

Protection of Consumers' Economic Interests by the EC

NORBERT REICH*

1. Consumer rights versus consumer choice: conceptual and legal basis of consumer protection policy by the EC

The economic interests of consumers are *per se* diffuse because they concern most, if not all people living in any given jurisdiction, in the present case, the European Community (EC). Their substance depends on such factors as income, place of residence, social status, sex, and race. The result is a total lack of coherence among the 350 million citizens of the EC as far as the promotion and protection of their economic interests are concerned.

In a system of market economy, political and legal theory agree that consumer interests may be protected by following either of two different approaches, disregarding their character as diffuse interests.¹ We will call the first the consumer rights approach, the second the consumer choice model. Both exist in EC policy and practice, though to differing extents.

1. Consumer rights

Consumer "rights rhetoric" was developed parallel to the rise of the consumer movement in the 1960s. President Kennedy's consumer message of 1962 to the United States Congress in particular, listed four consumer rights² which have since been consistently repeated, finally finding their way into the first consumer program of the EC of 1975.³ The Community maintains that:

the consumer is no longer seen merely as a purchaser and user of goods and services for personal, family or group purposes, but also as a person concerned with the various facets of society which may affect him either directly or

* Professor of Law, University of Bremen (Germany); 1991 Allen, Allen & Hemsley Visiting Professor, University of Sydney.

Editor's note: The list of abbreviations used in this article and not familiar to the Australian reader: *ArbuR*: Arbeit und Recht; *BB*: Betriebsberater; *CDE*: Cahiers de droit européen; *CMLR*: Common Market Law Reports; *CMLRev*: Common Market Law Review; *Com*: Commission of the EC document; *ECR*: European Court Reports; *ECLJ*: European Consumer Law Journal; *ELRev*: European Law Review; *EuZW*: Europäische Zeitschrift für Wirtschaftsrecht; *JCP*: Journal of Consumer Policy; *NJW*: Neue Juristische Wochenschrift; *OJ*: Official Journal of the EC, Series L (lois) or C (communications); *RTDE*: Revue trimestrielle du droit européen; *WM*: Wertpapiermitteilungen.

1 For a more general introduction to consumer policy and law issues, see my paper "Different approaches to consumer protection philosophy" (1991) 14 *JCP* [to be published].

2 See Hippel, E v, *Verbraucherschutz*, (3rd edn, 1986) at 281.

3 *OJ C* 92 of 25 April 1975; for a discussion, cf Th Bourgoignie, in: Bourgoignie, Th and Trubek, D, *Consumer Law, Common Markets and Federalism* (1987) at 89-110; Krämer, L, *EEC Consumer Law* (1987) Nos 15-53; Reich, N, *Förderung und Schutz diffuser Interessen durch die EG* (1987) No 68.

indirectly as a consumer. Consumer interests may be summed up by a statement of five basic rights:

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

In our subsequent analysis, we will exclude the right of redress and the protection of consumer health and safety through, for instance, the law of product liability. Other rights like education and representation fall more readily into the sphere of politics than that of law, and accordingly will not be examined in this paper. We are interested here in analysing the consumer's right to protection of economic interests and his/her right to information as a basis for a market economy operating in the interests of the individual consumer, and of consumers as a group.

In that same document, the Community justifies its referral to this rights rhetoric by pointing to market deficiencies and imbalances which act to the consumer's detriment:

As market conditions have changed, the balance between suppliers and customers has tended to become weighted in favour of the supplier.

Consumer protection policy and law therefore need to compensate for these imbalances. The first program lists a number of principles and priorities used to protect the economic interests of consumers, for example:

- (1) purchasers of goods or services should be protected against any abuse of power by the seller, in particular against inequitable standard form contracts, the unfair exclusion of essential contractual rights, stringent credit terms, demands for payment of unsolicited goods, and high-pressure selling techniques;
- (2) the consumer should be protected against damage to his/her economic interest caused by defective products or unsatisfactory services;
- (3) no form of advertising should mislead the potential purchaser of the product or service;
- (4) the consumer is entitled to reliable after-sales service for consumer durables, including the provision of spare parts for repairs.

This quite ambitious program, which takes a sceptical attitude towards the ordinary functioning of the market system, is followed by a "shopping list" of measures which the Community wishes to take and which we will study later in greater detail. For present purposes, it suffices to mention just a few: harmonising the general conditions of consumer credit, taking appropriate measures against false or misleading advertising, protecting consumers from unfair commercial practices, in areas such as contract terms, conditions and guarantees, and door-to-door sales.

The Commission also refers to the promotion of the more general economic interests of consumers as a means of fulfilling the individual and collective needs of consumers, for example, improving the quality/value ratio for goods and services supplied, waste prevention, and protection against forms of advertising which encroach on the individual freedom of consumers.

The program is far more restrained regarding information and redress, just listing some possible options.

In 1981 the Community published its second consumer program.⁴ This contained a repetition of basic *rights* and paid special attention to reasonable spending. It urged that consumer policy become more positive and more open to discussion. The principles of the first program, as far as protection of economic interests was concerned, were repeated. Special action was promised to promote the interests of specific groups of underprivileged consumers in order to cater better to their particular needs and to expand Community action on services. Consumer information and redress were to be improved by several specific measures.

The "rights rhetoric" of these two programs certainly gave consumer policy in the EC an important thrust, and encouraged the submission of several proposals and later the adoption of directives in certain spheres relevant to consumers' economic interests. It also had an "extraterritorial" influence, for example, on the Spanish Constitution of 1978 which accepted literally EC consumer rights.⁵ It also influenced the United Nations Guidelines on Consumer Protection⁶ which, even though a "soft-law" instrument, were and are quite influential in spelling out certain basic consumer rights, especially in developing countries.

The Community did not adopt any further programs on consumer policy subsequent to its second program. In 1985, the Commission issued a paper on a "new impetus for consumer policy".⁷ The paper is somewhat sceptical as to the compensatory, regulatory approach of early Community initiatives and insists upon concentrating future initiatives on three basic objectives:

- (1) products marketed in the Community should meet acceptable safety and health standards;
- (2) the consumer must be able to use the advantages of the common market;
- (3) consumer interests should be taken into account in other Community policies.

A Resolution of the EC Council of 23 June 1986⁸ supported this new approach to harmonising consumer policy, with the objective of creating a "Europe of citizens". A later document of the Commission⁹ and one of the Council¹⁰ insisted on integrating consumer policy into the other policies of the Community. A Council resolution of 9 November 1989¹¹ proposed priorities for relaunching consumer protection policy.

As can be seen from this chronological analysis, the Community has not had resort to the "rights rhetoric" since 1985. The most important reason for this change has certainly been the advent of the internal market as proposed. Consumer rights have, it seems, been overridden by consumer choice.

4 *OJ C* 133 of 3 June 1981.

5 Bofarull, I Uriarte, "The Spanish Act on the Protection of the Rights of Consumers and Users", (1985) 8 *JCP* 169.

6 Harland, D, "UN-Guidelines for Consumer Protection" (1987) 10 *JCP* 245.

7 *Com* (85) 314 final of 23 July 1985.

8 *OJ C* 167/1 of 23 June 1986.

9 *Com* (86) 540 final of 24 October 1986.

10 *OJ C* 3/1 of 7 January 1987.

11 *OJ C* 294/1 of 23 November 1989; cf van Miert, K, "Verbraucher und Binnenmarkt" (1990) *EuZW* 401.

2. *Consumer choice and internal market*

Neither the Commission White Paper of 1985 on completing the Internal Market,¹² nor the Single Act of 1987 amending the Treaty¹³ envisages the creation of a European consumer policy but rather, per Article 8a of the amended EEC Treaty, the progressive establishment of the internal market over a period expiring on 31 December 1992:

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.

The impetus of the Single Act is directed towards "*negative integration*".¹⁴ The basic Community freedoms are strengthened in order to safeguard the free flow of goods and services. Where this is not possible on account of continuing justified Member State restrictions, the Community foresees legislation to facilitate this free circulation. If we correctly interpret the welfare analysis of the Commission as the main policy initiating institution of the Community, this should enhance consumer power to create opportunities for improved individual choice. Consumer policy is seen as "*market-complementary*". The efficient functioning of the internal market has its correlation in the improvement of consumer interests.

Improving consumer choice by opening national markets with the objective of creating a truly *internal market* within the Community cannot, however, function without adequate consumer protection rules. This is certainly true with regard to the health and safety area with which we are not concerned here. However, it is also true for the protection of economic interests of consumers by requiring, as a consequence of the abolition of restrictive Member State regulations, the enactment of *positive* consumer protection measures on a Community level, for example, by improving access to information and consumer remedies. Therefore, consumer protection becomes a concern of Community policy to complete the internal market, though in a more *indirect* way.

On the other hand, to insist on consumer choice does not mean to abandon completely consumer rights rhetoric and practice. The Community, even after 1987, as we will see later, has been quite productive in proposing new Community legislation aimed at protecting consumers' economic interests. Rights rhetoric has been reinstated by the objective of creating a *Europe of citizens*. Citizens need more than open markets to satisfy their needs. The more active the consumer her/himself becomes, the more he/she moves across borders (as tourist, but also as worker, student, retired person), the more he/she uses transborder communication to shop around for goods and services, the more the Community must harmonise (and not simply coordinate) legal standards of protection. The requirement of a minimum level of protection becomes one of the basic objectives of the Community as the formation of the Single Market nears completion.

3. *Community jurisdiction*

The EEC Treaty does not provide for a specific Community jurisdiction in the area of consumer protection. This absence of express powers has not prevented

12 Com (85) 310 (final) of 10 July 1985.

13 OJ L 169 of 29 June 1987.

14 Reich, N and Leahy, D, *Internal Market and Diffuse Interests*, Vol I (1990) Nos 10-12.

the Commission from formulating far-reaching consumer rights in its consumer programs of 1975 and 1981, which have won quasi-legal recognition in the judgment of the Court of Justice of the European Communities (European Court) in the *GB-INNO* case.¹⁵ The European Parliament has generally supported the Commission approach to consumer protection. The Council, although somewhat more hesitant, has usually not challenged Community jurisdiction in consumer policy matters and has enacted several directives aimed explicitly at consumer protection. Lately, however, Community jurisdiction in some highly controversial areas, like tobacco advertising or unfair contract terms, has been challenged by some Member States like Germany or some well known authors like Professor Steindorff.¹⁶ In the following, we will take a closer look at the bases for Community jurisdiction, its justifications and its limitations.

a. *The Preamble and Article 2 EEC Treaty as a basis for consumer policy measures?*

The *rights rhetoric* found a basis in the Preamble and in Article 2 of the Treaty. The Preamble states that "the essential objective of their (ie the founders of the Community) efforts (is) the constant improvement of the living and working conditions of their peoples". According to Article 2, the Community shall have as its task, inter alia, to create "an accelerated standard of living" for its citizens, this being interpreted as improving the overall quality of life in the Community.¹⁷ These provisions merely state objectives of the Community as such, but do not convey powers to implement them. This is left to more specific provisions of the Treaty. There is agreement among legal writers¹⁸ that the Preamble and Article 2 cannot be used to justify a theory of "implied powers". This would violate the model of power distribution between the sovereign Member States as founders and masters of the Treaty, and the Community as a "constitution" of a central legal order, federally related to the legal orders of the Member States.¹⁹ The European Court has been somewhat more flexible in its approach to Community jurisdiction. It has held that the Preamble and Article 2 may allow a wide interpretation of the existing authorisations of Community action, for example, in anti-discrimination and competition matters.²⁰ This concept was, however, not used to justify Community jurisdiction in the consumer policy area.

15 Case C-362/88, judgment of 7 March 1990, (1990) ECR I- 667 - *GB-INNO-BM v Confédération du Commerce Luxembourgeois*, with comments by Gormley, L, "Recent case law on the free movement of goods: Some hot potatoes" (1990) 27 *CMLRev* 825 at 839; Turpel, G, "Free Movement of Goods at the Expense of Consumer Protection?" (1991) *ECLJ* 89.

