24 The Myths We Built around EU Consumer Law

Tamas Dezso Ziegler[*]

24.1 Introduction

EU consumer law is an area that has gone down its own, independent path for several decades. It has its own approach, separate institutions and autonomous principles. Several of its basic 'values' were not previously present in the legal systems of the Member States (hereinafter referred to as: MSs), or, if they did exist, they did so in divergent form. Nowadays there seems to be wide acceptance of EU consumer law among academics, especially in continental Europe. Furthermore, there is strong support for the principles of such legislation: its central purpose as well as the methods it uses to protect the 'vulnerable' consumer. Because of its recognition, concerns are rarely raised regarding the existing material – not even by UK scholars, whose old contract law approach would make it understandable to raise issues. I am certain that a large part of the European academic community is aware that the premises used to build the current system were based on shaky foundations. Questions like 'Is this set of sources really followed in practice?', 'shouldn't we protect the consumer in a different way?' or 'Is the consumer truly vulnerable at all?' are rarely asked. And if so, we receive two kinds of untruthful answers regarding the nature of EU consumer law. Firstly, scholars and legislators state that 'we all know the system and several of its solutions often function in an unfortunate way, but there is nothing new, interesting or worthy of research in this area'. According to this argument, the malfunctions of the system are inherent attributes of EU consumer law. Secondly, as another good example of misrepresenting the facts, they will state that the system is 'still useful for consumers, even if some of its basic solutions are not ideal'. However, both answers are wrong. There are problems we need to tackle in order to modernise and/or change the system into a new one that better serves our purposes. And a better system could certainly be built.

Numerous groups have done an excellent job of collecting the existing laws of EU consumer law and EU contract law (especially as they were implemented into the legal

* Research fellow, Hungarian Academy of Sciences – Institute for Legal Studies of the Centre for Social Sciences. E-mail: ziegler.dezso.tamas@tk.mta.hu.

systems of MSs).[1] These collections are handy if we want to check MS implementations of EU consumer law – in itself often chaotic – meaning that national systems become more and more messy as they must follow EU legislation. Beside scholarly work and legislation, these works are also useful for large multi-national companies. Without them (and through no fault of their own) the humble lawyer at a law firm or corporation would likely be unable to collate the relevant provisions. A number of other groups have tried to provide frameworks and principles for the future, such as the Study Group of a European Civil Code.[2] These are extremely useful if we need an overview of the material. However, they cannot fulfil the same role as the ALI's or the Uniform Law Commission's works in the USA. All of the above mentioned scholarly works as well as existing legislation follow the path and thinking marked out by the EU Commission. The thinking of academics is somehow focussed on existing works and rules, and even when they attempt to draft ideal future solutions, being realistic, they tend to follow present art.

Yet there are some crucial issues here that we should tackle. First of all – and this is the core of all other issues – we do not know which directions are important for us and why we move in those directions. It is highly typical in European law that its solutions are answers to specific, timely problems. A good example is the adoption of provisions for timeshares. But why exactly are we adopting rules for timeshares and not for other, far more important areas? Another typical way of legislating is to act based on non-issues that appear 'problem-like', without any kind of intention to create a transparent system, not even when there exists the opportunity to create it. Somehow, it seems as though EU consumer law has started to gain self-awareness as Skynet does in the film Terminator. Secondly, it is highly doubtful that the present system can fulfil its goal and protect the consumer. Recently, I ordered a book on a well known website. The book did not arrive from Spain to Hungary in two months. All I could do was to cancel the contract, but was this 'real', 'beneficial' protection for me? There are some very important questions rarely asked by scholars: are there other options that would be more effective at enforcing consumers' rights? Is the basic paternalistic thinking behind our system appropriate in a world centred on a market economy? Is legislation, including the provisions on the private international law aspects of consumer contracts applied in practice? Or, to be more precise, can they be applied at all? Is the system of remedies protecting consumers? If I buy a mobile phone and it crashes again and again, how many times do I have to bring it back to the seller? Is this substantial and well functioning protection for me?

1 H. Schulte-Nölke et al. (Eds.), *EC Consumer Law Compendium: The Consumer Acquis and Its Transposition in the Member States,* Sellier, 2008.

2 Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group) (Eds.), *Draft Common Frame of Reference (DCFR) – Full Edition Principles, Definitions and Model Rules of European Private Law*, Sellier, 2009.

We have built up myths around these questions. Instead of providing answers, we created a kind of 'irrational cloud' that engulfs the present system. The purpose of this article is not really to supply proper answers. I do not pretend to know the answers and accept that there could be answers different from mine, even multiple adequate answers to the same question. Moreover, each of the questions raised could be answered in books, or in a complete set of books. However, it is highly important to raise these questions and to try to give at least draft solutions. Furthermore, it is also important to get rid of bogus answers and concepts. In Europe at the end of 2011,[3] a new law for consumer contracts was adopted and a common European sales law was proposed.[4] We could be forgiven for feeling as though we were running through a dark forest without any lights, without knowledge about the landscape or nature, living organisms, our destination or any specific goal. Let us stop and rethink our objectives.

24.2 The Myth of an Area which Represents Justice

One of the greatest basic myths we can build around a field of law that has the ability to cover and hide every important detail from our eyes is that the particular field represents 'justice'. The argument that a field of law represents justice reminds me of populist politicians who like to present their government as serving 'the people's interests'. When used generally, these are empty phrases.[5] The same unsteadiness is true regarding EU consumer law. As Prof. Micklitz highlighted,[6] in legal systems and especially in EU private law, a new kind of 'justice' has emerged from the past: 'social justice', the justice which handed rights and protection to weaker parties such as consumers and employees. EU law has got more and more 'social'. Beside social justice in the EU, another type of justice, so-called 'access justice' (not 'access to justice') also exists and existed even before the rise of the social idea. 'That is, that it is for the European Union to grant justice to those who are excluded from

3 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and European Parliament and Council Directive 1999/44/EC repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, Text with EEA relevance. OJ L 304/64. *Cf.* H-W. Micklitz and N. Reich, 'Crónica de una muerte anunciada: The Commission Proposal for a Directive on Consumer Rights', 46 *Com. M. L. Rev.* (2009), pp. 471-519; W.H. Van Boom, 'The Draft Directive on Consumer Rights: Choices Made & Arguments Used', 5 *J. Of Cont. Eur. Res.* (2009), pp. 452-462.

4 European Commission, 'Proposal for a regulation of the European Parliament and of the Council on a common European sales law', COM(2011)0635 final.

5 For a good example of these diffuse elements, which, if not examined one by one with special care seem completely useless, *see* ILO Declaration on Social Justice for a Fair Globalization adopted by the International Labour Conference at its Ninety-seventh Session, Geneva, 10 June 2008. (ILO website) www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_099766.pdf, 17 October 2013.

6 H.W. Micklitz (Ed.), *The Many Concepts of Social Justice In European Private Law*, Edward Elgar Publishing, 2011

the market or to those who face difficulties of the market freedoms'.[7] Thus, social justice is more about protection, and access justice is more about participation. The emphasis of social justice in consumer law and EU private law has advantages but also several disadvantages, even if its basic idea is somewhat useful.

The problem is that this idea does not bring us further if we want to know more about an area. I am sure most of us believe that the law itself was invented to achieve a kind of 'justice' or 'morality' in society. This is because the law is not (and cannot be) only about 'liking' or 'not liking' an act or certain kinds of acts.[8] Of course, there are numerous divergent theories regarding the relationship between law and morality that can be found even in basic textbooks on legal theory and in books on conceptual legal theory. Most of them concern themselves with the dispute between natural lawyers and legal positivists, and especially in connection with unjustified laws: see for example the works of Hart,[9] Dworkin, Fuller,[10] Raz,[11] Radbruch or Alexy.

There are three distinct ways for the law to be interpreted:

- As a set of rules *containing moral minimum*, or
- As a set of rules *which have a* '*function*'. The law as a '*functional category*', or more precisely, the function of law is based on *some sort of moral* principle, or
- *As a norm*. As such, it must have a certain link to morality. This relationship is based on the imperative effect of legal provisions.[12]

It is true that according to legal positivists, we can in theory imagine a legal rule without any moral background – a neutral legal rule. However, I hope we can agree that as Jellinek emphasized,[13] law as such acts as a kind of moral minimum, or, if we do not agree with that strict definition, it is the content which society tends to think of as a moral minimum. This compromise changes with place and time. Not just consumer law but all of our domestic legal systems, including the legal system of the EU, were set up to create a kind of 'ideal state of relations' following an 'ideal law' based on 'common social values'. Without this, the law as such would not have a purpose. Of course, the specific content changes throughout history. One of these moral values is 'justice' in general, which also includes social justice. Even Roman law was created to grant access justice and to achieve social justice. Later on, behind all of our legal systems, there were present the notions of ideal

7 Micklitz, *supra* note 6, p. 5.

8 M. Bódig, 'A jog és erkölcs közötti viszony a konceptuális jogelmélet szempontjából [The Relationship Between Law and Morality from the Point of Conceptual Legal Theory]', 2 *Miskolci Jogi Szemle* (2007), p. 11.

9 H.L.A. Hart, *Essays on Bentham: Jurisprudence and Political Theory*, OUP, 1982.

10 L. Fuller, *The Morality of Law*, Yale University Press, 1964.

11 J. Raz, *Ethics in the Public Domain*, Clarendon, Clarendon, 1994.

12 The three methods of interpretation are taken from Bódig, *supra* note 8, pp. 16-18.

13 G. Jellinek, *Die sozialethische Bedeutung von Recht, Unrecht, und Strafe*, VDM Verlag Dr. Müller, 2007.

law and ideal society (the world of *sollen* in Kant's philosophy). All legal systems have wanted to achieve higher morality (whatever we may mean by that term) in their *ethos*. Not even the positivists questioned that formulation of law was mostly based on presumed or real concepts of morality and justice, but they thought it better to separate what is behind the norms and the norms themselves.[14] The exact methods and tools a legal system employs to achieve justice are irrelevant in this regard. Consequently, it seems to make less sense to think of consumer law as an area that represents justice. Of course it does. It also represents social justice, and so it should. The real question is how it should go about it, not the determination of whether it must contain elements that make human relationships fair.

The system of the EEC/EC/EU was not only made to grant access justice to individuals and companies, i.e. to create fair balance on the market, for example in competition law or consumer law, but beyond this, its fundamental approach is and always has been to make social issues, including cross-border economics in Europe fair. The EEC was established to avoid another war in Europe. Cooperation between MSs was set up to ensure proper functioning of the economy, trade, taxation, culture, agriculture and foreign policy. As such, the aim of the organisation has always been to achieve a shared and enhanced system, which may also be more decent, even if this sounds highly subjective. It is somewhat misleading to suggest that the rules of the internal market in themselves do not serve social justice. In this system, social values cannot and never could be separated from other values. Social justice has always been present and cannot be separated from access justice. Market interests cannot be separated from the sole consumer and their position.

Last but not least, apart from the basic approach, if we step closer to the picture of EU consumer law, it can be questioned whether there always is the necessary 'justice', in every situation that exists behind the substantive rules of the system. The biggest problem is that the system's architecture, institutions and several of its rules do not work properly. To use the phrase 'justice' for the effects of such a system is unnecessary. Below I will highlight some of the most basic problems that cast doubt on the 'well justified' nature of the system.

24.2.1 System and Justice

The first question regarding substantive law should be, before getting into detailed provisions, whether an extremely fragmented system is able to provide 'justice' for those in need. The consumer, especially in business to consumer relations (hereinafter referred to

14 One reason to do so was the subjective content of morality. Moreover, in their view, in certain special instances law does not have moral support, *see* H.L.A. Hart, *Essays*, No. 7, pp. 145-161; H.L.A. Hart, 'Positivism and the Separation of Law and Morals', in *Essays in Jurisprudence and Philosophy*, Oxford, Clarendon, 1983, pp. 72-78.

as: '*B2C*') cannot even check which rules are to be applied since there are dozens of rules on consumer law issues. This results in disorder in reaching (accessing) any kind of social or access justice.

On the topic of this article, the most important laws – to name just a few – are the relatively new directive on consumers' rights,[15] the directive on liability for defective products,[16] the directive on unfair terms in consumer contracts,[17] the directive on certain aspects of the sale of consumer goods and associated guarantees,[18] the directive on electronic commerce,[19] the directive on unfair business-to-consumer commercial practices,[20] the new directive on timeshares,[21] the directive on consumer credit,[22] the directive on distance contracts (repealed by the new consumer law directive)[23] and the directive on doorstep sales (also repealed by the new directive).[24]

A good example of the chaos of legislation is the case of international e-sales consumer contracts: five or six EU laws containing substantive provisions may be applied alongside numerous domestic regulations and to check the scope of each is terribly complicated. Perhaps this situation is the result of the minimal harmonisation approach, which causes numerous, divergent rules to be applied without any system or framework to link them together.[25] However, I believe that it is the result of a lack of carefully planned legislation (see later), and that it could be corrected: it is a mere technical issue.

---

15 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and European Parliament and Council Directive 1999/44/EC repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ 2011 L 304/64.

16 Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ 1985 L 210/29.

17 Council Directive 93/13/EECof 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29.

18 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ 1993 L 95/29.*

19 European Parliament and Council Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ 2000 L 178/1.

20 European Parliament and Council Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ 2005 L 149/22.

21 European Parliament and Council Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (Text with EEA relevance), *OJ 2009 L 33/10.*

22 Council Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, *OJ 1987 L 42, 12* February *1987/48.*

23 European Parliament and Council 97/7/EC on the protection of consumers in respect of distance contracts, *OJ 1997 L 144/19.*

24 Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises. *OJ L 372/31.*

25 S. Weatherhill, 'Maximum versus Minimum Harmonization: Choosing Between Unity and Diversity in the Search for the Soul of the Internal Market', in N.N. Shuibhne and L.W. Gormley (Eds.), *From Single Market to Economic Union: Essays in Memory of John A. Usher*, OUP, 2012, pp. 175, 182 *et seq*.

If we add that even the conflict of laws aspects of consumer contracts are extremely hard to overview – partly because in certain instances substantive rules also contain conflict-of-laws provisions[26] – we may rightfully call this a highly unfriendly system.

Moreover, beyond all these issues, in certain cases an 'extra layer' could be created in the future, which will be somewhere in the space between substantive law and conflict of laws. One of the 'funniest' problems in choice-of-law issues nowadays is that there may exist an extra 'choice of the law' governed by the proposed Common European Sales Law (hereinafter referred to as '*CESL*'),[27] a choice which in itself is not really a choice according to the Rome I regulation:[28]

> […] the CESL constitutes 'a second contract law regime. The CESL provides for an alternative, or parallel, set of contract law rules that can be chosen within the applicable national law system and that replaces the existing 'classical' national sales law. It is the (substantive) national law (and thus not private, international law) that leaves room for the application of the CESL (or part of it) and permits the CESL to replace 'classical' national sales law, including the mandatory provisions […] Note that the 'classical' national law will continue to play a role as a gap-filler where the CESL does not provide for adequate rules. It is clear, however that the choice of the CESL is not a choice of law, in the sense that it is attributed by private international law.[29]

In fact, the latter approach would be better called the incorporation of a law that is neither EU law, nor national law, but somewhere in between. However, this 'layer' may overwrite all contract provisions of national legislation, al well as many provisions of other EU rules, thereby resulting an even more chaotic situation.

Furthermore, the EU has recently announced that the Commission will be looking into whether there is a need to adopt further rules, such as on electronic cross-border sales.[30]

It can certainly be stated that the relationships between different substantive and private international law rules is chaotic and the adoption of the rules seems *ad hoc*. Several of

---

26 Tamas Dezso Czigler and Izolda Takacs: 'The Quest to Find a Law Applicable to Contracts in the European Union – A Summary of Fragmented Provisions', 12 *Global Jurist*, Article 6, pp. 1-46; Joined Cases C-509/09 and C-161/10CJEU *eDate Advertising GmbH v. X*, *Olivier Martinez, Robert Martinez v. MGN Limited*, 2011, ECR I-10269.

27 Commission, 'Proposal for a regulation of the European Parliament and of the Council on a common European sales law' COM(2011)0635 final.

28 Regulation of the European Parliament and of the Council (EC) 593/2008 on the law applicable to contractual obligations (Rome I), OJ 2008 L 177/6.

29 M. Piers and C. Vanleenhove, 'Another Step towards Harmonization in EU Contract Law: The Common European Sales Law', http://ssrn.com/abstract=2151256, 5 October 2013, p. 13 *et seq.*

30 In this regard the US system is also not an example to follow, *see* T.D. Czigler, 'E-Consumer Protection in the US – the Same Jungle as in Europe', 4 *Comparative Law Review* (2013), pp. 1-32.

these rules were created as the result of concrete cases. The legislation of the EEC/EC/EU has always been situative in the field consumer law. Once again, the question can be asked: who in the eighties could have predicted that the rules for timeshare contracts or those on doorstep selling would be the most important laws to be harmonized? Yet they were selected by the Commission for exactly this. In sum, we would be justified in harbouring doubts *about* whether such a system is able to provide those in need with a high level of support and a 'perfect form' of social justice.

24.2.2 Content and Justice

Beyond basic systemic problems, several of the most important, typical substantive law provisions should also be questioned. Here I will only deal with some of the most important basic issues.

First of all, we could ask whether the approval of the withdrawal (cancellation of a contract) for consumers is a righteous tool or not? Not all scholars would agree with that. I really enjoyed reading Prof. Smits's critical opinion about this question, namely:

> […] it was seen […] that withdrawal rights are in particular well founded where a party cannot exercise its party autonomy as a result of pressure put on that party. The clear example of this is doorstep selling: in that case, the traditional instruments of mistake, undue influence and the general unconscionability or good faith doctrine are not optimal. It is then better to standardise the likely possibility that the consumer felt pressurised by allowing her to withdraw from the contract. This is different in case of distance contracts, where there is no need to give a mandatory rule allowing the consumer to rethink its decision to enter into the contract.[31]

Furthermore, the period available for cancelling a contract has been getting longer and longer. Recently, in the CESL, fourteen days was specified.[32] It is important to highlight

31 J. Smits, 'The Right to Change Your Mind? Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law', 2011, *Maastricht European Private Law Institute Working Paper* 3. Also published in 29 *Penn State International Law Review* (2011), pp. 671-684.

32 'Article 40 – Right to withdraw
1. During the period provided for in Article 42, the consumer has a right to withdraw from the contract without giving any reason, and at no cost to the consumer except as provided in Article 45, from:
(a) a distance contract;
(b) an off-premises contract, provided that the price or, where multiple contracts were concluded at the same time, the total price of the contracts exceeds EUR 50 or the equivalent sum in the currency agreed for the contract price at the time of the conclusion of the contract.'
'Article 42 – Withdrawal period.
1. The withdrawal period expires after fourteen days from:

that there is a similar tendency in several other parts of the world as well. E.g. in the US, the Federal Trade Commission has successfully adopted some important rules on cooling off periods and the protection of consumers. First of all, its rule on cooling off periods for doorstep sales states that a consumer has the right to cancel a contract until midnight of the third business day after the contract was signed. Secondly, according to the mail or telephone order rule,[33] if someone orders goods by mail, phone, computer or fax, the latter law requires that the seller ship to the buyer within the time promised or, if no time was stated, within thirty days. If the seller cannot ship within these periods, he must send the buyer a notice with a new shipping date and offer the option of cancelling the order and being issued a refund, or accepting the new date. If the buyer opts for the second deadline but the seller cannot meet it, the buyer must be sent a notice requesting their signature to agree to a third date. If the buyer then does not return this notice, the order must be automatically cancelled and the purchase price refunded. The seller must issue the refund promptly, within seven days if the buyer paid by check or money order, or within one billing cycle if the buyer charged the purchase.[34]

Turning back to EU law, if we think of the consumer as always being the 'weaker party' (for this myth see later), the rule that the consumer must pay the costs (up to € 40) of returning goods can also be questioned.[35]

Furthermore, besides cancelling, the system of remedies would also need a deeper analysis. We could ask whether repairs instead refunds are beneficial for consumers. In most cases, the seller has the option to repair the goods supplied.

The question that must be raised regarding the above problem is the following: can we claim that a system serves social justice if there are fundamental problems with it? Perhaps we can, but such an approach makes us blind to the most important problems.[36]

(a) the day on which the consumer has taken delivery of the goods in the case of a sales contract, including a sales contract under which the seller also agrees to provide related services […].'

33 For deeper analysis into the technical matters and the wording of the law, *see* FTC 'A Business Guide to the FTC's Mail or Telephone Order Merchandise Rule' (Federal Trade Commission website) http://business.ftc.gov/documents/bus02-business-guide-mail-and-telephone-order-merchandise-rule, 8 October 2013.

34 The basics of my summary were taken from Joseph N. Conway, 'Consumer Law Help Manual' (Orange County) www.orangecountygov.com/filestorage/124/826/1278/Consumer_Law_Help_Manual_-_Contracts.pdf, 1 February 2012.

35 P Rott, 'Harmonising Different Rights of Withdrawal: Can German Law Serve as an Example for EC Consumer Law?', 7, *German Law Journal* (2006), P. 1123. For German solutions *see ibid.*

36 Incidentally, in EU labour law we may also find strange solutions and practices. In that field are right to have doubts about the effectiveness of certain regulations such as those on equal payment of men and women, since women still earn less than men. The practice is well known and is widely accepted (whist there is regular action taken to attempt to change the situation).

24.2.3 Institutions and Justice

Besides general systemic and substantive law concerns about justice, there are also institutional, procedural problems that can cause malfunctions. There is no harmonisation in the field of a common institutional background. Thus, apart from the Commission in certain competition law related cases, there is no general EU authority that could protect consumers in cross-border contracts. Furthermore, the systems of national authorities are quite diverse. In several countries there are four to six authorities dealing with consumer claims. Powers are split between authorities dealing with and supervising consumer loans, unfair advertising, damaged goods, product liability, etc. When considering access to justice and social justice, the latter can be very problematic, especially in cross-border contracts. If we accept the fact that rights are useless if they cannot be enforced and accessed, we should emphasize enforcement far more.

Incidentally, law enforcement in EU consumer law could be best helped by giving people more autonomous rights and by teaching them how to defend their interests, instead of creating more domestic authorities. Yet in majority of Member States no small claims courts exist, even though such courts would serve as effective tools in protecting consumers' rights. It is true that in several countries, a special payment process is used for small claims, and it is usually faster than normal court proceedings. In the EU the regulation on the Order on payment procedure[37] and the regulation on small claims procedures[38] attempt to solve these problems. I would be surprised if these rules in themselves would be enough for protecting consumers, since very few consumers will sue and try to enforce the court's ruling in another country.

Furthermore, opt-out class action (collective redress) is generally not available either. The Commissioners for justice (Reding), Competition (Almunia) and Consumer Affairs (Dalli) agreed in 2010 regarding the following principles of a necessary class action procedure:

- They regarded collective redress as an instrument to strengthen the enforcement of EU law, notably within the more decentralised situation of enforcement that prevails.
- Collective redress if a broad concept encompassing any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation of harm caused by such practices.
- Collective redress is not a novel concept, and the existing mechanisms vary widely throughout the EU.

37 European Parliament and Council Regulation (EC) 1896/2006 creating a European order for payment procedure, OJ 2006 L 399/1.

38 European Parliament and Council Regulation (EC) 861/2007 establishing a European Small Claims Procedure, OJ 2007 L 199/1.

– The diversity and lack of a consistent approach may undermine the rights of citizens and businesses and give rise to uneven enforcement.'[39]

The newly proposed class action recommendation[40] is only a recommendation, and only partly tackles the problems.[41] When opt-out class action is mentioned, most people in continental academia will start to feel discomfort and even distress, due to unfamiliarity with that approach. Some claim that it causes 'excessive litigation, excessive legal transitional costs, blackmail settlements and punitively high costs for business'.[42] These arguments seem to be unfounded from a moral point of view: our purpose should be to achieve higher standards for consumers, and (as seen later) to force them to respect their obligations. However, concerns that litigation costs would be too high or that there would be blackmailed settlements cannot be sufficient reason to dismiss such a tool: in fact, they are completely irrelevant as long as the system functions better.[43] A survey showed that 74% of EU consumers would defend their rights before a court if it were useful for them.[44] As another argument against class actions, it is also regularly stated that the EU may not have sufficient authority – another strange argument we should forget, since it is perhaps untrue.[45] Last but not least, there is the argument that consumers will remain unidentified

39 Ch. Hodges, Developments in Collective Redress in the European Union and United Kingdom 2010 (Stanford Global Class Action Exchange), http://globalclassactions.stanford.edu/sites/default/files/documents/1010%20Class%20Actions%20UK%202010%20Report.pdf, October 2013, p. 2.

40 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law. OJ [2013] L 201/60

41 For a good summary see Csongor István Nagy The European collective redress after the European Commission's Recommendation: one step forward, two steps back? (Manuscript)

42 Ch. Hodges, 'European Union Legislation', 622 *Annals of the American Academy of Political and Social Science – The Globalization of Class Actions* (2009), p. 81; L. Fiedler, *Class Action zur Durchsetzung des europäischen Kartellrechts*, Mohr Siebeck, 2010, p. 66; D. Fairgrieve and G. Howells, Collective Redress Procedures – European Debates, 58 *Int'l & Comp. L.Q.* (2009), pp. 379 *et seq.*

43 This is a key issue: there is an argument against class action that it could be misused by consumers, *see* Fiedler, Class Action… (note 42), p. 67.

44 *See* p. 82 thereof.

45 *See* Treaty on the Functioning of the European Union OJ C 326/47. It is still disputed which areas of consumer law and related procedural law issues could be covered by EU law. On the other hand, I believe that, after so many years of EU consumer law legislation, when the single European market got more and more connected to consumer law, when a European consumer even in intra-country B2C relations is connected 'to the whole of Europe as such', we should not state that the EU has no authority in this field. For mainly substantive provisions, Art 169 Treaty on the Functioning of the European Union (hereinafter referred to as: 'TFEU') says the following:

1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.
2. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:
   (a) measures adopted pursuant to Article 114 in the context of the completion of the internal market;
   (b) measures which support, supplement and monitor the policy pursued by the Member States.

in many cases and therefore that a majority of them would not receive any payment in compensation for their damage. Nevertheless, if there is a chance for a portion of consumers to receive some compensation, such claims should still be supported. In addition, businesses would obviously care more if they were forced to pay large sums for deceptive practices or mass breaches of contracts. As the European Consumer Organisation wrote to President Barroso in an open letter,

> […] recent scandals related to defective breast implants (at least 100,000 victims throughout Europe) or dangerous medicines, as well as numerous other cross-border unfair commercial practices and infringements of consumer rights leave EU citizens stranded with little prospect of redress. It is unfortunate that the lack of action from the Commission allows some wrongdoers to retain illegal profits and fails to create incentives for fair competition… We thus reiterate our high hopes that, alongside other steps to strengthen the Internal Market, your Commission will proceed with concrete legislative steps on collective redress.[46]

As seen above, even in EU competition law interpreted broadly (in the field of unfair business practices) there is a need to introduce this concept, and the Commission has also

---

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 2(b).
4. Measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them.

'It emerges from this provision that the TFEU envisages the adoption of secondary EU consumer law in different legal contexts: first, such law may be internal market law adopted on the basis of Art. 114 TFEU. Under this provision, the European Parliament and the Council shall adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. Second, consumer protection legislation may be adopted on the basis of Art. 169(3) TFEU. In addition and in a broader sense, consumer protection legislation may also be found in other legal contexts, e.g. transport law or social non-discrimination law.' Christa Tobler: *The Lisbon Treaty And Its Influence On Consumer Law. Gastvorlesung an der Ryukoku University, Kyoto, Japan, 23.04.2011.* 2011. https://ius.unibas.ch/uploads/publics/7522/Consumer_protection_28June2011.doc, 5 October 2013; for a comprehensive analysis about the background *see* e.g. Jürgen Schwarze (Ed.), *EU-Kommentar*, 3rd edn, Nomos, 2012, p. 1420, pp. 1763 *et seq*., esp. p. 1764. If, beyond substantive law, we think about the background of procedural law, we could also use Art. 81(f) TFEU, which says that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States. Latter provision clearly gives the EU authority to act in the field of class actions.

46 Letter of Monique Goyens, General Director to President Barroso (The European Consumer Organosation, 25 April 2012), www.beuc.org/custom/2012-00274-01-E.pdf, 10 October 2013.

investigated this.[47] However, it seems now that, these plans in the field of consumer law and competition law were unfortunately dropped by the Commission, without the option for change in the near future. In a typical case from 1970s that could occur even today and which proves that something is going wrong within the EU, a French wine producer filled bottles with 1,486 litres of wine instead of 1.5 litres as labelled. After 200 million bottles, their profit on this small discrepancy was 13 million francs.[48] The present framework is not able to avoid such cases either, and a simple recommendation is not a useful tool to solve the existing problems.

Class actions notwithstanding, punitive redress is also not applied, even though it would be effective in providing tighter control over global-multinational companies.[49]

Consequently, in many cases there is no real and effective protection for consumers when a large company with cross-border affiliations mistreats its buyers. To claim that such a system provides justice is very unfortunate. Undeniably, there is indeed a kind of justice: in some cases the system yields optimal results. But there are also plenty of examples to the contrary, with devil being in the detail: it is as if the really important rules of EU consumer law were hidden behind a finely decorated draught-screen.

24.3 Myths of the Vulnerable Consumer

European consumer law is fundamentally paternalistic and handles consumers like they are small children and not adults capable of making independent decisions, contracting with responsibility. There exist strict rules on what they are allowed to do, what other parties (businesses, banks, etc.) are allowed to do and how consumers may reclaim their money. In itself, the existence of such a system is completely acceptable. For example, this is how general contract law works in MSs. There are actions that are legal and actions deemed illegal. EU paternalism has two sides in the area of consumer law: firstly, there exists strong intrusion, as mentioned before, which may yield good results. Yet secondly, in numerous instances consumers receive unjustified benefits. Knowing this system, we are bound to feel that its approach is deeply rooted in the thinking of European academia: that the consumer is always the exposed party. However, this is not the case. Businesses may also be harmed. Not in all situations is the consumer the weaker party. If masses of consumers abuse their rights, this can also lead to undesired results. For example, as already

47 Commission, 'Green paper on consumer collective redress', COM(2008)794 final.

48 Example taken from L. Fiedler, *Class Action zur Durchsetzung des europäischen Kartellrechts,* Mohr Siebeck, 2010, p. 36.

49 I don't go into detail about that idea here, because I also feel that introducing punitive redress could have more weaknesses than that of class actions. In the US, there is an enormous body of literature available about the usefulness of this instrument, but of course there are also scholars who criticize its usage and practice. Thus, the collection of all advantages and disadvantages would take a deeper analysis into this topic.

mentioned before, a valid question is what reasons should be valid for allowing consumers to withdraw from and cancel a freshly concluded contract. This concept of withdrawal is used in the doorstep selling directive (Article 5), in the previous timeshare directive (Article 5), in the new timeshare directive (Article 6), in the distance selling directive (Article 6), in the directive on the distance marketing of financial services and[50] as well as in the new directive on consumers' rights (Article 9).[51] In each directive, the length of time allowed for withdrawal was set differently: according to the latter directive, consumers have 14 days to return an article.[52] When consumers are not notified about their right to do this, the time allowed will extend – however, this extension varies among MSs as well as throughout EU legislation.[53] This instrument may well be useful when the consumer really is in a position that requires him/her to make a decision quickly, as in the case of doorstep sales. Perhaps, contrary to Prof. Smits's opinion as presented earlier, it could shape as set in the contract, in cases the buyer not being able to check the good before signing. However, withdrawal should not be used as an all-round 'tool' in a broad range of consumer contracts. Why should we instruct consumers to breach an obligation they voluntarily entered into? This way we educate them not to respect the contracts they sign. We ought to train them differently, informing them on how to make sound decisions independently, and based on those decisions, to accept the responsibility. The 'vulnerable consumer myth' is not based on the real life position of consumers. It is based on a false interpretation of duties. Of course, there are situations when consumers are subject to harm and need to be protected, but I do not believe that allowing them to cancel an obligation is the best way to create redress – not even for consumers themselves. The primeval period of consumer legislation is over. There is no longer a continuous need to defend the consumer. We are not living in a night-watchman state that leaves vulnerable parties without the means do defend themselves.

Furthermore, as another effect (and not always a cause!) of the same problem, we can observe companies slowly but surely starting to think in distorted ways. If contracts and contractual obligations are not respected by one party, they won't be respected by the other. E.g. in electronic commerce, it has become quite common to advertise goods sellers do not even own on the most popular, international websites. When the company receives

50 European Parliament and Council Directive 2002/65/EC concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC OJ 2002 L 271/16.

51 For a good analysis of these rules and the related case-law *see* H. Schulte-Nölke et al., *supra* note 1, pp. 471 *et seq*.

52 It is obvious for most of academia that the difference in lengths is also harmful for businesses, since it requires extra effort to check the rules.

53 *See* the chart in H. Schulte-Nölke et al., *supra* note 1, pp. 475 *et seq*. Please also note that according to Art. 11 of the Directive on consumers' rights, if the trader has not provided the consumer with the information on the right of withdrawal, the withdrawal period shall only expire after twelve months from the end of the initial withdrawal period.

an order, it orders the goods from another supplier (e.g. in the US) and attempts to sell it. However, if there is a shortage of the goods in the market, even if there was an offer by the company and formal acceptance of this offer by the buyer, the consumer will not receive the goods ordered, or only receive it with after a long delay. It has to be mentioned again that formally, a contract exists – even if the entry into force was modified by the company. Thus, businesses are starting to break away from the old 'you sell what you've got' rule and make abundant offers for goods they have not stocked. This approach in itself would not be a problem, but it can result in serious complications. At worst – those who often order goods on the Internet know this well – there is a high probability that goods ordered will never arrive, or only arrive after major delays. In such cases, the buyer only has two options: to wait or to cancel the contract. However, cancelling the contract is not a real 'remedy', and it will not bring the buyer closer to possessing the goods. And this brings us on to the problem of the questions about the myth of the vulnerable consumer being answered in several different, inadequate ways: one of these answers is that the consumer needs the specific assistance as provided by the present state of EU law.

24.4 The Myth of Consumer Benefits and the Usefulness of the Rules

Unlike we would suppose based on the above-mentioned point, there are situations in which the EU should indeed act. Thus, there is a real need to create rules, yet the EU does not do anything. Consumers really are vulnerable, though not especially in sales contracts, but in other areas. Yet, in some sales contracts, the system could also be more protective, but it seems unwilling to provide substantial real protection instead of a bogus one (see below).

24.4.1 Asking Companies to Provide Information Is in Itself a Useless Measure

As an example of a problem that needs more attention, we could examine the case of Hungarian consumer loans and mortgages, and especially lending by banks in a foreign currency (hereinafter referred to as: 'FX loans'). As a sort of protection, businesses (as well as banks) are required to give several pieces of information to consumers regarding the conditions of loan contracts, even if clients cannot reasonably understand this information. This obligation stems from the relatively new movement 'away from market restraint remedies toward information remedies', and the same trend also exists for selling goods.[54] These obligations concerning information contain strict mandatory rules and the parties

54 Ch. Moorman and L.L. Price, 'Consumer Policy Remedies and Consumer Segment Interactions', 8 *Journal of Public Policy & Marketing* (1989), p. 182.

may not use their own, more flexible ones. When consumers conclude a contract in a bank for example, they can check the general contract terms, which can be found in a thick dossier at the counter. In addition, bank clerks also attach several forms to each contract.

> […] There seem to be a growing, though naïve and empirically doubtful confidence in the belief that better information and cooling off periods will prevent unfairness to consumers from occurring in practice.[55]

However, giving information does not provide real protections, as the following example shows.

In Hungary, a large number of people entered into loan and mortgage contracts denominated in Euros or Swiss Francs over several years without expecting that the local currency would lose significantly from its value against the foreign ones. We could say that this arrangement (with enticingly lower interest rates than domestic rates) was the product of the EU internal market and international macroeconomics at work. However, given that more than one million (*sic!*) such contracts were concluded in Hungary, a country with 10 million citizens, this has ended up seriously destabilizing the financial liquidity of the population. Many borrowers lost all they had in a couple of years due to the sudden, significant and permanent weakening of the domestic currency (Forint) in the wake of the crises beginning in 2008. In order to limit such dangers of lending, the government introduced a wholesale bans on certain types of loan contracts – legislation that seemed to violate EU law. A decree adopted in 2011 codified a restriction that a client is only eligible for a foreign currency-denominated loan if his/her gross monthly salary, earned in the currency of the loan applied for, exceeded a sum equivalent to 15 times Hungary's minimum wage, expressed in Forints. In response to this legislation, after initiating a pilot procedure in 2011, an infringement procedure was commenced against Hungary, only to be dropped in July 2013. The decision to withdraw the case against Hungary (and, incidentally, another against Spain) came after the European Court had ruled in favour of France in a similar case. In late 2013 the Hungarian government pressed banks to limit their FX loan activity and restructure and/or renegotiate existing loans with consumers.[56] Later, the government forced banks to change foreign currency loans to

55 Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law'. 10 *European Law Journal*, 6, 2004 p. 661.

56 Hungary banks should bear most of FX losses on loans (*CNBC*), www.cnbc.com/id/101013522, 1 October 2013. 'We are prisoners of the exchange rate (because of the high amounts of foreign-currency loans) – we have to free ourselves from that.' Mr. Orban said. (*Wall Street Journal*) http://blogs.wsj.com/emergingeurope/2013/03/12/hungary-wants-freedom-from-foreign-currency-loans/101013522, 1 October 2013; P.J. Szpunar, 'System Risk Lessons from FX Loans in Central and Eastern Europe' (*Central Banking Journal*), www.centralbanking.com/central-banking-journal/feature/2175181/risk-lessons-loans-central-eastern-europe, 1 October 2013.

Forint. In the related *Kásler* case the Hungarian Supreme Court (Kúria) asked[57] the CJEU whether certain terms in foreign currency loan contracts may be deemed invalid from the point of EU directive law, especially that of the Directive on unfair terms in consumer contracts.[58] In its judgment, the CJEU said that contractual terms relating to foreign currencies are not necessary exempt from an assessment as to whether they are unfair, and the evaluation of such contracts may be done by local courts.[59] As an answer, the government introduced a new law. According to the new rules, the government sued banks, and banks had to prove (in a 30 days long court procedures) that foreign currency loans were conform with consumer law rules. However, courts were instructed not to accept the former arguments of banks that these contracts were conform with the letter of the law at the time of signature. As a result, in most of the cases banks lost the trials, which raised several constitutional problems: a retroactive rule was created forcing banks into an extremely quick trial and loosing about 3 billion Euros, while judges had to assist to this procedure.[60] Later, the Constitutional Court found the nonsensical procedure conform with constitutional principles.[61] An EU introduction into the field would be necessary to maintain balance on the single market and fix such problems for the future Europe-wide.

What can we ascertain after knowing the facts of this case? From the point of consumer law, on one hand, we have useless obligations such as having to provide information that is not useful for ensuring that conditions are fair. On the other hand, we have a lack of rules that could yield more protection. In a vanishingly small number of cases such contracts may be irrelevant: consumers must have basic self-awareness and need to think in a more international way. However, the result of such contracts could be the impoverishment of the masses in a country. We must emphasize that the global financial crisis also began in such an environment. Simplified strongly, a core component was that individual borrowers could not pay their loans back, and this caused a crunch for lenders. Therefore, in order to protect the economy (and not just consumers) it is important to act as soon as possible. The complete uselessness of information given to consumers can be clearly seen in these cases.

As mentioned above, the situation is also very similar regarding consumer sales and information requirements. Some authors highlight the fact e.g. in connection with the Common European Sales Law that

57 Case C-26/13: Request for a preliminary ruling from the Kúria (Hungary) lodged on 21 January 2013 – Kásler Árpád, Káslerné Rábai Hajnalka v OTP Jelzálogbank Zrt. [2013] *OJ C 156/18.*

58 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] *OJ L 95/29.*

59 Judgment of the Court (Fourth Chamber) of 30 April 2014. Case C-26/13. ECLI:EU:C:2014:282

60 Banks facing EUR 3 billion forex bill. <http://budapesttimes.hu/2014/09/14/banks-facing-eur-3-billion-forex-bill/>

61 Decision III/1522/2014. (soon to receive a new number).

> its contract disclosures are likely to fail because consumers will not pay attention to them. People do not pay attention to standard forms, neither long nor short, in plain language or in legalese, written or oral, separately signed or unified into one document, handed out in advance or *ex post*. The failure of consumers to attend to mandated disclosures packaged in pre-drafted language has been documented thoroughly, in area after area of consumer transactions, medical «informed consent», privacy, financial literacy, and much more.[62]

System of Remedies Is not Always Beneficial for Consumers

Returning to sales contracts: it is not worth allowing cancellation but (as explained further on) a real remedy would be more useful. E.g. if companies had to pay back double the purchase price, this measure, together with collective redress procedures could possibly stop them from being acting in bad faith. Simple cancellation is not an effective tool for that, as it has no retaining effect. Furthermore, as already mentioned, we could ask whether repair as such serves the interests of companies or of consumers. In fact, we might well feel that the approach of favouring repair over exchange is only beneficial for businesses, and perhaps for the environment, but not for everyday consumers. The method used in the US where businesses conclude special service contracts for purchasing goods could also be considered for the EU. With these, consumers receive goods far cheaper than with a longer warranty period.

Private International Law on Consumer Contracts Cannot Be Followed in Practice

Finally, the private international law background of consumer contracts also seems highly problematic. This area is another typical example of how EU (private international) consumer law tries to protect consumers but is unable to do so. Article 6 of Rome I regulation (hereinafter referred to as: 'Rome I. regulation' or 'regulation')[63] contains specific provisions on the law applicable to contracts in contrast to the general rules of its Articles 3 and 4. Based on the former rules, as a kind of 'protection', the law of the consumer's habitual residence may be applied in B2C contracts in the EU. There are two important necessary conditions for such contracts to fall under Article 6:

62 O. Bar-Gill and O. Ben-Shahar, 'Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law', 50 *Common Market Law Review* (2013), p. 117. I also agree with the view that '[…] traders, too, are often happy to cover their backs by oversupplying information. Academics are just starting to question whether information rules could not be more effectively targeted. Bearing in mind the magic number 7 (as being the most chunks of information that can be processed), they are suggesting that the starting point should probably be that "less is better".' G. Howells, 'The Potential and Limits of Consumer Empowerment by Information', 32(3) *Journal of Society* (2005), p. 363.

63 European Parliament and Council Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I) OJ L 177/6.

- The contract between the professional and the consumer has to fall under the material scope of consumer contracts, and also
- The activity of the professional must be directed to the MS where the consumer has his/her habitual residence.

Thus, if the business pursues its commercial or professional activities in the country where the consumer has his/her habitual residence, or the business directs such activities – whether exclusively or not – to that country, the contract shall be governed by the law of the country where the consumer has her habitual residence. Even if there is an *expressis verbis* choice, it is not a mere competition of legal systems. This is why I strongly disagree with a statement that a significant number of B2C contracts would contain choice-of-law provisions leading the parties to the application of a foreign law.[64] The statistics that 65-80% of contracts contain choice-of-law clauses are completely irrelevant, and so is the fact that 43% (or 85%, according to other statistics) of companies occasionally use foreign law in their contracts.[65] These are not competing legal systems applied, but fixed positions forced at the consumer to create safe and standard rules for the company.[66]

Based on the Rome I regulation, B2C contracts can be concluded and executed via the Internet as well.[67] The law applicable to contracts for downloading software, music and films from the web is generally the law of the country where the consumer has her habitual residence, if that is the location of the download process and if the site includes a request to conclude a contract.[68]

In case of multi-national companies, the application of this rule can be extremely misleading. In legal practice, in most cases the law of the professional's residence is applied, even if the professional has activity in the MS of the foreign customer, and such a useless rule only complicates B2C relationships. For example, if a Hungarian temporary resident in Germany visits a German (multinational) phone company's shop in Berlin and buys a mobile phone, in most cases German law will be applied because of the rationality argument

64 G. Rühl, 'Regulatory Competition in Contract Law: Empirical Evidence and Normative Implications', 9 *European Review of Contract Law* (2013), pp. 68 *et seq.* In this regard I agree with the majority of German scholars like Basedow, Leible or Mankowski. For their related articles *see* Rühl, *Regulatory Competition*, *op. cit.* p. 67, note 18. thereof.

65 *See* p. 69 thereof.

66 Incidentally, the statistics are also misleading since in several instances they mix B2B and B2C contracts which should be separated. The attributes of such contracts are completely different.

67 A.V. Dicey et al., *The Conflict Of Law*, 4rd Cumulative Supplement to the 14th edn, Sweet & Maxwell, 2011, pp. 393-394; S. Leible and M. Lehmann, 'Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht ('Rom I')', 54 *RIW* (Recht der Internationalen Wirtschaft) (2008), pp. 528, 537.

