22

European consumer law

Geraint Howells

1 Introduction

Few areas of national law have been influenced as heavily by EU law as consumer protection. This impact at first remained contained within the specialism, but with the adoption of the Unfair Terms in Consumer Contracts Directive,[1] which introduced minimum controls on unfair terms in consumer contracts, and especially the Consumer Sales Directive,[2] which set minimum quality standards for goods, the reach of the legislation spread out to irritate[3] core areas of private law and in particular sales law, which is the cornerstone of national commercial law regimes. In particular, the modern approach of the EU legislator is being strongly influenced by a new breed of European private lawyers. Many of these are from Germany and see European contract law inspired by the ethic of consumer welfare values as a means of releasing their national law from the shackles of the Bismarckian

[1] Directive 1993/13 (OJ [1993] L95/29). [2] Directive 1999/44 (OJ [1999] L171/12).

[3] To borrow the language from the well-known article on good faith as a legal irritant by G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11.

era German Civil Code. However, the prospect of a European private law developing has support beyond Germany with the enthusiasm of some transcending mere consumer law or even contract law and encompassing a broader desire to reform private law across the whole EU. Some even favour the development of a European Civil Code;[4] though others are more modest in their goals.[5] The notion of a common European sales law found political support from those within the European Commission, who see the increase in cross-border trade as a goal in its own right.[6] However, it was too ambitious and had to be withdrawn in favour of measures which were initially focused on online sales and digital content.[7] The former though morphed from a measure targeted at online sales into a general reform of sales law. It also adopted a maximal harmonization approach achieving therefore to some extent the ambitions of the Common European Sales Law. Consumer critics of current EU policy sometimes argue that the European Commission is becoming more interested in consumer law harmonization as a means of promoting trade rather than protecting consumers.

One impact of the EU has been to remove national rules that claimed to protect consumers but acted as unjustified barriers to trade. This is considered in section 2. The rest of the chapter is about the EU's positive harmonization agenda, which is needed not only to give the EU a social face, but also because many national consumer protection measures are justified and a harmonized approach is the only way to promote the free circulation of goods and services. Section 3 provides general commentary on the EU's approach. A distinctive feature of EU consumer law is an emphasis on empowering consumers to make the right decisions. Information duties (including the duty to not mislead which became part of a wider regulation of unfair commercial practices) and the right of withdrawal are key instruments in this approach and are reflected on in sections 4 and 5. Such rules promoting the free choice of the consumer are favoured as they promote autonomy more than substantive rules and interfere less in national private law legal systems. However, the EU also provides for substantive consumer law issues, which are considered in sections 5 to 10, with details being provided on product safety, product liability, unfair contract terms, and sale of goods law. There has recently been a review of a large part of the consumer acquis as part of the REFIT project.[8] The conclusion was that for the most part EU consumer law was still fit for purpose, but there was room for some refining especially in relation to digital services. There was also room for improvement in consumer awareness, law enforcement, and redress. The Commission mapped its way forward in its *New Deal for Consumers*.[9] The last topic, considered in section 12, is enforcement and redress which is a current priority for the EU. Having created a set of EU consumer protection rules it is clear that for these to be effective there must be enforcement measures in place. Given the small scale of many individual consumer disputes this poses challenges even in the most efficient national legal systems. Across the EU there are different blends of public and private enforcement and different levels of practical enforcement depending on the resources available and the efficiency of court services and regulators.

[4] A Hartkamp et al (eds), *Towards a European Civil Code* (4th edn, Alphen aan den Rijn: Kluwer Law International, 2010); H Collins, *The European Civil Code: The Way Forward* (Cambridge: Cambridge University Press, 2008). cf P Legrand, 'Against a European Civil Code' (1997) 60 *Modern Law Review* 44.

[5] H Beale, 'The Future of the Common Frame of Reference' (2007) 3 *European Review of Contract Law* 257; C von Bar, 'Coverage and Structure of the Academic Common Frame of Reference' (2007) 3 *European Review of Contract Law* 350. cf H Eidenmüller et al, 'The Common Frame of Reference for European Private Law—Policy Choices and Codification Problems' (2008) 28 *Oxford Journal of Legal Studies* 659.

[6] COM(2011) 635 final, 11 October 2011. [7] See section 10.

[8] See Report on the Fitness Check on six of the key directives (SWD (2017) 209). There was a separate review of the Consumer Rights Directive COM (2017) 0259 final.

[9] COM(2018) 183.

2 The negative impact of EU law on national consumer protection rules

The bulk of this chapter is concerned with the positive consumer protection rules introduced by the EU that now pervade national consumer law. However, there is another important contribution of EU law in removing redundant national laws. EU law might be compared to a glacier removing all national consumer protection rules that impede the development of the internal market without having any real consumer protection purpose, or at least any purpose that could not be achieved by any less restrictive means. Thus unjustified rules limiting permitted ingredients could not be used to exclude imports from other EU Member States—the German Beer Purity Law limiting ingredients of beer to water, barley, and hops[10] and Italian rules requiring pasta to be made from durum wheat[11] were successfully challenged, as was a German ban on the importation of 'Cassis de Dijon' because it did not have a high enough alcohol content to satisfy requirements of German law.[12] Many advertising rules, especially under the German Unfair Competition Law, were successfully challenged because whilst claiming to protect consumers they were in reality placing unfair limits on competition.[13] An illustrative example was the need for the Court of Justice to find the cosmetic name 'Clinique' should not be banned because of the risk of confusing German consumers that the product had medicinal properties. Out of this line of cases came the EU image of the average consumer being 'reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors'.[14] This was a reaction to some overprotective national regimes which really did not serve the consumer well as they unduly restricted competition. The Court has, however, shown itself to be sensitive to genuine consumer needs. The ambition of a level playing field was achieved in large part by using (old) Article 30 EC (now Article 34 TFEU) with an expansive definition of 'measures having effects equivalent to quantitative restrictions'[15] and applying the concept of mutual recognition.[16]

Not all national consumer law rules could be removed in this way for the very good reason that some had legitimate consumer protection goals. Indeed, the Court was alert to genuine consumer protection needs and would refuse challenges where a genuine consumer protection concern was at stake. For instance, it upheld a French ban on the marketing of educational materials on the doorstep.[17] These national rules might be justified on the basis of a Treaty provision[18] or the Court-established mandatory requirements which in *Cassis De Dijon* were said to include consumer protection as a justification for national laws that would otherwise be obstacles to movement.[19] To take the glacier analogy one step

[10] Case C-178/84 *Commission v Germany* [1987] ECR 1227.

[11] Case 202/82 *Commission v France* [1984] ECR 933 and Case 90/86 *Zoni* [1988] ECR 4285.

[12] Case C-120/78 *Cassis de Dijon* [1979] ECR 649.

[13] Case C-315/92 *Clinique* [1994] ECR I-317; Case C-470/93 *Mars* [1995] ECR I-1923; Case C-210/96 *Gut Springenheide* [1998] ECR I-4657; C-303/97 *Kessler* [1999] ECR I-513; and Case C-220/98 *Estée Lauder* [2000] ECRI-117.

[14] Directive 2005/29 (OJ [2005] L149/22) recital 18.

[15] Case C-8/74 *Dassonville* [1974] ECR 837.

[16] *Cassis de Dijon* [1979] (n 12).

[17] Case C-382/87 *Buet* [1989] ECR 1235. In Case C-286/81 *Oosthoek* [1982] ECR 4575 a Dutch ban on the use of free gifts to promote sales was upheld; nowadays such national bans are likely to fall foul of the Unfair Commercial Practices Directive (on which see later).

[18] Art 36 TFEU.

[19] *Cassis de Dijon* (n 12).

further, these areas of legitimate consumer protection might be compared to the mounds left behind after the glacier has done its work. EU law then gets to work on these issues by positively harmonizing the rules that are needed for consumer protection in a way that promotes the internal market.

3 Consumer protection and the internal market

3.1 Legal basis

In the early days the only legal basis for introducing EU consumer rules was the internal market provisions. Indeed Article 114 TFEU, which provides for the adoption of 'measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market' is still the basis for most EU consumer laws. Article 114(3) requires such measures to take as a base a high level of consumer protection.

Article 169 TFEU provides for a specific consumer protection provision which provides that 'In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.' However, when it comes to the legislative means to achieve these aims, it is content to cross-reference to Article 114 TFEU or otherwise limits the scope to 'measures which support, supplement and monitor the policy pursued by the Member States.' As a result, few EU provisions rely on Article 169 TFEU as a legal base. Consumer protection also features in Article 38 of the Charter of Fundamental Rights.

The legal basis for EU activity in consumer law being based for the most part on Article 114 TFEU might explain the dominance of the internal market perspective in the European Commission's consumer policy. It was not always so. There is indeed a certain irony in that the European Commission was the most fervent advocate of consumer protection at a time when its powers in this field were limited. It had to justify intervention solely on the ground that harmonized rules were needed to promote the functioning and establishment of the internal market.[20] Once intervention was justified the European Commission had the freedom to choose the appropriate level and consumer protection objectives could come into play. Indeed, the primacy of consumer protection as the motivating force is evident in one of the first legislative measures being the Doorstep Selling Directive, which provided a cancellation option for sales and services contracts signed in the consumer's home.[21] Whilst a case can be made out for such legislation promoting the internal market—there are a few companies that operate doorstep selling on a pan-European basis—it is evident that the motivation for the law was the vulnerability of people buying in their homes, normally from local businesses operating high-pressure sales techniques.

Despite consumer protection featuring more prominently in recent Treaty amendments there has been in fact a noticeable change in tone with the emphasis being placed on the internal market impact of divergent consumer laws. Whilst consumer law has risen up the

[20] eg Directive 85/577 gave particular regard to Art 100 EEC. For a detailed overview of the development of EU competence for consumer protection, see S Weatherill, *EU Consumer Law and Policy* (Cheltenham: Edward Elgar, 2005) 1–23. On the relationship between consumer protection and the internal market, see further chapters 11 and 12.

