



# **CONSTITUTIONAL ASPECTS OF THE CONSUMER PROTECTION IN THE EU**

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**LL.M. SHORT THESIS**

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# Table of Contents

Abstract .....	3
Introduction .....	4
1 Development of the EU Constitutional and Consumer Law .....	9
1.1 Impact of Development of the EU Constitutional Law on Consumer Protection.....	9
1.2 The Evolution of Consumer Protection in the EU – a Side Effect of the Market Integration? .....	12
2 Consumer Protection in the EC Treaty.....	17
2.1 Approximation of Laws – Article 94 and Article 95 of the EC Treaty .....	17
2.2 Authorized Derogations and Outvoted Member State – Article 95 of the EC Treaty...	19
2.3 Negative Law and Consumer Interest in the EC Treaty and the ECJ Case Law .....	20
2.4 Article 153 of the EC Treaty and its Implementation through the EC Normative Regulation.....	22
3 Consumer Protection in the Charter of Fundamental Rights of the European Union and in the Treaty Establishing a Constitution for Europe .....	27
3.1 Legal Status and Incorporation of the Charter of Fundamental Rights of the EU .....	27
3.2 Article 38 of the Charter of Fundamental Rights of the European Union .....	29
3.3 Article III-235 Treaty Establishing a Constitution for Europe (TEC).....	31
4 Expectations of Future Development of Consumer Protection in the EU.....	32

5	Complementary Approaches to Effective Protection of Consumers .....	36
5.1	Self-regulation .....	37
5.2	Private Law Approach .....	38
5.3	Authoritative Regulation.....	39
	Conclusion .....	40
	Bibliography .....	42

## Abstract

This paper is devoted to an analysis of constitutional aspects of consumer protection in the EU. Both legislation and case law will be investigated. The protection of the consumer at the EU level will be scrutinized to assess its desirability and scope in order to propose the ways of its future development to achieve more effective consumer protection. This paper was made out as a LL.M. Final Thesis at the Central European University, Budapest.

The investigation shall be assessed through three main methods. First, the black-letter analysis, i.e. the analysis of constitutional legal texts in the EU. Second, the law-in-context analysis, i.e. the analysis of the case law of the European Court of Justice (ECJ) and Court of First Instance (CFI). Third, the analysis of jurisprudential and legal philosophy, which forms the contemporary policy choice and the application of consumer laws.

Consumer protection in the EU has gone through a long and productive development, during the last half of the twentieth century. Its position in the European legal and economic systems has been strengthening. The number of consumer protection legislations is rising. Consumer protection must be therefore properly linked to the free and efficient market in the EU.

## Introduction

Persons living together in society must regulate their mutual relations with series of specific legal instruments. Most of these instruments are based on the equal position of both parts. This system works when the backgrounds of both parties of the relationship are nearly the same. But what happens when the positions are substantially different and sets the conditions for an inequality and vulnerability of one party? What can the legal system do to create fair conditions for everybody? Should societal relations between persons with unequal positions be legally balanced?

One of these vulnerable social groups are consumers. Consumers are traditionally understood as persons who consume and therefore acquire goods and services for their direct use rather than for resale or use in production and manufacturing.<sup>1</sup> From the economic point of view a consumer is an individual or a household who buys and consumes the economic goods and services as a final user.<sup>2</sup> Consumers therefore create a part of the aggregate demand for the goods and services in the production market on the one hand; and at the same time the supply side of the market of the factors of production on the other. The consumer is thus a crucial part of the economy because they are an essential supplement of the production side of the market.

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<sup>1</sup> <http://www.thefreedictionary.com/consumer>

<sup>2</sup> Mankiw, N. G. (2004). Principles of economics. Mason (Ohio, USA), Thomson/South-Western.

From the legal point of view a consumer is mostly considered as an individual who is disadvantaged in a free market economy and needs to be favored by state interference<sup>3</sup>. The notion of consumer is particularly known in connection with consumer rights and consumer protection laws.<sup>4</sup> A logical legal justification for consumer protection is based on possible market failures and inefficiencies; i.e. in situations when the “invisible hand of the market<sup>5</sup>” does not allocate the goods and services efficiently; that is to say, in situations when the non-market institutions would be more wealth producing than purely private companies. Purely market and private institutions do not necessarily serve the public interest.<sup>6</sup>

Because almost everyone is a consumer, the policy choice and the political consequences are of major political significance. Consumer protection is used to promote “public interest” and “general welfare”; the specific goods that are shared and beneficial for all or most members of society. In addition, concerns for the interests of consumers have formed much activism known as consumerism, as well as incorporated consumer teaching into law and business schools’ curricula. The awareness and knowledge of consumer protection and consumer position in law

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<sup>3</sup> Overby, A. B. (2001). "An institutional analysis of consumer law." Vanderbilt Journal of Transnational Law - Issue 34

<sup>4</sup>See Pasa, B. and G. A. Benacchio (2005). A guide to European private law : the harmonization of civil and commercial law in Europe. Budapest ; New York, Central European University Press.

Pg. 17-19

<sup>5</sup> Smith, A. (1776, 1991). The Wealth of Nations. New York, David Campbell.

<sup>6</sup> Scott, C., J. Black, et al. (2000). Cranston's consumers and the law. London, Butterworths.

has markedly increased in European society<sup>7</sup>, which goes hand in hand with the increasing political demand for the implementation of consumer laws into European constitutional legislation.<sup>8</sup>

In the area of consumer protection, there has been research activity in the last two or three decades. This research enriches legal studies generally and the EU constitutional law especially. Among the biggest researchers who created the basis concepts of consumer protection in the EU are Norbert Reich, Hans Micklitz, Reiner Schulze, Caoimhin Macmaolain, Julia Black, Colin Scott, Paolisa Nebbia, Geraint Howells and Stephen Weatherill.

The contribution of my thesis will be the summary of the previous research in light of the new consumer protection developments in the EU as well as prognostication of future evolution in the field of consumer protection.

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<sup>7</sup> The *General Framework* for Community activities in favor of consumers (1999 OJ L34/1) allocated for years 1999-2003 an amount of €12.5 million for consumer protection. The Program of Community action in the field of consumer policy for years 2007-2013 (*Decision 1926/2006/EC*) allocated the amount of €156, 8 million for consumer protection.

<sup>8</sup> See Article 153 EC Treaty

[http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C\\_2002325EN.003301.html](http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html)

See Article 38 of Charter of Fundamental Rights of the European Union

[http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)

See Article III-235 Treaty establishing a Constitution for Europe

[http://europa.eu/constitution/en/ptoc47\\_en.htm#a292](http://europa.eu/constitution/en/ptoc47_en.htm#a292)

Therefore, my thesis is devoted to an analysis of constitutional aspects of consumer protection in the EU. Both legislation and case law will be investigated. The protection of the consumer at the EU level will be scrutinized to assess its desirability and scope in order to propose the ways of its future development to achieve more effective consumer protection.

The area of consumer protection has recently undergone a rapid development in the EU countries, especially in the new member states. And the process is still under way, e.g. since January 2007, there is a new Commissioner for Consumer Affairs, Meglena Kuneva. However, many of the consumer protection provisions are still only “on paper”, but not in the minds of the people, corporations and judges. Therefore, the application and enforcement of the consumer laws is still very difficult.

The above-mentioned investigation shall be assessed through three main methods. First, the black-letter analysis, i.e. the analysis of constitutional legal texts in the EU. Second, the law-in-context analysis, i.e. the analysis of the case law of the European Court of Justice (ECJ) and Court of First Instance (CFI).<sup>9</sup> Third, the analysis of jurisprudential and legal philosophy, which forms the contemporary policy choice and the application of consumer laws.

My thesis will be aimed at the latest development of the consumer protection at the EU level; however, its time frame will reach from the beginning of the European integration up to the expectations of the upcoming activity in this area.

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<sup>9</sup> See <http://curia.europa.eu/en/transitpage.htm>



The thesis is divided into five chapters. Chapter One devotes itself to the description of the previous development of the constitutional aspects of consumer protection laws. This chapter is divided into two sections – the Impact of Development of the EU Constitutional Law on Consumer Protection [which tackles the features of general development of EU constitutional law with the specific impact on consumer protection] and the evolution of consumer protection in the EU [which deals with the specificity of consumer protection within the context of the EU constitutional law]. Chapter Two considers consumer protection in the Treaty Establishing the European Community (EC Treaty) and the legislative and judicial development of consumer protection within the EC Treaty. This chapter is divided into four sections – first the Approximation of Laws, second the Authorized Derogations and the Outvoted Member State, third Negative Law and Consumer Interest, fourth the Implementation of the Article 153 of the EC Treaty. Chapter Three discusses consumer protection in the Charter of Fundamental Rights of the European Union (Charter) and in the Treaty Establishing a Constitution for Europe (TEC); especially their legal status and incorporation into the binding legislation. Chapter Four forecasts the future development of consumer protection in the EU. It summarizes the designed issues of the future actions of the EU institutions as well as proposes and appraises the directions of the future development. Chapter Five discusses the techniques of consumer protection by constitutional means as well as suggests and assesses the complementary approaches to effective consumer protection. It evaluates the advantages and disadvantages of the alternative approaches to consumer protection (e.g. a self-regulation, a private law approach, a public law approach,) and compares them.

# 1 Development of the EU Constitutional and Consumer Law

## 1.1 *Impact of Development of the EU Constitutional Law on Consumer Protection*

The policy of consumer protection is a core component of the European Commission strategy objective of “improving the quality of life of all EU citizens.”

*“Implementation of this policy involves the **development of legislative and other actions to promote the interests, health and safety of consumers in the internal market, to ensure the proper integration of consumer concerns in all EU policies and to complement the consumer policy conducted by Member States. Within this general context, the Commission actively **supports consumer organizations** and is seeking to enhance the role of consumer representatives in decision making.**”<sup>10</sup>*

However, the way to this official declaration of the governmental body of the European Union hasn’t been so straightforward as it seems. The development of consumer protection has undergone a long and demanding journey since the establishment of the European Community.

The purpose of this thesis is neither a detailed description of the process of European integration nor the explanation of the structure of the institutions of the EU. Here after, the basic

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<sup>10</sup> [http://ec.europa.eu/consumers/missions\\_en.htm](http://ec.europa.eu/consumers/missions_en.htm)

knowledge of the history of the EU, the organization of its institutions, as well as the legal order of the EU will be presumed. However, for the comprehension of this thesis topic we need to mention the elementary milestones of the evolution of the European Community and the consumer protection there.

The EU originates in three European Communities. The Treaty of Paris founded the first, the European Coal and Steel Community in 1952. The Treaty of Rome established the other two, the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM) in 1958. The objective of these three European Communities was peaceful development and economic cooperation among the member states.

The EEC Treaty was amended several times. The first amendment was the Single European Act (SEA), in force since 1987. The most important modification of the SEA were the approval of the qualified majority voting system instead of the unanimous voting system.<sup>11</sup> The SEA also promised the completion of the internal market, defined as “the area without internal frontiers in which the free movement of goods, persons, services and capital is ensured,”<sup>12</sup> by the end of 1992.

The EEC Treaty was for the second time revised by the Treaty on European Union (EU Treaty), which was agreed in Maastricht in the Netherlands in December 1991 (came in force in November 1993). The EEC Treaty was renamed the EC Treaty and the new concept of the “three-pillars” structure of the EC was introduced. The three pillars consist of the first pillar – internal market of European Communities, the second pillar – the foreign and security policy,

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<sup>11</sup> Mathijsen, P. S. R. F. (2004). A Guide to European Union Law. London, Sweet & Maxwell.

and the third pillar –justice and home affairs. The first pillar is based on the supremacy of EC law and its direct effect on the national legal systems. The second and third pillars are based on intergovernmental cooperation. The EU Treaty also brought education, culture, public health and consumer protection within the ambit of the EC Treaty (the first pillar).<sup>13</sup>

Furthermore, by the EU Treaty (the Treaty of Maastricht) the status of the Citizenship of the Union was created and the position of the European Parliament was strengthened through the emphasis of the co-decision legislative procedure (with shared legislative power between the EU Council and the EU Parliament.)<sup>14</sup> All these steps were done in order to achieve the main objective – the creation of the Economic and Monetary Union and the introduction of the single currency – the euro. The United Kingdom, however, was granted an opt-out right to stand outside the euro-zone and retain the pound currency.

The Treaty of Amsterdam (in force since 1998) amended the EC Treaty, which hereafter mentions other objectives and values which the Community must invariably take into account with its activities<sup>15</sup>: a high level of protection with regard to health, safety, environmental and consumer protection<sup>16</sup> and a high level of consumer protection requirements.<sup>17</sup>

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<sup>12</sup> See Article 14 EC Treaty.

<sup>13</sup> Lenaerts, K., P. Van Nuffel, et al. (2005). Constitutional Law of the European Union. London, Sweet & Maxwell. pg. 40

<sup>14</sup> Howells, G. and S. Weatherill (2005). Consumer Protection Law. Aldershot (UK), Ashgate Publishing.

pg. 103

<sup>15</sup> Ibid pg. 84, 85.

<sup>16</sup> See Article 95 (3) EC Treaty.

<sup>17</sup> See Article 153 (2) EC Treaty.

The last revision of EC Treaty took place in Nice, France in December 2000 (in force since February 2003) in order to adjust the EU institutional architecture for the planned expansion to central and eastern Europe; however, it has no significant impact on consumer protection.

## ***1.2 The Evolution of Consumer Protection in the EU – a Side Effect of the Market Integration?***

Current legal thinking dates the interface among law, consumers and consumption to March 1962 in a speech by U.S. president John F. Kennedy which, following the thalidomide crisis, introduced the 1962 Drug Amendments Bill.<sup>18</sup> The attitudes expressed within this speech were reproduced, almost verbatim, in 1975, in an EEC Council Resolution on a Preliminary Programme for a Consumer Protection and Information Policy.<sup>19</sup>

At the beginning of the European integration, consumer protection was only a side effect of the economic integration and the creation of the common market (namely the free movement of goods and services.) The reference to the consumer has been explicitly mentioned in the Treaty of Rome (in force since 1958) only five times. None of these references, however, attempts to develop a sophisticated system of consumer protection. The assumption in the original EC Treaty was that the consumer would benefit indirectly from the process of market

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<sup>18</sup> Bollier, D. and J. Claybrook (1986). Freedom from Harm. Washington, Public Citizen Project

<sup>19</sup> Everson, M. (2004). Legal Constructions of the Consumer. Knowing Consumers: Actors, Images, Identities in Modern History. Conference at the Zentrum für Interdisziplinäre Forschung in Bielefeld, Germany.

integration through the enjoyment of its higher efficiency. Common market theory places the consumer as the ultimate beneficiary of the whole process, although as a passive recipient of the advantages of cross-border commercial activity.<sup>20</sup> The consumer was assumed to enjoy lower prices through the realization of economies of scale, wider choice and higher quality of goods and services through the stimulation of the competition and the specialization. The substantive provisions of the original EC Treaty -- such as those designed to remove barriers to the free circulation of goods, persons and services -- are intended indirectly to improve the position the consumer; these provisions are also known as inexplicit, 'hidden' type of instruments of consumer protection.<sup>21</sup>

The development of consumer protection starts with the Council Resolution of April 14, 1975 concerning a Preliminary Program for a Consumer Protection and Information Policy (the Preliminary Program for a Consumer Protection) and with the following Action Program on Consumer Policy. It was the result of the Paris Summit in October 1972, where the EU member states expressed the desire for further EC interference beyond the economic affairs into social issues. The Preliminary Program for Consumer Protection was an answer to a strong demand for a consumer protection program after the successful completion of removal of trade barriers

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Pg. 4

<sup>20</sup> Artis, M. and F. Nixon (2001). The Economics of the European Union. Oxford, Oxford University Press.

<sup>21</sup> Weatherill, S. (2005). EU Consumer Law and Policy. Cheltenham (UK), Edward Elgar Publishing, Inc.

Pg. 4

within the common EEC market. The Preliminary Program for a Consumer Protection in 1975 incorporated:<sup>22</sup>

- *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).*

In addition to the economic integration, consumer protection has developed through soft-law initiatives in the consumer protection field – through self-regulation and through consultation among consumer representatives, producers and distributors. Another technique of consumer protection has been the harmonization of national consumer protection laws<sup>23</sup> as one of the indirect forms of consumer protection at EU level.

The 1975 Preliminary Programme on Consumer Protection was followed by the Council Resolution of 19 May 1981 on a Second Programme of the EEC for Consumer Protection and Information policy.<sup>24</sup> The 1981 Second Programme for Consumer Protection continued with a similar approach to consumer protection as the 1975 Preliminary Programme by restating the

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<sup>22</sup> See O.J. [1975] C92/1.

<sup>23</sup> See Article 94 and Article 95 EC Treaty.

<sup>24</sup> See O.J. [1981] C133/1.

five basic rights. In addition, it supported the soft-law approach to consumer protection by promoting the discussions among consumer representatives, producers and distributors.

Next, the third Council Resolution of 23 June 1986 on Future Orientation of the Policy of the EEC for the Protection and Promotion of Consumer Interest<sup>25</sup> and the fourth Council Resolution of December 1986 on the Integration of Consumer Policy in the Other Common Policies<sup>26</sup> were already directed within the context of internal market policy. Both stated that the objectives of the previous two resolutions on consumer protection were fulfilled only partly, mainly because of a small number of adopted consumer-related measures. The Councils' resolutions linked consumer protection with the notion of the *People's Europe* and called the Commission to prepare proposals of consumer-related measures. Moreover, it also prescribed consumer protection to be taken into greater account in other EC policies. The fifth Council Resolution of November 1989 (on Future Priorities for Relaunching Consumer Protection Policy) contained an annex with a list of priority areas:<sup>27</sup>

- *the integration of consumer protection policy into other common policies,*
- *the improvement of consumer representation,*
- *the promotion of general safety of goods and services,*

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<sup>25</sup> See O.J. [1986] C167/1.

<sup>26</sup> See O.J. [1987] C3/1.

<sup>27</sup> O.J. [1989] C294/1.



- *the better information on quality of goods and services, and*
- *the encouragement of EC Member States to promote access to legal redress.*

The list of priorities was implemented into the Commission's Three Year Action Plan for Consumer Policy,<sup>28</sup> covering 1990-92. The EC internal market was accomplished at the end of 1992. The higher degree of consumer protection was truly experienced. All EC consumers were able to enjoy the benefits of border-less and integrated markets, *"to travel freely to the territory of another member state and to shop under the same conditions as the local population"*.<sup>29</sup>

The consumer protection at the EU constitutional law level was finally recognized by the EU Treaty, which amended the EC Treaty (agreed at Maastricht in December 1991; in force since November 1993). After all, there has been a constitutional norm with a direct impact on consumer protection.<sup>30</sup> For the first time it inserted the explicit authorization of the EC to act in the consumer protection area; i.e. the power to adopt its own secondary legislation in the name of consumer protection. However, the main engines of the consumer protection still remain the market integration, self-regulation and legislative harmonization of national consumer protection laws.

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<sup>28</sup> See COM [1990] 98.

<sup>29</sup> See ECJ, Case C-362/88 GB-INNO-BM v. Confédération du Commerce Luxembourgeois [1990], para 8.

<sup>30</sup> See Article 153 EC Treaty.

## 2 Consumer Protection in the EC Treaty

### 2.1 Approximation of Laws – Article 94 and Article 95 of the EC Treaty

The approximation of laws and its main instrument, the *legislative harmonization*, are important tools to accomplish the main aim of the European economic cooperation. They create *common rules for a common market*. There used to be and still remain many differences among the laws, regulations and administrative provisions of the EU member states. In reaction, the Single European Act (in force since 1987) inserted new provision into the EC Treaty.<sup>31</sup> In order to promote the free movement of goods and services within the common market the EU institutions (Council, Commission and Parliament) are authorized to create legal measures to harmonize requirements of the member states on goods and services; this area includes, also consumer protection.

