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Email: eucml.editors@unife.it

Editorial

Ten Years EuCML – Thoughts on Future Tasks

In 10 years, EuCML has turned into the most important journal on European Consumer Law. The Journal thereby benefited from a kind of second boost of EU rule production – after the establishment of EU consumer law in the aftermath of the adoption of the Single European Act in 1986 – through the full harmonisation move and the greening of consumer law in the last two decades, not to forget the steadily growing case-law of the CJEU. The current and forthcoming years appear more challenging, not only due to geopolitical changes enshrined in the plea for 'enhanced competitiveness', but also due to the shifting European focus on regulating the digital economy and realising the green economy. Time to stand and stare, to think about future tasks.

There is no way forward without looking back. Since 1962, the famous speech of President Kennedy, consumer law and policy in Europe have gone through various stages. The *making* took place at the national state level, from which the EU took over after the decline of the welfare states. The *transformation* placed the EU in the driver's seat, broadening consumer law through the integration of consumer policy into services, banking and finance, energy, telecommunications (including electronic communication), transport, and deepening the existing consumer acquis. The greening of the economy challenges the conceptual foundations of the consumer law acquis, the reliance on ever more rights and remedies, without integrating the sensitive question of whether consumers also have responsibilities. The EU digital policy legislation began from the premise that the existing acquis is sufficient to handle potential risks. The Digital Fairness Act, currently under discussion, is likely to be incorporated into an Omnibus regulation containing a limited set of amendments to the Unfair Commercial Practices Directive, the Unfair Terms Directive, and the Consumer Rights Directive, but will not delve deeper into what digital fairness could and should mean. I am witnessing a *decline* of consumer law and policy in the EU agenda through the focus on digital policy legislation, as well as, perhaps more importantly, shattering established legal concepts through the EU digital policy legislation, such as the consumer, the supplier, contract terms, and advertising, thereby triggering deep-seated questions about the future of consumer law and policy.

One of the key issues is undoubtedly the potential applicability of the UCTD, UCPD and GDPR beyond judicial control of the *substance* of standard terms, commercial practices and data privacy policies to *procedural* and *institutional* requirements of what might best be called socio-technical regulation, the infrastructure and the subsurface or more generally socio-technical practices which structure the communication in the digital economy and society. Competition law is ahead of the curve, perhaps due to its more comprehensive approach to the new forms of socio-technical regulation. The same is true for sports law and the law of standards. The CJEU has opened new pathways

that extend beyond substantive review to encompass procedural and institutional dimensions of sports law and the law of technical standards.[1] Consumer advocates will have to test whether and to what extent the UCTD and the UCPD can integrate the subsurface, a field that combines private regulation/ordering and technology. The potential list of questions is long: if technical standards are 'law', does it mean that socio-technical AI standards can be submitted to judicial review, against which benchmark – standard terms, commercial practices and/or data privacy? Only their substance, or also the procedural and institutional dimension? Can the GDPR fill eventual gaps?

The key actors in rule production are private companies. They operate worldwide. The EU digital policy legislation aims at Europeanising international regulation to defend 'core European values' – 'secure, ethical and trustworthy AI' – EU fundamental rights. Tensions are rising between EU policy and international actors, the United States, China, India, as well as between international private organisations such as ISO/IEC, IEEE, and IFRS, and the European standardisation organisations CEN, CENELEC, and ETSI. So far, these tensions have not yet directly impacted the consumer law acquis. Still, they are already governing the application and enforcement of EU digital policy and the EU global value chain regulation. The changing geopolitics have reached the OECD, where the US is attempting to influence the work of the Consumer Committee, which includes representatives of EU member states.

Consumer law and policy do not form part of the core European values. Consumer law is not a fundamental right, but a mere principle. The European Commission is not actively promoting the export of the EU consumer law acquis to South America, Africa, and Asia. The EU is nevertheless playing a key role within UCTAD, the UN body responsible for implementing the UN Consumer Guidelines. The gradual collapse of the post-war international economic order, as enshrined in GATT and WTO, requires a reorientation of the EU's trade policy, of which EU consumer law forms a part. Nable gazing and defence of the consumer law acquis against external economic and political pressure do not do justice to the complexity of the questions that surround the debate of EU neo-colonialism and the divide between the Global South and the Global North. EU consumer law and policy need to be integrated into the emerging new international economic order, in which the US, China, India, and Russia will play a key role, and where Europe still needs to find its place, not to mention the involvement of the Global South. Geopolitics requires taking non-European consumer laws and policies more seriously, Europe as a learner and not as the civil hegemon. Mutual learning might allow a self-critical stock-taking, analysing the effects and efficiency of EU legislation not only within the EU but also beyond its territory.

The globalisation of EU consumer law – to paraphrase *de Sousa Santos*[2] – calls equally for its localisation, considering the impact of EU consumer law on the legal orders of the Member States, and not only on their legal orders, but also on their different regions. The move towards full harmonisation is a move away from self-standing national legal orders. This is most evident in the decline of comparative law in the EU law-making process. The European Commission is no longer monitoring and supervising the implementation of the remaining consumer law directives into national law. Transforming the already detailed directives into regulations seems a logical consequence, rendering supervision of implementation superfluous. The bulk of the preliminary references comes from a few Member States. The judgments of the CJEU, although theoretically meant to guide all Member States in the interpretation of EU law, are primarily discussed in the countries where the reference originates. The considerable knowledge gap between the vast number of sophisticated EU rules, including the judgments of the CJEU, and their practical relevance in the Member States' legal orders requires more scholarly attention.[3] EU consumer law may gradually diverge from national private laws and, consequently, from the people in the Member States.

1 Rodrigo Vallejo, The Private Administrative Law of Technical Standardisation, Yearbook of European Law, Volume 40, 2021, Pages 172–229, https://doi.org/10.1093/yel/yeab011; Sarah Hinck, Technological Rule-Setting Power of Digital Platform Ecosystems – Code is Law Revisited, forthcoming on file with the author.

2 B. de Sousa Santos, 'Law: A Map of Misreading: Toward a Postmodern Conception of Law' (1987) 14 Journal of Law and Society 279-302

3 Promising A. De Franceschi/R. Schulze (eds.) Harmonising Digital Contract Law, 2023, which covers 27 national reports and a comparative analysis.

More complicated is the debate about the centre and the periphery, the old West and the new East. The EU has made membership conditional on the acceptance of the Acquis Communautaire. For many years, candidate states and their ministries and parliaments have been preoccupied with law production. Until today, there is little knowledge available on how the acquis affected their private law systems. Lehman Brothers and the Euro crisis heavily affected them. The old Member States discovered EU law through market freedoms, which companies used to challenge national legislative barriers to trade. The new Member States recognised EU consumer law as a tool to protect their consumers against the disastrous impact of ever-rising interest rates on Swiss currency loans after the great financial crisis. However, before 2004, the new Member States did not participate in the elaboration and conceptualisation of the consumer law acquis. More than thirty years later, a more sophisticated analysis of the West-East scenario is necessary. It suffices to recall the regions suffering from the decline and vanishing of the coal and steel industry. The tensions are no longer (solely) between the West and the East, the Old and the New, but between the economically blossoming centres – the major European cities and the forgotten countryside.

The EU's sustainability and digital policy regulations are bridging the potential differences between the West and the East, more importantly, between the richer and poorer regions, as they establish universal rules that, prima facie, impact all companies and citizens in Europe equally. The EU legislative response is to protect small and medium-sized (European) companies against the larger, more powerful (international) companies located outside the EU. SMEs are said to be the new consumers. The weaker party is no longer the consumer of the 1960s, but the vulnerable. This category encompasses the acquis, now complemented by two conventions on minors and disabled people, as well as the discriminated. The EU's sustainability rules are still lagging, most prominently on the integration of vulnerabilities. Scholarship and courts will have to operationalise the concept of 'vulnerability' so that it can be integrated into the interpretation of the law.

There is a more profound shift behind the sustainability and digital policy legislation, away from public regulation towards a double privatisation, involving the production and enforcement of rules. This shift shatters the rule of law. In rule production, the EU relies on harmonised European standards for sustainable products and AI, as well as codes of conduct and codes of practice partly approved by the European Commission. This is private regulation, or, more accurately, private ordering, at its finest. The rule-making actors are no longer political authorities, such as European and national Parliaments, but business organisations, standardisation bodies, sector-related business associations, or simply leading businesses. These private bodies borrow legitimacy through the participation of stakeholders from civil society. The EU legislator promotes the integration of civil society, albeit hesitantly and weakly. The European Commission is granted the power to exercise control over access to and participation in rule-making. The democratic institutions, the European and national Parliaments and the Member States are not involved in the rule-making process. Their role is limited to ex post approval. The privatisation neatly continues in the enforcement of private regulation/ordering. Under the Treaty, enforcement rests with the Member States. On the surface, the EU legislature respects the division of competence. The result is hundreds of competent national authorities. In finance and platform regulation, the European Commission has the authority to take regulatory actions. In sustainability and digitisation, public enforcement is complemented – or substituted (?) through self- and third-party compliance. Private actors must document compliance with the vast array of due diligence obligations either directly or through certification bodies and/or auditing companies. Enforcement authorities must supervise and monitor compliance documents, to which private parties and potential litigants have no access. In theory, the public authorities may take action outside and beyond compliance. In practice, such ex officio activities require considerable skills and resources, which only a minority of Member States' authorities will have. Private litigation will play a key role in enforcing the digital and sustainable consumer law acquis.

The quite dramatic move in EU legislation triggers theoretical, methodological and doctrinal opportunities to rethink the future of consumer law. Theoretically, the question is whether the ever-broader and ever-deeper consumer law necessitates revisiting the old debate on social, private, or perhaps even

better, civil law. The experiences of the last decades might allow scholars to distil out of successful and effective tools generally acceptable civil law principles and concepts. Methodologically, consumer research should not fall into what *Herbert Marcuse*[4] called the empiricism trap —the risk that total empiricism prevents scholars from engaging in deep thinking. Driven by the EU and accepted by the Member States, policy-making is claimed to be based on evidence. However, sometimes it appears that consultancy firms produce evidence to justify and legitimise predetermined political decisions. More importantly, the digitisation of the economy and society is enhancing empirical research without theoretical grounding.[5] Doctrinally, the double privatisation has to be integrated into existing legal concepts. The urgent need allows scholars to benefit from the experimental tools the CJEU is developing and testing not only in consumer law. Here is ample room for innovative doctrinal pathways.

The long list of issues raised is far from being complete. Different scholars have different ideas and proposals. I would like to encourage the EuCML editing board to launch calls for papers to initiate debates on the issues I raised or on those they believe to be relevant. There appears to be a scholarly consensus that EU consumer law is under pressure. One might also wonder whether the EuCML needs to be renamed to integrate the international, national, and local dimensions of consumer law into the strong EU focus.

*Hans-W. Micklitz**

4 The radical empiricist onslaught (..) thus provides the methodological justification for the debunking of the mind by the intellectuals, a positivism which, in its denial of the transcending elements of Reason, forms the academic counterpart of the socially required behaviour Marcuse, One-Dimensional Man, 1964, at 15.
5 A. