regional governments (Länder) and the federal level as well. Only in the 1990s they changed the system how to raise money. A certain percentage of the budget is self-earned money today, but that was not the case in the 1970s and 1980s.

Besides the Verbraucherzentralen at regional level, the Verbraucherschutzverein (VSV) at federal level became an important player, after the injunction claim in favour of consumer association was adopted by the AGB-Gesetz (Standard Contract Terms Act) 1976. The VSV was later integrated into the Verbraucherzentrale Bundesverband (VZBV; Federal Association of Consumer Centers).

There was one field of law which was in the forefront of discussions in the 1970s in Germany, that was consumer credit law, because in

the middle of the 1970s an economic crisis in Germany broke out which resulted in people losing jobs. They were not able to pay back the consumer credits. That was for the first time, it did not have the dimension as today after the 2008 crisis, but that was new at that time. So it was necessary to develop some rules. Of course the courts were the first that applied the general clauses of the BGB already in the late 1970s and 1980s to help consumers. But consumer activists felt that was not enough and tried to put pressure on the national legislator to adopt certain rules, which went beyond the Consumer Credit Directive 1987. Finally they were successful, and in 1990 a Verbraucher kreditgesetz (VerbrKrG, Consumer Credit Act) was adopted, which provided for significantly more consumer protection than the 1987 Directive.

Contrary to consumer credit law, the German government tried to obstruct EC proposals providing for withdrawal rights as the Doorstep Sales Directive or the Distant Selling Directive. Eventually the government was not successful so far, but in consumer credit law there are a lot of additional rules to the Consumer Credit Directive. Some of them were taken up by the new Consumer Credit Directive, 2008.

3. Academics

The third level of major actors were academics. Of course now it is time to come to Norbert Reich who really played the leading role. I cannot avoid to give a personal touch to that part of my presentation. Thierry Bourgoignie already mentioned Norbert's book 'Verbraucher und Recht' of 1976: Hartmut Wegener and I were the co-authors. We were young researchers in 1976. Each of both of us wrote one of the six chapters. The four others were written by Norbert. Nevertheless there was more than a „thank you” in the foreword, but we were accepted as co-authors on the frontpage of the book – a style not practiced by too many German law professors, but by Norbert Reich.

I was very happy when more or less by accident Norbert got his first chair at the Hochschule für Wirtschaft und Politik (HWP) in Hamburg in 1972. I had met him in Frankfurt/M, where he finished his Habilitation, and he offered me a job at the HWP. There he met Gerhard Scherhorn, who had also a chair at the HWP (on economics). He was at that time member of the advisory board for economy of the federal government nominated by the trade unions. Scherhorn already had started from an economic point of view to develop consumer policy (*Verbraucherinteresse und Verbraucherpolitik*, 1975). They found each other for further cooperation after they had written the two books.

A result of this cooperation was the foundation of the Journal of Consumer Policy together with Folke Ölander. Originally the Journal was bilingual (*Zeitschrift für Verbraucherpolitik/Journal of Consumer Policy*), because English was not the lingua franca of international associations as it is today – the UK was not even a member of the EC in those days. This foundation is important beyond the existence of JCP, because it gave an orientation towards interdisciplinarity and internationality, this is to say beyond national law making policy. Both are topics which lawyers and especially academic lawyers did not like so much at that time, in particular interdisciplinarity – except in the new University of Bremen and a limited number of other places. Law professors were happy to teach law and nothing else. The foundation of the JCP was a symbolic act that the development of consumer law must not ignore interdisciplinarity and internationality.

It was not only the JCP, which was established, but also a national journal, directed to legal practitioners, *Verbraucher und Recht* (VuR, Consumer and Law). Again Norbert Reich worked in the background to establish this journal, but he left it to the next generation to be the first editors. These were Hans Micklitz, Udo Reifner and I.

There is a further line to the next generation. Norbert Reich went to Bremen, and today his scholar Hans Micklitz is the leading Ger-

man expert of German, European and International consumer law, whereas Gerhard Scherhorn went to Stuttgart, where Lucia Reisch became his scholar and is today a leading expert in social behaviourism with a focus on consumer policy. Both are members of the consumer advisory board of the federal government; Hans Micklitz was the first chairman, and Lucia Reisch is the present chairwoman. There should be no word to say about that policy and law have to work together, but from the German point it is an exceptional development. I am very happy that my friend Hans played the role of law in this board so excellent.

One word about the Hamburg Max Planck Institute. This institute also played a role. They had a liberal time in the 1970s where they opened themselves to new developments. I remember the big conference at the occasion of the 50th anniversary of the Institute in 1976, the first international conference on consumer law. The Institute also tackled the topic of environmental law at that occasion. The international dimension of consumer law was on the agenda of this conference, not only Europe, e.g. this was the first time I met David Harland from Sydney. I point out to the book of Eike von Hippel, research fellow at the Institute which played a certain role, not at last as it opened the view to the international dimensions of consumer law (Verbraucherschutz, 1st ed. 1974).

But these discussions had no practical results in the daily life of law faculties. Consumer law did not become part of the legal education, and there was no chair for consumer law for a long time. Only in the recent years there was one but not during the time of the development of consumer law. It was very difficult for interesting academics to teach consumer law because it was no subject of the state exam, which is prescribed by rules of the regional governments. So students had to learn what is required by these state exams rules. Of course a professor can offer courses of consumer law at the university but you had difficulties in finding students and so consumer law did not

play a role. This only changed when all the rules became part of the BGB, but this was not before 2002.

II. International influence and its limits

1. Influence from other countries

I would like to mention two topics: (1) the Kennedy message was very important. But it is interesting when you compare the German Bericht zur Verbraucherpolitik (report on consumer policy) of 1971 with the first program of the EEC, you can see that the EEC program was far more modeled according to the Kennedy message than the German report. The German report focused on the role of the state, which does not play a role in the Kennedy message and the EEC Programs as well, though all of them are influenced by the traditional welfare state approach of the 1970s. Another topic in the German report which cannot be found in other international documents is the role of consumer associations.

2. The Scandinavian ombudsman

The Nordic countries were no members of the EEC in those days. The Scandinavian system with its ombudsman was regarded as a model, which should be pursued, by consumer activists. We were very happy for insights into the Nordic countries; Ulf Bernitz, e.g., was a popular guest. I remember that when Denmark became a member of the EEC we were happy to have one of the Nordic countries inside the EC that could influence policy. But when looking to the practical results, there were nearly none. The Scandinavian model was discussed by consumer activists and academics, but the discussion did not end up in practice. So Germany has nothing like an ombudsman. Today, the word ombudsman is very often used in Germany for arbitration – industry engages a retired judge and calls him ombudsman. That must not be mixed up with the term ombudsman in the Scandinavian sense. There is a misuse of the good word ombudsman which happened sometimes in Germany.

The question is why the ombudsman model could not be transferred to Germany. Possibly this model might work better in smaller member states than in the big ones. Also in France and in the UK there is nothing like an ombudsman, and the Codes of Conduct, which were negotiated in the UK by the former Office of Fair Trading (OFT) are different from the development in the nordic countries.

3. Influence in other countries

You can see it in a nutshell when looking to the AGB Gesetz (Standard Contract Terms Act) of 1976, which had a significant influence on the development of standard terms control within the EC. On the other side there was a big discussion about the law of unfair competition which eventually failed in the 1980s. New approaches to unfair competition law came from the EU at a later stage, not from Germany. I will now address myself to the success story of the AGB-Gesetz and discuss three points.

The first is the famous word: ‘Sonderprivatrecht’ (special private law), which played a very prominent role in the 1970s. The academic discussion, if you can call it a discussion, was more a fight, nearly a war. Maria Reiffenstein yesterday used the term of ideologic fights. They took place in Germany in those days. Today they are overcome but in the 1970s sometimes the word ‘Sonderprivatrecht’ was used just to discredit new consumer bills. I remember the Deutsche Juristentag in 1974 in Hamburg where a debate took place about the bill of the later AGB-Gesetz with heavy disputes between Norbert Reich and Peter Ulmer. The Juristentag in Munich 2012, which officially dealt with consumer law and commissioned Hans Micklitz to write the official opinion, was in a completely different world. In the 1970s it would not have been a good recommendation to a young academic to study consumer law, if he only looks to his further career.

There was a big discussion, whether the AGB-Gesetz should be shaped as specific consumer protection law or general private law.

Before the AGB-Gesetz was adopted, there were many judge made rules about standard terms. All these court decisions never made a distinction between consumers and small business. So these court made rules had to be applied in b2b contracts and b2c contracts as well. Of course most of these decisions were consumer cases. According to the Bundesgerichtshof (BGH, Federal Supreme Court) unfair clauses contradict to the good faith principle of the Civil Code. Then the new consumer law came up with the idea to be restricted to b2c relations within contract law. The AGB-Gesetz as it was adopted was a compromise between these two ideas: On one side was the federal government with the social democratic head of government and on the other side a conservative majority in the second chamber of parliament, the Bundesrat. So a compromise was necessary and the legislator found a compromise: According to the AGB-Gesetz as finally adopted the general clause is applicable to all kind of contracts, whereas the black and grey lists included in this Act were restricted to b2c contracts. The practice afterwards was that the Federal Supreme Court developed the idea that the essence of the black and grey lists is also part of the general clause and applicable to b2b contracts too. So in practice the judges tried to minimize the differences between consumer contract law and general contract law inspite of the idea of the legislator that there should be different developments. That created problems especially when the Unfair Contract Terms Directive had to be transposed in Germany.

Further, there was a controversy between supporters of consumer protection who pleaded for the Bundeskartellamt (BKartA, Federal Cartel Office) as state authority to enforce the AGB-Gesetz. But a conservative majority in the second chamber of parliament preferred private enforcement. The result was the injunction claim in favour of consumer associations which later served as a model for the Unfair Contract Terms Directive and is regarded today in Germany as quite successful. Today, there is a new discussion about the role of the

Bundeskartellamt with regard to consumer law enforcement. It should not be forgotten that such a debate is not new.

III. Conclusion

Consumer protection policy started in Germany as part of a welfare state policy in the 1970s. In the beginning it was a mere national policy, not influenced by any EC policy. Actors were the social liberal government (Willy Brandt) and the consumer centres, which became activists. Also academics played a role which should not be underestimated.

The 1970s saw an ideologic fight between such activists and traditional lawyers, which discredited the new consumer law as „Sonderprivatrecht“, which would violate the principle of general applicability of private law. This dispute was only overcome in 2002, when the legislator integrated the consumer contract law into the Civil Code.

Questions and answers

Benedicte Federspiel: Germany has a special position among the European rules because they are the only ones that do not have a consumer Ombudsman or sb who can take cases to court from acting practices violations because they are the ones that can do it. It is a bit strange and it caused problems when the European consumer organizations wanted to say ‘so ein Ding müssen wir alle haben’ (we all need something like this). They said no we do not want it because we have it and finally the other country that did not have it was Holland. They got it but is it fair that the VZBV (Verbraucherzentrale Bundesverband) is so sure that they do not want any kind of legislation along those lines because they have it as a monopoly? And they are private organizations

Stefan Grundmann: I have a comment and a question. The comment is that I liked your presentation very much but I disagree with one point in particular that is somehow to say that there were no other centers in Germany traditional ones as well those which did interdisciplinarity and international things were very little. I think that the 70s and the 80s were the years where in Germany that was strongest I am just saying Frankfurt (Habermas) had a critical school, Tübingen (Raiser, Esser) is a modern university not a traditional one but I would clearly say that the ordoliberal approach and the law and economics approach was very strong as well. You mentioned Peter Ulmer, who is somehow in some respects ordoliberal, economics oriented still but he was in Hamburg, then went to Heidelberg and Heidelberg had a very strong law school. My question related to that is whether you would really say that the most important act which is clearly the Standard Contract Term of 76 has been modeled on the unequal bargaining power theory or has been modeled on asymmetric information theory? I would say the latter and that would explain why you included as well enterprises on that side. Therefore I would say there was a fight between different centers and Bremen is one. I always advocated that Bremen was quite important but there were five six centers really. In the end I would say the outcome in the most important act, Peter Ulmer, was more influential actually.

Hans-W. Micklitz: I certainly disagree but..

Iain Ramsay: Just a quick question: what drove the early interest in consumer credit? You mentioned you did not have time so I give you some time.

Klaus Tonner: I will start with the last question: consumer credit played a role because we had problems with consumer credits in the 1970s. In the middle of the 1970s a certain crisis in Germany broke out which resulted in people losing jobs. They were not able to pay back the consumer credits. That was the first time. It was not a dimension as we had today in Spain, but that was new at that time. So it was

necessary to develop some rules and of course the Courts were the first ones that applied the general clauses of the BGB (German Civil Code). But people thought that was not enough so they came with certain rules which were fought in a national frame. This is what I wanted to mention what happened in the 1980s. There were a lot of proposals for directives in Brussels, which German policy did not like, door step selling. For instance, Germany played a role to avoid that. Eventually they were not successful so far but in consumer credit we have a lot of additional rules to the consumer credit directive of the 1970s (in fact the consumer credit directive was adopted in 1987). That was really the only directive that took place. We had more consumer protection (in consumer credit law) than provided by EU level. It was provided in the German law.

To the consumer ombudsman I always thought why this model of the Nordic countries could not play a role in the big members states. Sometimes I thought that the consumer ombudsman model might work better in smaller member states than in the big one. In France and UK we have the code of conducts which were negotiated by the OFT but that is different from the development in the Nordic countries. I cannot give an answer as to whether this model as it worked originally in the Nordic countries could be transferred to the other members, to pick member states.

The first question was interdisciplinarity in Germany in the 1970s; of course all of us read (..) in the 1970s and the other books you mentioned but I restricted myself to influences to practical consumer policy from the academic world. These other discussions had their own life. But I cannot see the influences of those - of course you can find them when you look closer to them but to draw a line between actors and policy results - then the group really was a small group.

11. Elisa Alexandridou, Greece

I would like to start by congratulating Hans Micklitz and also Claudia de Concini who assisted him for all that perfect organization of the conference and also I thank Hans very much for inviting me in that conference and for giving to me the chance to speak in front of such a distinguished audience, including also my friend Stefan Grundmann who is with us today. I will try to express my memories in a way to answer to the general questions you have put to us, Hans. I have distributed a plan to you all, just to follow what I am saying.

I must inform you that during the decades of '70s and '80s there were no specific law provisions for the protection of consumers in Greece. This was ought, among other reasons, to the fact that Greek consumers were not well organized and they were not even aware of their inferior position in market transactions. Only at the late '80s the situation changed, due to the evolution of social policy and gradually the interests of consumers were seriously considered in the legislative-decision making. Courts have also followed this tendency at the late '80s and that could be observed in their changing approach towards general clauses such as fair trade, good faith, abuse of rights and others. Not only the interests of businesses but also those of society at large got to be step by step important elements in the assessment of courts. At the same time, Greek legal scholars have contributed

a lot. Long studies and articles were concerned with defining the constitutionally guaranteed rights of consumers as a social group and as individuals and scrutinized the possibilities of their protection under existing private law.

The first Greek consumer association, called “Consumers’ Protection Institute”, was founded in Athens on 1971. It was an association with offices in the most important cities of Greece and according to its statute, it intended to safeguard the protection of consumers and of the environment and to work for the improvement of the quality of life. It also issued a magazine including various matters of interest for consumers. Besides, it published regularly a “black list” including the names of the enterprises that had provably falsified products, had deceived consumers through advertising or had acted contrary to market police orders. Gradually more consumer associations have been founded, for ex., EKPOIZO and KEPKA in Thessaloniki but all of them confronted generally grave economic difficulties since they were not regularly financed by the State or by any other public or private source.

Before proceeding, let me remind you the relevant Aristoteles point of view in “ETHIKA NIKOMAHEIA”, (Oxford Classical Textbook 5, 1970). “As long as traders and consumers are subjects of the market, they must be equally protected. This protection may be guided by the yardstick of “corrective justice”, that is to say, the justice that must be applied in everyday-transactions in order to re-establish equity in a disturbed balance of interests”.

I. And now back to my memories! The main legislative texts at the ‘70s and ‘80s that formed the market law and constituted the legal basis for ensuring the consumers’ economic interests in Greece were the Act on unfair competition and the Act on free competition (Unitrust Act)

The Act of 1914 against unfair competition which was almost a copy of the German Act of 1909 included a number of specific regulations prohibiting the exercise of specific acts of unfair competition and a general provision including the principle of fairness, that is to say, the general clause of good morals.

Let us start with the general provision of art. 1 of the Act, which prohibited “any act made in commercial, industrial or agricultural transactions made for purposes of competition which was contrary to good morals”. By enacting the general clause of good morals the legislator intended to give power to courts to curb acts of competition disapproved by the “public order”, although not prohibited by the specific provisions of the Act. In order to decide when this occurred, courts applied the balancing of interests test. Using this method, they took into account the interests of the trader and his competitors but step by step, also the interests of the public at large (die Allgemeinheit) including naturally the interests of consumers. Comparative advertising was not permitted within the ambit of the general clause of good morals because it was deemed as violating the principles of fair competition. According to case law, such advertising could be allowed only in those extraordinary cases when it served to protect the reasonable interests of the trader concerned and only if it was accurate, modest and did not contain disparaging statements about competitors. In balancing the interests connected with comparative advertising, Greek courts did not at that time take into account the necessity for consumers to be informed.

By applying the general clause of good morals courts have also held as unfair and therefore prohibited marketing practices which constituted a psychological coercion to buy or an excessive lure, impinging upon the consumer’s freedom of choice. This might occur when enterprises succeed in selling goods by offering bonuses and gifts, by using premiums, by organizing lotteries etc, because

those methods exploit the human passion for gambling and making easy money.

Among the specific provisions of the Act against unfair competition, which referred also to the interests of consumers, was that of art. 3 *concerning misleading advertising*. It prohibited any advertisement that gave the impression of an especially favorable offer when that did not correspond to reality (was not true), introducing the principle of truth as a guideline for every advertisement. Art 3 regulated the advertisement only of goods, not of services and this article, as well as the Act against unfair competition as a whole, did not grant the right to individual consumers or to their organizations to take legal action when such advertising took place. This Act did not even recognize the existence of consumer associations.

Other specific provisions of the Act against unfair competition were the following. Because a wrong impression could be created to consumers provoking confusion to them as to which enterprise has produced certain goods, the unauthorized use of designations (brand name, name of firm etc) by a competitor was prohibited, even if he used them with small alterations (passing off). Discounts and announcement of selling at discount prices were also prohibited as a rule and were permitted only exceptionally at the end of season under specific prerequisites. Announcements of discount sales were also prohibited if the seller had increased the prices just before the sales in order to lower them to the original level during the sales period. Also the bait and switch offers (the well known method of “Lockvogelangebot”) were prohibited. Although the above prohibitions aimed mainly at protecting the interests of professionals-competitors, they had a positive effect towards consumers as well.

As far as *standing to sue* is concerned, let me say the following. In case of violation of articles 1, 3 and other specific provisions of the Act, it was provided that any businessman who produced or marketed similar goods, as well as associations engaged in promot-

ing commercial interests and generally professional associations and chambers of commerce and industry were entitled to forward claims to court.

Concerning the violation of art. 3 (which prohibited misleading advertising) a part of the Greek legal theory has expressed convincing arguments that consumers too were legitimated to bring action not only for indemnity for the damages suffered but also for the discontinuance of a misleading behavior of a trader (let me confess that myself was a pioneer on that view).

I must say that when practices of unfair competition within the scope of art. 1 of the Act against unfair competition took place and competitors suffered because of those practices, they themselves or their professional bodies had a speedy remedy, as well, by asking the court for a preliminary injunction for the discontinuance and the termination of the infringement. On the other hand, if a trader made profits by harming the economic interests solely of consumers, his competitors would usually not bother and would even sometimes imitate him (using the same unfair marketing practices) in order to make profit of their own. According to dominant view, consumers had no right to bring an action either as individuals or through their associations for discontinuance of practices which were harmful to them. It was obvious though that this situation could result to the distortion of “best-offer competition”, the well known “Leistungswettbewerb” to the detriment of the interests of honest competitors, of consumers and also to the detriment of the good functioning of the market. It must be noted though that there existed a minority view in theory which has been followed also by a small part of the jurisprudence. The Multimember Court of Athens, for ex., in its decision of 1986 in the case “Bingo” decided that for practices which violate art. 1 of the Act against unfair competition, the action for discontinuance could be brought also by consumers. This view was previously supported in Greek legal theory by one scholar and the above court

adopted it, making 25 references to articles and books (in Greek and German publications) of this scholar! Who was she? I modestly say that it was myself.

So, the Court of Athens based its reasoning on the general view that aim of the Act against unfair competition is to protect the interests not only of competitors but also of the public at large. So indirectly also the interests of consumers, declaring that only this way a healthy competition can be preserved which may offer the best economic results for society. And the Court continued its reasoning by saying that as long as consumers may bring action for indemnity for the damages suffered based on the provisions of the civil code on tort (because practices of unfair competition are deemed to be torts), it seems proper that they may also have the right to bring action for discontinuance of unfair marketing practices. This may be justified also having in mind the spirit of the Act against unfair competition and taking into consideration the danger existing because of the increasing economic power of competitors that may turn to the detriment of consumers .

Another point to refer to is that courts were entitled to grant permission to the winning party to publish in the press court decisions that ordered the offender to cease performing acts of unfair competition in the future. This fact could actually contribute to the preventive protection of consumers as well as of honest businessmen.

As a conclusion one could say that the Greek Act against Unfair Competition, by combining rules of specific prohibitions with the general clause of good morals which covered any unfair practice of competition not specifically prohibited, provided a quite satisfactory regulation. The protection of consumers' interests has been in fact improved though, when courts started to interpret the principle of good morals in a broad-minded spirit and applied the balancing of interests test taking into account their interests too.

The other text of legislation in force at that time, which was part of the market law, was the *Act of 1977 on the Control of Monopolies and Oligopolies and the protection of free competition*. The application of its articles 1 and 2, which were similar to articles 85 and 86 of the Treaty of Rome, aimed at controlling abuses of economic power and restrictions of competition. The goal of the above has been to improve market conditions also in the interest of consumers and generally to safeguard competition as an institution but also to protect the freedom of individuals to participate in the market transactions. There is no doubt that the application of that Act too had a positive effect upon consumers.

The 3rd legislative text in force was the *Market Police Code*, a decree of 1946. This code dealt directly with the protection of the economic interests and the health of consumers. It has been amended several times and kept on being supplemented by new legislative acts according to emerging needs. The above Code provided for specific instruments concerning market inspections which were carried out by policemen in cooperation with civil servants of the administrative authorities and of the chemical, public health and veterinary authorities. Through the control of the above, the State tried to secure sufficient supply and distribution of goods in the market, to ascertain their quality and to take measures against adulteration, as well as to control the stability of retail prices in order to avoid profiteering and to regulate the amount of profit of suppliers. Price ceilings or profit margins for the wholesale or retail traders were regulated by market police orders. Infringements of the Market Police Code were penalized by imprisonment and fines. Imposition of administrative sanctions was also provided for, in the form of confiscation of goods.

Another text, the Food and Beverages Code of 1971, in order to avoid food adulteration provided that every foodstuff produced and distributed for consumption, should have the approval of the Supreme

Chemical Committee and/or the Supreme Sanitary Council. Sampling of foodstuffs and beverages were performed precautionally.

Labeling was also regulated by market police orders. Goods of any kind offered to the ultimate consumer had to carry a label with the information required by law. This was the trade name and address of the manufacturer or of the importer or of someone residing in an EEC country who was responsible for selling the goods. The information concerned also the content of the product, the exact net weight or its volume and the country of production. Besides, the Code imposed to producers the obligation to give information about the maximal durability of several kinds of foodstuffs and beverages, e.g., frozen meat, frozen fish, mineral water and others.

As far as *discount sales* were concerned, besides the rules of the unfair competition Act which permitted discounts only in exceptional cases, market police orders provided for sales with reduced prices and offers under particular prerequisites. The seller had to state the terms and conditions of the reduction, the beginning and closing date, the mode of retail used and other details. Signs for special offers had to be placed at visible locations in the shop indicating the “before” and “after” prices of every good involved.

Approaching the question of whether and how has the *Civil Code* with its provisions contributed to the efforts made in order to assure the protection of consumers at that time, I will say the following.

Let us start with the point that general rules, such as those referring to the principles of good faith, of the protection of the weaker party and of the contractual freedom, were already to be traced in the local customs before the adoption of the civil code which took place at the year 1941. The same rules existed also as elements of the common legal heritage of the European countries, as we all know. Let me also stress the fact that the Greek civil code enjoyed always flexibility because it contains a great number of abstract notions and

general clauses which allow its renewal by the judiciary through the interpretation of its rules. Those general clauses are imbued with a humanitarian and social spirit which has its foundation in the ideas of fairness and of respect to human dignity, also on the concern for the protection of the weaker contracting party and of the injured party in the law of contracts and the law of torts respectively, as well as on the maxim that contracts should be performed in accordance with the principle of good faith.

As far as the subject of *general contract terms* is concerned, there existed de lege lata no specific legislation about the assessment of their *fairness* and the gap was filled by courts. For the interpretation of the content of those terms, courts applied the general clause on good faith of the civil code. In severe cases judicial control of the terms have led to the pronouncement of their invalidity and this has happened when they were contrary to good morals or when they constituted abuse of a right, that is, when the exercise of the right obviously exceeded the limits imposed by good faith, good morals or by the social or economic purpose of the right. In extreme cases, control could lead to the adjustment of standard terms in accordance with the requirements of good faith taking into consideration business usages.

Concerning the protection of consumers, the control of general contract terms based on the civil code was not really satisfactory. This was due to the fact that no specific provisions existed for the assessment of terms included in contracts between a consumer and a supplier, so a control could take place only after the terms had been used in a contract and only by coincidence, in cases where a consumer had considered the terms of his contract to be excessively abusive and had brought action at court against the supplier.

As regards the *liability of producers for defective goods*, the only legislative source were the provisions of traditional Greek law, that is, the provisions of the Civil Code on torts. The protection provided

was not satisfactory for consumers though, because in order to be compensated, consumers had to prove not only that the damage was due to the defectiveness of the product but also that the defectiveness was due to the fault of the producer. Courts helped by distributing the burden of proof according to the sphere of influence of each of the litigants. But even then, if the producer brought evidence to show his lack of fault, the consumer would find it almost impossible to provide contrary proof due to his ignorance about the production process, which could lead to a defective product.

In the year 1991 the Parliament voted to adopt the *first Greek Act on Consumer Protection* mainly because of the obligation of Greece as a member state of the European Community to implement the EEC directives (me being one of the members of the Committee who drafted this Act).