The most convenient measures are *directives*, which do not incorporate exact wording of legal texts into the national legal systems but demand the binding result to be reached. Another tool of approximation of laws is the *mutual recognition* of national laws in the area of the free movement of goods. Every member state must admit all goods lawfully manufactured and launched on the market of another member state.<sup>32</sup> The mutual recognition of laws of each member state is guaranteed.

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<sup>31</sup> See Article 94 EC Treaty.

<sup>32</sup> See ECJ, Case 8/74 *Dassonville*, [1974], para 5.

See ECJ, Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, known as „*Cassis de Dijon*,“ [1979], para 14.

Also Schulze, R., H. Schulte-Nölke, et al. (2002). A casebook on European consumer law. Oxford, Hart Publishing<sup>7</sup>

The EC Treaty, nevertheless, makes a distinction between the more general notion of the common market and the narrower notion of the internal market. The common market covers most of the activities of the Community,<sup>33</sup> including the internal market, which consists in the basic freedoms only.<sup>34</sup> Under the Article 94 EC Treaty the approximation of the common market is implemented by the *unanimous act* of Council on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee. Under the Article 95 EC Treaty the harmonization of the internal market is realized by the *qualified-majority voting* in Council and the co-operation of Parliament. This distinction in the legislative procedure between the harmonization within the common market and the harmonization within the internal market causes that the Article 95 EC Treaty is more frequently applied for the approximation of the national laws, including the consumer protection.

Therefore, the harmonization has a dual function. First, it approximates the national rules and creates the common rules for the single European market. Second, it involves a possibility of regulatory protection through creating the common standards, including consumer protection.<sup>35</sup>

Moreover, the ECJ has gone further and accepted that the harmonization directives are capable to produce a *direct effect*, i.e. generating rights vested in consumers to seek the monetary compensation from the member state in the event of failure of a member state to implement the envisaged protective measure within the defined time period.<sup>36</sup>

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Pg. 32-457

<sup>33</sup> See Article 3 EC Treaty.

<sup>34</sup> See Article 14 EC Treaty.

<sup>35</sup> Weatherill, S. (2005). EU Consumer Law and Policy. Cheltenham (UK), Edward Elgar Publishing, Inc.

Pg. 12

<sup>36</sup> See ECJ, Case C-91/92 *Paola Faccini Dori*, [1994].

## 2.2 *Authorized Derogations and Outvoted Member State – Article 95 of the EC Treaty*

However, the qualified-majority voting can create the situation when the majority of the member states would override a dissenting member state, where its legislation is based on a higher degree of consumer protection than it was agreed by the European institutions. Therefore the EC Treaty stated that in the areas of health, safety, environmental protection and consumer protection “*will take as a base a high level of protection, taking account in particular of any new development based on scientific facts.*”<sup>37</sup> In addition to that, the harmonization measure may embody a *safeguard clause*, which authorizes the member state to take for a non-economic reason stated in Article 30 EC Treaty the *provisional measures*.<sup>38</sup>

Finally, the EC Treaty introduced an exception provision in Article 95 (4), which authorizes the member state to maintain a national provision on grounds of major needs referred to in Article 30 EC Treaty or a national provision, which assesses the risk to public health differently from the EU harmonization legislation from which the national provision *derogates*.<sup>39</sup> However, the member state must prove that the aim is to achieve a level of public health protection, which is higher than in the EU legislation, and that it does not go beyond what is necessary to reach that aim.<sup>40</sup>

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Also Schulze, R., H. Schulte-Nölke, et al. (2002). A casebook on European consumer law. Oxford, Hart Publishing. Pg. 137-151

<sup>37</sup> Article 95 (3) EC Treaty.

<sup>38</sup> See Article 95 (10) EC Treaty.

<sup>39</sup> Lenaerts, K., P. Van Nuffel, et al. (2005). Constitutional Law of the European Union. London, Sweet & Maxwell. Pg. 274

<sup>40</sup> See ECJ, Case C-3/00 *Denmark v Commission*, [2003], paras 63-65.

Therefore, if no previous provision for the opposing the Council's qualified majority's proposal were applicable, the overridden member state would be tempted to proceed to the ECJ and argue that the opposed legislative harmonization was improper exercise of the competence to harmonize laws and thus invalid.<sup>41</sup> The harmonization directive was for the first time annulled by the ECJ in the "Tobacco Advertising" judgment on the basis that the directive has failed to make an adequate contribution to the establishment and functioning of the internal market through elimination of obstacles to the free movement of goods or services or through removing the appreciable distortions of competition.<sup>42</sup>

### ***2.3 Negative Law and Consumer Interest in the EC Treaty and the ECJ Case Law***

EU institutions are empowered to implement legislation in order to promote the cross-border movement of goods and services (positive lawmaker). EU Commission is also authorized to prohibit the national laws which obstruct the free communitarian trade (negative lawmaker). For example, it is authorized to strike down any national measure contrary to the European market integration.<sup>43</sup>

However, the EC Treaty contains the narrow list of the exceptions to the free movement of goods and services. It states the exhaustive list of justification on the ground of "*public morality, public policy or public security; the protection of health and life of humans, animals or*

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<sup>41</sup> Weatherill, S. (2005). EU Consumer Law and Policy. Cheltenham (UK), Edward Elgar Publishing, Inc.  
Pg. 14

<sup>42</sup> See ECJ, Case C-376/98 *Germany v. Parliament and Council*, [2000], paras 96-105.

<sup>43</sup> See Article 28 EC Treaty.

*plants [...]*”<sup>44</sup> The consumer protection justification is considered as one of these exceptions and is using by the member states relatively often.

The ECJ ruled in its previous decisions<sup>45</sup> that the EU member states are able to implement the legal measures in order to promote consumer protection in the area of trade of goods and services, even if they hinder or render less attractive the free movement of goods and persons guaranteed by the EC Treaty. However, the conditions of rule of reason must be complied:<sup>46</sup>

- The implemented measures cannot be discriminatory on basis of nationality and must apply the same way regardless the state of origin of the goods and nationality of providers of services.<sup>47</sup>
- The implemented restriction on trade of goods and services must be justified by imperative requirements in the general interest (“public interest”) – e.g. consumer protection.<sup>48</sup>
- The measure must be proportionate (“objectively justified”) to its goal in the public interest, must be suitable for its objective and cannot exceed its boundaries of necessity to achieve its goal, i.e. the same result cannot be achieved by the less restrictive means.<sup>49</sup>

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<sup>44</sup> Article 30 EC Treaty.

<sup>45</sup> See ECJ, Case C-204/90 *Bachmann v. Belgian State* [1992], para. 16.

<sup>46</sup> Lenaerts, K., P. Van Nuffel, et al. (2005). Constitutional Law of the European Union. London, Sweet & Maxwell. Pg. 197

<sup>47</sup> See ECJ, Case C-55/94 *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995], para. 37.

