COMPETENCE REVIEW EXERCISE
EU CONSUMER LAW AND POLICY

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Introduction

> 'While consumer protection has long been an established fact in the Member States of the Community, the concept of a consumer policy is relatively recent. It has developed in response to the abuses and frustrations arising at times from the increased abundance and complexity of goods and services afforded the consumer by an ever-widening market. Although such a market offers certain advantages, the consumer, in availing himself of the market, is no longer able properly to fulfil the role of a balancing factor. As market conditions have changed, the balance between suppliers and customers has tended to become weighted in favour of the supplier. The discovery of new materials, the introduction of new methods of manufacture, the development of means of communication, the expansion of markets, new methods of retailing — all these factors have had the effect of increasing the production, supply and demand of an immense variety of goods and services. This means that the consumer, in the past usually an individual purchaser in a small local market, has become merely a unit in a mass market, the target of advertising campaigns and of pressure by strongly organized production and distribution groups. Producers and distributors often have a greater opportunity to determine market conditions than the consumer. Mergers, cartels and certain self-imposed restrictions on competition have also created imbalances to the detriment of consumers.'[1]

This picture of the consumer as the 'weaker party' to a commercial transaction remains at the heart of EU consumer law and policy. It is perhaps arguable that imbalances have become even more pronounced in light of the fact that trade practices, contractual terms, consumer credit… have all developed. Furthermore, as consumer expenditure accounts for 56 % of EU GDP and is essential to meeting the Europe 2020 objective of smart, inclusive and sustainable growth,[2] the case is stronger than ever to ensure that consumers are well informed and their rights adequately protected.

This report focuses on the development (I) and the limits (II) of EU consumer law and policy. It certainly does not purport to act as a comprehensive guide to this area of law, though it offers some suggestions for further reading for those interested in gaining a more in-depth understanding.

[1] 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 92/2, at paragraphs 6 of the Annex.
[2] Consumer Agenda 2014-2020, COM(2012) 225 final, at page 2.

I. The development of EU Consumer Law and Policy – From Rome to Lisbon

The Treaty of Rome and its isolated references to 'consumers'

The Treaty of Rome referred on five occasions to 'consumers': in Articles 39(1)(e) and 40(3) on the Common Agricultural Policy; in Articles 85(3) and 86(b) on Competition Policy; and in Article 92(2)(a) regulating state aids. However, these references were scattered in different policy chapters of the Treaty, and could not as such be interpreted as defining any EU consumer law and policy. These references, which remain essentially unmodified in the Treaty on the Functioning of the European Union (TFEU),[3] illustrate a recurring theme in EU consumer law and policy: namely, that consumer protection requires a horizontal, integrated approach covering a broad range of policy areas, including (among others) the Common Agricultural, Competition and State Aids Policies.

These isolated references also show a lack of engagement of the Community in its early days with consumer protection. When it was adopted in 1957, the Treaty of Rome contained no provision specifically dedicated to the protection of consumers, and in particular no legal basis for the adoption of EU measures in this policy area. The general assumption at the time was that consumers would benefit from free trade: a larger market would lead to more competition which would, in turn, increase consumer choice and lower prices whilst improving the quality of consumer products and services. Thus, from this perspective, economic integration in Europe can in itself be seen as a form of consumer policy, even though it has not been explicitly presented as such by the Treaty.[4] In the absence of a specific legal basis allowing for the adoption of consumer protection measures, the Community's intervention in this policy area could only be indirect, largely through the case law of the Court of Justice of the European Union (the CJEU or the Court).

A growing awareness of the need to protect consumers at EU level

The fact that the original EU Treaty did not contain any specific provision on consumer protection began to be seen as unsatisfactory. In particular, what was then Article 2 EEC provided that one of the tasks of the Community was 'the constant improvement of the living and working conditions' of the peoples constituting the Community'. The question whether this objective should have led to the development of an EU consumer policy did not reach unanimous agreement. It did however prompt the Heads of States and Governments, gathered at the Paris Summit in October 1972, to discuss the need to promote the more social dimension of the Community. They identified the need to accompany the free movement provisions of the Treaty with provisions intended to protect consumers (as well as the environment and health and safety at work) from market failures and the risk derived from the deregulation induced by free trade. For example, if goods can move freely from one Member State to another, it is necessary to ensure that these goods are safe for consumption across the Community. Free movement must be made conditional on certain consumer protection standards being complied with. These discussions were followed by the adoption of a Council Resolution on 14 April 1975.[5] This Resolution is important as it was the first to

[3] They have however been renumbered twice, once by the Treaty of Amsterdam and once by the Treaty of Lisbon. Their current version is now found in Articles 39(1)(e) and 40(2), Articles 101(3) and 102(b) and Article 107(2)(a) respectively.

[4] S. Weatherill, *EU Consumer Law and Policy* (Elgar Publishing, 2nd edition, 2013), at page 8.

[5] Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a

state what consumer interests should entail and therefore set the tone of what EU consumer law and policy would subsequently become. In particular, Point 3 of the Annex identified five key principles and areas of intervention which very much remain at the heart of EU Consumer Law and Policy today:

1. The right to protection of health and safety
2. The right to protection of economic interests
3. The right of redress
4. The right to information and education
5. The right of representation (the right to be heard)

The consumer is considered as a person affected by the different aspects of economic and social developments, rather than merely a by-product of the common market. He is thus 'no longer seen merely as a purchaser and user of goods and services for personal, family or group purposes, but also as a person concerned with the various facets of society which may affect him either directly or indirectly as a consumer'.[6] However, Point 3 was supplemented by Point 4 which stated that no consumer protection policy existed in the EU independently of other specific EU policies.[7] In other words, the Resolution of 14 April 1975 did not propose to introduce a new chapter of EU competence.

Despite its symbolic importance, this Resolution did not give rise to a significant body of legislation in the years that followed its adoption. Overall, very few measures were adopted on the basis of this first programme of action, and they were in any event limited to rather narrowly defined sectoral measures. One of the most significant arguably was Directive 79/112 on the labelling of foodstuffs.[8]

The Council Resolution of 19 May 1981 that followed laid down a second European consumer protection programme. This Resolution reiterated the five basic consumer rights laid down in the Resolution of 14 April 1975, emphasising that they should be effectively protected.[9] The subsequent Council Resolution of 15 December 1986 further noted that it was 'desirable that in achieving the internal market, the Community take measures allowing a high level of consumer protection'. In particular, it insisted on the importance of informing and educating consumers in order to allow them to enjoy the benefits that the common market offered them.[10]

In the late 1970s and 1980s, a range of directives were adopted on the basis of what is now Article 115 TFEU (ex-Article 100 EEC, which became Article 94 EC following the entry into force of the Amsterdam Treaty). At the time, this provision was the main legal basis available

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consumer protection and information policy, OJ 1975 C 92/2.

[6] Point 3.

[7] Point 4:'All these rights should be given greater substance by action under specific Community policies such as action under specific Community policies such as the economic, common agricultural, social, environment, transport and energy policies, as well as by the approximation of laws, all of which affect the consumer's position'.

[8] OJ 1979 L33/1. The Food Labelling Directive was amended on several occasions before being recently replaced by Regulation 1169/2011 on the provision of food information to consumers: OJ 2011 L 304/18.

[9] Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy, OJ 1981 C 133/1.

[10] Council Resolution of 23 June 1986 concerning the future orientation of policy of the European Economic Community for the protection and promotion of consumer interests, OJ 1986 C 167/1.

to EU institutions for the adoption of internal market measures and was relied upon for the adoption of the following consumer protection measures:

- Directive 84/450 on misleading advertising,[11] which has since been repealed by Directives 2005/29 and 2006/114[12]
- Directive 85/374 on defective product liability[13]
- Directive 85/577 on contracts negotiated away from business premises (often referred to as the Doorstep Selling Directive),[14] which has now been repealed by Directive 2011/83 on consumer rights[15]
- Directive 87/102 on consumer credit,[16] which has been repealed by Directive 2008/48[17]

The adoption of this body of EU legislation was supplemented by significant rulings of the CJEU. Of seminal importance for consumer protection is the Court's decision in the *Cassis de Dijon* case.[18] It involved the compatibility with the free movement of goods provisions of the Treaty of a German rule requiring, on *inter alia* public health and consumer protection grounds, that only alcoholic beverages having a wine-spirit content of at least 32% per volume could be marketed as liqueurs in Germany. The Court held that this measure was indirectly discriminatory and, as such, restricted the free movement of goods within the EU. However, it continued:

> 'In the absence of common rules relating to the production and marketing of alcohol […] it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory.
>
> Obstacles to movement in the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.'[19]

Three important points come out of this ruling. Firstly, the Court confirmed that consumer protection was a mandatory requirement which Member States could invoke to justify national rules restricting the free movement of goods. However, and secondly, this freedom is subject to a proportionality test: Member States can only impose restrictions which are 'necessary' to fulfil the consumer protection objective they pursue. It is on this count that Germany lost the case: a label indicating the alcoholic content of a given beverage would have been sufficient to make consumers aware of the nature of the goods they might have considered purchasing; a marketing ban was excessive and thus unduly restricted the free movement of goods.[20] Thirdly, Member States may only impose national rules 'in the

[11] OJ 1984 L 250/17.
[12] OJ 2005 L 149/22 and OJ 2006 L 371/21 respectively.
[13] OJ 1985 L 210/29.
[14] OJ 1985 L 372/31.
[15] OJ 2011 L 304/64.
[16] OJ 1987 L 42/48.
[17] OJ 2008 L 133/36.
[18] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.
[19] At paragraph 8.
[20] The Court's case law interpreting the general free movement provisions of the TFEU and its relevance to

absence of common rules', i.e. when the EU itself has not adopted regulatory measures at EU level which bind all Member States.[21] Similarly, in relation to services, Member States can invoke consumer protection imperatives as a ground for derogating from the free movement provisions.[22]

The introduction of qualified majority voting and its importance to the development of EU consumer law and policy

It is only with the adoption of the Single European Act that the EU started to recognise consumer protection as one of its objectives in the Treaty itself. However, it did not do so by inserting a new title on consumer protection – contrary to what it did for health and safety at work and environmental protection. Rather, it introduced Article 114 TFEU into the Treaty (ex-Article 100a EEC, ex-Article 95 EC) which empowers the EU to adopt harmonising measures to facilitate the establishment and functioning of the internal market. In its third paragraph, Article 114 specifically requires that the EU shall take as a base a high level of consumer protection when harmonising the laws of the Member States on the basis of Article 114(1). This amounts to saying that trade liberalisation and consumer protection must work hand in hand and that the former should not be pursued to the detriment of the latter.

Another significant novelty of the Single European Act was the introduction of qualified majority voting (QMV) as a new voting procedure. Article 114 TFEU, in contrast to Article 115 TFEU, does not require unanimity. Following subsequent Treaty amendments, QMV has been extended to a range of policies and has now become the norm rather than the exception,[23] though unanimity voting remains in place for certain areas of EU competence.[24]

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consumer protection is vast and cannot be discussed at any length in this report. For a recent analysis, see also P. De Sousa, 'Negative and Positive Integration in EU Economic Law: Between Strategic Denial and Cognitive Dissonance', *German Law Journal* 13 (2012) 979. On the principle of proportionality, see T. Tridimas, *General Principles of EU Law* (Oxford University Press, 2nd edition, 2006), chapter 4.

[21] On the relationship between the free movement of goods and consumer protection, see S. Weatherill, *EU Consumer Law and Policy* (Elgar Publishing, 2nd edition, 2013), at page 29. On the law on the free movement of goods more generally, see C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press, 4th edition, 2013), and P. Oliver et al., *Oliver on the Free Movement of Goods in the European Union* (Hart, 5th edition, 2010).

[22] The Court has interpreted the Treaty provisions on the freedom to provide services as entailing the freedom to receive services: see in particular Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377 and Case 186/87 *Cowan* [1989] ECR 195. One of the consequences of this interpretation is that consumers can travel in the EU and exercise their right to free movement, and they benefit from entry, residence and non-discrimination rights in other Member States, as per the EU Treaties and relevant EU legislation, as interpreted by the Court: relevant legislation includes in particular Directive 2004/38 on EU citizenship (OJ 2004 L 158/77) and Directive 2006/123 on services in the internal market (OJ 2006 L 376/6). On the relationship between the free movement of services and consumer protection, see S. Weatherill, *EU Consumer Law and Policy* (Elgar Publishing, 2nd edition, 2013), at page 29. On the law on the free movement of services more generally, see C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press, 4th edition, 2013).

[23] Article 238 TFEU provides that QMV is the rule, except when otherwise provided.

[24] This is in particular the case for the harmonisation of taxation measures adopted on the basis of Article 113 TFEU. For example, the EU has adopted minimum rates of excise duties on cigarettes, alcoholic beverages and environmental emissions. Even though these measures were not adopted with consumer protection concerns in mind, they can be useful instruments for such protection. The rates and structures of the minimum excise duties applicable are set in sectoral directives. For alcoholic beverages, see Directive 92/83, OJ 1992 L 316/21, and Directive 92/84, OJ 1992 L 316/29. For manufactured tobacco products, see Directive 92/79, OJ 1992 L 316/8, Directive 92/80, OJ 1992 L 316/10, and Directive 95/59, OJ 1995 L 291/40 – these three directives have been more recently amended by Directive 2010/12, OJ 2010 L 50/1;

The procedure of QMV voting allows for the adoption of a legislative proposal if a certain majority of votes is cast in favour of the proposal in question.