16 Steindorff, E, *Grenzen der EG-Kompetenz* (1990).

17 Krämer, above n3, No 24; Zuleeg, M, in v d Groeben, H, et al, *Kommentar zum EWG-Vertrag* (4th edn, 1991) at 102.

18 Kapteyn, P D G and VerLoren van Themaat, P, *Introduction to the Law of the European Communities*, (2nd edn by Gormley, L, 1989) at 72-79; Zuleeg at 98.

19 Lenaerts, K, "Constitutionalism and the Many Faces of Federalism" (1990) 39 *Am J of Comp L* 205 at 209, referring to the landmark case 26/62, judgment of 5 February 1963, (1963) ECR 10 at 12 — *Van Gend & Loos*.

20 Case 6/72, judgment of 21 February 1973, (1973) ECR 215 at 244 No 24 — *Europaemballage Corporation & Continental Can Company v Commission*; case 43/75, judgment of 8 February 1976, (1976) ECR 455 at 472 No 10 — *Defrenne v Sabena*.

b. Article 100 EEC-Treaty as basis for harmonisation directives

Before the enactment of the Single Act, Article 100 served as the general provision which enabled the Community to develop a consumer policy of its own and to take measures in the form of directives to protect, *inter alia*, the economic interests of consumers.²¹ Article 100 gives authority to the Council, acting unanimously on a proposal from the Commission and after consultation with the Parliament and the Social and Economic Committee, to issue:

directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.

This provision has found a very broad interpretation in European Court practice, the only real (political, not legal!) limitation being the principle of unanimity. Since most Member States had enacted consumer protection rules relating to advertising and marketing practices, the Community could step in with a view to harmonising them. Even if Member States had not enacted specific provisions but had reduced consumer policy to the general principle of *caveat emptor* of common or civil law, the Community would have jurisdiction to set higher standards of its own. Article 100 was not to be interpreted restrictively so as to leave the initiative for consumer protection measures exclusively to the Member States. The Council's obligations were reduced to a justification duty by Article 190, whereby it had to state the reasons that a particular directive "directly" affects the establishment or functioning of the common market. The threshold of this justification duty was not very high. The European Court was usually satisfied with general statements of the Council in the considerations of a directive that the common market would be distorted if the harmonisation measure were not adopted.²² The European Court therefore, to our knowledge, has never directly or indirectly questioned the legality of a directive relating to consumer protection.²³

c. Article 100a

With the adoption of the Single Act by 1 July 1987 and the inclusion of Article 100a in the Treaty, the legal basis of consumer policy has changed somewhat.²⁴ Article 100a must be regarded as a special provision to achieve the internal market by 31 December 1992, as spelled out in Article 8a. Harmonisation measures which have as their object the establishment and functioning of the internal market can now be adopted by a qualified majority in the Council under the so called "cooperation procedure" with the European Parliament and the Commission, per Article 149. This new provision must be interpreted parallel to the paradigm shift in consumer policy from rights rhetoric to consumer choice.

21 Cf for an account of the relevant legal discussion Close, G, "The Legal Basis for the Consumer Protection Programme of the EEC and Priorities for Action" in Woodroffe, G (ed), *Consumer Law in the EEC* (1984) 1 at 12.

22 See Case 242/87, judgment of 30 May 1989 (1989) ECR 1425 at 1458 — *Commission v Council* (re BRASMUS).

23 Cf the infringement proceedings for failure to implement the advertising directive 84/450 against Belgium, case C-360/88, judgment of 16 November 1989, (1989) ECR 3803, *Commission v Belgium*; C-329/88, judgment of 6 December 89, (1989) ECR 4059, *Commission v Greece* (only summary publications).

24 Cf for a discussion Ehlermann, C, "The internal market following the Single Act", (1987) 24 *CMLRev* 361; Reich, "Protection of diffuse interests in the EC and the perspective of 'progressively establishing' an internal market" (1988) 11 *JCP* 395.

Consumer policy has become a part of the objective to establish and complete the internal market. It has not yet reached the status of an independent Community policy of its own,²⁵ unlike environmental policy, per Article 130r and following.

An indirect reference is made to consumer policy in paragraph 3 of Article 100a, whereby the Commission, in its internal market proposals concerning consumer protection, will take as a base a "high level of protection". This provision is an indirect corroboration of the Community jurisdiction in consumer policy matters.

Its extent is, however, subject to controversy. The modern, especially German, discussion is divided as to whether:

- (1) Article 100a only allows for consumer protection measures which are linked to the internal market policy insofar as they contribute to removing obstacles from the free movement of persons, goods and services,²⁶ or
- (2) it also justifies an activist Community consumer policy measure *as such*, even if it may create obstacles to free movement, or only has a very remote connection with the functioning of the internal market.²⁷

The discussion is not just a theoretical one, but has political and legal consequences as far as Community action in the area of tobacco advertising (below II 6c) and unfair contract terms (below IV 5) is concerned.

The European Court has not yet had a chance to decide this conflict. A recent judgment of 11 July 1991²⁸ concerning the delimitation between Article 100a as the general provision on the establishment of the internal market, and Article 130s as the specific provision on actions relating to environmental policy, suggests that the Court will opt for a broad interpretation of Article 100a, as it had done beforehand with Article 100. The Court pointed out that the reference in par3 of Article 100a to environmental protection made it possible that its objectives could be effectively pursued by harmonisation measures under Article 100a. The same principles will be applicable to consumer protection measures.

Therefore, whenever the Community can justify a direct or indirect link between a consumer protection measure and the establishment or the functioning of the internal market in a broad sense, its jurisdiction should not be questioned. Accordingly, there are very few legal limits on Community authority to enact measures protecting the economic interests of consumers, because every rule on consumer protection has some, at least indirect or potential connection with the functioning of the internal market.

The European Court takes a similarly broad approach in the interpretation of measures having "an effect equivalent" to a quantitative restriction on imports, per Article 30 EEC Treaty.²⁹ It should be noted that Community powers under Article 100a must also be interpreted in connection with the Preamble and Article 2, insofar as the Community has as one of its objectives to increase the standards of living and the quality of life of the people living within it. Therefore,

25 Title XVI of the proposed Treaty on political union, adopted by the inter-governmental conference in 1991, provides the EC institutions with express competence to promote consumer interests in the field of health and safety, information and economic interests.

26 So called "abhängige Sozialpolitik" in the terminology used by Steindorff, above n16 at 93.

27 Reich, N, "Binnenmarkt als Rechtsbegriff", (1991) *EuZW* 203 at 208.

28 Case C-300/89, (1991) ECR not yet reported (nyr) — *Commission v Council*.

29 The ample case law is discussed in Reich and Leahy, above n14, Nos 23-32.

the objective of the Single Act to complete the internal market by 31 December 1992 does not only mean that producers, suppliers and distributors have Community-wide access to markets, but that consumers' overall choice is guaranteed and that certain minimum rights are effectively protected within the Community. Thus, the Community enjoys an almost unlimited jurisdiction in order to protect the economic interests of European consumers.

4. *Community consumer protection measures and their legal effects*

Consumer protection measures by the Community, as we will show later, generally take the form of *directives*, per Article 189 (3). Regulations have not yet been enacted, although this is not precluded by Article 100a (1).³⁰

A special, though rather limited, instrument of consumer policy has been the convention, per Article 220, especially concerning conflict of law rules and reciprocal recognition and enforcement of judgments. Its legal effects follow established principles of international law and present no EC-specific problems. It will be discussed in this paper only insofar as it contains consumer protection rules.

Directives appear as the most particular and at the same time the most controversial legal instrument of Community law. They are unknown to other, more developed federal jurisdictions. Their legal nature has been subject of much debate and has frequently been raised in the practice of the European and Member State Courts.

The starting point to explain their legal nature is Article 189 (3), according to which:

a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

The wording of Article 189 (3) seems to exclude a direct effect. This argument is supported by a comparison with the legal effects of regulations, per Article 189 (2), which are "directly applicable" in the Member States. This *argumentum e contrario* was, however, rejected by the Court in its landmark *van Duyn* decision³¹ and has not been used since in its case law to limit the legal effects of directives.

Three reasons have led the European Court to develop, however, haphazardly, a theory of "direct effect" of directives:

- (1) The Community has developed a practice of enacting very specific, detailed and unconditional directives which do not leave much room to Member State discretion in implementation. As a consequence, the European Court will only consider a "direct effect" if the obligations spelled out in the directive are sufficiently precise and unconditional.³² It will also take into account its effects on harmonisation.³³ Most directives protecting consumers' economic interests are *minimum* directives; they do not prevent Member States from enacting more favourable protective provisions, even risking a certain disintegration of the internal market.³⁴ In certain areas,

30 Ehlermann, above n24 at 386.

31 Case 41/74, judgment of 4 December 1974, (1974) ECR 1337 at 1348 No 12 — *H van Duyn v Home Office*.

32 Case 148/78, judgment of 5 April 1979, (1979) ECR 1629 at 1642 — *Ministère public v Ratti*.

33 For an explanation see Krämer, above n3, Nos 78-89.

however, where the internal market requires uniform legislation, the Community may opt for total harmonisation, for example, tobacco advertising (below II 6c).

- (2) Article 5 EEC Treaty obliges Member States to take all appropriate measures to ensure fulfilment of the obligations resulting from action taken by the institutions of the Community.³⁵ Member States are "estopped" from "any measure which could jeopardize the attainment of the objectives of this Treaty". This "estoppel" principle has found wide recognition in Court practice.³⁶ It has justified a so-called "vertical direct effect" of directives, meaning that no Member State nor any public body in its territory, including courts of law, may invoke its own non-transformation or incorrect implementation of a directive to frustrate the legal protection granted in favour of an individual.³⁷ The new case law opts for a broad reading of the notion of "public body" including, *inter alia*, corporations like British Gas providing a public service under the control of the State.³⁸
- (3) Community directives may have undisputedly an "indirect horizontal direct effect" in relations between individuals insofar as they may be used to interpret extensively Member State law in order to ensure the "practical effectiveness" (*effet utile*) of Community law. This principle has been developed and constantly applied by the European Court in the implementation of the anti-discrimination directives vis-à-vis non-complying Member States.³⁹

Both under the *estoppel* and the *effet utile* doctrines, the theory of direct effect has been stretched quite extensively. They stop short before admitting a "horizontal direct effect", allowing individuals directly to bring claims against private persons under the directive, even if the Member State has not implemented it at all or incorrectly. The European Court, in an *obiter dictum* in the *Marshall* case,⁴⁰ has denied, however, such a direct effect, while some Member State courts have affirmed it.⁴¹

Most authors have followed the European Court and take *Marshall* as an explicit rejection of the theory of horizontal direct effect.⁴² They also refer to

34 See case 382/87, judgment of 1989, (1989) ECR 1235 at 1252 No 16 — *Roger Buet SARL Educational Business Services "EBS" v Ministère public*.

35 For a recent account of Temple Lang, J, "Community Constitutional Law: Article 5 EEC Treaty" (1990) 27 *CMLRev* 645.

36 Pescatore, P, "The Doctrine of Direct Effect: An Infant Disease of Community Law" (1983) *ELRev* 169; Laenerts, above n19 at 213 citing the relevant case law.

37 Case 103/88, judgment of 22 June 89, (1989) ECR 1839 — *Costanzo v Comune de Milano*; case 125/88, judgment of 9 November 1989, (1989) ECR 3533 — *Nijmann*; case C-107/89, judgment of 31 November 1990, (1990) ECR nyr — *Marleasing v La Comercial internacional de alimentación*, with annotation by Stuyck, J and Wytinck, P, (1991) 28 *CMLRev* 205.

38 Case C-188/89, judgment of 12 July 1990, (1990) ECR nyr, (1990) 2 *CMLR* 833 — *Foster v British Gas* with comment by Howells, G, (1991) 54 *ModLRev* 456; see also the House of Lords judgment of 18 April 1991, (1991) 2 *CMLR* 217 at 224 per Lord Templeman.

39 Case 14/83, judgment of 10 April 1984, (1984) ECR 1891 — *S v Colson & E Kamann v State of Nordrhein-Westphalen*, and the follow-up decision of the German Bundesarbeitsgericht of 14 March 1989, (1990) *NJW* 65.

