THE PHILOSOPHY AND ECONOMICS OF EU CONSUMER LAW CONTRASTED WITH INDIAN CONSUMER LAW AND PRACTICE

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ABSTRACT

Having been invited to this prestigious conference I first want to clarify what I want to talk about. The topic which has been assigned to me by the convenor in the framework of the GNLU Law and Economics Conference and which I readily accepted is a complex one because of the wealth of material both with regard to legislation and interpreting case law of the Court of Justice of the EU (CJEU). I have – frequently with colleagues – written extensively on the subject matter, the last being a 400 p treatise on European Consumer Law.[1] To make things somewhat easier for you, I have prepared an Annex I concerning first an overview of EU legislation and regulation, and an Annex II linking the philosophy and economics of EU consumer law to certain images of the consumer. Annex III is concerned with some findings on Indian consumer law which I prepared during two stays in India in 2013 and 2014, namely in New Delhi and in Bangalore in the context of a project managed by GIZ, the German development agency, with your Ministry of consumer affairs and where I had a chance to take interviews with academics, judges, consumer activists, and state officials. My findings were published in a German Festschrift[2] and will also be available to the Indian reader.

The structure of my paper will follow the Annexes. In a sort of overview, I will explain some of the specifics of EU consumer law – I will do that without going into any details so that we know what we are talking about (II). More extensive parts (III) will discuss the different and sometimes conflicting consumer images in EU law and propose a differentiated approach (IV) based on CJEU case law and referring to findings of recently quite popular behavioural economics. The last

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1 Reich/Micklitz/Rott/Tonner, European Consumer Law, 2nd edition 2014 (Cambridge/ Intersentia).

2 Reflections on Hans Micklitz' Plea of a Movable System (of Consumer Law) – Anything to Learn from the Experiences of Indian Consumer Law, in: Purnhagen/Rott, Varieties of European Economic Law and Regulation, Liber amicorum Hans Micklitz, 2014, 651-674 (Indian) International Journal on Consumer Law and Practice, 2014 No.2, 1-31.

part (V) will come to some observations which I made during may work in India – you're invited to discuss and even criticise them if you think my assessment is wrong. Due to time reasons I will present my findings about Indian consumer law only in an overview in the Annex but I will circulate my Festschrift paper to the participants of the conference.

AN OVERVIEW OF EU CONSUMER LAW AND PRACTICE

Legislation on consumer law in the EU – which was then called "European Economic Community" (EEC) - started 30 years ago with the adoption of the product liability directive 85/374/EEC;[3] a rather minor directive on misleading advertising had been already adopted in 1984 but has now been supplemented and extended by the more recent Directives 2005/29/EC on Unfair Commercial Practices[4] (in B2C marketing) and 2006/114/EC on Misleading and Comparative Advertising (in B2B relations).[5] After this initial phase a number of EEC/EC/EU-Directives followed, mostly relating to consumer contract law. The most important ones had been Dir. 93/13/EEC on Unfair Terms in Consumer Contracts[6] and 99/44 on Sales of Consumer Goods.[7] A consolidation of prior directives was enacted in 2011 by the so-called "Consumer Rights Directive" (CRD) 2011/83,[8] relating mostly to so-called off-premises and distance contracts and containing not only detailed information requirements but also a right of withdrawal of the consumer of 14 days after contract conclusion resp. delivery of the good.

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3 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 [1985] L 210/29.

4 Directive 2005/29/EC of the EP and the Council of 11 May 2005 on Unfair Commercial Practices, [2005] OJ L 149/22.

5 Directive 2006/114/EC of the EP and the Council of 12 December 2006 on misleading and comparative advertising [2006] L 376/21.

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

7 Directive 1999/44/EC of the EP and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L 171/12.

8 Consumer Rights Directive 2011/83/EU of the EP and the Council of 25 October 2011 (CRD), [2011] OJ L 304/64.

Worth mentioning is also a – somewhat specific – Directive 2004/114/EC[9] prohibiting any – direct or indirect – discrimination based on gender in the "sale and supply of goods or services available to the public". The same discrimination prohibition concerning race or ethnic origin has been enacted by Dir. 2000/43.[10] I will refer to that in the context of collective consumer interests protected by EU law.

Another area where the EU legislator has been particularly active are financial services, in particular consumer credit by Directive 2008/48[11] and, with regard to mortgage credit, recently Directive 2014/17/EU.[12] Consumers in the EU will have a right to a bank account with basic features from 2016 on according to Dir. 2014/92.[13]

Commercial practices have found a comprehensive regulation in the above mentioned Dir. 2005/29. Access to justice which is usually a matter of Member States under Art. 19(1) s. 2 of the EU-Treaty has recently been improved by imposing ADR systems of conflict resolution on Member States by Dir. 2013/11[14] and Regulation 524/2013.[15] Questions of liability in tort have proven to be much more difficult to harmonisation and – with the exception of the Product liability directive - have been left to coordination by a conflict of law regulation (called Rome II) 864/2007[16] – of course

9 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between women and men in the access to and supply of goods and services [2004] OJ L 373/37.

10 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.

11 Directive 2008/48/EC of the EP and the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ 122/66.

12 Directive 2014/17/EU of the European Parliament and the Council of 4 February 2014 on credit agreements relating to residential immovable property, [2014] OJ L 60/34.

13 Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, [2014] OJ L 257/214.

14 Directive 2013/11/EU of the European Parliament and the Council of 21 May 2013 on consumer ADR, [2013] OJ L 165/13.

15 Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on Consumer ADR [2013] OJ L 165/1.

16 Regulation (EC) No 864/2007 of the EP and the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199/1.

with the exception of product liability which was only slightly modified in 1999 but was not extended to services. There is now a recently adopted Directive on competition damages 2014/104[17] which has only an indirect relevance to consumer protection.

EU consumer law, particular in the area of contract, looks quite impressive, but it is far from comprehensive. That is why Member State contract law still plays a prominent role in consumer protection and has to be coordinated by an internationally applicable conflict-of law instrument, namely Reg. 593 /2008,[18] the so called Rome I-regime. It contains a specific consumer protection provision in Art. 6 intending to preserve to the consumer the application of his or her home law when having been approached for contracting in the country of residence. There is no codification of consumer law at EU level, unlike in France, Italy or Spain.

As you could see from this overview, most of EU-consumer law is contained in so–called directives. They are now based on Art. 114 TFEU (Treaty on the Functioning of the EU as adopted under the Lisbon instruments of 2009) giving the EU a broad competence for so-called internal market measures which should take as a starting point a high level of consumer protection – an objective repeated in other provisions of the Treaty (Art.12, 169 TFEU) and in Art. 38 of the Charter of Fundamental Rights in the EU of 2009. According to Art. 288 TFEU, directives are binding on Member States with regard to "the result to be achieved...but shall leave to the national authorities the choice of form and methods." Directives must therefore be implemented by Member State legislation; they do not on their own create rights and obligations of private parties. There is of course much debate on details of these provisions which will not be outlined here. The situation is different with EU-regulations which

17 Directive 2014/104/EU of the European Parliament and the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, [2014] OJ L 349/1.

18 Regulation (EC) No 593/2008 of the EP and the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I") [2008] OJ L 176/6.

have been used in particular for conflict-of-law questions under a different competence provision, namely Art. 81TFEU.

Directives only selectively regulate questions of consumer law; their scope depends on the extent of harmonisation – a rather controversial issue in EU-law which I cannot discuss in any detail. EU lawyers usually distinguish between "minimum" and "full" harmonisation, the first allowing Member States setting a minimum threshold but allow to provide for "better" consumer protection, the second setting both the upper and lower threshold of protection itself. In the beginning, EU law started with minimum harmonisation - with the exception of product liability in Dir. 85/374; later directives imposed a more or less "full" or "complete" harmonisation on Member States to avoid a drifting apart of laws, which however is limited to the extent of harmonisation itself. For example, the consumer credit directives 2008/48 and 2014/17 have fully harmonised the requirements of pre-contractual and contractual information, but have excluded questions of consumer over-indebtedness, default on repayment, setting of interest rates and default costs, consumer bankruptcy and the like, except for a warning obligation imposed on the creditor.

I cannot finish this overview without mentioning the role of the CJEU. According to Art. 267 TFEU it can – in certain cases it must - be called upon by Member State courts or tribunals to deliver judgments concerning the interpretation of EU law, once a question is raised in a litigation in Member States. As I will show later, the case law of the CJEU has played an enormous role in the development of EU consumer law – much of it has now become "case law" almost in the common law tradition familiar to Indian lawyers! This cannot be understood without a close look at the different consumer "images" which EU law has used and which we will distinguish as the "informed", the "weak" and the "vulnerable" consumer standard, added by remarks about collective consumer interests, to which I will turn now with some detail which may be of interest to my Indian colleagues.

CONSUMER IMAGES IN EU LAW

2.1. The "Informed Consumer" Standard

Community and now Union law proceed from the premise that the EU consumer law should be based on the model of an "informed consumer". Consumer protection understood as a form of social protection is generally the responsibility of the Member States within the framework of minimum harmonization measures, as recognised by the CJEU in *Buet* already in 1989.[19] Under the new framework of full harmonisation the Member State's discretion in the field of social protection depends on the scope of application of EU measures. In the area of consumer credit, under Directives 2008/48/EC and 2014/17, questions of social protection of the consumer-debtor against usury, default and insolvency are left to Member State law. EU consumer protection law generally belongs to *economic, not social, law.* A somewhat more "social approach" has been attempted in Article 28 of the Mortgage Credit Directive, which concerns "arrears and foreclosure". Even there, however, the provision leaves much discretion to Member States as to how to implement these consumer protective measures. Article 11(1)(g) requires the Member States to ensure that the standard information any advertising concerning credit agreements includes "a general warning concerning possible consequences of non-compliance with the commitments linked to the credit agreement." It is of no surprise that the information requirements are mandatory for the Member States, and in consequence for credit providers, while the social protective provisions on foreclosure and arrears remain more or less optional.

The Union legislator – and to an even larger extent the Commission – rely on the effects of the internal market and on competition in delivering

19 Case 382/87, [1989] ECR 1235; thereto J. *Stuyck*, in: L. Krämer et al., Law and diffuse interests, (Baden-Baden, Nomos, 1997) 287; *G. Howells/Th. Wilhelmsson*, *EC Consumer Law*, (Aldershot, Ashgate, 1997) 315-320; *St. Weatherill and H.-W. Micklitz*, in: Grundmann/Kerber/Weatherill, Party Autonomy and the Role of Information in the Internal Market, (Berlin, de Gruyter, 2001) 173, 185-187, 197, 200; *E. Hondius,* The protection of the weak party in a harmonised European contract law, (2004) 27 Journal of Consumer Policy (JCP) 245.

consumer welfare. For liberal authors, the right to free choice constitutes the core ingredient of the European economic constitution[20] because it is necessary for the exercise "the individual rights of the citizens to participate in cross-border transactions in accordance with Community law". Consumer protection extends these liberties to "passive citizens".[21] According to this view consumer protection excessively limiting the freedom of contract may hamper rather than enhance market integration.[22]

Consumer protection measures adopted by the EU focusing on the right to information reflect the policy choices taken by the Treaty, as visible in the wording of Article 169 TFEU.[23] They are regarded as compatible with a market economy. Socio-political, distributive demands are less important.[24] These issues are left to the Member States, in accordance, one could argue, with the principle of subsidiarity under Art. 5(3) TEU. It is due to the principle of subsidiarity that the finish author Wilhelmsson objects excessive unification of European contract law where "social values" are unlikely to be adequately considered.[25]

2.2. The "Weaker" Consumer in the Case-Law of the CJEU

As far as the application and interpretation of European consumer law directives are concerned, the practice of the CJEU shows the tendency to emphasise the *protection of the consumer as a weaker party* in a contractual relationship.[26] The battlefield is the interpretation of Directive 93/13/EC. Here a steady influx of references, in particular from the new Member

20 Critical discussion thereof in M. Kenny, *The Transformation of Public and Private EC Competition Law*, (Berne, Stämpfli, 2002) 86-93; *B. Lurger, Grundfragen der Vereinheitlichung des Vertragsrechts in der EU*, (Wien, Springer, 2002) 396-400.

21 *Reich*, General Principles of EU Civil Law, 2014, paras 1.5-1.9.

22 Chr. Kirchner, in: St. Grundmann/W. Kerber/St. Weatherill at 165.

23 For an overview see the contributions in *Grundmann/Kerber/Weatherill*.

24 Cf. *Wilhelmsson*, Social Contract Law and European Integration (Aldershot, Dartmouth, 1995); differing opinion *Willet*, Can Disallowance of Unfair Contract Terms Be Regarded as a Redistribution of Power in Favour of Consumers?, (1994) 17 JCP 471.

25 *T. Wilhelmsson*, Private Law in the EU: Harmonised or Fragmented Europeanisation?, (2002) European Review of Private Law (ERPL) 77, 84; similar view *Reich*, A European Contract Law or an EU Contract Law Regulation for Consumers?, (2005) 28 JCP 383.

26 CJEU, 13 December 2001, C-481/99, *Heininger*, [2001] ECR I-9945, para 38.

States (those who became members after 2004), but also from the Member States suffering more harshly from the Euro crisis (for example Spain), is matched by the Court's readiness to take consumer protection 'much more seriously'.[27] In order to understand the protective ambit of the Unfair Terms Directive, as interpreted by the CJEU, it is helpful to recall a statement from the *Penzügij Lizing* judgment,[28] which the Court makes repeatedly to justify its more consumer protective interpretation of the Directive:

> ... according to settled case-law, the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms…. The Court of Justice has also held that, on account of that weaker position, Article 6(1) of the Directive provides that unfair terms are not binding on the consumer. As is apparent from case-law, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them … In order to guarantee the protection intended by the Directive, the Court has also stated that the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the actual parties to the contract.

This case law overtly concerns only Directive 93/13 but the Court's approach should be regarded as indicating more generally the Court's

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27 *H.-W. Micklitz/N. Reich,* Von der Klausel- zur Marktkontrolle, (2013) 24 Zeitschrift für Europäisches Wirtschaftsrecht,(EuZW) 457; *same*, The Court and Sleeping Beauty - The revival of the Unfair Contract Terms Directive, (2014) 51 Common Market Law Review (CMLRev), 771; the leading case is CJEU, C-415/11, *Mohamed Aziz v Catalinyacaixa,* judgment of 14 March 2013.

28 CJEU, 9.11.2010, C-137/08 *VB Penzügji Lizing v Schneider,* [2010] ECR I-10847 at para 46.

understanding of the objectives of EU consumer law. In B2C transactions party autonomy is tipped in favour of the consumer as a typically weaker party. The business or professional party is regularly seen to be in a stronger bargaining position.

The CJEU seems even to be willing to improve existing remedies in directives. It does so both in a formal and in a substantive sense. Directive 93/13/EEC has led to a number of surprising judgments that have insisted on the principle of effective protection justified by the unequal bargaining power of the parties, lately highlighted by the *Invitel* and *Aziz* judgments.[29] This results in the requirement for national courts to apply *ex officio* certain protective provisions, in particular Article 6 of the Directive on the non-binding consequence of unfair terms. The case law began with *Océano*, concerning jurisdiction clauses,[30] was continued in *Claro*[31] *and Asturcom*,[32] in relation to arbitration clauses in consumer contracts, and was confirmed and refined in *Pannon.*[33]

The court *seized* of the action is therefore required to ensure the effectiveness of the protection intended to be given by the provisions of the Directive. Consequently, the role thus attributed to the national court by Community law in this area is not limited to a mere power to rule on the

29 Case C-472/10 *Nemzeti Fogyaszróvédelni Hatóság v Invitel* [2012] ECR I-(26.4.2012); comment H.-W. Micklitz/N. Reich, 'AGB-Recht und UWG – (endlich) ein Ende des Kästchendenkens nach Pernivoca und Invitel', EWS (Europäisches Wirtschafts- und Steuerrecht) 2012, 257; the prior opinion AG Trstenjak of 6 December 2011 has been commented on by H.-W. Micklitz/N. Reich, EuZW 2012, 126.

30 Joined Cases C-240-244/98 *Océano Grupo ed. v Quintero et al.* [2000] ECR I-4941.

31 Case C-168/05 *E.M.M. Claro v Centro Movil Milenium* [2006] ECR I-10421.

32 Case C-40/08 *Asturcom v Christina Rodrigues Nogueria* [2009] ECR I-9579; comment H. Schebasta, 'Does the National Court Know European Law', in: H.-W. Micklitz/N. Reich (eds,), 'The Impact of the Internal Market on the Private Law of Member Countries', EUI Working Papers 2009/22, 47 = ERPrL 2010, 847, insisting that in *Asturcom*, which concerned a consumer who "in total inertia" did not raise any defence against arbitration proceedings, including the *res judicata* of the final award against her (para 34), the CJEU did not apply the effectiveness principle, but rather the less stringent equivalence test.

33 Case C-243/08 *Pannon v Erzsébet Sustikné Győrfi* [2009] ECR I-4713; see also case C-137/08 *VB Penzügyi Lizing v Ferenc Schneider* [2010] ECR I-10847, para 56, concerning investigation on its own motion whether the court has jurisdiction or not according to the disputed clause.

possible unfairness of a contractual term, but also consists of the obligation to examine that issue of its own motion, where it has available to it the legal and factual elements necessary for that task, including when it is assessing whether it has territorial jurisdiction (para 32 of Pannon).

Regarding substantive law, the battleground has been the Consumer Sales Directive 99/44. The leading cases are Weber and Putz[34] decided by the Court on 16 June 2011; they are a good, and at the same time controversial, example of the impact of EU law on traditional ideas on remedies in sales law beyond the wording of Directive 99/44. They concern reimbursement of additional costs by the consumer for replacing a defective product and installing an improved one, for example by tearing off and replacing defective tiles used for floor panelling, or by disconnecting and reconnecting a dishwasher that did not function. The reasoning of the Court is based on the rather vague provisions in the Directive that repair and replacement should be done within "a reasonable time", "free of charge" and "without significant inconvenience to the consumer", even if the contract did not include installation services. This creates a strict liability regime for the seller, not only for the act of replacing the defective product itself, but also for the resulting follow-up costs even after the transfer of the risk. If the replacement would lead to disproportionate costs for the seller, he could reduce them "to an amount proportionate to the value the goods would have if there were no lack of conformity and the significance of the lack of conformity" (para 74). The consumer would not get full reimbursement of his costs. The reference point is not therefore the (possibly much higher) cost of removal of the defective product or/and the installation of a conforming product, but its lower net value. This seems to be a fair balancing of the different interests of the parties.

It is hard to predict where this development will lead. The CJEU is narrowing down the leeway of the Member States' to set their own

34 Joined Cases C-65/09 + C-87/09, *Gebr. Weber et al. v J. Wittmer et al.* [2011] ECR I-5257.

protective standards within the framework of EU measures. In this way, the CJEU seems to be counterbalancing the much harsher market-orientated philosophy motivating the European Commission, and to some extent also the European legislator.

2.3. The "Vulnerable" Consumer Standard[35]

If we look at the concept of "vulnerable consumers" as it emerges from existing EU legislation it seems to encompass, still rather superficially, those who cannot, or can no longer, cope with the requirements of the modern consumer society. Some consumers run the risk of being isolated from social and economic life, be it by over-indebtedness, disabilities, or a lack of possibilities to communicate. There is also a growing problem of "social deprivation". This group of consumers was the focus of the national consumer policies of the 1960s and '70s. The political movement of those decades concentrated on protecting in particular vulnerable persons without differentiation. This was taken up by the EU in the Lisbon Strategy of 1999 where the EU mentioned, for the first time explicitly, the existence of different types of consumers. It speaks of, as a separate group, humans "living below the poverty line and in social exclusion".[36]

Improved information and market transparency are of little help to vulnerable consumers when the goal is to enable them to lead self-determined life. It is rather the targeted improvement of infrastructure, and intelligent, realistic schemes of providing advice, that enable consumers, including vulnerable consumers, to participate independently in economic and social life. If one declares inclusion and social participation as the objective, as the EU does, then one also has to take care of "vulnerable consumers".[37] Amazingly enough, the vulnerable consumer has entered

35 This section follows *Micklitz/Reich*, in: European Consumer Law, (Cambridge, Intersentia, 2nd ed. 2014) para 1.36a.

36 COM(2010) 2020 3.3.2010, http://www.europarl.europa.eu/summits/lis1_en.htm, last accessed 31.07.12.

37 http://www.bmelv.de/SharedDocs/Downloads/EN/Ministry/Trusting-Vulnerable-Responsible-Consumer.pdf.

the European consumer policy agenda. Recital 34 of the Consumer Rights Directive (CRD) 2011/83/EU insists that:

In providing that information, the trader should take into account the specific needs of consumers who are vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee. However, taking into account such specific needs should not lead to different levels of consumer protection.

However, the obligation mentioned in the recital did not make it into the specific information requirements of the provisions of the CRD!

Legal recognition of this new type of consumer is closely linked to the liberalization of the energy and telecommunication markets, which was strongly promoted by the European Commission after the adoption of the Single European Act in 1987. The guarantee of supply for everybody was added to the concept of universal services. The universal service obligation not only refers to vulnerable consumers but actually includes them in its protective realm by giving them certain basic rights. For the first time the concept appears in Directive 2002/22/EC on universal services and users' rights relating to electronic communications networks and services (Universal Service Directive).[38]

Article 1(1) of the Universal Service Directive aims at ensuring the availability throughout the Community of good quality publicly available services through effective competition and choice and further, aims to deal with circumstances "in which the needs of end-users are not satisfactorily met by the market". According to the 7th recital, the Directive's objective is to ensure "the same conditions [of] access, in particular for the elderly, the disabled and for people with special social needs". Directive 2009/140/EC has not changed the terms defined in Article 2 of Directive 2002/21/

38 Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) [2002] OJ L108/51.

EC. For the first time disabled persons are granted special rights.[39] In the Internal Market in Electricity Directive 2003/54/EC and the Internal Market in Natural Gas Directive 2003/55/EC,[40] the so-called second generation of the liberalization of the energy markets, the European Commission coined the notion of the "vulnerable customer".[41] In light of the increasing problems of social exclusion as a consequence of the liberalization of the Single European Market, the EU further tightened its approach in Directive 2009/72/EC of 13 July 2009.[42] However, the EU has left it to the Member States to define the term of vulnerable consumers and to implement their protection, as Article 3(7) of the Directive indicates, including protection against disconnection.

The differentiation between categories of consumers in Directive 2005/29/EC on Unfair Commercial Practices can also be considered to have an impact on traditional contract law understanding which usually starts from a rather abstract and uniform concept of "persons". Interestingly the Directive does not speak of the "vulnerable consumer", but of "consumers whose characteristics make them particularly vulnerable" to unfair commercial practices. This concept includes consumers whose "age, physical or mental infirmity or credulity that render them susceptible".

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39 Arts 7 and 23a of Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws [2009] OJ L337/11 ; for an evaluation see *Nijenhuis, in: F. Benyon*, *Services and the EU Citizen*, (Oxford, Hart, 2013) at pp. 56.

40 Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC - Statements made with regard to decommissioning and waste management activities [2003] OJ L176/37; Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L176/57.

41 Compare Art. 3 (5) Directive 2003/54/EC and Art. 3 (3) 2003/55/EC, 'vulnerable consumer respectively vulnerable customer'.

42 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55.

Poverty does not account for the concept of vulnerability.[43] The law does not define the characteristics of the "normal addressee of an advertisement", who in the Directive is spoken of as the "average consumer".

Finally, the more recent Regulation (EU) No. 524/2013 on consumer ODR refers to "vulnerable users" in its Article 5 concerning the most inclusive possible access and use of the ODR-platform by all, including "vulnerable users ('design for all')". The Regulation, does not, however, contain a definition of "vulnerable users".

Persons with physical disabilities, on the other hand, have entered EU law in different regulations relating to passenger transportation, even though the concept of "vulnerability" is not used in their respect. Article 2(1) of Regulation 261/2004[44] talks of persons with "reduced mobility," "who require special services and attention by airlines. There has been a remarkable extension of the obligations of airlines by the CJEU, for instance in cases of interruption of traffic due to the volcanic eruption of the Icelandic volcano Eyjafjallajökull, leading to the closure of air space. There the Court used Article 9 of the Regulation to grant entitlements to stranded passengers, which were unlimited in time and value and did not distinguish between the different types of passengers. One could argue that in these circumstances every passenger was in some way an ad-hoc "vulnerable consumer" with reduced mobility, not due to the personal situation but due to the closure of air traffic. The Court wrote in its *McDonough*-judgment[45] concerning the care an air carrier owed to passengers' flight interruption which was due to a volcanic eruption:

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43 Compare Directive 2005/29/EC Art.5(3)…clearly identifiable group of consumers who are 'which mentioned as 'particularly vulnerable'.

44 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2004] OJ L46/1. The Commission's proposal for amending the regulation (COM(2013) 130 final) of 13 March.2013 has been critically discussed by *Müller-Rostin*, (2013) 2 euvr 138; I will not go into this discussion.

45 CJEU, C-12/11, *McDonagh v Ryanair,* judgment of 31 January 2013.

"…the provision of care to such passengers is particularly important in the case of extraordinary circumstances which persist over a long time and it is precisely in situations where the waiting period occasioned by the cancellation of a flight is particularly lengthy that it is necessary to ensure that an air passenger whose flight has been cancelled can have access to essential goods and services throughout that period" (para 42).

2.4. The Collective Dimension and the Problem of Discrimination

"Consumers, by definition, include us all", as President Kennedy famously said in his consumer message of 1962.[46] This statement seems to exclude a collective dimension of consumer protection, whatever the consumer image which it tends to protect. Therefore, consumer protection depends on the activity of the individual consumer which is injured in contracting or by some other illegal behaviour of the professional. Usually, the consumer must defend his/her rights before a court of law or a similar institution, including now an ADR mechanism.

Practice shows that the individual judicial process is not always suited to sufficiently supervising obedience of the laws. In general, the consumer as an individual will avoid legal proceedings for a number of reasons. Often legal proceedings are not commenced as the damage is only minor, and assertion of a claim by an individual would not be worth it. There is also a certain wariness of legal institutions as well as the fear of bringing a claim against a well-known undertaking. This is to the detriment of the collective interest of consumers, as the passivity of consumers allows undertakings to continue their illegal practices and in so doing harm an unidentifiable number of consumers. So far, collective legal protection has failed as a result of consumers' lack of power as a genuine counterpart to *business*, itself a result of the lack of organisation of the consumers as a

46 See the note by *E. Hondius,* The Innovative Nature of Consumer Law, 35 (2012) JCP 165.

group. The falling apart of objective law and subjective legal protection of the individual justifies the introduction of collective legal protection.

Collective legal protection relates to the "abstract" competence of consumer associations to assert a claim and bring an action; these associations need not be in a legal relationship with the defendants. Consumer associations can take action without having to satisfy the requirement that the review of the conduct in question is in their own legal interest. In fact, the protection of individual interests is of little concern; this, however, does not prevent the establishment of a competence based on a public interest test. Asserting a claim for "de-individualised" consumer rights by bringing a legal action results in an institutional "system of guarantees" for the protection of the consumer. Collective protection leads to a transition from an individual's subjective rights being affected to a wider group of consumers being affected collectively, for example by unfair terms or misleading advertising, thus synchronising public and private law. As the CJEU wrote in its *Henkel* case[47] concerning jurisdiction for actions of consumer associations:

> "The legal basis for its action [of the consumer association] is a right conferred by statute for the purpose of preventing the use of terms which the legislature considers to be unlawful in dealings between a professional and a private final consumer".

EU law has recognized a right of action of consumer associations in such important directives as Unfair Terms, 93/13, Unfair Commercial Practices under Dir. 2005/29 and Consumer Rights under the recently adopted Dir. 2011/83. Directive 2009/22/EC of 23 April 2009[48] on injunctions for the protection of consumers' interests, pursues as an objective the access of consumers and consumer associations to justice. By regulating the right of consumer associations to take legal action, the Directive also

47 CJEU 1 October 2002, C-167/00, *Verein für Konsumenteninformation (VKI)/Karl Heinz Henkel*, [2002] ECR I-8111, para 39.
48 [2009] OJ L 110/30.

applies to purely national circumstances. This represents a further step in approximating the procedural provisions.

In its Consumer Policy Strategy 2007–2013[49] the Commission wrote that it will consider taking action on collective redress mechanisms for consumers both for infringements of consumer protection rules and for breaches of EU antitrust rules in line with the 2005 Green Paper on private damages actions. Some Member States have introduced different schemes for collective redress of consumer injuries mostly based on an opt-in scheme, not as an opt-mechanism as in the US class action system. The general discussion in the European Parliament on collective redress has been rather hostile, as a report of the legal committee of 12 January 2012 shows:

> "a collective redress system where the victims are not identified before the judgment is delivered must be rejected on the grounds that it is contrary to many Member States' legal orders and violates the rights of any victims who might participate in the procedure unknowingly and yet be bound by the court's decision" (para 20).

The Commission has therefore not made any legislative proposals on that subject, and instead has only released a Recommendation of 11 June 2013[50] rejecting any type of opt-out solution and leaving it to Member States to define standing, admissibility and funding, and containing, surprisingly, a prohibition on punitive damages and contingency fees. Unfortunately, the Recommendation does not show any sincere concern for collective redress of violations of consumer law and may even discourage Member States from advancing legal reform; instead it seems to aim only at rejecting any US class-action initiative.

A certain collective dimension can also be seen in Directive 2004/113 prohibiting discrimination with regard to gender. The constitutional

49 COM (2007) 99 final of 13.3.2007, 11.
50 COM (2013) 3539/3, [2013] OJ L 201/60; critical comment by *A. Stadler*, European Developments in Collective Redress, [2014] euvr 80.

dimension of this directive was before the CJEU in its Test *Achats* case.[51] Its Art. 5(2) contained an exemption for insurance contracts:

Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission.

On 1 March 2011 the CJEU condemned the exemption from the non-discrimination principle in insurance contracts by ruling in the judgment:

> Article 5(2) of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services is invalid with effect from 21 December 2013.

The judgment is surprisingly short.[52] The CJEU shows its willingness to control strictly the conformity of EU provisions with the human rights regime to which the EU subscribed in a number of documents, the latest one being the "elevated" Charter of Fundament Rights, which from 1 December 2009 has had the same value as the EU Treaties. The Court's ruling is based on several arguments, only some of them will be mentioned here. Most important, the Court recognises that equality between men and women in insurance contracts cannot be simply produced by "legal fiat", but contains

51 CJEU C-236/09 *Ass. Belge Test-Achats et al*, [2011] ECR I-773.

52 Comment N. Reich, 'Some Thoughts after the "Test Achats" Judgment', [2011] EJRR, 283; K. Purnhagen, [2011] Euroaprecht (EuR) 690; *C. Tobler*, 'Case note',[2011] CMLRev, 2041; *P. Watson*, 'Equality, fundamental rights and the limits of legislative discretion', [2011] ELRev 896.

an evolutionary element which must be "progressively achieved".[53] The EU non-discrimination directives do not immediately forbid discrimination but contain a mandatory political programme to be elaborated and implemented over time. In order to fulfil this dynamic element of non-discrimination, legislative action "must contribute, in a coherent manner, to the achievement of the intended objective, without prejudice of providing for transitional periods or derogations of limited scope".[54] The Court invalidated it, but only with ex nunc consequences, beginning five years after the Directive's entry into force. This is a courageous step in order to give the legislator time to remedy the complex political, economic or legal circumstances.

The CJEU expressly condemned the exemption in Article 5(2) as a violation of the equality principle. In consistent case law, the CJEU defines the principle of equal treatment as requiring that "comparable situations must not be treated differently, and that different situations must not be treated in the same way, unless such treatment is objectively justified".[55] Despite the different risk profiles of the sexes in certain types of insurance, for example third party liability of car drivers, where men seem to take more risks and are responsible for more accidents, on the one hand, and life and health insurance, where women have a higher and more costly risk profile according to relevant statistics, these differences were expressly ruled not to be relevant by Article 5(1) of Directive 2004/113. Men and women, despite the difference in life expectancy, have to be treated as "normatively comparable" even though "empirically different".[56] The CJEU did not find any justification for this differentiation to continue without a time limit. It amounted to a "pure and simple" discrimination to persist indefinitely.[57] In order to remedy this situation, the Court took upon itself the position of legislator and imposed a time limit of its own accord, without invalidating the entire legislative act. As a consequence, existing insurance contracts

53 Ibid., at para 20.
54 Ibid., at para 21.
55 Ibid., at para 28.
56 See ibid., at para 30.
57 Ibid., at para 33.

with different premiums, tariffs and benefits for men and women that are not overtly inconsistent with Article 5(2) can be maintained until 20 December 2012, but may not be offered from 21 December 2012 onwards, when "unisex" tariffs will become mandatory.

THE NEED FOR A DIFFERENTIATED TREATMENT OF THE DIFFERENT CONSUMER IMAGES – SOME CRITICAL REMARKS

3.1. Critique of the "Information Paradigm of EU Law"

The "informed consumer standard" has been the basis of many EU provisions. It is based on the model of the consumer as a rational "homo oeconomicus". The consumer right of information has already been part of Article 169(1) TFEU (ex-Article 153(1) EC), can be found in great detail in many consumer law directives, and must be regarded as a "general principle" of EU consumer law, to be balanced with the other principle of autonomy of business in consumer contracting.[58] Article 5 of the CRD has codified this general right as a condition to a binding contract:

Before the consumer is bound by a contract other than a distance or off-premises contract, or any corresponding offer, the trader shall provide the consumer with the following information in a clear and comprehensible manner, if that information is not already apparent from the context.

Article 5(1)(a) to (h) lists in detail what that information consists of, for example the main characteristics of the goods or services, the total price of the goods or services inclusive of taxes (VAT), the duration of the contract and as a novelty, "where applicable, the functionality, including applicable technical protection measures, of digital content and any interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of".[59] Paragraph 3 contains an exception for day-to-day transactions that are to be performed immediately,

58 See N. Reich in H.-W. Micklitz/N. Reich/P. Rott/K. Tonner, *Understanding EU Consumer Law*, 2nd ed. 2014, para 1.11.

59 For details see *N. Helberger et al*., 'Digital Content Contracts for Consumers', 36 [2013) JCP 37 at 46.

while paragraph 4 allows Member States to adopt or maintain additional pre-contractual requirements. Article 6 contains similar requirements for off-premises and distance contracts, with some specificities concerning additional information about the right of withdrawal and the consequences in case of withdrawal.

These information requirements have been extended by a right of withdrawal, a so-called "cooling-off period" in certain areas of contracting, to allow the consumer who has been caught in situations of restrictive decision-making (off-premises contracts), or who may be entering into a transaction where s/he does not know enough about the good or service to be provided (distance selling), or where s/he may not immediately understand the service because of its complexity and inherent risks (for example insurance, timeshare or consumer credit).

The usefulness and effectiveness of these information requirements has been subject to a controversial debate which ranges, on the one extreme, from criticism of the merely symbolic character of these regulations that are based on a model of the "rational informed consumer" contradicted by behavioural studies,[60] to a more traditional critique fearing an erosion of the *pacta sunt servanda* principle, "protecting" the irresponsible consumer and putting unnecessary costs on business.[61] I will not go into this discussion, even though it is true that EU law tends to provide for a certain – and highly selective and specific - "overkill of information duties".[62] These duties do not contain "personalised information" even if necessary. Instead of an "information excess," information must be framed so as to meet consumer

60 See the spical issue 34 (2011) JCP 271-398 with conbtributions by A. Atzoni, S. Frerichs, G. Spinbdler, M.G. Faure & H.A. Luth. W.H. *van Boom, J. Trzaskowski, M. Lissowska*.

61 *M. Engel & J. Stark,* Verbraucherrecht ohne Verbraucher (Consumer law without consumers), (2015) Zeitschrift für Europäisches Privatrecht (ZeuP) 32.

62 *G. Howells/T. Wilhelmsson*, 'EC Consumer Law – Has it Come of Age', (2003) ELR 370; *R. Sefton-Green (ed.)*. Mistake, Fraud and Duties to Information, 2005, 396; P. Giliker, 'Pre-contractual good faith and CESL', (2013) ERPL, 79 at 98; *N. Reich*, 'The Social, Political, and Cultural Dimension of EU Private Law', in: R. Schulze/H. Schulte-Nölke, European Private Law – Current Status and Perspectives, 2011, 80.

demands. Not more but better information is necessary.[63] The current requirements are at best a mere minimum of protection.

As *information rights* they should correspond to the pronouncement of Article 169(1) TFEU and to a specific understanding of EU fundamental freedoms from the perspective of proportionality.[64] Four main questions remain:[65]

- Are information rules sufficient to give the consumer a fair chance to participate in consumer markets as a "passive market citizen"?
- Are information rules efficient in achieving their objective of strengthening party autonomy and consumer choice?
- Are information provisions effectively implemented?
- Are information provisions used as an element in limiting liability of the business party?[66]

The "information overkill" provided for by EU law, in particular in consumer credit transactions, is contrasted by finding of behavioural studies of the limits of use, usefulness, and usability of information due to limited heuristics of consumers. Consumers are not in general risk-averse; therefore, abstract warnings on the consequences of certain transactions, e.g., against overextending the use of credit, will not be considered as specific risks to take account of, while on the other hand positive but only potential and rather unlikely benefits will be exaggerated in their meaning, e.g., in games of chance – there is an asymmetry between loss aversion vs. positive expectations.[67] The model of the "average consumer who is reasonably well informed and reasonably observant and circumspect" which plays such an

63 *N. Helberger* et al., Digital Consumers and the Law, 2012, pp. 68.
64 *H.-W. Micklitz/N. Reich/P. Rott, K. Tonner,* Understanding EU Consumer Law, paras 1.11-1.14.
65 *N. Reich*, Yearbook of Consumer Law 2009, 2010, 8.
66 *N. Helberger* et al., *supra* note 63, at 95.
67 More details in *Kahneman,* Thinking Fast Slow, (Penguin 2012), at pp. 278 et sq. on "prospect theory."

important role in the case law of the CJEU[68] amounts in reality to a rather irrational model of consumer behaviour.

Critique has also been voiced against the broad scope of withdrawal rights in particular in distance contracts which may create an incentive for opportunistic behaviour of consumers: they might be encouraged to order goods which they can return without risk of payment after 14 days to check their quality, but in reality use them for short-time purposes like a wedding or other event without ever intending to pay the full purchase price. To some extent, the CJEU in its *Messner*-judgement[69] recognised this possibility of abuse and allowed Member State law to provide for measures avoid it:

> However, although Directive 97/7 (the predecessor of the CRD, NR) is designed to protect the consumer in the particular situation of a distance contract, it is not intended to grant him rights going beyond what is necessary to allow him effectively to exercise his right of withdrawal. Consequently, the purpose of the Directive does not preclude, in principle, a legal provision of a Member State which requires a consumer to pay fair compensation in the case where he has made use of the goods acquired under a distance contract in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment.

Art. 14 (2) of the CRD has taken up this possibility of limiting consumer rights: the consumer can only examine the product free of compensation, but has to take liability for diminished value of the goods because of their being used as such.

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68 Out of the many cases of the CJEU see case C-465/98 *Darbo* [2000] ECR I- 2297 at para 22.

69 Case C-489/07 *Messner v Firma Stefan Krüger*, [2009] ECR I-7315 at para 25-26; details *Reich*, General Principles of EU Civil Law at para 5.9.

3.2. Mandatory Substantive Law as "Legal Paternalism"? Who Pays the Bill?

The model of the "weak consumer" is supposed to be counteracted by EU law containing unilaterally binding provisions from which the professional cannot deviate to the disadvantage of the consumer. Mandatory consumer contract law is the other, more "interventionist", element of EU consumer law. It can be found in many directives which expressly preclude the parties to a B2C contract to contract-out of mandatory protective provisions (see latest Article 25 CRD). But the extent of substantive rules is much more limited in EU contract law, although it does exist, however selectively. In areas like sales law under Directive 99/44/EC, the EU legislator certainly wants to give the consumer a set of minimum rights that cannot be waived by contract. In academic writing there is no agreement as to how far EU law should go with regard to substantive fairness rules: some fear unwanted "paternalism" (Grundmann/Ogus/ Wagner),[70] while other authors, on the contrary, in line with the "Manifesto" group,[71] want to extend these rules as basis for a "social justice agenda for European contract law", namely to "fairness", "constitutionalisation of private law", and "legitimacy modes of governance"

The CRD as the most recent example contains some additional consumer rights in Chapter 4, like those on delivery, passing of risk, and additional payments. The CRD has however not really extended the scope and extent of mandatory provisions of consumer contracting, even though that was originally foreseen in the 2008 proposal, which, however, did not succeed

70 *S. Grundmann/W. Kerber*, 'Information Intermediaries', in: S. Grundmann/W. Kerber/S. Weatherill (eds.), Party Autonomy and the Role of Information in the Internal Market, 2001, 264, preferring information-type rules over mandatory standards; *A. Ogus*, 'The paradoxes of legal paternalism and how to resolve them',(2010) Legal Studies, 61; *G. Wagner*, Zwingendes Privatrecht, (2010) ZEuP, 243, pleading for a restrictive use of mandatory rules in contract law.

71 *Study Group on Social Justice*, (2004) ELJ, 653 at 664; *B. Lurger*, 'The Common Frame of Reference/Optional Code and the Various Understandings of Social Justice in Europe', in: T. Wilhelmsson et al. (eds.), Private Law and the Many Cultures of Europe, 2007, 177.

due to its "full harmonisation approach".[72] One of the "last minute" amendments to the proposal for a CRD now found in the final text is the concept of "fees that exceed the cost borne by the trader for the use of such means" (of payment) in Article 19. How is this to be calculated in a simple and cost-effective way? The CJEU will have to give its answers at a later date.

From an economic point of view, mandatory provisions in consumer contract law function as a sort of insurance premium. However, this premium is imposed on every consumer, whether they are risk averse or not, whether they would be willing to pay the premium or not. It will have to be included in the overall price of the product, whether the consumer wants to pay the price or not. It may even create moral hazards encouraging careless behaviour of consumers but making those who are able to protect themselves or simply do not want protection to pay the bill. As a result, there may be a transfer of costs from careless to careful and responsible consumers. As a general tendency, so the hypothesis goes, prices will increase because of mandatory consumer law which works in the end against overall consumer welfare.

However, it seems to me that these fears are not really corroborated by EU practice. Quite to the contrary, mandatory law can also be regarded as an incentive for business to increase quality standards in order to avoid exposure. Thereby the well-known phenomenon of "market for lemons"[73] can be avoided. By creating uniform standards for quality coupled with adequate remedies in consumer sales – which is the objective of Dir. 99/44 and its follow-up, the *Weber-Putz*-judgment of the CJEU mentioned above – business will have a "level playing field" for marketing its products; it cannot gain market shares by dumping prices and undercutting quality.

72 For a critique *H.-W. Micklitz/N. Reich*, Cronica de una muerte anunciada, 46 (2009) CMLRev 471 at 507 (consumer sales), and 510 (unfair terms).

73 *G. A. Akerlof: The Market for Lemons: Quality Uncertainty and the Market Mechanism.* In: Querterly J. Ec. 84 (1970) 488-500.

Interestingly, the author Grundmann[74] who sides more with the critical economic analysis of EU consumer law being sceptical with mandatory provisions, hails the outcome of the *Weber-Putz* case as the "recognition of a strict liability system in a chain of contracting conceiving contracts not in isolation but embedded in markets."

3.3. The Evasive Concept of "Vulnerable Consumer"

The concept of "vulnerable consumer" has only recently entered EU consumer law, and it is not yet clear how it can be relevant in consumer contracting – perhaps outside the special case of services in the public interest like telecommunication and energy once they have been privatised. As compensation to privatisation, EU law has imposed so-called universal service obligations on providers which also aim to protect vulnerable consumers, particularly the handicapped and the poor consumers. Consumer law is linked to social law – a difficult relationship which has to be regulated by Member States themselves and maybe quite different from country to country. In this case consumer law must find how to fairly distribute risks of consumers who are unable to pay their bill but still have a right to some basic supply. In the EU this is left to Member State law, and there are no general principles cognisable at the moment. The protection of vulnerable consumers points to important redistributive effects of contract law which according to mainstream economic theory should not be part of it.[75]

On the other hand, freedom of contract gives every market participant the right to enter into contracts – or not – for whatever reason. Only certain types of discrimination are forbidden, as I mentioned with regard to gender – but even this poses problems as I will show in the next section. But vulnerability of consumers is not such as to restrict freedom of contracting.[76]

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74 *St. Grundmann*, Consumer Sales, in: E. Terryn et la, Liber amicorum J. Stuyck (Intersentia Cambridge) 2013, 725 at p.742.

75 For a broader discussion see Reich, General Principles…, para 1.20, based on *T. Wilhelmsson*, 'Varieties of Welfarism in European Contract Law', (2004) ELJ, 712; see *C. Mak*, Fundamental Rights in European Contact Law, 2008, at 286-289; *N. Reich* in: R. Schulze/H Schulte-Nölke, *European Private Law*, 2011, 57.

76 On the importance of the principle of (framed) freedom of contract see *Reich*, General Principles… para 1.12.

Contracting is a two-side affair, and protecting one side means putting an additional burden on the other. If the professional is not aware of the vulnerability of the consumer – or could not reasonably be aware of it – under traditional contract law doctrine there seems to be no reason to put an additional burden on him – perhaps with the exception of minors who traditionally enjoy a special protection. In the age of internet contracting this will be even more difficult to verify the eventual vulnerability of the consumer. As mentioned above, recital 34 of the recently adopted CRD mentions the particular information needs of vulnerable consumers, but does not put any legal consequence on an eventual lack of such information.

3.4. Non-Discrimination in Insurance Contracts – A New Source of Inequality?

The collective dimension of EU consumer law has been mentioned briefly, and its main impetus has been on giving consumer associations a right of action against unfair, intransparent and misleading business practices and pre-formulated contract terms. This remedy seems to work quite well if the cost-barriers can be overcome, with however the exception of compensation where EU law has shunned away from providing any remedies of its own.

Non-discrimination law in consumer markets is a new issue in EU law, and the mentioned *Test-Achats*-case gives a flavour of what may come in the future. The outcome of the judgment is quite paradoxical and maybe even against the very consumer interest which was seemingly promoted by the Belgian plaintiff which is a consumer association itself. As a result of the necessity to offer only unisex insurance contracts in motor insurance disrespecting the particular risks of male drivers which usually have a much higher accident rate than women, and in health and life insurance where women in the EU (this may be different in India?)[77] due to longer

77 See the provocative book by *J. Drèze & A. Sen,* An Uncertain Glory – India and its Contradictions, 2013, in particular Chap. 6 on "India's Health Care Crisis" hitting in particular Indian women!

life expectancy are "costlier" on the insurance market, there is a tendency now in the EU of a general premium increase for so-called "new contracts" from 21 December 2012 on; exact statistical material is however not yet available. As critical law and economics experts have noted several times, consumer protection – whether via mandatory rules or via non-discrimination provisions comes at a price, and it remains a question of economic efficiency and political legitimacy whether people are willing to pay this price. This however is not a legal question.

ANNEXURES

A. Overview of Important EU-Regulations and Directives Relating to Consumer Law

CONTRACT	FINANCIAL SERVICES	TORT	TRADE PRACTICE	SAFETY/HEALTH	ACCESS TO JUSTICE
90/314: Package Travel (under review)	2002/65: Distance marketing	85/374 + 99/34 – Product liability	2000/31 – E-commerce	2001/95 – General product safety	Art. 47 Charter / Art. 19 (1) s. 2 TEU
93/13: Unfair terms in Consumer Contracts	2004/39: MiFID I (including retail investment services)	Proposal on service liability withdrawn	2005/29 – Unfair commercial practices	Reg. 765/2008-Market surveillance	2009/22 – Collective dimension - injunctions of consumer ass.
99/44: Sale of Consumer Goods	2008/48: Consumer Credit	2014/104 – Anti-trust damages	2006/114 – Comparative adv.	Reg. 1235/2010 Pharmacovigilance of med. products	2013/11 – Consumer ADR
2004/113: Non-discrimination based on sex	2014/17: Mortgage credit	Reg. 462/2013 – Credit rating agencies	2003/33 – Tobacco advert.		Reg. 524/2013 – Consumer ADR
Reg. 261/2004: Air passengers (under review)	2014/65: MiFID II	Art. 340 TFEU – Union liability for illegal action	Special advert. legislation - medicines, food		Regulations of "Brussels"-regime 44/2001+ 1215/2012
2011/83: Consumer Rights (distance, off-premise contract	2007/64: General payment services	Francovich-liability against State for EU illegal action			Reg. 861/2007 – EU small claims
Art. 6 Reg. 593/2008: Conflict (Rome I)	2014/92: Access to basic fin. services	Art. 5 Reg. 864/2007 – Rome II			

B. The Different Consumer Images in EU Law

EU image	Legislation	CJEU Case Law	Critique
The informed consumer standard	Transparency of terms, Dir. 93/13 and other Dir, Positive information duties, Dir. 2011/83 Rights of withdrawal Detailed information requirements in consumer credit	Case C-362/88 – GB Inno C-470/93 – Mars – C-465/98 - Darbo CJEU "average, reasonably well-informed and reasonably observant and circumspect consumer"	"Information overflow" Lack in adequate information format Fictitious model of consumer rationality Behavioural studies show limits of information
The weak consumer standard – its collective dimension	Fairness of pre-formulated terms, Dir. 93/13 Mandatory conformity standard in consumer sales, Dir. 99/44	Case C-137/08 – Penzügij Lizing: "... according to settled case-law, the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge."	"Legal paternalism" Absence of free choice of consumers? Cross-subsidy of careful consumers to careless consumers? What about small traders?
The vulnerable consumer standard only in exceptional cases Concept vulnerability: intellectual, physical, economic	Art. 5 (3) Dir. 2005/29 Recital 34 of Dir. 2011/81: "In providing that information, the trader should take into account the specific needs of consumers who are vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee. Air passengers with "reduced mobility" according to Reg. 261/2004 Dir. 2014/92: basic financial services	Case C-12/11 McDonough – flight interruption – due to volcanic eruption: "the provision of care to such passengers is particularly important in the case of extraordinary circumstances which persist over a long time and it is precisely in situations where the waiting period occasioned by the cancellation of a flight is particularly lengthy that it is necessary to ensure that an air passenger whose flight has been cancelled can have access to essential goods and services throughout that period".	"Who pays the bill"? Redistributive effects of regulations protecting weaker consumers! Limits of solidarity in contract law?

Need for a differentiated approach	More empirical studies needed	Problems of subsidiarity + proportionality, Art 5 TEU	Choice of legislator depending on culture, income of population

C. The Consumer Image in Indian Law

Includes the Consumer Image in India Law, its missing collective dimension, and absence of preventive mechanisms for protection before contracting – Reform suggestions of the Indian Consumer Protection Act of 1986 (CPA) as amended

1. In order to improve the protection of the c*ollective interest of Indian consumers*, there is a need for a *paradigm extension* in Indian consumer law and practice under the CPA. Such extension would imply action under the CPA from compensation only to both compensation and prevention.

2. This paradigm extension implies both legislative and institutional changes, but in no way radical *modifications* of the existing structure and practice under the CPA.

3. As a first requirement, preventive jurisdiction against unfair trade practices (UTP), in particular misleading & unfair advertising should lie *exclusively with the State Commissions*, eventually the National Commission, not with District Fora. Such centralization and concentration of proceedings would accelerate the complaint handling which in the end would be monitored by the possibility of an appeal to the Supreme Court of India.

4. As a second important reform to be enacted by the Indian legislator, there is a need to modify existing legal restrictions to improve prevention, in particular by broadening the jurisdiction under Sec. 12 to cover practices also *before* any commercial transaction with a consumer has taken place, similar to Sec. 36A MRTP Act of 1984 as repealed, Art. 3 (1) EU Dir. 2005/29. The concept of consumer needs to be widened to include cases where there has been no express transaction for consideration, but its preparation via advertising or solicitation.

5. The *remedial mechanism* should be improved with a view to attain rapid cessation orders against obvious UTP, including interlocutory/interim

injunctions to be sought by "recognized consumer associations" under Sec. 12 (b), consumer groups under Sec. 12 (c) and/or governments under Sec. 12 (d) CPA. Individual consumers should not have standing.

6. Whether trade associations should have standing like under EU law and the former MRTP-Act must be decided by the legislator. This author is convinced that a *broadening of standing to include also business actors* would increase the preventive effect of the CPA, but strictly be limited to preventive, not to compensatory jurisdiction.

7. In order to allow a speedy out of court settlement of a case concerning an UTP, an informal pre-trial *"warning procedure"* would be helpful as used in many EU countries. It could be initiated by consumer organizations, consumer groups and governments having standing under Sec. 12 CPA, eventually also by trade associations. If the trader/advertiser complies, he would sign an undertaking to abstain from continuing the UTP, sanctioned by a conditional penalty in case of breach.

8. It is suggested that the already existing remedies under Art. 11 (2) CPA, including accelerated procedures for orders with *"interim effect"*, could be activated to allow for rapid injunctive relief.

9. Orders by State Commissions or the National Commission enjoining a specific UTP should be accompanied by a *conditional penalty* payment in case of breach. If the order has been appealed, the penalty payment would only be preliminary and has to be revoked in case of a successful appeal by trader.

10. Under existing law, neither the State Commissions nor the National Commission have investigative powers, unlike the former MRTP-Commission. In the opinion of this author, this principle should not be abandoned because of the judicial character of the Commissions. It would therefore be part of the substantiation requirements of an action for an injunction by the plaintiffs as mentioned under paras 5/6, to submit the necessary documentation to the Commission to justify a claim. If consumer associations do not have the means to provide the necessary documentation, this must be done by the state plaintiff under Sec. 12 (d) CPA. The defendant advertiser could obviously rebut the claim by appropriate counter-evidence. The Commission could use its

own expertise and knowledge of the deceptiveness of an adverting, or, as the case may be, consult an independent expert to assess the claims. It could however not take action *proprio motu*.

11. The proposed *"paradigm extension"* of the CPA should not undermine the traditional consumer protection role of its institutional structure, in particular by the jurisdiction of the District Fora for compensation and/or restitution which should remain untouched, but be supplemented by elements of a better preventive control in order to avoid consumer harm *before a contract is entered into.* Some legislative changes as indicated above will be necessary for this objective. On the other hand, the existing CPA already contains elements to protect the collective consumer interest, in particular in its provisions on standing (to be extended to trade associations), compensation (exemplary and/or punitive) with deterrent effect), and remedies for injunctive relief. However, proceedings need to be accelerated – late justice is no justice!