Chapter 34
From the Kennedy Message to Full Harmonising Consumer Law Directives: A Retrospect

Klaus Tonner

Abstract This contribution looks to the past of consumer law. There are two reasons for doing so: the personal one is that this author accompanied Hans Micklitz during the first years of his career in Hamburg, Bremen and Berlin, when we established in 1986, together with Udo Reifner, the law journal *Verbraucher und Recht*, and the academic one is that an answer to the question in which direction a development might go is easier to be found when you know where it comes from.

So this contribution draws an arc between the US consumer policy of the Kennedy era and its spread over to Western Europe—that is to say to the states of Western Europe, not to the then EEC—and the completion of the first generation of consumer (contract) Directives with the Sales of Consumer Goods Directive in 1999 and to the full harmonisation approach of the second generation of Directives. At the beginning, Member States were active, whereas the EEC only adopted programmes which were not implemented; at the end of this period, the question is what will be the next steps after targeted full harmonisation. In retrospect it becomes clear that the relation between national and European influence in consumer law cannot be fixed to a certain stage but is subject of a process of continuing changes.

Hans Micklitz is, as the author of this contribution, a contemporary witness of the decades described herein, and he contributed substantially not only to academic discussions, but also to the process of political decision-making. Younger readers may find access to the historical background of today's consumer law.

34.1 Introduction

In 1980 and 1981, a series of books were published dealing with the consumer law of the nine Member States at that time. The series was mandated by the Commission of the European Economic Community; the purpose was to deliver a comprehensive comparative law study as the basis for building a European consumer law. The editors of the series and the authors of the volumes about comparative law and German

K. Tonner (✉)
Civil Law and European Law, University of Rostock, Rostock, Germany
e-mail: klaus.tonner@uni-rostock.de

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law were an already well known Professor, Norbert Reich, and a young academic scholar, Hans Micklitz.[1]

None of the consumer law Directives had been adopted in those days; the landscape of European consumer law was like a desert, except for a not implemented programme from 1975. The series of books dealt with national law and helped to start the project of European consumer law. So the development of European consumer law and also the academic career of Hans Micklitz started with the same couple of books in the early 1980s.

Many of the contributions of this Festschrift will look forward to the future of consumer law as well as other areas of law. This contribution, however, does the opposite: It looks back. There are two reasons for doing so: the personal one is that this author accompanied Hans Micklitz during the first years of his career in Hamburg, Bremen and Berlin, when we established in 1986, together with Udo Reifner, the law journal *Verbraucher und Recht*, and the academic one is that an answer to the question in which direction a development might go is easier to be found when you know where it comes from.

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34.2 Consumer Policy as Expression of Welfare Policy in the 1960s and 1970s

34.2.1 Starting Point: The Kennedy Message

The origin of modern consumer policy in western states is a shift from a liberal—in some states ordo-liberal economic approach to a Keynesian orientation of the

[1] See N Reich and H-W Micklitz, *Consumer Legislation in Germany* (Wokingham, Van Nostrand Reinhold, 1980); id, *Consumer Legislation in the EC Countries: A comparative Analysis* (Wokingham, Van Nostrand Reinhold, 1981).

[2] Dir 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, [1999] OJ L 171/12.

economic policy of states. The confidence in the capability of the state to regulate social problems was nearly unlimited. It was the general opinion, that liberal markets led to 'market failure', and that the state has to intervene to make markets functioning. The state was regarded as being responsible to provide for social goods which were not delivered by the market. Prevention for the risks of daily life was regarded as an area of responsibility of the state. State meant the national state; the perspective was not a global one and was restricted to industrialized countries.