[21] Directive 85/577 (OJ [1985] L371/31).

EU's agenda and been more mainstreamed, it is possible to argue that the protection element has become less important. The internal market needs harmonized rules, but these need not necessarily be the best consumer protection rules. Those defending the EU policy would argue that they fulfil the obligation to adopt a high base of protection, but there is scope to debate what that means and certainly it is not necessarily the same as the highest level found in some Member States.

3.2 EU consumer law as a driver for greater cross-border trade

It should be recognized that the present Treaty still does not see consumer legislation as an end in itself. Any such laws have to be internal market-related or support and supplement national law.[22] The major motivations are to promote active cross-border consumerism as well as encouraging businesses to seek consumers in other Member States to make markets within the EU more competitive. The European Commission is frustrated at the lack of growth in cross-border trade.[23] This is very evident when we come to see its attempts to introduce maximal harmonization in the Consumer Rights Directive[24] and subsequently (when that was unsuccessful for unfair terms and sale of goods, which were removed from the initial proposal[25]) by the unsuccessful attempt to try to adopt an alternative optional regime for cross-border sales in the proposal for a Regulation on a Consumer European Sales Law. Eventually maximal harmonization was a key element of the reformed rules for sales and digital content.[26] The Commission has few levers to increase cross-border trade besides making the law more harmonized. This has driven the change in emphasis in EU consumer policy. The objective of European Union consumer law is no longer to provide a platform of minimum rights so that consumers could be confident in buying anywhere in the Union. Rather, it is increasingly the policy (though this has been resisted in some areas[27]) to make the EU rules the sole source of consumer protection (maximal harmonization, ie a uniform EU law that does not permit Member States to apply lower *or* higher standards) to give traders the confidence to trade across borders. Such an approach results from a change of focus to one that prioritizes inspiring businesses with the confidence to trade across borders without the risk of being surprised by unfamiliar national laws.[28]

The message from the European Commission is clear: consumers have more to gain from increased competition between traders who are emboldened to supply consumers in other States than they risk from any marginal reduction in consumer protection at the national level. This is controversial and the European Commission has not managed the

[22] Arts 2(5) and 114(1) TFEU.

[23] eg business attitudes towards cross-border sales and consumer protection showed a decrease in businesses conducting cross-border transactions (29 per cent in 2006, 21 per cent in 2008), see 'Business Attitudes towards Cross-Border Sales and Consumer Protection' (2006) Commission Eurobarometer, Flash EB Series #186, http://ec.europa.eu/consumers/topics/flash_eb_186_ann_report_en.pdf.

[24] Directive 2011/83 (OJ [2011] L304/64).

[25] COM(2008) 614 final, 8 October 2008. [26] See section 10.

[27] eg in addition to doorstep selling and distance selling contracts the initial proposal for a Consumer Rights Directive also sought the full harmonization of unfair contract terms and consumer sales: COM(2008) 614 final, 8 October 2008. The final version of the Consumer Rights Directive, adopted in 2011 after intense legislative discussion, does not include the areas of unfair contract terms and consumer sales (Directive 2011/83 (OJ [2011] L304/64)). The latest reform of sales law adopts maximal harmonization, but at the same time allows Member States discretion on available remedies. See below section 10.

[28] Though the argument is sometimes invoked that consumers may be made more active in the internal market if only the EU law applies as the rules are more certain. However, it is hard to understand how the possibility that national laws might provide for better than the minimal rights can be a deterrent to cross-border shopping.

soft politics of this process well, with consumer organizations remaining nervous about such developments.[29] The extent to which changes in the law really will impact on cross-border trade is unclear[30] with other factors such as language, delivery costs, and access to redress should things go wrong also being important factors.[31] Equally, the extent to which maximal harmonization can fulfil the Commission's ambitions is limited by the scope of harmonizing measures (for Member States retain competence in areas not harmonized, subject to EU free movement law, as discussed later) and the discretion within the laws themselves for national differences to emerge in implementation, application, and enforcement.[32] What is also missing from this debate is any consideration of what is the optimum amount of cross-border shopping. More seems impliedly viewed as better, but sending consumers travelling around Europe or having traders delivering goods long distances conflicts with another important EU policy of environmental protection.[33] On the other hand it is pleasing to see that the EU has taken action against unjustified geo-blocking that risked preventing consumers from taking full advantage of the single market by traders who wanted to partition markets for no justifiable reasons.[34]

3.3 Legislative approach

Traditionally EU legislation in the consumer protection field used directives and applied to cross-border trade and domestic trade alike. There are increased signs that both these approaches are being eroded. Regulations are becoming more frequently preferred as the legislative instrument. This may be appropriate if in fact EU law gives little discretion in implementation and especially if EU law is to become the sole source of law due to the use of maximal harmonization. This may be beneficial to consumers as regulations become directly applicable and so immediately available for use by consumers. Consumers struggle to obtain rights under directives that are not implemented or not properly implemented as most of their transactions are with private parties and not emanations of the State, and directives lack 'horizontal direct effect' against private parties.[35] However, in one famous case German consumers, relying upon the principle of Member States' damages liability for their breach of EU law, did recover from the German State for losses caused by the failure to set up a compensation fund for package travel holiday insolvencies as required by EU legislation.[36]

In many areas the traditional approach of national law sitting alongside EU rules will continue. In such areas there are advantages to the use of directives as they provide

[29] U Pachl, 'Common European Sales Law—Have the Right Choices Been Made: A Consumer Policy Perspective' (2012) 19 *Maastricht Journal of European and Comparative Law* 180, 189.

[30] eg the results of a 2010 study show that 57 per cent of traders consider that harmonization of the law would not impact on their cross-border sales: 'Retailers' Attitudes towards Cross-Border Trade and Consumer Protection' (2011), Commission Eurobarometer, Flash EB Series #300. See also BEUC, 'European Contract Law 28th regime—BEUC'S 10 Reservations' (2011) BEUC Position Paper, X/2011/118; Pachl, 'Common European Sales Law' (n 29) 185.

[31] SEC(2011) 1409 final, 29 November 2011, 3.

[32] See also discussion of open-textured norms at section 11.2.

[33] On the substance of environmental policy, see chapter 21. See, European Commission, *Closing the Loop—An Action Plan Towards a Circular Economy*, COM (2015) 614 final.

[34] Regulation 2018/302 (OJ [2018] L60I/1).

[35] Case C-91/92 *Paola Faccini Dori v Recreb Srl* [1994] ECR I-3325. For more on the nature and legal effect of directives and regulations, see chapters 5 and 6.

[36] Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer v Bundesrepublik Deutschland* [1996] ECR I-4845.

the flexibility to create a coherent national framework. There is, however, also a tendency, started in the area of access to justice, where national procedural law autonomy is fiercely protected, for EU law only to apply where there is a cross-border trade dimension. The arguments here are nuanced and need to be considered on a case-by-case basis. Whilst some contexts may justify such a parallel regime being established, there is a danger in making the law too complex if multiple or overlapping regimes emerge. This was one of the debating points surrounding the proposal for an optional Common European Sales Law.[37]

4 Information policy and unfair commercial practices

Information has been a prized technique of consumer protection by the EU. Many of the national consumer protection rules that were found to be incompatible with Article 30 EC (now Article 34 TFEU) could be so held because informing the consumer about the goods or services was seen as a more proportionate way of achieving the desired consumer protection objective.[38] Also national rules restricting the provision of information in advertising have been successfully challenged.[39] Rules permitting explicit or implicit comparisons with competitors and their products ('comparative advertising') which comply with key principles is also evidence of the desire to promote competition by better informing consumers.[40]

In its positive harmonization agenda the EU has also favoured information provision rules. This is partly out of an ideological belief in promoting consumer autonomy by rectifying the lower amount of information the consumer has in relation to the seller (so-called 'information asymmetry').[41] If consumers are provided with more information it is hoped they will make better decisions. It also has the practical advantage of being easier to achieve in a multi-State context than changing substantive practices or legal standards. The relevant rules cover both information in advertising and marketing and the information that has to be supplied pre-contractually, in the contractual documentation and post-contractually.

4.1 Information obligations

Some of the earliest EU consumer law measures were concerned with the provision of misleading information.[42] These are now found in the Unfair Commercial Practices Directive.[43] As well as containing a general clause controlling unfair practices, the Directive also contains 'mini-general clauses' which prohibit misleading and aggressive practices. Thus its ambit extends beyond mere information policy. In assessing conduct the legislation borrowed the concept of the average consumer from the free movement case law but

[37] See section 11.6.

[38] eg in *Commission v Germany* (n 10) and *Cassis de Dijon* (n 12).

[39] Case C-362/88 *GB-INNO-BM* [1990] ECR I-667; Case C-44/01 *PippigAugenoptik* [2003] ECR I-3095; S Weatherill, 'The Rôle of the Informed Consumer in EC Law and Policy' (1994) 2 *Consumer Law Journal* 49.

[40] Directive 97/55 (OJ [1997] L290/18) recital 2, now Directive 2006/114 (OJ [2006] L376/21) recital 6; Weatherill, 'The Rôle of the Informed Consumer in EC Law and Policy' (n 39) 178.

[41] S Grundmann, W Kerber, and S Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (Berlin: De Gruyter, 2001); G Howells, A Janssen, and R Schulze (eds), *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Aldershot: Ashgate, 2005).

[42] Directive 84/450 (OJ [1984] L250/17). [43] See n 14.

amended it somewhat to take account of needs of vulnerable consumers. There is also an annex containing practices that are always to be considered unfair. The Directive was also innovative by including an obligation to promote the provision of relevant information through the rules on misleading omissions; thus introducing a positive duty on traders to provide material information.[44] Work has been going on to provide guidance on how this applies to the internet and new rules cover situations where traders pay for higher rankings in search results.[45] The new law also treats as misleading 'dual quality' products: where products are marketed as being identical to products marketed in other Member States, but have significantly different product characteristics.

The bulk of EU rules concern positive obligations to provide specific information pre-contractually and in the contractual documentation. This has gradually become a more and more prevalent form of regulation as can be seen by contrasting the very early Doorstep Selling Directive, in which the only information obligation was to inform the consumer of the right of cancellation,[46] with the far more extensive rules in the Distance Selling[47] and Distance Marketing of Financial Services Directives.[48] The information obligations in the latter Directive totalled more than 30 and resulted from a need to satisfy all States in order to have agreement on a maximal harmonization list. The Consumer Rights Directive[49] now has substantial information rules that extend to all consumer contracts, but has specific detailed rules under which off-premises and distance contracts are treated similarly. It replaces the earlier directives on doorstep and distance selling.

4.2 Information and behavioural economics

The extensive rules on information may be helpful to provide the consumer with a full record of what was agreed, but if the aim is to improve consumer decision-making more attention is needed to the lessons of behavioural economics and in particular the limited processing powers of consumers.[50] This branch of research uses the insights of psychology as to how consumers actually behave to challenge traditional formal economic models that assume consumers will always act rationally when provided with information. This allows more realistic appraisals of the impact of not just contractual information obligations, but also the rules concerning advertisements and the role of warnings, for example, in relation to product safety. It is not just the amount of information that is important, but also how it is presented and the account taken of the likely reaction by consumers to the information. Behavioural economics has been used to inform tobacco policy, for example, to draft the warnings about the risks of smoking to make them relate to consumer concerns, to give them authority, and to inform their placement and rotation.[51] The amendment to require a colour photograph to be on tobacco packages is an example of how evidence of the impact

[44] Directive 2005/29, Art 7; G Howells, H Micklitz, and T Wilhelmsson, *European Fair Trading Law* (Aldershot: Ashgate, 2006) 147–158.

[45] Directive 2019/2161 (OJ [2019] L 328/7). Member States must apply this Directive by 28 May 2022.

[46] Directive 85/577, Art 4. [47] Directive 97/7 (OJ [1997] L144/19) Art 4.

[48] Directive 2002/65 (OJ [2002] L271/16) Art 3. [49] Directive 2011/83 (OJ [2011] L304/64).

[50] G Miller, 'The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information' (1956) 63 *Psychological Review* 81; G Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 *Journal of Law and Society* 349; Better Regulation Executive and National Consumer Council, 'Warning: Too Much Information Can Harm' (2007) http://webarchive.nationalarchives.gov.uk/20090609003228/http://www.berr.gov.uk/files/file44367.pdf. There are other ways in which the EU uses behavioural insights, eg by requiring that there be positive consent to any add-ons to prices, rather than pre-ticked boxes (eg when purchasing holiday insurance): see Consumer Rights Directive, Art 22.

[51] G Howells, *The Tobacco Challenge* (Aldershot: Ashgate, 2011) 272–275.

of such techniques on smoking reduction can help to inform policy.[52] In the consumer credit field more might be done to take account of how consumers budget when providing information since even very high interest rates as indicated by the APRs (annual percentage rate charges) may not impact significantly on consumers' decisions if they focus more on how much has to be repaid each month. There might be scope to personalize information, for example to inform consumers about how they have actually used their bank accounts or gym membership.[53] The EU is showing an awareness of the impact of behavioural economics on consumer policy and has held several conferences on this theme, but it takes time to apply this to rules where the natural tendency is to play safe and appease Member States by allowing them all to keep their national preferences.

5 Right of withdrawal

5.1 Justification

The EU has also promoted the right of withdrawal for particular contracts as a consumer protection technique. This shares some of the objectives of the information strategy insofar as it does not seek to challenge the substance of the deal, but rather seeks to promote more informed consumer choices. Sometimes it does this by giving the consumer further information about the product by being able to handle it in person before becoming irrevocably bound to the contract, in other cases it serves as a safety valve ensuring that consumers are not bounced into a decision when, for example, accosted on their doorstep or by a telephone call without proper time to reflect on whether the goods or services truly meet their needs.

5.2 Harmonization

This right, which has been given various names such as cancellation or withdrawal, first appeared in 1985 in the Doorstep Selling Directive.[54] It has since been extended to distance selling[55] and to particular contracts where the risks of high-pressure selling are prevalent, such as timeshare,[56] or where the consequences for consumers of a rash decision are serious, for example, life assurance[57] and credit contracts.[58] These rights grew up piecemeal and there were different lengths of the withdrawal periods, different times from which that withdrawal period began to run, different rules on how withdrawal could be affected and the consequences once the right was invoked (though often these were left to national law), and different rules about the effect on the withdrawal period if information obligations were not complied with.[59] As part of a broader programme of consolidation of

[52] Directive 2014/40 (OJ [2014] L127/1).

[53] O Bar-Gill and F Ferrari, 'Informing Consumers about Themselves' (2010) 3 *Erasmus Law Review* 93.

[54] Directive 85/577, Art 5; on the variety of terminology, see B Pozzo, 'Harmonisation of European Contract Law and the Need of Creating a Uniform Terminology' (2003) 6 *European Review of Private Law* 754, 764.

[55] Directive 97/7, Art 6; Directive 2002/65, Art 6.

[56] Directive 2002/122 (OJ [2008] L33/10) Art 6.

[57] Directive 2002/83 (OJ [2002] L345/1) Art 35.

[58] Directive 2008/44 (OJ [2008] L133/66) Art 14.

[59] Case C-91/02 *FacciniDori* [1994] ECR I-3325; Case C-481/99 *Heininger* [2001] ECR I-9945; Case C-336/03 *easyCar* [2005] ECR I-1947; Case C-350/03 *Schulte* [2005] ECR I-9215; Case C-412/06 *Hamilton* [2008] ECR I-2383; Case C-205/07 *Gysbrechts* [2008] ECR I-9947; Case C-489/07 *Messner* [2009] ECR I-7315; Case C-227/08 *MartínMartín* [2009] ECR 11939; and Case C-511/08 *HeinrichHeine* [2010] ECR I-3047.

EU contract law there have been proposals to develop a more harmonized approach to the right of withdrawal, notably by the Acquis Group.[60] This has yet to be put into practice, but the Consumer Rights Directive has at least standardized the procedure for distance and off-premises contracts with a 14-day right of withdrawal period.[61]

5.3 Effective consumer protection?

The right of withdrawal is undoubtedly a helpful consumer protection technique.[62] It gives consumers encouragement to use certain distribution channels such as the internet with the confidence that they can return goods that do not meet their expectations without having to give a reason. It is a protection against over-forceful salesmen in some contexts where consumers may be especially vulnerable, such as in their homes.[63] It is particularly useful as it is a self-help technique consumers can use without having to invoke a formal procedure. They simply have to withdraw to escape from their contractual obligations. However, if they have paid money over and the trader does not follow his legal obligations a claim may be needed to recover the amounts due. There are nevertheless limitations on its effectiveness.[64] Consumer behaviour indicates both that consumers are reluctant to admit they made poor choices and that they will be reluctant to take the initiative to withdraw from the contract. Traders are entitled to require consumers to pay the cost of returning goods and this may be a practical disincentive, particularly in a cross-border situation.[65] Also in some instances it may not be possible for consumers to determine whether they have made a good choice during the time allowed for withdrawal. This is true of many financial services products. In these cases a better solution may be to provide consumers with fair exit routes during the course of the contract.

6 Rules establishing consumer expectations

The rules on information provision and the right of withdrawal, though fettering the complete freedom of traders as to how they do business,[66] essentially build on the freedom of contract model. Indeed they can be seen as reinforcing that model by ensuring the consumer enters into an agreement with full knowledge and consent. It is where the consumer is given substantive non-excludable rights[67] that the extent of freedom of contract is less

[60] Research Group on the Existing EC Contract Law (Acquis Group), *Contract I—Pre-Contractual Obligations, Conclusion of Contract, Unfair Terms* (Munich: Sellier, 2007); *Contract II* (Munich: Sellier, 2009); *Contract III* (Munich: Sellier, 2014).

[61] Directive 2011/83, Art 9.

[62] P Rekaiti and R Van den Bergh, 'Cooling-Off Periods in the Consumer Laws of the EC Member States: A Comparative Law and Economics Approach' (2000) 23 *Journal of Consumer Policy* 371.

[63] G Howells, 'The Right of Withdrawal in European Consumer Law' in H Schulte-Nölke and R Schulze (eds), *European Contract Law in Community Law* (Cologne: Bundesanzeiger, 2002) 230–232; M Loos, 'Rights of Withdrawal' in G Howells and R Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Munich: Sellier, 2009); H Eidenmüller, 'Why Withdrawal Rights?' (2011) 7 *European Review of Contract Law* 1, 7–18.

[64] Howells, 'The Right of Withdrawal in European Consumer Law' (n 63) 233.

[65] eg the inclusion of the potential cost of return by the consumer would have to be taken into account when calculating the total cost, see G Borges and B Irlenbusch, 'Fairness Crowded Out by Law: An Experimental Study on Withdrawal Rights' (2007) 163 *Journal of Institutional and Theoretical Economics* 84, 100.

[66] Howells, Janssen, and Schulze, *Information Rights and Obligations* (n 41).