The national legislator, that is, our committee, chose to adopt the system where the consumer protection law and the contract law exist in parallel and the Act had a considerable impact on the national contract law. The interpretation of the general clauses of the Civil Code, that is, good faith, good morals, public order, social and economic purpose of the right etc., has been indirectly influenced by the principles of European law as expressed in the primary and the secondary community law. The national legal order has been generally influenced in considerable extent by European perceptions because Greek courts have most of the times taken into consideration in their assessments the case law of the European Court of Justice. A second Act on consumer protection was adopted on 1994.

An interesting maybe point which is worth stressing is that civilists did not at that time recognize unanimously the provisions of the Act on Consumer Protection as an autonomous new branch of law but only as an expression of the broader principle of the necessity to protect the weaker contracting party. They brought the argument that it was the same principle which had influenced besides the provisions for

the protection of consumers, also those for the protection of workers in labour law, the protection of insured persons in insurance law, etc.

Personally, I had long open discussions in various congresses with my colleague *Stathopoulos* at that time, insisting that the provisions of the Act on consumer protection constitute a separate integral branch of law, with mandatory rules, aiming at balancing the socio-economic unequal position, that is, the inferior position of consumers in comparison to the position of suppliers in the market transactions.

Concerning the *sale of consumer goods* and associated guarantees it is worth stressing the method followed for the transposition into Greek law of the relevant directive. Contrary to the system followed for the other directives on consumer protection, that is, including them in a separate specific Act, for the implementation of the directive on sale of consumer goods, the legislator has chosen the option of integrating its provisions in the Corpus of the Civil Code, in the chapter on sale. The reasons expressed in the Explanatory Memorandum were that the legislator had been oriented towards a European solution and towards the vision of a supranational law of obligations. By harmonizing the national law on sales with the relevant directive as well as with the principles of European contract law, the Greek legislator intended to assure that Greece would participate in the common efforts of the countries of Europe to achieve a unified contract law because such a contract law could be a factor of facilitating and simplifying transactions in the Internal Market. Besides, as referred to in the Memorandum, the danger of fragmentation of the regulation on basic subjects ruled by the provisions of the civil code, such as the sale of goods, had to be taken seriously into account and be avoided.

Coming back to the Act on Consumer Protection generally, let me say that this text has made new inroads in the Greek legislation by providing an institutional framework for consumer protection and by regulating substantive issues. Broadly speaking, the Act has taken

into account the EC legislation and adapted the Greek law to contemporary technical innovations and complex economic and social conditions. The efforts to encourage small and medium enterprises while offering protection to consumers has given to the Act a social character without neglecting the need to promote healthy competition.

As far as the definition of *consumer* as a contracting party, is concerned, the Act of 1991 had adopted the definition which was in accordance with the EEC directives and drafts of directives existing at that time. But the second Act on consumer protection, that of 1994, which is in force today too, has adopted a very wide definition of the notion of consumer, practically including in its notion every contracting party except those acting as merchants.

Hans-W. Micklitz: Elisa can you please come soon to the end? You speak 25 min now.

Elisa Alexandridou: O.K. Let me only add that the Act on consumer protection of 1994 has regulated in a separate provision the liability of the supplier for defective services and introduced the reversal of the burden of proof in favour of the consumer. The relevant legislative committee followed the guidelines of the draft of the directive on the liability for defective services, which, as we all know, has been finally withdrawn from the agenda of the Commission. So, surprisingly, Greece has preceded on that subject in comparison to the European legislation.

Coming to the conclusion, let me resume that in fact no serious tradition on consumer protection policy or specific legal texts existed before the 1990's. After the 1990's the legislator, the judiciary and legal scholars, who have been influenced by European law, are the three main actors who have contributed for the strengthening of the consumer protection law in Greece. Thank you!

Questions and answers

Jules Stuyck: Thank you very much Elisa, this time I have a quick question. At the beginning of your expose you mentioned these specific provisions on sales promotions in the unfair competition act of 1914. My question is whether these provisions have been adapted to the unfair commercial practices directive. Is my question clear?

Elisa Alexandridou: I did not have the time to mention that the first and the second Acts on Consumer protection included an indicative list of unfair marketing methods which were prohibited and a general clause on fairness which covered all other sorts of advertising which could be assessed as unfair under the general clause, so it covered also the sales promotions which were earlier included in the unfair competition Act. Consequently, the provisions of the Act on Unfair Competition did not need to be revised. Was that your question?

Jules Stuyck: My question was about sales promotion like premium offers (Zugabeverbote), that kind of provisions whether they have been repealed or whether they have been adopted to be in conformity to the UCPD.

Elisa Alexandridou: With the amendment of 2007 of the Act on Consumer Protection new provisions replaced the Chapter concerning advertising, sales promotions etc, transferring in fact the text of the Directive into Greek law word for word. So, the provisions on sale promotions and the Act as a whole is harmonized with the UCPD being today completely in conformity with it.

Maria Reiffenstein: You mentioned that the act of 1991 implemented the EC directives. Did Greece follow the minimum standards of the directives or there have been examples where Greece went beyond those minimum standards? Did you use the minimum standards in order to go beyond?

Elisa Alexandridou: Yes, Greece went most of the times beyond the minimum standards. For example, I could refer to the directives on distance selling and on off premises selling. The period for the right of withdrawal of the consumer was fixed in the Greek law to 14 and not to 7 days as it was in the two relevant directives.

Benedicte Federspiel: It is a question of consumer organizations' role in all these because you know as well as others that the Greek organizations have been weak over time and very diversified and some of them existed more by name but they cannot do anything because they have no income. Has that played any role in how to make new legislation in Greece? Did Greece make reference to consumers in the Constitution?

Elisa Alexandridou: Consumer organizations, at least some of them, do play a role for the protection of consumers, nowadays. Enterprises take care not to act in a way that those organizations would sue them or would publish negative critics. Consumer associations have de lege lata the right to bring collective actions against suppliers and some of them, for ex. EKPOIZO and KEPKA in Thessaloniki, play an active role on that. They bring collective actions also precautionally, most of the times with success. What is important is that consumers must be informed for the existence and for the role that consumer associations may play. Personally, I always try to explain to people that when they have a problem they may address themselves to a consumer association because, by bringing the consumer and the enterprise face to face, those associations might manage also to solve problems in favour of the interests of consumers. Concerning the subject of economic shortage of consumer associations, the problem still exists as it is not yet effectively faced by law.

I must finally say that the Greek Constitution does not make reference particularly to consumer's rights but only to constitutional rights of the individual.

12. Alex Schuster, Ireland

First of all just to echo what Elisa has been saying, just many thanks to Hans and to Claudia and everybody involved in the organization of this conference. I think I can say that whenever I come to Florence it is like balm to the soul. I would better spell the word balm because of difficulties of picking up what people say in this acoustically challenging chamber, 'B-A-L-M' to the soul. I am just standing in the Medici Chapel yesterday or this morning in the Pensione Bencista looking down the Duomo, it is another world and I think that whatever we learn intellectually about consumers we can all go back to our respective countries feeling revitalized emotionally as well as spiritually. And, yes, as Bob Schmitz has just observed, I am beginning to sound like a priest.

However, turning to Ireland and consumer protection in Ireland I should say that in terms of background there are two publications that are very important in the Irish context, the first, is by the Consumer Strategy Group and it is called 'Make Consumers Count'. It was published back in March 2005 and it made the case for reforming Irish consumer law. Over a weekend, I very quickly wrote chapter 9 of that report, which represents a snapshot of the state of consumer law in Ireland in 2005, but also looks back into the past. So I am not going to rely on that today but just from the perspective of this con-

ference, if I refer to pieces of legislation, you will probably find them referred to in that particular chapter (which has been despatched to you via e-mail).

Much more important than the Consumer Strategy Group report, however, because that was overtaken by subsequent developments in Ireland, I should also refer to the leading Irish textbook on Irish consumer protection law. I would like to say that it was I who wrote it especially as I spent 30 years coming to Brussels (as one of the Irish representatives on the European Consumer Law Group), you think the least I could do would be to write a book on Irish consumer protection law. But it was not me, it was two women from University College Cork, Mary Donnelly and Fidelma White. Their book is titled *Consumer Law Rights and Regulation*. Hans asked us to identify some of our heroes over the years. I suppose both of these women - Mary Donnelly and Fidelma White - are the next generation of legal vindicators of consumer rights. I cannot fault their book. It is very good; but what I do not like about the book, *Consumer Law Rights and Regulation* is that it is published by a commercially oriented firm and it retails at 284 euros. It is a lot of money and it made me think, even at the relatively advanced age of 60 maybe I should write a book for consumers and find a publisher that would charge a maximum of 45 euros instead of 284 euros.

However, turning to the history of consumer protection law, it started with our relationship with England in particular. They had a huge influence on us. If I was really negative and if Iain Ramsey were not in the room, although he is Scottish in any event, so it is okay, I could reiterate the old Irish complaint that we were oppressed by the British for 800 years. However, it would be a mistake to argue that the uneasy relationship between the two adjacent jurisdictions was overwhelmingly negative. We both share similar senses of humour. And there were considerable legislative and common law principles that evolved from the UK. So most of our consumer protection law

was contained in the Sale of Goods Act of 1893, together with many commercial law statutes emanating from Westminster, as well as a lot of common law cases that were decided by both the British and the Irish courts way back then. In the first phase of Irish consumer law there was no distinction between b2b and b2c types sales. I mean you were a consumer if you were a business or a private individual. The same rights applied to you. It was easy for business to exclude those rights, should they so desire. The earliest Irish consumer case that I could find is 1902. It is a case called *Wallis v. Russell*, and it is a very interesting one. I know the time is at premium here but it is worth stopping for a second and think about this 1902 case because it involved an elderly woman, and she sent her granddaughters into Cork city to purchase, some crabs for tea. Crabs were like the working mans' meal. Lobsters were for the rich people and crabs were for the poor people. The young girl went into town, she went into the fish shop and she said to him, she was 9 years of age: I would like to have some nice fresh crabs for tea. He said well I do not have any living crabs at the moment but I have some beautiful boiled crabs, would you like those? And she said, well are they fresh? Are they good for tea? He said yes, they are. So she bought the crabs, brought them back to her grand-aunt. The grand-aunt cooked them for friends that were visiting and both the grand-aunt and her guests suffered food poisoning as a result.

The case went all the way to the Court of Appeal in Ireland and in the end the aunt won the action because the young girl was treated as being the agent of the grand-aunt for the purposes of making the contract. The young girl of nine appeared in the witness box and the judge said 'Where did you learn that? To say to the shopkeeper I want some nice fresh crabs for tea, was it your aunt? What happened?' She replied 'well actually no, in the Ursuline Convent School, where I am a pupil, the nuns always tell us that we should check with the retailer beforehand and that we are better protected if we specify exactly what we want the goods for'. The judge then described the

nuns as ‘admirable’ and decided that the young girl had brought her grand-aunt within the protection of the Sale of Goods legislation by spelling out the exact purpose for which she required the crabs. . So that was consumer protection in 1902 in Ireland. So quite exciting times!

But then consumer law died a little bit after that. We just copied whatever they did in the UK. Hire purchase was one of the most popular ways of financing the purchase of goods in the 1940s, the 1950s, the 1960s. Most of the large finance firms were from the UK. So Ireland copied the UK legislation on hire purchase. It was a very dead period for Irish consumer protection law. Interestingly, however, when one of the Irish pieces of hire purchase legislation had been debated in 1957 that’s the first time the consumer was ever mentioned in an Irish Parliamentary debate. So 60 years ago was the time we first became really aware of this notion of the consumer. Then time went by until we reached the 1960s. This academic called Michael Whincup, some of you might know him, I think he is a New Zealand lawyer, who was based in Keele University, he came over to Ireland in 1970s to look at our legal system and he said, look, your legal system stinks. There is nothing for consumers here. It is based on British commercial law from the Victorian era. ‘Get your act together’ essentially.

So, in response to Michael Whincup’s report for the National Prices Commission in Ireland, two pieces of legislation were enacted: one was influenced to a certain extent by the misleading advertising directives which had been promulgated at European Union level. But I also think there was a feeling that we needed a strong personality to be a consumer enforcer in Ireland and we also achieved this objective by passing legislation in 1978, the Consumer Information Act of that year. We set up the Office of Consumer Affairs and thankfully the first person appointed was a larger than life personality. When you meet him today he is a much slimmer individual, but he was almost

as large as I was back then (in 1978), his name was Jim Murray and he really pulled his weight. He did not even have to go to Court when he was chasing Irish businesses. He would just send a 'cease and desist' letter to problematic or recalcitrant businesses and if Murray wrote such a letter, he did not do so lightly and businesses and their legal advisers took such missives seriously. Jim Murray had a huge impact on enforcing Irish law on false and misleading advertising by businesses from 1978 onwards.

The second piece of legislation proposed by Michael Whincup was the introduction of a more up-to-date sale of goods code. In 1980, the Sale of Goods and Supply of Services Act recognized the vulnerability of Irish consumers by recognizing that the 'freedom of contract' principles operable in respect of b2b transactions were not appropriate in the context of b2c transactions. Consumers were in greater need of legal protection than their commercial counterparts in the marketplace for goods and services. You should impose certain terms in their contracts to protect them, and there could be no exclusion clauses to allow businesses to exculpate them from liability vis-a-vis consumers. So that was an exciting time. But really the golden era of Irish consumer protection was in 1970s when we changed the face of our advertising law and modernized it, at least to a certain extent, in the form of the Consumer Information Act of 1978. Then it all stopped. There was a flow of EU legislation from 1980 to 2000. In these 20 years we faithfully implemented the EU legislation but without creativity, without imagination. Instead, word for word we implemented every single directive in statutory instruments, Irish secondary regulations and all of it in a minimalist way, no maximalism, no desire whatsoever to go beyond the parameters of the directives in the interests of even greater consumer protection (as happened in Scandinavia). And that brings us up to the year 2000.

By 2000, one of the key consumer issues in Irish society was the problems generated by financial services transactions. The

government was getting a little bit worried about financial services transactions and the activities of banks and the different lending organizations. In 2004-2005, they strengthened the powers of the Central Bank but they set up - and I would say this is really the third or maybe the fourth stage of the Irish era of consumer protection - an independent financial services regulator. Sadly for Ireland, if I could be permitted to engage in understatement for just a moment, he was less than talented at his brief. I do not have to worry about the laws of defamation here because he has been roundly criticized, without challenge, by both a Circuit Court judge, Martin Nolan, and a respected economist, David McWilliams, who described him as “arguably the worst regulator the world has ever seen.”

His ineptitude has also been exposed in a report entitled *Misjudging Risk: Causes of the Systemic Banking Crisis in Ireland* (produced by Peter Nyberg in March of 2011). But to extend a scintilla of fairness to this particular regulator, few, if any, people foresaw either the Lehman Brothers collapse or the crisis within AIG or the huge challenges faced by the financial services industry worldwide and at a European Union level. That whole area of financial services law was intended to act as a regulatory safety net throughout the Republic of Ireland and it was also a discrete area of Irish consumer protection law insofar as it was designed to shield and protect consumers from the adverse economic consequences of the collapse of financial institutions.

I am running out of time but I think I would say that by way of conclusion, that we suffered severe shell-shock as a result of the financial collapse in 2008, and that we are now in a situation where we are regrouping in Ireland when it comes to consumer protection law. There is an element of confusion because if you look at the sale of goods, you have got 4 different (layers) relating to sale of goods. You have got the UK Sale of Goods legislation dating back to 1893, part of that is still in force in Ireland, certainly the provisions related to passing of property of goods and to insurable risk and so on; you

also have the Sale of Goods and Supplies of Services Act of 1980, which gave special protection to consumers in relation to consumer transactions for the purchase of goods and services; you also have the Consumer Sales and Guarantees Directive (emanating from Brussels) which came later in the 21st century. Instead of changing our whole sale of goods legislation to introduce the consumer sales and guarantees directive we took our typical ‘manana’ approach. We left it until the last minute to implement the Consumer Sales and Guarantees directive; we did not even look at pre-existing sale of goods law. We just implemented the Consumer Sales and Guarantees Directive in a piece of secondary legislation, a statutory instrument instead of a piece of legislation. And question marks still remain as regards how *exactly* the fourth piece of legislation in this area, the Consumer Rights Directive, will fit into the jigsaw of Irish consumer protection law.

We implemented the latter Directive, but how does it all fit together? The old UK Sales of Goods legislation, the Consumer Sales and Guarantees Directive and the Consumer Rights Directive? All I can say by a way of word of hope and conclusion is that there is a very good individual working in the Irish Department of Business, Enterprise and Innovation, called Bill Cox and unlike some of his predecessors, he actually listens to consumer lawyers and the views of consumers. Indeed he listens to all of the stakeholders, and I think that the next phase is that all of those stakeholders and the legislators will need to sit down seriously and discuss how to produce an integrated sales law that is good not only for consumers but that also works in a commercial context. I think this is all I want to say this morning.

Questions

Hans-W. Micklitz: So Alex the question is whether Irish consumers are buying crabs or lobsters today?

Alex Schuster: There is famous Irish footballer called Roy Keane, who is currently assistant manager of the national squad. He has publicly expressed his disdain for consumers of 'prawn sandwiches' in hospitality lounges at football matches, mainly on the basis that the food and drink on offer in luxury boxes is far more important to them than supporting their team or indeed the outcome of the games they watch. This may well be true. But it would be a mistake to equate prawn sandwiches with a life of luxury or privilege. They are available in most retail outlets in Ireland for just a few euro. Many discerning Irish consumers of seafood today would, however, tend to steer clear of prawn sandwiches (not least because, for the most part, they are mass produced, containing prawns just as likely to have been sourced in Honduras or Iceland as in the West of Ireland, and rarely live up to expectations) in favour of either salmon, crabmeat (which remains popular) or, on rare occasions, lobsters.

Benedicte Federspiel: My usual question: You know, as I, that the Irish consumer organization is very weak and you mentioned that. I know it is very weak, it has very little money and I know very well because I talked to them all the time about that. You mentioned Jim Murray, who was not consumer organization but got a fantastic influence as the first Director of Consumer Affairs, but that was not a consumer organization. Did that play any role? That the consumer organization is quite weak?

Aneta Wiewiórska- Domagalska: I just wanted to ask a question, why does Ireland go for new statutory instrument instead of making the system more coherent, because we had this situation in Poland and we had our reasons, so I was wondering about the Irish ones.

Thomas Wilhelmsson: Well you mentioned financial services, and this guy whose name you did not mention .. as well as some others, but I wonder after the crisis, crisis in many European countries, consumers got in quite difficult troubles. I will guess that in Ireland that was hit by financial troubles that the consumers did as well,

now we have the ECJ flooded by Spanish cases and by Eastern Poland, Hungary and so on but I have not seen any cases in Ireland. Does the system function or do you just refrain from going to the European Court?

Bob Schmitz: Just quickly to follow up on Benedicte, If I am correct, the UK Which organization, was actually instrumental in setting up the Irish consumer organization, why did they drop out and they did not manage for instance the Belgian Test Achats, which really got off the ground in Spain, Portugal, Italy, why did the hell the British drop out? Why it was not successful to get also a strong consumer association in Ireland?

Alex Schuster: I can answer the above questions to a certain extent. I will take Benedicte's and Bob's questions together. The Consumers Association of Ireland was set up in 1966 which was also when the England won the world cup so there might be a connection with the Which consumer organization.... I do not really know why Which lost interest.

In response to Benedicte's question, yes, I mean you are absolutely right, the Consumers Association of Ireland was never a strong association, they were under funded, they had one director and that was the only full time salary. All the others were part time. Most of the money went into producing the magazine for decades. There was very little money for campaigns. So, yes is the answer, they were weak. Though I admire what they have been trying to achieve, they are still weak as an organization relative to their counterparts in the United Kingdom, the Netherlands and Scandinavia.

Benedicte Federspiel: Did they play a role in initiating the legislation?

Alex Schuster: Not to my knowledge. I think that most of the legislation was initiated at government level and certainly from 1980-2000 most of it was EU inspired. But the piece of legislation I mentioned to you, which is pivotal to Irish law, the Sales of Goods and Supply

of Services Act 1980, was first recommended by Michael Whincup (a New Zealander) in his report to the National Prices Commission. The Consumers Association of Ireland was not the creative force behind the 1980 legislation.

To answer a couple of other questions, why did Ireland implement such legislation on a stand-alone basis, that is a good question. I think one of the problems, and you know I am sad to make this admission, but consumer protection never had a priority from an Irish perspective, so that often when it came to implementation, we left it at last minute and we never considered the contextual background against which we implemented the directives. We decided to play clever ball because of course, if you implement a directive word for word, it is unlikely that the Court of Justice will rap you over the knuckles and say that you either mis-implemented it or you failed to implement it. I think that something is going to happen in the next few years and you are going to see a change in approach in respect of the legal code governing sales of goods transactions in Ireland. Something has to be done in the near future because an Irish consumer has to know, if he/she is going to court, should I rely on the Sales of Goods and Services Act 1980? To what extent, if at all, is the Sale of Goods Act of 1893 relevant to the consumer issues arising? Should I rely on the EU Consumer Sales and Guarantees Directive? Does the Consumer Rights Directive have a role to play here? Which is better in the context of the proceedings I am instituting against a commercial entity? And his/her lawyers will need greater certainty – in drafting their statements of claim on behalf of such consumers – as to which of the above legislative provisions are most effective from a consumer perspective

Finally, Thomas mentioned the fact that there are a lot of Spanish cases making it by preliminary references and other methods, certainly preliminary references while there is nothing from Ireland at this particular point of time. Certainly, people are in a lot of financial

pain as a result of what has happened in Ireland. There have been a lot of people evicted from their houses. But I have to say that there is not the same tradition of making referrals to the Court of Justice in Ireland, as in a country like Germany, for example. Indeed, I participated in a project here 30 years ago that Professor (Joseph) Weiler organized. At that stage there had been well over 300 preliminary references from Germany, but Germany had been in the EU longer. There were only 14 references from Ireland during the first three decades of our EU membership. It is often very difficult to get an Irish judge to make a reference. Usually, if it is a Irish judge who was in the Court of Justice or in the General Court and they come back to Ireland to serve in the Supreme Court in Dublin, you are likely to have greater success in persuading such judges to make references to the Court of Justice in Luxembourg.

13. *Guido Alpa, Italy*

“Consumer”: the construction of a legal concept

Although the notion of “consumer” has had difficulty gaining credit in the Italian legal culture, it was not actually ignored outright before being accepted in studies by economists, sociologists, and law scholars. In particular, it was already well known from the studies of Vilfredo Pareto (in his *Cours d’Économie Politique*, 1897) and of other early twentieth-century economists. The Italian civil code of 1942, still in force today, already alludes to the consumer as to the monopolist’s counterpart. Although no mention is explicitly made of the consumer, by requiring the monopolist to deal with *anyone*, we can immediately understand which is the monopolist’s counterpart, and that this counterpart, given his or her contractual weakness, must be protected in the purchase of goods or services. The Italian Civil Code, the contract framework generally prefers using the neutral term “party” or “contracting party”; in special contracts, again in a neutral manner, the code uses the term purchaser in a contract of sale, passenger or consignee in a transport contract, lessee in a lease contract, borrower in loan agreement, and so on.

Only the general Report about the new Civil Code prepared by the Minister of Justice Dino Grandi for the King, illustrating the meaning of the provisions included in the code, mentions the term “*consumer*,”

again in relation to competition rules and to the bargaining obligation imposed upon the monopolist. The passage (no. 1046) reads as follows: “In close connection with the matter of competition, it was decided to establish a principle already contained in special laws, which is to say the obligation for all enterprises that are in a condition of legal monopoly to negotiate with anyone that so requests, observing equal treatment (art. 2597). A principle of this kind is imposed to defend the consumer as a necessary tempering of lack of competition (..).” To be sure, this minimal protection does not in fact insure choice among a number of prices, or among a number of qualities of products, and at any rate the passage shows a certain awareness by lawmakers of a category of subjects that cannot negotiate the conditions of the service offered them by the entrepreneur, and are forced, if they wish to conclude any economic transaction, to accept the conditions imposed by the other party.

After 1942, it took a long time to construct the *legal* notion of consumer and the conceptual categories allowing the consumer’s status to be defined and appreciated, to introduce regulations to protect the consumer, to promote lines of interpretation favourable to the category of consumers, and, even more, to construct a notion of user of public services in relations with public administration. Dating the origin of the legal protection of the consumer in the modern sense would then take us to the 1960s: in that sense, it is not a native notion, but rather the effect of importing notions and concepts derived from other, more highly evolved experiences. The juridical notion of “consumer” is itself an emblematic example of the circulation (or transplantation) of ideas. In the United States, scholars in this field usually credit President John F. Kennedy’s special message to Congress in 1962 with defining the first programmes of legislative intervention in favour of “consumers,” with the term to be understood as *everyone* belonging to society, considered in their role as acquirers or users of products and services.

In the United Kingdom, a dividing line between past and future was marked by the Report to Parliament in July that same year by the Committee on Consumer Protection led by Dennis Molony. This Report, with great caution and without claiming to modify the regulations in force, acknowledged that the consumer had to be considered as the weaker party in the relationship established with the entrepreneur, and that it was therefore appropriate to intervene with some protective measures in the consumer's favour.

John F. Kennedy's message was epoch-making because, for the first time, "consumer's rights" were articulated, which is to say (i) the right to safety, to be protected from the dissemination on the market of products that are life threatening or hazardous to health, (ii) the right to be informed and to be protected from deceptive, misleading messages, from untruthful labelling, and from other commercial practices, in order that the consumer might be able to make informed choices, (iii) the right to choose, where possible among a variety of fairly and competitively priced products and services of satisfactory quality, (iv) the right to be heard, so that the consumers' interests might be taken into proper consideration by government policies, and so that consumers might be able to swiftly seek redress in court.

In the early 1960s, Italian jurists were unprepared to accommodate a notion that had sprouted in the terrain of economics and sociology, but was unknown to lawmakers. The cultivators of civil law were still closely bound to the civil code. And the fact that the Report to the King spoke of "consumer" in connection with competition and therefore with market rules was the sign that the drafters of the civil code and of the Report did not have in mind a subject to be protected in all phases of the establishment and execution of the consumption relationship, but only in exceptional situations, which is to say of monopoly in the sale of products or services. In other words, it was the triumph of contractual autonomy, in its indifference to the parties' economic and social conditions. With legal formalism

dominating, whoever dealt with these problems was considered either a non-expert in law, or a subversive one, and had little following and merited little credit.

We must then move forward in time to the early 1970s to record the first changes and the first attempts to demolish the formalist scaffolding. Consumer protection became a tool, a sort of picklock, to take traditional civil law apart piece by piece, and to bring legal categories closer to social problems. Now, the conceptual categories of dogmatics built upon the tradition of Roman Law and of its transfiguration by the German Pandectists could no longer meet the needs of civil law scholars sensitive to social values.

Scholars began to study the most appropriate remedies for protecting above all the consumer's health: the liability of the producer of defective goods was the breach that allowed the new civil law to thrive and flourish. There were then two parallel paths: the evolution of civil law, which was gradually abandoning the dogmatics of the nineteenth and early twentieth centuries, and the evolution of commercial law, which no longer dealt only with parties that produce and distribute goods and services on the market, but also with those that purchase or consume them. In particular, in commercial law, we have to turn to the genius of *Tullio Ascarelli* who, as early as the 1950s, in his essay *Teoria della concorrenza e interesse del consumatore* (*theory of competition and the consumer's interest*) attempted for the first time to define the traits of a new market player – the consumer. Subsequently, Gustavo Ghidini, who had studied how unfair competition is regulated, published, in 1970, the first book written by Ghidini on manufacturer's liability, placing responsibility within the sphere of the framework governing commercial advertising and consumer information, and thus using the rules on pre-contractual liability (articles 1337 and 1338 of the Italian civil code).

In the meantime, civil-law scholars had examined this issue in greater depth. Three directions of interpretation had been undertaken:

(i) the “constitutionalization” of private law, which opened the doors of civil law to the values and principles of the Constitution (that had entered force in 1948); in truth, the Italian Constitution never speaks explicitly of consumers, but protects the weaker parties to a contract, in particular in the labour sector, protects savings, and requires everyone to observe the principle of social and economic solidarity, in connection with the proclamation of the principle of equality (art. 3); it also allows business to be limited for reasons of social utility (art. 41). As to the Civil Code, (ii) the use of general clauses, such as good faith and fairness, public order and morality, rarely used by interpreters until that time, offered to lawyers more freedom in defining the obligations taken on by the parties in their economic relationships and to introduce a sort of “contractual justice”; (iii) the use of legal instruments to achieve social ends, what at the time was called “social control. of private business.” The two perspectives – of commercial and civil law – are not in opposition to one another, but, rather, are complementary: the former looks to the consumer’s relationship from the business’s standpoint, and the latter from the perspective of the weaker party, whether that party is the contracting party, the user, or the damaged party. The circulation of defective products had been considered the most important area, because it pertains to the value of the *person*, defended by art. 2 Const. Regard was given first to health, and then to the other aspects of consumer protection, such as the conclusion of contracts and the control of unfair terms, unfair commercial practices and the control of commercial advertising, and so on for the other sectors in which the consumer is in a situation of weakness, such as the sectors of banking and finance, tourism services, and relations with public administration. Later on, became relevant collective interests, the standing of consumer associations, the introduction of class actions .

2. Producer’s liability: from fault to strict liability

However, within the sphere of civil liability, it was necessary to be equipped with new juridical concepts. The principle of “no liability without fault,” codified in almost all legal systems and in Italy by art. 2043 of the Civil code, was also operative in the matter of the producer’s liability. The first forms of liability borne by the company for fabricating defective products were in fact based upon the entrepreneur’s *fault*, rarely presumed. Presuming manufacturer’s fault meant reverting the burden of proof to the producer. The Italian experience is symptomatic of the backwardness of the law code models, and case law, in the albeit rare decisions in the matter, has always followed the principle of “no liability without fault.”⁷⁴ There was no talk of enterprise liability, or of distribution of risk and strict liability. The pioneering studies by Pietro Trimarchi were an exception: in the early 1960s he had already designed a system of civil liability also founded upon economic categories. In Italy and the United States alike, we are at the dawn of the interpretative orientation led by law and economics.

At an initial moment, the attempt was actually made to exclude the producer’s *direct* liability⁷⁵. However, case law tended to apply the general clause of civil liability (art. 2043) expansively. For example, the liability was affirmed of the manufacturer of a paper cutting machine without screens appropriate for preventing injury to the users, by simply establishing that the safety mechanisms were required by law, and it was thus possible to find, in this case, the existence of an *objective* fault due to violation of law⁷⁶. In a case concerning a toy pistol used negligently by a minor, the manufacturer was found liable because the article’s construction failed to take into due account the fact that children can also make *abnormal use* of the product, and it is therefore

74 Cassazione (supreme court of cassation), 21 January 2000, no. 639, in “I contratti,” 2000, p. 903, with note by Capoluogo.

75 App. Cagliari, 27 June 1958, in Alpa and Bessone, *La responsabilità cit.*, p. 8 Cass., 15 July 1960, no. 1929, *ibid.*, pp. 8-9

76 Cass. no. 2237/1970

necessary to provide the toys with suitable information and devices to prevent damage to the young users⁷⁷. The manufacturer's liability was also invoked in a case in which there was no clear evidence of its fault: a bottle of Coca-Cola, removed from the refrigerator, that explodes as soon as it is placed on the counter, injuring the saleswoman, was considered a circumstance that was sufficient basis for the manufacturer's negligence for having introduced a defective container into circulation⁷⁸.

Moreover, two Supreme Court decisions innovate the orientations of jurisprudence in the matter. The first resorts again to the principle of fault-based liability, but – in the absence of clear evidence of the manufacturer's negligence – holds that liability may all the same be affirmed when, from a careful assessment of the circumstances, the fault may be presumed⁷⁹. This was a case of biscuits, sold in a box, that caused damage to the consumer's health. Their package was intact when sold to the consumers, and then no fault could be put on the seller.

The second holds that the strict liability of the driver of the motor vehicle for damage due to construction defects (pursuant to art. 2054 of the civil code) does not rule out the manufacturer's fault-based liability⁸⁰. Recourse to objective charging criteria in the case of damage caused by products is not typical of the Italian experience; it is, however, typical in North America. And in fact, if I may make a personal reference, I referred precisely to that experience both in preparing my university degree thesis discussed in July 1970, and in later studies. In particular, in my 1975 book dedicated to Enterprise liability and consumer protection, in which I proposed applying no-fault liability to

77 Cass. no. 4004/1957

78 Trib. Savona (court of Savona), 31 December 1971

79 Cass., 25 May 1964, no. 1270.

80 Cass., 02 March 1973, no. 577, in Alpa and Bessone, *La responsabilità cit.*, pp. 31-33. Cass., 15 July 1960, no. 1929).

all cases of the manufacturer's liability – in the areas of design, of the information given to the consumer, and of manufacturing proper – I had referred to studies by Pietro Trimarchi, Guido Calabresi, William Prosser, Frumer & Friedman, and so on. But conversations with or readings of European authors who studied these issues, such as Gordon Borrie, John Spencer, Jean Calais-Auloy, Norbert Reich, and Hans Micklitz – and later on, Basil Markesinis and Jacques Ghestin or Philippe Malinvaud – were also useful.

In Italy, a great debate had opened, perhaps of interest more to scholars than to market operators or the consumers themselves. The proposals that emerged did not tally with the prevailing orientation still based on fault, or with the (cautious) openings towards liability systems more favourable to the consumer. Some held that strict liability must strike only large corporations, while for small businesses and so on, fault-based criteria are more suitable. Others proposed applying the business risk criterion only in the case of damage derived from manufacturing defects or failure to provide information, but not in the cases of design defects because – since these types of defect are encountered not in an isolated item but in all items in the mass production – the enterprise's burden would be too great.

This problem was in some aspects overcome in 1985 by the Directive on producer's liability (no. 85/374/EEC). The European lawmakers' choice, founded upon risk rather than fault, is unequivocal. However, some Italian scholars continued to interpret the framework using traditional categories, or, at most, ended up admitting that this was an attenuated strict liability. In Italy the Directive (85/374/CEE) was implemented with a decree (no. 224 of 1988), and was then considered as a corpus of rules to be entrusted to a special law rather than to be inserted into the Civil code. The directive left national lawmakers free to expand or restrict the manufacturer's liability with regard to the state of scientific and technical knowledge that could be acquired when the product was designed. Italian lawmakers

made the choice of circumscribing liability if the state of scientific and technical knowledge at the moment when the product was introduced into circulation did not yet allow the producer to consider the product as defective. In application of the so-called “development risk,” the producer’s conduct is therefore to be assessed starting from the objective knowledge of the defect on the basis of the most advanced level of technology and science, combined with that of the accessibility of this knowledge⁸¹.

Unlike what occurred in other countries in the European Union, case law in the matter of manufacturer’s liability in the first decades of application of the Decree of the President of the Republic no. 224 of 1988 was not abundant; in fact, rulings are quite scant in number. It is hard to tell whether this dearth of case law is due to the fact that few cases of injuries caused by defects had occurred, or whether the cases that did take place resulted in damage modest enough to discourage lawsuits, or whether consumers, unaware of their rights, did not take pains to have them defended in court, or, finally, whether proceedings were not brought, or were concluded before the decision was handed down, due to settlements between the parties. The last of these possibilities might perhaps be the most plausible justification, given that any publicity given to the decision reflects negatively on the name, prestige, and therefore the market position of the business that has lost in court. At any rate, the (few) cases which were decided appear to be appreciable from the standpoint of technique and from that of the attitude shown towards the harmed consumers.

For some time now, the Supreme Court of Cassation (Corte di Cassazione) has had an opportunity to specify that the “framework of regulations governing producer’s liability for defective products, as *it gives rise to a strict liability* of the importer of the defective product for the harm caused by it due to the defect, aims to safeguard consumers from the effects of the flaws inherent to processed products

81 Trib. Sassari 12 July 2012

introduced into circulation by professional economic operators, also regardless of whether there are elements of fault.”⁸² This is a form of special liability that requires the presence of an objective element represented by the private, non-professional use of the damaged item, and a subjective element that, in the case of bivalent use, still requires the private use to prevail over the professional one. “Therefore, the absence of these fundamental requirements rules out this type of liability which may in actuality be likened to the objective and/or aggravated liability provided for in articles 2047 and 2052 of the Civil code, but differs from fault-based liability pursuant to art. 2043 of the civil code in terms of assumptions and requirements of evidence.”⁸³

The objective nature is confirmed by the fact that it also exists in the case where the producer has no direct fault, if it has not acted with recklessness or negligence during the production phase, and thus for the mere fact of having created a situation of danger, as the marketing of a defective product may be⁸⁴: the producer automatically becomes liable for damage caused by the good it has manufactured, starting from the moment it puts it on the market, with the only corrective derived from the fact that, for the producer to be held concretely liable, there must be, in the product, a defect, damage, and a cause-and-effect relationship between one and the other, for which the injured party must provide evidence⁸⁵.

An interesting case law emerges from the indexes and commentaries, extending to all sectors in which products are consumed or used in daily life⁸⁶. The sector with the greatest number of rulings concerns the exercise of hazardous activities. This sector includes, for example, the explosion of gas cylinders – a well-known and fre-

82 Cass. civ. (civil Court of Cassation) Sect. III, 14 June 2005, no. 12750

83 Thus, Trib. Florence, 26 March 2014

84 Trib. Trento, 3 May 2012

85 Trib. Caltanissetta, 14 October 2008

86 Appeals, Naples, 14. September 1979, in *Foro pad.*, 1979, I, p. 202.

quent case. In this regard, the Supreme Court has specified that if no evidence of the cause of the explosion is furnished, the presumption of the liability of the producer/distributor, as the party exercising the hazardous activity, and that of user, as keeper, may operate with cumulative effect, as they refer to two different omissions⁸⁷.

Another interesting sector is that of the production of blood products, in which the producer and importer of their components hold joint liability with the final producer⁸⁸. In addition to the identification of the liable party or parties, this case in point involves other delicate problems to be resolved: whether the producer could, based on the means at its disposal, learn of the product's defectiveness, and the response in this regard was first negative and then positive⁸⁹; whether, to relieve themselves of liability, the producer and distributor can provide evidence of having complied with the ad hoc provisions of law, and the response was negative⁹⁰; above all, the manufacturer's strict liability facilitates the burden of proof of the injured party, who might have been infected by other causes as well.

Directive no. 85/374/EEC achieved only partial harmonization. As has been pointed out, three options had been left open to the Member States, regarding the exclusion or inclusion of non-processed agricultural products, the producer's exemption or non-exemption from liability for the development risk, and the ceiling for damages derived from death or personal injury caused by identical products presenting the same defect. Every five years, the Council was supposed to examine the application of the implementation frameworks and ascertain whether the options and limits should be modified. The first report was submitted in 1995, casting light on the directive's

87 Cass., 19 January 1995, n. 567, in *Resp. civ. Prev.*, 1996, p. 687. Cass., 4 June 1998, no. 5484, *ibid*, 1999, p. 115.

88 Cass., 20 July 1993, no. 8069, in *Giust. civ.*, 1994, I, p. 1037.

89 For the negative response, see Cass., 27 July 1991, no. 8395, in "Nuova giur. civ. comm.," 1992, I, p. 569.

90 Cass., 20 July 1993

relevance in the Member States' legal systems, the legal systems' necessary, gradual adjustment to the new rules, and the scant case law that had been formed during the first years of application.

The European Parliament approved the Directive's modification – following the Mad Cow epidemic – based on which non-processed agricultural products and products of hunting were included in the area of producer's liability. In July 1999, the Commission published a Green Paper on *Civil Liability for Defective Products* to ascertain whether further modifications had to be introduced concerning the victim's burden of proof, the development risk, psychological damages, the threshold of maximum compensation, statutes of limitations, and financial limits. On 1 March 2000, the Economic and Social Committee adopted an opinion concerning the Green Paper, and the European Parliament voted on a resolution on 30 March 2000. On 31 January 2001, the Commission published a report on the directive's application. The conclusions' thrust is that the time is not yet ripe to modify the directive as to the options and that it is in the meantime more relevant to continue the monitoring action, accompanied by the prescription of rules as to the products' safety, redress, and the extension of environmental liability. In implementation of directive no. 99/34/EC, Legislative Decree no. 25 of 2 February 2001 thus modified the provisions of the Decree of the President of the Republic no. 224 of 1988, suppressing the exemption for agricultural products (para. 3 of art. 1 and para. 2 of art. 2). Thereafter the provisions were completed with the directive on sellers' guarantees to consumers, and with the directive on product safety. Then came the directive on commercial advertising, transposed into the directive on unfair commercial practices. But, as already stated, for the history of consumer protection, the problem of producer's liability due to defective products is the battering ram that broke down the citadel.

3. Consumer contracts and unfair terms.

Also belonging to the area of civil law experts is the other sector particularly characteristic of consumer protection: that of unfair terms in contracts made by the consumer with the professional. But in this regard, it must be pointed out that the provisions of the terms drafted by one party to the contract and imposed on the other had been the subject of considerable and analytical regulation already in the Civil code with articles 1341, 1342, 1370. These articles also remained in force after the EC Directive, precisely because they are general in nature and aimed at regulating all standard contracts and not just those signed by the consumer.

This also merits a few words. As already mentioned, our Code contains rules on standard contracts, and, in 1942, it was an exception among the codes then in force. The Code requires the unfair terms listed by art. 1341 para. 2 to be signed; in the absence of specific signing, the terms are without effect; it establishes that in the event of uncertainty the interpretation favouring the signer prevails, and if added, the added ones prevail over those already prepared. This is because, in every market sector, the practice of standard contracts functional to the strategy of dominant businesses is manifested in particular forms, which are due to the particular structures of the various branches of industry and of mass distribution. But wherever mass production and mass distribution exist, there are the same problems still open today, and the social costs of a phenomenon that is spreading, with results now described by an entire literature, are very high.

We were all aware of the fact that reliance on negotiating standards unilaterally prepared by manufacturers and operators in the distribution sector was not under discussion, because in a modern market economy there are no rational alternatives. But the unilateral preparation of the contract conditions is increasingly aimed at being the instrument at the service of corporate profit, without there being the necessary consideration of the widespread interests of the

consuming public. The very idea that the contract is the encounter of free wills ends up being ideology, plain and simple. The standard contract was increasingly becoming the forced adherence by the weaker parties to a set of imposed conditions, and thus a matter of grave and continuous abuse, committed in various ways with the modes documented by the terms that from time to time circumscribe guarantees, provide exemption from liability, govern the prices of goods and services, establish time limitations, refer to additional conditions established elsewhere, and lay risks upon the occasional operator and the naïve consumer. In the more general perspective of reform heralded by those theorizing a new legal status of consumers the problems of governing contractual standards thus presented all the traits of seriousness and urgency reported everywhere, requiring radical corrections of the market practices traditionally permitted by entirely inadequate regulatory regimes.

Already in the early 1970s, at a major conference held in Catania by Pietro Barcellona, the possibility was discussed of applying the remedies of the Civil Code to standard contracts, beyond the remedies already established, in order to achieve better control over content and to strengthen the weaker party to the contract. Thus, the use of the lawsuit, of good faith, of the object of the contract, and of public order, were probed. And the young scholars of the time, in the hot-bed that was the University of Genova, to which I myself belonged, devoted their efforts to studying foreign schemes and the tendencies in the legal system, in order to achieve the hoped-for objective. I am referring in particular to Enzo Roppo's monograph on standard contracts, to Mario Bessone's essays on consumer protection in contractual relations and on the distribution of risk in the contract, and of course to our teacher, Stefano Rodotà, with his proposals on the aims of private law in a modern society.

The preparation of the directive's designs on unfair terms became the path for accessing a new conception of the contract, in which

formal justice was supplemented, through good faith and fairness, by substantial justice. The introduction of this directive, partially borrowed from the English law on disclaimers (1977) and from German law (AGB, 1977) and the French law of 1978, was an essential achievement for the consumer's protection in our legal system, since the rules of the Civil code ensured a control only of form but not of content. The adoption of the EC Directive on "unfair" terms (no. 13/1993 EC) took place with the EC law for 1994 (art. 25, law no. 52 of 6 February 1996); the text was then inserted into the civil code, in chapter XIV *bis*, under title II on contracts in general.

As early as 13 December 1996, just a few months after approval of the adoption text, the EU Commission had made several comments to the Italian government: (i) a comment on the Directive's sphere of application, considered too circumscribed for defining the content of consumers' contracts to which the code's framework applies (art. 1469 *bis*). Since, to the contrary, the directive applies "to consumer contracts as a set," all contracts that do not have as their purpose the supply of goods or services would be removed from the scope of this regulatory framework; (ii) it was also challenged that, since the injunction regulation does not repeat the exclusion of the application of the rule "*interpretatio contra proferentem*," the Italian regulation of the matter reduced the room for protection in procedures of urgency, since the judge, with an interpretation operation, could have corrected the meaning of the unclear or incomprehensible term, and thus without upholding the petition, and allowing the professional to continue employing the term *medio tempore*; (iii) another comment regarded the application of art. 6, paragraph 2 of the law concerning the application of the framework of regulations more favourable to the consumer in the case of a contract subject to the framework of a third country, but connected with the territory of a Member State. Since art. 1469 *quinquies*, paragraph 5 reproduces the provision of favour, but circumscribes it to "this article" (which regards terms at any rate deemed unfair, and the effects of the unfairness) and

does not extend it to all the provisions of the chapter, its restrictive transposition of the directive was seen; (iv) it was again stressed that the injunction pursuant to art. 1469 *sexies* does not give consumer associations standing to take action against associations of professionals that have issued recommendations related to the contract forms used by their members.

The Italian government responded to these comments with its letter of 14 March 1997, observing: - as to the first comment, that the definition of the objects of the consumers' contracts did not rule out the introduced regulatory framework being applicable to all contracts belonging to the category; - as to the second comment, that the civil code already has a provision (art. 1370) that imposes a rule of a general nature as to the contract's interpretation, derogation from which was not justified; - the third comment was upheld; - the fourth comment was considered immaterial, since recommendations by trade associations have no juridical relevance.

Unsatisfied with the Italian government's responses, and at any rate with its inertia, on 6 April 1998 the Commission opened the infringement proceedings no. 98/2026 pursuant to art. 169 of the Treaty of Rome. It challenged the Italian replies, repeating its own observations and, with regard to the injunction, it specified that the new framework only regards the effect subsequent to the conclusion of the contract, while it thwarts the preventive intervention, which should be possible to propose even before the contract is concluded but the forms are in use by the professional or by the associations of professionals. In response to the Commission's objections, the Italian government prepared and announced further observations in Brussels. On the first comment, it was observed that the specification of the purpose of the consumer's contracts is not a restriction of the sphere of application, but only an explanation of the purpose, which at any rate results also from the directive's "*whereas*" clauses (no. 2, 7, 9, and 18), and it was added that doctrine has already proposed an

expansive interpretation of art. 1469 *bis*, comprising every economic transaction concluded by the consumer with the professional, and therefore, for example, including condominium regulations connected with timeshares, the granting of mortgages, surety, optioning, unilateral contracts, promises, the sale of used or occasional goods. As to the second point, given that art. 1370 of the Civil code on *interpretatio contra proferentem* already applied, it is specified that the interpretation most favourable to the consumer is not the one that saves the term (assigning it a meaning more favourable to the consumer), but the one that makes it possible to render it null and void. On the third comment, it is held that application of art. 1469 *quinquies*, paragraph 5 is the result of the lawmakers' oversight, which doctrine has already seen to overcoming by proposing an expansive reading aimed at safeguarding the consumers' interests; however, a legislative intervention aimed at removing the error is hoped for. On the fourth comment, it was stressed that in our legal system, simple recommendations by associations of professionals are not legally binding. As to the fifth comment, the government dwelled above all on the interpretation of art. 1469 *sexies*, which gave rise to contrasting case law, which will be discussed below, some instances of which were restrictive and others expansive, with regard to verifying the prerequisites of the injunction petition; it referred to the orientation of doctrine most favourable to the expansive interpretation that safeguards the consumer. In any event, it stressed that a restrictive interpretation of the procedural rules that would prevent the performance of a preventive control of the unfair terms would conflict with art. 7 of the directive, and thus be inadmissible in our legal system.

The dispute with the Commission did not end here. On 18 December 1998, the Commission issued an opinion in which it was maintained that Italy did not faithfully adopt the directive, and thus asked our country to adopt the measures needed to comply with the following indications: - "to apply the provisions of said directive to the set of contracts concluded between a consumer and a professional"; - "to

adopt art. 5, third sentence, of said directive”; - “to fully adopt art. 6, para. 2 of said directive”; - “to fully adopt art. 7 para. 3 of said directive.” The Commission only partially upheld the Italian government’s observations, and thus, with law no. 526 of 21 December 1999, the text of the Civil code was modified. The words specifying the content of the consumer’s contract under art. 1469 bis para. 1 were suppressed; para. 3 was added to art. 1469 quater, so as to specify that the interpretation most favourable to the consumer does not exclude resorting to the injunction pursuant to art. 1469 *sexies*; art. 1469 *quinquies* was amended, specifying that “any contractual term that, by providing for the applicability to the contract of a legislation of a non-EU country, has the effect of depriving the consumer of the protection ensured by this chapter, shall be null and void.”

Since all the required modifications were not made, the EU Commission called Italy before the Court of Justice, which found our country in default of its EU obligations, at the very least for having amended its framework only in part, and sentenced it pursuant to art. 69 no. 3 of the procedure regulating disputes before the Court (Decision of 24 January 2002, Case C-372/99). Even the directive’s translation (from French or from English) into the Italian text posed problems. With regard to the controlling unfair contract terms, “a *dépit de la bonne foi*” was translated as “*malgrado la buona fede*” or “in spite of good faith,” thereby making the meaning unclear. The error was corrected, but only in the matter of interpretation. It took many years for amending the text, which was corrected in 2015.

In Italy, too, the directive’s implementation therefore took no easy path. As already said, it was first entrusted to a special law. Then, these rules of EC origin, and the one on guarantees in sales to consumers, were inserted into the civil code (articles 1469 bis ff., 1519 bis ff.). Classical contract theory drew no distinctions between contracts concluded *inter pares* and contracts concluded between parties having a different status or parties having different contractual

power: in fact, it was precisely the presumed (and unquestioned) parity of the parties that had made it possible to create a notion of the contract that was unitary, monolithic, and removed from the concrete circumstances in which the contract was supposed to operate.

The insertion of the definition of the consumer and the appearance of a new subject in the Civil code had opened a broad discussion, with some holding that it was a highly appreciable operation (just look at the French civil code or the German civil code), and others seeing it as a desecration, since the Civil code deals with the contract in general, and does not concern itself with the parties' particular status. Regulatory theory distinguishes categories of contracts depending on how they are concluded, depending on whether or not they are for consideration, and depending on the parties' status. Uniform categories of contracts – taking account of the aggregation of rules aimed at regulating the contract in single consolidated laws, industry codes and, even earlier, depending on the economic sphere in which the contracts are an instrument of exchange and cooperation – have been isolated, such as contracts of consumers and of business: banking, financial, and insurance contracts, transport contracts, agency contracts, and so on.

4. The consumer code (Legislative Decree no. 6 of 6 September 2005)

In 2005, I was asked to chair a Commission at the Ministry of Industry, Commerce and Handicraft to draw up a “consumer code.” The choice was made (perhaps debatable from the standpoint of the legal categories, but in line with the contents of the other European codes with similar content) to insert those provisions into the consumer code. In this regard as well, there was much debate: whether the Civil Code, which was to be considered as the general law in all legal relationships, had to be supplemented, or whether it was necessary to yield to the temptation of imitating neighbouring models like the French one (Code de la Consommation) and to condense into a

code *a latere*, all the rules concerning the consumer. In fact, in 2003, the so-called “sectorial codes” were invented.

The sectorial codes were defined as “the instrument by which lawmakers, by replacing the model of mixed consolidated laws and adopting single legislative decrees, implements the substantial re-organization of specific sectors of the legal system through the simplification, reduction, and re-organization of norms (the excessive production of which is historically due to the multiplication of sources, of different levels and provenances, as well as to constitutional reforms and the increased incidence of EC law). Sectorial codes were born as a consequence of the gradual erosion of the systematic unity of the Civil code, begun in the second half of the last century with the phenomenon called “decodification,” which describes the way in which special laws have incorporated matters taken from the framework dictated, in fact, by the Civil Code.” They are in other words a glaring example of “decodification.”

The Consumer Code (Decree of the President of the Republic no. 206 of 06 September 2005) gathered together most the norms regarding the consumption relationship. Other codes regard tourism, insurance, cultural assets, construction, etc. The Consumer code concerns itself with dictating rules on “educating” consumers, which is to say on their awareness in establishing relationships with professionals and on providing them with suitable information, on representing them with the bodies that protect their rights, and on their participation in administrative proceedings involving matters of interest to consumers (art. 4). Consumer information regards in particular labelling and package leaflets accompanying the products (art. 5). There are particular procedures for indicating prices (art. 13 ff.) and rules on commercial communications; unfair and aggressive commercial practices are penalized, telemarketing, e-commerce, product safety, financial services, and means of defence, in particular

the injunction (art. 139-140) and the class action (art. 140 *bis*), are regulated.

5. The antitrust law (l. 10.10.1990 n. 287)

Commercial law evolved in parallel with the development of civil law. Our legal system did not have a true system of regulations governing competition, as the cCvil code dedicated itself only to unfair competition. The modern competition framework was introduced into our country on the model of the EC framework only in 1990. Dating in fact to that year was the application of Law no. 287 of 10 October 1990. The title of Law no. 287 of 10 October 1990 concerns the protection of *competition* and of the *market*.

As I had argued when the law appeared, since they are joined by an “and,” the two terms “competition” and “market” might constitute a hendiadys (that is, the two defining a single concept), or they might allude to phenomena different from one another. According to logic, the second alternative is the correct one, in this context: while there can be a market without competition (referred to as the monopolistic or oligopolistic market), there can be no competition without market; it is therefore reasonable to believe that we are dealing not with a hendiadys but with phenomena different from – although not opposite – one another. But since competition is a way of being for the market (the “free” market), it could be simpler to refer exclusively to safeguarding competition. If “and the market” is added, the intention was to warn that the spectrum of affected interests is broader than what is usually referred to when speaking of competition (that is, the interests of competing entrepreneurs), alluding to such third interests as the public interest, the interest of the entrepreneurs acquiring goods and services, the consumers’ interests, and all the interests that come into conflict and are put back together in the market.

Where the title of the statute should be taken as the synthesis of the purposes pursued by lawmakers, the conclusion should imme-

diately be reached that this framework of regulations is designed: a) to protect values or goods and services (competition, market) and therefore: b) for the interests involved by those values or by those goods and services, and that is to say: c) for the public interest and for individual interests; thus: d) the public interest – in this context – would be identified with competition and market, and individual interests would be protected insofar as they are compatible with the public interest and with the market; e) the individual interests might be diversified, as their holders are the economic operators that produce goods and services (offering entrepreneurs), the economic operators receiving goods and services (acquiring entrepreneurs), and the consumers, considered as operators (*homines oeconomici*) or as simple users.

The interpreters thus noted that reference had to be made to the legal notions of competition and market, as they are understood in the EC framework, cited under para. 4 of art. 1 under “principles of the legal system of the European Communities in the matter of regulating competition.” In the commentators’ reconstruction, the legal notion of market remains vague, as the market is an ideal figure of the encounter of supply and demand, that varies depending on the goods and services, the regions, the political systems, and therefore the economic systems. The notion of competition also varied with regard to unfair competition, to consortia, to non-competition agreements, etc.

In the text in question, the term “consumer” recurs a number of times, and in particular: a) under art. 3, para. 1, in which, in the matter of abuse of a dominant position, it is specified that it is forbidden to “prevent or limit production, market outlets or access, technical development or technological progress, to the detriment of consumers”; b) under art. 4, para. 1, where, in the matter of derogations to the prohibition against understandings restricting the freedom of competition, said understandings are held as lawful if, being authorized

by the administrative agency (the authority instituted by the same statute), they give rise to “improvements in the conditions of supply on the market, which bring such effects as to involve a substantial benefit for consumers”; c) under art. 12, in which, in the description of the Authority’s powers, the elements brought to its knowledge “by public administrations or by anyone with an interest therein, including associations representing the consumers” are considered relevant.

I had stressed that with the introduction of the framework of laws governing competition “and the market,” the consumers’ interests are by necessity directly impacted: therefore, not as a case of protecting competition, but of protecting the market. This is because consumers also operate on the market, not as *domini* in the situation, but not as *subiecti* either. If the market is the ideal place of conflict and encounter of the various interests in play, then the *consumers’ interests* – from the economic/social standpoint as well as from the legal one – must have citizenship.

Now, what relevance is given to these interests in the framework of Law no. 287 of 1990? Rather modest attention is reserved for the consumers’ interests – attention also reflected in the comments on the new regulatory framework, tending to underestimate, if not ignore, the problem. The impression one has, upon an overall reading of the text, is that the interest of consumers was taken into consideration only as a point of reference, as a metric for assessing the anti-competitive nature of an act or practice, and that is to say as a *means*, not an *end*. Things changed over time. The Antitrust Authority is now recognized as having the power of moral suasion to contain or expunge abusive terms, and may levy penalties, following the infraction procedure, on enterprises that fail to comply. As already mentioned, the consumer code regulates all the sectors in which the need was felt – first of all in EU law – to take legislative action to protect the consumer. But in a reconnaissance of the origins of consumer protection, the two areas that were taken into greatest consideration – producer’s

liability and control of unfair terms – were the first to be the object of analysis and proposals.

6. Current discussion on the notion of consumer

In doctrine, based on the rules introduced overall by the European Union, on the social policy programmes outlined by the Union and progressively implemented, but also taking into account the evolution of the national situations and the comparison with schemes outside Europe, the debate has returned on the current meaning of the notion of consumer, and on the remedies with which the consumer may be adequately protected.

In various contributions, Hans Micklitz stressed the distance between the orientation of the European model centred upon the limited market freedom in which the consumer operates as an informed player, from the current United States model in which the consumer's protection is not pursued through information but, reflexively, through market efficiency. In this alternative, a fundamental role is played by the principle of the consumer's behavioural rationality – a principle that now appears abandoned by the American Law Institute, which deals with the legislative projects of greatest importance for the United States economy and society. And then, what model will prevail if the agreement between the European Union and the United States for an integrated market were to be reached? In other words, the extension of the entry into the market of sectors of distribution of goods and services offered on the internet and thus open to access by all implies that the consumer is increasingly immersed in economic relations and is considered a pawn in the entire system – the so-called “marketized” consumer. And there's more. Since the markets are fragmented – there's the market of goods, that of services, the market of the supply of essential utilities like water, gas, and electricity, the market of banks and of financial intermediaries – the consumer also appears “fragmented” because, in each of these markets, the consumer receives differentiated protection. And what's more, the

consumer is unanchored to the neutral and unifying definition already alluded to, when he or she, from one time to the next, is considered sure and hardened, or responsible, or “weak.” Every gradation of ways of being and therefore of situations corresponds to a different apparatus of rules and remedies. A response to all this was the “constitutionalized” consumer, which is to say the consumer understood as bearer of fundamental values.

Micklitz’s judgment is quite harsh: “the consumer was broken by the regulatory and political weight that required him or her to behave as the good and active market player, as a wary and careful customer”; indeed, he doubts that the constitutionalization of the consumer’s legal position is sufficient defence for the millions of people who turn to the market every day. This lucid analysis must alert us not only of the need to assess, from time to time, the consumer’s position in the individual relationships, but also of the need to consider the potential of law, and the consumer’s *legal* protection in general, as not unlimited. In other words, a clear, basic definition of consumer appears absolutely appropriate, that carves out the consumer’s essential aspects and is functional to the interpretation and application of the rules; a specification, with respect to the general definition, of the situations in which particular relationships require taking into consideration not the *average* consumer but the *weak* one appears ineluctable. It appears inappropriate, at any event, to consider the figure of the *advised and responsible* consumer, a figure that is based on the presumption that the information asymmetry and the asymmetry of contractual power can be remedied with a quantity of information and a quantity of remedies sufficient to put the two opposing positions on equal footing. However, the “constitutionalization” of the consumer’s legal position appears praiseworthy not only because it corresponds to the notion offered by the Charter of Fundamental Rights, but also because the radical criticism that denounces, in the construction of the figure of the consumer, a creature of capitalism advanced to the detriment of – or in spite of – the

protection of the *person* is wholly myopic. Of course, although there is no identity between the legal position of the person *tout court* and the legal position of the consumer, it cannot be denied that being a consumer is a dimension of the person, and that, by promoting the consumer's protection, the protection of the person is promoted – that is, the person's health (precisely by protecting the person from food fraud, from harmful products, from dangerous drugs), his or her private sphere (in fact by protecting him or her from unfair practices and from the unlawful use of databases), his or her assets (in fact by protecting him or her from unfair terms, from deceptive advertising, from economic transactions concluded under the pressure of unfair practices, from inappropriate investments), and also by extending the protection to trial aspects with the identification of ad hoc remedies (redress through individual and collective remedies).

A large harvest of decisions has been reaped on the notion of “consumer,” since the restrictive definition chosen by lawmakers and confirmed in the text collected in the consumer code appeared too narrow, in doctrine as well. However, on a number of occasions, before the renewal of art. 7 of Legislative Decree no. 1/2012 (which inserted letter *d-bis* into art. 18, paragraph 1, of the consumer code, and extended the protection established for consumers to micro-enterprises limited to unfair commercial practices) the Constitutional court ruled out that the provision that provides its definition, and with it circumscribes the regulations protecting only natural persons, does not conflict with the principles of the Constitution. With order no. 469 of 22 November 2002, the Court deemed as ungrounded, with reference to articles 3, 25, and 41 Const., the question of the constitutional legitimacy of art. 1469 bis, paragraph 2, of the civil code [now corresponding to art. 3, para.1, letter a) of the consumer code]: “in the part in which it does not make equate *small enterprises and handicraft enterprises* with the consumer, since the lawmaker's choice cannot be criticized, of attributing – in compliance with the text of Directive 93/13/EC concerning unfair terms in the contracts

executed with the consumers, the regulations of numerous Member States of the European Union, as well as the project, being developed, of the European civil code – the quality of consumer to the natural person that acts for purposes extraneous to the entrepreneurial or professional activity that might be performed, and with this excluding from the corresponding special protection all those parties – such as professionals, small businesses, and artisans – that, in individual or also collective form, act for purposes at any rate connected with the economic activity, although without the purpose of making a profit: the preparation of common protection instruments, implemented on the basis of uniform models in the various countries of the European Union, is in fact on its own a suitable reason for legislative policy in support of this choice, and all the more so as it is not unreasonably directed towards protecting parties that, by acting according to “*id quod plerumque accidit*,” in an occasional, irregular, and non-professional manner, are presumably without the necessary competence for bargaining on an even playing field.

The principle of pre-establishment of the judge, on the other hand – as has been repeatedly affirmed – is complied with when the court body has been set up by the law on the basis of general criteria set in advance, and not in view of individual disputes; nor can the injury of said principle be held to exist with reference to the impossibility of applying to the judgment in which a joint-stock company is sued as a consequence of lacking the quality of consumer, the law on jurisdiction provided for by art. 1469 bis, paragraph 3, no. 19, of the civil code, while the criticism according to which the claimed disparity of treatment between the private consumer and the small business may determine a limitation of competition and a hindrance to the free market is inconsistent, due to lack of clear and adequate grounds.”

In actuality, as has been seen, in other legal systems the extension took place, but in favour of bodies that do not perform a profit-generating economic activity. What the judge takes into consideration

to define the consumer is the declaration of the consumer who “self-qualifies,” and then the purpose for which the operation was carried out. With the decision no. 24731 of 2013, the Court of Cassation specified that “with regard to the regulations on protecting the consumer and on contracts negotiated outside of commercial establishments, a natural person does not have the quality of consumer when, through the contract, he or she procures a good or service within the framework of the organization of a professional activity to be undertaken, taking the initiative of seeking said good or service, precisely for the purpose of achieving that organization.”

However, the professional too – and that is, the professional economic operator – may be considered on the level of the simple “consumer” when concluding a contract to meet the needs of daily life, extraneous to the exercise of said activities⁹¹. In concrete terms, the verification, if a certain contract was concluded by a legal operator such as a consumer or, rather, within the context of the exercise of that operator’s professional activity, involves an appraisal of the facts, as such reserved for the trial judge and not to be challenged on appeal, where backed by an adequate and juridically correct justification⁹². In the matter of an insurance contract executed in favour of third parties, the position of beneficiary-consumer of the insurance policy is likened to that of the party to the contract, with the consequence that the former may also invoke the so-called “consumer jurisdiction,” or the jurisdiction of the judge in the location where the consumer resides or is domiciled⁹³.

The legislative definition, however, is not so rigid. The relevant case law includes rulings that tend to expand its semantic content. For example, it was held that the *condominium* – a mere organization of co-owners with stable representation for specific acts related to

91 Cass. civ., sect. VI, 14 July 2011, no. 15531

92 Cass. civ., sect. III, 5 June 2007, no. 13083

93 Cass. civ., sect. III, 11 January 2007 no. 369

specific objects – has the quality of consumer to which individual parties would be entitled, and therefore the regulations contained in the consumer code would be applicable to it⁹⁴. Thus, the occasional use, and for marginal sums, of the current account for entrepreneurial, commercial, artisanal, or professional purposes, does not rule out the qualification of consumer with regard to the banking institution with which the contractual relationship was maintained⁹⁵.

In the same way, based on an expansive interpretation of the quality of party to the contract concluded between the professional and the consumer, the term “party to the contract/consumer” is understood not only the “direct” stipulating consumer, but also the party at any rate identified as the holder of the relationship, even if the execution thereof, in the various forms provided for by law (in representation, or in the form of the contract for person to be appointed, or in the form of the contract in favour of third parties, etc.), has been done by another party. This is why, “whenever it happens that, as early as the phase of concluding the contract with the professional, it is established that the contract is destined to yield its effects in favour of a party other than the party executing it, with the consequence that this party becomes, from the beginning, the holder, in autonomous and non-derivative fashion, of the rights and obligations arising from the contract, the reasons that are at the basis of the regulations governing the protection of the consumer justify – and in fact require – likening the position of the third-party beneficiary to that of the party executing the contract, and thus attributing legal importance to the party’s subjective quality of “consumer.”⁹⁶.

7. The rights of associations of consumers and users

94 Trib. Genoa, 14 February 2012; Trib. Bari, 24 September 2008; Trib. Bologna, 3 October 2010

95 Trib. Turin, 4 June 2010

96 Trib. Bari, 24 September 2008 no. 2158

Given that the individual consumer is often unable to learn his or her own rights, or to defend them, an important role of associations is that of exercising legal activity alongside the activity of informing, educating, and assisting consumers (including those not belonging to the association), of promoting their interests, of bargaining with enterprises over quality, price, and modes of marketing of goods and services, or of resolving conflicts. Art. 3 of said 1998 law must be linked with art. 5, since there is a connection between rights accorded to associations and their representativeness. The right of action consists of: (i) exercising the injunction (against acts and behaviour injurious to the interests of consumers and of users); (ii) exercising precautionary actions aimed at correcting or eliminating the harmful effects of ascertained violations; (iii) exercising the action of compensating the damage in specific form, limited to the publication of the obtained measure.

These are actions proposed autonomously or *ad adiuvandum*, in proceedings brought by the individual consumer or user (art. 3, para. 7). In any event, this recognition of trial rights does not exhaust the list of trial activities that the associations may carry out, but supplements the trial activities to which the associations are admitted. Before the administrative authority, consumer associations have been admitted to intervene *ad adiuvandum*, and, in some cases, autonomously as well. This is not the case before the ordinary judiciary authority. The case law in this regard is still disputed, so that the recognition made by the law, albeit limited, brings clarity for the types of proceedings that are contemplated; in all the other cases, the associations' trial position will remain uncertain until the orientations of the judges have consolidated, or until action is taken, this time in organic fashion, to regulate standing and the trial capacity of all the associations, and not only of certain categories of them, as currently takes place in fact for the associations addressing environmental protection, for those addressing consumer protection, and so on.

The same associations are accorded the right to bring the conciliation procedure provided for by art. 2, para. 4, letter a of the Chambers of Commerce reform law (law no. 580 of 29 December 1993). This procedure may of course be brought by the individual interested parties; here, reference to the regulatory framework appeared useful to avoid questions as to standing; the procedure may conclude with conciliation, the report for which was declared enforceable by the magistrate (art. 3, civil code, 2, 3, 4).

Representativeness, which is a condition for exercising the rights provided for by art. 3, is founded upon certain basic requirements: a written Constitution and a legal system with a democratic basis, an exclusive purpose of non-profit protection of consumers and users, a list of members, a number of members of no less than 0.5 per thousand of the national population and a presence in at least five regions or autonomous provinces (and with a number of at least 0.2 per thousand for each of them), financial statements in compliance with the requirements dictated for unrecognized associations, the performance of ongoing activity, and the representatives' immunity from convictions. The most important associations defending consumers are about ten in number, and are generalist in nature. The most well-known are CODACONS, ADUSBEF, ALTROCONSUMO, ADUC and the oldest one, UNIONE DEI CONSUMATORI. Some consist of a law office given the apparent guise of an association. In any event, the legal activity is more cultivated than the information and education areas.

Their representation is before the Ministry of Economic Development - MISE. The only Italian government that tried to remove its jurisdiction from a ministry dedicated to industry and commerce and entrusted it to a ministry for social affairs was the one led by Carlo Ciampi, who assigned jurisdiction to the Minister Fernanda Conti. But this attempt vanished with the subsequent government. The consumer code, too, was drawn up at the Ministry of Industry.

Ordinary and administrative case law is favourable to the standing of associations, as shown by multiple decisions.

Questions and answers⁹⁷

Hans Micklitz: let me make one remark. So when Guido came, when we met in Bremen, he brought a little present. It was a glass with something green in it. It was pesto from Genova and I did not know what it was, I had to find out what it was.

Bob Schmitz: I think Italy is one good example to show that what you do with European law, how you enforce it, and the highly criticized unfair commercial practices directive – full harmonization. Italy actually shows sth that you did not mention Guido, which is the Authority - Autorita garante della concorrenza e mercato - which really shows that this directive actually run by a public authority has been extremely effective in cases like Apple. Now dieselgate, tripadvisor etc, I say this but it echoes what my friends of Comitato di Difesa actually say because when we criticize these pieces of total harmonization at the end of the day it very much depends on how we enforce it. Would you agree with that?

Guido Alpa: I agree with you.

Claudius Torp: I found very interesting that you mentioned at the beginning that consumer protection in Italy received criticism by the left and the right. And I was wondering was that a criticism voiced by the far left or by the social democratic version of the left? And did it change in time? Did the left in Italy at some point realized that the consumer might be an interesting subject in terms of social reform?

97 Guido Alpa replaced his transcript by a written manuscript. There might be a mismatch between the questions and the written contribution.

Conference participant: Guido could please expand more on the role of Guido Triminarchi and his reception of law and economics? And how this ended up turning towards I think a more neoliberal almost enterprise rather than your approach that was much more about values, you were more the Calabresi and he was more Posner I think.

Lubos Tichy: I found very I interesting your thoughts about the Directive. Should it be transported in the Codice Civile or could it be transposed in a special act maybe to create a consumer code? What are the ideas behind this decision of the Italian legislator?

Guido Alpa: About the implementation of the directives: I mean Italy has always chosen to implement the minimal degree. But giving the power to the administrative agencies with their ..negotiation with enterprise we can notice some results not only with the directive you mentioned but also in regards to unfair contract terms because the judicial control of unfair contract terms in Italy is not very active. When the Ciampi Government appointed a Commission chaired by Massimo Bianca, we suggested to introduce an administrative control because at that time there was a great discussion whether it was better to introduce the judicial control or administrative control. Of course that was considered a sort of public intrusion in economic liberties and so it was rejected.

About the problems, political problems, consumer interest and the position of the left, well, being left still I was accused to protect consumers in the wrong way because the reason was that consumer interests are not class interests because consumers are not a class so if you defend interests of consumers this does not mean that you defend the poor class, the lower classes. Another critique was that we have to defend the person as it is in all its aspects and not only the very strict aspect of consuming goods or services so it was thought that it was a sort of diminishing the protection of the person while the jurists should protect the person in whole.

About Pietro Trimarchi, he is an exemption in Italian legal thought because just in 1961 in the same time which Guido Calabresi published a book concerning the same problems and using the same method. But he considers the economic analysis of law as a method to cope the law with the economic interests so he thinks that the law should not damage the economic interests. The economic analysis of law in his mind, in his perspective is very liberal, very similar to the Chicago School instead of one of Calabresi which is much more progressive.

Regarding the discussion of codici this is a great discussion because it was a dogmatic one whether the Civil Code should take into account all the interests also the new interests, the interests of consumers. This was the first reply that the Italian government gave in Parliament because the Directive on Unfair Clauses was included into the Civil Code through a special statute. The same happened with the sale of good and consumer guarantees. After the decision to collect all the rules in France in the Code de la Consommation, in Italy too all the rules were included in a Consumer Code. In the Civil Code now we have one mention of consumer contracts providing a reference to the Consumer Code. In some way we can say that they are connected. Consumer protection should not be considered a special brunch of law but a special brunch of civil law.

14. Bob Schmitz, Luxembourg

My short paper focuses on three areas : contract law, marketing practices and finally enforcement and access to justice. I will start with a quote : parties' autonomy is acceptable only if it refers to genuinely free wills. Conversely, a person imposing its will on another party thanks to its economic, technical or intellectual superiority should be considered as an abuse even if the parties are formally on an equal legal level. Such a misuse should not be tolerated in a society which supports the primacy of law.

This statement was made by the Luxembourg government in 1978 to justify the proposal of a first law on the legal protection of consumers. It actually echoed the result of a couple of years of lobbying by the already existing Luxembourg Consumer Union which interestingly follows up on discussions we had before about the consumer movement. It was set up in 1961 by a platform of 7 trade-unions and consumer cooperatives. The starting point was that all opposed new legislation to make it more difficult to create new consumer cooperatives. Then they said: we actually want an organized consumer regime in Luxembourg, and it led to this proposal of law which was not an easy ride, contrary to other countries like Finland, because the law, actually only the first part of it, was only adopted by parliament five years later in 1983. Why ? Because there was fierce reluctance

from the business community but also the Council of State, which has a quasi-veto right in Luxembourg.

To show how difficult it has been for business to accept this change of paradigm, another quote from 1996 when Luxembourg had to amend the law of 1983 to comply with Directive 93/13/EEC on unfair contract terms. I just quote one statement from the opinion of the *Chambre de Commerce*: « *Government is of the opinion that unfair contract terms imposed by professionals are 'a plague of our time'. It shows the hostile attitude of Government vis-à-vis trade circles deemed to be of bad faith, an attitude which has prevailed all over the years each time that new consumer protection measures were introduced... ».*

This well reflects the climate we had in the 1970s and 1980s until the mid- 1990s. So what happened to this first law ? It had to be split in two parts to get it adopted and some parts, in Government's original proposal, were even more interventionist. These had to be taken out to ensure a parliament adoption. So the law was basically adopted in two times. First in 1983 and the second part in 1987. I am not going into detail but if you read the 1983 parts you will notice that all the fundamentals on unfair contract terms such as a black list of 20 clauses, withdrawal rights for doorstep selling and mail orders and many other provisions are already in the 1983 law. Even more interesting in terms of systematic approach is the second part adopted in 1987.

Why is it actually? It is more interesting not only because it added some further rules to the 1983 law but it introduced new provisions into the civil code. So for **contract terms**, I would conclude that the laws of 1983 and 1997 offer already all the fundamentals which were confirmed later by EU directives. Coming back to the influence of Europe : as indicated, in 1996 these laws had to be scrutinized to see whether they were in conformity with the 1993 directive on unfair contract terms. Our laws go further, quite further despite busi-

ness opposition. So at the beginning of the years 2000 Luxembourg maintained higher standards than the minimum directives. But since then a little bit like in Ireland, in Luxembourg the implementation of EU directives follows the better regulation proposal: implement « the directive, only the directive » so options or possibilities left to Member States to go further are hardly used. This explains why we as consumer organization wish from Brussels to get the highest harmonization standard which is reasonably achievable. We know that when it comes to implementation, we will not get more. We even supported the controversial Common European Sales Law, actually my country is probably the only one where everyone, authorities and all stakeholders, including the consumer organization, were in principle in favour of it. I still believe our position was the right one but maybe that's another discussion. So that was on contract law.

On *marketing practices*, again we had already laws, like many other countries such as Germany : our unfair competition law was initially focusing on the business side and the consumer angle came later. The unfair commercial practices directive (UCPD) clearly helped to streamline and clarify our rules of 1986/87, in particular we had very ambiguous, contradictory rules on consumer solicitation/doorstep selling/home parties. Contrary to countries like Belgium and Germany we had liberalized marketing practices before UCPD, namely in 2002. So UCPD did not really force us to get rid of existing bans/restrictive provisions. Even if Luxembourg awaits basically since the beginning of 2000 EU initiatives to move forward, we adopted in 2011 a *Consumer Code* which includes all contract and marketing provisions also the sectoral ones (package travel, consumer credits, mortgage credits...). In the explanatory memorandum of the proposal Government stressed:

« *Consumer law should no longer be considered as an exception but as a law regulating the economy with the aim of ensuring transparency, loyalty and security of transactions and consequently the*

proper functioning of the market. This Consumer Code consolidates the specificity of consumer law while establishing the necessary link with general law... ».

Our Council of State while being conservative made the following statement : « *As the EU objective is to foster the Single Market, consumer law will become in the coming years a key European subject , with the economic and financial crisis supporting further the argument in favour of stimulating the internal European economy. »*

Now I come to my last part on *access to justice and remedies*. On paper I would suggest that the Luxemburg consumer law is pretty solid, also in terms of remedies because we have already under our unfair commercial practices rules a contractual sanction. The consumer has the right to ask for voidance of the contract. But we very much depend still on Europe concerning access to justice. Without the recent directive on ADR we would not have a consolidated structure on ADR in Luxemburg, Before we had only 2-3 sectoral initiatives.

Concerning courts, we have little consumer case law and hardly any reference to the European Court of Justice. We have no special court facilities except the EU Regulation on small claims. We have no law on collective redress, despite having, as a source, laws in France and Belgium. Luxemburg is very hesitant to propose a law and if there is no formal proposal from the EU we will probably not move forward.

Questions and answers

Jules Stuyck: Thank you very much Bob and from the Luxemburg perspective, let me make two comments, because I know this is something that you cherish as well : The first one is on the civil action that you mentioned : I would like to know how exactly it operates in Luxemburg law because we do have this provision in Belgium, also

in the Netherlands if I am not mistaken, they have also introduced something to that effect, that if you conclude a contract on the basis of the unfair commercial practice the consumer can annul whatever it is called and the consumer does not have to return whatever he/she has received. That is in Belgium, this is not the case in Luxembourg, ok so it is not so drastic. My second comment is about class actions because I think you are right. I am not sure that in Belgium it is used for the proper causes. The delay of the train and the peanuts that you lose and you do not get refund from the railway company, I do not think it is a priority for consumer organizations but it is up to them to decide what is a priority. But this is how it operates. I do not know how it functions in France, it is true that the procedure is quite complicated but then we can turn again to the Netherlands because they have this specific law which exists now for ten years I think, the WCAM, and they have actually a system of settlement followed by a binding order of the Court so first you have to settle and then you go to court, and it functions and there is a lot of foreign shopping because the big cases, the class actions in that part of Europe, or perhaps in all Europe, they go to the Netherlands so it is very smart from the Dutch. So we have lousy laws and they all go to litigate in the Netherlands, so Benelux is a reality.

Børge Dahl: Having been listening to the Country reports I am sitting here wondering whether all known consumer protection rules that we get into the legislation of various countries, do they make a difference, do they protect consumers in reality or are they rules we write on paper? The other question is we all got added up rules coming from the EU system, in your judgement, is consumer protection in your country better of with that development, with that harmonization or would the consumer have been better off had he/she been left with national regulation?

Maria Reiffenstein: Just a very brief comment on collective redress : as perhaps some of you know the Austrian consumer association

with the help of the ministry but not only of the ministry but also third parties who give financial support to take the financial risk of the cost, our association did not do many but very huge cases, I just mention the German AVD banking investment firm, now in Swiss hands, and it was not a quick solution, that is true, not at all, because we do not have a specific law on collective redress, we would really like to see the Commission to propose a law, a directive on that but I must say I am rather pessimistic that they will do that. Now for the AVD the association went to court, so the aim was not to get a court proceeding because that would have lasted for, I don't know, ten years at least, it lasted five years only to get a court decision that this kind of action is permitted and on this basis we had an out of court mediation and that was successful in four days and it brought compensation to 2,500 consumers. And right now we have the MPC case in Germany also an investment case so usually banks and investment firms are addressed but this system does not function as well as it could but it functions to a certain extent and we are quite proud of that and I just want to mention that.

Bob Schmitz: Can I give very quick answers first to the question of Børge and then a comment on Jules:

To Børge Dahl: is this consumer protection of practical value? As I said it has hardly been tested in Court, very little, apart from unfair contract terms; but it is clearly used of course because our organization is basically membership based not to get product testing but rather to help to prevent litigation. My colleagues and lawyers working with us use the arguments to get amicable settlements, so I would say practically speaking yes, it is helpful but it would be nice if we had more case law and test it.

To Jules Stuyck: Consumer harmonization, that is of course the whole debate: I may just underline one point which is often forgotten at European level; very much depends whether the consumer lives in a small economy like Luxemburg, Malta, or in a big country, because

the Luxemburgish are the ones that use most internet to buy on their own initiative in other countries. And then they fall under the laws of the trader's country. I will give you one example that is in my paper: if you are in Luxemburg today if you go to Amazon France you have now the two year reversal of the burden of proof. In Germany we have 6 months like in Luxemburg. In practical terms, and we have cases, this might make a difference, so it is an example that we really want to have shortlisted very practical examples of rights and obligations and have them consolidated at the European level as far as possible. On the civil remedies we are testing this now, the possibility to cancel the contract in the dieselgate case but the cars are bought from the car dealers, the car dealers of course they are at the end of the chain, they are not responsible. We have Volkswagen, we have maybe the general importer, but concerning this contractual remedy remedy, we do not see the action directe against Volkswagen.

15. Ewa Łętowska and Aneta Wiewiórowska-Domagalska, Poland

I am very happy to speak after Luxemburg, because this brings back sweet memories. When I was chairing the CESL group in the Council (and that was a rather painful experience) whatever Luxemburg said it was always making my task a little bit easier. I could think: not everyone hates us! Luxemburg likes us!

But coming back to the subject of my speech: I am representing Professor Ewa Łętowska here, and her interests are definitely not limited to consumer law. Being a human under a system of law - consumer is just a part of it. Providing protection for weaker and less fortunate is hence very much connected with constitutional law. This is another area of her interest, and this is why she actually cannot be with us today. As you might know, our constitution is also in need of very strong support and protection those days, and Professor Łętowska is very active doing this.

My speech takes this wider perspective as a starting point also because if you would like to understand what has happened in Poland, and what is happening in Poland today, you need to know how the Polish society functions. What makes it absolutely impregnated to the concept of protecting a weaker party. I am choosing my words carefully here, so there is not so much of exaggeration.

As of year 2000 Professor Czapiński, a sociologist, is running an interdisciplinary project, called “Social diagnosis”. It provides information about conditions and quality of life of Poles, on very regular basis; it is a continuous research. The results that he provides confirm very strongly that, generally speaking, the level of trust among Polish people is very low. So, Poles do not trust other Poles, but also Poles do not trust the state, and Poles do not trust the government. There is one positive thing, though. We really like European Union and we are very enthusiastic about it. Another sociologist, Professor Sztompka, put it in a very concise observation: this is a self - perpetuating process of creating a spiral of distrust that leads to the destruction of our society.

This is very sad, but it also reflects in law. In particular, in those areas of law where there is a need to sacrifice one’s own interests for the benefit of another party that needs support, protection, or for a common good. In other words, where a need to cooperate exists. This is where the Polish society falls short. Because in order to do that you must either be convinced that the needs of the others are really important, and you should support them, or you should believe in the common good.

Neither is the case. Polish people do not want to cooperate, they want to “get” or “wrench” their entitlements, and this is not only a consumer law problem. The same situation one can find in the Polish approach towards refugees, towards disabled people or even the concept of a democratic state of law. This is a common cause that we (as Poles) do not really fully understand. And this lack of trust means that there is no willingness, but also no ability to negotiate. How can than consumer law, how can contract law function properly without this?

That was a pretty long introduction, but I wanted to present the background properly.

Now, shortly, about the socialist time, the free market economy, and a question: is there a really substantial difference between these two. Regarding the first question, if you think about socialism, was consumer protection as a concept consistent with the socialist morality? Was there even a space to discuss it? Of course, at the beginning it was not, because after the II World War the destruction was so great that first one needed to provide for the basic needs. Only later one could start discussing whether these are proper or correct.

Next, the problems that appeared on the market were denied due to the ideological reasons. They (the widely understood consumer aspirations) were seen as manifestations of the capitalist economy. That led to a conviction that the socialized planned economy will grant proper realization of social policies. This, in turn, led to a conclusion that certain shortages in the area of consumer protection are necessary concessions of individuals for the common social interest; i.e. this is how it should be. Also, satisfying egoistic consumerist needs was seen as contrary to the socialist ideology. This approach has started to change at the end of the 1970s but the acceptance was never complete. It extended only to satisfying the proper needs, but not anything in excess. It was not like you may have wanted anything, on the contrary: you should be provided with what is needed for you, and the state will decide it for you. When it comes to the normative environment, the Civil Code that we have adopted in 1964 totally disregarded the notion of consumer and consumer protection. The code introduced a dichotomic distinction: relationships between public commerce (contracts concluded between social economy units) and all other types of relationships. This “all other types of relationships” was quite incoherent and it included relationship between private people and social economic units that provided non-pecuniary prestation. It was called mixed trade and these were in reality consumer contracts.

The funny thing about our code of 1964, is that it is based on very strong fundamentals of a free market economy. This characteristic allowed it to survive the socialism - we still do not have new civil code, although we have worked on it for many years (at the moment, however, it is just an academic project). The underlying assumptions of the code were that the framework and the abstract character of the norms, as well as their dispositive character will allow the parties to regulate their relationships via individual negotiations. That was a market vision outdated already in the 1960s but we really strongly fell for that. The code made frequent use of general clauses and undefined terms, sometimes referred to subjective criteria to be set out by the units of market economy. To give you some examples: information on cancelled bus rides had to be provided as far as it was possible. Trains were to be kept tidy as far as it was possible - if it was not possible then: no. This general character of the rules made it very difficult to apply in specific situations characteristic for mass transactions. That led to the situation when a large number of acts were enacted, outside the Civil Code to deal with performance of contracts. Then again, a funny thing happened: some of these acts were adopted by the administrative bodies, which themselves performed the contracts. The outcome was that first, a party was able to regulated (in a public capability) its own relations, and second, these acts very often were in breach of the default rules of the Civil Code. A great discussion opened up in Poland about what these positive rules really were.

The most common problems identified at the practical level related, of course, to the bad quality of goods, just as the example that Hans gave us yesterday: whether 1 meter is 97 cm or not. That is typical for the economy of shortages, or simply lack of goods. That of course had had an impact on consumer preferences, meaning that the real performance was always the best option for consumers. Once you got your pair of shoes you wanted to keep them, you would not try to exchange them because you might not get a new pair. There was

also another source of massive dissatisfaction of consumers, and that was the way they were treated by their contractual partners: arrogant and imperious manner that violated the moral comfort of consumers. I wanted to give you an example here, because while we Poles are very egoistic, we do not know how to cooperate, we do have a sense of humor. So, there is a movie, and in this movie a guy goes to a cloakroom and asks for his coat back and the cloakroom attendant says "I do not have your coat. And what will you do to me?" And that was it. But that was really a reflection of what was happening in reality. This was maybe funny, but it was also tragic. It led to accepting the idea that not only consumer interest are being violated, but also that there is no real way to remedy it.

Mateusz Grochowski, who is also here, has helped me preparing materials for this conference and came up with an overview of the courts' practice of that times. At the beginning of the 1970s the courts have started reinventing or maybe rather inventing consumer law in Poland. They came up with several ideas on the basis of the rules that existed at the time. For example, the acknowledgment that particular rules or the way contract law is constructed in fact has a protective character and therefore has to be interpreted in favor of a certain party, the prohibition of risks allocation in the case of non-performance, the information deficits and obligation to provide private parties with the information. These were quite progressive ideas and they were developed during the communist times.

But then we had the change of regime and what has happened? Everything changed. Poland has definitely achieved a massive economic success over the last 25 years. Nobody can really deny that (apart from our government those days). You just need to go to Poland and see how it looks. One of the reasons why this happened, why Polish were able to achieve this as a society, was the deep conviction that one can only rely on oneself. So what has happened is that Poles have massively engaged in economic activities - they

were willing to take the risks. But this of course had consequences for consumer law, and these were very deep repercussions. On the one hand you have this vision that economy needs business, and that of course is true. This means that business must be supported. At the other hand, it means that if someone is willingly engaging in a contract, this is just a manifestation of the autonomy of will, so why would you protect this person? If the person later decides not to enforce his rights, then again it is his decision - what is the problem then? All parties are equal and the market will correct the potential imperfections. This is really a strong belief in Poland. And I know that it might sound extreme to you, but in 2013 the father of the Polish economic success Professor Balcerowicz wrote, and I quote here: "All forms of supporting weaker parties in law is nothing more than a paternalistic and often unconscious reflection of Marxism". This is where we are, and Professor Balcerowicz was really surprised when Professor Łętowska opposed him. The free market economy is often equated with a perfectly functioning market, where any legal intervention is supposed to destroy the freedom of contracts. This is really the conviction in Poland.

When it came to transposing EU law, of course, we had problems putting the directives into the code that I have just described. Our Civil Code was not a very welcoming host to casuistic and dogmatically disturbed consumer acquis. We only have unfair contract terms and sales within the code, and the rest is outside the code. This, of course, disturbs the integrity of the system. Sales law, for example, we transposed twice: first outside of the code, and not only have we destroyed the consistency and the logic of the existing regulation, but we have also managed to lower the level of protection (the prior rules in the code gave better entitlements to consumers). But funnily enough, when we were reintroducing the sales rules into the code again, reapplying the rules of the code to consumer relations (I was doing this) we have faced a horrible opposition of businesses and lobbyists against the reintroduction of the old rules. They claimed

that if we have had the rules that we had since 1964 for consumer relations, this is going to disturb the business.

In other words: the axiologies of Poland and EU clash. We cannot have fully functioning EU law, because we do not believe in it, we do not trust it, and we want something else. The last few years we have had a number of cases relating to contract denominated in Swiss franc. We already have around 100 judgments, so EU law has been tested massively (unfair contract terms directive). More and more often the court decisions are ok, but let's put it this way: it is really not difficult to find decisions when the court will say (those are translations of the reasons): since the consumer has actually read the contract the autonomy of will could have been realized, so there is no problem; or: well, of course, there were unfair contract terms in the general terms and conditions, but actually bank has never applied them, so what is the problem? This is a clear violation of the Luxemburg case law. What is really interesting, a few weeks ago the ombudsman for financial matters directed a question to the Polish Supreme Court, asking what is the moment relevant for establishing unfairness. One would think this is actually already settled. However, Polish Supreme Court two years ago gave a famous judgment on unfairness in franc denominated contracts and stated the following: establishing that there is unfairness in a term cannot lead to the contract being change. The contract must stay, as it was (how - I don't know). In order to save the contract (the court has claimed that it works to help out consumers, which is not true), the court divided the unfair contract term "like a watermelon". The court split it into two, to eliminate the unfair part of the contract term. This is where we are in Poland right now...

So what is the difference between the socialism and the market economy? Of course, we have had the socialist market economy - economy of shortages with a heavily administrated market, which was supposed to help the citizens. Nowadays this help is to be provided

by the competition. Consumers do not want the real performance of contracts, as previously. It is rather the traders' side that wants to stay with the contract rather than to cut it. The abuse of position by the consumers' contract parties was motivated in socialism by opportunistic behavior. This is a quotation from Professor Radwański. They were just lazy. They would not care, they would abuse your rights. Now, it is profit maximization that motivates the abuse of consumers' rights. But somehow, consumer protection has always been seen as something redundant, and this feeling has not changed. Behind this socialist world that rejected consumer protection due to ideological reasons, rested the belief which was very well anchored in the rules and the structures of the Civil Code, and in the power of the autonomy of the will. Once this belief was unveiled, together with the change of the political system, it is very difficult for the system to overcome it because it fits perfectly with who Polish people are. This is against our nature to help others. We have massive problem with the effect of the judiciary protection and here I would like to refer to Professor Zoll, who in his PhD years ago wrote that it is really surprising that we have the same rules as Germans but somehow Germans can get so much more in terms of protection than we do. We are heavily influenced by German legal thinking, legal system, structure, you name it, you have it, and there is this conviction that if you want something you have to fight for it, you will not be given anything and this also translates to understanding what consumer protection is.

So ADR do not function very well, consumer organizations we do have but they are, unfortunately, rather weak.

Closing, I would like to return to what Professor Łętowska said in 1982. She made some legislative proposals that could better the position of consumers and she requested: Semi-mandatory or mandatory rules instead of default; A more detailed regulation of specific contracts; Information duties including information about legal rights;

Involvement of bodies representing consumer in the process of enforcing their rights; Effective sanctions, that would have a preventive effect; Specific rules for the burden of proof.

This is all that we got as a result of transposing and implementing European law. So you know, a quick thirty years later we have the tools. The problem is that effective application of these rules requires change of mentality and this is much deeper and much more difficult process and for the time being we are just not there. We are but a skin deep when it comes to consumer protection. And I do hope this will change, but at the moment the picture is rather gloomy, I must say. Thank you very much!

Questions and answers

Thomas Wilhelmsson: Thank you for this fascinating speech this was kind to the deeper layers of culture which I think it is much more interesting than the details of specificities. I would have many questions but I would rather start a comment or a question to all of you. I think it is very important that you stressed the role of trust in the economy and in the European Union we have countries very, very different levels of trust, basic feature of society. In Nordic countries I can say, because Finland, No 1, we are those that trust the Courts most, the State most, even the Police most, which is strange but if you look at the Courts for instance according to Eurobarometer the Finish and the Danish are no 1, we 85% trust the courts. The poorest EU countries less than 30% trust the Courts. But this also go for the businesses that in some countries we tend to trust the market participants, we tend to trust business. And my question is: If you have these very different levels of trust is it in the interest of the consumers to aim at similar rules all over the union? Because, of course, in market where you trust the participants you have to act in a very different way that in market where you kind need to be prepared all

the time when you move around. So this a general question you put very eloquently on the table. ?

Benedicte Federspiel: it is very interesting to hear to what you say, you moved so much longer than you had. When I was in Poland I was helping the Ministry to set up Polish legislation which should have been reasonably ok seen from the views of the EU and I was working with the Ministry and I was trying to say to the Ministry that maybe you should look at complains board, which was something, I was part of the British project and they said no we cannot handle that, that is hopeless and the Ministry of justice is against. And then I said ok, interesting, can I have a meeting with the Ministry of Justice? I said I need to have it because I cannot quite understand it was against all the legislation in Poland to have that and I said I do not understand, could you give me a translation of it and can I have a meeting? And when I went to the Ministry of Justice they did not understand what was wrong, there was no problem at all; so they were open to listening to others but the ministry responsible for consumer affairs was definitely no. And it was my impression that it was depending on the individuals persons now and at one stage they were living and one of the directors I think went in Brussels actually and worked for the Commission and was pleased to be there getting out of this (charade?) as she would say because the atmosphere and the interest in really doing something was very bad.

The problem now I have mentioned several times, what about the consumer organizations, you do have almost two, one and half or one and one third and the half one has really no power. The other one has some power because they managed to get some extra funding to do something for the government so they had some power but as it is still today it is very weak. So I certainly hope that they will improve but let me say that without -and that is an answer (...) without the legislation that we get from the EU many many countries would get zero so it depends a lot if you have a push from the EU

and this is what the European consumer organizations are doing at the moment, they are trying to tell people, you may think that they are stupid in the EU etc but do you really realize how much you got out of it because most of the legislation, even in Denmark where I said yesterday that we have everything, the rate of interest. We could not get in Denmark, they said it is complicated, banks cannot and I said it is simple you have a thing like this, you know what the rate of interest is, no but we got that from the EU so I will always remember to mention that and the European Organizations have actually made a kind of a letter mentioning all the many things that people are getting; it has nothing to do with EU being wonderful but people forget that they got something there and that they got it from their own country, no they did not.

Betül Kas: I don't want to make a question but a comment because we heard first that there is a critical remark regarding national collective remedies which are not working efficiently, now we looked at Poland and we see some problems but I mean I would say even though they do not work perfectly it is still good to have them and they have different approaches and they can further be improved. I mean it is better than no collective remedy at the end I would say and then Poland for example came with this preliminary reference about the register of unfair terms. Even though consumer protection does not work well in Poland it still adds something to the European level and to the European discourse. The same happened in the *Invitel* case⁹⁸ and the Hungarian case, but it also added important elements to the European level which then had the potential to spread and improve, collective remedies in other countries as well. So I would not see these developments as something negative regarding collective remedies.

Ludwig Krämer: I would like to comments on this issue of trust. I find this from a historical point the problem that Thomas Wilhelmsson

98 Judgment of the European Court of Justice C-472/10 ECLI:EU:C:2012:242.

raised is the problem that we had today, that European Institutions are not trusted. And this is a difference to what we had in the 70s and the 80s. The answer to this problem and I would even submit to Poland is that we follow open society provisions of complete transparency and we should not forget this. All Scandinavian countries where they have this trust in public authorities, are based on absolute transparency and I live in Spain and in Spain you see this problem with government because there is no transparency or little transparency. And perhaps the situation in Poland is in the same way so access to information full disclosure of contract terms, product composition etc, these are basic elements which are capable of increasing trust of citizens and political party or government goes for close society as we see in France with the Front National we are a little bit (...) to go away from the model which western Europe has built over the last 50 years, the European Institutions make the same errors. They go away from transparency, they try to shield, to make meetings and legislation which is not transparent and they are astonished that citizens do not support that; so my answer is let us go for transparency rules for open society provisions, access to information, participation, decision making, committee building, complaints boards, there are a lot of instruments that can be set up.

Thom van Mierlo: I have an informative question, you say there is a lack of trust out of Court, alternative dispute resolution, how does Poland fulfill its obligations from the ADR directive because if you have nothing at hand yet then the MS should do something to fulfill their obligations.

Aneta Wiewiórowska-Domagalska: if I may start with this question, this is the beauty of Commission's control, they do not control implementation, they control transposition. Transposition, we do have but then how do you make the parties to go for alternative dispute resolutions? Because it is not so difficult to convince consumers. Three years ago I made a case law research. I read 200 cases that

dealt with consumer sales and consumers are very much willing to get help and go for alternative dispute resolution. This is the business that does not want to engage. We are facing a very peculiar process at the moment in Poland. We definitely have a crisis of judiciary and the judiciary does not know how to communicate with people. We also have a Consumer and Competition Protection Office who is in charge of the public part of enforcement. Right now the Office, whose vice presidents were nominated by the previous government and so far survived in the position, both women, both excellent, face a problem that is very difficult to solve. You cannot have either public or private enforcement. They have to go hand in hand. For example with unfair commercial practices you have this strong private law element. If it does not function properly you cannot have proper public law enforcement, and in Poland there is a huge clash there. The Office does not know what to do because the Supreme Court does not play in one team with them.

That is the problem and returning to your question on trust, Thomas, I think that even though the level of trust is so drastically different, we should have the same rules because we should aim at higher targets. I think over time it is possible to achieve some kind of coherence. I share this belief that law is a tool of social engineering, and I think we can achieve it. It is, of course, a very difficult process, and a slow one. We should look decades ahead, but we cannot get there and if we lower our ambitions. Then we get nowhere at the end. Concerning consumer organizations I think especially, Federacja, because I think you refer to Federacja. The consumer organisations are working very closely right now with the Office of Consumer and Competition Protection and the head of the part responsible for consumer protection. She is very much willing make the organisations more active, and very much supports them. So there are really options for development right now. I hope it will work out, but our society is now facing a deep crisis so maybe consumer protection is not the biggest concern at the moment. Thank you very much.

16. *Iain Ramsay, United Kingdom*

I would like to thank Hans Micklitz for his kind invitation and for the excellent organization of the conference. I was diffident about making this presentation because I would not classify myself as a father of consumer law and policy in the UK. I was directly involved in the early 1980s and I will say something about that but during the 1970s I was teaching in Canada and from 1986 until 2007 I returned to Canada so I have a little bit of distance on the UK scene. Having said that I knew several individuals from this early period and talked to them in preparation for this conference and I have been going through some of the archives that are now available under the 30 year rule. For those of you who want to pursue further the history of this period Matthew Hilton's book *Consumerism in 20th Century Britain* is the starting point. He interviewed many of the consumer figures of the modern development of consumer policy who sadly are not now with us. What I will attempt is to give a rough narrative through from 1950 to the late 1980s, which will be superficial but will attempt to pick up some of the questions that Hans suggested we should address.

If we think about periodization of consumer protection in the UK we could identify 1950-1959, 1959-70, 1970-79---protection of the weaker party and consumer protection, 1979-92---from protection to empowerment. In terms of the 1950s the Labour party had investigated the consumer problem in 1949 but during the 1950s to the extent that the consumer interest was taken into account it was primarily about the broader objective of making the UK economy more competitive. One significant development was the founding in 1956 of Which?, the Consumers Association. Without subscribing to the great person theory of history it is worth noting the role of Michael Young. Young was a polymath. He wrote a number of well known books such as *The Rise of the Meritocracy*, was a drafter of

the Labour party manifesto in 1945, helped to found the Consumers Association, was the first chair of the National Consumer Council, assisted in the foundation of the Open University and the University of the Third Age. He was something of a visionary and he published in 1960 a book called *The Chipped White Cups of Dover* suggesting that politics will become less and less the politics of production and more and more the politics of consumption. Anthony Crosland the labour politician had also written about the future of socialism in the 1950s where he talked about the importance of consumer issues.

In terms of initial developments the Moloney committee was appointed by the Conservative Government in 1959 to look into issues of consumer protection and some of the issues they looked at included a review of the Merchandise Marks legislation which was primarily unfair competition law to protect manufacturers, issues of standards and labelling, comparative testing, hire-purchase, civil redress, contracting out of implied terms, advertising and sales practices. The Moloney Report provided the source for reforms during the 1960s. It was critiqued by Aubrey Diamond, a co-author of *The Consumer Society and the Law* as 'insular and unimaginative'. In terms of initial thoughts about the influence of foreign models Moloney commented that 'we have not derived much help from foreign or overseas examples' and in relation to advertising regulation, a hot topic at the time, concluded that 'we do not find the model of the USA Federal Trade Commission a congenial one and we are satisfied that the wider problems of advertising ought to be, and can, be tackled by effective voluntary controls' which I will come back to in terms of the development of the Advertising Standards Authority.

Notwithstanding that Moloney was 'insular and unimaginative' it did provide a menu for reforms during the 1960s including the Hire Purchase Acts of 1964 and 1965 that updated the 1938 act, introduced the cooling-off period for door step credit, and required more extensive disclosures, and the creation of the Consumer Council that

would provide research, representation, and information. Moloney also provided a template for the Trade Descriptions Act 1968 as a reform of the Merchandise Marks Acts legislation. The Trade Descriptions Act was originally introduced in 1964 by the Labour Government but it was not finally enacted until 1968; it was originally called the Protection of Consumers bill. But business pressure managed to change it to simply the Trade Descriptions Act.

Why was this Act important? It created a public duty on local authorities to enforce the act so it was a significant move towards public regulation. There was some path dependence in it since it followed very much the drafting of the Merchandise Marks Acts and it was not very ambitious in its drafting. It also followed the traditional English approach to enforcement of consumer legislation namely the use of strict criminal liability with a due diligence defense, which I call the regulatory offence. At the same time the reorganization of local authorities during this period resulted in a transformation from local Weights and Measures committees to Consumer Protection committees. Some authorities began to develop Consumer Advice Centres which was actually an idea coming from the Consumers Association which led the way with its consumer advice center in Camden London.

The Trade Descriptions Act 1968 was the work horse of consumer protection in the UK for many years. It was not actually abolished in relation to consumer issues until the implementation of the Unfair Commercial Practices Directive in 2008.

A further significant development in the 60s was the creation of the Law Commission in 1965. Gerald Gardiner, then Lord chancellor promoted this legislation. He had been legal advisor to the Consumers Association, defending them against potential libel cases. The Law Commission would modernize and reform the law, and produced a number of reports on exemption clauses; one of the first projects was on exception clauses. It produced very thorough reports and

consulted widely; it was very solid in its analysis but often perhaps not as imaginative as one might have hoped.

Those are some of the developments in the 60s and if I can just pick up on advertising because I mentioned that Moloney looked closely at advertising. Much pressure existed to have legal regulation of advertising, and the advertising industry forestalled this by setting up the self-regulatory ASA which Moloney had said ‘we will give... a try’. We will let it prove itself. And during the 60s there were some suggestions that there should be a legal regulatory board; in the early 70s, Shirley Williams, labour minister of consumer affairs, threatened legal regulation, the industry reacted by making self-regulation somewhat more strong; by 1978 however the UK government was stressing the importance of self-regulation in its discussion of the draft EU proposals on advertising and the government managed to save the ASA by having the recognition of ‘established means’ of regulation in the directive with a back up power for the Office of Fair Trading—which would meet the EU requirements.

The history of advertising regulation in the UK has in short been one of periodical claims that self-regulation does not work and the advertising industry responding by adjusting the system of self-regulation, so that you cannot call the current advertising standards authority self-regulation. It is subject to judicial review, there is an independent adjudicator, they have a consumer panel and it is really regulation rather than self-regulation. Sidney Freedman who was at the relevant EU DG during the development of advertising regulation, delivered a speech a couple of years ago, claiming that the EC commission foresaw that this would happen, that they would get tougher regulation in the UK.

The period of 1970 to 1974 is what may be described as ‘the big burst’ which resulted in a very significant number of consumer statutes. These included the appointment of a Minister of Consumer Affairs in 1972, Director General of Fair Trading under the Fair Trading

Act 1973, the Supply of Goods (Implied Terms) Act 1973, Consumer Credit bill introduced in 1973 carried through by labour in 1974, and the Competition and Credit Control bill which I come to in a minute. This upsurge in consumer legislation is at first sight ironic because Edward Heath had come to power in 1970 as a conservative pledged to bring radical change, including deregulation of business and a focus on competition. The conservatives had campaigned as a stark alternative to Labour and the post war consensus, embracing competition, and opposed to bailing out 'lame ducks'.