68 A passive website, through which concluding a contract is not possible, cannot be considered to be activity in that country, *see* Lorna E. Gillies, *Electronic Commerce and International Private Law*, 2008, p. 141; Leible and Lehmann, 'Die Verordnung…' (note 66), p. 537. F. Ragno, 'The Law Applicable to Consumer Contracts under the Rome I Regulation', in F. Ferrari and S. Leible (Eds.), *Rome I Regulation*, Sellier, 2009, p. 147.

of two parties concluding a contract in Germany, and also because this approach is also enforced by the company. Such choice-of-law is sometimes *expressis verbis* uttered in the contract, or (without reference that it would be a choice-of-law) the parties simply use German (substantive law) conditions in their contract. From the viewpoint of private international law, the latter can be considered an incorporation of foreign law. However, in theory, according to Rome I, neither of these two solutions is allowed to harm the consumer's rights that he would have based on the law of his/her permanent residency: in our example, Hungarian law (see Art. 6 (1) Rome I regulation). Since the substantive provisions of the MSs are different, that is why I believe there may exist billions of contracts in which the customer's rights are harmed and where the parties use an 'improper choice of law' for their contract.

Moreover, the situation is similar in regard to third states (non-MSs). If a company from a third state maintains a website and contracts can be concluded through this website, the habitual residence of the consumer will likely have relevance. If someone concludes a consumer contract with a New York based company and buys goods from New York via the Internet, the contract may be a consumer contract according to Article 6. of Rome I, and the general rules of Article 4. of the Regulation [especially Article 4(1)a] cannot apply. Of course, in order to reach this conclusion, the term 'directed activity' has to be interpreted (targeted activity test) considering all circumstances of the case.[69] However, the text and background of the Rome I Regulation would lead to the determination of this fact since the territorial conditions are present in the country of the consumer's residence. According to Art. 6(2) of the Regulation, if the parties decide to choose New York law, they may not lower the level of consumer protection as set out in the laws of the country of the consumer's habitual residence. In this case, managers of the New York company will be hard pressed to consider that both EU and domestic law may have relevance, and the consumer would also not likely be aware of this fact.

In summary, the relevant private international law rules also seem completely useless for the protection of consumers, even if they sound very nice at first sight. As an extra problem, just like in for substantive law, EU private international consumer law also has another problematic point, namely the question of fragmentation: most of the EU directives/regulations dealing with substantive issues contain rules on private international law issues, which overrule the provisions of Rome I regulation, and thus make the framework even more complex.[70]

---

69 For the best explanation of the targeted activity test *see* G-P. Callies (Ed.), *Rome Regulations*, Alphen aan den Rijn, Kluwer, 2011, pp. 124-155.

70 T.D. Czigler and I. Takacs, 'Chaos Renewed: The Rome I Regulation vs Other Sources of EU Law – a Classification of Conflicting Provisions', Andrea Bonomi (Ed.), *Yearbook of Private International Law*, Vol. 14, Swiss Institute of Comparative Law & Sellier, Munich, 2012/2013, pp. 539-558. For concrete texts *see* Tamas Dezso Czigler and Izolda Takacs, 'The Quest to Find a Law Applicable to Contracts in the European Union – a Summary of Fragmented Provisions', 12(2) *Global Jurist* (2012), Article 6, pp. 1-46.

24.5 The Myth of the Necessity of Continuous State Intervention

Paternalism in EU consumer law has reached many areas, all in connection with the boundary between actions deemed legal or illegal. For declaring actions illegal, the system allows less and less leeway for parties. Many scholars criticize the use the term 'paternalistic' at conferences, because they feel that the present level of intrusion into party autonomy in Europe is optimal. But this statement can be questioned. The contract law approach of the English and US legal systems has always been more open and liberal, and it would be tough to claim that this is bad for consumers. For example, as discussed above, with shorter periods for remedies in the US, they receive goods cheaper. In Europe (and especially, traditionally in eastern Europe) governments are very much afraid of markets and the idea that the market may create its own rules, without continuous state intervention. Of course, the *laissez-faire* approach was not useful, and the night watchman state resulted in highly unfair practices throughout the legal system, but this approach was blocked by constitutional principles and rules defending weak parties.[71] However, those times have passed, and we should not act as if the consumer would is completely defenceless. Somehow, today Europe seems to be moving in a strange direction in consumer law, trying to enter into new areas and govern them instead of allowing space for the parties. If we allow some more space, the market will be able to govern itself, and only basic legal frameworks need be established. At the present time, the most important institutions for consumers are consumer protection authorities. These are the offices in the centre, and MSs punish those who do not comply with rules.

However, there exists another way of thinking: let us allow consumers to defend their rights instead of having government agencies do so. In a consumer issue, in most cases consumers are still, even under the present paternalistic system vulnerable, because they have no tools in hand to undertake effective legal action. Due to certain legal instruments, US companies are forced to be careful with customers. One of these is class action litigation: cases abound in which corporations have had to pay off thousands of their customers. Class action suits make the system more 'alive' and active than centralized government organizations trying to control corporations.

The same is true regarding small claims courts: lacking in most European countries, such forums are worth applying to for consumers, potentially granting them a decision easily without the formidable expense of traditional litigation.

Another institution to push companies back is the system of punitive (exemplary) redress. Continental lawyers are always afraid of this instrument being used. However, its open market approach should be an example of the direction to move in.

71 M.W. Hesselink et al., 'Constitutional Aspects of European Private Law', *Centre for the Study of European Contract Law Working Paper Series*, No. 2009/05, http://dare.uva.nl/document/171573, 5 October 2013, p. 6.

24.6 Ease of Myths: Cornerstones of an Ideal System

24.6.1 Systemic vs Individual Problems and a Four-Step Model for the Future

As it can be concluded based on the above, there are two kinds of problems in existing EU consumer law.

Firstly, there are structural problems. One of the structural problems is the acceptance of a paternalistic system and all of its elements without criticism. Contrary to what is suggested by legislators and NGOs representing consumer rights, such a system in itself is not always useful and not always beneficial for the consumer. Its rules can lead to results ranging from bad to optimal, but the mystique surrounding it only serves to cover up the problems it causes. Moreover, another structural problem is the complicated access to legal sources; in a highly fragmented system it is easy to get lost between legal sources. Furthermore, missing institutions weaken the system.

Secondly, there are problems with badly judged one-off, independent solutions. These problems may seem less problematic, but if they become systemic mistakes, they can cause malfunctions as well. We can state that systemic failures are created by the compounding of wrong decisions at the lowest level. In order to achieve a properly functioning policy of consumer law, even though it sounds didactic, I would recommend a four-step model to follow when creating legislation proposed by the Commission. We know the Commission investigates most of these problems – however, the output of legislation is not as well structured as it could be.

The steps are the following:

- 1st step (systemic level 1): decide whether legislation is necessary or not? I.e. decide between party autonomy and EU intervention
- 2nd step (systemic level 2): avoid fragmentation – overview of existing provisions
- 3rd step (individual level 2): real rules for real life – explore the purpose: who do I want to support
- 4th step (individual level 2): choose the right solution.

Henceforth, the single steps will be explained in detail.

24.6.2 Step 1 (Systemic Level 1): Party Autonomy vs EU Intervention

In the first step, the legislator must decide two questions. Firstly, whether the intervention is necessary or not. Secondly, whether she wants to follow the European model of governing the relationships, which prefers state/EU intervention into private relationships, or if there is another, more liberal (useful, flexible, etc.) model which may be beneficial.

We know the Commission undertakes thorough background analysis before it starts a legislative procedure. However, in most cases this procedure is a result of a model typically used in Europe: it is based on state intervention, even when intervention is not quite as important or useful in order to reach the stated goals. Sometimes we get the impression that some rules exist merely to be able to demonstrate that certain departments at the Commission are doing their job instead of reacting to real social needs. E.g. it is dubious whether in case of timeshare contracts it was more necessary to adopt independent rules than in the case of electronic sales, car sales, computer sales, sales of real estate, etc. The question could also get raised about why we do not have a general rule for consumers like the Magnuson Moss Warranty Act[72] in the US? Of course, admittedly, total harmonisation of consumer law seems highly problematic.

Moreover, it seems that presently we only use in all laws a single regulatory model based on EU intervention: setting informational rights, withdrawal periods and remedies such as repair, exchange and refunds. The main purpose of this strategy could be that it makes for greater coherence and enables many different sources to be interpreted analogously or nearly so. However, we are right to doubt whether 'one size fits all' really is the correct approach to follow. Is it obvious that distance contracts must be regulated similarly to timeshares and doorstep sales? Each and every relationship has its own rules that cannot be used for another relationship. This means that cases should be handled separately. We know there were conflicts during the negotiations between civil law and common law countries regarding consumer law issues during the preparatory works of the new consumer law legislation: that was the reason why its scope ended up being severely curtailed. However, there is obviously no need for all issues to be handled similarly in different legal sources, and we civil lawyers should act with more flexibility and allow for more common law approaches in our statutes.

24.6.3 Step 2 (Systemic Level 2): Avoiding Fragmentation

The question of whether to intervene or not and the basic tool/*ethos* we employ brings us to the next question: whether we need new regulation at all, or if we can introduce new rules into existing regulation(s). In this regard there are two very important guidelines, which are presently not followed at all:

Firstly, all rules should be put into one directive.[73] This is just a technical issue, not deep reform. Existing rules should perhaps not be reformed if we cannot accept the new

72 15 U.S.C. 2301. *Cf.* Ch. Twigg-Flesner, *Consumer Product Guarantees*, Ashgate, 2003, pp. 133 *et seq*.

73 This approach was used for example in the field of the free movement of persons, where several rules were collected and put into a new directive, *see* European Parliament Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC,

solutions, i.e. if there are differences among MSs' opinions that cannot be resolved though compromise. But we do need a well-structured legal source for consumer issues. It would be especially important to handle the question of scope: currently, some regulations provide not a word about their scopes, while others covering similar areas do contain rules on their applicability.[74] For certain kinds of sales there are three to five directives that must be applied. Without having a single regulation and a transparent, properly and easily accessible source for consumer law issues, the system will remain utterly unfriendly for non-experts. At present, this is a system for academics, not for practicing lawyers.

Secondly, even if we do not follow this path (and especially if we do), it would be advisable to use another important rule in order to retain transparency: no new rules (regulations, directives, etc.) should be adopted; instead, new rules should be incorporated into existing directives/regulations. Unless we reform our ways, chaos will deepen. We should apply a limit, drawing a line at the point reached today. It seems that the present system is based on a German approach, which regulates individual, specific issues. Maybe this is also the reason why German academia is traditionally so strong compared to other countries in dealing with EU consumer law issues. However, even in their case, after the collapse of the Allgemeines Landrecht für die Preussischen Staaten (ALR), Germans had to learn that transparency in legislation is of elementary importance. There is a line that should not be crossed. In sum, it would be crucial to summarize existing provisions and not to adopt completely new regulations if they can be added to existing ones.

24.6.4 Step 3 (Individual Level 1): Who Do We Want to Support with this Rule?

The third step (the first individual decision in a case concerning legislation) would be to explore the purposes of the new rule, and especially the point of who we want to support. With thorough and sincere analysis, we can strike a balance between business and consumer interests. It is obvious that businesses should not be lumbered with useless obligations. It is obvious that there is tension between the values of a liberal market and the intrusion into that market which is required for it to function properly. It seems obvious that the present system that allows breaching of contracts easily was not as inspiring for the parties

72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance). OJ L 158/77. However, later, the Commission continued to create new independent rules, *see* e.g. Regulation (EU) No. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union. Text with EEA relevance. OJ L 141/1.

74 M. Fallon and S. Francq, 'Towards Internationally Mandatory Directives for Consumer Contracts?', in J. Basedow et al. (Eds.), *Private International Law in the International Arena – Liber Amicorum Kurt Siehr*, T.M.C. Asser Press, 2000, p. 158; Lajos Vékás, *'Der Weg zur Vergemeinschaftung des Internationalen Privat und Verfahrensrecht* – eine Skizze', in P. Šarčević et al., (Eds.), *Liber Memorialis Petar Šarčevic: Universalism, Tradition And The Individual*, Sellier, 2006, pp. 174-175.

as a properly functioning one could be. Nevertheless, we should allow as much space as possible for the parties themselves to decide their own business.

Thus, we have to decide whether to act or not. If we decide to act, we must do so in a way that provides consumers real protection, not a completely useless set of rules. Moreover, we should also grant businesses receive the offset as promised. And this leads us to the next level, the second level of individual questions.

24.6.5 Step 4 (Individual Level 2): Choosing the Most Appropriate Rule

Finally, if we set the basic direction, we must select the most appropriate rule. In this regard, temptation arises from the present rules to provide answers that are very similar to existing approaches. However, after we set the target, i.e. ask the question of 'who we want to support', we need to create a set of rules around that frame. Two questions must be answered at this level.

Firstly, we have to decide what we want to achieve. E.g. if we find consumers' rights are harmed en masse by e-sales contracts, we have to regulate e-sales in a way which results in a more balanced system, and, as such, in the fulfilment (*sic!*) of such contracts. The present system does not lead us in this direction, but lead to a regularly applied kind of 'money back guarantee' if the consumer was 'lucky enough'. From the point of view of business, the same is true: consumers sometimes withdraw without finding fault in goods or services. If we find the consumers' position weak, we have to create an environment that supports the fulfilment itself, and sanctions in case of default in performance, and especially, in case of a fundamental breach of the contracts drawn up by the business. When we find consumers breach contracts (which is practically allowed, i.e. 'legally permitted' presently), we have to act against that practice. Consequently, we needed a performance centred approach instead of a money centred one (in this regard the approach suggested by this paper is different from both the common law approach and also the continental one).

Secondly, after we set out our main purpose to make businesses fulfil their duties, the question of how to regulate issues also must be asked. At present, there is no effective system of remedies. Refunds (allowing withdrawal) are not a good solution. In most cases, it would be far better to strictly apply an additional remedy that the consumer would be entitled to in case goods do not arrive, or are late. Allowing withdrawal by parties if they conclude a contract is wrong and encourages them to cheat. We could instead propose a type of sanction that amounts to e.g. 10, 20, 30, or 50% of the purchase price if goods do not arrive in good shape or contain hidden faults. This approach raises several problems. It can be argued that harm to consumers is not this high. However, in certain cases this is not true, for example, purchasing a car. Moreover, the high volume of claims submitted

by consumers could lead to problems and fraud. In this regard, putting the burden of proof on the consumer may be helpful. Furthermore, adding some specific rules to avoid fraudulent behaviour also seems logical.

24.7 Final Conclusions

It would be naïve to think that the above critiques will be followed by the Commission in the near future. However, the main purpose of this article has been to provoke the thinking of the legislator as well as the thinking of the European academic community and to show that there exists another world outside the regular limits of EU law. It would be a great mistake to blindly follow our own, European path without thinking more progressively. The framework of that path was set twenty to forty years ago, and it is time to re-think fundamental approaches.

It is obvious that several patterns in more liberal systems are subject to valid criticism, e.g. the use of punitive redress or class actions, which are continuously debated. The present system of remedies is sometimes defended. But in order to reach a better, more functional system, several of our basic, bad habits must be reviewed. Not only will this lead to better legislation, but also make Europe more competitive in the global economy.