[67] eg the right of withdrawal in Directive 85/577, Art 6; Directive 97/7, Art 12(1); and Directive 2008/122, Art 12(1). Later a number of substantive rights affecting the core obligations towards consumers are considered.

and potentially ceases to be the main underlying concept. In EU law these non-excludable rights are backed up by provisions both within the Directives[68] and in EU private international law[69] that prevent consumers losing core rights granted by EU law by choosing the law of a non-Member State. Some have even claimed that such a regime should be viewed more like a tort law or regulatory regime; namely, a regime imposed by the law rather than a contractual regime where the premise is that the obligations are derived from the parties' mutual agreement.[70] However, many substantive rules in practice leave some margin for traders to affect the expectations of consumers by the way they market and present the products.

Some of the laws we shall consider can be seen as specialist consumer rules with limited impact on the general law—product safety, product liability, and to some extent unfair commercial practices law might be viewed in this light. By contrast the directives on unfair contract terms and, particularly, sale of goods law strike more into the heartland of private law. Whilst they could be viewed as creating specialist regimes for consumer contracts, the Consumer Sales Directive in particular in many countries became a model for a broader reform of sales law. This was particularly the case in Germany, where reform of the sales provisions in the German Civil Code had long been recognized as essential but had stalled under political inertia. The Consumer Sales Directive gave fresh momentum to a more general modernization of German sales law not restricted to consumer contracts.[71] Out of this grew a brand of 'European private law' scholarship that sought to modernize European contract law more generally. However, some also see this as a threat to consumer protection as some European private lawyers may prioritize harmonization over consumer protection and therefore may be prepared to sacrifice some more protective national rules to achieve their broader ambition of a modern common European contract law.[72] The substantive rights will now be outlined, before some general reflections on them are made.

7 Product safety

7.1 Public law control and consumer protection

Although most of the rules setting minimum standards are private law in nature, it should not be overlooked that there are significant public law controls aimed at protecting the consumer, for instance in the field of product safety. The EU's involvement in product safety grew out of its work on technical harmonization and the realization that many standards needed a consumer safety element. The new approach to technical harmonization[73] saw a suite of directives being adopted (eg on personal protective equipment,[74] machinery,[75]

[68] eg Directive 93/13, Art 6(2); Directive 97/7, Art 12(2); and Directive 1999/44, Art 7(2).

[69] These are the rules which govern which law and jurisdiction apply, see Regulation 593/2008 on the law applicable to contractual obligations (Rome I), Art 6(2).

[70] R Brownsword, 'Regulating Transactions: Good Faith and Fair Dealing' in Howells and Schulze, *Modernising and Harmonising Consumer Contract Law* (n 63).

[71] C Herresthal, '10 Years after the Reform of the Law of Obligations in Germany—The Position of the Law of Obligations in German Law' in R Schulze and F Zoll (eds), *The Law of Obligations in Europe* (Munich: Sellier, 2013) 186 *et seq*.

[72] H-W Micklitz, 'The Targeted Full Harmonisation Approach: Looking behind the Curtain' in Howells and Schulze, *Modernising and Harmonising Consumer Contract Law* (n 63) 75–83.

[73] Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards (OJ [1985] C136/1).

[74] Directive 89/686 (OJ [1986] L399/18).

[75] Directive 2006/42 (OJ [2006] L157/24), amending Directive 95/16 (OJ [1995] L213/1).

and toy safety[76]) that set down general expectations of safety, backed up by an annex laying out essential safety requirements. These were then operationalized by the development of European (CEN) standards by privatized standards bodies. Traders could choose either to meet the Directive's standards in their own way or adopt the CEN standard (as transformed into a national standard) and benefit from safe harbour provisions. Compliance with standards was indicated by use of the CE marking, which indicates conformity with standards and should not be (but often is) confused with a safety mark.

7.2 General Product Safety Directive

The EU realized that some consumer products were not covered by new approach directives and in 1992 adopted a General Product Safety Directive[77] that set a general safety requirement for all consumer products that applied where there were no specific EU rules.[78] It also set out powers the Member States had to have to react to product safety concerns,[79] introduced reporting obligations to the EU on the part of Member States about product safety incidents[80] as well as an emergency procedure to allow the EU to adopt decisions on serious and immediate risks where Member States have taken different positions.[81] This Directive was subsequently amended[82] to clarify a number of issues, but also to place an obligation on producers to report product safety issues and to provide an express recall obligation.[83] Additional amendments have recently been proposed to further clarify concepts, make clear the relationship with vertical directives, integrate even more the standardization approach, and significantly enhance enforcement. It is also proposed that the new rules should be set out in regulations, one dealing with the substantive rules, the other with the enforcement mechanisms.[84] Reform has been stalled, apparently mainly over disagreement about proposed requirements to require country of origin labels. An important outcome of this Directive has been to ensure at least every Member State has an authority responsible for product safety.

8 Product liability

Product safety laws put standards in place to ensure products are safe and provide measures to remove any unsafe products that do reach the market. The Product Liability Directive,[85] on the other hand, seeks to compensate those injured by defective products. It is something of an outlier in the consumer *acquis*, partly due to its origins in the directorate concerned with internal market affairs rather than consumer protection.[86] Its adoption was in large measure due to the personal tenacity of Dr Taschner, a Commission official, who was convinced of the need to introduce strict product liability in response to the thalidomide disaster in the 1960s in which many children suffered deformities as a result of their mothers taking a morning sickness preventative drug. It was hard to establish fault

[76] Directive 2009/48 (OJ [2009] L170/1), replacing Directive 88/378 (OJ [1988] L187/1).

[77] Directive 92/59 (OJ [1992] L228/24). [78] Directive 92/59, Arts 3 and 4.

[79] Ibid, Arts 5 and 6. [80] Ibid, Arts 7 and 8. [81] Ibid, Art 9.

[82] Directive 2001/95 (OJ [2001] L11/4).

[83] See D Fairgrieve and G Howells, 'General Product Safety—A Revolution through Reform?' (2006) 69 *Modern Law Review* 59.

[84] COM(2013) 78 final, 13 February 2013.

[85] Directive 85/374 (OJ [1985] L210/29).

[86] For more on the structure of the European Commission, see chapter 3.

liability as the effects of drugs on children *in utero* were unexpected. This Directive shows the value of being able to adopt a common European approach, as Member States' legal systems were struggling with the limitations of contract (due to privity) and tort (due to fault requirement) to address product liability claims, but each feared being the first to introduce strict liability that did not require fault in case it imported a US-style litigation explosion. The 1970s had seen a product liability insurance crisis in the US with the liability risks making it hard or impossible for some producers to obtain insurance. The Directive seeks in the words of the recital to provide 'liability without fault on the part of the producer' as this was viewed 'as the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production.'[87] Instead of fault, liability would be based on defectiveness that is found when a product 'does not provide the safety which a person is entitled to expect.'[88] However, this standard is open-textured, in the sense that it requires a general assessment. The extent to which such assessment is based on consumer expectations or if there is a role for risk-utility analysis is moot. In England, the High Court in *A v National Blood Authority*[89] had held blood infected by Hepatitis C did not satisfy the legitimate expectations of the public and that factors to be taken into account excluded the benefits of the product and the costs of precautions. Two subsequent High Court decisions questioned the value of talking about legitimate expectations as the test was based on what a person was entitled to expect, which may be different from their factual expectations.[90] The judges in those cases would also take a wider range of factors into account such as risk, benefit, and regulatory approval. In continental courts the reasons for finding defectiveness often do not have to be spelled out in such detail and this has allowed courts to find liability where a product has simply behaved in an unexpected manner, eg a coffee machine exploding.[91] The Court of Justice has even upheld a French rule of evidence that proof of both defect and causation between a vaccine and damage did not need any evidence of medical consensus.[92] Equally the strictness of the liability regime will depend upon how the defences are interpreted and in this respect the inclusion of the (optional)[93] development risks defence is significant. This seeks to protect producers where there was no way they could have known of the defect and risks thereby returning the debate to a negligence-style analysis where what is important is the conduct of the producer rather than the condition of the product. The Court of Justice, on the one hand, interpreted the defence narrowly as being lost by the most advanced knowledge even if that did not at the time form part of the scientific consensus. Thus as long as one researcher has identified the risk, the defence is lost as producers would be expected to invest in further research or insurance. On the other hand, the judgment tended towards a negligence-style analysis by requiring the knowledge to have been reasonably accessible; Advocate General Tesauro famously gave the example of research only published in Manchurian, which European

[87] Directive 85/374, recital 2. [88] Ibid, Art 6(1).

[89] *A v National Blood Authority* [2001] 3 All ER 289.

[90] *Wilkes v DePuy* [2016] EWHC 3096 (QB); [2018] QB 627; [2017] 3 All ER 589 and *Gee v DePuy* [2018] EWHC 1208; [2018] 5 WLUK 394; [2018] Med LR 347.

[91] S Lenze, 'Strict Liability for Manufacturing Defects – What Proof is Needed?' (2003) *European Product Liability Review* 11/37, comments on the Austrian Supreme Court (OGH 22. 10. 2002 10 Ob 98/02p).

[92] Case C-621/15 *N.W, L.W en C.W v Sanofi Pasteur MSD SNC, Caisse primaire d'assurance maladie des Hauts-de-Seine and Carpimko*, EU:C:2017:484; [2017] 4 WLR 171; [2018] 1 CMLR 16.

[93] The development risks defence is excluded in Finland and Luxembourg, whereas there are limitations on the defence in France, Germany, and Spain.

producers might not be expected to know about.[94] Whether this accessibility requirement is justified is a moot point.[95] The European Court of Justice has handed down a pro-consumer decision concerning implantable medical devices. It held that it was sufficient to establish defect that the product belonged to a category of products with a potential to be defective, even if defect could not be established with respect to the particular implanted device.[96] The operation needed to remedy the defect was considered to be damage caused by death or personal injury.

The Product Liability Directive has hardly been amended since it was adopted and reviews of it have been rather superficial. The Commission signalled that a more detailed evaluation would need to be made with the driver being the need to adapt it to the digital society.[97] A recent report concluded the Directive was still essentially fit for purpose but that some concepts might need to be refined for the digital age.[98] There has been some interesting work produced by the Commission on Artificial Intelligence and whether this needs new paradigms of liability.[99]

9 Unfair terms

The Unfair Terms in Consumer Contracts Directive[100] was inspired by German law and is therefore restricted to non-individually negotiated terms: in effect standard form contracts.[101] This controls terms which are unfair because contrary to the requirement of good faith, they cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.[102] The reference to good faith was symbolically important to many continental States where good faith had been an important means of controlling unfairness. However, as it is not the sole criteria of unfairness, but has to be combined with a significant imbalance, it might in fact be considered a limiter on controls by requiring procedural as well as substantive unfairness.[103] The European Court of Justice in *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*[104] gave a favourable pro-consumer understanding by stating that 'in order to assess whether the imbalance arises "contrary to the requirement of good faith", it must be determined whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations.'

[94] Case C-300/95 *Commission v UK* [1997] ECR I-2649.

[95] M Mildred and G Howells, 'Comment on "Development Risks: Unanswered Questions" ' (1996) 61 *Modern Law Review* 570.

[96] Case C-503/13, *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt—Die Gesundheitskasse*, EU:C:2015:148.

[97] European Commission, 'Evaluation of the Directive 85/374/EEC concerning liability for defective products' (2016) http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_grow_027_evaluation_defective_products_en.pdf.

[98] Report on the application of Directive 85/374/EEC; COM(2018) 246 final.

[99] See E Commission, *Artificial Intelligence for Europe*, COM (2018) 237 final and especially EU Commission Staff Working Document *on the free flow of data and emerging issues of the European data economy*: SWD (2017) 2 final.

[100] Directive 93/13 (OJ [1993] L95/29).

[101] Directive 93/13, Art 3(2). [102] Ibid, Art 3(1).

[103] R Brownsword and G Howells, 'The Implementation of the EC Directive on Unfair Terms in Consumer Contracts—Some Unresolved Questions' [1995] *Journal of Business Law* 243.

[104] Case C-415/11, EU:C:2013:164.

It is likely that the use of flagrantly unfair terms (eg the exclusion of liability for negligently caused death and personal injury) will be viewed as a breach of good faith per se. There is no black list of terms that are automatically unfair, but rather an annex with a non-exhaustive list of terms that are indicatively unfair. The assessment cannot, however, cover 'the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration . . . in so far as these terms are in plain intelligible language.'[105] This exemption from control has been broadly construed by the UK's Supreme Court in a case where bank charges were unsuccessfully challenged.[106] Many bank accounts in the UK work on the basis that the service is free of charge as long as the account is in credit, but there are heavy charges incurred if the user goes overdrawn without permission. These charges were held not to be subject to review (and also could not be controlled as penalty clauses as they were provided for in contract rather than resulting from a breach). It is unfortunate the Supreme Court considered this matter *acte claire* and therefore not needing a preliminary reference. The Court of Justice has subsequently adopted a distinction between core and ancillary terms, though its application is left to national courts.[107] However, this core term exemption runs counter to the Nordic tradition of allowing fairness of the core terms and those States' desire to retain this stronger control is an impediment to agreeing maximal harmonization in this area.

Individual consumers can challenge unfair terms, which if found to be unfair will be non-binding. The contract will continue in existence if it is possible to sever the offending terms. However, few consumers will in practice have sufficient incentive to challenge unfair terms and indeed it is important to ensure they are not included in contracts as consumers may be unaware that the terms are unfair and therefore not binding and simply follow the contract terms. Therefore preventative controls allowing for injunctions against unfair terms were included. The Unfair Terms in Consumer Contracts Directive is an early example of the EU favouring injunctions brought by public authorities or consumer groups.[108]

An important and perhaps surprising feature of this Directive is the impact it has had on procedural law. The Court of Justice has been keen to ensure that the rules are given practical effect and has forced national courts to ensure that national procedural rules do not impede its effectiveness. They have also introduced an *ex officio* doctrine requiring courts to consider the unfairness of terms on their own initiative.

10 Sale of goods

The Consumer Sales Directive[109] had introduced the principle that goods should be in conformity and introduced a hierarchy of remedies; however, its impact on national law was limited as it was a minimal harmonization directive that allowed more protective national rules to be kept in place. Following the failure to agree a Common European Sales Law a maximal harmonization directive was proposed for online sales, but towards the end

[105] Directive 93/13, Art 4(2).

[106] *OFT v Abbey National plc* [2009] UKSC 6.

[107] Case C-26/13 *Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, EU:C:2013:282.

[108] In Case C-153/13 *Pohotovost', sro v JánSoroka*, EU:C:2014:1854 the Court of Justice lacked jurisdiction to decide on an interesting issue: does the Unfair Terms in Consumer Contracts Directive preclude legislation of a Member State which does not allow a legal person whose purpose is the protection of consumers' rights to intervene in court enforcement proceedings?

[109] Directive 1999/44 (OJ [1999] L171/12).

of the legislative process this was turned into a general maximal harmonization consumer sales directive.[110] This adopts a new style of defining conformity based on compliance with factors stipulated in the contract and objective requirements covering that goods should be in conformity with the contract, by which it is understood that they should:

- comply with any description;
- possess the qualities of any model or sample;
- be fit for any particular purpose known to and accepted by the seller;
- be fit for the purposes goods of the same type are normally used;
- be delivered with such accessories, including packaging, installation instructions, or other instructions as the consumer may reasonably expect to receive; and
- be of the quantity and possess the normal quality and other features, including in relation to durability, functionality, compatability, security, and performance the consumer can reasonably expect.

In assessing the last criterion the 1994 Directive had been innovative in, subject to certain conditions, taking into account public statements made not only by the seller but also the producer or his representative, for example, on the labelling or in advertisements. This has been maintained.

Some of these elements are included as they relate to digital content or services as the Directive also applies to such content or services when supplied with goods. Rules define when this directive applies and when digital content and services are covered by its sister Directive on certain aspects concerning contracts for the supply of digital content and digital services.[111] This contains rules derived from the consumer sales context, but modified to take account of the digtal environment. Thus whilst goods need to comply with a sample or model, the same principle is adapted to the digital environment by making reference to compliance with a trial version or preview. Equally incorrect installation is covered but reference is made to incorrect integration into the consumer's digital environment carried out by the supplier or due to shortcomings in the integration instructions provided to the consumer.[112] For both goods and the one off supply of digital content and services conformity is assessed at the time of supply and the burden of proof is reversed for the first year. Where the digital content or services contract specifies supply over a period of time the content must be in conformity throughout that period[113] and the burden of proof is always on the supplier, unless the consumer fails to cooperate by providing necessary details about their digital environment.[114]

The remedies regime has been the most controversial element. The remedies provided by the latest Consumer Sales Directive include repair, replacement, termination, or price reduction.[115] Damages are a matter for national law. European Union law has always favoured cure, with consumers under the Directive having first to seek repair or replacement, but the minimal nature of the first Consumer Sales Directive allowed Member States to retain the right to reject non-conforming goods as a primary remedy. Member States now only have a discretion to retain such remedies during the first 30 days. The Directive on certain aspects concerning contracts for the supply of digital content and digital services sale of goods also provides for cure in the first instance (and is a maximal harmonization with no special rules for the first 30 days). The specific remedies of repair

[110] Directive 2019/771 (OJ [2019] L136/28).
[111] Directive 2019/770 (OJ [2019] L 136/1).
[112] Art 9.
[113] Art 11.
[114] Art 12.
[115] Art 3.

and replacement are not mentioned; instead the trader has the freedom to decide how to cure with the recital mentioning possible means being the issuing of updates or the making of a new copy. For digital content and services the questions of what can and cannot be done with the digtial content on termination are also regulated. The modification of the digital content and services are also regulated. There are also rules on guarantees that are voluntarily provided with goods, but these do not control their content as much as ensure that they are treated as legally binding and set out the terms in plain, intelligible language (covering issues such as name and address of guarantor, procedure to implement guarantee, designation of the goods to which it applies, terms of the guarantee), and make it clear to consumers that they have remedies for non-conformity that are not affected.[116]

11 General comments on substantive rights

11.1 Goods and services

Whilst unfair terms and unfair commercial legislation applies to any consumer contract, most of the EU legislation providing general substantive rights focuses on goods. Only recently has the EU turned its attention to digital goods. Less has been done in the services field. The attempt to legislate for service liability is one of the few examples of the European Commission abandoning a legislative initiative.[117] Of course there are examples of EU intervention into particular services and it has been active in the field of services of general interest[118] and financial services.[119] The EU has also adopted a Services Directive,[120] which does contain some consumer protection measures on information provision, dispute resolution, and promoting voluntary measures to improve quality, but is mainly concerned with the freedom to provide services across borders. Nevertheless, as in most national systems, the wide variety of services and the difficulty in determining expected outcomes have made it harder to legislate in this field.

11.2 General standards

The general standards adopted are also by their very nature open-textured standards so that they do not provide concrete answers but require a complex assessment of the facts against the norms set out in general terms. Open standards are inevitable when setting such general norms, but create a severe risk of different interpretations emerging and in the EU context this includes national legal systems reading their traditional approach rather than to the rules. The discretion can be structured by use of relevant guiding factors being included in the legislation. An increasingly common practice now is for guidance

[116] Directive 2019/770, Art 6.

[117] COM(90) 482 final, 20 December 1990.

[118] eg electricity services under Directive 96/92 (OJ [1996] L27/20), now Directive 2003/54 (OJ [2003] L176/37); postal services under Directive 97/67 (OJ [1997] L15/14), now Directive 2008/6 (OJ [2008] L52/3); conditional access services (ie where pre-authorization is needed to access, eg television and internet services) under Directive 98/84 (OJ [1998] L320/54); and particular aspects of information society services under Directive 2000/31 (OJ [2000] L178/1).

[119] eg Directive 2002/65 (OJ [2002] L271/16) on the distance marketing of consumer financial services and Directive 2007/64 (OJ [2007] L319/1) on payment services.

[120] Directive 2006/123 (OJ [2006] L376/36).

to be issued by the European Commission.[121] Court decisions are also a way of concretizing the norms' meaning through experience. Despite one initial brave attempt to determine whether a term was unfair[122] the Court of Justice has since backed off and made it clear that the application of the unfairness test to consumer contract terms is a matter for national courts.[123] However, it still insists on its role in giving guidance and sometimes this can be quite prescriptive.[124] In fact the Court has been quite active in the unfair contract terms field. More generally it is rather rare for Court of Justice cases to give much helpful guidance on the content of the rules. The split roles, between the Court as interpreter of EU law and national courts which apply it, means that Court of Justice judgments can be rather abstract and the true impact only revealed by seeing how the judgment was received and applied in the national system, which can be difficult for lawyers from other Member States to discover. National decisions, even those not subject to a reference, can assist, but there was a need for the development of databases that allow learning to be shared and a common knowledge developed. The Commission has launched a consumer law database and hopefully this will assist. However, there is a need to go beyond mere provision of information and provide for synthesis of the rules. Projects such as the *ius commune* textbook[125] might have an educative role to play, but the development of guidance based on experience might be a helpful way forward in practical terms. Such soft law risks circumventing the European Parliament and so any such guidance should ideally be explicitly provided for in legislation.[126]

11.3 Channelling of liability

Obligations in EU law are imposed on several actors, including the seller, producer, and importer. Sales law traditionally focuses on the seller and the Consumer Sales Directive follows this pattern save for the provisions of voluntary guarantees where the producer may well be the guarantor. The General Product Safety Directive places obligations on both suppliers and producers, but those on producers are normally more onerous. The Product Liability Directive channels liability to the producer, with suppliers only having a secondary liability when they cannot disclose the identity of the producer or their supplier. The Directive does, however, impose liability on some own-branders and importers into the EU. Importer liability is in practice important if EU consumers are to be given effective protection, however, there may be problems if the importer itself is based outside the EU. As it is the importer into the EU and not into the consumer's State it may still involve complex litigation requiring consumers to sue in other Member States. The General Product

[121] Guidance document on the relationship between the General Product Safety Directive (GPSD) and Certain Sector Directives with Provisions on Product Safety; Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, SEC(2009) 1666, 3 December 2009; Guidance in the interpretation and application of Council Directive 93/13/EC (OJ [2019] C323/4). In the financial services field there is the very complex Lamfalussy procedure that allows regulators from across Europe to come together to develop rules in a consistent manner. This was named after the chairman of the committee that proposed the scheme: see 'Final Report of Committee of Wise Men on the Regulation of European Securities Markets', 15 February 2001, https://www.esma.europa.eu/sites/default/files/library/2015/11/lamfalussy_report.pdf.

[122] Joined Cases C-240–244/98 *Océano* [2000] ECR I-4941.

[123] Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3403.

[124] Case C-137/08 *VB Pénzügyi Lízing Zrt. v Ferenc Schneider* [2010] ECR I-10847.

[125] H-W Micklitz, J Stuyck, and E Terryn (eds), *Consumer Law: Ius Commune Casebooks for a Common Law of Europe* (Oxford: Hart Publishing, 2010).

[126] In the product liability context, see D Fairgrieve, G Howells, and M Pilgerstorfer, 'The Product Liability Directive: Time to get Soft?' [2013] 4 *Journal of European Tort Law* 1.

Safety Directive by contrast focuses attention on those distributors which are responsible for the first stage of distribution on the national market. This is more helpful in practical enforcement terms than looking to the importer into the EU.

11.4 Minimum content

Safety requirements, product liability, unfair terms, and sales law are all seen as representing minimum non-excludable rights. However, how high the minimum content is might be debatable since, as Mr Justice Burton noted in the product liability context, there is a tension between the non-excludability of the rights and the freedom to prevent liability arising through warnings.[127] Equally, in sales law, defects that are drawn to the buyer's attention do not give rise to liability.[128] As no unfair terms are automatically unfair it is moot as to the extent to which even those terms which on their face are unfair can be rendered fair by transparency, though one suspects that good faith places a limit on the extent to which transparency can make good an imbalance. Our case study of passenger rights (see case study 22.1) is one area where EU law does provide minimum rights that cannot be deviated from. The advantage of such rights is that they form a minimum set of expectations on which consumers can rely. The downside is that they constrain the offerings on the market and impose minimum obligations and with them costs which all market participants have to bear and this can increase the minimum cost of products.

Case study 22.1: Air passenger rights

On 15 April 2010 I sat in Zurich Airport at six o'clock in the morning when I heard that my Swiss Air flight to Manchester had been cancelled due to an ash cloud from the volcano Eyjafjallajökull in Iceland. Although Switzerland is outside the EU, due to a bilateral agreement I was covered by Regulation 261/2004[129] that governs air passenger rights and placed an obligation on the airline to look after me until my journey could be completed. If I had been in, say, Dubai and not using a European carrier I would most likely have been left without assistance even if I had bought a return ticket from Manchester.[130] Although the International Montreal Convention[131] provides an international scheme of passenger rights, it is less protective than the EU Regulation as it excuses airlines that took all measures that could have been reasonably required to avoid the damage or where it was impossible to take such measures. This would seem to cover air traffic control grounding flights due to volcanic ash.

The EU Regulation provisions apply in all circumstances except that the duty to pay financial compensation is not applicable in 'extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.'[132] This exemption does not affect the obligation to provide assistance. Fortunately, my airline immediately agreed to my request for a train ticket and, despite the travel agent claiming trains could only be

[127] *A v National Blood Authority* [2001] 3 All ER 289.
[128] Directive 1999/44, Art 2(3).
[129] OJ [2004] L46/1.
[130] Case C-173/07 *Emirates Airlines v DietherSchenkel* [2008] ECR I-5237.
[131] Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal, 28 May 1999. The Convention has been concluded by the EU (OJ [2001] L194/38).
[132] Regulation 261/2004, Art 5(3).

booked to London, I arrived home in Manchester in the early hours of the next day, tired but having made some new friends en route. Others were less fortunate and spent several days waiting to return home. European airlines had the duty to care for them, which included accommodating them and providing meals and refreshments. This burden was not shared by non-European carriers flying from outside the EU or other transport sectors within the EU. At the time there was a regulation on passenger rights for rail[133] and subsequently rules for ferries[134] and coaches[135] came into force. The rail sector might have been affected, but obviously the volcano did not impact on trains in the same way or else I would not have managed to get home so quickly! With respect to the rules on coaches and ferries, there are limitations on the extent of the obligation to provide accommodation, which carriers can cap at €80 per day for a maximum of two days for coaches[136] and three for ferries.[137]

The duty to pay compensation to airline passengers does not vary according to the price of the ticket. The same obligations flow from the delay and cancellation of a 1p ticket bought from a low-cost carrier as arise with regard to a business class seat with a scheduled airline. The low-cost carriers also complained that any compensation payable is at a fixed rate ranging between €125–600 depending on distance of flight and duration of delay; whereas for rail and ferry it is a reimbursement of 25–50 per cent of the ticket price and for coach 50 per cent of the ticket price. This differential treatment was litigated before the Court, which found that the harm suffered was the same regardless of the price paid, but then justified the different treatment of airlines as compared to other modes of transport by some rather tendentious arguments based on the distance of airports from urban centres and the procedures for checking and reclaiming baggage.[138]

However, the Commission consulted on revising passenger rights[139] in light of the volcano episode and some court decisions that were quite strict against airline carriers. *Sturgeon v Condor Flugdienst GmbH* treated a three-hour delay as equivalent to cancellation for the purposes of compensation[140] and *Wallentin-Hermann v Alitalia* made clear the narrow circumstances in which technical fault could be classed as an extraordinary circumstance in order to justify not paying compensation.[141]

There is a proposed regulation in this field which will clarify various points, but after several years it has not been adopted.[142] Concerning the previous discussion, it includes a definition of extraordinary circumstances in line with that of the Court of Justice decision in *Wallentin-Hermann v Alitalia*.[143] An annex sets out circumstances which will and will not be treated as extraordinary. Regular maintenance issues and unavailability of crew (unless on strike) are treated as not being extraordinary. Natural disasters rendering safe operation of the flight impossible, such as volcano ash, would be extraordinary. It also follows the *Sturgeon* decision in treating a long delay as equivalent to cancellation

[133] Regulation 1371/2007 (OJ [2007] L315/14).
[134] Regulation 1177/2010 (OJ [2010] L334/1).
[135] Regulation 181/2011 (OJ [2011] L55/1).
[136] Ibid, Arts 8 and 21.
[137] Regulation 1177/2010, Art 17(2).
[138] Case C-344/04 *R* (*International Air Transport Association and European Low Fares Airline Association) v Department for Transport* [2006] ECR I-403.
[139] See Public consultation on the possible revision of Regulation (EC) No 261/2004 on air passenger rights, at https://ec.europa.eu/transport/themes/passengers/consultations/2012-03-11-apr_en.
[140] Case C-402/07 *Sturgeon v Condor Flugdienst GmbH* [2009] ECR I-10923.
[141] Case C-549/07 *Wallentin-Hermann v Alitalia* [2008] ECR I-11061.
[142] COM(2013) 130 final, 13 March 2013.
[143] See also Case C-12/11 *McDonagh v Ryanair Ltd*, EU:C:2013:43.

as regards compensation, but increases the threshold to five hours for intra-community flights or journeys of less than 3,500 km and to nine or 12 hours depending on length for longer flights to third countries. Also in cases of extraordinary circumstances it would allow carriers to limit accommodation costs to a maximum of €100 per passenger for a maximum of three nights. However, this limitation cannot be applied to certain vulnerable groups. This loss of passenger rights is attempted to be mitigated by better rerouting rights, including on planes of other carriers; and carriers, airports, and other actors have to set up contingency plans to optimize the care and assistance of stranded passengers.