There were no plans for consumer legislation in the Conservative manifesto of 1970 and one of their first measures was axing of a swathe of labour created institutions including the National Board for Prices and Incomes, the Shipbuilding Industry Board, the Industrial Reorganisation Council and the Consumer Council. The abolition of the Consumer Council caused a significant political backlash. The media was very critical, the council was very successful and indeed its last report, *Justice out of Reach* was an excellent report about the limitation of access to justice in the County Court.

The conservative government realized that the consumer vote was significant but they did not actually have any programme for consumer protection. The Crowther Report (1970) did provide a blueprint in relation to consumer credit, but where did the Director General Fair Trading created in 1973 originate? This is not clear since there was no White Paper preceding its creation. There is some suggestion that the government looked to the Canadian model of regulation, where the Director of Investigation and Research under the Competition act also regulates misleading advertising, and also the model of the Swedish market court. Reforms of competition policy were going through Parliament at this time and the government tacked on consumer issues as a way of recognizing the consumer issue. A conservative group of MPs, one of whom was Philip Goodhart from the board of Which? also provided some ideas. The concept of a

high profile Director General of Fair trading could be attractive for consumer votes but what exactly the Director would do was less clearly established at the outset.

The actual powers in 1973 conferred on the Director General of Fair Trading did not work very effectively. He was given rule-making powers, and powers under part 3 to bring cease and desist orders. I will not go into details but neither set of powers worked well. However, during the House of Lords debates on the Fair Trading Bill, an amendment was added to include a duty on the Director General to encourage codes of practice and this became the major output of the office. It was one way of measuring and demonstrating success so we have the development of codes of practice over the years through the Office of Fair Trading. I think it is fair to say that many have not been convinced about the success of codes of practice; the few which were potentially successful being those like cartels which obviously raise competition issues. In addition, licensing powers under the Consumer Credit Act 1974 were conferred on the Director General of Fair Trading which could be used as a method of regulating unfair trade practices and also sometimes getting redress for consumers even though they had no formal powers to obtain redress.

The ideology of the Office of Fair Trading, when it was established, was a market model of consumer protection which recognized the limits of consumers protecting themselves in the market. The *Observer* newspaper described the Fair Trading Bill as weaving together 'two traditional strands of conservatism---competition and paternalism'. When introducing the Bill the relevant Minister, Geoffrey Howe argued that consumer sovereignty linked the competition and consumer provisions. Howe had attended several presentations by the Institute of Economic Affairs the lobby group in England which proselytized market economics. They were very disappointed with him when he went to government because he became a 'one nation Tory'.

I would like to briefly say something about consumer credit, because the English reforms of this period were significant. During the 1960s economic and social concerns existed about credit practices, for example, about people living on the 'never-never' as consumer credit was called, and concerns about rises in debt although in retrospect they seemed quite small. Macroeconomic issues were also relevant because the government used credit as a lever for regulating the economy in terms of cutting back on credit through the Bank of England and through terms control on deposits etc. In addition the legal rules were very constraining on some aspects of credit so the government appointed a Committee to review credit in 1968, chaired by Geoffrey Crowther. Crowther had been editor of the *Economist*, and in addition, Roy Goode then a solicitor and now an eminent academic was on the Committee and wrote the legal part of the Crowther committee report. The Crowther report recommended a complete modernization of lending and security in England and Wales following the model of Article 9 of the Uniform Commercial Code in the US. I will not go into the details but the report wanted to abolish traditional English legal categories of lending and have a consumer lending and sales act. The Consumer Credit Act 1974 only implemented the consumer lending act aspects and maintained the traditional concept of hire purchase. It updated and modernized the hire-purchase protections in the 1938-1965 legislation, introduced the concept of APR, truth in lending, and connected lender liability in section 75, which still exists and is very important in terms of making the lender liable for supplier breaches. Section 75 is one of the most extensive protections in the world.

There was some skepticism in the Crowther Committee about interest rate ceilings as a mechanism for protecting the poor and they also wanted to abolish macro - economic controls. The Committee viewed credit as generally beneficial, with the proviso that you should protect consumers who get into problems with rules which spread risks and losses primarily to creditors on the basis that creditors are

in a better position to deal with them. The Report with its generally positive approach to credit provided enhanced legitimacy to the consumer credit industry. In terms of foreign influences an interesting discussion took place within the Department of Trade and Industry after the Crowther report. The Department suggested that there was too much American influence in the work of the Crowther committee. The response of the Departmental secretary of the Committee was that 'we should follow the US and Canadian position because they are more advanced in consumer credit than we are (...) I know it is fashionable to try to bring the European into everything. It seems to me unfair to try to label our report this way'.

The Crowther Committee and the Consumer Credit Act 1974 were influential on credit law developments in the EU. Patrick Latham who was a principal administrator in DG X1 of the EC Commission in 1978 commented that the UK consumer credit bill was of great interest to the Commission because it was prepared 'against the background of the most thorough and far-reaching analysis (i.e. the Crowther Report) of consumer credit that had been undertaken in any member state' and took account of consumer credit developments in the US. 'It was for this reason that the first working paper issued by the Commission for discussion to government experts and interested bodies outside the Community Institutions and governmental ministries borrowed very freely from the UK bills'.

Let me turn to a further issue, the influence of consumer groups on consumer law developments. Two groups were significant, the Consumers Association, and the National Consumer Council. In their law reform both primarily operated through Parliament, the political process, rather than the courts and in this context one has to underline the importance of what is called the private members bill in the UK. Legislative time is very scarce in the UK Parliament and the government dominates the process but there is a possibility of MPs putting forward in a ballot the possibility of sponsoring a

bill. If you come top of the list you generally will be approached by pressure groups who want you to put a bill forward. And sometimes they succeed. David Tench of the Consumers Association became an expert at doing this, and the Consumers Association sponsored the Unsolicited Goods and Services Acts of 1971 and 1975 and this success also gave them legitimacy because the UK government consult what they view as 'legitimate' consumer groups.

The Consumers Association were also behind the Unfair Contract Terms Act of 1977. That was a private members' bill surprisingly, because it was a significant bill. The title developed by the Consumers Association was also clever and eye catching, but quite misleading since the bill addressed only exemption clauses. The original title was something like the Contracts (Avoidance of Liability Bill) and the heavy lifting in drafting the legislation had been done by the Law Commission. They had done a lot of technical work on it, but the law commission was not terribly good at getting their reports implemented and it was picked up by David Tench. With this combination the unfair contract terms act successfully entered the statute book.

Let me move to the National Consumer Council created in 1975 as a QUANGO (Quasi Non-Governmental Organization). It was intended to counter the TUC and the CBI in the era of corporatism during 1970s but it had a mandate to represent not just the middle class consumers which was perceived to be those in the Consumers Association but the inarticulate and disadvantaged. Michael Young who was the first Chair and instrumental in its establishment thought that the inarticulate and disadvantaged were not being served well by consumer policy and the NCC provided a consumer voice in relation to both public and private services. The NCC demonstrated a good combination of research, advocacy, and taking advantage of opportunities for bringing about change. They were a channel for academic and international ideas. The Council did early work on providing a consumer perspective on means tests and benefits, the way in which

the state dealt with consumers who were receiving public funds. It also published an important report on why the poor were paying more which replicated David Caplovitz's work in the English context, extending it to include public services.. It subsequently promoted significant reforms in areas such as financial services, banking, and extension of shopping hours.

Because I am very short of time I will jump to my contribution. Just briefly, in 1970s in Canada I did some empirical work on the impact of sales law remedies and I studied debt enforcement empirically at a law reform agency; when I returned to England in 1981 I taught consumer law and I felt at that time as a young academic there was no rigorous framework for analyzing consumer law and policy. The Office of Fair Trading commissioned me to write a policy paper on reasons for government regulation of consumer markets which was published in 1984 as *Rationales for Intervention in the Consumer Marketplace*. This attempted to bring an economic framework and empirical analysis to consumer policy providing an analytical grid for consumer policy. This paper was influential in OFT policy analysis from about 1986 through 1991 and then I elaborated on it in a book *Consumer Protection: Text and Materials* in 1989 which was again about basic issues of consumer protection and approached consumer protection as regulation. Many now analyze consumer law in terms of regulation; I suppose I was one person that was doing this quite early in the UK.

One final point is the question of the approach of the UK to EU legislation during the period up until the end of the 1980s. Lord Borrie in his Hamlyn lectures devoted a chapter to the EU and consumer policy. He identified three categories of EU legislation at that time: irrelevant and irritating, as in consumer credit because he thought the UK already had sufficient protection; retrograde, the misleading advertising directive which proposed to undermine the role of the Advertising Standards Authority; well-intentioned but damaging,

product liability, because he felt that the approach in the UK had been held up as it waited for action from the EU. He did not see much significance in cross border consumer activity and was quite negative. My own view then was that EU law was very interesting but I did not see then a significant role for consumer law harmonization or the idea of cross border consumers. In retrospect this view was probably mistaken.

Questions and answers

Conference participant: What do you expect after Brexit? Two words about it.

Iain Ramsay: Not much change, but it will be massive work for lawyers to go through all the technical details to adjust the law. Long term it is going to be more interesting in terms of what happens and there are some very specific areas where it will be significant but yes not much change;

Hans-W. Micklitz: This categorization (of EU law) irrelevant and irritating, well intentioned but damaging and then ask around the countries whether they all share it so you know..

Iain Ramsay: Well If I can comment Lord Borrie had strong views on it. I was in a meeting in Bremen in 1986 and there was an interchange between him and Patrick Latham about harmonization of credit, it was quite a robust interchange..

Thierry Bourgoignie: I don't like it as you can guess, I think what we have heard from different countries you have a lot of examples where input coming from the EU were probably irritating or retrograde or not relevant; but from my own experience working first at the EEC level and then at EU level and then at Eastern countries or central European countries I am sorry to say that input coming from Brussels foresaw that for some countries the added value was very limited

but for some other countries it was huge, huge steps forward; and we always have to think the general approach not think of our own country only but on the European scene, why Europe is now more advanced than many other parts of the world in consumer protection area? Because we had this push coming from Brussels; I am quite convinced about that so I do not like when I see this because I do not think this is representative of the whole development of European law and policy especially because we were really dealing with the 90s this century but in the 70s and the 80s I think that the pushing coming from Brussels was extremely important. Maybe it is not any more and maybe we will have another conference but during the formative years I think..

Hans-W. Micklitz: I would add there is another element, you don't know or it is very hard to measure to what extent all the countries we are listening to today were pushed into action through the European Commission just to demonstrate that they are better. All what we heard throughout the morning is each and every of you claimed – ok of the old Member States you will remain the new Member States for the rest, as you know, - but they all claimed that our law was better at the beginning and the EU did not add anything. I am talking about the formative period I am not so sure whether this catches the interaction between the policy drift from the European Commission and what happened at the national level; Ludwig this is for you.

Ludwig Krämer: Just for detail, I went with Patrick Latham in order to prepare the consumer credit legislation for the European Commission to all capitals were paid visits to the department of justice – there was the UK which prepared legislation but the rest of the member states was the hire purchase act and nothing more. So it was completely completely new to the other old MS to approach the issue of consumer credit so my assessment of that this is one sided British view, you do not see the European perspective you just see the national perspective.

Claudius Torp: Thank you for the many interesting perceptions so this is the first time that the development of consumer legislation did not happen under social democratic but under conservative government and I would like you to elaborate on that; how that happened? Because as you mention they started out they wanted to dismantle that, what were the exact mechanisms? Did the media pick it up or where there major debates in the parliament?

Iain Ramsay: It was a combination of those things, the media picked it up, they had not anticipated that the media would be so strong in the condemnation of the abolition of the consumer council; there were several MPs on the conservative party who were connected with the consumer association, for example Philip Goodhart, who presumably brought some pressure, remember that the Heath Government did not have a large majority and to the extent that in our parliamentary democracy which is majoritarian, the idea is on focusing on the median voter, it was actually perceived that the consumer vote was significant; they had to have a menu, they had to do something; the interesting thing is that they did not have much of the way of ideas because most of Moloney had been implemented by 1970 so they could not look at Moloney for much more; therefore they had difficulties initially in working out what would be the appropriate response, the OFT was the response. It is possible that the Crowther Committee might not have been implemented but for the concern about consumers because they never fully implemented Crowther, the reform of lending generally, they just reformed the consumer part and even there they did not abolish hire purchase.

Elisa Alexandridou: Iain you referred to the National Consumer Council and to the Director General of Consumer Credit; I would like to know what is the relationship between the two and what is the relation with the consumer associations; these three have the same common goal; but do they have to cooperate with each other? Do

they have to be members one of the other in the National Consumer Council?

Iain Ramsay: I will try to be very brief, when it was established the OFT was a regulatory agency. The consumers association was a private pressure group and the national consumer council was established by the state as a voice for consumers; so initially there would be communication between the OFT and perhaps the consumer association but there was no agreements in terms of responding to the consumer association etc they performed different functions; much later the consumer associations and the national consumer council did get a role in terms of what was called super complaints which they could make to the Office of Fair Trading to say that the particular market does not work properly; but there was no formal relationship between them.

Thomas Wilhelmsson: Not a question but just a short comment to Ludwig, just to confirm that you are completely right I was preparing the Finish chapter on consumer credit act together with colleagues from other Nordic countries; and I really looked very much at the EU drafts just before the members of the European Union, they used it very much but we looked at the British legislation as well; so it was a really important influence.

17. Hans-W. Micklitz, Niklas Olsen, Thomas Roethe, Claudius Torp and Thom van Mierlo: Roundtable

Niklas Olsen

I think now we are ready for the last session of the workshop which will be a roundtable of the 4 observers of the mothers and fathers of consumer law. Well, first of all I would like to say that it has been a pleasure for all of us to participate in this workshop, a pleasure and a privilege. Now we are faced with the very difficult task of stepping back a little bit and try to reflect on all of papers: the task is to bring up overall points but also some undiscovered themes and issues for discussion that might or might not bring a better understanding of what is at stake here. So, the procedure: we are going to do it like this: we will take 5 minutes each to present some observations, and then we are going to open the floor for a general discussion. We will see what happens and then we will might try at a certain point structure the discussion but let's see what happens. I will begin by giving the word to Thom.

Thom van Mierlo

Thank you. I have two points to make and before that I have a preliminary remark; as you have noticed there is no Dutch contribution

to the many contributions that have been made for today; But you should know that I have drafted a publication on the making of two pivotal consumer sections in our Civil Code that I am now waiting to finalize it. I have found 2 students to write their thesis on different aspects of it and in some weeks time I hope to send you the Dutch contribution to the conference.

Now my two points: the first one is a practical one but it might be useful; I envisaged as a concrete product of our deliberations to get into horizontal digital instruments call it timeline showing the highlights in the history of consumer law in all our different countries and it could be a growing model; so it could be filled in of course with our contributions but also by the countries that are not represented today and yesterday here. So you can imagine as an example, a timeline with: the country, the date, the bill which was important and then you click and you get a little instruction or something like that. It is just a consideration for you. Second point is that I have worked in the Social and Economic Council in the Netherlands for many years and when I retired one and a half year ago I published a book on the 50 years of consumers dialogue in the Netherlands within our social and economic council. Since then my interest in the history of consumer law has even grown; so I am very interested to hear from your group was there in your countries an institutionalized form of consumer law dialogue as well? Our Social and Economic Council has one leg direction government and one leg direction market. We are a kind of crossing point where all interests came together, those of consumer organizations but also those of business and trade; and also the academics, so it is a tripartite structure. I am very interested to hear whether other European Countries have the same structure and experiences. And of course I am also interested in the role of the European Social and Economic Committee, being the European equivalent of our Dutch Council, thank you. I think I did not need five minutes.

Claudius Torp

Let me also begin by saying thanks for the invitation to this wonderful conference with the “heroes” of consumer protection; I am very honored indeed. As a historian of consumer society, the title, the making of consumer law, is almost a provocation as it sounds like the birth of consumer protection policy. In light of the precursors of consumer policy in the 19th century and the interwar period, however, it seems to me more like the reinvention of consumer policy and consumer protection; one that had a very different character from the interwar initiatives. I think the major shift that occurred was one from protecting the consumer from market forces, as it took place during the first world war and after, to protection through and by the market by perfecting the rules of the market and by correcting the market failures. So it is a reinvention along a very different trajectory.

I think what we need to do is explain how this emergence of consumer policy and law in the 1970s as a separate legal field took place. In order to do so it would be useful to reflect on the major factors of historical change to gain insight into the building blocks of consumer policy since the 1960s. I will briefly mention four of them as the most important: socio-economic developments, events, actors and intermediaries, and ideological factors. As to the first point, I think we should spend more time thinking about what happened when an unprecedented abundance of goods became accessible in the consumer society of the 1960s and 1970s. What were the new challenges that presented themselves? Consumer credit was mentioned several times today and yesterday; the medicalization of society is certainly another point; as well as the increasing technological complexity of products. We need to assemble more of these basic economic developments that hit the countries at a different time and to a different degree which might offer already one explanation as to why some of them were early and others late in developing consumer protection. Having argued for the importance of socio-

economic contexts we should, however, be aware of a puzzle that remains in the fact that consumer protection arose in the 1970s at the height of postwar prosperity. By historical contrast, the consumer as a political figure had emerged during times of scarcity and through political ways of dealing with basic provisioning, price controls, and so on. So this is really a break from the past in that sense.

The second point I would like to make is about events. Events such as food scandals or any kind of product related scandals have the ability to trigger reconsiderations of consumer rights. I found it somewhat surprising that no one has mentioned the thalidomide scandal of 1961 which took several years to unravel; the main criminal Court settlement took place in 1970. and it was not a very fortunate decision because the responsible managers did not get a sentence. This is just one example of a scandal that had political repercussions in terms of product liability. Another kind of event to consider would be the student movements of 1968 which have been alluded to by several speakers. In this case I think the relation of the lawyers who were already active in the late 1960s to the student movement has not been worked out sufficiently. The historiography on the 1968 protests and their relationship to consumer society shows that this was not exactly a love story. The politicized students voiced strong dissent with the materialistic aspect of consumption and I do not think that this fed directly into a commitment to consumer protection. Another type of event that might be interesting is the publication of controversial viewpoints and new scientific findings. An influential intellectual contribution of this sort was Rachel Carson's 'Silent Spring' which came out in 1962. It was translated soon after and helped people acknowledge that risk had become an essential part of modern society. The sociological awareness of risk that is generally engrained in the consumption of goods and services and that you have to deal with politically was a completely new concept that had not been around twenty years earlier. So events, too, are interesting drivers of this whole reinvention of consumer protection.

With regard to the third factor, the actors and intermediaries speaking for the consumers, there seems to be a world of differences among the countries that we heard about. But if I compare the situation to the interwar period, what is most striking is that the traditional intermediaries, that is the labour unions and the consumer cooperatives, do not seem to figure very prominently in most countries in the 1970s.. Take, for example, the case of Weimar Germany where the cooperatives were the driving force behind consumer policy. Millions of people organized in cooperatives and they had an incredibly strong voice in administration and government. I do not see anything similar in the 1950s to 1970s. At least from a German perspective the cooperatives have been relegated to the margins. After the Second World War academics, lawyers and people in the government administration seem to have been much more relevant in shaping this field. This means that we should start to think about consumer protection as one of the strands within social engineering that began in the 1920s and reached its height in the 1960s and 1970s. Still, the consumer organizations are probably the most difficult actors to assess here because their strength was so different in the various countries. Questions of transfer and of regional and national peculiarities also arise in this context: the consumer ombudsman of Scandinavia, for example, has not been adopted in other countries.

Last but not least, ideologies and political convictions have shaped the formation of consumer law. In this regard, however, the presentations we heard during this conference share a certain blind spot. The pioneer consumer lawyers seem to be a little reluctant to really show their colours in terms of political allegiances and convictions. A comparative history of consumer protection and one that compares postwar consumer policy with earlier developments would strongly benefit from a more transparent view of the underlying political leanings and ideas that the consumer lawyers held. My overall impression so far is that the whole thing was a very social democratic undertaking. Maybe this was so much taken for granted by the actors in question

that few people mentioned it. That is one of the reasons why I found the presentation on Great Britain interesting because, as an exception to the social democratic mainstream, it made the whole story a little more heterogeneous. Were there then major ideological developments and tendencies common to all the countries? My impression is that a politicization of the relevant lawyers and actors occurred across the board, leading them to deal with issues of consumer protection and to establish a separate legal field because they were inspired by ideas of social reformism. This would mean that they were not radical leftists, but still on the progressive, leftish side of the political spectrum. At the same time, dealing with the issues of consumer protection reinforced politicization. After consumer protection had been successfully established as a separate legal field, however, the subsequent juridification made a process of depoliticisation possible which characterized the 1980s and partly the 1990s. This was the danger of successful juridification: The whole issue of consumer protection moved from the political arena to the routines of administration and individualized dealings with courts and so it diminished the level of public debate.

So much for the major perspectives that I think could inform an historical narrative of the making of consumer law. Thank you for your attention.

Thomas Roethe

Being an empirical researcher following the method of objective hermeneutics - I have a problem sitting here this moment at that place because normally I can only talk about events like this ex post, after studied all the transcriptions. So I do not run into the danger that I will influence my own results but still what I say I can only say it in the moment. It might be different in half a year. By the way I would like to get your permission if I will have any questions in half a year

or on one year that you might allow me to address you some questions, some problems that might arise.

So Ok, the foundations of this method is that we say is that life praxis is what really keeps moving what is really makes sense what is producing problems and producing solutions. And the observation I made yesterday and today is that we had no real problem in life praxis except one and Ludwig gave the citation of this when the little boys in the kindergarten got breasts because of mal nutrition with hormone meat. No other example of this kind was presented. In this case of the mal nutrition it is obvious that society has to react; first would be the parents of course alarming the medical doctors, whoever politicians, etc. I miss this as the underlying motive in the contributions of most of you. Again life praxis and problems call on the plan special drivers and the drivers who were named here was industry Henry Temple did it and the consumers took place in the debate after Kennedy in 64. Before that, I can't remember that this was the case the consumers themselves and the consumer associations and so on.

The politics took advantage of these problems, which are not defined in the proper way in my opinion. They are looking for voters of course and we have the impact of ideology in these cases well, we remember the citation of Bruno Kreisky, saying that the market itself was exploiting the consumers. If you have read Marx this is very very heavy abbreviation of the problems. The structure of market society and the class society one might say but it seemed that it had an impact in Austria at least. Then we have the trade unions, we have the social movements, we have a lot of NGOs taking care and then we have the lawyers, a group to which you all belong, a group in an entrusting blurred role play being academics being practitioners and all in yourself performing a pressure group to set through some ideas of consumer protection in the society. So you are influencing the politics, you are influencing the public media, you are influencing the

consumer themselves and as Ludwig said working in the European Commission he was really puzzled that it did not happen that they pressure these groups put on, the consumer agency for example was not enough that these consumer associations organized in the proper way being efficient. That was a claim I was wondering about and on the other hand you have quite in these days another a lot in these days you have the opposite picture that the pressure group of lawyers and academics come on pressure themselves, for example with the Diesel gate scandal when the public and the consumers say why we don't get the same refunds as consumers in America. So it is a strange picture to me and I do not have any clues how this can be solved in my analysis later on. So another player or another agent or another driver is of course the EU Commission and this especially after the introduction of the single market, which appears to be a logical consequence if you have a single market in Europe. Then you have of course European Consumers and you have to take care of them that they do not suffer and the consequences of the single market.

One miraculous player is the consumer himself. That is a strange figure. I did not find any sharp contours made up here what he is. In Lubos' speech we learned that the Communist regime and Czechoslovakia did put consumers and citizens in one, which was a socialistic approach. I learned in our conversation that putting consumers and citizens in one is quite often and common, I did not know that. But still it is a question of how to differentiate between consumers and citizens and one a remark Ludwig made when the question was crossing the Alpes via the streets or tunnelling them. He said that is a consumer question. To the great astonishment of Maria (Reiffenstein) we see that this question, is the consumer always a citizen? Is the citizen always a consumer? Still it is revitalized by the way we heard that in Ireland till the 1990s there were any consumers at all.

Alex Schuster: Consumer was not mentioned as a concept until the 1957. But you are right there was no serious consumer law until 1978 and 1980.

Thomas Roethe: Isn't it wonderful that the consumer did not exist? An amazing miracle. So since we are all consumers, the producers are consumers, the retailers are consumers, politicians, lawyers, all are consumers. The shape was given up to the 80s, early 90s if I remember correctly, was the ideal imago autonomous consumer vice versa of the autonomist consumer vice versa the consumer who has to be paternalized somehow. But in the early days I think that the autonomist consumer was the figure that everybody had in mind. I have the feeling when I listen to you that the vulnerable consumers, weak consumer somehow returns in your ideas. I have no explanation for this yet. This goes along with the question what we are talking about. Are we talking about consumer law or are we talking about consumer protection law? I think this is an essential question for me again. And I could not give an answer. What would you really think about that problem? That would be important to me to find out. Thank you.

Niklas Olsen

The first thing relates to what Claudius has been saying and it is about periodization. I am thinking the 70s as an epoch; this decade seems to me has many things and it has been characterized in many ways. When you all talk here, and I quote, you refer to "the golden age of consumer law". But when I read history books that has come out the last years about the 70s, it is a decade riddled with crisis. It is associated with the economic crisis, the oil crisis, the economic crisis, the breakdown of the Keynesian paradigm, the crisis of the welfare state, a crisis of democracy and so on and so forth. It is also a decade where there is a sort of peak, of the social democratic,

social engineering. On the one hand, the decade is connected to the previous decade, from what is going on from the 50s onwards, that reach a climax as a golden age of for example consumer law. But you also have widespread crisis, and uncertain future, and a decade where there is unprecedented distrust in state action on both the left and the right.

So you would have not only in Europe, but in particular in the United States, criticism of the regulatory system. This was challenged by a deregulation movement led by the Chicago School that claimed that consumers are better protected not by the State but by the efficiency of the market and the consumers' own rationality. I remember that Chicago economist George Stigler in a debate with the advocate of the Federal Trade Commission said and I quote: protection reminds me of the 'mafia'. We just heard Iain speaking about the UK: there is a nice book out by Christopher Payne about consumers' credit and the new neoliberalism, that describes in detail the connections between the Institute of Economic Affairs and the Chicago deregulation movement that pushes a vision of a marketized and non-protected consumer. If we go to Denmark we would have a huge discussion of the crisis of the welfare state. In this context, in the liberal party invented the idea consumer sovereignty as a remedy for the crisis of the welfare state, that is, a new kind of an ideal citizen that should discipline the allegedly inefficient and also undemocratic welfare state to produce what its citizens really want through implementing free choice in the public sector. This new idea of participatory democracy through free choice and individualism was in fact compatible with the language of 68, so there is a kind of ideological convergence stressing individualism and anti-statism. Of course these discourses do not win out in the 70s. I am just trying to outline some further contextualization, complexities and also contestations concerning the 70s that somehow must also be part of the story. One could finish by saying that ok it is the golden era

of consumer law but perhaps also the beginning of the decline? I do not know.