It is not surprising that consumer policy became part of such an orientation of economic policy. The market does not fulfil its promises with regard to prices and quality of consumer goods and services, and the state was considered responsible in providing redress for its citizens. It is also not surprising that the starting point for consumer policy was in the US as the most advanced economy. There is no need to characterize this development in detail, but we may recall the famous Kennedy message, which is regarded as the symbolic beginning of western style consumer policy. It begins with the famous words 'consumers, by definition, include us all.' The four rights, which today are part of Art 169 TFEU are

- the right to safety—to be protected against the marketing of goods which are hazardous to health or life;
- the right to be informed—to be protected against fraudulent, deceitful, or grossly misleading information, advertising, labelling or other practices, and to be given the facts the consumer needs to make an informed choice;
- the right to choose—to be assured wherever possible, access to a variety of products and services at competitive prices, and in those industries where competition is not workable and Government regulation is substituted, an assurance of satisfactory quality and services of fair prices;
- the right to be heard—to be assured that consumer interests will receive full and sympathetic consideration in the formulation of Government policy, and fair and expeditious treatment in its administrative tribunals'.[3]

34.2.2 Transfer to National Policy

As already mentioned, the ideas of US consumer policy were not transferred to the European level, but to the Member States—and it took a decade from the Kennedy message to declarations of consumer policy in Europe. To take, as an example, Germany as the home country of this author, two reports were adopted by the government in 1971[4] and 1975.[5] They differ from the Kennedy message and from the following EEC programme, as they focus on the market position of the consumer, safety, environmental protection, public services, and consumer organizations. In particular, the idea of strengthening the position of the consumer, be it individual, be it collective, is

[3] JF Kennedy, 'Special Message to the Congress on Protecting the Consumer Interest' (1962), www.presidency.ucsb.edu/ws/?pid=9108.

[4] Bundestags-Drucksache (Federal Gazette; BT-DrS) VI/2724.

[5] BT-DrS 7/4181.

of interest. There may be even drawn a line from these early documents to the recent coalition agreement of the new German government, which came into office in December 2013, which underpins the role of consumers and their organisations as market monitors ('Marktwächter').[6] It is not the weak consumer who must be protected in an individual case, but the consumer must be strengthened by giving him or her substantive rights—individual rights and the right of acting collectively.

34.2.3 Transfer to European Policy

The declarations of the EEC in the 1970s and the 1980s are closer to the US model than the German reports. There was a first programme in 1975.[7] On a Paris summit, the heads of states and governments had decided in 1972 to act in the field of consumer policy; after the summit the first programme was drafted by the Commission and adopted by the Council. Two follow-up programmes were adopted by the Council in 1981[8] and 1986.[9]

According to the first programme 'consumer rights may be summed up by a statement of five basic rights:

- the right to protection of health and safety;
- the right to protection of economic interests;
- the right of redress;
- the right to information and education;
- the right of representation (the right to be heard).'[10]

There was some debate as to whether the EEC had any competence to act in those days, as the provision on consumer policy was only introduced by the Maastricht Treaty in 1992. The programme refers to the broad wording of then Art 2 EEC Treaty (now Art 3 [3] TEU).

34.2.4 Transfer to the Global Level

The idea of consumer protection also reached the global level. In 1985, the General Assembly of the United Nations adopted Guidelines for Consumer Protection.[11] As

[6] CDU and SPD, 'Deutschlands Zukunft gestalten, Koalitionsvertrag zwischen CDU, CSU und SPD, 18. Legislaturperiode' (2013) 124 ff.

[7] Preliminary programme of the European Economic Community for a consumer protection and information policy, [1975] OJ C 92.

[8] Second programme for a consumer protection and information policy, [1981] OJ C 133.

[9] Council Resolution of 23/6/1986, [1986] OJ C 167/1.

[10] Preliminary programme for a consumer protection and information policy.

[11] United Nations General Assembly, Consumer Protection, Resolution No 39/248 of 9 April 1985; on which see D Harland 'The United Nation Guidelines for consumer protection' (1987) 10 *Journal of Consumer Policy* 245.

UN soft law, these guidelines cannot represent the interests of industrialized countries only, and in fact, the guidelines are not only western style consumer protection. They include the basic rights according to the Kennedy message and the 1975 EEC programme and refer to the information model,[12] but also take into account the needs of consumers in developing countries.[13] The Guidelines use the term of 'essential goods and services', which should be available also in rural areas and for that part of the population that lives in poverty. Special attention is given to food, clean water, and pharmaceuticals.