Guaranteeing non-excludable passenger rights is a classic example of minimum consumer rights potentially affecting the market choices available. Low-cost airlines may—though the impact of such costs might in fact be rather small—have to put up their fares to provide this basic cover. In effect the rules say that if you choose to operate a business flying people around Europe you need to be responsible for their welfare if they become delayed or stranded due to cancellations. The airlines become the insurer of their consumers and the EU obliges all market operators to guarantee a minimum level of customer services as the price for being allowed to be part of the marketplace. This cannot be waived in return for lower fares. This may restrict contractual freedom, but one might prefer this to the alternative of lots of people being stranded with no means of shelter and basic nourishment. This is one of the few true examples of collectivization of consumer risks and the current debate is an important test of how well that will be maintained. The solution on the table at the moment continues the principle that the harm caused should be compensated irrespective of price, but places limits on the amounts recoverable. It still leaves the dilemma that if another volcano ash disaster occurs, significant numbers may be stranded for more than three days without assistance. Is this a risk that can be left to the individual? Or should the State/EU step in to assist with such emergencies? Or is there a role for private insurance, with the lessons of behavioural economics being used to nudge[144] consumers to obtain such cover? The reform is being blocked because of a dispute over whether Gibraltar should be included within the Regulation's scope. In the meantime the Commission has issued some guidance to clarify application of the existing Regulation.

11.5 Extent of harmonization

The Court of Justice determined that the Product Liability Directive was a maximal harmonization directive, meaning that Member States cannot introduce rules that go beyond the scope of the Directive.[145] The Court avoids the use of the phrase 'maximal' and the Commission prefers the terms 'full' or 'total'. However, maximal seems the better contrast with minimal harmonization where Member States retain the discretion to be more protective. 'Full' and 'total' seem misleading as even in areas where EU law allows no discretion for Member States to retain or introduce more protective rules it is common that it does not cover the whole field and areas outside the scope remain within the competence of Member States. Thus, for example, whilst the Unfair Commercial Practices Directive is well known for adopting a maximal harmonization approach, the issues of taste and decency remain outside its scope. The General Product Safety Directive is also widely

[144] R Thaler and C Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (New Haven, CT: Yale University Press, 2008).

[145] Case C-52/00 *Commission v France* [2002] ECR I-3827; Case C-154/00 *Commission v Greece* [2002] ECR I-3879; Case C-183/00 *González Sánchez* [2002] ECR I-3901; and Case C-402/03 *SkovÆg* [2006] ECR I-199.

assumed to be maximal in character. By contrast the Unfair Terms and the first Consumer Sales Directives were expressly stated to be minimal in character.[146] Indeed it was the attempt to make rules in these areas maximal when the Consumer Rights Directive was first proposed that caused that Directive to be the most debated Directive in EU history.[147] The contentious issues were, for different Member States, the potential loss of the right to reject in sales law and loss of freedom to control core terms by national law. Unfair terms and sale were removed from that directive, however, the revised Consumer Sales Directive and the Directive on Digital Content favour maximal harmonization.

11.6 Cross-border-only rules

For a long time it was assumed that the EU consumer rules should apply to all supplies whether domestic or cross-border. In the next section, it is shown that as regards redress a different approach was often taken with the rules being crafted to deal only with cross-border situations. As regards the substantive law, a significant change was foreseen by the proposal for a Regulation on a Common European Sales Law.[148] This was the European Commission's response to the political opposition to maximal harmonization in the areas of unfair terms and sale of goods. It came up with the idea of a Regulation that created a Common European Sales Law that parties could opt into. It would only apply in cross-border sales and where parties had chosen it. As it was a Regulation that formed part of the national law of Member States, it was seen as circumventing the Rome I Regulation[149] on the applicable contract law which ensures that in some situations consumers cannot be deprived of their higher levels of mandatory national protection (Article 6(2)). In cross-border situations the argument is that the Common European Sales Law Regulation's rules would form the national level of mandatory protection for such contracts. This measure was withdrawn and instead measures on online sales (that expanded to cover all sales) and digital content were adopted. They are in fact subject to maximal harmonization: more interventionist into national legal regimes than the Common European Sales Law proposal.

12 Enforcement and redress

Consumer protection rules may take the form of regulations typically enforced by public authorities.[150] Enforcement is at the national level and there is no equivalent enforcement role in the consumer protection field for the Commission to the one it plays in the enforcement of competition law. Although patterns vary from State to State and over time, typically consumer safety, marketing practices, and unfair terms are controlled to a large extent by public enforcement. However, there has been concern that the sanctions are not dissuasive enough

[146] Directive 93/13, Art 8 and Directive 1999/44, Art 8(2).

[147] Over 2,000 amendments were tabled in the European Parliament: see G Howells, 'European Contract Law Reform and European Consumer Law—Two Related but Distinct Regimes' (2011) 7 *European Review of Contract Law* 173; Howells and Schulze, *Modernising and Harmonising Consumer Contract Law* (n 63); H-W Micklitz and N Reich, 'Crónica de una muerte anunciada: The Commission Proposal for a "Directive on Consumer Rights"' (2009) 46 *Common Market Law Review* 471; C Twigg-Flesner and D Metcalfe, 'The Proposed Consumer Rights Directive—Less Haste, More Thought?' (2009) 3 *European Review of Contract Law* 268.

[148] COM(2011) 635 final, 11 October 2011.

[149] Regulation 593/2008 (OJ [2008] L177/6).

[150] In some States there has been a tradition of enforcement by consumer organizations or even trade organizations, and this mechanism has spread under the influence of European Union law.

and, following recent amendments, certain key directives (the Unfair Commercial Practices, Unfair Terms, and the Consumer Rights Directives) will provide for the maximum sanction being at least 4 per cent of turnover where there is a widespread infringement or a widespread infringement with a Union dimension.[151] Consumers also have a right of private redress for goods that are of poor quality or cause them harm and to challenge unfair terms. They might also in some circumstances find it more convenient to exercise their right of withdrawal. In some States consumers also have a private right of redress when harmed by unfair commercial practices and one of the influences of Europe had been to encourage debate about expanding this remedy in States where this right is not currently enjoyed.[152] The Unfair Commercial Practices Directive has now been amended to require that contractual and non-contractual remedies should be available that include at least the possibility for the consumer to claim damages and, where relevant, seek price reduction or terminate the contract.[153] Traditionally the private law remedies for breach of information duties have been weak.[154]

12.1 Methods of enforcement

States have a range of traditions for enforcing regulation—this may involve the criminal law or administrative sanctions. Some directives do, of course, require some specific powers to be available,[155] but for the most part the EU laws normally merely require that States should provide 'adequate and effective means' of ensuring compliance and penalties should be 'effective, proportionate and dissuasive'.[156] It has already been noted that the General Product Safety Directive forced Member States to ensure an agency responsible for consumer safety was in place. The Consumer Protection Cooperation Regulation[157] went further and required each Member State to nominate a competent consumer authority to be part of an EU-wide enforcement network that provides for information exchange and mutual assistance. This was a development from the Consumer Injunctions Directive.[158] The idea behind that Directive was that, as well as rationalizing and embedding an EU right to seek injunctions for breach of the consumer *acquis*, cross-border infringements could be addressed by requiring States to give qualified entities (State consumer protection bodies and/or private consumer organizations) from other States access to their injunction procedures. However, the foray of the UK's Office of Fair Trading (OFT) into the Belgian courts in the *Duchesne* case[159] demonstrated how complex that route could be as the already difficult task for the OFT of litigating in a foreign court was made even more complex because of the range of parties involved in different countries giving rise to a plethora of private international law points. In principle the notion of the State where the perpetrator is situated

[151] Directive 2019/2161 (OJ [2019] L 328/7). Member States must apply this Directive by 28 May 2022.

[152] OJ [2010] C46/26. For the UK debate, see Law Commission, *Consumer Redress for Misleading and Aggressive Commercial Practices* (Law Com No 332, 2012) and new rules in s 27A Consumer Protection from Unfair Trading Regulations 2008.

[153] Directive 2019/2161 (OJ [2019] L 328/7). Member States must apply this Directive by 28 May 2022.

[154] C Twigg-Flesner and T Wilhelmsson, 'Pre-Contractual Information Duties in the Acquis Communautaire' (2006) 4 *European Review of Contract Law* 441, 465–468.

[155] eg under Directive 2001/95 Member State authorities are entitled to take a number of measures such as banning the marketing of a dangerous product and introduce the accompanying measures required to ensure the ban is complied with (Art 8(1)(e)) or ordering the actual and immediate withdrawal of a dangerous product (Art 8(1)(f)(i)).

[156] As is required in, eg Directive 2011/83, Art 24; Directive 2008/48, Art 23; and Directive 2002/65, Art 11. See also P Rott, 'Effective Enforcement and Different Enforcement Cultures in Europe' in T Wilhelmsson, E Paunio, and A Pohjolainen (eds), *Private Law and the Many Cultures of Europe* (Alphen aan den Rijn: Kluwer Law International, 2007).

[157] Regulation 2006/2004 (OJ [2006] L364/1).

[158] Directive 98/27 (OJ [1998] L166/51).