Second point: So, just to point to some of the further institutions and geographies that were on the table in many of the discussions, but not systematically or in detail. Maybe the first one would be the transatlantic system. We heard a lot about the US, in many of the papers, we heard about Kennedy, about Galbraith, about law and economics, about the American gateway through the OECD. All this could be illuminated in more detail. When you look at the research on consumer society you encounter a strong Americanization thesis when it comes to culture. I think it is striking if it is entirely lacking here. The same thing with other international institutions; the OECD has been mentioned, the Council of Europe has been mentioned. Are there other institutions we have not mentioned? Are they important and in what ways?

A few other points, if we talk about culture, history, we here about Eastern countries, but what about the role of the cold war in shaping consumer law and consumer politics in the EU and the western countries, including a figure of the consumer as an ideological refigurement that keynotes democracy and prosperity and free consumer choice? Hasn't be mentioned at all. I do not know whether it was a concern for you here. The very last point, that is short is connected to these further institutions and geographies, and with this I refer to my first point, from yesterday: the discipline of consumer law. It seems to me from many of the talks that sociology was the main discipline, I know from discussions from Denmark, from consumer organizations, that this was also there case here. But law seems to have been increasingly important, not least in an American contexts. So, just to repeat the question: what were the disciplines, you were in contact with besides sociology? Even if you take sociology, we heard that voiced from the audience here, you would have many sociological focused legal studies in Germany, concerned with con-

sumer law, many schools. So what were the points of contacts and inspirations? How did that help shape consumer law? Again these books of initiation that drove forward the project.

And for me especially I would be interested in, I asked the question of economics yesterday and it seems that there were not so many connected points but when the discussion opened there seemed to be quite a lot. And I am not talking only about friends. I am also talking about enemies, who did you define yourself against? Were there any other competing paradigms? What were the points of contestation? And one last point to connect to a theme raised by the other commentators. What were other thematically ideological commitments in this discipline? I think we will open up the discussion just from a different side and see what happens but before we go along the way I will try to get us back to some other points. But now the floor is open and I hope you have the energy for one more battle in the consumer law area.

Questions and answers

Niklas Olosen: We begin with few here and see what happens.

Borge Dahl: I will start with “what are we talking about? Consumer law, what is that?” This is a fundamental question it is very relevant and it is very good that someone is straightforward. Thank you.

You could define consumer law quite neutral, simply be the law relevant to the position as a consumer. So there is a shit in what we are talking about if you talk about consumer protection and consumer law. Consumer protection law is law in the protection of the consumer and consumer law is neutral and it is interesting that we found that consumer protection law goes to talk about consumer law because my interest in the field certainly and I hope that you understood yesterday came from the belief that law can make a better world.

And the law needs to make the world better for the individual as a consumer. There were so many things that influence the need for protection. In the 60s and in the 70s starting in the 60s people get more money and we take many more products. And the products are much more complicated and the life is becoming much more dangerous due to the development and (...) mentioned one a boom describing something which is really mind opening. I think that the golden age would not be the expression I would choose for myself but in a sense you would find a number of people from different countries that engaged in developing better law in protecting the consumer. And you see that development continues in the 80s and you have consumer policy development, you have the whole press focusing on consumer problems and there are a lot of consumer problems that are common all over the Europe and in the USA. So it is certainly something that started as a movement to achieve something through law and maybe the movement now has stopped. I do now know I was not there for 25 years.

Niklas Olsen: Thank you a lot, I would imagine that a lot of people agree with some observations now it is Ludwig's turn.

Ludwig Krämer: Yes, I would like to come back first on this issue on the issue of the 68 revolution. I would say that this had a very limited influence but imagine the summit conference in 72 the economic growth is not an end in itself. You would have not have found a conference in the 2017 which would make a similar statement. It shows all the differences that have occurred during all this period. As regards the ideology I would like to remind you that Kennedy said consumers 'we are all by definition' which is very much what the communists said at the same time. Having said this at the European level the USA influence including in particular the economists' was absolutely zero. And Ralf Nader and Rachel Curson were perceived by the consumer movement in Europe as a consumer problem. This leads me to the question of events. It was mentioned that there were

problems of thalidomide or others. But these are health problems and the consumer law has to a large extent developed and protected an economic interest of consumers. Health and safety are not conceived at least at European level but not either in many countries as being a consumer problem. It is in fact a citizen problem but not as a consumer problem. This leads to another aspect. If we think of the Crowther or the Molony Report or many others including the reports of the European Commission we do not have this kind of reports any more because people would have to talk about inequalities in our society and underlay that with figures and facts and do not have the courage to do so, for one reason or the other, sometimes for ideological sometimes political courage.

Allow me to say one last word on the European Economic and Social Committee because this was raised in the beginning. This committee, theoretically also includes consumers but it was mainly an organization to include employers and employees and agriculture at third level. Consumers were as one or two or three persons. The big deficiency of the Economic and Social Committee was that once they reached an opinion the different groups, traders employers, producers and so on went to the European institutions and defended their own point not the point of the ECOSOC. So literally I am not aware of any opinion of the Economic and Social Committee that played in law making any role. Not one single. It is completely superfluous from the law making point of view because under the Social and Economic Committee under the Treaty should advise the Commission. However in practice the opinion of the Social and Economic Committee is given once the Commission has made its proposal. So when the Commission's work is finished. And therefore there is no sense in having this kind of body. This is all. I will not go for that.

Niklas Olsen: Thank you. So, Thomas.

Thomas Wilhelmsson: Well of course there is a lot we could say but I will try to make a few points. The first one is that I do not really think that you should treat this group as a group in the sense that we share exactly the same opinion on Hans' role golden years of consumer protection, that is a very consistent movement. There are different political views involved, very different situations in different countries. It is a kind of dispersed movement, we are friends as persons but I do not see this as a very homogeneous and closed movement of the golden years. As Hans said, the golden years were the years when we got a lot of consumer protection, often purely technical. I would not like to take a stance that this was the best consumer protection law produced ever, I do not think so, but there was a lot of law produced. That is what you can say. I think I agree with the analysis that Claudius made on building blocks and so on. You made a question in what way these golden years differed from earlier pieces of consumer legislation. We had consumer protection rules already in the laws of Hammurabi. So there have been rules protecting us all through the ages.

But if I look at it from the internal perspective of legal discourse I think the change was that for the first time the concept of consumer was introduced in the legal discourse as a legal concept, kind of demanding a coherent response to the various issues all over the table, not only responses to specific events or to specific problems, but as a comprehensive legal concept. That was obviously an internal discourse of legal ideology rather than a societal discourse. That was clearly the case of social reform, social engineering of social democrats, in many countries, but at the same time it was as many have said, a welfare state project considering many places, and as we all know the political constellation behind the welfare state project was not that simple as a social democratic project. Many political movements and directions were involved and I think you can apply the same and this connects of course with the cold war. You can say that the whole welfare state project was a cold war project to

show the workers of the West that it was not a good thing to look at socialism as a solution. We see that after the collapse of the socialism the welfare state started to collapse. So you might see a correlation. One thing that you mentioned was that the transfer of Atlanticism and the impact of Americanization and this is an area within legal comparative research. There is different research done on the different approaches and here I think we should acknowledge the fact that if we do not trust the state, the Americans distrust it even more. You see very different approaches in the sense that Americans see the consumers as autonomous subjects which can take care of the problems through the courts, through the system, when they happen and they put in a lot of incentives like punitive damages, enormous damages and so on. They have a functioning protection system but it is relying much more heavily on the reaction of individual consumers or consumer groups or various groups. But Europeans still have a strong position of the state or of the European Union and there have been other players on the table in Europe. That were some of the impressions. But you managed to catch quite a lot of points from our speeches. That was interesting to me. Thank you.

Jules Stuyck: I would like to answer the questions that were raised but I will limit myself to just one. My point is Claudius' very interesting four factors. The first factor, social- economic. Claudius you were puzzled by the fact that we discussed consumer law in the 1970s in times of plenty, after that we heard that there was a crisis in 1973. I am old enough to know this. Indeed the crisis of 73 beginning of 70s consumer law so there is no contradiction. But, within the inter bellum and if I take the Belgian example we will find something like that in my paper. We had legislation in 1930s in times of economic crisis but they had another objective, that was macroeconomic, it was protection of small shopkeepers. It was also about the protection of consumers' income. But in 1970s it was a completely different story. Yes, there was the influence of the spirit of 1968. The influence might be that people like me started researching in 1970 at the time when

they read books like those of Marcuse, Vance Packard, Galbraith, Bataille and others. We were influenced by sociology, economy, philosophy...

I have one more point. The whole day I am looking at this bottle of water. And what I see is the content of it. Perhaps you might have not seen it. You will remember that two times today there was this mentioning of a law that says that one meter is one hundred cm. I do not think that Italy has such a law as you would assume that this bottle is one liter. It is not. It is 92 cl. And this may mislead consumers because they think it is one liter.

Benedicte Federspiel: It is very complicated because, I think it was mentioned by Jules that first you say it was the 70s were prosperous and then there was a crisis. I mean you have to decide what you mean. I would say as I saw it that it was needed and the first part of the legislation that we saw in the 70s were really the things that we were mistreating, cheating consumers. It was about marketing practices act, it was about having access to justice. It was about getting information at all so it was about basic legislation whether you call it golden or not golden, these were formative years and that was necessary. Nobody could stand up and say that it is great if people are misleading you and you should never get your right and so on. It was mentioned as well that this came from Kennedy. So I do not think it was not that fantastic that you made this legislation but these were the formative years this is what happened at that time and when you discuss whether that was politics leftwing or right wing.

In Denmark my experience has been that conservative parties were those that were helpful. Not necessarily the social democrats. We had a lot of trouble and they had a lot of kind of things but we had a very good minister who was conservative and who understood it all especially about financial services when we wanted to have a new credit act and so on. And that was mid 70s and the beginning of the 80s. So you cannot say that this was a left wing kind of movement at

all. The cooperatives in Denmark were seen as a business. You say this is wonderful and there are so many and why consumers. No in Denmark cooperatives were business with retailers and producers and insurance companies, nice people I am sure, but they were seen as a different kind of business. So no wonder that we did not operate with it. It was the EU that decided to be in the consumer committee as Ludwig was saying. But it was not something that we needed at all. As with UK, well I wanted to say that, has he left, oh you are there, well I wanted to say that UK was always an island. They thought that they did everything well, and the rest of us did not understand the thing so I am exaggerating. I was working with all the people you mentioned and they were nice people, they really wanted to do a lot but they had the superior feeling in the EU and we got it all wrong and so on and they were not thinking I am sorry to say about those that could not manage themselves when we were discussing now. Is it a big problem at all?

I mentioned that may be not all EU legislation was good but I can mention many countries that would not have anything if you had not proposals from the EU. And for us we thought that that was not good enough were complaining. We are still complaining about the lousy laws that come from the EU but if there had not been anything at that time there would have been nothing. Thank you.

And it was mentioned and we were talking about national countries here but the European consumer organization was not so active at that time. It was not so well developed but I tell you now that if you talk to people in Brussels, if you talk to the parliamentarians, they all know many times who is really with all the stuff rushing to attack and talk for consumers. So it was a different time, you did not have the same people there. And I really get upset when I hear the senses, I forgot how the guy was called who said that it was mafia that had consumer protection (it was Stigler). Come on, to protect the poor and the weak is that mafia? That says more about the guy because

that is crap. How can you say that when you help people that were cheated and you cannot get access to justice then it is mafia. I know some very very right wing politicians that might say that but never any sensible people. The thalidomide was mentioned and that is of course something to do with health but not health in the sense that it is difficult for many consumer organizations to handle. It was a question of product liability. You had some (...) and had dreadful consequences. And that led and it was mentioned at that time when the product liability act came. That thalidomide was one of the big cases and you used all that.

About the Economics and Social Committee I am sorry to say that Ludwig but I am a member of the Social and Economic Committee. But you are quite right. The way it was construed at that time and it is still construed, there is an overweight of business; there are three groups and the business group is the biggest one. And then you have trade unions and they are (...) the social affairs and not always talking to consumers and in the third group of which I am a member and I am the vice president of the consumer affairs, so they are doing a little more now. In that third group they have the SMEs and the SMEs that is business. 98% of European business are technically SMEs. So if they sit there you have the business part in group 1 and group 2 and 3 and there is also agriculture but that is business too, nice people that produce something but that is a business too and they sit in group 3 so it is the way that it was formed, they way should be changed but nobody will do that. As you know consumer affairs is not a very interesting topic at the moment; only here in Florence.

Niklas Olsen: Thank you Benedicte, Alex.

Alex Schuster: I think first of all, socio economic analysis, some of us sitting around this table have experience in this issue some have not, some are more skilled in socio economic analysis than

others. I have to confess that I am not the greatest but I have an open mind and we are working towards producing something at the end of the day so I would definitely like to hear more your ideas on that. With regards to reciprocation and the couple of matters that you mentioned Claudius, Gordon Borrie and Aubrey Diamond's book, 'The Consumer, Society and the Law' is worth reading. It is kind of a guide to consumer protection. It gives the British picture and I know has received some criticism for some of the things he says about European law in his later publication but 'consumer, society and the law' is worth looking at and some of the social and economic factors as well behind consumer protection in the UK, also in Ireland and some other countries. As regards product liability and whether you categorize that as a consumer problem or a health and safety problem experienced by individuals in different countries, I think there are different approaches. As Ludwig has explained, from some civil law perspective it is more as being not a consumer problem, but more of an issue of health and safety perspective of individuals. In Ireland and in the UK the perspective is different because of legal history and it all goes back to a simple statement by a Scottish judge (Lord Atkin), the manufacturer owes an ultimate duty of care to the consumers. And then 80 years of jurisprudence later the definition of consumers keep on expanding; and that comes within consumer protection.

On the Thalidomide tragedy which I am interested in, again there is another book that might be of interest, it is called 'Suffer the Child, the Story of Thalidomide' (it is 'Suffer the Children, the Story of Thalidomide'), and it is by the Sunday times inside team and it is really excellent. They were lawyers and non-lawyers and they really give an excellent picture of the whole Thalidomide tragedy. Just one final point on what Thomas was saying: you rightly said we did not really give which is surprising of lawyers many case examples over the last two days. The one that you identified was the hormone and beef and the poor unfortunate male children developing breast as a result. And actually that issue of actual example or when something

goes critically wrong for consumers. It was not something I was thinking yesterday because certainly in the context of this conference we have examined the legislation and the regulatory and the private law extent but we have not asked about the case law in the different countries. But this would open the Pandora's box to a certain extent. But if everybody around the table can you just limit to six cases and can you identify within thirty years what were the most important six cases on consumer protection law in your country you get a broader picture I suspect of the evolution of consumer law and this is all I wanted to say at this stage.

Hans-W. Micklitz: Perhaps, three remarks: the first one is about the golden age, what I observe also at the EU is this glorification of the 1970s. In so far I think this is an absolute valid remark. Let us be pretty clear on this. In the mid 1970s the welfare state was already in a crisis. All these dreams of using consumer law to change the society, to create a more just society, and so on was challenged. The breakeven point was the judgement of the German Constitutional Court on co-determination. Wiethölter analyzed this and he said this is the end of the welfare state. I think this is important for many things. Politically, Norbert and I wanted to write an article 'Did the EU save consumer law?' What would have happened if the EU had not taken over? Or if the Member States would not have delegated the powers to the EU? Maybe the Nordic countries would have continued but maybe the continental ones would have not. So I think there is a link between the EU and the nation states that is not on your agenda what you have raised so far.

The change of the level playing field is also very important for the combination of a political movement and juridification. The EU could only act via law at least this was the idea until 2002, the White Paper on Governance. Via law we can change the society. I think here you are right but that is really the 1920s. Look at France and Germany, all these debates took place before the first world war, but

what can you do with law? We have a tremendous juridification. It was Fritz Scharpf who said - that all the members states in the EU in the 70s went through a process of social democratization. This is even true for the UK, this was a social democratic policy? The social democratization has a long term impact. In Germany for example you do not know any longer what is a conservative party and what is a social democratic party. There was this overall conviction that law was the solution. When the EU law was to be implemented we had two options. We could believe in courts or we could believe in administrations. The first were the courts, the courts saved the world, the Supreme Court in the US and the ECJ in the EU. I think this is not the full picture because it is also the power of the administration, not judicial review alone. Thomas (Wilhelmsson) said it literally so you had an executive power (in Finland) and this power decides for the good. Where is the link to the consumer movement? I speak for myself, so we were pushing in the 1970s to bring consumer cases to the courts. We were not aware of the depoliticizing effects that such a strategy would have in the long run. I think we were still inspired by the thinking and the debate of the 1920s about what the courts can do, I do not know. That is for you to find out.

The last point I want to make is fragmentation. I see a huge clash between the EU that has a more holistic perspective on consumer policy and law and the national understanding where we put consumer law and policy into boxes. Public law, consumer credit law, health and safety and so on. Sorry it is German, ok it is true but we are discussing a lot about contract law. Here you have the understanding that the enforcers are the courts. When you think contract law could be enforced by an agency we are in socialist times, at least this is the western understanding. I would just draw your attention to the process of glorification, depoliticization, and juridification and fragmentation. That is the risk of juridification. We do not see the big picture any more.

Niklas Olsen. Micklitz: I think we have four more people on the list and I also think that the panel should be given a chance to respond. Actually only three now.

Maria Reiffenstein: There are three points I want to make. The first one is, one of you asked the question of why the consumers association or the consumer groups did not have much impact and I remember and, I am not sure if that was a book of Nibert Reich or Hans Micklitz, where I read that from the diffused interests. I think that it is true until today and I know only very few examples in Europe where consumer associations are having enough consumers as members in order to survive. I think this is one of the difficulties that consumers are not very aware of their problems. They are aware of the problems if they now have it. After they have solved it they do not have this interest any more. Although I was a child in the 70s BUT I think the important thing is that consumer law was regarded as an own policy and the consumer, as Thomas said, was born as a legal concept. I think that it has a legitimation until today.

Perhaps there is one common view from the socio economic developments in the 70s the mass production societies, and the standard contract terms were important and that created problems to people. Now there is digitalization and it is a problem that the consumer does not have a transparent view in many branches what actually happens behind the curtain and in that respect today it is even more than necessary to find and maintain this legal concept. One of my main concerns in the EU is that a consumer policy more and more is just part of economic policy and under the heading if the business works fine and the markets work fine then all people are happy. I think this is one of the headings of our society today and one of the beliefs of the EU if people consume more and more across border and if the competitiveness of Europe towards the US is functioning then the goal is reached. I think that because of that thinking of the EU consumer policy is losing its importance and my question to all

of you how do we change the conditions so that consumer policy takes its own role back as a policy in its own right. Thank you.

Thierry Bourgoignie: Thank you. I would also like to add some ideas on what has already been said here. I think Borge asked what are we talking about. My question would be what are we fighting for? What are the objectives? If we want to assess the achievement made during the formative years the first question is what are we looking for? What was the objective of what we did and of course here again as in my paper yesterday I will give you my own reasons why I invest so much time. In fighting for consumer policy both at national level and at the EU level I think you mentioned this distinction between protecting consumers against market forces or protecting consumers through market forces. That for me is a very right way to reflect the different objective we have been following. Personally, when I started I really wanted to fight against market forces. There is a radical approach in my thesis in 1988. I had been criticized by many as being too leftish and too radical with a Marxist analysis of the market operation and for me that was the goal. That was the ultimate goal. Trying to correct markets failures for me was a very reformist approach; why to make the market better operating if the market exploits or cheats consumers? Let's change the paradigm so for me there is a link with the student movement. I was politically very much engaged in the student movement and that was a kind of ... to change society afterwards.

Remember at that time there is also a Vietnam war. So this was a kind of Americanism. Not to import into Europe the same capitalism that was in the US. I was educated on consumer law in the US. I was at Yale and this is where I studied consumer law. When I decided to come back to Europe I was absolutely decided not to see in Europe the same type of capitalism as it was there so this was behind all the investment. The same at the EU. When I see the EU started developing the internal market I had exactly the same approach, I said

we have to fight so that this internal market is not the predominant, is not the only, is not the exclusive objective of all EU integration process. We will have to harmonize all because there is not internal market if there is no harmonization. So we have to fight as lawyers so that harmonization is among the highest denominators and so that consumer protection policy is not just a byproduct of internal market policy which it was.

For all these reasons, I have been also puzzled by the role of consumer organizations when they proclaimed that they are the only one representatives of the consumer interest. For me trade unions, or cooperatives they also represent the consumer interest because this is a diffuse interest. And as many as we are the best. If we have to start the revolution we should be many many and we should not be divided. So that's why I took distance in Belgium from Test Achats. They had a very commercial approach, very business approach of selling reviews so I said this is not my model. Comparative testing is not how I change society. But I was against criticized for that. I do not mind. That goal we had of course we did not achieve it. I think we did not achieve it because we did not select the right topics. If that was the goal we should have selected another topic. We gave too much emphasis on the protection of economic interest of consumers. We left aside sustainable consumption. Now it is a big topic, but it was already in the 60s. Why did we choose it at that time? Because those general interest topics were not directly into the protection of economic interest of the cost benefit analysis of making purchases in the market place. In my opinion we concentrated on the topics that were the priority ones but we concentrated on individual interests other than collective interests. We devoted too much time to comparative testing; we were not radical enough. I remember in the 70s in some of these conferences, I do not remember in which I said for consumer groups, Benedicte will kill me after this, we need Greenpeace in a consumer movement. We do not have it. Where is Greenpeace? So what I am saying is that in the environment protec-

tion movement they were much more radical than we were. We were soft towards consumer society so it is important to better identify what we are looking for and certainly we are not here as a group. I am sure others have a different opinion on this. My own investment clearly is that we must have a clear goal and then we have to define the tools and the role of consumer in order to reach that goal.

Niklas Olsen: Thank you. One last comment and quick response from the panel here. Please.

Bob Schmitz: Thank you. I think I would be interested to get the four building blocks by Claudius because I really like to respond in detail to these four building blocks but that would take an hour. I would not like to be controversial either but also we have arguments with the way Benedicte presents what the consumer is, the weak, the poor, the same I suppose Thierry said, and again coming back to your building blocks I think we should especially contribute to the consumer cooperative played a vital role in Italy and the Baskland, in Finland and in France.

The last one on Thomas (Roethe) I think indeed this is quite interesting and not only for the past. The practical examples as I mentioned, if you look at France the French consumer organization one of the famous cases was Kleber (car tires) and I remember she later became a colleague of mine. She told me that this company went bankrupt and after that the French consumer organization, the boss who was later my colleague had actually very strange feelings. The other ones that we are talking about had implications on the olive oil scandals and motor oil in Spain. Last but not least when Hans says indeed Aziz (ECJ judgment Mohamed Aziz) so this is recent but actually Aziz is the subprime mortgage in Spain, very little has been out of this judgement in order to show what we actually talk about. Until recently we had been talking a lot about EU consumer credit etc but one of the subjects we have not got hold of is the whole issue of indebtedness. There indeed, the whole thing was (is full) practical

examples. This is a game indeed because maybe the subprime crisis and we talk about mortgage again will come back very soon. So I stop here but it is interesting and again the dieselgate case which I am highly involved in and which shows how complicated it is to enforce our law in the European common market.

Niklas Olsen: Thanks. And now Iain has been awarded 30 seconds.

Iain Ramsay: One perspective you might want to think of is the conflict between Olsen's argument about the problems of collective action which suggests that consumers will never be successful or if they are successful they will get symbolic benefits rather than real benefits which relate partly also to Pepper Culpepper's book quite and loud politics which I think is relevant. The conflict between this and Trumble's argument about the strength of which suggests that consumers have been successful primarily because they make coalitions with other groups around shared narratives of access or protection, so for example, there is a shared narrative in the UK between the State and consumer groups around access so that might be an interesting theme.

Niklas Olsen: Thank you. I will do the same round and we will award ourselves a minute and a half each. Please Thom.

Thom van Mierlo: Two remarks I have: the first one is that the picture about the European Social and Economic Committee that Ludwig gave I think it is a proper description of the position of the EEC in the formative years until the beginning of the 80s. But later on, the position of EC has changed. It has been strengthened within the European treaties and it is not only advising the European Commission. It can also give and it gives opinions at its own initiative. Now it claims to be the forum or the bridge between civil society and Europe or sth like that. The picture of the 70s-80s is correct but please do not think everybody that this is the EC of today. That is one, second, it is a short one and Thomas suggested to distinguish poor country

let's say the six major incidence that accelerated the development of consumer law, I think it could be included in the digital timeline.

Claudius Torp: I will also try to respond to several interesting remarks. It has been rightly remarked that the legislation of the 1930s was geared towards macroeconomic issues and not to consumer protection per se. This was also the case in Germany in the 1930s, but my point was more about the 1920s when you had an amazing level of action in terms of consumer representation. There were consumer chambers, where you had a lot of debate about who is the consumer in the first place and who is represented, there were price controls and debates about consumer boards and municipal provisioning. So this was some substantial legislation on consumer issues.

As to Benedicte's points, the formative years of the 1970s were shaped, I am sure, by all kind of unfair practices, but isn't that the case at all times? The way you put it makes it look like it was a natural reaction to some real problems, which is an argument that I do not really buy into. The problems have to be perceived in a specific way and be put on the agenda. Maybe we can talk about this later. The consumer cooperatives in Denmark you depict as a sort of usual business. This may apply to the situation after the Second World War, but before they were more than that. Maybe they lost their idealistic baggage along the way, but if you read the theoretical treaties of the movement originating from the 1920s and before... (he is interrupted). As to the activities of the consumer organizations, that is really a tricky point. In this regard I would like to draw your attention to what I gathered from Matthew Hilton's book, 'Prosperity for All', in which he argues that at some point their activity on the transnational scale shifted very much to non-European countries like Malaysia.

Finally, Ludwig's objections are interesting. The way you reacted to my point about the relevance of the thalidomide scandal was to argue that this had not so much to do with the consumer interest because you construe consumer interests as purely economic interests, and

unrelated to questions of health. Well, you can obviously construe them in such a way, but there is no necessity to do so. I cannot see a difference between the consumption of hormone-treated meat, which triggered debates about consumer protection, as you mentioned, and the consumption of medication with disastrous side-effects. If you are right about the way the field was compartmentalized in the 1970s, then we need to better understand the historical decision to do so. As to the remark on the critique of the growth concept that had arguably been more important in the 1970s, I am not sure if this was a major driving force. The Club of Rome study of '73 on the limits of growth was not universally well-received among economists. And in the 1990s there emerged equally many commissions and institutes on the topic of alternatives to a growth economy without resulting into a boom of consumer protection legislation.