The triple threshold for QMV:

Until 31 October 2014, a qualified majority is achieved if (1) a simple majority of Member States casts (2) at least 255 votes[25] in favour of the measure and (3) if these Member States represent at least 62 % of the population of the Union. These three requirements, which have to be fulfilled cumulatively, constitute the so-called triple threshold which is needed for a measure to be adopted.[26]

From 1 November 2014 onwards, 'a qualified majority shall be defined as at least 55 % of the members of the Council, comprising of at least fifteen of them and representing Member States comprising of at least 65 % of the population of the Union. A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained'.[27]

The advent of QMV clearly reinforces the supranational nature of the Union's legal order, insofar as Member States may be bound by an EU measure which they have voted against. At the same time, however, the introduction of QMV in Council has reinforced the role of the CJEU in arbitrating disputes relating to the scope of EU powers. This is logical: before QMV was introduced, Member States could avoid being bound by a given legislative act by simply vetoing its adoption. This is no longer possible given that QMV has become the rule for the adoption of a growing body of EU law. Hence, the only alternative left to an outvoted Member State is to challenge the validity of the unwanted measure before the Court via a judicial review action[28] on grounds of: lack of competence, fundamental procedural shortcomings (e.g.: adoption of the wrong legislative procedure, failure to state reasons), failure to exercise EU powers in conformity with the principles of subsidiarity or proportionality, breach of fundamental rights... The Court's case law is discussed more fully below.

Since the introduction of QMV, many legislative measures have been adopted on the basis of Article 114 TFEU. The most significant are:

- Directive 90/314 on package travel[29]
- Directive 93/13 on unfair contract terms[30]
- Directive 97/7 on distance selling,[31] repealed by Directive 2011/83[32]

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moreover, in the interest of clarity and rationality, these directives on tobacco excise duties have been codified by Directive 2011/64, OJ 2011 L 176/24. For carbon emissions, see Council Directive 2003/96, OJ 2003 L 283/51. Common provisions have also been adopted on the control, holding and movement of duty-suspended products in Directive 92/12, OJ 1992 L 76/1, and Directive 2008/118, OJ 2009 L 9/12.

[25] Each Member State has between 4 and 29 votes, depending in part on the size of their population: see Article 3(3) of the Protocol (N° 36) on Transitional Provisions, OJ 2008 C 115/201.

[26] Article 16(5) TEU read together with Article 3(3) of the Protocol (N° 36) on Transitional Provisions, OJ 2008 C 115/201.

[27] Article 16(4) TEU.

[28] Article 263 TFEU.

[29] OJ 1990 L 158/59.

[30] OJ 1993 L 95/29.

- Directive 1999/44 on consumer sales and guarantees[33]
- Directive 2001/37 on tobacco products[34]
- Directive 2001/83 on medicinal products for human use[35]
- Directive 2001/95 on general product safety[36]
- Regulation 178/2002 on food safety[37]
- Directive 2003/03 on tobacco advertising and sponsorship[38]
- Regulation 2006/2004 on the cooperation of national consumer protection enforcement authorities[39]
- Directive 2005/29 on unfair commercial practices[40]
- Directive 1924/2006 on nutrition and health claims made on foods[41]
- Directive 2008/48 on consumer credit[42]
- Directive 2008/122 on timeshare[43]
- Directive 2009/22 on injunctions for the protection of consumers' interests[44]
- Regulation 1169/2011 on the provision of food information to consumers[45]
- Directive 2011/83 on consumer rights[46]
- Regulation 531/2012 on roaming on public mobile communications networks within the Union[47]
- Regulation 524/2013 on online dispute resolution for consumer disputes[48]
- Directive 2013/11 on alternative dispute resolution for consumer disputes[49]

Sectoral measures have also been adopted on the basis of other harmonising provisions of the TFEU, and complement the body of laws intended to protect consumers across the EU. For example:

- *Services*: most notably Directive 2000/31 on electronic commerce;[50] Directive 2002/65 on distance selling of financial services;[51] Directive 2006/123 on services in the internal market;[52] Directive 2009/72 on the internal market in electricity;[53]

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[31] OJ 1997 L 144/19.
[32] OJ 2011 L 304/64.
[33] OJ 1999 L 171/12.
[34] OJ 2001 L 194/26 (currently under review).
[35] OJ 2001 L 311/67, as amended.
[36] OJ 2002 OJ 2002 L 11/4.
[37] OJ 2002 L 31/1.
[38] OJ 2003 L 152/16.
[39] OJ 2004 L 364/1.
[40] OJ 2005 L 149/22.
[41] OJ 2006 L 404/9, as last amended by Commission Regulation 116/2010, OJ 2010 L37/16.
[42] OJ 2008 L 133/66.
[43] OJ 2009 L 33/10.
[44] OJ 2009 L 110/30.
[45] OJ 2011 L 304/18.
[46] OJ 2011 L 304/64.
[47] OJ 2012 L 172/10.
[48] OJ 2013 L 165/1.
[49] OJ 2013 L 165/63.
[50] OJ 2000 L 178/1.
[51] OJ 2002 L 271/16.
[52] OJ 2006 L 376/6.
[53] OJ 2009 L 211/55.

Directive 2009/73 on the internal market in natural gas;[54] Directive 2010/13 on audio-visual media services;[55] – adopted on the basis of Articles 53(1) and 62 TFEU

- *Transport*: including Regulation 261/2004 on air passengers' rights;[56] Regulation 1371/2007 on rail passengers' rights;[57] Regulation 1177/2010 on the rights of passengers travelling by sea and inland waterway;[58] Regulation 181/2011 on the rights of passengers travelling by bus and coach transport[59] – adopted on the basis of Articles 91(1) and 100(2) TFEU

- *Justice*: not least Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, with Article 4 dealing specifically with consumer contracts;[60] Regulation 861/2007 on the European small claims procedure;[61] Directive 2008/52 on certain aspects of mediation in civil and commercial matters;[62] Regulation 593/2008 on the law applicable to contractual obligations, with Article 6 dealing specifically with consumer contracts[63] – adopted on the basis of Articles 67 and 81(2) TFEU

This increased legislative activity has taken place alongside the adoption of further policy statements which have increased the recognition that the EU had an important role to play in protecting consumer interests.[64]

The introduction of a new consumer protection title in the EU Treaties and its follow-up

The Treaty on the European Union, often referred to as the Maastricht Treaty, marks an important moment in the development of EU Consumer Law and Policy, as it inserts a new title on 'Consumer Protection', thus recognising that consumer policy should constitute a European policy in its own right. This title consists of one article only: Article 129a EEC, which then became Article 153 EC following the Amsterdam renumbering and has been Article 169 TFEU since the entry into force of the Lisbon Treaty.

This article is quoted in full in its current version and discussed at greater length in the second section of this report. At this stage, suffice it to say that Article 169 TFEU provides two avenues for the adoption of consumer protection measures at EU level. Firstly, it refers explicitly to Article 114 TFEU, thus confirming the strong relationship existing between EU consumer law and the objectives of EU market integration. Secondly, it provides an alternative legal basis which is independent of the internal market objective pursued by the EU.

[54] OJ 2009 L 211/94.
[55] OJ 2010 L 95/1.
[56] OJ 2004 L 46/1.
[57] OJ 2007 L 315/14.
[58] OJ 2010 L 334/1.
[59] OJ 2011 L 55/1.
[60] OJ 2001 L 12/1, to be replaced as of January 2015 by Regulation 1215/2012 (OJ L 351/1).
[61] OJ 2007 L 199/1.
[62] OJ 2008 L 58/3.
[63] OJ 2008 L 177/6.
[64] Shortly after the entry into force of the Single European Act, see in particular the Council Resolution of 9 November 1989 on future priorities for relaunching consumer protection policy (OJ 1989 C 294/1), followed by the three year action plan of consumer policy in the EEC (1990-1992): COM(90) 98 final.

Notwithstanding this new avenue, the legislative activity which followed the insertion of a specific title on consumer protection in the Treaty has continued to rest on Article 114 TFEU, rather than the alternative option opened up by Article 169 TFEU. To date, very few regulatory instruments have been adopted on the basis of Article 169(2)(b) TFEU: one could mention Directive 98/6 on the indication of the prices of products offered to consumers.[65] One should nonetheless also add that Article 169 is often mentioned alongside Article 114 in legislative instruments to clarify that they pursue consumer protection objectives.[66]

The insertion of a new head of EU competence in the field of consumer protection led to the establishment of the Directorate General for Health and Consumers (also known as DG SANCO, after the French acronym for 'Santé Consommateurs'). Moreover, it also provided the basis for the adoption of several consumer programmes, not least the two consumer strategies for 2002-2006 and for 2007-2013. In its 2002-2006 Strategy,[67] the Commission noted that consumers did not derive full benefit from the internal market and that it was therefore necessary *inter alia* to develop simpler and more uniform rules ensuring a high level of consumer protection and facilitating their enforcement throughout the Union, with the involvement of EU citizens through consumer organisations. The 2007-2013 Strategy[68] also emphasised the need 'to empower consumers, to enhance their welfare and to protect them effectively' by adopting a single set of uniform rules for their benefit and with a view to 'making the European Union a tangible reality for each European citizen through guaranteeing their rights as consumers in their everyday life' and contributing 'to alleviate social problems' and, thus, 'to a more cohesive society throughout the 27 Member States'.

One of the main themes to emerge from these two EU Consumer Protection Strategies is the Commission's explicit statement that consumers would benefit more fully from the internal market if the EU adopted uniform consumer protection rules. Such a statement marks a clear departure from the traditional approach characterising several EU consumer protection directives laying down minimum standards and therefore leaving a margin of discretion to Member States as to how they wanted to increase the protection provided to consumers on their territory. The preference has explicitly shifted for 'a uniform regulatory environment that is equally enforced across the European market'. The minimum *v* maximum harmonisation' debate is examined in more detail in the second part of this report.

The Lisbon Treaty and future prospects

[65] OJ 1998 L 80/27. See also Decision 3092/94 introducing a Community system of information on home and leisure accidents, OJ 1994 L 331/1, as amended. However, neither of these regulatory measures constitutes a significant contribution to EU consumer law and policy.

[66] To cite a few of the most significant examples, see: Directive 2001/95 on product safety (OJ 2002 L 11/4), Directive 2005/29 on unfair commercial practices (OJ 2005 L 149/22), and Directive 2011/83 on consumer rights (OJ 2011 L 304/64).

[67] Communication from the Commission of 7 May 2002 to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – 'Consumer Policy Strategy 2000-2006', COM(2002) 208 final.

[68] Communication of 13 March 2007 from the Commission to the Council, the European Parliament and the European Economic and Social Committee – 'EU Consumer Policy Strategy 2007-2013', COM(2007) 99 final.

Apart from notoriously renumbering all Treaty provisions for a second time,[69] the Treaty of Lisbon introduced Article 12 TFEU which places a duty on the EU to take consumer protection requirements into account in defining and implementing other Union policies and activities. The significance of this provision is discussed in the second section of this report. For the time being, we will simply note that it confirms the inherently multi-sectoral nature of consumer protection. This provision is reinforced by Article 38 of the EU Charter on Fundamental Rights which was proclaimed in 2000 and became legally binding when the Lisbon Treaty entered into force and which provides that 'Union policies shall ensure a high level of consumer protection'. Not only does the Charter require that the EU shall take into account consumer protection requirements into all its policies; it also requires that it shall ensure a 'high' level of protection.

In May 2012, the Commission published a Consumer Agenda for 2014-2020, which replaces the Consumer Strategy for 2007-2013.[70] This Agenda contains four main objectives to support the Europe 2020 Strategy:[71]

- Improving consumer safety so that consumers are protected from serious risks and threats that they cannot tackle as individuals
- Enhancing knowledge so that consumers can make choices, based on clear, accurate and consistent information
- Improving implementation, stepping up enforcement and securing redress access so that consumers have fast and efficient ways of resolving disputes with traders
- Aligning rights and key policies to economic and societal change so that consumers can access digital products and services easily, legally and affordably from anywhere in the EU

The first three objectives do not indicate any significant change of emphasis and have been priorities of EU intervention in the field of consumer policy over the last decades. By contrast, the fourth one is relatively new and shows a desire of the EU to act in areas of economic activity which are of primary concern to consumers, and in particular in relation to the food, energy,[72] financial, transport and digital markets. In particular, the Commission proposed, in January 2012, a Directive and a Regulation on data protection,[73] with a view to reinforcing the current EU data protection framework[74] by strengthening consumers' data protection rights in order to increase their trust in the Digital Single Market and in cross-border services.[75] Similarly, in October 2011, the Commission proposed a Regulation for a Common European Sales Law in order to overcome barriers resulting from divergent contract

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[69] Official Table of Equivalences as referred to in Article 5 of the Lisbon Treaty, OJ 2008 C 115/361, at footnote 25.

[70] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: A European Consumer Agenda – Boosting confidence and growth, COM(2012) 225 final.

[71] The Europe 2020 Strategy is the current EU's growth strategy. It is intended to help the EU become a smart, sustainable and inclusive economy and therefore help the EU and its Member States deliver high levels of employment, productivity and social cohesion. For more information on the Europe 2020 Strategy, see: http://ec.europa.eu/europe2020/index_en.htm.

[72] One should also note the potential of Article 194 TFEU to promote consumer interests. This new legal basis was introduced by the Lisbon Treaty to allow the EU to adopt a European energy policy.

[73] COM(2012) 10 final and COM (2012) 11 final, respectively.

[74] Directive 95/46 on the protection of personal data and their free movement, OJ 1995 L 281/31.

[75] For more information on this ongoing reform, see: http://ec.europa.eu/justice/newsroom/data-protection/news/120125_en.htm.

laws.[76] It would contain a single set of rules for sales contracts as well as for contracts governing digital content, which businesses and consumers could voluntarily choose to apply.[77]

Over the past fifty years, the EU has put in place a set of policies and rules in order to provide a high level of protection for EU consumers and to enable them to benefit from the social and economic progress Europe, and more specifically its internal market, has achieved. This has allowed consumer protection to gain far more visibility at EU level, even though the instruments which the EU has used to legislate in this field of EU competence have not changed significantly over the years. This field of EU regulatory intervention remains inextricably linked to the development of the EU internal market.

A taxonomy of EU consumer law and policy:

The EU regulatory intervention in the area of consumer protection reflects the diversity of consumer interests. The following discussion offers a snapshot of the different measures the EU has adopted to promote a high level of consumer protection in all its policies.[78] To do so, it classifies existing EU rules on consumer protection into four main headings:[79]

- Product safety
- Consumer information
- Consumer rights affecting the substance of commercial transactions
- Enforcement and access to justice

Product safety

If goods are to move freely from one Member State to another, they should be safe. However, once the need for EU legislation has been accepted, it is necessary to agree on the content and the enforcement mechanisms in place.

A large body of EU consumer protection rules have been adopted to ensure that products are safe. Nevertheless, because the implementation of the principle that only safe products should be placed on the EU market still gives rise to difficulties in practice, product safety remains one of the four priorities of the Commission's 2014-2020 Consumer Agenda.

EU rules distinguish between food and non-food products. Food products are now covered by Regulation 178/2002 on food safety (which was adopted in the wake of BSE crisis),[80]

[76] COM(2011) 635. For more information, see http://ec.europa.eu/justice/contract/cesl/index_en.htm.

[77] The proposal has given rise to vivid academic debates. See, among others: S. Whittaker, 'The Proposed Common European Sales Law: Legal Framework and the Agreement of the Parties', *Modern Law Review* 75 (2012) 578; U. Pachl, 'The Common European Sales Law: Have the Right Choices Been Made? A Consumer Policy Perspective', *Maastricht Journal of European and Comparative Law* 19 (2012) 180; M. Kenny, L. Gillies and J. Devenney, 'The EU Optional Instrument: Absorbing the Private International Law Implications of a Common European Sales Law', *Yearbook of Private International Law* 13 (2011) 315.

[78] Once again, this report does not purport to be exhaustive of all existing EU measures of consumer protection. See the bibliography provided at the end of this report and in footnotes for more detailed information.

[79] There is however an unavoidable degree of overlap between these categories.

[80] OJ 2002 L 31/1.

whereas non-food products are covered by what is referred to as the product safety legislation.[81] The systems in place are broadly comparable.

Whereas the first directives adopted in the field of product safety both contained very specific rules and were vertical in nature (in that they applied to specific products), a 'New Approach' was put in place in the 1980s which required that only essential requirements be harmonised, thus offering far more flexibility than the previous approach did.[82] The idea that standardisation bodies (such as CEN, CENELEC, CESTI…) could be entrusted with the adoption of more specific standards. Furthermore, sectoral directives have been complemented by a horizontal instrument: the General Product Safety Directive, first adopted in 1992[83] and replaced by Directive 2001/95 in 2001.[84] As a result, the EU product safety legislation has become comprehensive: all the products which are not covered by specific legislation falls within the scope of the General Product Safety Directive,[85] ensuring that no product is left unregulated except if specifically excluded from the scope of EU rules.[86]

The General Product Safety Directive has three main components: 1) it defines what a safe product is, 2) it lays down a general safety obligation, and 3) its sets up the Rapid Exchange mechanism, often referred to as RAPEX.

A product is safe if 'under normal or reasonably foreseeable conditions of use including duration […] it does not present any risk or only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons'.[87] If not, then it is 'dangerous'. To determine whether a product is safe, the Directive lists a range of factors, including its characteristics, its effect on other products, its presentation, the vulnerability of certain consumers. Importantly, the possibility to obtain a higher level of safety does not mean the product is dangerous: the safety provided is relative, not absolute. Consequently, it is all the more important that consumers are 'provided with the relevant information to enable them to assess the risks inherent in a product'.[88]

The general safety requirements are laid down in Article 3 of the Directive: 'Producers shall be obliged to place only safe products on the market'. A product is deemed safe if it is in conformity with national rules and it is presumed safe if conforms to voluntary national standards transposing European standards.[89] Otherwise, safety is determined on the basis of a

[81] Product safety legislation does not apply to services, except if a product is involved in the provision of a service.

[82] Directive 88/378 on toy safety (OJ 1988 L 187/1) is one of the first examples of 'New Approach' harmonisation. It has since been replaced by Directive 2009/48 (OJ 2009 L 170/1).

[83] Directive 92/59, OJ 1992 L 228/24. The validity of this Directive was challenged by Germany, but the Court upheld the validity of the Directive: Case C-359/92 *Germany v Council* [1994] ECR I-3681.

[84] OJ 2002 L 11/4.

[85] Article 1(2) of the General Product Safety Directive clearly establishes the principle that 'each of its provisions shall apply in so far as there are no specific provisions with the same objective in rules of Community law governing the safety of the products concerned'. In practice, however, the demarcation may be difficult to draw. For Commission guidance on how the General Product Safety Directive relates to more specific EU product safety rules, see http://ec.europa.eu/consumers/safety/prod_legis/index_en.htm.

[86] This is the case for second-hand products where they are 'supplied as antiques or as products to be repaired or reconditioned prior to being used, provided that the supplier clearly informs the person to whom he supplies the product to that effect' (Article 2(a) of Directive 2001/95).

[87] Article 2.

[88] Article 5(1).

[89] Article 4 lays down the procedure concerning the drawing up of European standards.

list of factors.[90] The obligation to check conformity rests on the producer rather than the distributor.

The RAPEX system is intended to ensure that goods which are dangerous within the meaning of EU product safety rules are removed from the market before they have caused harm.[91] It allows for the exchange of information between Member States and the Commission through a dedicated network of national contact points. Furthermore, under certain conditions, the Commission may adopt a formal Decision requiring the Member States to ban the marketing of a product posing a serious risk, to recall it from consumers or to withdraw it from the market. Such Decisions at Community level can be taken 1) where the Member States have different approaches to dealing with the risks posed by such a product; 2) where urgency is required to deal with the serious risk of the product, and where no other Community law can achieve this; or 3) where the serious risk can effectively be eliminated only by a Community measure.[92]

To complement the provisions of product safety legislation, the EU also has rules in place on defective products.[93] They allow consumers to indirectly put pressure on producers by preventing unsafe products from being placed on the market in the first place.[94] This is reflected in the notion of defectiveness itself: a product is defective where it does not provide the safety which a person is entitled to expect.[95] And here again, a product is not defective simply because a better product exists on the market. The product must be relatively – as opposed to absolutely – safe.[96] The liability of the producer is strict (i.e. not based on fault), though it is subject to the 'development risks' defence.[97]

Even though EU rules on product safety were among the first ones to be adopted, their implementation still remains a priority for the Commission. As it noted in its Consumer Agenda 2014-2020, at a time when national administrations responsible for market surveillance face resource constraints, the whole enforcement network is struggling to do more with less. At the same time, however, globalisation of the production chain continues, thus making the detection of unsafe products a significant challenge for the EU and its Member States.[98] The Commission has therefore declared the improvement of the EU regulatory framework on product and service safety and the enhancement of the market surveillance framework one of its key areas of intervention in the forthcoming years.[99]

Consumer information

Requiring that consumers be provided with specific information about a product or a service

[90] Article 3(3).
[91] For more information on RAPEX, see http://ec.europa.eu/consumers/safety/rapex/index_en.htm.
[92] To date, this emergency procedure has been used on four occasions.
[93] Directive 85/374 on defective product liability, OJ 1985 L 210/29. This Directive has only been amended once: Directive 1999/34 has extended its scope to cover primary agricultural produce (OJ 1999 L 141/20).
[94] S. Weatherill, *EU Consumer Law and Policy* (Elgar Publishing, 2nd edition, 2013), at page 262.
[95] Article 6(1) provides a non-exhaustive list of factors to be considered when determining whether a product is defective.
[96] Article 6(2).
[97] Article 7(e). On this controversial notion, see C. Newdick, 'Risk, Uncertainty and Knowledge in the Development Risks Defence', Anglo-American Law Review 20 (1991) 309.
[98] At paragraph 3.1 of the Consumer Agenda 2012-2014.
[99] At paragraph 4.1 of the Consumer Agenda 2012-2014.

is a regulatory technique that has enjoyed considerable popularity in the development of EU measures affecting the protection of consumers' interests. The 'information paradigm' has always been at the heart of EU consumer law and policy, from the Council Resolution of 14 April 1975[100] to the EU Consumer Strategy for 2007-2013[101] and the latest Consumer Agenda for 2014-2020.[102] It aims to convey information enabling consumers to make an informed choice about their consumption behaviour and address concerns relating to the information asymmetry characterising consumer transactions. It places the onus on consumers to decide what they should buy, expecting them to read the information provided and process it whilst taking their own personal circumstances and those of their families into account. The provision of information is therefore seen as a striking a good compromise: on the one hand, protection is provided as a result of the introduction of duties on traders to inform consumers of the qualities of their goods and services, but intrusive controls are avoided, such as the imposition of bans on particular types of contract, which may unduly diminish consumer choice.[103]

However, the information paradigm promoted at EU level may only serve its purpose if the information made available to consumers is sufficient, clear and reliable to guide their choices and thus allows them to 'protect' themselves effectively. This is why the EU has imposed a range of information disclosure obligations on traders: some information must be disclosed by all traders when contracting with consumers,[104] whilst additional information must be disclosed specifically in certain circumstances.[105] Within the broad category of information disclosure requirements, one may distinguish two sub-categories.[106] First, some information is intended to convey a neutral, objective message to make consumers aware of the properties of the goods they are about to purchase. For example, the EU requires that a range of specified particulars be listed on food labels, including the ingredients, the use by date, any storage conditions, a nutrition declaration... This is intended to ensure that the information provided to consumers is sufficient to facilitate healthier diets.[107] Secondly, other information conveys a negative message that is intended not only to create the relevant state of awareness of consumers but also to steer them away from a particular product or behaviour. For example, the EU requires that health warnings be affixed to tobacco products, mandating not only the text of the warnings in question but also how they should appear on the packaging to ensure that they act as an effective deterrent for existing and potential consumers.[108]

EU consumer law and policy focuses also on the quality of the information provided to

[100] OJ 1975 C 92/2.
[101] COM(2007) 99 final.
[102] COM(2012) 225 final.
[103] S. Weatherill, *EU Consumer Law and Policy* (Edward Elgar, 2nd edition, 2013), at page 92.
[104] Article 4 of Directive 2005/29 on unfair commercial practices contains a list of 'material information' which must be disclosed when an invitation to purchase is made (OJ 2005 L 149/22).
[105] For two examples among many others, see Article 3 of Directive 90/314 on package travel (OJ 1990 L 158/59) and Article 4 of Directive 2008/48 on consumer credit (OJ 2008 L 133/66).
[106] This is discussed much more thoroughly in A. Alemanno and A. Garde, *Regulating Lifestyles in Europe: How to Prevent and Control Non-Communicable Diseases Associated with Tobacco, Alcohol and Unhealthy Diets?* (Swedish Institute for European Policy Studies, Study 2013/7, December 2013), at page 28.
[107] The latest food labelling requirements are to be found in Article 9 of Regulation 1169/2011 on the provision of food information to consumers (OJ 2011 L 304/18), repealing Directive 79/112 on food labelling (OJ 1979 L33/1), as amended.
[108] Article 5(2) of Directive 2001/37 on tobacco products (OJ 2001 L 194/26), currently under revision.

consumers. In particular, the general principle that information should not be misleading is at the core of Directive 2005/29 on unfair business-to-consumer commercial practices.[109] The provisions of this framework directive, which applies in the absence of more specific provisions, have been tailored to apply to more specific sectors. If we rely once again on the example of tobacco, EU law prohibits the use of certain texts, such as 'low-tar', 'light', 'ultra-light', 'mild', names, pictures and figurative or other signs likely to mislead the consumer into the belief that such products are less harmful and give rise to changes in consumption.[110] However, determining whether the information provided to consumers is misleading requires that a benchmark be set. In EU law, the 'average consumer' benchmark has first been defined by the Court as 'the consumer who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors'.[111] However, this benchmark sets a relatively high threshold. This is why certain legislative provisions of EU law[112] not only have implemented but have also refined the test by making provision to prevent the exploitation of consumers whose characteristics make them particularly vulnerable to misleading information, such as children.[113]

As a corollary of the information paradigm, several instruments of EU law require that consumers be granted a 'cooling off' period to reflect on the information they have been provided with at the time they entered into a contractual transaction. This is coupled with a right of withdrawal: if consumers change their mind by the end of the 'cooling off' period, they can cancel the agreement without having to give any reason for their withdrawal. This is in particular the case for contracts negotiated away from business premises[114] and distance selling contracts[115] in light of the methods used to enter into such transactions, or for particularly risky and complex agreements, such as credit agreements.[116]

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[109] OJ 2005 L 149/22. See in particular Articles 6 and 7 and Points 1 to 23 of Annex I. The prohibition on misleading information also underlay the provisions of its predecessor, Directive 84/450 on misleading advertising (OJ 1984 L 250/17).

[110] Article 7 and Recital 27 of the Preamble of Directive 2001/37 (OJ 2001 L 194/26), currently under review.

[111] See, in particular, Case C-373/90 *Nissan* [1992] ECR I-131; Case C-210/96 *Gut Springenheide* [1998] ECR I-4657; Case C-220/98 *Estée Lauder* [2000] ECR I-117. For a discussion of the average consumer benchmark, see S. Weatherill, 'Who Is the Average Consumer?', in S. Weatherill and U. Bernitz, *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart Publishing, 2007), at 115; T. Wilhelmsson, 'The Average European Consumer: A Legal Fiction?', in T. Wilhelmsson, E. Paunio and A. Pohjolainen (eds), *Private Law and the Many Cultures of Europe* (Kluwer Law International, 2007); T. Wilhelmsson 'The Informed Consumer *v.* The Vulnerable Consumer in European Unfair Commercial Practices Law: A Comment', *Yearbook of European Law* 27 (2007) 211; C. Poncibo and R. Incardona, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution', *Journal of Consumer Policy* 30 (2007) 21.

[112] See, for example, Article 5 and Recital 18 of Directive 2005/29 on unfair commercial practices (OJ 2005 L 149/22) and Article 5 and Recital 16 of Regulation 1924/2006 on nutrition and health claims made on foods (OJ 2006 L L404/9), as amended.

[113] On the notion of 'vulnerable consumers', see M. Friant-Perrot, 'The Vulnerable Consumer in the UCPD and Other Provisions of EU Law', in W. Van Boom, A. Garde and O. Akseli (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Ashgate, forthcoming, 2014). See also A. Garde, 'Advertising Regulation and the Protection of Children-Consumers in the European Union: In the Best Interests of … Commercial Operators?', *International Journal of Children's Rights* 19 (2011) 149.

[114] Directive 85/577 on doorstep selling (OJ 1985 L 372/31), as repealed by Directive 2011/83 on consumer rights (OJ 2011 L 304/64).

[115] Directive 97/7 on distance selling (OJ 1997 L 144/19), as repealed by Directive 2011/83 on consumer rights (OJ 2011 L 304/64). Note that specific provisions apply to the distance selling of contracts for financial services: Directive 2002/65 (OJ 2002 L 271/16).

[116] Directive 2008/48 on consumer credit (OJ 2008 L 133/66), which has replaced Directive 87/102 (OJ 1987 L 42/48).

The information paradigm however contains a range of limits to effectively protect consumers. If the provision of clear, sufficient and trustworthy information is necessary to guide consumer choices, it is not always sufficient to ensure a high level of consumer protection. In particular, many criticise the regulation of information as ineffective in achieving its declared goal of making consumers capable of protecting themselves when making individual choices. To support their claim, they rely on mounting evidence suggesting that few individuals read the information provided to them and even fewer actually process this information.[117] More fundamentally, the assumption that individuals are able to base their decisions on the information provided to them is increasingly being questioned today, due to cognitive limitations.[118]

Consumer rights affecting the substance of commercial transactions

Beyond the regulation of product safety and consumer information, the EU has also attempted to redress the imbalance existing between consumers and traders by regulating certain substantive aspects of consumer contracts. In particular, the EU has adopted rules on unfair contract terms, as well as rules on consumer sales and guarantees.

Directive 93/13 on unfair contract terms is intended to ensure that standard-form contracts, which are not negotiated by consumers,[119] do not contain any unfair term – defined as 'a term which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'.[120] The Annex to the Directive contains a non-exhaustive list of the terms which national authorities can use as an interpretative tool to determine whether a term is unfair. However, the presence of in a contract of a term listed in the Annex is not necessarily conclusive that the term is unfair. The Annex does not lay down an irrefutable presumption of unfairness: national authorities must assess the specific circumstances of each case, 'taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract'.[121] The Commission's proposal[122] to introduce a uniform, binding list of unfair

[117] See, e.g., S. Schwarcz, 'Rethinking the Disclosure Paradigm in a World of Complexity', *University of Illinois Law Review* (2004) 1.

[118] See C. Jolls and C. Sunstein, 'Debiasing through Law', *Journal of Legal Studies* 35 (2006) 199. On the limits of EU rules on information provision as a tool of consumer protection more specifically, see among others: G. Howells, 'The Potential and Limit of Consumer Empowerment by Information', *Journal of Law and Society* 32 (2005) 349, and C. Willett and M. Morgan-Taylor, 'Recognising the Limits of Transparency in EU Consumer Law', in J. Devenney and M. Kenny (eds), European Consumer Protection: Theory and Practice (Cambridge University Press, 2012).

[119] The Directive does not apply to individually negotiated contractual terms: it only applies to terms which have been 'drafted in advance' and where 'the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract' (Article 3(2)).

[120] Article 3.

[121] Article 4. In this respect, the Unfair Contract Terms Directive differs from the Unfair Commercial Practices Directive which contains an exhaustive list of all practices presumed to be unfair in the EU, without the need for courts to examine the specific circumstances of the case. On the relationship between national courts and the CJEU in assessing contractual fairness, see in particular: Joined Cases C-240 to 244/98 *Oceano Grupo* [1982] ECR I-4941; Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-4303; Case C-137/08 *Penzugyi Lizing* [2010] ECR I-10847; and Case C-472/10 *Nemzeti*, judgment of 26 April 2012.

[122] COM(2008) 614 final.

terms across the EU as part of the revision of the *Consumer Acquis* failed, following the strong opposition several Member States and a wide spectrum of academics[123] had voiced against the proposed move of the Commission from minimum to maximum harmonisation. The Unfair Terms Directive therefore remains a directive of minimum harmonisation, thus allowing Member States to exceed the minimum standards of protection its provisions lay down. The relationship between the harmonisation model chosen and the regulatory autonomy of Member States is discussed more fully in the second section of this report. Consumers are not bound by unfair terms.[124] The purpose of the Directive clearly is to redress the balance to the advantage of the consumer as the 'weaker party' to a commercial transaction. However, to mitigate the regulatory inroad thus initiated into the principle of contractual autonomy, the Directive contains an important limitation: it does not apply to the adequacy of the price or to the main subject matter of the transaction, 'in so far as these terms are in plain intelligible language'.[125]

Similarly, Directive 1999/44 on consumer sales and guarantees is also intended to protect consumers from abusive commercial practices.[126] It requires that 'a seller shall deliver goods to the consumer which are in conformity with the contract of sale goods'.[127] Any lack of conformity resulting from incorrect installation of the consumer goods is assimilated to a lack of conformity of the goods if the installation forms part of the contract of sale of the goods and the goods were installed by the seller or under his responsibility.[128] The Directive even lays down a presumption that goods are in conformity if the goods:

- comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model;

- are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted;

- are fit for the purposes for which goods of the same type are normally used;

- show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made

[123] See in particular H. Micklitz and N. Reich, 'Crónica de Una Muerte Anunciada: The Commission Proposal for a "Directive on Consumer Rights" ', *Common Market Law Review* 46 (2009) 471 and J. Rutgers and R Sefton-Green, 'Revising the Consumer Acquis: (Half) Opening the Doors of the Trojan Horse', *European Review of Private Law* 16 (2008) 427.

[124] Article 6. For a recent interpretation of the scope of this provision, see Case C-453/10 *Perenicova and Perenic*, judgment of 15 March 2012.

[125] Article 4(2). The Preamble of the Directive adds that 'the main subject matter of the contract and the price/quality ration may nevertheless be taken into account in assessing the fairness of other terms'. For a controversial interpretation of the scope of Article 4(2), see the UK Supreme Court's decision in *Office of Fair Trading v Abbey National plc* [2009] UKSC 6. This decision has been widely commented upon. See among others: M. Kenny, Orchestrating Sub-Prime Consumer Protection in Retail Banking: *Abbey National* in the Context of Europeanised Private Law', European Review of Private Law 19 (2011) 43 and S. Whittaker, 'Unfair Contract Terms, Unfair Practices and Bank Charges', Modern Law Review 74 (2011) 106.

[126] OJ 1999 L 171/12.

[127] Article 2(1). This provision binds the seller, not the producer.

[128] Article 2(5).

about them by the seller, the producer or his representative, particularly in advertising or on labelling.[129]

By contrast, conformity shall be presumed 'if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity.[130]

In the event that goods lack conformity, the consumer is entitled to have them brought into conformity free of charge by repair or replacement, or – if this is impossible or disproportionate – to have an appropriate reduction made in the price or the contract rescinded with regard to those goods.[131] The seller is liable for the lack of conformity within two years of the delivery of the goods.[132] A seller can exceed the requirements laid down in the Directive and make any undertaking to the consumer, without extra charge, to reimburse the price paid or to replace, repair or handle consumer goods. Such an undertaking binds the seller if the goods do not meet the specifications set out in the guarantee statement or in the relevant advertising.[133] Consumers cannot waive the rights they derive from the Directive,[134] and Member States can increase the level of protection the Directive provides on their territory.[135] Despite the Commission's attempts to move to a model of maximum harmonisation,[136] the Directive remains an instrument of minimum harmonisation.[137]

Directive 2011/83 adds certain provisions on consumer sales, which apply both to goods and services.[138] In particular, traders are no longer entitled to charge fees to consumers which exceed the cost born by the trader for the use of a given means of payment.[139]

Enforcement and access to justice

General remedies of EU law such as direct effect[140] and State liability[141] apply to consumer disputes. However, their effectiveness is limited. Most importantly, directives do not have horizontal direct effect: if directly effective provisions of EU law can be invoked against a Member State which has failed to implement them properly into its national legal order, they cannot be invoked against private parties.[142] As consumer disputes often involve two private

[129] Article 2(2).
[130] Article 2(3).
[131] Article 3(2), as interpreted by the CJEU in Case C-404/06 *Quelle* [2008] ECR I-2685 and Joined Cases C-65 and 87/09 *Weber and Putz* [2011] ECR I-5257.
[132] Article 5
[133] Article 6.
[134] Article 7.
[135] Article 8.
[136] COM(2008) 614 final.
[137] Note, however, that Directive 2011/83 on consumer rights (OJ 2011 L 304/64) introduced a new Article 8a to Directive 1999/44 requiring Member States to notify any more protective provisions adopted in relation to consumer sales and guarantees to the Commission.
[138] See Articles 19 to 22.
[139] Article 19.
[140] Direct effect refers to the ability of a party to invoke EU law rights before national courts. See Case 26/62 *Van Gend en Loos* [1963] ECR 3.
[141] State liability is an EU law remedy allowing an aggrieved party to claim damages against a Member State for its failure to comply with its EU law obligations before national courts. See Joined Cases C-6 and 9/90 *Francovich v Italy* [1991] ECR I-5357.
[142] Case 152/84 *Marshall v Southampton Area Health Authority* [1986] ECR 723.

parties (a consumer and a trader), the defective implementation of an EU directive may leave an aggrieved consumer without a remedy before his or her national courts.[143] The obligation resting on national authorities to interpret national law as far as possible in conformity with EU law cannot fully compensate for its lack of horizontal direct effect.[144] Nor can an action in damages against the State,[145] not least because the liability test the CJEU has laid down is rather difficult to satisfy.[146]

Problems of rights enforcement and access to justice are accentuated in consumer disputes. Litigation may be particularly daunting, in light of the time, apprehension and costs involved (particularly if assessed in proportion to the relatively small sums generally involved in a given dispute). This is even more so if a trader has engaged in a range of aggressive, unfair commercial practices and if the dispute takes place in a cross-border context.

In light of these hindrances to the effective cross-border enforcement of consumer rights, the Commission has made access to justice and enforcement one of the long-lasting priorities of its consumer protection programmes and strategies. The question, which was first raised in the Council Resolution of 14 April 1975, very much remains at the heart of its reflection: the 2014-2020 Consumer Protection Agenda has even made enforcement one of its four key priorities. The EU has therefore sought to improve judicial cooperation between Member States in order to ensure that consumers are not prevented or discouraged from taking advantage of their EU substantive rights due to the complexity of national judicial and administrative rules.

The measures adopted to date with a view to promoting the access to justice of consumers and the enforcement of their rights fall within two broad categories – private and public enforcement. These two forms of enforcement complement each other in order to maximise the chances that consumer rights are effectively protected.

As far as private enforcement is concerned, the EU has adopted a range of rules intended to increase the incentives consumers have to pursue their claims before relevant competent authorities. In particular, the Commission has set up the network of European Consumer Centres which offer free consumer advice and support to EU residents who are buying goods or services from a trader based in another EU Member State.[147] Beyond ensuring that consumers have access to relevant information and support, the EU has also attempted to make judicial procedures more simple and less costly for consumers. In particular, the European Small Claims Procedure provides an alternative to existing national procedures,[148] whilst the Legal Aid Directive lays down minimum rules relating to the availability of legal aid in cross-border disputes.[149] Similarly, the 'Brussels I' Regulation, which governs the jurisdiction and the recognition and enforcement of judgments in civil and commercial

[143] See in particular Case C-91/92 *Faccini Dori* [1994] ECR I-3325 and Case C-192/94 *El Corte Inglés* [1996] ECR I-1281.
[144] See in particular Case C-106/89 *Marleasing* [1990] ECR I-4135.
[145] For a successful claim against Germany for its failure to implement Directive 90/314 on package travel, see Joined Cases C-178, 179, 188, 189 and 190-94 *Dillenkofer et al. v Germany* [1996] ECR I-4845.
[146] See Joined Cases C-46 and 48/93 *Brasserie du Pêcheur v Germany* [1996] ECR I-1029.
[147] All Member States have a national contact point. For further information on the ECC-Network, see http://ec.europa.eu/consumers/ecc/index_en.htm.
[148] Regulation 861/2007, OJ 2007 L 199/1. This procedure has applied since January 2009 in civil and commercial matters where the value of a claim does not exceed EUR 2,000; it covers pecuniary as well as non-pecuniary claims.
[149] Directive 2002/8, OJ 2003 L 26/41.

matters, entitles consumers to have their case heard before the national courts where they are domiciled (rather than the courts where the trader is established),[150] whilst the 'Rome I' Regulation on the law applicable to contractual obligations, provides that consumer contracts are governed by the laws of a consumer's place of habitual residence.[151] Finally, to further promote a more effective resolution of consumer disputes, the EU has recently adopted rules intended to facilitate alternative dispute resolution[152] and online dispute resolution.[153]

EU public enforcement rules are to be found in two main instruments: Regulation 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws[154] and Directive 2009/22 on injunctions for the protection of consumer interests.[155] These measures are supplemented by specific provisions to be found in a range of consumer protection instruments. Regulation 2006/2004 establishes a consumer protection cooperation network and lays down the general conditions and a framework for cooperation between national enforcement authorities. It applies to situations where the collective interests of consumers are at stake and allows competent authorities to stop breaches of consumer rules when the trader and the consumer are established in different Member States.[156] Directive 2009/22 requires a system of independent public bodies to exercise injunctions where the collective intra-community harm on consumers is suffered so that infringements harmful to the collective interests of consumers can be terminated in good time.[157]

Together, there is no doubt that these measures make a significant inroad into the traditional principle of national procedural autonomy according to which it is for Member States rather than the EU to determine how substantive EU rights and obligations should be implemented and enforced. Nevertheless, several difficulties remain regarding the extent to which the EU should adopt further procedural rules to facilitate access to justice and enforcement of consumer rights. The harmonisation of procedural laws cuts deep into national legal cultures. The balance remains to be found between acceptability and effectiveness of EU standards. The debates surrounding the adoption of an EU collective redress mechanism is symptomatic of the difficulties encountered. After years of debate, the Commission launched an initiative in June 2013 which aims to ensure a coherent horizontal approach to collective redress in the EU without proposing the harmonisation of Member States' systems: national redress mechanisms should be available in different areas where EU law grants rights to citizens and companies, notably in consumer protection.[158] Beyond difficult issues of competence and

[150] Article of Regulation 44/2001 (OJ 2001 L 12/1), as amended and codified by Regulation 1215/2012 (OJ L 351/1). The latter Regulation will take effect as of 1st January 2015.

[151] Regulation 593/2008 (OJ 2008 L 177/6).

[152] Directive 2013/11 on alternative dispute resolution for consumer disputes (OJ 2013 L 165/63) which requires that Member States shall facilitate consumer access to ADR through online systems on a voluntary basis for either domestic or cross-border EU disputes.

[153] Regulation 524/2013 on online dispute resolution for consumer disputes (OJ 2013 L 165/1) which requires the Commission to produce and maintain an ODR platform for free use.

[154] OJ 2004 L 364/1, as amended.

[155] OJ 2009 L 110/30, which replaces Directive 98/27, OJ 1998 L 166/51.

[156] It covers a broad range of areas of consumer interest, including unfair commercial practices, e-commerce, comparative advertising, package holidays, timeshares, distance selling, and passenger rights. For a list of relevant areas, see http://ec.europa.eu/consumers/enforcement/docs/simplified_annex_2013_en.pdf.

[157] Recital 3. Articles 2 to 4 define the role of qualified entities responsible for enforcement.

[158] More information on this initiative is available at: http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm#comrec. On collective redress, see also W. Van Boom and M. Loos (eds), *Collective Enforcement of Consumer Law* (Europa Law Publishing,

subsidiarity which harmonisation raises, it is always necessary first to ascertain whether there is enough political will in Member States to pursue the Commission's agenda.

2007).

II. Delineating the Scope of EU Powers in relation to Consumer Law and Policy

Article 5(1) TEU provides that 'the limits of Union competences are governed by the principle of conferral', whilst 'the use of Union competences is governed by the principles of subsidiarity and proportionality.' The principle of conferral reflects the seminal judgment of the CJEU in *Van Gend en Loos*, where it held that 'the [EU] constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, *albeit within limited fields*, and the subjects of which comprise not only Member States but also their nationals'.[159] In other words, if the EU Treaties[160] do not provide a legal basis, i.e. a specific Treaty article allowing the EU to intervene in a certain area, then action may only be taken by Member States. Once it has been established that the EU has the competence to act, it is necessary to determine whether, and if so how, it should exercise its powers. The principles of subsidiarity and proportionality constrain EU action, by requiring, first, that the EU should act only when the objectives of a proposed intervention can be better achieved by the EU than by Member States and, second, that EU intervention should not go beyond what is necessary to achieve the objectives.

This second section focuses on the relevance of the principle of conferral and – to a lesser extent – the principles of subsidiarity and proportionality, for EU consumer law and policy, and highlights the difficulties these principles have raised in practice.

EU powers in the field of consumer protection

The question of EU competence is fundamental: the provisions of the EU Treaties circumscribe EU intervention and thus determine its legality in all areas of policy-making. The general power to act rests with Member States, subject to the transfer of their sovereign rights which they have operated to the benefit of the EU in defined areas only.[161] Article 5 therefore confirms that EU intervention is limited and specific.

One of the corollaries of the principle of conferral is that binding acts adopted by EU institutions must state the reasons on which they are based.[162] All regulations, directives and decisions must therefore have a legal basis which identifies the Treaty article(s) permitting that such action be taken. This requirement is intended to make EU institutions more accountable and the legislative process more transparent.

Under Article 4(2) TEU, consumer policy falls within the areas where the competence is shared between the EU and its Member States.[163] Thus, in the absence of common rules adopted at EU level, Member States remain free to adopt consumer protection rules, provided

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[159] Case 26/62 *Van Gend en Loos* [1963] ECR 3 (emphasis added).

[160] The 'EU Treaties' refer to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

[161] Article 1(1) TEU reiterates this principle and makes it even clearer: 'By this Treaty, the High Contracting Parties establish among themselves a European Union, hereinafter called "the Union" *on which the Member States confer competences* to attain objectives they have in common' (emphasis added). See also Article 4(1) TEU: 'In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States'.

[162] Article 296 TFEU.

[163] The Treaty of Lisbon expressly classified the nature of EU competences. In particular Articles 2, 3, 4 and 6 TFEU distinguish between exclusive, shared and supportive (or complementary) EU competences and give an indicative list of subjects falling within each competence heading.

that these rules comply with the general free movement provisions, and in particular Article 34 and Article 56 TFEU on the free movement of goods and services respectively.[164] The difficulties therefore reside in the need to draw the boundaries separating what is permissible from what it is not for both the EU and its Member States.

A good starting point to assess the regulatory powers the EU enjoys in the area of consumer law and policy is Article 169 TFEU on 'Consumer Protection'. As discussed in the previous section, the role of the EU has evolved in this field, and it was only when the Maastricht Treaty was adopted in 1992 that the EU was formally granted some competence in this field and this provision introduced. Article 169 TFEU is quoted in full in the box below.

Article 169 TFEU (ex-Article 153 EC, and before then Article 129a EC):

1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

2. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through

   (a) measures adopted pursuant to Article 114 in the context of the completion of the internal market;

   (b) measures which support, supplement and monitor the policy pursued by the Member States.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 2(b).

4. Measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them.

Article 169 TFEU envisages two main avenues for the adoption of EU consumer protection measures: the first one refers to Article 114 TFEU (Article 169(2)(a)), whilst the second one provides a legal basis which is autonomous from the internal market (Article 169(2)(b)). Their scope is considered in turn.[165]

[164] See the *Cassis de Dijon* ruling for an illustration of this principle, discussed in the first section of this report: Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

[165] For the sake of completeness, one should also briefly mention the residual legal basis of Article 352 TFEU (ex-Article 308 EC, ex-Article 235 EEC). Its first paragraph provides that 'if action by the Union should prove necessary […] to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures […]'. This provision is unlikely to be of much use in the field of consumer protection, bearing in mind the existence of Article 169 TFEU and the broad scope of intervention its first paragraph entitles the EU to adopt to protect consumers, including via harmonising measures adopted on the basis of the ordinary legislative procedure

The role of Article 114 TFEU in the EU consumer protection agenda

Article 114 TFEU grants powers to the EU to 'adopt measures necessary for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'.[166] From a formal point of view, the ordinary legislative procedure applies: both the Council (on the basis of QMV) and the European Parliament must reach a common decision (co-decision) for the measure to be adopted.[167] From a substantive point of view, measures may be adopted on the basis of Article 114 only if '[they] have as their object the establishment and functioning of the internal market'.

The boundaries between what falls within and what falls outside the scope of EU powers under Article 114 TFEU have proven extremely difficult to draw in practice, as the seminal *Tobacco Advertising* ruling of the Court of Justice demonstrates. The constitutional significance of this case cannot be overstated: for the first time ever, the Court annulled an EU measure for lack of EU competence, thus confirming that EU powers are not unlimited and must be exercised in compliance with the Treaties.[168]

The *Tobacco Advertising* litigation (1998-2006):

In July 1998, the European Parliament and the Council adopted, on the basis of Article 114 TFEU, a directive approximating the laws, regulations and administrative provisions of the Member States and laying down a general prohibition on the advertising and sponsorship of tobacco products.[169] Germany, which was outvoted in Council, challenged its validity, arguing – among others – that the EU did not have the required competence to adopt such a measure. More specifically, it contended that the 1998 directive was in reality a disguised public health measure whose effects on the internal market, if any, were purely incidental, preventing Article 114 TFEU from providing a proper legal basis. The CJEU accepted Germany's argument and annulled the 1998 directive. It held that the purpose of Article 114 was to improve the conditions for the establishment and functioning of the internal market, as opposed to vesting in the EU legislature a general power to regulate the internal market. This clearly confirms that the scope of Article 114 TFEU is not unlimited: this would not only be contrary to the express wording of the provisions but it would also be incompatible with the principle of conferral embodied in Article 5 TEU that the powers of the EU are limited to those specifically conferred upon it.[170] If a mere finding of disparities between national rules sufficed to justify the choice of Article 114 as a legal basis, the judicial review of compliance

(rather than the special procedure required under Article 352 TFEU). On Article 352 TFEU, see R. Schütze, 'Organized Change Towards an "Ever Closer Union": Article 308 EC and the Limits to the Community's Legislative Competence', *Yearbook of European Law* 22 (2003) 79. On consumer protection more specifically, see C. Twigg-Flesner, *A Cross-Border-Only Regulation for Consumer Transactions in the EU: A Fresh Approach to EU Consumer Law* (Springer 2012), at pages 42 to 44.

[166] Article 114(1) TFEU.

[167] Article 294 TFEU.

[168] Case C-376/98 *Germany v Council and the European Parliament* [2000] ECR I-8419 (*Tobacco Advertising I*).

[169] Directive 98/43, OJ 1998 L 213/9.

[170] At paragraph 83.

with the proper legal basis might be rendered nugatory and the Court would be prevented from ensuring that the law is observed in the interpretation and application of the Treaties.[171]

On the facts of the case, the Court accepted that Article 114 could be used to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws. Nevertheless, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them.[172] The Court accepted that the prohibition of tobacco advertising in press products could be justified on the ground that the different national rules in place could constitute a likely obstacle to trade between Member States in these products. By contrast, it did not accept that the prohibition on all forms of advertising laid down in Article 3 of the Directive could be validly adopted on the basis of Article 114 on the ground that they hindered intra-EU trade. In particular, the Court noted that advertising on posters, parasols, ashtrays and other articles used in hotels (static advertising), as well as advertising spots in cinemas, were not related to inter-State trade: there is neither an existing market nor a likely future market in such products.[173] As the infringing provisions could not be severed, the CJEU annulled the 1998 directive in its entirety.

In May 2003, the European Parliament and the Council adopted, also on the basis of Article 114 TFEU, another directive on the advertising and sponsorship of tobacco products prohibiting:

- first, the advertising of tobacco products in the press and other printed publications, in information society services (such as the Internet) and in radio broadcasts;[174]
- secondly, the sponsorship of radio programmes by tobacco companies;[175] and
- thirdly, the sponsorship of events or activities having cross-border effects.[176]

Only publications intended for professionals in the tobacco trade and publications from non-EU countries which are not principally intended for the EU market are exempted.[177] This time, the Court dismissed Germany's challenge to the validity of the directive as unfounded and held that the conditions required for recourse to Article 114 TFEU as a suitable legal basis had been met.[178] It noted that the advertising and sponsorship of tobacco products were dealt with differently from one Member State to another, and that there was an appreciable risk that the differences would increase as a result of the enlargement of the EU to ten new Member States. These disparities warranted an EU intervention.[179] The Court ruled that the market in press products and the radio market were markets in which trade between Member States was relatively sizeable and was set to grow further as a result, in particular, of the link

[171] At paragraph 84.
[172] At paragraph 86.
[173] In relation to sponsorship specifically, the Court observed that differences between certain national regulations on tobacco advertising, such as the fact that sponsorship was prohibited in some Member States and authorized in others, had given rise to certain sports events being relocated, with considerable repercussions on the conditions of competition for undertakings associated with such events: at paragraphs 106 to 113.
[174] Directive 2033/33, OJ 2003 L 152/16, in Articles 3 and 4.
[175] Article 4.
[176] Article 5.
[177] Article 3(1).
[178] Case 380/03 *Germany v Council and the European Parliament* [2006] ECR I-11573 (*Tobacco Advertising II*).
[179] At paragraphs 46 to 51.

between the media in question and the internet, which is the cross-border medium *par excellence*.[180] The same finding was made as regards sponsorship of radio programmes by tobacco companies. Differences between national rules had already emerged on the date when the 2003 directive was adopted or were about to emerge and those differences were liable to impede the freedom to provide services by denying radio broadcasting bodies established in a Member State where a measure prohibiting sponsorship was in force the benefit of sponsorship from tobacco companies established in another Member State, where such a measure did not exist.[181] Furthermore, those differences also mean that there is an appreciable risk of distortions of competition.[182] Nevertheless, the CJEU added that it was not necessary to prove distortions of competition in order to justify recourse to Article 114 TFEU once the existence of obstacles to trade had been established.[183] The requirements are alternative, not cumulative. The Court concluded that Articles 3 and 4 of the 2003 directive did in fact have as their object the improvement of the conditions for the functioning of the internal market and, therefore, that they were able to be adopted on the basis of Article 114 TFEU. It added the following:

> This conclusion is not called into question by the applicant's line of argument that the prohibition laid down in Articles 3 and 4 of the Directive concerns only advertising media which are of a local or national nature and lack cross-border effects.
>
> Recourse to [Article 114 TFEU] as a legal basis does not presuppose the existence of an actual link with free movement between the Member States in every situation covered by the measure founded on that basis. As the Court has previously pointed out, to justify recourse to [Article 114 TFEU] as the legal basis what matters is that the measure adopted on that basis must actually be intended to improve the conditions for the establishment and functioning of the internal market.[184]

The *Tobacco Advertising I* judgment of the Court has therefore confirmed that the scope of Article 114 TFEU is not unlimited. However, the *Tobacco Advertising II* and other judgments from the Court of Justice suggest that the EU actually retains a broad margin of discretion when adopting harmonising legislation on the basis of Article 114.[185]

The *Vodafone* decision, which involved the legality of Regulation 717/2007 on roaming services,[186] states the conditions that EU legislation must fulfil to be validly adopted on the basis of Article 114 TFEU:

- there must be an 'internal market barrier' resulting from the disparities in the legal systems of the Member States measures;
- this market barrier should not consist of an 'abstract risk of obstacles', but should be 'such as to obstruct the fundamental freedoms' or create 'distortions of competition' within the internal market; and

[180] At paragraph 53. For a fuller discussion, see paragraphs 54 to 64.
[181] At paragraph 65.
[182] At paragraph 66.
[183] At paragraph 67.
[184] *Tobacco Advertising II*, at paragraphs 79 and 80.
[185] For a criticism of the case law, see D. Wyatt, 'Community Competence to Regulate the Internal Market', in M. Dougan and S. Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing, 2009), 93.
[186] OJ 2007 L 171/32. This regulation has now been replaced by Regulation 531/2012: OJ 2012 L 172/10.

- the intended harmonisation should 'genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market'.[187]

This case law calls for a few remarks. The less an aspect is regulated at EU level, the higher the potential for the existence of obstacles to trade. As already stated above, in the absence of harmonised rules, Member States remain competent to adopt national measures regulating for instance the provision of consumer information, sales conditions, and product safety requirements in the light of consumer protection objectives. Thus, the rules governing the production, presentation and marketing conditions of goods and services often differ from one Member State to another.

Nevertheless, the Court case law unequivocally establishes that 'a mere finding of disparities between national rules' is not sufficient to justify reliance on Article 114 TFEU.[188] Rather, these disparities must be 'such as to obstruct the fundamental freedoms or to create distortions of competition' and thus have a direct effect on the functioning of the internal market.[189] While 'national rules laying down the requirements to be met by products, in particular those relating to their designation, composition or packaging, are in themselves liable, in the absence of harmonisation throughout the Community, to constitute obstacles to the free movement of goods',[190] it is disputable that other regulations, such as those dealing with the way in which goods or services are sold, may be considered *per se* as barriers to trade. Thus, on the basis of the *Tobacco Advertising* case law, Stephen Weatherill has argued that the provisions on doorstep selling[191] would not pass the test. Notwithstanding the fact that the Preamble states that 'any disparity between such legislation may directly affect the functioning of the common market', there is no evidence that this statement is actually true.[192]

The *Philip Morris* judgment, which involved the compatibility with the general free movement provisions of the TFEU of the Norwegian display ban on tobacco products, may offer some guidance on what could constitute a barrier to trade and how far selling arrangements could be harmonised at EU level.[193] In this case, the EFTA Court held that 'by its nature' a visual display ban of tobacco products was not only liable to favour domestic products over imported ones – as consumers tend to be more familiar with the former,[194] but also that such a discriminatory effect would be particularly significant with regard to market

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[187] See in Case C-58/08 *Vodafone Ltd. And Others v Secretary of State for Business, Enterprise and Regulatory Reform (Vodafone)* [2010] ECR I-4999, para 32.

[188] See for a relatively recent example Case C-301/06 *Ireland v Parliament and Council* [2009] ECR I-0593, at paragraphs 63 and 64.

[189] See, for example, *Tobacco advertising I*, at paragraph 90, and *Tobacco Advertising II*, at paragraphs 37 and 51.

[190] At paragraph 64. See also Joined Cases C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6126, at paragraph 15, and *Tobacco Advertising I*, at paragraph 64.

[191] Directive 85/577 on doorstep selling, OJ 1985 L 372/31, now repealed by Directive 2011/83 on consumer rights, OJ 2011 L 304/64.

[192] S. Weatherill, 'Competence Creep and Competence Control', *Yearbook of European Law* 23 (2004) 1. See also S. Weatherill, *EU Consumer Law and Policy* (Elgar Publishing, 2nd edition, 2013), at pages 13 and 73.

[193] Case E-16/10 *Philip Morris Norway AS ./. Staten v/Helse- og omsorgsdepartementet* [2011] EFTA Court, judgment of 12 September 2011, at paragraph 84, annotated by A. Alemanno, 'The Legality, Rationale and Science of Tobacco Display Bans after the Philip Morris Judgment', *European Journal of Risk Regulation* 4 (2011) 591.

[194] *Philip Morris*, at paragraph 48 referring to C-405/98 *Konsumentombudsmannen v Gourmet International Products AB* [2001] ECR I-1795, at paragraph 21.

penetration of new products.[195] It follows that one approach for finding a basis under Article 114 TFEU for an EU-wide regulatory intervention could be to establish that, due to the progressive emergence of national restrictions, there exists a risk of obstacles to trade such as to obstruct the free movement of goods or create distortions of competition on the relevant market, especially *vis-à-vis* new products.[196]

However, the *Philip Morris* ruling did not answer the inextricably difficult question of the relationship between measures adopted on the basis of Article 114 TFEU and the general free movement provisions of the TFEU, and more specifically the question of the extent to which selling arrangements can be harmonised on the basis of Article 114.[197] There seems to be an understanding that an internal market barrier within the scope of Article 114 TFEU is broader that a trade barrier under Article 34 or Article 56 TFEU, and that Article 114 TFEU may be used to harmonise national rules which would not be considered as trade barriers within the meaning of Article 34 or 56 TFEU.[198] For example, Directive 2005/29 prevents Member States from maintaining in place a general prohibition on sales below costs.[199] This stands in stark contrast with the Court's prior case law that such prohibitions fell outside the scope of Article 34 provided that they applied equally in law and in fact.[200] The Directive lays down an opposite presumption to that in *Keck*: namely, a presumption of the illegality of national rules restricting or prohibiting certain commercial practices and a presumption in favour of free trade.[201] This being said, the point at which divergent national rules are likely to create an obstacle to trade and therefore allow the EU to satisfy the test laid down in Article 114 as interpreted by the Court in its *Vodafone* and other decisions remains difficult to determine with any degree of precision.

Overall, despite years of case law, circumscribing the scope of EU powers under Article 114 TFEU still is a particularly arduous task, leading to an unavoidable degree of regulatory

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[195] *Philip Morris*, at paragraph 49.

[196] See, for example, *Tobacco Advertising I*, at paragraph 90, and *Tobacco Advertising II*, at paragraphs 37 and 51. This is discussed more fully in A. Alemanno and A. Garde, 'The Emergence of an EU Lifestyle Policy: The Case of Alcohol, Tobacco and Unhealthy Diets', *Common Market Law Review* 50 (2013) 1745.

[197] This question is at the core of G. Davies' article 'Can selling arrangements be harmonised?', *European Law Review* 30 (2005) 371.

[198] G. Davies' article 'Can Selling Arrangements Be Harmonised?', *European Law Review* 30 (2005) 371. See also S. Weatherill, *EU Law and Consumer Policy* (Elgar Publishing, 2nd edition, 2013), at page 78.

[199] Selling below cost is not listed in Annex I as an unfair commercial practice prohibited in all circumstances. Thus, in light of its content and its general scheme, Directive 2005/29 precludes any national provision which establishes a presumption of unlawfulness of sales below cost and prohibits, generally and pre–emptively, sales below cost, without any verification of their unlawfulness in the light of the criteria laid down in Articles 5 to 9. On the extent to which Directive 2005/29 bans sales below costs, see B. Keirsbilck, 'Pre–Emption of National Prohibitions of Sale Below Cost – Some Reflections on EU Law Between Past and Future', in W. Van Boom, A. Garde and O. Akseli (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Ashgate, forthcoming, 2014).

[200] Joined Cases C-267/91 and C-268/91 91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6126. The *Keck* judgment on the French prohibition of sales below cost was confirmed in relation to the Belgian prohibition of sales yielding only a very low profit margin: Case C–63/94 *Groupement national des négociants en pomme de terre de Belgique v ITM Belgium SA and Vocarex SA* [1995] ECR I–2476.

[201] B. Keirsbilck, 'Pre–Emption of National Prohibitions of Sale Below Cost – Some Reflections on EU Law Between Past and Future', in W. Van Boom, A. Garde and O. Akseli (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Ashgate, forthcoming, 2014). See also G. Anagnostaras, 'The Unfair Commercial Practices Directive in Perspective: From Legal Disparity to Legal Complexity?', *Common Market Law Review* 47 (2010) 156.

uncertainty. This provision nonetheless remains the key provision which EU authorities have relied upon to harmonise national consumer protection rules.

The potential role of Article 169(2)(b) in the future EU consumer protection agenda

As stated in the first section of this report, Article 169(2)(b) has only been used on one occasion for the adoption of EU consumer protection legislation: Directive 98/6 on the indication of the prices of products offered to consumers.[202] On this basis, it is fair to say that it has done very little for the development of the EU consumer policy agenda.

The question arises how far the EU could rely on Article 169(2)(b) in the future. This provision is limited to the adoption of measures which 'support, supplement and monitor the policy pursued by the Member States'. The wording of this provision does not exclude harmonisation by means of regulations or directives (whereas several other provisions which call on the EU to 'complement national policies' explicitly do[203]). Nevertheless, what this phrase actually means is not entirely clear. If it could be interpreted as placing the EU in a position subordinate to the Member States,[204] the condition it lays down may be very simple to meet in practice, insofar as all 28 Member States already have consumer policies in place.[205]

From a formal point of view, Article 169(3) TFEU requires that the EU use the ordinary legislative procedure when adopting measures on the basis of Article 169(2)(b):[206] Measures are adopted jointly by the Council (by QMV) and the European Parliament, in the same way as for measures adopted on the basis of Article 114 TFEU.

From a substantive point of view, it is important to note that Article 169(2)(b) does not require a link with the internal market, in contrast to Article 114 TFEU. Consequently, it avoids the intricacies of the internal market competence discussed above.[207]

Directive 98/6 on the indication of the prices of products offered to consumers:

This argument may find support in the *travaux préparatoires* which have led to the adoption of Directive 98/6 on the indication of the prices of products offered to consumers. This Directive repealed Directive 79/581 on the indication of the prices of foodstuffs, which had been adopted on the basis of Article 352 TFEU (then Article 235 EEC),[208] and Directive

[202] OJ 1998 L 80/27.
[203] See, for example, Article 168 TFEU on Public Health.
[204] S. Weatherill, 'The European Commission's Green Paper on European Contract Law: Context, Content and Constitutionality', *Journal of Consumer Policy* 24 (2001) 339, at page 340. See also C. Twigg-Flesner, *A Cross-Border-Only Regulation for Consumer Transactions in the EU: A Fresh Approach to EU Consumer Law* (Springer, 2012).
[205] J. Stuyck, 'Enforcement and Compliance: An EU Law Perspective' in R. Brownsword et al. (eds), *The Foundations of European Private Law* (Hart Publishing, 2011), at page 517.
[206] Article 294 TFEU.
[207] N. Reich, 'A European Contract Law, or an EU Contract Law Regulation for Consumers?', *Journal of Consumer Policy* 28 (2005) 383, at page 398.
[208] OJ 1979 L 158/19.

88/314 on the indication of the prices of non-food products, which had been adopted on the basis of Article 114 TFEU (then Article 100a EEC).[209] It requires the indication of the selling price and the price per unit of measurement of products offered by traders to consumers in order to improve consumer information and facilitate price comparisons.[210] To justify the choice of Article 169(2)(b) as the proper legal basis for the 1998 directive, the Commission argued as followed:

> 'The legal basis for the proposed simplified system is Article 129a of the Treaty [now Article 169 TFEU]. By severing the existing link between the Directives on the indication of unit prices and the Community mechanism governing ranges of pre-packaged products – whose main purpose is to ensure the free movement of the goods concerned within the internal market – the policy on indication of the unit price will henceforth belong in the context of "specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers" as provided for in paragraph 1(b) of Article 129a.'[211]

It is arguable that using Article 169(2)(b) empowers the EU to adopt measures whose effect on the internal market is difficult to ascertain. For example, Jules Stuyck has suggested that Article 169(2)(b) could be used as the legal basis for the adoption of measures intended to facilitate the collective redress of consumers. Such an intervention 'would certainly support and supplement measures of substantive and procedural law existing in the Member States to protect consumers and therefore Article 169(2)(b) would seem to be a proper legal basis for such legislation'.[212] As discussed above, however, a preliminary question is whether there is sufficient political will among the Member States for such initiatives.

The degree of harmonisation: from minimum to maximum harmonisation?

Another important distinction between Article 114 and Article 169(2)(b) is that the latter requires that the EU should harmonise through the adoption of minimum standards. By contrast, Article 114 TFEU does not contain any such requirement, thus allowing the EU to determine the degree of harmonisation it prefers. The two methods of minimum and maximum harmonisation vary widely in relation to the discretion which EU Member States retain once the EU harmonising standard is in place.

Measures of minimum harmonisation only lay down minimum standards which Member States must all implement in their national legal orders; however, they are free to apply stricter requirements to ensure a higher level of protection, subject to the limits set by the general Treaty provisions, and Article 34 TFEU on the free movement of goods and Article 56 TFEU on the free movement of services more specifically. The method of minimum harmonisation has traditionally been considered as the most appropriate way to strike a compromise between conflicting approaches to a given problem in sensitive areas, including

[209] OJ 1988 L 142/59.
[210] See in particular Article 1.
[211] COM(95) 276 final, at page 11.
[212] J. Stuyck, 'Enforcement and Compliance: An EU Law Perspective' in R. Brownsword et al. (eds), *The Foundations of European Private Law* (Hart Publishing, 2011), at page 517.

consumer protection.[213] The adoption of minimum standards at EU level reduces regulatory diversity to an extent considered acceptable by all the Member States, whilst recognising that economic, social and cultural traditions may differ too significantly to allow for the replacement of national consumer laws by a uniform EU standard.[214] This is all the more so as a minimum standard does not necessarily constitute a minimal (i.e. lowest common) standard, as the Court has clearly stated in its case law.[215] Rather, it is set at the level which Member States were able to agree upon.

Nevertheless, in the last decade, the Commission has started to view minimum harmonisation as an obstacle to, rather than a facilitator of, cross-border trade in the area of consumer law and policy.[216] If minimum standards reflect the cultural reality of heterogeneity between the Member States, they also run the risk of acquiescing in the fragmentation of the EU market as States make different choices about the level at which they will pitch their rules above the required minimum, subject to the limits set by the general Treaty provisions. The rationale for maximum harmonisation, which lays down a common EU standard for all Member States, is therefore understood by the Commission as increasing legal certainty and fostering a deeper degree of EU integration.[217]

The technique of maximum harmonisation[218] was not completely unknown to EU consumer law and policy.[219] Nevertheless, in the last ten years, this technique has become the preferred technique of the Commission's Directorate General for Health and Consumers. In its Consumer Policy Strategy for 2002-2006, the Commission listed as its first mid-term objectives 'a high level of consumer protection', central to which was 'the establishment of common consumer protection rules and practices across Europe'. This was understood as the need to 'move away from the present situation of different sets of rules in each Member State towards a more consistent environment for consumer protection across the EU'.[220] The Commission further stated that it was determined 'to bring existing EU consumer protection directives up to date and progressively adapt them from minimum harmonisation to "full

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[213] J. Stuyck, 'Patterns of Justice in the European Constitutional Charter: Minimum Harmonisation in the Field of Consumer Law', in L. Kramer, H. W. Micklitz and K. Tonner (eds), *Law and Diffuse Interests in the European Legal Order* (Baden-Baden: Nomos, 1997).

[214] The technique of minimum harmonisation has been relied upon in a wide range of legislative instruments intended to protect consumers, e.g.: Directive 84/450 on misleading advertising (OJ 1984 L 250/17); Directive 85/577 on doorstep-selling (OJ 1985 L 210/29); Directive 93/13 on unfair contract terms (OJ 1993 L 95/29); Directive 97/7 on distance selling (OJ 1997 L 144/19).

[215] See in particular Case C-84/94 *UK v Council (Working Time Directive)* [1996] ECR I-5755.

[216] This is unequivocal in the Commission's Consumer Strategies for 2002-2006 (COM(2002) 208 final) and 2007-2013 (COM(2007) 99 final).

[217] For a discussion of the relationship between legal certainty and maximum harmonisation, see A. Garde, 'Can the UCP Directive Really Be a Vector of Legal Certainty?', in W. Van Boom, A. Garde and O. Akseli (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Ashgate, forthcoming, 2014). For a different view, see A. De Vries, 'The Aim for Complete Uniformity in EU Private Law: An Obstacle to Further Harmonization', *European Review of Private Law* (2012) 913.

[218] 'Maximum harmonisation' is also referred to as 'full harmonisation'.

[219] See in particular Directive 85/374 on product liability, OJ 1985 L 210/29, as amended by Directive 1999/34, OJ 1999 L 141/20 and as interpreted by the Court in Case C-183/00 *Maria Victoria Gonzalez Sanchez* [2002] ECR I-3901, Case C-52/00 *Commission v France* [2002] ECR I-3827 and Case C-154/00 *Commission v Greece* [2002] ECR I-3879 See also Directive 97/55 on comparative advertising, OJ 1997 L 290/18, as replaced by Directive 2006/114 on misleading and comparative advertising, OJ 2006 L 376/21 and as interpreted by the Court in Case C-44/01 *Pippig Augenoptik v Hartlauer* [2003] ECR I-3095.

[220] COM(2002) 208 final.

harmonisation" measures'.[221] The subsequent Consumer Strategy for 2007-2013 adopts a similar viewpoint ('Better Consumer Protection Regulation'[222]):

> Most of the existing EU consumer rules are based on the principle of 'minimum harmonisation'. Legislation explicitly recognises the right of Member States to add stricter rules to the EU rules which set a floor. This approach was entirely valid at a time when consumer rights were very different between the Member States and e-commerce was non-existent. The previous strategy set out a new approach based on 'full harmonisation'. This simply means that, in order both to improve the internal market and to protect consumers, legislation should not, within its given scope, leave room for further rules at national level.
>
> [...] The choice the EU faces is a clear one: if it is serious about the growth and jobs agenda, it needs a well-functioning Internal Market. A well-functioning Internal Market requires harmonisation on certain issues. Harmonisation is not possible without Member States' willingness to adjust certain practices and rules. At the same time, the Commission will not instigate a race to the bottom. It will always strive for a high level of protection.[223]

Directive 2005/29 on unfair commercial practices represents the culmination of the Commission's explicit preference for maximum harmonisation.[224] Article 3(5) confirms that Member States could only maintain in force 'national provisions within the field approximated by this Directive which are more restrictive or prescriptive than this Directive and which implement directives containing minimum harmonisation clauses' for a transition period of six years as of 12 June 2007 and provided they were 'essential to ensure that consumers are adequately protected against unfair commercial practices' and 'proportionate to the attainment of this objective'.[225] Furthermore, an internal market clause prohibits Member States from restricting the free movement of goods or services 'for reasons falling within the field approximated by the Directive'.[226] Only one exception to the rule of maximum harmonisation is provided for in the Directive, namely in relation to financial

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[221] *Ibid.*, at page 12.

[222] As Stephen Weatherill has pointed out, the Commission's quest for enhanced 'coherence' is an element in the broader project for 'better regulation' designed to secure improved economic performance: S. Weatherill, 'Maximum versus Minimum Harmonization: Choosing Between Unity and Diversity in the Search for the Soul of the Internal Market', in L. Gormley and N. Nic Shuibhne (eds), *From Single Market to Economic Union – Essays in Honour of John Usher* (OUP, 2012), at page 184.

[223] COM(2007) 99 final, at page 7.

[224] See in particular Recital 11 of the Preamble. For another example of maximum harmonisation, see Directive 2008/48 on consumer credit, OJ 2008 L 133/66, which provides that 'insofar as this Directive contains harmonised provisions, Member States may not maintain or introduce in their national law provisions diverging from those laid down in the Directive' (Article 22).

[225] The scope of this temporary derogation is far from clear, as discussed by A. Bakardjieva-Engelbrekt, *EU Marketing Practices Law in the Nordic Countries: Consequences of a Directive on Unfair Business-to-Consumer Commercial Practices* (Helsinki: the Nordic Council of Ministers Committee on Consumer Affairs, January 2005), at page 66.

[226] Article 4. The significance of this clause is difficult to predict, as discussed by A. Bakardjieva-Engelbrekt, *EU Marketing Practices Law in the Nordic Countries: Consequences of a Directive on Unfair Business-to-Consumer Commercial Practices* (Helsinki: the Nordic Council of Ministers Committee on Consumer Affairs, January 2005), at page 14, and by H. Micklitz, 'Minimum/Maximum Harmonisation and the Internal Market Clause', in G. Howells, H. Micklitz and T. Wilhelmsson, *European Fair Trading Law; The Unfair Commercial Practices Directive* (Aldershot: Ashgate Publishing, 2006), at page 27.

services and immovable property and for which Member States retain their discretion to adopt stricter requirements at national level even in the fields which it approximates.[227]

As a result of the broad scope of Directive 2005/29 and the move towards maximum harmonisation, the hands of Member States are now largely tied. If a measure falls within the scope of the Directive, then Member States cannot increase the level of consumer protection provided on their territories. In fact, some States have had to lower the level of protection they traditionally provided to comply with the provisions of the Directive.[228]

More recently, the EU adopted Directive 2011/83 on consumer rights which provides for the maximum harmonisation of certain aspects of consumer protection which were previously subject to clauses of minimum harmonisation (e.g. cooling-off periods).[229] Nevertheless, the proposal of the Commission to fully harmonise consumer sales and guarantees as well as unfair contract terms largely failed following the sharp criticism its initial proposal had received from commentators,[230] and the opposition of some Member States.

The question remains whether the benefits of moving from a minimum to a maximum harmonisation model of harmonisation outweigh the costs.[231] One thing is clear: in light of the complete transfer of regulatory powers a model of maximum harmonisation entails, the Commission's preference for such a model increases the responsibility of EU institutions to determine a satisfactory level of consumer protection and strike a convincing balance between potentially competing interests, taking particular account of the EU's duty to ensure a high level of consumer protection in the adoption and implementation of all its policies. However, it may be extremely difficult to predict the effect which an EU-wide regulatory instrument laying down general clauses whose general scope is unavoidably vague may have on Member States, as the Unfair Commercial Practices Directive has demonstrated.[232] Furthermore, one should not underestimate the difficulties for Member States to implement measures of maximum harmonisation. This will be particularly so when the substantive content of the EU harmonising regime is altered and Member States will have to ensure that they amend their laws accordingly, without lowering or exceeding the standards laid down by the harmonising provisions adopted at EU level.[233] Overall, maximum harmonisation may be a better tool for targeted harmonisation, than for harmonisation based on general clauses.

The exercise of EU powers: the principles of subsidiarity and proportionality

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[227] Article 3(9). In its First Application Report, published on 14 March 2013, the Commission considered that there was 'no case for removing this limitation, whether in relation to financial services or in relation to immoveable property': COM(2013) 139 final, at page 4.

[228] The Court's case law is unequivocal in this respect: see in particular: Joined Cases C-261 and 299/07 *VTB-VAB* [2009] ECR I-2949; Case C-304/08 *Plus Warenhandelsgesellschaft* [2010] ECR I- 217; Case C-540/08 *Mediaprint* [2010] ECR I-10909; Case C-206/11 *Köck* [2013] ECR I-xxx, judgment of 17 January 2013.

[229] OJ 2011 L 304/64.

[230] For an excellent criticism of the Commission's attempted move towards maximum harmonisation in relation to consumer rights, see H. Micklitz and N. Reich, 'Crónica de Una Muerte Anunciada: The Commission Proposal for a "Directive on Consumer Rights" ', *Common Market Law Review* 46 (2009) 471.

[231] This is discussed more fully in S. Weatherill, 'Maximum versus Minimum Harmonization: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market', in L. Gormley and N. Nic Shuibhne (eds), *From Single Market to Economic Union – Essays in Honour of John Usher* (OUP, 2012).

[232] A. Garde, 'The Unfair Commercial Practices Directive: A Successful Example of Legislative Harmonisation?' in P. Syrpis (ed.) *The Judiciary, the Legislature and the Internal Market* (Cambridge University Press, 2012), at page 118.

[233] S. Weatherill, 'Maximum versus Minimum Harmonization: Choosing Between Unity and Diversity in the Search for the Soul of the Internal Market', in L. Gormley and N. Nic Shuibhne (eds), *From Single Market to Economic Union – Essays in Honour of John Usher* (Oxford University Press, 2012), at page 187.

Once it is established that the Union has the competence to act in a given policy area, the questions arise, firstly, whether it should exercise its powers and, secondly, how it should do so. These questions are embodied in the principles of subsidiarity and proportionality, respectively, which are constitutional principles of the EU legal order and which are, as such, subject to judicial review under Article 263 TFEU.

Under Article 5(3) TEU, 'in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level'.[234] It applies to areas of shared and supporting competence between the EU and its Member States, including consumer protection. Consequently, for each measure envisaged as part of its consumer policy, the question arises whether the EU can achieve the objectives of a proposed measure better than Member States.

The principle of subsidiarity has been invoked on several occasions by the European Commission to avoid adopting harmonising legislation in a given area of EU competence. For instance, Directive 2005/29 on unfair commercial practices does not address 'legal requirements related to taste and decency which vary widely among the Member States'.[235] Similarly, the EU has been extremely reluctant to harmonise the laws of the Member States on the labelling and marketing of alcoholic beverages, on the ground that the variation of drinking patterns from one Member State to another excluded a stronger EU regulatory intervention.[236]

Traditionally, EU institutions have tended to pay lip service to the principle of subsidiarity, due probably to 'its lack of conceptual contours'.[237] In particular, the CJEU has been criticised for failing to engage meaningfully with the question of whether the EU legislature has complied with its requirements.[238] For example, in the *Vodafone* case, in which major telephone operators unsuccessfully challenged the validity of the Roaming Regulation imposing maximum roaming charges within the EU,[239] the Court merely noted the economic interdependence between retail and wholesale charges for roaming services to conclude that

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[234] Article 5(3) TEU. This provision expressly refers to the 'Protocol on the Application of the Principles of Subsidiarity and Proportionality', which is intended to establish the conditions for the application of the principles of subsidiarity and proportionality with a view to defining more precisely the criteria for applying them and ensuring their strict observance and consistent implementation by all institutions: Protocol (N° 2) on the Application of the Principles of Subsidiarity and Proportionality (2008), OJ 2008 C115/201, at page 206.

[235] Recital 7 of the Preamble, which continues as follows: 'Commercial practices such as, for example, commercial solicitation in the streets, may be undesirable in Member States for cultural reasons. Member States should accordingly be able to continue to ban commercial practices in their territory, in conformity with [EU] law, for reasons of taste and decency even where such practices do not limit consumers' freedom of choice.'

[236] O. Bartlett and A. Garde, 'Time to Seize the (Red) Bull by the Horns: The EU's Failure to Protect Children from Alcohol and Unhealthy Food Marketing', *European Law Review* 38 (2013) 498.

[237] R. Schütze, *European Constitutional Law* (Cambridge University Press, 2012), at page 178.

[238] See in particular A. Dashwood, 'The Relationship between the Member States and the European Union/European Community', *Common Market Law Review* 41 (2004) 2. This is not to suggest, however, that if the Court had reviewed the EU's compliance with the principle of subsidiarity that it would necessarily have concluded that the measures under review did not comply with this principle: P. Craig, 'Subsidiarity: A Political and Legal Analysis', *Journal of Common Market Studies* 50 (2012) 72, at page 81.

[239] Case C-58/08 *Vodafone* [2010] ECR I-4999.

the EU legislature had not infringed the principle of subsidiarity. It did not engage in any detail with its substantive aspects.[240] One may ask whether the enhanced role granted to national parliaments to check compliance with the principle of subsidiarity[241] will lead the Court to take subsidiarity more seriously. By enabling the national parliaments to scrutinise compliance with this principle and forcing the EU institutions to take their concerns into account,[242] the 'subsidiarity-check' is expected to produce a critical mass of analysis that has historically not been available to the Court (i.e. reasoned opinions by national parliaments and the Commission) which the Court may rely upon in its assessments.[243]

Any EU measure must also comply with the principle of proportionality, which requires that 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'.[244] Protocol N° 2 adds that 'draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved'.[245] Thus, the Commission's Impact Assessments attempt to balance the competing interests involved, looking at the different options available to the EU legislature and their relative costs and benefits.

According to established case law, an EU act is proportionate when it is suitable and necessary to achieve its declared objective.[246] Here again, EU courts have tended to adopt a relatively light scrutiny when verifying the compliance of a given measures with the principle of proportionality. In particular, 'where [an EU] authority is required to make complex assessments in the performance of its duties, its discretion also applies, to some extent, to the establishment of the factual basis of its action'.[247] This case law has not proven to be any significant obstacle to date.

Consumer protection and the mainstreaming obligation resting on the EU

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[240] At paragraphs 77 to 79. For a more detailed discussion, see A. Alemanno and A. Garde, *Regulating Lifestyles in Europe: How to Prevent and Control Non-Communicable Diseases Associated with Tobacco, Alcohol and Unhealthy Diets?* (Swedish Institute for European Policy Studies, Study 2013/7, December 2013), at page 69. See also A. Biondi, 'Subsidiarity in the Courtroom', in A. Biondi and P. Eeckhout (eds), *EU Law after Lisbon* (Oxford University Press, 2012), and M. Brenncke, Annotation in *Common Market Law Review* 47 (2010) 1793.

[241] Article 5(3) TEU, Article 12(b) and Article 8 of Protocol N° 2.

[242] The Commission decision to maintain its proposal can be overridden by the European Parliament or the Council. In these circumstances, the legislative proposal shall not be given further consideration. See Article 7(3) of Protocol N° 2.

[243] A. Alemanno, 'A Meeting of Minds on Impact Assessment: When *Ex-Ante* Evaluation Meets *Ex-Post* Judicial Control', *European Public Law* 17 (2011) 487.

[244] Article 5(4) TEU.

[245] Article 5 of Protocol (N° 2) on the Application of the Principles of Subsidiarity and Proportionality (2008), OJ 2008 C115/201.

[246] Case 11/70 *Internationale Handeslgesellschaft mbH v. Einfhur- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

[247] See, e.g., Case 138/79 *Roquette Frères v Council* [1980] ECR 3333, at paragraph 25; Joined Cases 197–200, 243, 245 and 247/80 *Ludwigshafener Walzmühle v Council and Commission* [1981] ECR 3211, at paragraph 37; Case C-27/95 *Bakers of Nailsea* [1997] ECR I-1847, at paragraph 32; Case C-4/96 *Nifpo and Northern Ireland Fishermen's Federation*, [1998] ECR I-681, at paragraphs 41 and 42; Case C-120/97 *Upjohn* [1999] ECR I-223, at paragraph 34; Case T-13/99 *Pfizer Animal Health v Council* [2002] ECR II-3305, at paragraph 168. This case law is discussed in A. Alemanno and A. Garde, 'The Emergence of an EU Lifestyle Policy: The Case of Alcohol, Tobacco and Unhealthy Diets', *Common Market Law Review* 50 (2013) 1745, at page 1771. On the application of the principle of proportionality by the CJEU, see also T. Tridimas, *The General Principles of EU Law*, (Oxford University Press, 2nd edition, 2006), at page 142.

Article 169, Article 114(1) and all potentially relevant Treaty basis should be read in conjunction with Article 12 TFEU requiring that 'Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities', and Article 38 of the EU Charter of Fundamental Rights requiring that 'Union policies shall ensure a high level of consumer protection'. In EU jargon, EU institutions have an obligation to 'mainstream' consumer protection concerns into all fields of EU competence. This is further echoed in Article 114(3) TFEU which mandates the EU to take as a base a high level of consumer protection when legislating on the basis of Article 114.

Mainstreaming consumer protection concerns into all EU policies should involve a proactive approach rather than a reactive approach relying solely on the CJEU to review already adopted EU law and ensure that it complies with the relevant Treaty provisions, and Article 169 TFEU more specifically. As Olivier De Schutter has argued, 'mainstreaming should be seen as operating *ex ante* rather than *post hoc*: it influences the way legislation and public policies are conceived and different alternative paths compared to one another; it does not simply require that such legislation and policies do not violate fundamental rights. It is pro-active, rather than reactive'.[248] More fundamentally, mainstreaming implies, at its core, that a high level of consumer protection should not be pursued only via ear-marked, distinct policies, but must be incorporated in all the fields of law- and policy-making, and not be 'something that is separated off in a policy or institutional ghetto. Mainstreaming is transversal or horizontal'.[249]

As discussed in the previous section, many Union policies have an impact on consumer protection across Europe. They include internal market policy, as explicitly referred to in Article 169(2)(a), but also agricultural, competition, transport, energy, taxation, public health and cultural policies. The relevance of these policies to the EU consumer protection agenda stems from the fact that consumer protection is interdisciplinary and requires a coherent multi-sectorial intervention if it is to be fully effective.

Assessing the impact of policies on consumer protection requires, in turn, that a careful balancing exercise is carried out between competing interests at every stage of the policy-making process.[250] The exercise is all the more difficult as 'a high' level of consumer protection is by no means 'the highest', as vividly illustrated by the *Deposit Guarantee* case.[251] However, one should read this judgment in light of the approach which the CJEU

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[248] O. De Schutter, 'Mainstreaming Human Rights in the European Union', in P. Alston and O. De Schutter (eds), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Hart Publishing, 2005), at page 44.

[249] *Ibid.*, citing C. McCrudden, 'Mainstreaming Equality in the Governance of Northern Ireland', *Fordham International Law Journal* (1999) 1696.

[250] Hence the importance of impact assessments. The Commission Impact Assessment Guidelines are available at: http://ec.europa.eu/smart-regulation/impact/commission_guidelines/commission_guidelines_en.htm. This is discussed more fully in A. Alemanno and A. Garde, *Regulating Lifestyles in Europe: How to Prevent and Control Non-Communicable Diseases Associated with Tobacco, Alcohol and Unhealthy Diets?* (Swedish Institute for European Policy Studies, Study 2013/7, December 2013), at page 79.

[251] In this case, the Court ruled: 'Although consumer protection is one of the objectives of the Community, it is clearly not the sole objective. As has already been stated, the Directive aims to promote the right of establishment and the freedom to provide services in the banking sector. Admittedly, there must be a high level of consumer protection concomitantly with those freedoms; however, no provision of the Treaty obliges the Community legislature to adopt the highest level of protection which can be found in a particular Member State. The reduction in the level of protection which may thereby result in certain cases through the application of the second subparagraph of Article 4(1) of the Directive does not call into question the general

adopted in its recent *Deutsches Weintor* decision[252] and in which it relied explicitly on Article 35 of the EU Charter, which contains a public health mainstreaming obligation similar to Article 38, to dismiss the claims of alcoholic beverages industry operators that the EU legislature had exceeded the limits on its margin of discretion by banning the use of health claims on all beverages containing more than 1.2% by volume of alcohol.[253]

Conclusion

Since the 1970s, the EU has developed a significant body of rules which reflect the diversity of consumer interests calling for protection. However, several key questions remain unanswered. In particular, it is unclear how far the EU can adequately protect consumers by relying primarily on internal market mechanisms, and Article 114 TFEU more specifically. Perhaps one should prefer to rely on the alternative avenue provided by Article 169(2)(b) rather than excessively blur the boundaries of Article 114 TFEU. A degree of ambivalence remains in what the EU is trying to achieve in this policy area.

Further reading:

Stephen Weatherill, *EU Consumer Law and Policy* (Elgar Publishing, 2nd edition, 2013)

Hans Micklitz, Norbert Reich and Peter Rott, *Understanding EU Consumer Law* (Intersentia, 2009)

Iain Ramsay, *Consumer Law and Policy – Text and Materials on Regulating Consumer Markets* (Hart Publishing, 3rd edition, 2012)

James Devenney and Mel Kenny (eds), *European Consumer Protection: Theory and Practice* (Cambridge University Press, 2012)

Hans Micklitz, Jules Stuyck and Evelyne Terryn (eds), *Cases, Materials and Text on Consumer Law* (Hart Publishing, 2010)

result which the Directive seeks to achieve, namely a considerable improvement in the protection of depositors within the Community': Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405, in particular at paragraph 48. One should note, however, that this judgment was delivered before the EU Charter was adopted.

[252] Case C-544/10 *Deutsches Weintor eG v Land Rheinland-Pfalz*, judgment of 6 September 2012.

[253] Article 4(3) of Regulation 1924/2006 on nutrition and health claims made on foods, [2006] OJ L404/9, as amended.