In the 1990s, the Guidelines were 'greened'. Provisions following a relevant section of the Rio Declaration from 1992 were added to the Guidelines.[14]

34.3 Competition Between EEC and Member States

34.3.1 European Level

The EEC programme of 1975 included not only general principles, but also a comprehensive number of actions, which should have been taken at European level. Among these were the harmonization of the conditions of consumer credit, measures against false or misleading advertising, against unfair commercial practices, which include unfair terms, door-to-door sales, unsolicited goods, the harmonization of product liability and improving the quality of services. In other words, this was the programme for the Directives adopted between 1985 and 1999, which we call the first generation of consumer protection directives. But no piece of legislation was passed in the years to follow immediately after 1975. Why?

The reason is at least twofold: first, there is a formal reason. According to the EEC Treaty, before the entry into force of the Single European Act in 1987, the Council had to adopt proposals of the Commission unanimously. The legal basis for such directives was Art 100 of the original Rome Treaty dealing with harmonization of law. The internal market provision was only passed as an amendment of the Treaty in 1987.

But in our view, not legal, but political reasons were the main cause for the Council not to pass consumer protection directives. Consumer protection was a playing field of the Member States; they had only discovered this topic a short time earlier; and they did not want to hand it over to another law-maker. Simply speaking, the time was not ripe for European consumer protection in the 1970s.

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[12] 'Access to adequate information to enable … [consumers] to make informed choices (…)', no 3 (c) of the Guidelines.

[13] See AH Benjamin 'Consumer protection in less developed countries—the Latin American experience' (1996) 4 *Consumer Law Journal* 47.

[14] See K Tonner, 'Towards a sustainable consumer contract law' (2012) 10 *Zeitschrift für Europäisches Umwelt- und Planungsrecht* 56.

34.3.2 Member States

The Member States saw in the 1970s a lively development of consumer protection by legal instruments. They were discussed as measures of national policy, consumer markets were, or at least seemed to be, national markets and nobody took care whether such legislation had a cross border impact. Member states were the first on the playing ground.[15]

We will give some examples from Member States' legislation, which later influenced European legislation, and begin with standard terms regulation in Germany. This country had—and has—a rich jurisdiction in this field, which was transposed to a formal act in 1976, the AGB-Gesetz (Act on standard contract terms). This act was based on a general clause which gave courts the opportunity to continue their case law even after the adoption of the AGB-Gesetz. Further, it includes a right of consumer associations to take action against unfair standard terms. Both proved to be a success story. Meanwhile, the general clause became part of the Civil Code, the BGB, whereas the provisions on the right to take action were transferred to the Unterlassungsklagengesetz (Injunction Claims Act).[16]

Other examples, where German rules were 'on the national market' a long time before the adoption of European legal instruments were the right to withdraw from a consumer credit contract (in Germany since the Consumer Credit Act 1990,[17] at EU level only since Directive 2008/48/EC), or the travel law sections in the Civil Code since 1979, whereas the Package Travel Directive was adopted only in 1990. Also Belgium[18] and France[19] adopted legislation protecting the travelling consumer a long time before the Package Travel Directive.

In the 1970s, France developed a set of withdrawal rights, which were far more comprehensive and earlier[20] than the relevant rules of the original Doorstep Sales Directive.[21] The same is true with regard to the Distance Selling Directive.[22] A UK example is the monitoring of Codes of Conduct by the Office of Fair Trading. Other examples from other Member States could be added; not at last they are reported in the series of books edited by Norbert Reich and Hans Micklitz, mentioned in the introduction of this contribution.

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[15] Consumer law books were published on national, not European law. A first book on European consumer law was L Krämer, *EEC Consumer Law* (Louvain-la-Neuve, Centre de Droit de la Consommation, 1986), which in its structure followed the Reich and Micklitz series.

[16] This act was a transposition of Dir 98/27/EC.

[17] The Verbraucherkreditgesetz (Consumer Credit Act) was the transposition of the original Consumer Credit Dir, 87/102/EEC. Whereas the Directive did not provide for a withdrawal right, the German act of 1990 did so—making use of the minimum harmonisation principle.

[18] Act of 30/3/1973.

[19] Loi no 75-627.

[20] Loi no 72-1137.

[21] Dir 85/377/EEC, now part of the Consumer Rights Dir (Dir 2011/83/EC).

[22] Loi no 88-21; Dir 97/7/EC, now part of the Consumer Rights Dir (Dir 2011/83/EC).

We can summarize that the consumer protection laws of the Member States were no traditional laws, but only recently adopted, when the EEC entered the scene not only with programmes, but with legislation in the second half of the 1980s.

34.4 Shift to the European Level in the 1980s and 1990s

34.4.1 Single European Act

It could have been foreseen that the 'victory' of the Member States in the 1970s to play the fundamental role in consumer law, was not final. The 1980s and 1990s saw the shift from Member States to the European level with regard to the responsibility in consumer law. Again, the reasons were twofold.

A formal reason was provisions of the Treaty. The internal market project of the Delors Commission arose. It was linked with the first amendment[23] of the original Rome Treaty, the Single European Act. The core provision of this Treaty was the internal market rule of Art 100a EEC Treaty (since the Amsterdam Treaty Art 95 EC, today Art 114 TFEU). According to this rule, majority voting for purposes of establishing the internal market was sufficient. The unanimity rule of Art 100 EEC Treaty was maintained, but could be circumvented, if a proposal of a legal instrument was of relevance for the functioning of the internal market. If it could be pointed out in the recitals of a legal instrument that the instrument would contribute to the functioning of the internal market, the mechanism of majority voting in the Council according to Art 100a EEC Treaty could—and can—be employed.

It was not surprising that this new possibility was used also in the field of consumer protection. The Directives of the 1980s were based on the old mechanism of Art 100 EEC, that is to say unanimity. The proposals of these Directives were published already in 1976[24] respectively in 1977[25] and 1979.[26] It was due to the complicated process, according to Art 100 EEC Treaty, that they were not adopted earlier. All the other ones, beginning with the Product Liability Directive,[27] were based on Art 100a EEC. Even after the provision on consumer policy in the Maastricht Treaty came into force, this practice was not changed, but the Commission maintained Art 100a respectively Art 95 EC as basis for its proposals. The possibilities of Art 129a EEC Treaty, since the Amsterdam Treaty Art 153 EC, now Art 169 TFEU, to serve as basis for the legal instruments were never tested.[28]

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[23] Except the accession treaties with new Member States.

[24] [1976] OJ C 241/6: Product Liability Dir 85/374/EEC.

[25] [1977] OJ C 22/6: Doorstep Sales Dir 85/577/EEC.

[26] [1979] OJ C 80/6: Consumer Credit Dir 87/102/EEC.

[27] Dir 85/374/EEC; see also H-W Micklitz, in N Reich, H-W Micklitz, P Rott and K Tonner, *EU Consumer Law,* 2nd ed (Cambridge, Intersentia, 2014) ch 6.

[28] With one exemption, Dir 98/6/EC on consumer protection in the indication of the prices of product offered to consumers.

This raises the question, whether consumer policy became really a part of internal market policy, or whether it was only tricky to make use of Art 100a EEC to pass legal instruments of consumer policy, either to circumvent Art 100 EEC or to disguise that there was—before Maastricht—no authorization in the Treaty for consumer protection measures. Consumer policy was described as by-product in relation to internal market policy.

The consumer protection policy of the Member States in the 1970s and the programmes of the Commission from 1975 and 1981 were not the same as the consumer policy under the internal market rule. The legal instruments of the 1970s were designed as part of social policy to protect the weaker party to the contract. They were part of a welfare state. In the second half of the 1970s faith in to successfully balance market failure got lost. 'State failure after market failure' was one formula. Neo- liberal theories came up and dominated the economic policy of the states. This was not without influence on consumer policy. Consumer protection policy changed to consumer policy; 'protection' was denounced as 'paternalistic'. The confident consumer entered the scene.[29] So it is not by chance that the internal market rule was used to establish consumer policy.

34.4.2 The Role of the ECJ

The possibility of the Commission and Council establishing a European consumer policy was substantially supported by the European Court of Justice (now Court of Justice of the European Union). Through case law the Court struck down provisions of the Member States which contradict the free movement of goods (then Art. 30 EEC Treaty). The European legislator could establish new law on the European level on the, so to speak, cleared grounds. It is not necessary to explain here the *Cassis de Dijon* doctrine of the ECJ again,[30] as this is well known, but I will expose that this doctrine did not only enable the European legislator to establish new rules on the cleared grounds but even forced it to do so.

The ECJ introduced a three steps test. The national provision at stake must impede the free movement of goods. This is understood in a wide sense according to the *Dassonville* formula,[31] and therefore many national provisions are considered by the ECJ, in other words the autonomy of Member States to pass their own (consumer protection) acts is restricted by the requirements of the free movements of goods. At the second step, Member States may object that the national law may protect their 'general interests'. It is the ECJ which defines what a general interest is and, according to the Court, consumer protection is, since *Cassis*, one of the general interests that are accepted by the ECJ. That is to say that Member States are free to establish their own systems of consumer protection, including legal instruments, as long as they can argue that the legal act at stake protects consumers, even if it inter-

[29] For critique see T Wilhelmsson, 'The abuse of the "confident consumer" as justification for EC consumer law' (2004) 27 *Journal of Consumer Policy* 317.

[30] Case 120/78 *Rewe-Central AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

[31] Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837.

feres with the free movement of goods. But whether the provision at stake is really a consumer protection measure is under control of the ECJ. This is the third step, the proportionality test. So Member States are free to adopt their own consumer protection rules, but only if they can give evidence before the ECJ, that they are really consumer protection rules (and not only hidden protectionist instruments), and that they meet the standard of proportionality.[32]

The consequent approach taken by the Commission was that *Cassis* could be used as a 'weapon' not only against alleged consumer protection but in fact protectionist national legal instruments. As the line between an alleged and non-proportionate legal act and a really consumer protecting act cannot be drawn without difficulties, Member States could no longer establish legal concepts of consumer protection on their own without taking into account the European aspect of the matter. On the other hand, the Commission had to take into consideration that Member States are allowed in principle to adopt their own legal instruments, especially if there is no regulation of the specific general interest at European level. This was the basis of the re-establishing of a system of consumer protection at European level. It was combined with the minimum standard principle, which grants Member States their autonomy for their own rules—as long as they are proportionate. A national rule, which goes beyond a minimum standard provision of a Directive, is not necessarily in all cases considered to be non-proportionate, but is in danger of being so.[33] So even in the days of the minimum standard principle, Member States were not absolutely free with rules which went further.

34.4.3 The First Generation of Consumer Protection Directives

The minimum standard policy was, of course, not only a result of the ECJ case law, but mainly a political decision for more cooperation with the Member States—and it was finally successful. All the Directives, which were already part of the programmes of 1975 and 1981, were adopted one by one in the 1980s and 1990s. The core of consumer law at European level was consumer contract law. Seven Directives dealt with contract law, beginning with the Doorstep Sales Directive in 1985 and ending with the Sales of Consumer Goods Directive in 1999. They were accompanied by the Product Liability Directive, two Directives dealing with unfair commercial practices (first the Directive on Misleading Advertising[34] and then the Unfair Commercial Practices Directive[35]) and Directives for the enforcement of consumer law.[36]

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[32] One of the many examples is the purity of German beer rule, which protected German breweries against competition from abroad, case 178/84 *Commission v Germany* [1987] ECR 1227.

[33] Case C-205/07 *Gysbrechts and Santurel Inter BVBA* [2008] ECR I-9947. See also N Reich, 'The ECJ and the autonomy of Member States—Some critical remarks on the use and methodology of the proportionality principle in the internal market case law of the ECJ' in H Altmeppen et al (eds), *Festschrift für Günther H. Roth zum 70. Geburtstag* (Munich, CH Beck, 2011) 615.

[34] Dir 84/450/EEC.

[35] Dir 2005/29/EC.

[36] Especially the Dir on injunctions for the protection of consumers' interest, originally Dir 98/27/EC, now Dir 2009/22/EC.