40 Case 152/84, judgment of 26 February 1986, (1986) ECR 723 at 749, No 48 — *Marshall v Southampton and South West Hampshire Area Health Authority*, discussed by Prechel, S, "Remedies after *Marshall*" (1990) 27 *CMLRev* 451; cf also case 80/86, judgment of 8 October 1987, (1987) ECR 3969 at 3985 — *Kolpinghuis*, concerning criminal proceedings.

41 OLG Celle, judgment of 28 August 1990, (1991) *WM* 110 at 111.

Article 191 EEC Treaty whereby directives do not require publication in the Official Journal of the Community, even though this happens as a regular practice.

A minority of writers, including this author,⁴³ have warned against drawing far reaching conclusions from Article 191. They also insist that the Court's dictum in *Marshall* did not go to the heart of the dispute; the case was decided in favour of the women discriminated against, condemning the state run hospital under the above mentioned "estoppel" doctrine. These authors have also pointed to the principle of effectively protecting an individual in enforcing her/his rights through courts of law which are bound by the directive. The theory of direct effect becomes therefore a means to ensure Community law implementation against non-complying Member States, because, in the words of the Court in *van Duyn*:

the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law.⁴⁴

Finally, the recent case law of the European Court blurs the distinction between "interpretation" and "application" and should therefore be abandoned. This can be shown in the recent *Dekker* case⁴⁵: The Dutch government had implemented the anti-discrimination directive, but only in an incomplete way because certain qualifications limited the cause of action for damages of a woman subject to discriminatory exclusion from employment. The Court ordered the national court to eliminate the exemptions and thus reinstated the legal protection as granted by the directive despite opposing Member State law. It remains a legal squabble whether the Court only "interpreted" Dutch law in the light of the directive or whether it "directly applied" it in relations between individuals.

This paper therefore follows modern trends in case law which allow for a horizontal direct effect of EC directives in the area of consumer protection. It should be kept in mind, however, that not every provision contained in a directive enjoys direct effect, but only, as far as consumer protection directives are concerned, those that spell out specific and unconditional obligations of suppliers of goods and services, and therefore grant to the consumer specific rights which he/she can enforce before courts of law. There is no doubt that courts of law, if approached by a consumer acting against a supplier, are bound

42 Kapteyn and VerLoren van Themaat, above n18 at 333-348; Zuleeg, above n18 at 141; Roth, W H, "The Application of Community Law in West-Germany: 1980-1990", 28 *CMLRev* 137 at 140 (1991); Jarass, H, "Voraussetzungen der innerstaatlichen Wirkung von EG-Recht" (1990) *NJW* 2340; Manin, F, "L'invocabilité des directives" (1990) *RTDE* 669.

43 Reich, N, "Binnenmarkt als Rechtsbegriff" (1991) *EuZW* 203 at 209; *ibid* and Dieball, H, "Mittelbare Diskriminierung teilzeitbeschäftigter weiblicher Betriebsratsmitglieder" (1991) *ArbuR* 225 at 234-235; Bleckmann, A, *Europarecht* (5th edn, 1990) Nos 155, 848; Stuyck and Wytinck, above n37 at 212 ("passive horizontal effect"); Curtin, C, "Directives: The effectiveness of judicial protection of individual rights" (1990) 27 *CMLRev* 709 at 729, and St Weatherhill, "National remedies and equal access to public procurement" (1990) *Yearbook of European Law* 243, both proposing a cause of action for damages by the individuals against the non-complying State. In this sense see now cases C-6/90 and 9/90, judgment of 19 November 1991, (1991) ECR nyr — *A Francovich et al v Italian Republic*.

44 Above n30.

45 Case C-177/88, judgment of 8 November 1990, (1990) ECR nyr — *Dekker v Stichting Vormingscentrum voor Jong Volwassenen*.

by the directive, per Article 5 EEC Treaty,⁴⁶ and must find adequate remedies in their legal order.

II. Advertising

1. Preparatory work

EC harmonisation in the field of advertising was not originally concerned with consumer protection. The Commission's initial moves dealt with the approximation of Member State laws on unfair competition. Consumer protection emerged only later, with the advent of new members such as the United Kingdom and Denmark who, at that time, had already developed consumer protection legislation in the field of advertising, apart from classical ideas of "unfair competition" or passing-off among competing businesses.

The Commission commenced with an analysis of the original six Member States' legislation on unfair competition, supplemented by studies of the incoming states. It was shown that traditions and regulations differed widely. There was scarcely a uniform concept of unfair competition and even less uniformity in law enforcement. The Commission therefore decided to abandon the work on unfair competition in general and concentrate more on the specific area of advertising.⁴⁷

When the first proposal was published in 1978⁴⁸ and amended in 1979,⁴⁹ it was strongly influenced by the rising consumer movement which had found its way into the first program and into the consumer "*rights' rhetoric*". The Commission took a far-reaching approach to advertising which, on the one hand, was to harmonise both unfair and misleading advertising, and at the same time deregulate comparative advertising which was still restricted in some Member States such as Germany. It also took up many of the reform proposals such as corrective advertising, group actions against unfair and misleading advertising, and reversal of the onus of proof.

The discussion in the Council took more than five years before a directive could finally be adopted unanimously, as was then required by Article 100. The points giving rise to greatest conflict were:

- (1) Some Member States wanted to include the concept of unfair advertising, while others did not recognise such a concept and were therefore hesitant to accept it. This conflict was particularly apparent between Germany and the United Kingdom, on account of their different traditions in trade practices law.
- (2) There was no agreement on the usefulness of including comparative advertising in the Directive. Cases where comparative advertising was not deceptive were left to regulation by individual Member States.
- (3) Law enforcement was a point of debate because several countries had used individual and group actions under civil law, while other countries opted for administrative or criminal law sanctions. Some countries, especially

46 Cf case 125/88, above note 37 at 3546, No 6 — *Nijmann*.

47 Cf Krämer, above n3 at Nos 204-208.

48 *OJ C 70/4* of 21 March 1978.

49 *OJ 194/3* of 1 August 1979.

Great Britain, were used to an effective self-control system of advertising regulation and were only disposed to accept more formal sanctions before courts of law as a last resort.

- (4) Many of the consumer policy proposals such as corrective advertising and reversal of the burden of proof were bitterly opposed by traders and by some less consumer-oriented Member States. The original Commission proposal therefore became considerably diluted in the final deliberations of the Council.

2. *Directive 84/450*

Directive 84/450/EEC, which was adopted by the Council on 10 September 1984,⁵⁰ is a compromise:

- (1) It tries to strike a compromise between different Member State policies against misleading advertising, thus harmonising on the lowest common denominator rather than at a high level of protection, as is now required by Article 100a.
- (2) Article 7 of the Directive provides for minimal harmonisation insofar as the Directive does not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection for consumers, persons carrying on a trade, business, craft or profession, and the general public.
- (3) The Directive is only concerned with *misleading* advertising. It excludes the harmonisation of unfair advertising, as well as comparative advertising, which should take place at a second stage of law harmonisation (below 6b). As far as enforcement is concerned, this is basically left to the Member States; there are some minimal requirements which will be considered later, but the way misleading advertisements are sanctioned is left to their discretion. This creates problems in enforcing sanctions against transborder advertising in the internal market.
- (4) The British option for self-regulation is still possible according to Article 5 of the Directive, but must be supplemented by final recourse to an administrative agency or a court of law. On the other hand, the German principle whereby enforcement is effected by way of private law through individual or group actions before civil law courts can be continued and extended.
- (5) Some of the more effective remedies in favour of consumer protection, such as corrective advertising or reversal of the burden of proof, are options left to the Member States.

As can be seen from this short overview, the truly harmonising effect of the Directive is relatively small. Its legal importance lies in other areas to which we will now turn.

3. *The substantive law of the Directive*

The Directive aims at controlling misleading advertising. This is defined very broadly by Article 2. "Advertising" means the making of:

⁵⁰ OJ L 250/17 of 19 September 1984.

a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations.

This definition includes advertising aimed at the public in general, a specific group of consumers, as well as individual representations. Moreover, advertising does not only include written or oral messages but any commercial activity in any form implicitly containing representations. Sales promotion methods, the make-up of products or services, and the sponsoring of broadcasts come under the broad concept of advertising under the Directive. If Member States have a narrower concept of advertising, they have to adjust their legislation accordingly, or courts have to interpret their law in conformity with Community law provisions. The Community provisions only apply to representations made in commerce; the Directive excludes any charitable, political or informative activity of trade unions, consumer associations, government institutions or the like, unless they are engaged in commerce.

The concept of *misleading* advertising is defined in general in Article 2 and then specified in Article 3. The Directive makes it clear that this concept merely requires an activity that may endanger competition and is likely to affect economic behaviour. The person who is entitled to bring a complaint or action against misleading advertising does not need to prove that actual loss or damage will arise out of the misleading advertising or that the advertiser acted negligently (cf Article 4 par2). Although misleading advertising is an illegal activity, not all elements of the tort must be proven. Article 3 lists some of the features which courts or administrative agencies may use in determining whether advertising is misleading, for example, the characteristics of goods or services, their price or the nature of the advertiser.

4. Enforcement

Enforcement is left to the Member States, who have extensive but not complete freedom in providing for sanctions. The major Community law obligation imposed on Member States is to provide for *effective, rapid and preventive* enforcement,⁵¹ per Article 4(1):

Member States shall ensure that adequate and effective means exist for the control of misleading advertising in the interests of consumers as well as competitors and the general public.

The Directive does not explicitly provide *locus standi* for consumer or other associations to take action against alleged misleading advertising before courts of law or administrative agencies, but leaves this to the discretion of the Member States. But this discretion is not without limits; consumer associations must at least have some possibility of lodging a complaint and being assured that action is taken in a case of a truly misleading advertisement. Because an advertisement may be misleading without fault, criminal law sanctions will not usually be sufficient because of the basic requirement of *mens rea*. Member States are free to choose between civil or administrative proceedings. They may require prior submission of misleading advertisements to self-regulatory bodies, but cannot completely exclude proceedings before courts of law or administrative bodies.

51 This basic requirement of the directive has been developed in more detail in Reich, "Rechtsprobleme grenzüberschreitender irreführender Werbung im Binnenmarkt", (1992) 56 *RebelsZ* [to be published].

The Directive is also explicit about rapid enforcement. Member States must therefore make provisions for measures to be taken under an "accelerated procedure either with interim or with definitive effect". As far as remedies are concerned, the main thrust of the Directive is rather to provide an order for cessation of the misleading advertisement, than compensation for possible damage to consumers or competitors. The Directive leaves it open to Member States whether they wish publication of a decision ordering cessation or the publication of a corrective advertisement. The original proposals have in this respect been diluted.

The burden of proof usually lies upon the person taking legal action against the advertising message. There is no reversal of burden of proof, as was originally proposed by the Commission, at least as far as certain unsubstantiated claims are concerned. On the other hand, Article 6 of the Directive obliges Member States to confer upon the courts or administrative authorities powers enabling them to require the advertiser to furnish evidence as to the accuracy of actual claims and advertising, and to consider factual claims as inaccurate if the evidence demanded is not furnished. This amounts to an indirect duty of substantiation in advertising claims.⁵²

5. *Implementation of the Directive by Member States*

Even though the Directive is based on a compromise between differing Member State traditions, its implementation has been slow.⁵³ As far as the large EC countries are concerned, the situation as to the implementation of the Directive is as follows:

a. Germany

The German government has always maintained the view that the Act against Unfair Competition of 1909, as amended, is in conformity with the Directive because it contains a broad provision against misleading advertising and allows competitors, business organisations and (since 1965) consumer associations to take action to enjoin the misleading advertisement. German law's traditionally strict definition of misleading advertising has raised problems under the rules of primary Community law on the free movement of goods and services which are beyond the scope of this paper.⁵⁴ As far as Article 6 is concerned, obligations of proof have been developed by German courts only in some areas, but not under the broad approach taken by the Directive. German law must therefore be applied in conformity with the Directive.

52 This principle is discussed on a comparative basis by Harland, D, "The Legal Concept of Unfairness and the Economic and Social Environment: Fair Trade, Market Law and the Consumer Interest" in Balate, E (ed), *Unfair advertising and comparative advertising* (1987) at 40.

53 For more details, cf Reich, N and Ahrazoglu, C, *EG-Binnenmarkt und Werberecht* (1990); Schrickler, G, *Recht der Werbung in Europa* (1990).

54 Cf Case 16/83, judgment of 13 March 1984, (1984) ECR 1299 — *Criminal proceedings against K Prantl*; case 177/83, judgment of 6 November 1984, (1984) ECR 3651 — *Kohl v Ringelhahn & Rennett*; case C-238/89, 13 December 1990, (1990) ECR I nyr — *Pall Corp v P J Dahlhausen*. An overview of the discussion is given by Leisner, W, "Der mündige Verbraucher in der Rechtsprechung des EuGH" (1991) *EuZW* 498.

b. *France*

France had enacted Articles 44, 46 of the *Loi Royer* of 1973 which prohibited *publicité trompeuse* and allowed, apart from criminal sanctions, an *action civile* of consumer associations against misleading and other types of forbidden advertisements. French doctrine had originally interpreted the notion of *action civile* narrowly, limiting it to an action for damages linked with criminal proceedings.⁵⁵ A new act of 1988 has made the action of consumer associations independent of measures taken by the public prosecutor. The *action civile* can now be brought also before civil courts, thereby giving consumer associations more independence in taking legal action to impugn misleading advertisements. It is also possible to use the *référé* (interlocutory injunction) procedure as a means of rapid enforcement.

c. *United Kingdom*

Great Britain has enacted the Control of Misleading Advertisements Regulations of 1988, which permit the self-regulatory system of the Advertising Standard Authority to continue, while at the same time giving the Director General of Fair Trading a remedy of last resort if self-control fails. The Director General has the power to consider any complaint made to him that an advertisement is misleading. This complaint may come from a consumer association, whether home- or foreign-based.

Before initiating enforcement measures against the advertisement, the Director will examine whether the complaint may be dealt with by "such established means as he may consider appropriate". Before going to court, he/she applies a public interest test. If he/she considers that an enforcement action has to be taken before the court, he/she will seek an injunction before the High Court which must issue an injunction or an interlocutory injunction if it is in the public interest to stop the misleading advertisement. Only the Director General, not trade or consumer associations, may take action before the Court. The British procedure is cumbersome and may only conform to the Community standard of effective, rapid and preventive enforcement if and insofar as the system of self-control itself functions effectively.

d. "*Direct effect*" of the directive?

Where Member State law does not conform with Directive 84/450 which had to be implemented by 1986, Member State courts must interpret their legislation in conformity with the Directive. They may therefore remedy certain deficiencies in national legislation to conform with the Directive. Where interpretation alone does not lend itself to this task, there remains the resort to the doctrine of *direct effect*. The provisions of the Directive, however, are not specific enough in terms of the criteria developed by the European Court.

Where misleading transborder advertising is involved, conflict of law and jurisdiction rules will determine which laws are applicable. The Directive does not contain any rules as to applicable law, in sharp contrast to the insurance directives. The general rules of private or public international law will therefore be applicable. The basic Community law requirement that Member States cooperate in enforcing Community law (Article 5 EEC Treaty) and in making

55 Cf the discussion by Calais-Auloy, J, "Les actions en justice des associations de consommateurs" (1988) *Dalloz* 193.

access by all EC-based trade and consumer associations to their courts of law possible without discrimination (Article 7) should be observed here.

6. *Specific Community legislation on advertising*

The general ban on misleading advertising by Community law is certainly an important minimum protection for consumers if effectively enforced by the competent authorities and courts of law of Member States. But the realities of modern advertising practice and the political controversies surrounding them are much too complex to be resolved by simply relying on the principle of "truth in advertising". Member States have been keen to enact different types of restrictions on advertising, for example, relating to health claims. These restrictions serve to protect the consumer, the honest trader, and the public in general. But at the same time they also create obstacles to the free movement of goods and services which, in modern European Court practice, comprises the free flow of non-deceptive advertisements as a *marketing device*.⁵⁶ The Community therefore stepped into more specific areas of advertising of which we will give three examples.

a. *TV advertising*

Special rules have been enacted for advertising in television services which fall under Directive 89/552/EEC,⁵⁷ for example, transborder advertising by means of cable or satellite. The Community tries to realise the principle of free flow of broadcasting and information as part of the freedom to provide services under Article 59 EEC Treaty.⁵⁸ On the other hand, the directive contains certain quantitative and qualitative restrictions on advertising and sponsorship. Most important are the rules imposing standards on advertising for children, prohibiting advertising of tobacco products and of prescription drugs, and provisions restricting the advertising of alcohol. These rules must be enforced by the home country authority which supervises the advertising activity of the broadcaster. It is not clear how far possible control by the host country has been preempted by the directive, but it has been suggested that misleading claims may be banned both by home and by host country authorities.⁵⁹

b. *Comparative advertising*

Comparative advertising is regulated differently by Member State law.⁶⁰ Some countries like the United Kingdom or Denmark, and recently Spain, only forbid misleading or defamatory claims which compare the trader's own performance with that of his or her competitors. Other countries like Germany, Italy and Belgium regard comparative advertising as an unfair trade practice which with some exceptions should be banned *per se* even if true and not defamatory,

56 Cf case 352/85, judgment of 10 April 1988, (1988) ECR 2085 — *Bond van Adverteerders et al v The Netherland State*; case C-353/89, judgment of 25 July 1991, (1991) ECR nyr — *Mediawet*; case C-288/89, judgment of 25 July 1991, (1991) ECR nyr — *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media*.

57 *OJ L* 298/23 of 17 October 1989.

58 Reich and Leahy, above n14 at Nos 51-59.

59 Reich, above n51 with a detailed account of the relevant principles of private and public international law and EC law.

60 For an account of the different principles, cf Franck, B, "Le statut de la publicité comparative dans les pays de la CEE" in Balate, above n52 at 137-174; Tonner, K, "The legal control of unfair advertising in th Federal Republic of Germany" in Balate, above n52 at 93-110.

the rationale being that a trader should not take advantage of the bad performance of a competitor nor disparage it. Some other countries like France and the Netherlands have started to liberalise the ban on comparative advertising and, for example, will permit price comparisons if they are correct.

Community law is involved insofar as different rules on comparative advertising create at least indirect obstacles to intra-Community trade. Excessive restrictions on truthful comparative advertising may therefore constitute a measure of equivalent effect which is forbidden by Article 30 or 59 of the EEC Treaty and cannot be justified under the "rule of reason" approach. Furthermore, the consumer protection philosophy behind the diverging rules on comparative advertising varies greatly: German and Belgian law patronise the consumer, while the United Kingdom and to some extent Denmark and France start from the model of the sovereign consumer who should receive all relevant information to optimise her/his choices on the market, including information distributed by advertisements of traders on their performance in comparison with their competitors.⁶¹ The European Court, in the *GB-INNO* decision, has clearly opted for the second model of consumer protection and regards consumer information as an important element of consumer protection.

The Commission, in the preparation of directive 84/450, had originally proposed a special provision liberalising the ban on comparative advertising. Absence of agreement in the Council of ministers led to its elimination and its postponement to a second stage of harmonisation.⁶² After several years of preparatory work, the Commission issued a proposal in 1991.⁶³ If it is enacted by the Council, comparative advertising will be allowed, subject to some qualifications which will probably give rise to litigation in the future. Comparative advertising will be permitted:

provided that it objectively compares the material, relevant, verifiable and fairly chosen features of competing goods or services and that it

- (a) does not mislead,
- (b) does not cause confusion in the market place between the advertiser and a competitor or between the advertiser's trade marks, trade names, goods or services and those of a competitor,
- (c) does not discredit, denigrate or bring contempt on a competitor or his trade marks, trade names, goods, services or activities or aim principally to capitalize on the reputation of a trade mark or trade name of a competitor.

c. Tobacco advertising

One of the most controversial issues in modern trade practices law is the regulation of tobacco advertising. This is due to the health hazards of smoking which may cause cancer not only among smokers but also non-smokers.⁶⁴ Member States therefore enacted different restrictions on tobacco advertising causing a near to complete legal anarchy in the EC.

61 Cf the discussion by Boddewyn, J, "Comparison Advertising: Advantages and Disadvantages for Consumers, Competitors, Media, Industry and the Marketplace" in Balate, above n52 at 175-196, with comment by de Win and Mitchell, J.

62 Cf Krämer, above n3 at Nos 206-210.

63 *OJC* 180/1 of 11 July 1991.

64 The issues were extensively dealt with in the Australian tobacco litigation; for an account see the comprehensive publication by Everingham, R and Woodward, St (eds), *Tobacco Litigation* (1991).

At first, the Community enacted legislation concerning labelling which will not be studied in detail. Its later proposals required warnings and media restrictions on advertising.⁶⁵ A new proposal of 6 June 1991⁶⁶ provides for a complete ban on tobacco advertising, including sponsorship and brand stretching. Only advertising within tobacco sales outlets will be permitted.

The proposal raises a number of highly controversial and not yet settled legal policy issues. The first concerns Community jurisdiction aiming at a complete ban of advertising (above I 3). This seems to be contrary to the idea of a free flow of goods, services and information under the internal market perspective. On the other hand, this free flow is not guaranteed without limits, but only "in accordance with the provisions of this Treaty", per Article 8a (2). This means that health concerns may override the principle of free flow of advertising information. The Community concern for health issues is corroborated in Article 36 and 100a (4), because "the protection of health and life of humans" justifies Member State restrictions on the freedom to provide goods and services, and it even allows them to opt out of Community harmonisation measures.⁶⁷ The Commission is therefore justified in proposing a total harmonisation which, due to the risks of smoking, can only result in a total ban, thus preempting Member States from applying different rules.

The second problem concerns the notion of the consumer used in the proposal. The consumer is restricted to the smoker, while non-smokers shall be protected from tobacco advertising. Therefore, advertising will be authorised only in establishments specialising in the sale of tobacco and with enclosed indoor premises for serving their customers. A justification for this narrow approach, which is in opposition to the broader consumer concept used otherwise, must again be found in the health hazards of smoking to which advertising contributes. It also serves consumers' economic protection because it helps prevent non-smokers, especially young people, spending their money on the hazards of smoking.

A third criticism is voiced against the extension of the ban on tobacco advertising to practices common in marketing like brand stretching and sponsorship. This may violate the property right of the owner of the trade mark which is protected by Community law, per Article 36 (2), 222 EEC Treaty. It should, however, be kept in mind that the case law of the European Court only protects the very *subject matter* of the trade mark, not its extensive use in neighbouring areas.⁶⁸ Therefore, Community law⁶⁹ preempts national legislation allowing the extension of trade mark protection outside its very subject matter.

It remains to be seen how these controversies will be settled in the legislative process of the Community.

65 Proposals of the Commission in *OJ C* 125/5 of 7 April 1989, modified in *OJ C* 125/5 of 19 May 1990.

66 *Comm* (91) 111 final.

67 Reich and Leahy, above n14, Nos 39-44; Ehlermann, above n23 at 389-398.

68 Case C-10/89, judgment of 17 October 1990, *SA CNL-sucal v Hag*; (1990) ECR I-37 with a comment by Oliver, P, (1991) 54 *ModLRev* 587; for a general discussion Reich and Leahy, above n14, Nos 131, 133.

69 See also the Trade mark Directive 89/104/EEC, *OJ L* 40/1 of 11 February 1989.

III. Consumer protection by rules of private international law

1. General

Private international law is a body of *national* law, legislation, tradition, and court practice which determines what law is applicable in cases where the legal orders of two or more countries are involved. With regard to the protection of consumers' economic interests, we may refer to the following situations which make it necessary to determine the applicable law by conflict rules:

- (1) A contract is concluded in a transborder transaction between a supplier residing in one country and a consumer residing in another. The Internal Market explicitly encourages these types of transactions through its insistence on the free movement of *goods* and *services*.
- (2) A consumer who lives in one EC country may enter into contracts in another EC country to satisfy her/his needs, for example, as a tourist, as an investor, in order to study or benefit from health care. These transactions also fall within the ambit of the free movement of persons principle in Article 8a.
- (3) Advertising messages will be directed from one EC country to another, for example, by television or direct mail. They will encourage transborder transactions, but also "transborder deceptions" which must be effectively controlled.

Private international law has developed rules which make the coordination of different legal systems possible. They do not aim at a substantive level of protection of consumer interests, but rather at a compromise between different principles from which the applicable law can be chosen. Community law has become ever more important in establishing conflict of law rules of its own which will be analysed in the following.

2. The Rome Convention

a. Ratification

The Rome Convention is an instrument under Article 220 EEC Treaty and was concluded by the then nine Member States in 1980.⁷⁰ It was open to ratification by the Member States, this having become effective on 1 April 1991. Belgium, Luxemburg, Germany and Denmark had previously applied the Convention. It is now also in force in the United Kingdom, France and Greece. It will enter into force in the Netherlands in 1992 together with the enactment of the new Civil Code. Ireland and the new Member States, Spain and Portugal, have yet to sign and ratify the document.

b. Freedom of choice

The liberal model of a market economy as enshrined in the Internal Market rules or in primary Community law has been repeated by Article 3 of the Convention. It spells out the simple rule that "a contract shall be governed by the law chosen by the parties".

⁷⁰ OJ L 266/1 of 9 October 1980.

It creates some basic requirements as to the choice of forum and as to the determination of material validity, which will usually be determined by the law applicable under the Convention if the contract or term were valid, see Article 8.

Article 8 seems to allow a *choice* of law by general contract terms. There is however, an exception in Article 8, par2 that:

a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.

This rule allows the choice of law principle to be restricted. It is not yet clear how far it applies to a rather fictitious choice of law by general contract terms, for instance between business and consumers.

According to Article 4, if there is no express or implied choice of law, the law of the country with which the contract is most closely connected will be applicable. Again, the Convention mentions some criteria on how to determine the close connection, but we will not go into details here. Usually, the business seat of the trader will determine the applicable law, not the place of residence of the consumer.

c. Consumer protection under the Convention

Freedom of choice or application of the law with which the contract is most closely connected may endanger consumer protection rules existing in the consumer's country of residence, if the latter allow the avoidance of mandatory requirements. Similar to the "*Cassis*" principle,⁷¹ the Convention aims at guaranteeing the consumer the continuing protection of her/his home laws in certain circumstances. Freedom of choice is not forbidden in these cases, but is only possible insofar as it improves the position of the consumer with regard to mandatory provisions of consumer protection. The consumer thus enjoys a *most favoured protection rule*.

This very important principle is set out in Article 5 of the Convention. In the Guiliano/Lagarde report,⁷² which is attached to the Convention and amounts to a quasi-official interpretation thereof, this rule is justified with the following words:

On the one hand the choice of the parties should not adversely affect the mandatory provisions of the state in which the consumer is habitually resident; on the other, in this type of contract it is the law of a buyer (the weaker party) which should normally prevail over that of the seller.

The report makes explicit reference to the protection of the consumer as the weaker party,⁷³ just like the first consumer program of the Commission. Private international law is thereby given substance by intending the protection of the weaker party (which may not only be a buyer but also a recipient of services, as the wording of Article 5 explicitly shows). The same is true for the protection of the worker in Article 6.

71 Case 120/78, (1979) ECR 649 at 664 — *Rewe Zentralverwaltung v Bundesmonopolverwaltung für Branntwein*; Reich & Leahy, above n14, No 46.

72 OJ C 282 of 31 December 1980.

73 This principle was already spelled out in 1978 by the European Court in case 140/77, judgment of 21 June 1978, (1978) ECR 1431 — *Bertrand v Ott* under Article 13 of the Brussels Convention of 1968 on jurisdiction and recognition of judgments which will not be discussed in detail here.

d. *Definition of "consumer" and "consumer contract"*

One of the great problems of consumer law in the Member States and in the EC (as well as in other jurisdictions) is to define the persons protected. Article 5 par1 uses a combination of objective and subjective criteria. The object of the contract must be the supply of goods or services to a person (the consumer) for a purpose which can be regarded as being outside her/his trade or profession, or a contract for the provision of credit for that object. The Guiliano/Lagarde report insists that the scope of this provision must be determined by its purpose, namely to protect the weaker party. Problems exist, for instance for doctors or lawyers who may act within or outside their profession. The report suggests that it suffices that the trader act *primarily* outside her or his trade or profession.⁷⁴ If the purpose of the contract is consumption, but the consumer does not disclose this purpose, then the good faith of the other party should be protected.

The definition of *consumer contract* is very broad. All types of contracts for the sale of goods and the supply of services fall under it. Credit transactions, if we follow the wording of the Convention, are only subject to Article 5 if they relate to sales or services (such as instalment sales), but not to the provision of credit as such. This point, however, remains undecided. One may well take the view that granting credit is a service *per se* even if not connected with the financing of another transaction, and that it must therefore be subject to Article 5 par1.

Certain transactions are excluded, for instance a contract of carriage (except package holiday tours), investment sales and insurance, and service contracts which will be performed exclusively in the country of the supplier, such as hotel bookings and study courses.

e. *Passive v active consumers*

Article 5 allows the consumer to rely on the mandatory provisions of the country of her/his habitual residence only in certain, rather narrowly described circumstances. It is the main intention of the Convention to limit consumer protection in conflict of law rules to the so-called *passive* consumer, not to the active consumer who enters into contracts outside the country of her/his residence or is active in pursuing offers from abroad. The Convention lists three alternatives in respect of passive consumers:

- (1) The first alternative relates to situations where the trader has taken steps to market the goods or services in the country where the consumer resides. According to the report, it is intended to cover mail order and doorstep selling. The consumer here is the passive recipient of marketing activities by the supplier or its agents.
- (2) The second alternative covers situations where the trader or her/his agent has received the order of the consumer in the country in which the consumer is habitually resident. This will apply particularly to fairs and exhibitions in which a foreign firm participated in the consumer's home country.
- (3) The third alternative relates to "border-crossing excursion selling", namely situations where a trader takes consumers from one country another in order to sell goods. This alternative strangely enough does not cover services.

74 Above n72 at 24.

f. *Absence of choice — problems of application*

If there has been no choice of law by the parties, then par3 of Article 5 provides for an application of the laws of the consumer's country of residence, but only in cases where the contract has been entered into under the same circumstances as above, that is where the consumer has enjoyed a purely passive role.

Problems of application of Article 5 demonstrate that the distinction the Convention makes between active and passive consumer is *artificial* and needs to be reconsidered. The leading cases which have been heard in Germany and have given rise to an upsurge of conflicting case law, may be summarised as follows:

German tourists in Spain are encouraged to conclude a contract by a Spanish sales agency. The contract is to be executed by a German supplier in Germany, but its terms provide for the application of Spanish law. If the contract has been concluded outside business premises, the applicability of German law would allow for a right of cancellation under the German (and Community) doorstep legislation. If Spanish law were applicable, this right of withdrawal might be frustrated because Spain has not yet implemented Community Directive 85/577 (below IV 2).

There is no doubt that a consumer contract in the sense of Article 5 par1 has been concluded. If a choice of law is possible also by a clause in general contract terms, then its validity must be determined by Spanish law. Spanish law, however, does not provide for a right of cancellation by the consumer. It can be argued that the choice of law must be controlled by the country of residence of the consumer under Article 8 par2. This argument has been discussed by some authors but rejected by most courts.

Another way to protect the consumer by allowing recourse to the right of cancellation under German law would be to apply one of the alternatives of Article 5 par2. The problem here is that the consumer is not a passive one in the sense of the Convention, because he/she went of her/his own free will to Spain and entered the contract there. Can one construe par2 in such a way as to cover situations of the "passive consumer abroad"? This seems to contradict Article 18 which requires uniform interpretation of the Convention, even though there is as yet no possibility of reference to the European Court under the preliminary proceedings of Article 177 EEC Treaty.

Other authors suggest applying Article 7 on mandatory rules or Article 16 on *ordre public*.^{*} Again, this question depends very much on the appreciation of the case by the courts.

The most convincing solution is offered by the theory of *horizontal direct effect* (above I 4). This depends on whether the directive contains unconditional and sufficiently precise obligations of traders and specific rights of consumers. This is the case, as we will show in analysing Article 5 of the directive (below IV 2e). Such a solution would follow the spirit of modern Community law which aims at substantive harmonisation of certain types of consumer transactions, and not only at the coordination of consumer protection provisions through rules of private international law.

* For an overview of the intricate discussion cf Jayme, B, *Ein Internationales Privatrecht für Europa* (1991).

3. Insurance contracts

As far as insurance law is concerned, Community harmonisation was slow and at first related only to freedom of establishment. This meant that the Member States could not prevent foreign insurance companies from establishing their business in the receiving country, but could subject it to their insurance regulation, including contract law and terms of insurance. The European Court decision of 4 December 1986⁷⁶ in principle upheld this state of law and allowed Member States to require preliminary control of insurance business and terms in the receiving country. The Court suggested that liberalisation may be possible for so-called commercial risks, but did not take any steps in this direction itself.

Later Community directives, which cannot be analysed in detail here, sought to open up insurance markets by deregulating supervision at least for large risks, and at the same time determine the applicable law of contract. Community insurance law thereby departed from the principles of the Rome Convention, this being possible through an express reservation to this effect, if the risk is situated within the Community.

This special development in insurance law starts with Directive 88/357/EEC of 27 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance.⁷⁷ It deregulates supervision to some extent and allows free choice of law for policies covering certain commercial risks, especially in transportation. As far as the cover of other risks, especially mass risks is concerned, Article 7 sets out its own provisions on the applicable law. As a basic rule, the law of the country where the risk is situated should apply. Free choice is excluded unless expressly provided for by the Member State; therefore, no provision similar to Article 5 of the Rome Convention is necessary to guarantee the consumer minimum protection, unless the risk is located outside the EC. It should be noted that the insurance directive is not so much concerned with consumer protection as with the opening of certain sectors of the insurance market. It is debatable whether this objective can be reached with rather restrictive rules on choice of law.

Article 7 lists several tests on how to determine the applicable law. This will normally be the law of the country of residence of the insured. Choice of law is restricted to specific alternatives if the residence of the insured and the location of the risk are different. We will not go into details.⁷⁸ As far as consumer protection by government regulation was concerned, Article 18 allows state authorities to continue the supervision and control of contract terms. Where this administrative control exists, as in Germany or, to a lesser extent, in France, government authorities will usually impose the application of the law of the receiving state even in the case of transborder transactions.

The Second Directive 90/619/EEC on life assurance of 8 November 1990⁷⁹ set forth similar rules in its Article 4. Again, the law applicable to contracts is the law of the Member State where the obligation exists. According to Article 2, this is the Member State where a policy holder has her/his habitual residence. The Directive allows for the choice of other laws connected with the life assurance

76 (1986) ECR 3755 — *Commission v Germany*.

77 OJ L 172 of 4 July 1988.

78 Cf Roth, W H, "Grundlagen des gemeinsamen europäischen Versicherungsmarktes", (1990) 54 *RabelsZ* 63; Basedow, J, "Das neue internationale Versicherungsvertragsrecht" (1991) *NJW* 785.

79 OJ L 330/44 of 29 November 1990.

policy, but there is no free choice of law unless provided for by the Member State of the commitment.

Finally, the proposal for a third Directive on direct insurance of 1990⁸⁰ will allow freedom of choice of law as far as commercial risks are concerned. As far as mass risks are concerned, Article 7 of the second directive will continue to be applicable with some modifications (Article 24 of the proposal). On the other hand, the systematic control and monitoring of insurance terms by government authorities must be abandoned by the Member States except for compulsory insurance. To allow for free choice by the insured and at the same time to compensate against the dangers of deregulation, Article 25 provides:

The Member State in which the risk is situated shall not prevent the policy holder from concluding a contract conforming with the rules of the home Member State, as long as it does not conflict with legal provisions protecting the general good in the member state in which the risk is situated.

Unfortunately for the development of consumer protection law in the EC, the relationship between Article 24 restricting free choice and Article 25 allowing it in the limits of the *general good* proviso is not at all clear. A new tendency in insurance law seems to suggest that the principle of free choice of law will also be applicable to insurance contracts, provided that the mandatory provisions of Articles 5 and 7 of the Rome Convention are respected.⁸¹

Life assurance will be deregulated completely if the Commission proposal for a third directive⁸² is to be adopted. It does not change the conflict of law rules of the second directive. It includes some rather weak provisions aiming at a substantive protection of the insured by allowing a right of cancellation, Article 26, and giving access to some basic information, Article 27.