Thomas Roethe: Ladies and gentlemen thank you very much for your comments and explanations which I keep in mind when I do my analysis. I do not want to go into the subject furtheron. Jules, the trick in the GDR (German Democratic Republic/Deutsche Demokratische Republik) was that the government tried to convince the producers, the workers everybody that a meter has 100 cm and they never succeeded with that. When they sold this billy bookshelves they could not sell them because they never had the right measures so in the GDR they would not say that 99 cl but they would say one liter and that was the point. To your rejection of being a group for several years, and good reasons and understandable reasons, well if you are not a group because you do not have one single interpretation of reality and law then you are still the fathers and mothers of consumer law and they do not have the same opinion all the time.

Niklas Olsen: I have two very brief comments, two about definitions: I thought about it from the very first session onwards but I was too shy to ask: that is about the definition of consumer protection law. So if I understand it correctly, consumer protection law is some-

thing that addresses consumer protection in more or less direct and comprehensive ways. It may, or it may not refer to the consumer, as a semantic object and that's why we have the difficulties with all the prehistories because there have been a lot of legislation in the American days back in the 19th century, in the Irish case something in the 20th century, which may or it may not refer to the consumer. This also goes for consumer protection law more generally. Moreover, it may or may not be a separate branch of law, but what strikes me when I speak to people here is that it has a strong ethical connotation too. It cannot not just be about efficiency and markets and growth. It has to have some ethical layers on the societal level: social and political rights have to be there in the definition. So there were some ideas about that.

Definitions of the consumer as a societal figure: that is clearly shifting all the time. I would just like to say that I am writing this book on consumer sovereignty, the idea about the so-called sovereign consumer. If we take a stance away from consumer protection law on the European level, not only in the intellectual scholarly political debate, I observe a ground breaking shift from the 70s, from the consumer as being weak, vulnerable figure that should be protected from market forces and deficiencies to a rational sovereign consumer that should be revealed not only on the market but also in the state. May be not central to this context (though I would think so) but in the general discussions I follow in the Western world across countries and also in international institutions, it is certainly present.

Last point I am just observing as a historian, connecting to what you said Hans, the 70s and the social democracy and connecting with your point, Iain, about consumer credit some of the most influential interpretations of the age link the breakdown of the traditional democratic state to a liberalization of the consumer credit market, for example in the form of privatized Keynesianism, to quote Colin

Crouch. Thanks for the very good discussions I hope everybody is satisfied.

Hans –W. Micklitz: I will not comment and open the debate on the end of capitalism and the end of history and whatever. It is the end of the day and that is the story. Now I only want to thank you all and also Claudia has to leave. Thank you very much, we will decide what we will make out of it, we will clear our minds and we will be back to you.

VII. Biographies



Elisa Alexandridou

Elisa Alexandridou has studied Law in Greece. Post-graduate studies: University of Hamburg, Max Planck Institut for Industrial Property - Munich. Scholarships: 1) Deutscher Akademischer Austauschdienst, 2) Alexander von Humboldt Stiftung, 3) Max-Planck Gesellschaft (Mitarbeiterin of the Institut-Munich)

Professor: at the Law Faculty of the University Thrace (1979-1996), Aristoteles University Thessaloniki (1997-2009). Emeritus honorary professor since 2010. The “Essays in honour of Elisa Alexandridou” were devoted to her on 2017.

Law Making: Member of the Committees who drafted the first Act on Consumer Protection (1990-1991), the Act on Electronic Commerce (2002-2003), the Reform of the Greek Commercial Code (2008 to 2010), the Reform of the Company Law (2009 to 2012).

Subjects of teaching: Company law, Competition law, Law on Consumer protection, Law on Electronic commerce. Teaching also at the Post-graduate students, at the School for Training Judges, at the “Open” University and at Erasmus Programms

Other activities: President of the National Consumer Council (1997- 2001). Member of the National Antitrust Committee (2006 to 2010). President of the Committee for Public Relations - Aristoteles University (2005-2008). Member of the Administrative Council of Hospital “Achepea” (belongs to Aristoteles University) (2001 to 2005).



Guido Alpa

Guido Alpa is Professor of Civil Law, School of Law, Sapienza University of Rome .He has written many books concerning torts, products liability , contracts and European private law. Since 2004 until 2015 he has been president of the Italian Bar Council.



Thierry Bourgoignie

Professor Dr. Thierry Bourgoignie (Licence en droit, Louvain-la-Neuve; LL.M, Yale University; Docteur en droit, Louvain-la-Neuve) has been teaching consumer law for the last 45 years, first at the University of Louvain-la-Neuve in Belgium, then at the Université du Québec à Montréal (UQÀM), in Montreal, Quebec, Canada.

In July 2017, he was awarded the title of Doctor Honoris Causa by the Federal Universidad de Rio Grande do Sul in Porto Alegre, Brazil. His main teaching assignments are Consumer Law, European Law, Critical Analysis of Private Law, and International and Comparative Consumer Law. His publication list comprises more than 25 individual and collective monographs and more than 120 published papers. From 1988 to 2000, he was the director of the Centre de droit de la consommation in Louvain-la-Neuve; he is one of the founders of the International Association of Consumer Law that he chaired from 1998 to 2003. In 2004, he founded at UQAM the Groupe de recherche en droit international et comparé de la consommation (GREDICC), of which he is the acting director. GREDICC is the main organizer of the Summer programme in national, comparative and international consumer law, which is held in Montreal every second year. Professor Bourgoignie is acting as a consultant in consumer affairs, product safety and market surveillance, by several international institutions and governments in Europe, South America, the Caribbean countries, the Gulf States and Central Africa. In 2016, he was appointed member of the Committee of governmental experts on consumer law and policy of the United Nations Conference for Trade and Development (UNCTAD).



Børge Dahl

Børge Dahl, Former President Of The Supreme Court Of Denmark, Professor, Dr.merc.h.c. Born 1944. High school certificate 1963. Lieutenant in the Army 1965, first lieutenant in the reserve 1968. Cand.jur., University of Copenhagen, 1972. Postgraduate fellow, University of Copenhagen, 1972-1975. Studies at University of Freiburg (Germany) and University of Cambridge (England), 1973-1974. Associate professor at the University of Copenhagen, 1976-1981. Professor, Director of the Law Department, Copenhagen Business School, 1981-96. Justice of the Supreme Court of Denmark 1996-2010, President 2010-2014. Adjunct professor, University of Copenhagen 2014.

Other functions include: Member of the Permanent Court of Arbitration, The Hague, 2010-2014. Chairman of the Danish Labour Court 2003-2010, Vice Chairman 1998-2003. Chairman of the Danish Competition Appeals Tribunal 1997-2009. Member of CCJE, the Council of Europe Consultative Council of European Judges, 2002-2010. Member of the European Consumer Law Group 1977-1996. Member of the Wissenschaftlicher Beirat des Zentrum für Europäisches Rechtspolitik an der Universität Bremen 1986-1991.



Benedicte Federspiel

Law Degree, Copenhagen University

Danish Embassy, London / Danish Consulate General, New York

The Danish Consumer Council (Forbrugerrådet): Head of Legal / Economic Department; Executive Director;

Chief Counsel

The European Consumers' Organisation, BEUC: Member of the Executive; Treasurer; President; Vice-President

Consumers International: Member of the Executive; Honorary treasurer; Member of the Council; Chairman of Membership Committee

ECCG, the Consumer Committee of the European Commission: 1973-Member President

The European Economic and Social Committee: 2006- Member; 2015-Vicepresident of Gr. III, President of the Trade Group

1998- TACD, the Trans Atlantic Consumer Dialogue: Member of the EU Board.

2014- Member of the Expert Group of DG trade

President of ANEC, the European Organisation for Consumer influence in standardisation and certification; 2006- Treasurer

Member of several boards and committees in ministries and agencies in Denmark and of committees of Nordic, European and international organisations.

She has long-term experience regarding projects at the Nordic and European level, and participated in projects in Latvia, Lithuania, the Czech Republic, Bulgaria, Poland and Slovenia.



Ludwig Krämer

Studies of law and history in Kiel, München and Paris (ENA). Judge at the Landgericht Kiel (1969 till 2004). Official of the Commission of the European Community, consumerdepartment (1972 till 1984 and subsequently environmental department (1984 till 2004).

Retired from both functions.

LL.D University Hamburg on EEC Consumer Law (in German). Lecturing activity on EU consumer and environmental law in more than 60 European and North American universities.

Since 2005, Director of the environmental law consultancy “Derecho y Medio Ambiente” in Madrid. Visiting Professor at University College London.

Specialisation: EU environmental law; publication of some 20 books and more than 270 articles on that subject.

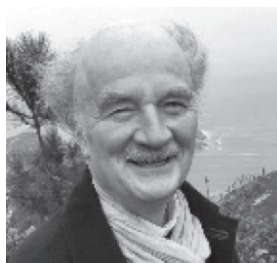


Ewa Łętowska

Professor Ewa Łętowska, judge emeritus of the Polish Constitutional Tribunal, doctor honoris causa of Gdańsk University, Warsaw University and the Maria Grzegorzewska University in Warsaw, a full member of the Polish Academy of Science, a corresponding member of the Polish Academy of Learning, and the first Pol-

ish parliamentary ombudsman (1988 – 1992).

Associated with the Legal Science Institute of the Polish Academy of Science, she specialised in civil law (including consumer protection), constitutional law and human rights. She has authored books, articles, essays and columns relating to law (mainly constitutional, private and human rights).



Hans-W. Micklitz

Since 2007 Professor for Economic Law at the European University Institute, Jean Monnet Chair of Private Law and European Economic Law at the University of Bamberg (emeritus). Head of the Institute of European and Consumer Law (VIEW) in Bamberg. Studies of law and sociology in Mainz, Lausanne/Geneva (Switzerland), Giessen and Hamburg. Consultancies for OECD in Paris, UNEP Geneva Switzerland/Nairobi Kenya and CI (Consumers International) Den Haag Netherlands/Penang Malaysia. Study visits at the University of Michigan, Ann Arbor, Jean Monnet Fellow at the European University Institute Florence, Italy, visiting professor at the Somerville College at the University of Oxford, co-founder of the Centre of Excellence at the University of Helsinki. Holder of an ERC Grant 2011-2016 on European Regulatory Private Law. Finland Distinguished Professor of the Academy of Finland 2016-2020, Consultancies for ministries in Austria, Germany, the UK, the European Commission, OECD, UNEP, GIZ, non-governmental organisations.



Thom van Mierlo

Thom van Mierlo (1951) is a consumer law expert and a consumer member of the European Economic and Social Committee. He has been Secretary consumer affairs at the Social and Economic Council (SER) in the Netherlands from 1982 until his retirement in 2015. See from his hand: 'Self-regulation in the consumer

field: the Dutch approach' in https://www.eesc.europa.eu/sites/default/files/resources/docs/dutch_approach_2011_def_5_09082011.pdf Before that he was Secretary consumer affairs at the Dutch Standardization Institute (NEN). Van Mierlo studied at Leyden University and the College of Europe in Bruges.

At the EUI-conference he suggested to come to a European digital time-line with highlights in the history of European and national consumer law. As a follow-up to that he has published a draft for a Dutch Consumer Canon in: Crown Jewels for Consumers in the 1992 Civil 265 Code: the Making of Consumer Law in the Netherlands, *Journal of European Consumer and Market Law*, 2018-01. See here his extended update from May 2019.



Niklas Olsen

Niklas Olsen is associate professor at the SAXO-Institute (History Section), University of Copenhagen, and Chair of the Center of Modern European Studies also at the University of Copenhagen. He graduated at the University of Copenhagen and wrote his PhD at the European University Institute in Florence. Among other things, he is the author of *History in the Plural: An Introduction to the Work of Reinhart Koselleck* (Berghahn Books 2012, paperback version 2014) and *The Sovereign Consumer: A New Intellectual History of Neoliberalism* (forthcoming with Palgrave Macmillan). He has also moreover edited volumes about the memory of '68' in Denmark, twentieth century German intellectuals, the challenge posed to Danish Universities by National Socialism in the 1930s and 1940s, and critical theories of crisis in Europe.



Iain Ramsay

Professor Iain Ramsay (LL.B. Hons, Edinburgh, 1971) LL.M. (McGill University, Montreal, 1973) is currently (since 2007) Professor of Law at the University of Kent, Canterbury, UK. His primary contemporary areas of research are regulation of consumer credit markets and personal insolvency. During the 1970s he taught in Canada and from 1981-1986 at the University of Newcastle upon Tyne, England. During this period he acted as a consultant for the National Consumer Council, and the Office of Fair Trading which published his paper *Rationales for Intervention in the Consumer Marketplace* (1984). From 1986-2007 he was a Professor at Osgoode Hall Law School, York University, Toronto, Canada. He has published extensively on consumer law and policy. His books include *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3d ed, 2012); *Advertising Culture and the Law* (1996) and *Personal Insolvency Law in the 21st Century: A Comparative Analysis of the EU and Europe* (2018). He acted as a consultant to Federal and Provincial governments in Canada on topics such as advertising regulation, the alternative consumer credit market, and small claims courts.

He has also advised international and national NGOs on consumer law and policy and presented his work to the OECD Committee on Consumer Policy. He was a member of the Canadian Federal Task Force on Personal Insolvency 2000-2003, and President of the International Association of Consumer Law, 2003-2007. He is a co-drafter of the World Bank, *Report on the Treatment of the Insolvency of Natural Persons* (2013) and is an elected member of the American Law Institute and the International Insolvency Institute.



Maria Reiffenstein

Maria Reiffenstein, born 1959. Studied Philosophy and German Literature in Graz/Austria (Dr. phil) and Law (Graz and Vienna/Austria). 1987/1988 Research Associate at University Vienna (Institute Philosophy of Law). Since 1990 civil servant in the public administration in the field of Consumer Policy, since 2009 General

Director of the Consumer Protection Directorate of the Federal Ministry of Labour, Social Affairs, Health and Consumer Protection.

Co-Publisher (together with Beate Blaschek) of the Annual Consumer Policy Journal (Konsumentenpolitisches Jahrbuch).

Thomas Roethe

Thomas Roethe, born August 22. 1943

Education

Dissertation: Department of Sociology, University of Dortmund. Advisor:
Title of dissertation: "Acht exemplarische Fallanalysen zur These von den
zwei politischen Kulturen." Summa cum laude.

Dissertation grant by the Max-Planck-Institut für Bildungsforschung.

Diploma: Master's thesis: 'Die Familie als sozialer Ort der Konstruktion
sozialer Wirklichkeit.'

Scientific assistant of the Max-Planck-Institut für Bildungsforschung in
Berlin in the research project "Elternhaus und Schule". Scientific col-
laborator at Pädagogisches Zentrum, Berlin.

Studies of Sociology, Political Science, Ethnology, Psychology and Phi-
losophy at the Free University of Berlin.

Taking up the study of Economics, Sociology (Staatswissenschaften) at
Ludwig-Maximilians-University, Munich.

Career

Legal sociologist at EUI Firenze. Research and methodology in the
ERPL-project

Project management BEBRAG GmbH, "Aesthetic Renovation of Historical
Apartment Houses" in Berlin.

Senior Researcher at VIEW Berlin. Concentration on Consumer Protec-
tion and Consumer Law in the perspective of legal sociology. Empirical
studies in the field of risk assessment in consumer protection. Studies
on the establishment of consumer protection regulations throughout the
EEC/EU; after 1989 in Eastern Germany and Poland, Hungary, Bulgaria,
Slovakia, Albania, Serbia and Baltic States. Studies on Financial Service
and indeptedness.

Research Associate at the European University Institute, Florence. Em-
pirical studies on comitology in the food-stuff area.

Legal sociological researcher at ZERP, Bremen. Focus: Methods and
means of qualitative research in consumer protection, transformation
of consumer law into action, administrative and consumer behaviour,
formal and informal strategies enforcing consumer protection. Divorce
law and ADR.

Manager and owner of two Art Galleries in Hannover and Braunschweig.

Legal sociologist researcher at the Law Faculty, University of Hannover.

Assistant at the Department of Sociology and Social Sciences at the
Johann-Wolfgang-Goethe-University, Frankfurt.

Assistant at the Department of Sociology, University Dortmund.



Bob Schmitz

Bob Schmitz, a Luxembourg citizen with a French law degree (Strasbourg 1974) and a post-graduate EU law diploma from College of Europe (Bruges 1975).

Active in EU public & regulatory affairs in Brussels since 1976.

Legal counsel of EU consumer association BEUC (1983 -89).

Manager regulatory affairs Coopers & Lybrand European Office (1989-90).

Senior consultant PRP (Public Relations Partners) (1991-97).

Own EU regulatory affairs consultancy since 1998 (Cabinet Bob Schmitz).

Expertise : consumer affairs, environmental/packaging policy,
air transport, competition law, free movement of goods.

Counsel Union Luxembourgeoise des Consommateurs (ULC) / EU delegate ;

Member European Consumer Consultative Group (ECCG) ;

Member Commission Fitness Check Stakeholders Group on EU consumer
& marketing law ;

Member Commission Expert Group on European Contract Law (CESL) ;

Member Commission Multi-stakeholder Dialogue on Green Claims ;

Member Advisory Council TRUSTED Shops GmbH.



Alex Schuster

Alex Schuster was elected as a Foundation Scholar of Trinity College Dublin in 1976. He is currently an assistant professor in the Law School at Trinity College. He introduced Consumer Law as an academic discipline in Ireland in 1981 and he lectures EU Consumer Law on the LL.M. course at Trinity (in addition to courses on both EU Competition Law and Comparative Product Liability). Back in 2004, he co-authored a textbook on Sport and the Law. Over the course of the past decade, eleven of his postgraduate students have secured doctorates under his supervision, three in the field of Consumer Law.

Alex Schuster was elected to membership of the European Consumer Law Group in 1983 and remained a member for three decades, until its disbandment in the early naughties. A former executive director of the Irish Centre for European Law (from 1991 to 1997), he subsequently served as a member of the Consumer Strategy Group (2004 to 2006) and on the Board of the National Consumer Agency (2007 to 2008).

Alex Schuster practised as a barrister for almost fifteen years (between 1995 and 2010) appearing as junior counsel in *M & J Gleeson v Competition Authority* (1999), and as sole counsel in both *Novartis v. The Controller of Patents, Designs and Trademarks* (2007) and *Commission v British Steel* (1997) (a case on State Aid decided by the General Court in Luxembourg). His article on “Tortious Liability for Defective Pharmaceutical and Medical Products” is published in the fourth volume of the 2011/2012 Quarterly Review of Tort Law.



Jules Stuyck

Jules Stuyck graduated in law from the Catholic University Leuven, where he also obtained his Ph.D on “Aggressive Sales Methods” (a comparative study of the law of the original 6 Member States of the European Community) in 1975. Jules is an emeritus professor of top European universities: KU Leuven (Catholic University Leuven) (BE) and Raboud Universiteit Nijmegen (NL). He is a guest professor at Université Panthéon-Assas Paris 2 (FR), and former guest professor at Central European University Budapest (HU). He is also the director and chair of Alancora Société De Gestion SA, a statutory manager of KBC Ancora SCA, and he is chair of the SELDIA (the direct selling association) Code Administrator.

Currently Jules Stuyck is a senior counsel in Crowell & Moring’s Brussels office and is a member of the firm’s Antitrust and Advertising & Product Risk Management groups. Jules is an experienced litigator, focusing on European competition law, intellectual property, and market practices. He counsels clients on state aid, the customs union, free movement, public procurement, trademark and trade practices law, media law, and environmental law.

Jules is a leading authority on Belgian and European antitrust/competition law, offering more than three decades of experience as a practitioner, government adviser, and law professor. He has advised on European sales law and has on several occasions been invited by the European Parliament’s Committee on Internal Market and Consumer Protection to offer his perspective on unfair trading practices, consumer law, sales law, and internal market issues.



Luboš Tichý

Luboš Tichý studied law, economics and political science at the Law Faculty of Charles University Prague and at Heidelberg University in Germany. He also completed a residency at the Max Planck Institute for Foreign and International Private Law in Hamburg, Swiss Institute for Comparative Law, at the Comparative Law Institute in Lausanne, and the Academy of International Law at The Hague, and as a research scholar at the University of Michigan in Ann Arbor (1992). Before he became the director of the Centre for Comparative law (2009), he chaired the Department of Community law at the Law Faculty of Charles University in Prague (1993-2009). Professor Tichý is a member of the European Group on Tort and Insurance Law that published the Principles of European Tort Law; a member of the Study Group on European Civil Code, and a member of the Board of ASCOLA. He is also a member of the advisory board of the European Revue of Private Law, the Zeitschrift für Europäisches Privatrecht and the European Review of Tort Law. Professor Tichý was formerly employed by the Federal Legislative Council of Czechoslovakia and his previous employment history includes serving as a legal adviser to the Federal Minister of Foreign Affairs and an adviser to the president of the Czech National Counsel. He is the former president of the Czech Bar Association.



Henri Temple

Henri Temple (born 1 November 1945 in Montpellier, France), is a French professor, lawyer, philosopher and politician. He received a Doctor of Juridical Science from University of Montpellier I with a thesis, “Les Sociétés de fait” (Partnerships by conduct or by estoppel)

In 1975, with Jean Calais-Auloy, he cofounded the first Centre of research in consumer protection. From 2000 to 2012, he became the direction of this Centre. He was also an expert close to the United Nations and European Union. He taught in Côte d’Ivoire, United Kingdom, Belgium, Romania, Brasil, Algeria, Spain, Italy.

He is an international expert specialised in Economical Law and économics.



Klaus Tonner

Klaus Tonner is born in Hamburg, Germany in 1947. After studying law in Frankfurt am Main and Berlin he was lecturer in law at the Hochschule für Wirtschaft und Politik in Hamburg from 1972 to 1994. In 1980 he passed his doctorate (Dr. jur.) at the University of Hamburg.

In 1991 he completed his Habilitation at the University of Bremen. In 1994 Klaus Tonner became holder of the Jean-Monnet-Chair for Private Law and European Law of the Law Faculty of the University of Rostock until his retirement in 2012. 2006 – 2012 he was part time judge at the Oberlandesgericht (Higher Regional Court) Rostock..

Klaus Tonner was Chairman of the Verbraucherzentrale (Consumer Centre) Hamburg (1993-1997), Vice President of the Deutsche Gesellschaft für Reiserecht (German Society for Travel Law). He is Vice President of the International Forum of Tour and Travel Advocats (IFFTA) and co-editor of the legal journals “Verbraucher und Recht” and “Reiserecht aktuell”..

He published on consumer law, in particular on travel law. Main publications: Reiserecht in Europa, 1992; Das Recht des Time-sharing, 1997; Der Reisevertrag, 5. ed. 2007; Vertragsrecht – Kommentar, 2010 (co-editor with Armin Willingmann and Marina Tamm); Verbraucherrecht – Beratungshandbuch, 2nd ed. 2016 (co-editor with Marina Tamm); Schuldrecht: Vertragliche Schuldverhältnisse 4th ed. 2015; Das neue Schuldrecht: Verbraucherrechtsreform 2014 (co-editor with Tobias Brönneke); Online-Vermittlungsplattformen in der Rechtspraxis, 2018 (co-editor with Peter Rott).



Claudius Torp

Claudius Torp is a researcher in modern history at the Universität Kassel, Germany. He is currently working as the Principal Investigator of a project funded by the German Research Foundation (2016-2019) which is entitled “Piano Culture and Cosmopolitanism. A Global History of Keyboard Instruments, c. 1850-1930.”

Having studied history and philosophy, Claudius Torp earned his Dr. Phil. as a researcher at the Collaborative Research Centre “The Political as Communicative Space in History“ from the Universität Bielefeld in 2009. Then he spent a year as a Max Weber Fellow at the European University Institute in Florence, and served as an Assistant Professor of modern history for six years at the Universität Kassel.

His research interests are in modern German history, the history of consumption, and the global history of music. His dissertation on the history consumer policy in the Weimar Republic, published by Vandenhoeck & Ruprecht (*Konsum und Politik in der Weimarer Republik*, Göttingen 2011), tells the story of a politicized consumer society in crisis. A second book unravels different strands of consumer politics over the twentieth century (*Wachstum, Sicherheit, Moral. Politische Legitimationen des Konsums im 20. Jahrhundert* (Göttingen: Wallstein, 2012). Most recently, he co-edited the special issue “Cultural Brokers and the Making of Glocal Soundscapes, 1880s to 1930s”. *Itinerario. International Journal on the History of European Expansion and Global Interaction* 40. 2017, No. 2 (Cambridge University Press).



Aneta Wiewiórowska

Aneta Wiewiórowska – Domagalska, PhD, Akademische Rätin a. Z. in the Chair of Civil Law, European Private and Commercial Law, Comparative Law and European Legal History at Osnabrück University. She holds a PhD from Utrecht University. She participated in the work of the Working Group for a European Civil Code (Dutch team). In Poland, she worked for the Polish Civil Law Codification Committee (consumer and civil law reform) and the Polish Ministry of Justice (negotiations of private law instruments in the European Council and the legislative process at a national level). At the moment, Aneta is one of the reporters in the ELI project on Online Intermediary Platforms and is working towards preparing her habilitation. She is an expert in private, consumer and European law.



Thomas Wilhelmsson

Chancellor, Professor (emeritus) Thomas Wilhelmsson (born in 1949), Doctor of Legal Science, was 1982 appointed Professor of Civil and Commercial Law at the University of Helsinki, Finland. He was 1998-2008 Vice-rector of the University, in charge of international affairs, 2008-2013 Rector, and 2013-2017 Chancellor of the University. As rector he led

a thorough university reform, converting the University from a state office into an independent public law legal person. He was 2010-2013 Vice Chair of the Finnish university association UNIFI and 2012-2013 President of the Scandinavian university association NUS. Since 2015 he is chairing the board of the Finnish public broadcasting company YLE. Since 2018 he is also chairing the board of Åbo akademi university.

As researcher professor Wilhelmsson has published books and articles in thirteen languages in contract law, insurance law, consumer law, the law of partnerships, tort law, European law and legal theory. He is internationally best known for his works on social justice in private law (in English: *Critical Studies in Private Law*, 1992 and *Social Contract Law and European Integration*, 1995) and on European consumer law (co-author of *EC Consumer Law*, 1997, *European Fair Trading Law*, 2006, and *Rethinking EU Consumer Law*, 2017). Recently he has been engaged in analysis of new trends of private law in postmodern society as well as in the debate on harmonization of contract law in Europe. For ten years (1980-1990) he was a member of the Finnish Market Court and he has been actively engaged in national and international commercial arbitration. He was a member of the Commission on European Contract Law (the Lando-Commission) and the Acquis group. He has been chairing several law drafting committees, dealing with reforms of consumer law, contract law as well as partnership law. He has been awarded the title Doctor iuris honoris causa by the Uppsala, Oslo and Tartu universities. He was awarded the Nordic Lawyers Prize in 2011.

ISBN: 978-92-9084-782-3
doi:10.2870/392562
QM-01-19-608-EN-N