[159] *Duchesne SA v OFT*, Cass, 2.11.2007, No C.06.0201.F/1.

acting against him seems more likely to achieve practical results, and this is hopefully the outcome of greater cooperation under the Consumer Protection Cooperation Regulation. Under the Regulation national authorities can be requested by their counterparts in other States to take all necessary enforcement measures to bring about the cessation or prohibition of the intra-EU infringement without delay.[160] It has recently been amended to make it more effective, especially in the Digital Age.[161] For instance, the Regulation talks of action for cessation or prohibition of infringements, but this might not capture short term scams that frequently appear on the internet and are then removed. The wording for cessation and prohibition remain the same but it is made clear that the harmful effects of activities that have ceased should still be addressed. It also allows investigation of the flows throughout the digital value chain in order, for example, to trace where payments go. Interim measures such as taking down websites are also permitted. The new Regulation also allows for coordination where the same infringement occurs in parallel in several States and gives the Commission a stronger coordinating role especially where the infringement is defined as being Union wide (ie affecting two-thirds of EU citizens).

12.2 Access to justice

Given the relatively small amounts at stake and the high costs of cross-border enforcement,[162] the amount of formal litigation by consumers in this context is likely to be limited. There are EU rules that seek to assist some consumers by providing that proceedings should be brought in their home State courts[163] or ensuring they are not deprived of their home State mandatory consumer protection rules.[164] Often this protection is linked to the consumer being a passive consumer targeted by the trader; though determining when this situation arises in, say, the context of websites, is hard to determine even with some guidance having been provided by the Court.[165] Indeed if the application of these private international law rules is called into question that in itself will involve expensive satellite litigation concerning questions of jurisdiction and choice of law before the substantive issue can be addressed.

The EU has sought to address the cost of litigation. There are some obligations to provide legal aid for cross-border disputes.[166] Also a European small claims procedure[167] has been introduced that in principle provides for a simplified procedure for cross-border disputes which as far as possible relies on a paper-based system. However, the scheme is underused and has revealed some problems, such as language issues, that need more work to redress.[168] Consumers may also be assisted in cross-border contexts by schemes such as the European payment order procedure.[169]

[160] Regulation 2006/2004, Art 8(1).

[161] Regulation 2017/2394 (OJ [2017] L345/1).

[162] COM(2008) 794 final, 27 November 2008, 4.

[163] See now Regulation 1215/2012 (OJ [2012] L351/1) Art 17. Consumers will also benefit from exequatur being abolished so that foreign judgments are automatically enforceable without any special procedure being needed.

[164] For consumer contracts, Regulation 593/2008 (OJ [2008] L177/6) Art 6(2). See also eg Directive 2008/48, Art 22(4); Directive 1999/44, Art 7(2); and Directive 93/13, Art 6(2).

[165] Joined Cases C-585/08 and C-144/09 *Peter Pammer v Reederei Karl Schlüter GmbH & Co KG and Hotel Alpenhof GesmbH v Oliver Heller* [2010] ECR I-12527.

[166] Directive 2002/8 (OJ [2002] L26/41).

[167] Regulation 861/2007 (OJ [2007] L199/1).

[168] X Kramer,'Small Claim, Simple Recovery? The European Small Claims Procedure and Its Implementation in the Member States' (2011) 12 *ERA Forum* 119. See also the Commission report on Regulation 861/2007 (COM (2013) 795, 19 October 2013) and the 2015 amendment of the legislation in light of these issues (Reg 2015/2421, OJ [2015] L 341/1).

[169] Regulation 1896/2006 (OJ [2006] L399/1).

12.3 Alternative dispute resolution

Given the difficulty consumers are likely to face with formal litigation, it is unsurprising that the European Commission has pinned a lot of its hopes on alternative dispute resolution (ADR). It adopted two recommendations on this topic[170] and established a network of advice centres to assist consumers with cross-border disputes (ECC-Net[171] and its financial services counterpart Fin-Net[172]). An important function they have is to channel consumers to appropriate national ADR bodies. A Directive required that Member States at least ensure that ADR procedures are available for all consumer disputes.[173] There is also a Regulation providing for an Online Dispute Resolution platform that seeks to facilitate resolution of disputes and which online traders have to notify their consumers about.[174]

12.4 Collective redress

There has been much talk about collective redress for consumers. This was sparked by proposals in the competition field[175] and at first was taken up with vigour by those within the Commission responsible for consumer protection. A Recommendation in this area dealt with both injunction and compensatory collective redress mechanisms.[176] There is now a proposal to develop the Injunctions Directive so that qualified entities can seek redress orders covering, inter alia, compensation, repair, replacement, price reduction, contract termination, or reimbursement.[177] Courts will also be empowered to issue declaratory decisions where individual redress raises complex questions, unless consumers are identifiable and suffered comparable harm or individual losses were small, in which case redress should be directed to a public purpose.

13 Conclusion

When in 1974 Lord Denning made his famous remarks about European law being, for English law, 'like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back',[178] he was talking about the EEC Treaty and probably would not have foreseen the swathes of secondary legislation which have had a positive tsunami-like effect on national consumer law. For the most part the influence has been positive with EU law allowing the best parts of traditional national consumer law to coexist with the EU imports. Even when it uprooted the UK's venerable Trade Descriptions Act 1968, EU law replaced it with an unfair commercial practices legal regime that is probably better suited to modern trading conditions.

[170] Recommendation 98/257/EC (OJ [1998] L115/31) and Recommendation 2001/310 (OJ [2001] L109/56).

[171] http://ec.europa.eu/consumers/ecc/index_en.htm.

[172] https://ec.europa.eu/info/business-economy-euro/banking-and-finance/consumer-finance-and-payments/retail-financial-services/financial-dispute-resolution-network-fin-net_en.

[173] Directive 2013/11 (OJ [2013] L165/63).

[174] Regulation 524/2013 (OJ L165/1).

[175] SEC(2011) 173 final, 4 February 2011; D Fairgrieve and G Howells, 'Collective Redress Procedures—European Debates' in D Fairgrieve and E Lein (eds), *Extraterritoriality and Collective Redress* (Oxford: Oxford University Press, 2012).

[176] Commission Recommendation 2013/396 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (OJ [2013] L201/60).

[177] COM (2018) 184 final. The Council position on this proposal is set out in Council doc 14600/19, 28 November 2019. The law must still be negotiated with the European Parliament.

[178] *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401, 418.

However, there are concerns that the consumer protection character of EU law is being diluted by an obsession with maximal harmonization that threatens national traditions. This is evident in the desire to extend maximal harmonization to areas of private law such as sale and unfair terms in the face of fierce opposition and, when the Commission was defeated, by the attempt to sidestep the result by proposing the Regulation on a Common European Sales Law. When that Regulation failed the Commission amended a proposal that had originally been limited to online sales to provide maximal harmonization (with some derogations) across all sales contracts. It seems that the persistence of the Commission won out in the end. Consumer law has become connected to broader debates about the internal market and private law reform, but it risks creating the impression that the consumer protection soul has gone out of EU consumer policy. Rather than the focus being consumer protection, consumer protection is increasingly being integrated into broader civil justice and internal market agendas. For the future, new legislative initiatives look likely to focus mainly on addressing issues related to the digital society. Hopefully some of the lessons of behavioural economics may be utilized.[179] However, there is unlikely to be the same flow of substantive reforms, though one area under scrutiny is the relationship between consumers and the environment, as the Commission adopted *Closing the Loop—An Action Plan Towards a Circular Economy*.[180] Instead the emphasis will be on increasing the effectiveness of enforcement so that consumer confidence to shop in other Member States is enhanced and national borders do not act as shields for rogue traders.

Further reading

A de Franceschi (ed), *European Contract Law and the Digital Single Market* (Cambridge: Intersentia, 2016)

A De Franceschi and R Schulze, *Digital Revolution- New Challenges for Law*, (Műnchen:Beck, 2019/Baden-Baden, Nomos, 2019)

S Grundmann, 'The Structure of European Contract Law' (2001) 4 *European Review of Private Law* 505

G Howells and T Wilhelmsson, 'EC and US Approaches to Consumer Protection—Should the Gap be Bridged?'[1997] *Yearbook of European Law* 207

G Howells and T Wilhelmsson, 'EC Consumer Law—Has It Come of Age?' (2003) 28 *European Law Review* 370

G Howells and T Wilhelmsson, *EU Consumer Law* (Aldershot: Ashgate, 1997)

H Micklitz, J Stuyck, and E Terryn (eds), *Casebook on Consumer Law* (Oxford: Hart Publishing, 2010)

H Micklitz, N Reich, and P Rott, *Understanding EU Consumer Law* (Antwerp: Intersentia, 2009)

H Schulte-Nölke, C Twigg-Flesner, and M Ebers, *EU Consumer Law Compendium* (Munich: Sellier, 2008)

R Schulze, 'Precontractual Duties and Conclusion of Contract in European Law' (2005) 6 *European Review of Private Law* 841

[179] There were two interesting applications of this in the Consumer Rights Directive on default tick-boxes (Art 22) and surcharges (Art 19).

[180] COM(2015) 614 final.

P Stone, *EU Private International Law* (2nd edn, Cheltenham: Edward Elgar, 2010)

J Stuyck, 'European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or beyond the Internal Market?' (2000) 37 *Common Market Law Review* 367

C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law* (Cambridge: Cambridge University Press, 2010)

C Twigg-Flesner, *The Europeanisation of Contract Law* (Abingdon: Routledge-Cavendish, 2008)

S Weatherill, *EU Consumer Law and Policy* (Cheltenham: Edward Elgar, 2005)

S Weatherill, 'The Role of the Informed Consumer in European Community Law' (1994) 2 *Consumer Law Journal* 49

T Wilhelmsson, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' (2004) 27 *Journal of Consumer Policy* 317

Chapter acknowledgements

I wish to acknowledge the research help provided by Jonathon Watson.