4. *Conflict of law rules in areas still outside Community jurisdiction*

So far Community law has only harmonised conflict of law rules in the area of contract, not of tort or similar matters giving rise to legal obligations between parties. This is especially true in regard to advertising. As we have seen or will demonstrate, Community law has harmonised basic standards of protection and marketing, but has not included any conflict of law rules relating to tortious liability arising out of them. Therefore, the differing Member State conflict of law rules under private international law remain in force.

The non-harmonisation of conflict of law rules in the area of tort liability may lead to consequences which are out of order with the basic prerequisites of the internal market, or which frustrate the principle of minimum consumer protection. It is not surprising therefore, that the European Court has been required to make preliminary rulings relating to conflict of law rules. This was the case with regard to advertising (*GB-INNO*)⁸³ where the Court stressed the right of the consumer to non-misleading information in the internal market, thereby setting aside traditional standards of private international law.

80 *OJ C 244/28* of 28 September 1990.

81 For a detailed analysis of this discussion of the proceedings of a conference in Florence edited by Reichert-Facilides, F and d'Oliveira, J, *Private international insurance law in Europe* (1991) with papers by Reichert-Facilides, Roth, and Reich.

82 *OJ C 99/2* of 16 April 1991.

83 Case C-362/88, judgment of 7 March 1990, (1990) ECR I-667.

IV. Harmonisation of contract law

1. General

Contract law has traditionally been the domain of Member States. Different legal traditions still exist in the internal market and will not easily be overcome as of 1 January 1993. Conflict of law rules, especially under the Rome Convention, will have to coordinate different contract law standards.

Since traditional contract law doctrine has been neutral with regard to its economic objectives, it could not be said to have any influence upon the functioning of the internal market. Contract law embodies the freedom of parties to enter into transactions. It contains the legal mechanism to decide when, with whom, and with what content a contract has been entered into and what consequences will follow from its breach. These rules differ between Member State jurisdictions, but their basic aim is the same: freedom of choice for the parties concerned in a market economy.

With the advent of consumer protection legislation, contract law took up substantive protective standards. Member State legislatures devised rules to protect the weaker party under a doctrine of consumer rights. Different situations of consumer *weakness* were developed in legal policy, for example the entering into of doorstep contracts, the unilateral use of standardised contract terms imposed by one party upon the other, namely the consumer, information deficiencies in contracts where the consumer could not overlook obligations imposed upon her/him, for instance in credit or insurance agreements, or inadequate remedies where the trader did not adequately fulfill her or his obligations, for instance in cases of defects in delivered goods or services.⁸⁴

Once the consumer movement achieved a stance on contract law, EC policy had to examine the consequences of the completion of the internal market, while guaranteeing the consumer certain minimum rights. Even if it is true that different Member State laws protecting the consumer have only a limited influence upon the functioning of the internal market to provide jurisdiction under Article 100a, the case law of the Court of Justice demonstrates that this must not be overlooked. Thus, legislation forbidding certain types of doorstep contracts like canvassing for language books could fall within the ambit of Article 30, but be justified by the mandatory requirements test if it aims at protecting weak consumers, as was held in *Buet*.⁸⁵ Similar rules may very well apply to legislation on standard form contracts and on warranties and guarantees, although we do not yet have any precedents.⁸⁶

Even more important are the distortions of consumer protection which are created by initiatives in one Member State that are not followed in others. As we have already demonstrated, under the Convention of Rome rules consumers in one Member State may enjoy a higher level of protection than consumers in other States. This difference in protection may be substantial. Even if Community law does not allow nationality to be taken as a starting point for imposing

84 An overview has been given in the study of Reich, N and Micklitz, H, *Consumer Legislation in the EC Countries — A Comparative Analysis* (1979).

85 Case 382/87, (1989) ECR 1235.

86 Reich and Leahy, above n14, No 32; case C-339/89, judgment of 24 January 1991, nyr — *Alsthom Atlantique v Sulzer and another*, discusses and rejects the applicability of Article 34 and 85 to the French "action directe"; it does not refer to Article 30.

different rights and obligations (Article 7 EEC Treaty), there may be other mechanisms to justify different treatment, for instance residence and place of entering into the contract. If Community law wants to guarantee the harmonious development of differing economies, it must also provide for certain minimal protective standards for consumers, irrespective of residence and place of conclusion of contract.

Ever since the first consumer protection program of 1975, the Community has become involved in setting specific standards in contract law through harmonisation. The areas chosen may look haphazard and may not yet display comprehensive consumer philosophy, as far as contract law is concerned, but they at least show Community concern in some important areas of contract law and thereby make law reform possible.

In the following we will analyse the most important initiatives of the Community in contract law. Three important directives relate to entering into contracts where a minimum level of protection is guaranteed by Community law, namely doorstep contracts, consumer credit transactions and package holiday tours. The relevant directives will be presented in the following sections of this paper. A recently published proposal on unfair contract terms and a recommendation on credit cards are equally important. Other activities will follow, for instance in mail order sales, guarantees and home study courses, but cannot be looked at in this context.

2. *Doorstep contracts*

a. Definition of consumer problems with doorstep contracts

The concept of doorstep contracts refers to a situation where the consumer enters into a contractual arrangement not at the ordinary place of business of the trader or provider of services. Rather, the latter takes the initiative and negotiates the contract away from business premises, for instance at the doorstep, at the place of work or during an excursion. The need to protect the consumer specifically in these situations has been reinforced by the fact that the consumer is usually surprised by a contractual offer, unable to compare similar offers in the market place and is therefore in a situation of reduced autonomy. The trader may use high pressure sales methods against the consumer, such as canvassing.

The national laws of Member States have developed different approaches to combat abusive marketing practices in the area of doorstep selling. Unfair competition law, criminal law or contract law may all be used to combat situations where the consumer is forced into a contract away from business premises.

Since market economies require freedom of trade, including doorstep selling, the application of criminal or unfair competition law has been generally reduced to exceptional situations of manifest abuse or fraud. Contract law provided for a more flexible remedy by not generally forbidding this type of contract, but giving the consumer a cooling-off period during which he/she could withdraw her/his consent. He/she therefore had the opportunity of rethinking the decision, requiring more information and, if he/she did not like the contract, withdrawing from it without giving any further explanation.

b. EC initiatives

This modern approach to doorstep contracts was discussed in most EC countries during the 1970s and accepted by the Commission in its first program.

A first proposal was published in 1977⁸⁷ and amended in 1978. It provided for a one-week right of cancellation for the consumer in certain cases where the contract was negotiated away from business premises. The contract had to be in writing, the consumer was entitled to certain specific information about price and other details. He/she had to be informed about her/his right of cancellation and the trader was obliged to include a form with which the consumer could cancel the contract.

This far-reaching proposal met strong opposition in the Council. Certain businesses which had adopted a code of practice for their members who engaged in doorstep selling regarded legislation as unnecessary. Other businesses lobbied for special rules in order not to be covered by the Directive. Both the insurance and mail order businesses insisted on being exempt from the directive.

Due to the principle of unanimity under Article 100, negotiations in the Council lasted for more than 5 years. Only on 20 December 1985 was Council Directive 85/557/EEC to protect the consumer in respect of contracts negotiated away from business premises⁸⁸ adopted. It was to be implemented by the Member States by 23 December 1987. This deadline was met by most Member States, such as Germany, France, the Netherlands, Denmark, England, while other Member States like Spain and Italy have not yet enacted its provisions.

The considerations of the Directive justified Community action due to disparity between Member State legislation which "may directly affect the functioning of the common market". The considerations also mention the inferior situation of the consumer in cases where the contract is negotiated away from business premises:

The special feature of contracts concluded away from business premises of the trader is that as a rule it is the trader who initiates the contract negotiations, for which the consumer is unprepared or which he does not expect. ... The consumer is often unable to compare the quality and price of the offer with other offers... This surprise element generally exists not only in contracts made at the doorstep but also in other forms of contract concluded by the trader away from his business premises...

It should be noted that these considerations do not reflect the individual possibility of abuse, but the general situation of a consumer entering into a contract at the doorstep. The Directive aims at general protection of consumers, not at an individual balancing of terms. At the same time, it seeks to provide fairness in marketing practices because a right of withdrawal will hopefully prevent the trader from high pressure selling.

c. The legal concept of doorstep contract

Article 1 of the Directive tries to describe as succinctly as possible the situation where a contract is negotiated away from business premises. This takes place when:

a trader supplies goods or services to a consumer where the contract is concluded either during an excursion organized by the trader away from his business premises or during a visit by a trader either to the consumer's home or to that of another consumer or to the consumer's place of work, unless the visit takes place at the express request of the consumer.

⁸⁷ OJ C 22/6 of 29 January 1977; C 127/6 of 1 June 1978.

⁸⁸ OJ L 371/31 of 31 December 1985.

This very specific description of the situation of a contract negotiated away from business premises still leaves room for interpretation. It should be mentioned that the Member States may extend the type of situation where a contract is regarded as being concluded away from business premises. Article 8 of the Directive makes it clear that it is supposed to offer a *minimum protection* and does not prevent Member States from adopting or maintaining more favourable provisions to protect consumers. Protection may therefore be extended to practices such as long-distance selling and transactions at fairs. The Directive also applies to situations where the consumer made the contractual offer in circumstances similar to those previously described.

Article 3 contains certain situations to which the Directive does not apply, such as contracts not exceeding 60 ECU, insurance contracts, contracts for securities, construction contracts, contracts for the supply of food stuffs and beverages by regular roundsmen, and, finally, mail order contracts in certain specific situations.

These exceptions must be exposed to criticism because they do not form part of a comprehensive policy argument. Insurance contracts and contracts for securities concluded at the doorstep may be just as dangerous for the consumer as other contracts which are covered by the Directive. As far as mail order sales are concerned, there is a need for protection, but the instruments chosen should be more flexible. Contracts for construction, sale or rental of moveable property are covered by very different Member State legislation, but again there is a need for consumer protection due to the considerable amounts of money involved.

d. *Concept of consumer*

The Directive uses a combined test in order to describe the persons protected by it:

Consumer means a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as lying outside his trade or profession.

A similar concept had been used in Article 5 of the Rome Convention. In the *Pinto* case, the European Court had to consider whether traders, who wanted to sell their business, where the paid sales announcement was negotiated away from the business premises, were protected by the Directive. Advocate General Mischo opted for a broad reading of the Directive and suggested that the notion of the consumer is not defined *in abstracto* but *in concreto*, depending on the type of activity he/she is engaged in. He argued that a businessperson, in selling her/his premises, is in a similar situation as a consumer because this is not a normal transaction to her/him. The transaction should therefore be regarded as being outside her/his trade or profession. The Court did not follow the learned Advocate General and opted for a narrow reading excluding contracts for the sale or advertising of business.⁸⁹

e. *Right of cancellation*

If the contract has been negotiated away from business premises by the consumer and in the form covered by the Directive, the consumer has a right of cancellation within one week after conclusion of the contract. The Directive is

⁸⁹ Case C-361/89, judgment of 14 March 1991, (1991) ECR nyr — *Criminal proceedings against P Di Pinto*.

very specific about this right. The consumer must receive written notice of it, which must in addition contain some basic information. Article 5 confers upon the consumer the unconditional

right to renounce the effects of his undertaking by sending notice within a period of not less than 7 days from receipt by the consumer of the notice ... in accordance with the procedure laid down by national law.

Article 6 forbids a waiver of these consumer rights.

There has been some discussion especially in German law, as to whether this right of cancellation has direct effect. The question arises in cases where the contract has been concluded in a Member State which has not implemented the Directive, like Spain or Italy, and whose law becomes applicable according to private international law rules under the Rome Convention. As we have argued elsewhere (above I 4), the rights granted in favour of the consumer are unconditional and specific enough to allow for a direct effect without being adapted to national law.

3. *Consumer credit*

a. Member State actions

Consumer credit has been a prime concern of consumer protection policy ever since credit became easily available to consumers. Legislation first turned to credit combined with the sale of goods or the provision of services. The idea of the early instalment legislation, for instance in Germany and later in Belgium, was to protect the consumer in case of repossession and to prohibit certain unfair clauses. The more the provision of credit became common by banks, credit unions and loan associations, the more it was separated from a transaction aiming at the sale of goods or the provision of services. Consumer credit became a merchantable good or service of its own and was marketed to consumers for any purpose. Therefore, consumer credit legislation had to take a broader approach and cover all forms of credit, whether connected or not with the sale of goods and services. This approach, as far as EC countries are concerned, was first used by the comprehensive British Consumer Credit Act of 1974. France followed suit in 1978. Other Member States extended their legislation to cover credit agreements beyond the transfer of property.

The approach taken by Member State legislation and court practice varied. The forms of credit covered by legislation or court practice differed widely. Most legislation agreed on giving the consumer certain basic information rights, especially about the total cost of credit, but used different methods of calculating the costs. Additional provisions in some Member States concerned the doorstep marketing of credit, securities and guarantees, clauses on default and recovery. Member States' national law therefore differed widely.

b. Community action

The Commission's programs on consumer protection proposed a harmonisation of consumer credit legislation in the EC context. The Commission published its first proposal on consumer credit in 1979⁹⁰ and modified it in 1984.⁹¹ The proposals were mostly concerned with consumer information. Its

90 *OJ C* 80/4 of 27 March 1979.

91 *OJ C* 183/4 of 10 July 1984.

approach was new insofar as it was to cover all types of consumer credit, with the exception of credit on immovables, small credit and credit agreements exceeding a certain sum of money (30.000 ECU). As a basic European consumer right, the proposals provided for a uniform method of calculating the annual percentage rate of charges which was to be part of credit offers and to be included in consumer credit agreements. Thereby the European consumer was able to compare credit offers within the common market. Some other provisions concerned unfair credit practices and protection of the consumer against certain clauses. Protection, in the words of the Commission official responsible, "principally meant informing".⁹² The problem of consumer indebtedness was not covered.

After protracted discussions, the Council adopted the Directive of 22 December 1986 87/102/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit.⁹³ The considerations justifying the adoption of the Directive did not so much relate to genuine consumer protection objectives as to harmonising distortions of competition between providers of credit in the common market due to different Member State legislation. They stressed the basic right of the consumer to receive adequate information on the conditions and cost of credit and her/his obligations. This was to be calculated by the annual percentage rate of charge which, however, could not be harmonised in the present directive; therefore, Directive 90/88 was enacted.⁹⁴ Its basic philosophy rests upon consumer protection through increased information.

c. Scope of application

Article 1 of the Directive defines the basic notions for its application. The concept of the consumer is defined narrowly, as we have seen in the doorstep Directive and the Rome Convention. The notion of credit is used very broadly, covering any type of deferred payment. The directive was to cover any type of credit agreement, but excluded certain arrangements where consumer protection was not deemed necessary, for instance, credit granted or made available without payment of interest or any other charge. Small credit (less than 200 ECU) or large credit (more than 20.000 ECU), credit secured by mortgages on immovable property, credit in the form of advances on current account granted by a credit institution (other than on credit card accounts) were all excluded, except for some basic information requirements. One must conclude from this paragraph that credit card accounts are covered insofar as the consumer has to pay charges for overdrafts.

The Directive insisted that the consumer be informed about the annual percentage rate of charge in the agreement, but not necessarily in the advertising (unless the advertisement made reference to interest rates or costs of the credit). The credit document was also to include some other information pertinent to the consumer. The calculation of the annual percentage rate of charge was left to the Member States or to further efforts at harmonisation (Article 5). Credit on running accounts was subjected to less stringent requirements. There was no

⁹² Cf Latham, P, in Goode, R, *Consumer Credit* (1978) at 348.

⁹³ *OJ L* 42/48 of 17 February 1987.

⁹⁴ *OJ L* 61/14 of 10 March 1990.

provision against a rise in interest rates during the running of the account (Article 6 par2).

d. Regulation of unfair credit terms

The Directive also contains certain provisions on unfair credit terms without making clear its philosophy. It does not cover the different types of abuses which occur in the marketing of credit and collection of debts. Again it can be seen that the original proposals were watered down in the Directive. It is left to the Member States as to how they guarantee consumer protection, for instance against repossession (Article 7), assignment (Article 9), granting security or making payments by means of bills of exchange (Article 10), and third party financing (Article 11). On the other hand, the Directive imposes an obligation upon the Member States to ensure adequate legal protection. Article 12 of the Directive aims at guaranteeing the consumer some sort of public control over the behaviour of credit institutions, but leaves it to the Member States whether they choose an authorisation procedure, an inspection or monitoring of the activities or the establishment of a complaints procedure. On the other hand, the Member States are under an obligation to implement the provisions. They cannot simply abstain from their Community obligations. This is especially true as far as complaint handling is concerned, which is not officially recognised by many Member States.

e. Implementation

The Directive had to be implemented by the Member States by 1 January 1990. The process of implementation has been slow. Germany only implemented it on 1 January 1991. Other Member States have not done so at all. Because of its broad and imprecise formulations, the Directive does not confer upon consumers specific rights and cannot be construed as having direct effect. It may only be used to interpret Member State law.

It is unclear how the Directive relates to the banking Directive 89/646⁹⁵ which aims at opening the financial service markets by permitting banks to operate on a single EC licence. As far as consumer credit is provided by banks, both documents must be coordinated. The logic of a single licence means that every bank may provide credit throughout the EC without having to obtain an additional licence. There is no conflict between the Directives insofar as the obligation to provide the annual percentage rate of charge is concerned.

It is most regrettable that the problem of consumer debt has not even been mentioned in the Directive. This is certainly a more complex area of consumer protection because not only consumer credit, but other types of debts must be considered.

Directive 90/88 allows for generous delays in implementation for countries like Germany that have already used a mathematical formula in calculating the annual percentage rate of charge.

95 *OJ L* 386/1 of 30 December 1989; Schneider, U and Troberg, H, "Finanzdienste im EG-Binnenmarkt" (1990) *WM* 165.

4. *Package holidays*

a. *Tourism and the Community*

Another area of Community concern for consumer protection in contract law has been package tours. It is hard to explain why the Community, after having adopted Directives on doorstep contracts and on consumer credit, chose package tours as a field for harmonisation. One reason might have been the advent of an internal market for tourist services. This at least has been suggested by the Commission Proposal of 1988 which followed the new impetus for a consumer policy in 1986.

Another justification may be the different levels and instruments of consumer protection which had meanwhile been adopted by the Member States.⁹⁶ Consumer protection in package tours had become the concern of most Member States where organised holidays and travel had become common, particularly in the northern EC countries. The consumer was to have a right to certain quality standards in tourism if he/she prepaid her/his holidays; he/she should also be protected against bankruptcy of the tour operator. This consumer protection impulse was taken up by some Member States in very different legal instruments. Germany and Belgium chose specific civil law legislation, but based on different philosophies. France chose an administrative regulation, Great Britain and the Netherlands opted for a Code of Conduct containing voluntary quality standards and information obligations. Some states such as Denmark and the United Kingdom added legislation on guarantee funds and compulsory insurance of tour operators. Wherever the consumer concluded her/his contract for a package tour, he/she enjoyed a different level of protection according to applicable conflict of law rules.

b. *Community directive 90/314*

The Commission Proposal of 1988⁹⁷ again used an information approach, but was also concerned with guaranteeing the consumer certain quality standards through the imposition of a strict liability scheme upon the operator and the establishment of an effective complaint handling system through a small claims procedure, compulsory insurance and a guarantee fund of the operator. The proposal was based on Article 100a, and so shared the internal market philosophy which, at the same time, sought to take a high level of protection as a starting point. The proposal attracted very wide and profound discussion in Parliament where more than 30 proposals for amendment were presented. Most proposals were aimed at improving consumer protection, but at the same time opted for total harmonisation.⁹⁸

On 23 June 1990, the Council adopted Directive 90/314 on package travel, package holidays and package tours to complete the Internal Market, of which the tourist sector forms an essential part.⁹⁹ The different Member State legislations in protecting consumers were regarded as a disincentive to consumers in one Member State from buying packages in another Member State. Community action was therefore regarded as necessary.

⁹⁶ See the thorough analysis of Tonner, K, *Reiserecht in Europa* (1991) which we follow closely.

⁹⁷ *OJ C* 96/5 of 12 April 1988.

⁹⁸ *OJ C* 69/102 of 20 March 1989 and *C* 149 of 18 June 1990.

⁹⁹ *OJ L* 158/59 of 23 June 1990.

The Directive is again based on an information approach, but goes beyond it by laying down certain rules on liability of the operator and on complaint handling.

c. Scope of application

The Directive does not cover every travel arrangement but only those which are called "*packages*", that is pre-arranged combinations of not fewer than two components, including transport, accommodation and other tourist services which are not ancillary to transport or accommodation. The pre-arranged rental of holiday apartments is therefore not covered unless accompanied by additional services like transport or excursions. The travel organiser is only a person who organises packages on a professional, not on an occasional basis. The concept of the consumer is broader than in the directives on doorstep selling and on consumer credit. It includes any person who takes or agrees to take a package (which may also be in the course of a business trip).

This concept is extended to beneficiaries and transferees to include persons who do not themselves enter into the contract but who profit from it or take it over.

d. Protective provisions

Article 3 forbids any misleading information about the package and contains some minimum requirements when a brochure is made available. There is no obligation on the organiser to supply a brochure.

Article 4 contains detailed contractual information obligations which to some extent repeat the brochure. The annex contains the elements which must be included in the contract. It is not clear whether the Directive allows for a simple referral to the brochure in order to meet the information obligations.

Much more important for the consumer are provisions on *price* and its revision. Article 4(4) limits price revision clauses to certain express reasons such as variations in transportation cost, taxes and exchange rates. These reasons must be expressly stated in the contract, while other reasons are disallowed.

As an additional right, the consumer is entitled to price stability during the 20 days prior to departure. The Parliament wanted to include a 30-day period of price stability, but this was rejected. Such a clause is unknown in many Member States.

e. Liability of the tour operator

Article 5 goes beyond the mere information remedies and contains provisions on liability of the tour operator. The organiser is liable not only for her/his own performance, but also for that of the retailer and of the suppliers. This is in line with the structure of the package tour which is a *combination* of several elements for which the operator is liable.

As far as failure in proper performance is concerned, the Directive has not opted for strict liability as suggested in the Commission proposal, but for a presumption of fault on the part of the operator. It is only excluded from liability in cases of *force majeure*, failures of third parties outside the package and failure on the part of the consumer. In any case, the organiser is required to give prompt assistance to a consumer in difficulty.

Clauses excluding liability are forbidden. Limitation clauses are allowed only under certain circumstances, especially in accordance with international conventions. Damages for personal injury may not be limited under the contract.

f. Implementation

The Directive does not take up the Commission proposal on compulsory insurance or an operator's guarantee fund in case of bankruptcy. On the other hand, Article 7 obliges the organiser to provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency. It is not clear how this obligation should be implemented by the Member States.

The Directive does not provide for a complaint handling system, but contains an *obligation de moyen* of the organiser to make prompt efforts to find appropriate solutions in the case of complaints. There is no obligation upon the Member States to do anything in this regard.

The Directive must be implemented by the Member States by 31 December 1992, that is with the coming into effect of the internal market. Whether and how far any of the provisions may have direct effect remains to be seen. It is conceivable that the detailed provisions on price increases and on liability may enjoy such direct effect, especially when read with existing Member State law which must be interpreted or applied accordingly. It will not be sufficient for Member States to rely on soft law instruments, as in the United Kingdom and the Netherlands. Special legislation will be necessary to guarantee the consumer the rights to which he/she is entitled under the Directive as from 1 January 1993.