<sup>48</sup> See ECJ, Case C-204/90 *Bachmann v. Belgian State*, [1992], para. 32.

See ECJ, Case C-205/84 *Commission v Germany*, [1986], paras 30-33.

Since the EU Treaty (Maastricht Treaty) a new issue has arisen: the issue of ambiguity between the ‘positive’ commitment to market regulation at EU level and the ‘negative’ emphasis on removing national rules, which in fact work as trade barriers in EU market integration. The appropriate balance among the integration, deregulation and re-regulation is sought. It is asserted that the striking of balance is the most controversial economic issue facing the EU today.<sup>50</sup>

## ***2.4 Article 153 of the EC Treaty and its Implementation through the EC Normative Regulation***

The third part of the EC Treaty – “Community policies” – considers directly consumer protection in its title XIV. – “Consumer protection.”

*“In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community 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.”<sup>51</sup>*

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<sup>49</sup> See ECJ, Case C-106/91 *Ramrath v. Ministre de la Justice*, [1992], paras 29-31.

<sup>50</sup> Weatherill, S. (2005). EU Consumer Law and Policy. Cheltenham (UK), Edward Elgar Publishing, Inc.

<sup>51</sup> Article 153 (1) EC Treaty.

The measures used to achieve these objectives are harmonizing measures adopted pursuant to Article 95 EC Treaty in the context of the completion of the internal market and measures -- supporting, supplementing and monitoring the policy pursued by the Member States, which are adopted by European institution under the co-decision procedure referred to in Article 251 EC Treaty.<sup>52</sup> Member states may maintain or introduced more stringent protective measures provided that these measures are compatible with the EC Treaty and that the Commission is notified of them<sup>53</sup> (as far as the measures adopted on basis of Article 94 or Article 95 EC Treaty are concerned.)<sup>54</sup> <sup>55</sup> Consumer protection requirements must be taken into account in defining and implementing other Community policies and activities.<sup>56</sup>

Community consumer policy concentrates its action in four areas: **health protection and safety, protection of economic and legal interests, education and information, representation.** In the area of food safety the EU Commission and the EU Council mainly concentrate on the completion of the internal market for foodstuff, with proposed legislation mainly for the labeling<sup>57</sup> and nutritional labeling.<sup>58</sup>

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<sup>52</sup> Article 153 (3) and (4) EC Treaty.

<sup>53</sup> Article 153 (5) EC Treaty.

<sup>54</sup> Lenaerts, K., P. Van Nuffel, et al. (2005). Constitutional Law of the European Union. London, Sweet & Maxwell. Pg. 315

<sup>55</sup> See ECJ, Case C-52/00 *Commission v France*, [2002], para 15.

<sup>56</sup> Article 153 (2) EC Treaty.

<sup>57</sup> Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the **labeling, presentation and advertising of foodstuffs** for sale to the ultimate consumer.

Council Directive 79/581/EEC of 19 June 1979 on consumer protection in the **indication of the prices of foodstuffs**.

Council Directive 90/496 /EEC of 24 September 1990 on **nutrition labeling for foodstuffs**.



The key areas of the consumer protection for both, the consumer as well as the entrepreneurs are the directives on product safety<sup>59</sup> and liability for defective products.<sup>60</sup> In relation to the liability for defective products, the ECJ held that “[I]n order for a producer to incur liability for defective products [...], the victim does not have to prove that the producer was at fault; however, in accordance with the principle of fair apportionment of risk between the injured person and the producer set forth in [the preamble to the Directive 85/374], the producer has a defense if he can prove certain facts exonerating him from liability, including ‘that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered’.”<sup>61</sup> The application of the defective product liability does not exclude the possibility of the injured party to claim the damage under other liabilities.<sup>62</sup>

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Commission Directive 93/102/EC of 16 November 1993 amending Directive 79/112/EEC on the approximation of the laws of the Member States relating to the **labeling, presentation and advertising of foodstuffs** for sale to the ultimate consumer.

Directive 2000/331/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the **labeling, presentation and advertising of foodstuffs for sale to the ultimate consumer**.

See ECJ Case, C-85/94 *DIAGEME*, [1995].

<sup>58</sup> Council Directive 90/496 /EEC of 24 September 1990 on **nutrition labeling for foodstuffs**.

Council Directive 76/796/ECC on **marketing and use of dangerous substances and preparations**.

<sup>59</sup> Council Directive 92/59/EEC of 29 June 1992 on **general product safety**.

<sup>60</sup> Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning **liability for defective products**.

<sup>61</sup> ECJ, Case C-300/95 *Commission v UK*, [1997].

<sup>62</sup> See ECJ, C-183/00 *González Sánchez v. Medicina Asturiana SA*, [2002].

Others areas not expressly mentioned in the Article 153 of the EC Treaty are under the heading protection of the economic interest: misleading advertising<sup>63</sup>, unfair commercial practices<sup>64</sup>, the protection in respect of distance contracts<sup>65</sup>, sale of consumer goods and associated guarantees,<sup>66</sup> electronic commerce<sup>67</sup> and also advice, help and redress.<sup>68</sup> In the area of economic interest, consumer protections -- in addition to the measures above mentioned -- several other areas receive attention such as consumer credit;<sup>69</sup> the indication of prices on non-food products;<sup>70</sup> unfair terms in consumer contracts<sup>71</sup> package travel, package holidays and

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<sup>63</sup> Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning **misleading advertising**.

<sup>64</sup> Ibid.

<sup>65</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of **distance contracts**.

<sup>66</sup> Directive 99/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the **sale of consumer goods and associated guarantees**.

<sup>67</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on **electronic commerce**).

<sup>68</sup> See European Network for Out-of-Court Settlement of Consumer Disputes or European Extra Judicial Network (**EEJ-network**)

[http://ec.europa.eu/consumers/redress/ecc\\_network/index\\_en.htm](http://ec.europa.eu/consumers/redress/ecc_network/index_en.htm)

<sup>69</sup> Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning **consumer credit**.

<sup>70</sup> Council Directive 88/314 /EEC of 7 June 1988 on consumer protection in the **indication of the prices of non-food products**; and

Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the **indication of prices of products offered to consumers**.

<sup>71</sup> Council Directive 93/13/EEC of 5 April 1993 on **unfair terms in consumer contracts**.

package tours;<sup>72</sup> and late payments in commercial transactions.<sup>73</sup> In this context the ECJ held that the term “consumer” refers exclusively to physical person.<sup>74</sup>

For the better coordination of the EU policies and activities with the consumer protection requirements the Consumer Committee was established.<sup>75</sup> Here after, the EU has to take measures to reach the consumer protection objectives and to support, supplement and monitor the policy pursued by the EU member states.<sup>76</sup> From this point the measures of the consumer policy have to be adopted jointly with the EU Parliament and the EU Council in accordance with the co-decision procedure.<sup>77</sup>

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<sup>72</sup> Council Directive 90/314/EEC of 13 June 1990 on **package travel, package holidays and package tours**.