At the beginning, the Directives did not affect core matters of contract law. They picked up new business practices, those which were unfair or were caused by new technological developments, especially the internet. It was a development from the margin to the core.[37] The Doorstep Sales Directive and the Timeshare Directive[38] were two examples, in which the consumer is protected against unfair business practices by means of contract law, whereas the Distance Selling Directive is an example for the consumer's getting acquainted with the internet.[39] In the eyes of the Commission, the internet plays a leading role for the establishment of the internet market; so the European legislator has to guarantee by legal instruments that the consumer is not deterred from using it.

Only with the Unfair Contract Terms Directive of 1993[40] did the European legislator come closer to the core of contract law, followed by the Sales of Consumer Goods Directive of 1999, which was the last and most important step towards core matters of national contract law.[41] But the legislator circumvented, in all the Directives, a definition of contract. In the E-Commerce-Directive, e.g., it used the terms 'order' and 'confirmation' instead of 'offer' and 'acceptance'. It was left to the CESL project to go a step further. But it remains to be seen whether the CESL will ever be adopted.

The minimum harmonisation principle does not mean unification of the laws of the Member States. It is only an approximation. To disguise the difference between unification and approximation, the imprecise term of harmonisation is used. 'Approximation' makes it clearer that the goal to remove barriers for the internal market cannot be realized in this way.

On the other hand, minimum harmonisation does not allow Member States uncontrolled own policy beyond the standard. We already mentioned the limitations as identified by the ECJ, but in practice, since the middle of the 1980s, own initiatives of the Member States nearly disappeared. The governance of consumer policy was in Brussels, no longer in the Member States. In particular, it was the European legislator that picked up new developments such as the internet. Shared liability was only in theory: initiatives came from the Commission, Member States implemented them. Of course, this does not mean that there were no exceptions to this observation, for example on cold calling in Germany.[42]

It cannot be surprising that the Commission took the first opportunity to switch from minimum to full harmonisation. This happened after the completion of the seven consumer contract law Directives of the first generation by the follow-up programme of 2002.[43]

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[37] See K Tonner, 'Die Rolle des Verbraucherrechts bei der Entwicklung eines europäischen Zivilrechts' (1996) *Juristenzeitung* 533.

[38] Dir 97/47/EC, now Dir 2008/122/EC.

[39] And the E-Commerce Dir 2000/31/EC, which is no mere consumer protection Directive.

[40] Dir 93/13/EEC.

[41] On which see Micklitz in Reich et al, *EU Consumer Law,* ch. 4.

[42] Gesetz zur Bekämpfung unlauterer Telefonwerbung (Act against unfair commercial practices by telephone) of 2009.

[43] COM(2002) 208.

34.5 The First Decade of this Century

The full harmonisation option was somehow hidden in the Consumer Policy Strategy 2002–2006,[44] as other areas than contract law stood in the foreground in this period. Especially, the Unfair Commercial Practices Directive was drafted and adopted.[45] Though one piece of legislation of the time, the Directive concerning the distance marketing of consumer financial services,[46] already followed the full harmonisation approach in contract law, it was only the next Consumer Policy Strategy[47] and in particular the proposal of a Consumer Rights Directive,[48] which led to a comprehensive discussion. The idea of full harmonisation was rejected by academic writers[49] and also by Member States.[50] The proposal of the Consumer Rights Directive failed, only a much reduced part of the original proposal was adopted by Parliament and Council.[51]

Again, a compromise was at hand. As the minimum standard of the 1980s was a compromise between acting fully in the field of consumer protection or not at all, this time 'targeted harmonisation' was the compromise.[52] This meant that Member States remained free to adopt legislation in sectors where there is no relevant provision in a European legal instrument, but must not alter provisions of the European legislator. For example, a national legislator is free to apply the provisions of the transposition act of the Unfair Commercial Practices Directive also to business to business relations, which are not covered by the Directive, but a national legislator must not change a period set out in the Directive, e.g. a withdrawal period.

It seems that the targeted full harmonisation principle might work, though it is sometimes difficult to draw the line as to what the implementing national legislator is allowed to do and what not. The Consumer Policy Strategy 2007–2013 was implemented in that sense, that is to say that meanwhile a new Consumer Credit

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[44] Ibid.

[45] See G Howells, H-W Micklitz and T Wilhelmsson, *European Fair Trading Law* (Aldershot, Ashgate, 2006).

[46] Dir 2002/65/EC.

[47] COM(2007) 99.

[48] COM(2008) 614; on which see G Howells and R Schulze, 'Overview of the proposed consumer rights Directive' in G Howells and R Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Munich, Sellier, 2009) 3.

[49] See H-W Micklitz and N Reich, 'Crónica de una muerte anunciada: The Commission proposal for a Directive on Consumer Right' (2009) 46 *CML Rev* 471; P Rott and E Terryn, 'The proposal for a Directive on consumer rights: no single set of rules' (2009) *Zeitschrift für Europäisches Privatrecht* 456; K Tonner and M Tamm, 'Der Vorschlag einer Richtlinie über Rechte der Verbraucher und seine Auswirkungen auf das nationale Verbraucherrecht' (2009) *Juristenzeitung* 277.

[50] See the then Minister of Justice B Zypries, 'Der Vorschlag für eine Richtlinie über Verbraucherrechte' (2009) *Zeitschrift für Europäisches Privatrecht* 225.

[51] Dir 2011/83/EC.

[52] See H-W Micklitz, 'The targeted full harmonisation approach: looking behind the curtain' in Howells and Schulze (eds), *Modernising and Harmonising Consumer Contract Law,* 47.

Directive[53] and a new Timesharing Directive[54] follow the new approach. The new Consumer Rights Directive is also a targeted full harmonisation Directive. The question is still open for the Package Travel Directive, where a proposal does not give a clear answer and shows the uncertainty of the Commission.[55] Whereas the Consumer Rights Directive includes a provision with clearly stated that this Directive is a targeted full harmonisation Directive, the proposal of a new Package Travel Directive is silent in that respect. There is also no answer as to what the Commission intends to do with unfair contract terms and sales of consumer goods after the failure of the original proposal of the Consumer Rights Directive.

The question remains what targeted harmonisation means in a series of steps in the development of consumer policy from autonomy of the Member States and not implemented programmes of the EEC to a shared responsibility, where the EEC *de facto* took the lead, but left some autonomy to the Member States. Targeted full harmonisation is not unification of the laws of the Member States. It still leaves room for national solutions, and in particular, the interdependencies between the law, which transposes directives, and autonomous parts of national law prevent consumer law in Member States being identical. In consumer law cases it is still necessary to determine the applicable *national* legal order according to the rules of the Rome I Regulation,[56] even after the transposition of the targeted full harmonising Directives of the second generation. Thus, targeted full harmonisation is only a next step, not a final solution. The relation between European and national influence must be continuously adjusted based on the insight that there is a development to more and more centralisation on the European level. But this process must be respect the characteristics of Member States and must not be too rash.[57]

34.6 Beginning of a Systematic Structure of European Consumer Contract Law?

There is another observation, when comparing the first and the second generation of consumer protection Directives. The first Directives were an archipelago, as it was called,[58] not connected among each other. They were adopted not as part of a systematic approach, but as 'stand-alone' pieces of legislation, though nearly all the Directives were already part of the first programme of 1975. The lack of a systematic approach had an advantage for the Member States as they could maintain their

[53] Dir 2008/48/EC.

[54] Dir 2008/122/EC.

[55] COM(2013) 512.

[56] Reg (EC) 593/2008.

[57] See T Wilhelmsson, 'Introduction: Harmonization and national cultures' in T Wilhelmssson et al (eds), *Private law and the many cultures of Europe* (Alphen an den Rijn, Kluwer, 2007) 3.

[58] See J Basedow, 'Das BGB im künftigen europäischen Privatrecht: Der hybride Kodex' (2000) 200 *Archiv für die civilistische Praxis* 445.

own systems and integrate the transpositions into their national systems. Especially the Dutch and German approach to integrate the Directives into their national civil codes, could be realized only because of a missing system on a European level—and because of the minimum standard which makes such integration easier.

But the 'stand-alone' approach also has disadvantages. A borderline between the directives of the first generation did not exist. They could overlap. There are two famous decisions of the ECJ, in which the judges declared the provisions about the right to withdraw of the Doorstep Sales Directive applicable in a timesharing case[59] and in a consumer credit case.[60] In both cases the court declared the unlimited right to withdraw in case of missing information about the right to withdraw applicable, though the original Timesharing Directive[61] and the original Consumer Credit Directive were silent on that right—a result, which is consumer friendly, but was probably not the intention of the legislator.

The possible overlapping of directives was eliminated by the directives of the second generation. In the Consumer Policy Strategy 2007–2013 the Commission introduced the differentiation between horizontal and vertical directives, trying to assemble four directives in one horizontal Directive: the Consumer Rights Directive, and three vertical directives (consumer credit, timesharing and package travel), that is to say, directives which affect only one economic sector. The system is still incomplete, as European consumer contract law does not only consist of these seven directives. It is for the first time that a system appears, even if only in an embryonic stage.

The basic idea is that the Consumer Rights Directive covers all business to consumer transactions which are not regulated by a special vertical directive. As at the moment, only three directives are identified as vertical directives, this means, that the Consumer Rights Directive has more than a residual character. The Consumer Rights Directive includes a long list of exemptions, which has to be criticized partly,[62] but not insofar, as cases are excluded which are subject to other directives. Each of the new directives includes a provision not only about their scope, but also about distinguishing them from other directives. Each of the directives stands on its own feet and does not refer to other directives. In particular, the Consumer Rights Directive is not the general part of consumer contract law. That is to say that one has to apply only one directive in a given case—exactly the opposite of the *Travel Vac* and *Heininger* decisions of the ECJ.

The stand alone principle requires a careful drafting of directives to ensure their coherence. For example, the withdrawal period has to be the same in all Directives which provide for such a right. Information duties in different directives must express the same general principles of consumer law. Those principles which have to underlie all directives have to be identified.

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[59] Case C-423/97 *Travel Vac SL v Manuel José Antelm Sanchis* [1999] ECR I-2195.

[60] Case C-481/99 *Georg Heininger and Helga Heininger v Bayerische Hypo- und Vereinsbank* [2001] ECR I-9945.

[61] Dir 94/47/EC.

[62] See S Weatherill, 'The Consumer Rights Directive: How and why a request for "coherence" has (largely) failed' (2012) 49 *CML Rev* 1279.

34.7 Conclusion

The development of consumer law started with consumer protection law as part of a welfare state policy and went on with the concept of the confident consumer who had to play his or her role in the process of establishing the internal market. According to Micklitz there was a further step, the efficient consumer[63]—and today? Today the vulnerable consumer has entered the scene: recent consumer law distinguishes between the responsible and the informed consumer, who needs enforceable rights, and the vulnerable consumer who needs special protection. It seems that a new concept has appeared: the consumer is not always weak, and s/he is not always well informed. Both types of consumer exist, and both need consumer law in a differentiated way. So the main streams of the past, the weak consumer and the informed consumer, may be connected together in the future. But it should be stressed that even the 'informed' consumer acts in asymmetric markets, so that mandatory (contract) law as special consumer law is indispensable.

The core of the consumer protection law of the Member States in the 1970s was mandatory contract law; it was shifted to the European level in two steps, first by minimum standard, then by targeted full harmonisation Directives. Now, for the first time, a somehow systematic approach to European consumer contract law appears. But the development is not at its end. Private law mechanism must be combined with public law, new types of contracts especially those dealing with services of general interest[64] need regulation, to mention only two of the many keywords.

It was Hans Micklitz in his Gutachten für den 69. Deutschen Juristentag,[65] who asked for a movable system (bewegliches System) 'that allows for connecting substantive rights and remedies to the different concepts of consumers, vulnerable, confident and responsible.' Let us work on that.

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[63] See Micklitz, 'The targeted full harmonisation approach'.

[64] On which see P Rott, 'Consumers and services of general interest: Is EC consumer law the future?' (2009) 30 *Journal of Consumer Policy* 49.

[65] H-W Micklitz, *Brauchen Konsumenten und Unternehmen eine neue Architektur des Verbraucherrechts?*—Gutachten A zum 69. Deutschen Juristentag (Munich, CH Beck, 2012). In English Do Consumers and Business Need a New Architecture of Consumer Law? (2013) 32 *Yearbook of European Law* 266.

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