5. Unfair contract terms

a. The consumer issues involved

The impact of the consumer movement caused contract law in the Member States to develop in two directions. The first concerned the formulation and protection of minimum rights in certain types of contract like credit or package tours, while the second was concerned with protecting the consumer against abuses of market power by traders which may diminish her/his bargaining power in any kind of contractual negotiations. The latter approach was used to a certain extent for contracts negotiated outside business premises. Another form of abuse concerned pre-formulated contract terms in standard forms which were imposed by business upon consumers (and also on small traders with whom we will not be expressly concerned here). Usually these terms would unilaterally disadvantage the consumer and favour the interests of the trader. Exclusion clauses, clauses shifting the burden of proof, and those imposing unilateral or unclear obligations upon the consumer, were typical provisions. It should be noted that the unfairness of such contract provisions must be seen from two angles:

- (1) The process of contract negotiation which, by using, or rather abusing, the doctrine of freedom of contract, disadvantaged the consumer.
- (2) The unfair content of a certain clause as measured against existing, though not mandatory contract law or against general principles of fairness and equity in bargaining power.

Member State contract law, following an important development in general contract law in many countries, devised different means to control unfair contract terms. Details of this development can be found in other works.¹⁰⁰ Usually two

types of control can be distinguished: the traditional approach controls the *consent* of the parties and tries to re-establish equality of bargaining power by information-type remedies. A more modern approach would be concerned with the *equitable content* of clauses themselves, especially exclusion and limitation clauses, and measure them against a certain yardstick. Member State legislation is still divided on what approach to use and how to re-establish fairness in contractual relations.

Other differences relate to control methods. Some countries preferred individual control by courts, others installed an administrative authority, while still others introduced group actions, as already experienced in unfair competition law. Usually Member States tried to combine the different approaches to allow both for fairness in individual contract relations and for effectiveness in fighting against unfair market practices by imposing unilateral contract terms.

b. EC action

It is not easy to justify specific EC concern for general problems of contract law and, more specifically, for legislation or harmonisation on unfair contract terms. The EC announced action in its Second Consumer Program of 1981, following a recommendation of the Council of Europe of 1976.¹⁰¹ The EC initiative was first based on Article 100 concerning approximation of law and, after the adoption of the Single Act, on Article 100a. After elaborate internal discussion, the Commission published a proposal on 14 September 1990¹⁰² which has been submitted to the Economic and Social Council¹⁰³ and the Parliament for consideration.

The proposal based on Article 100a is regarded as a measure to progressively establish the Internal Market before 31 December 1992. According to the Commission, and supported by the Economic and Social Council, different Member State laws relating to the terms of contract show disparities and may lead to distortions of competition. This can be seen particularly in the sales law area. Consumer protection is only indirectly invoked in referring to information deficits concerning consumer rights under law, which may deter consumers from direct transactions in the purchase of goods or services in another Member State. It is interesting to note that the Commission does not use the "consumer rights rhetoric", while the Economic and Social Council points out that a single market is acceptable for consumers only if there is a common standard of protection against unfair contract terms.

c. The unfairness concept

One of the most difficult and controversial tasks of contract law is to define with sufficient precision the concept of unfairness. It varies to a great extent among Member States. Article 2 of the proposal combines several tests in defining unfairness with reference to:

100 Hondius, E, *Unfair Terms in Consumer Contracts* (1987).

101 Hippel, above n2 at 120.

102 *OJ C* 243/2 of 28 September 1990. For a critical account see Brandner, H and Ulmer, P, "EG-Richtlinie über mißbräuchliche Klauseln in Verbraucherverträgen" (1991) *BB* 701.

103 See its opinion of 24 April 1991, *OJ C* 159/34 of 17 June 1991.

- (1) causing to the detriment of the consumer a significant imbalance in the party's rights and obligations arising under the contract or causing the performance of the contract to be unduly detrimental to the consumers or;
- (2) causing the performance of the contract to be significantly different from what the consumer could legitimately expect or;
- (3) being incompatible with the requirements of good faith.

Obviously, the proposal tries to take up the definition used by the Council of Europe and by several Member States, but with several qualifications. The Council of Europe does not insist on a *significant* imbalance.

On the other hand, it has been suggested by the European Consumer Law Group¹⁰⁴ and the Economic and Social Council,¹⁰⁵ that intransparent or unclear clauses may be regarded as unfair, as had been developed by the case law of the German *Bundesgerichtshof*.¹⁰⁶

The proposal is followed by an annex containing a list of types of unfair terms. Again it is not clear whether this annex can be regarded as a *black list* as used by several Member States like Germany and Luxemburg, or whether it is only indicative. It is also not clear how it can be extended. Nor is the proposal specific as to its legal effect as a minimum Directive, as is the case with the other Directives protecting the consumer's economic interests.

The approach of the proposal is broader than in most Member States because it is concerned with *any* contract term and not only with standard form contracts. This approach seems to be justified. It is not important to consumers whether a term is preformulated or not. Inequality of bargaining power exists in either case.

d. Concept of consumer contract

The protective ambit of the proposal is only concerned with *consumer* contracts. It does not include small traders and professional people who in some Member States are covered by unfair contract legislation. This approach is basically correct from a legal policy point of view, although one cannot deny a need to protect small traders, for example, in franchising relations. Community law here has only adopted Directive 86/652 on trade agents¹⁰⁷ which is, however, rather narrow in its scope and does not contain a general concept of unfairness.

The notion of the consumer is the same as in the Doorstep Directive. It is limited to a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside her/his trade, business or profession. Legal entities are not included, even if they serve the needs of consumers. On the other hand, the concept of trade and business includes the activities of suppliers, whether publicly or privately owned. It is important to realise that most public-service contracts fall under the proposal, which implies a broader approach than that taken by most Member States.

104 (1991) 14 JCP 107.

105 Above, n103, No 2.5.3.

106 For an account see Reich, N, "Le principe de la transparence des clauses limitatives relatives au contenu des prestations dans le droit allemand des conditions générales des contrats" in Ghestin, J, *Les clauses limitatives ou exonératoires de responsabilité en Europe* (1991) at 79.

107 OJ L 382/17 of 31 December 1986.

e. Obligations of Member States

Article 3 places some basic obligations upon Member States. They have to prohibit the use of unfair terms in any contract, and provide that if unfair terms are used, they shall be void and that the remaining terms of the contract shall continue to be valid and the contract continue to bind the parties without the void provisions. However, this principle of limited validity of the contract may force the consumer to continue a contract which he/she no longer supports due to the unfair clauses. It is submitted that it is preferable to give the consumer a right to cancel the contract.

Article 4 is concerned with providing effective remedies against unfair contractual terms. The article is drafted according to article 4 of the Misleading Advertising Directive, but is somewhat broader regarding *locus standi* of consumer associations:

Such means (ie adequate and effective means to control unfair terms in contracts) shall include provisions whereby persons or organisations, if regarded under national law as having a legitimate interest in *protecting consumers* (italics added), may take action before courts...

This formulation seems to suggest that Member States may not simply deny *locus standi* to consumer associations, as is presently permitted under Article 4 of Directive 84/450, but may only specify what is to be regarded as a consumer association having the ability to take action before courts (or administrative agencies). On the other hand, the proposal does not provide for a Community-wide procedure to ensure the avoidance of unfair terms.

f. The annex: An EC blacklist?

The annex lists types of terms which are unfair under certain conditions. From a consumer law point of view, certain clauses are interesting even if their drafting may be criticised:

Clause (b) forbids terms allowing a unilateral change or termination of contracts. It makes an exception for financial services. There is no reason why financial services should be exempted from the general principles of contract law which say that suppliers of products and services as well as consumers have to fulfill their promises.

Clause (c) concerns the rights of consumers in the case of a defective product or service which does not conform with the contract. Earlier versions tried to combine this clause with a second annex on minimum guarantees or warranties for the consumer in the case of sale of goods or supply of services. This technique has not been used in the proposal. Interpretation of the clause will therefore be difficult because it contains certain minimum obligations upon the seller coupled with rules on unfair clauses.

As far as the sale of goods is concerned, the consumer is entitled to receive goods which are in conformity with the contract and are fit for the purpose for which they are sold. It is surprising that *conformity* — a concept known to French but not to German or English law — is defined exclusively by reference to the contract and not to standards, advertising (like in the Package Holiday Directive) or legitimate quality expectations of the consumer. As a minimum right, the consumer is entitled to complain that the goods contain hidden defects. This is a trivial statement devoid of remedies. Unlike modern international sales legislation, there is no link between the seriousness of the defect and the remedy.

On the one hand, the right of repair should obviously not depend on the seriousness of the defect, while on the other hand cancellation may be limited to more serious defects. There is no mention of who bears the costs of the repair. There are no provisions on notification obligations imposed on consumers if defects are discovered.

The proposal regards a guarantee as a unilateral voluntary promise by the producer or supplier in favour of the consumer for a maximum period of 12 months. It does not, however, impose an obligation on the manufacturer to give the consumer a minimum EC guarantee which will be honoured in the entire internal market, as is provided for by EC competition law.¹⁰⁸

As far as contracts for services are concerned, the proposal has a specific flaw. It limits its application to the consumer as "purchaser" under a contract for the supply of services.

Clause (d) allows, with several exceptions, unilateral price increases, provided that the consumer has a right to cancel the contract in case of an imbalance between the contract price and the final price. The yardstick of such imbalance is not clearly defined. In this case, the consumer may be forced out of the contract.

6. *Payment systems*

To complete our critical overview we return to legislative initiatives in payment systems. EC law is only concerned with protecting the consumer as holder of a credit card. At first there were proposals for a directive to protect the consumer against hidden clauses in credit card agreements and to guarantee the interchangeability of payment systems used in the Internal Market. For political reasons, the Commission decided to issue the Recommendation 88/590/EEC of 17 November 1988 concerning payment systems, and in particular the relationship between card holder and card issuer.¹⁰⁹ This Recommendation, according to Article 189 par 5, does not have any legal force upon Member States. Its "implementation" (a time lapse of 12 months was suggested) is left either to the states themselves or to "soft law", drafted by banks and other issuers of debit or credit cards.

The annex lists some basic requirements for the protection of the card holder. These most frequently relate to information and marketing of credit cards. As far as the safety of the system is concerned, the recommendation tries to strike an equal balance between the obligations and risks taken by the consumers and the safety obligations and steps to be taken by the issuer. Article 4 specifies the obligations of the consumer: these are in particular to keep the card and the PIN number safe, to notify the central issuing agency without undue delay after becoming aware of loss or theft, and not to disclose the PIN number to other persons.

Article 8 proposes a fair division of risks in case of loss. Up to the time of notification the consumer shall bear the loss only up to the equivalent of 150 ECUs for each misuse except where he/she acted with extreme negligence or fraud. After notification he/she is no longer liable.

A recent study¹¹⁰ has shown that the recommendation has been implemented by banks and credit card institutions in most northern European countries,

¹⁰⁸ Cf Reich and Leahy, above n14 at Nos 98, 114.

¹⁰⁹ *OJ L 317/55* of 24 November 1988.

especially in Denmark where a special act on cards was adopted in 1984. Problems of implementation have developed in the southern countries where there is no limitation of loss to be sustained by the consumer before notification. It is open to debate whether the instrument of recommendation was helpful in improving consumer protection and creating common standards of marketing, or whether a directive would be the appropriate instrument in this field. In the meantime, the Commission installed a users' liason group to monitor the application of the recommendation.

Conclusion

The study has shown that the Community, since its first consumer protection program of 1975, has developed special legislation which aims at protecting consumer rights and consumer choice. This legislation, in the form of minimum directives, will certainly continue in areas which used to be reserved to Member State law. Their objective, namely to create an "internal market with a high level of consumer protection", should certainly be welcomed, even if some of the solutions found will remain controversial. It is also important that the Community took over the initiative in many areas, thus stimulating law reform in Member States in the consumer interest.

On the other hand, Community consumer law suffers from a number of flaws which hamper its integrative and protective effects. The Community acts haphazardly and without a clear definition of priorities. The law making process cannot be described as truly democratic, because the European Parliament only has a veto power. It may not initiate legislation nor adopt it on its own. Furthermore, a genuine "European" consumer input is only beginning to emerge; business has better Community-wide lobbying instruments than consumers.

From the legal point of view, the instrument of the directive serves its protective function only to a limited extent. It is primarily addressed to the States, not to traders. The States must implement directives by separate legislation which is often lacking or deficient. The controversial theory of "horizontal direct effect" may overcome certain implementation deficiencies if it finds recognition in the European Court. Finally, the remedies chosen by the European legislature are surprisingly weak, frequently restricted to information rights, and mostly left to Member State discretion.