<sup>73</sup> Directive 2000/35/EC of the European Parliament and of the Council of 8 August 2000 on combating late payment in commercial transactions.

<sup>74</sup> ECJ, Joined cases C-541 and 542/99, *Cape Snc v. Ideal Service MN RE Sas v. OLAI Srl.*, [2001].

<sup>75</sup> Commission Decision 95/260/EC of June 13, 1995 **setting up a Consumer Committee**.

<sup>76</sup> See Council Resolution 1999/C 206/01 of June 28, 1999 on Community consumer policy 1999 to 2001.

<sup>77</sup> The requirement of unanimity was abandoned.

### 3 Consumer protection in the Charter of Fundamental Rights of the European Union and in the Treaty Establishing a Constitution for Europe

#### 3.1 *Legal Status and Incorporation of the Charter of Fundamental Rights of the EU*

*“It is worthwhile referring to [the Charter] given that it constitutes the expression, at the highest level, of a democratically established political consensus on what must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order.”<sup>78</sup>*

The Charter of Fundamental Rights of the European Union arises from the common constitutional traditions and international obligation of the EU member states, especially from the *acquis communautaire*, the European Convention on the Human Rights, the European Social Charter, Community legislation on data protection, and the case law rising from these international conventions.<sup>79</sup> The Charter’s preamble states that its purpose is to create a closer union among the peoples of Europe and to share a peaceful future based on common values.

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<sup>78</sup> Opinion of Advocate General Mischo In ECJ, Case C-20/00 Booker Aquaculture Ltd and Hydro Seafood GSP Ltd v The Scottish Ministers [2003], E.C.R. para. 126.

<sup>79</sup> The text of the Charter may be found [2000] O.J. C367/1 or at

[http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)

The Charter is already featured regularly in the deliberations of the Advocates General and is therefore bound to play a part in ECJ findings. By early 2002, the Advocates General had referred to the Charter in 14 of the 23 cases they handled concerning human rights since the Charter's proclamation in December 2000.<sup>80</sup> Advocate General Tizzano has called it "a substantive point of reference for all those involved – Member States, institutions, natural and legal persons – in the community context".

Some liberals pointed out the ambiguity and unclearness of some articles of the Charter and expressed dislike to the spirit behind them.<sup>81</sup> This criticism of a conservative found out that the fuzziness in the wording is due precisely to the fact that the Charter makes "rights" out of what are in reality redistributive and interventionist "entitlements" of the modern welfare state, which jeopardy the free trade and the original free market ideal. The Article 38 of the Charter is considered as one of the inappropriate for redistributive and interventionist entitlements.

On one hand, the Charter has not been yet incorporated into any Treaty and it has not explicitly come into force. On the other hand, the Charter is still regarded as an authoritative catalogue of fundamental rights with respect to the broad participation in drawing up and its subsequent ratification by the EU member states and the EU institutions and with respect to the system of protection of fundamental rights, which the ECJ has developed since the 1970s.<sup>82</sup>

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<sup>80</sup> The Charter in the European context – A point of reference for the courts.

[http://ec.europa.eu/justice\\_home/unit/charte/en/european-context-reference.html](http://ec.europa.eu/justice_home/unit/charte/en/european-context-reference.html)

<sup>81</sup> See Ebeling, R. M. (2001). "The Fundamental Rights of the European Union: Individual Rights or Welfare-State Privileges?" The Future of Freedom Foundation - Freedom Daily.

<http://www.fff.org/freedom/0101c.asp>

<sup>82</sup> Lenaerts, K., P. Van Nuffel, et al. (2005). Constitutional Law of the European Union. London, Sweet & Maxwell.

This field of doubts about the legal status of the Charter would be hopefully resolved in time of the adoption of the TEC (Constitution for Europe). The Part II of the TEC incorporates the Charter as a catalogue of rights, freedoms and principles.

### ***3.2 Article 38 of the Charter of Fundamental Rights of the European Union***

*“Union policies shall ensure a high level of consumer protection.”<sup>83</sup>*

Fundamental rights incorporated in the Charter can be applied in the context of the EU law. The right to consumer protection is enshrined in the Article 38, which is the last article of Chapter IV – “Solidarity.” Consumer protection concerns several sectors and many policy areas: economic policy, internal market, agriculture policy, transport, energy, environment policy, etc. The principle of consumer protection corresponds to a fundamental political objective in Article 153 EC Treaty. The implementation of consumer protection is also backed by the recognition of other rights: protection of health and safety (Article 152 EC Treaty), the right to information (Article 11 of the Charter) and education (Article 14 of the Charter) and the right of association for the protection of a person's interests (Article 12 of the Charter).<sup>84</sup> In other words, the right to the consumer protection was constituted and embedded within traditional liberal paradigms of

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<sup>83</sup> Article 38 of the Charter.

<sup>84</sup> Committee on Citizens' Freedom and Rights, Justice and Home Affairs of the European Parliament –about the Article 38 of the Charter of Fundamental Rights of the European Union.

[http://www.europarl.europa.eu/comparl/libe/elsj/charter/art38/default\\_en.htm](http://www.europarl.europa.eu/comparl/libe/elsj/charter/art38/default_en.htm)

economic-civic ('protection of economic interests'), political ('right of representation') and social citizenship ('protection of health and safety').<sup>85</sup>

Most of the Charter's rights are granted to all persons, including those who are not citizens of the EU member state. The Charter's provisions are directed towards the European institutions and bodies, and towards the EU member states when they are implementing the *acquis communautaire*.<sup>86</sup> This means that the Charter applies to the national authorities only if they act within the scope of the Community law or non-Community provisions of the EU.<sup>87</sup> If any international convention provides more rights, the norm granting the highest level of protection prevails.<sup>88</sup> Similarly, any other international convention cannot prevent the EU law to render more extensive protection.<sup>89</sup>

The fundamental right incorporated in the Charter may be balanced and restricted, however, only by law and with respect to the essence of those rights and freedoms. The principle of proportionality shall be met and any limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.<sup>90</sup>

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<sup>85</sup> Everson, M. (2004). Legal Constructions of the Consumer. Knowing Consumers: Actors, Images, Identities in Modern History. Conference at the Zentrum für Interdisziplinäre Forschung in Bielefeld, Germany.

Pg. 5

<sup>86</sup> See Article 51 (1) of Charter.

<sup>87</sup> Lenaerts, K., P. Van Nuffel, et al. (2005). Constitutional Law of the European Union. London, Sweet & Maxwell. Pgs. 731-732

<sup>88</sup> See Article 53 of Charter.

<sup>89</sup> See Article 52 (3) of Charter.

<sup>90</sup> See Article 52 (1) of the Charter.

The Article 38 of the Charter is thus an important point of reference for the parties involved in consumer protection – the EU member states, the EU institutions, the natural and legal persons in the EU.

### **3.3 Article III-235 Treaty Establishing a Constitution for Europe (TEC)**

*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.*<sup>91</sup>

The TEC will replace the list of objectives, tasks and instruments contained today in the EC Treaty and will offer a shopping list of objectives.<sup>92</sup> The TEC concentrates much more on non-economic goals than is done today by the EC Treaty; a treaty whose primary aim is the economic cooperation and the common market. The TEC's principal goals are to promote peace and the well being of European Union's citizens.<sup>93</sup> The TEC's preliminary objective clause refers to "*the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy [...] with a high level of environmental and consumer protection and improvement of the quality of the environment.*"<sup>94</sup> The European Union shall take

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<sup>91</sup> Article III-235 (1).

<sup>92</sup> See Article I-3 TEC.

<sup>93</sup> Lenaerts, K., P. Van Nuffel, et al. (2005). Constitutional Law of the European Union. London, Sweet & Maxwell.

<sup>94</sup> See Article I-3 (3) TEC.



all its objectives into account and ensure consistency among its different policies and activities. The TEC states that “*consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities.*”<sup>95</sup>

## **4 Expectations of Future Development of Consumer Protection in the EU**

*“There is an urgent need for action, the world is moving so fast and Europe risks lagging behind.”*<sup>96</sup>

The field of consumer protection in the EU is covered by the co-decision legislative procedure within the shared power of the European Parliament and EU Council with its qualified majority voting. Thus, consumer protection legislative making is transparent and out of the communitology secrecy of the EU Council’s deliberations.

In the near future, the construction site of the EU consumer law would be the harmonization of the consumer acquis. The EU Commission adopted on February 7, 2007 Green Paper on the Review of the Consumer Acquis. The document identifies several areas of consumer protection with possible need for further legislative activity; presents main options for

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<sup>95</sup> See Article III-120 TEC.

<sup>96</sup> Consumers: Commission acts to boost confidence in digital world at <http://www.europa.eu/rapid/pressReleasesAction.do?reference=IP/07/158&format=HTML&aged=0&language=EN&guiLanguage=en>

a reform; as well as puts several specific questions. It also considers the future approach to consumer protection – whether it should be based on maximum or minimum harmonization, eventually combined with principle of mutual recognition. The Green Paper calls for the proposals from interested parties. The EU Commission will examine them during the summer 2007.

The Green Paper is considering possible action in the following areas:<sup>97</sup>

- *Reinforcing the notion of delivery for cross-border purchases.*
- *Clarifying and simplifying the rules on how to return goods.*
- *Setting common rules on the right and costs of returning goods.*
- *Simplifying with common rules the remedies available to consumers.*
- *Clarifying, with common EU wide standards, rules covering cooling-off periods.*
- *Should current guarantees and rights that cover products be extended to certain services – e.g. to the downloading of music from the Internet.*

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<sup>97</sup> See Green Paper on the Review of the Consumer Acquis at

[http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/acquis/green-paper\\_cons\\_acquis\\_en.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/green-paper_cons_acquis_en.pdf)

Also Consumers: Commission acts to boost confidence in digital world at

<http://www.europa.eu/rapid/pressReleasesAction.do?reference=IP/07/158&format=HTML&aged=0&language=EN&guiLanguage=en>

*The rules should also be clarified to end uncertainty around the exception of "second hand goods sold at public auctions."*

It seems to me that in these areas it is desirable to consider the maximum harmonization of the consumer protection standards in all EU member states. The maximum harmonization helps us to achieve the same standards in all member states. This approach will definitely help the further integration of the European market as well as the European society and stimulate feeling of the common European nationality. In addition, the unified codification of the consumer law would create a better structuralized protocol for this area of EU law.

The different standards of consumer protection are most obvious in a comparison of attitudes toward consumers, on the one hand, in Scandinavian countries and, on the other, in Southern European countries and Belgium. The position of the Scandinavian countries is based on the maximum autonomy of the consumer, consumer foreknowledge and powerful consumer choice. In the Scandinavian countries there are many consumer associations and the consumer topics are broadcasted in TV's prime time. The approach of the Southern European countries and Belgium is rooted in very strict normative regulation of all aspects of the consumer matters. Consumers, producers and retailers could feel restricted by the "over-regulation." However, the excessive regulation might hinder even the free movement of goods and services within the common European market. Some European countries, such as the United Kingdom and the Czech Republic resist the EU consumer protection legislation, which seems to them as the unjustified bureaucratic limitation of the entrepreneurs.

Although consumer protection at the EU level could be seen as over-inflated, the Union is in better position than the single member state to bargain, control and enforce its consumer protective regulations against the supra-national corporations. Especially in the situation when some of supra-national corporations operate larger budget than many of the 27 individual member states.

As the first step, Meglena Kuneva, the new EU Commissioner for Consumer Affairs, chooses to concentrate on the area of electronic commerce. The insufficiency of the cross-border trade in the digital commerce is very significant. Only 6% of EU consumers currently shop on-line cross borders. Meglena Kuneva further claimed that “[w]e need a root and branch review of consumer rules. At the moment, consumers are not getting a fair deal on-line, and complex rules are holding back the next generation of bright business ideas. We must find new solutions to new challenges. The question is can we afford to have 27 mini-online markets in Europe, denying consumers choice, opportunity and competitive prices. We need to inject a new sense of consumer confidence into the e-shopping world so it becomes a trusted market space. The rules of the game have changed, it's time for consumer policy to respond.”<sup>98</sup>

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<sup>98</sup> Consumers: Commission acts to boost confidence in digital world at <http://www.europa.eu/rapid/pressReleasesAction.do?reference=IP/07/158&format=HTML&aged=0&language=EN&guiLanguage=en>

## 5 Complementary approaches to effective protection of consumers

Firstly, the situation of the weaker contractual party could be preferred by many legal means. Irreversible and irrevocable terms, which favoratize (=make favorite) the weaker party, might be settled as obligatory components of the contract. The techniques of consumer protection encompass the self-regulation by business, the use of private law approach and the regulatory activities of the governmental bodies.

Moreover, the independent and professional governmental supervision might alongside the private interest of the own prosperity create the fair conditions and relationships on the free trade market. Furthermore, the position of the weaker party would be often handicapped even in front of the judiciary bodies (=justice). Their lay argumentation and lack of professional legal representation might emasculate them even before the independent bodies of the justice. Possible solution could be the establishment of the system of the collective legal actions and the collective legal representations of the common legal disputes, where is the stronger position abused.

In addition, the legal conception of the *punitive damages*, which is already commonly used in the USA legal system, could be slowly introduced into the European legal systems in order to discourage the chronic abusers of the stronger position. What's more, in the situation of the weaker party could be caught not only a consumer of goods, but also a client of banks and insurance companies who is in unequal position of bargaining power towards businesses. Similarly, a purchaser of the health service could end up in an unpleasant and extremely

dangerous situation.

Finally, all above mentioned could be dealt with not only within the relations between the parties from the same country, but even within the relationships between the international parties and trade partners. In the nutshell, the legal research and development of the protection of a weaker contractual party should be considered as an important issue of the legal studies, especially on the constitutional law platform, where is possible the legal comparison.

There are two main things that need to be considered when we are selecting the best technique to achieve the consumer protection. Firstly is to know that no solution is itself perfect at the end of the day. There is no perfectly competitive market on one hand and no designed regulatory technique is able to achieve the anticipated aim of the regulation and perfectly solve the main problem on the other hand.

Secondly the markets themselves are not completely free. There are many rules, which regulates even the freedom of the market, e.g. private property rules and laws of contract. These laws are essential part of the well-functioning market. When choosing the best technique for consumer protection there is no distinction between the free and unfree market. Here are the most important regulatory techniques in detail.

## ***5.1 Self-regulation***

The main advantage of self-regulation is that the businesses fell more commitments

towards their own rules and thus the compliance of self-regulation is more effective than the authoritative regulation. In additions to this there is no cost of administering the regulation for the state. Moreover self-regulation shows more technical and time flexibility because it is created by the professional who can easily identify and react to new challenges before they cause serious damages. Furthermore self-regulation is more legitimate impact into the private autonomy and market relations because it is voluntary created and voluntarily respected by the businesses and private individuals.<sup>99</sup>

## ***5.2 Private law approach***

Private law approach allows private parties, e.g. producers, suppliers, retailers and consumers to enforce their claims through the courts. Thus the consumers in particular have right to bring an action and receive remedy. However the sophisticated legal process and consumer protection is in hands of the individual.

This approach assumes that consumers know their rights and are prepared to enforce them and also presumes economic motivation of consumers. This approach without doubt brings many advantages. There are no costs for the state budget because the entire consumer protection is the responsibility of the individual consumer who bears the expenditures of investigation and legal process costs. In addition the costs of inquiry would be even lower for the consumer than for the state because the consumer has better factual knowledge about his/her matter than the state authority. Furthermore the consumer has his/her own personal motivation and interest in the

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<sup>99</sup> Scott, C., J. Black, et al. (2000). Cranston's consumers and the law. London, Butterworths.

favorable result of the proceeding. The damaged person would be legally compensated for the suffered damages and losses.

### ***5.3 Authoritative regulation***

Authoritative regulation of the consumers' matters came as a response to the incapacity of the above-mentioned private law technique to efficiently protect consumers. The public law regulation also reacted to the substantive unequally contractual position of the consumers and entrepreneurs as well as replied to the expansion of the negative externalities of the businesses (especially industries) causing damages to others.



## Conclusion

*“[T]he consumer is 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 might affect him directly or indirectly as a consumer.”<sup>100</sup>*

Consumer protection in the EU has gone through a long and productive development, during its modern epoch, since the half of the twentieth century. Its position in the European legal and economic systems has been strengthening. The number of consumer protection legislations is rising; a new commissioner for consumer affairs was designed. The budget for consumer protection is continually growing. However, the financial resources allocated to consumer affairs in the EU budget projection for the seven-year period from 2007 to 2013 (in the amount of €156,8 million is still insufficient); especially in comparison to the estimated annual cost of €200 million of the regular monthly moving of the European Parliament between Brussels (Belgium) and Strasbourg (France).<sup>101</sup>

Consumer protection must be properly linked to the existence of the free communitarian market and the efficient EU competition law, which both help consumers. Meglena Kuneva

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<sup>100</sup> Everson, M. (2004). Legal Constructions of the Consumer. Knowing Consumers: Actors, Images, Identities in Modern History. Conference at the Zentrum für Interdisziplinäre Forschung in Bielefeld, Germany.

<sup>101</sup> Malmström, C.: Why the Oneseat campaign?

<http://www.oneseat.eu/>

stated that the developed world, especially the USA, is moving faster in the field of consumer protection and Europe is already behind them.<sup>102</sup>

Consumer protection will continue to evolve in the European Union. Kuneva's focus on ecommerce really highlights the most efficacious approaches for this evolution. The historical exploration of this paper illuminates the influences that WILL impact consumer protection, despite any rhetoric or coercions to deny this. Historically, various components of EU influence, nation-state influence, industry influence, individual business influence, and consumer influence have shaped consumer protection. While any one of these facets, in the future, may attempt to monopolize and command the state of consumer protection in the EU, posterity will show that this strong-arming will be non-absolute and (relatively) short-lived. The nature of the EU – in that, it is currently a frequently-expanding body – also affects the mix of influences on EU consumer protection.

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<sup>102</sup> Consumers: Commission acts to boost confidence in digital world at <http://www.europa.eu/rapid/pressReleasesAction.do?reference=IP/07/158&format=HTML&aged=0&language=EN&guiLanguage=en>

## Bibliography

Artis, M. and F. Nixson (2001). The Economics of the European Union. Oxford, Oxford University Press.

Bollier, D. and J. Claybrook (1986). Freedom from Harm. Washington, Public Citizen Project

Ebeling, R. M. (2001). "The Fundamental Rights of the European Union: Individual Rights or Welfare-State Privileges?" The Future of Freedom Foundation - Freedom Daily.

Everson, M. (2004). Legal Constructions of the Consumer. Knowing Consumers: Actors, Images, Identities in Modern History. Conference at the Zentrum für Interdisziplinäre Forschung in Bielefeld, Germany.

Howells, G. and S. Weatherill (2005). Consumer Protection Law. Aldershot (UK), Ashgate Publishing.

Lenaerts, K., P. Van Nuffel, et al. (2005). Constitutional Law of the European Union. London, Sweet & Maxwell.

Mankiw, N. G. (2004). Principles of economics. Mason (Ohio, USA), Thomson/South-Western.

Mathijsen, P. S. R. F. (2004). A Guide to European Union Law. London, Sweet & Maxwell.

Overby, A. B. (2001). "An institutional analysis of consumer law." Vanderbilt Journal of Transnational Law - Issue 34

Pasa, B. and G. A. Benacchio (2005). A guide to European private law : the harmonization of civil and commercial law in Europe. Budapest ; New York, Central European University Press.

Scott, C., J. Black, et al. (2000). Cranston's consumers and the law. London, Butterworths.

Schulze, R., H. Schulte-Nölke, et al. (2002). A casebook on European consumer law. Oxford, Hart Publishing.

Smith, A. (1776, 1991). The Wealth of Nations. New York, David Campbell.

Weatherill, S. (2005). EU Consumer Law and Policy. Cheltenham (UK), Edward Elgar Publishing, Inc.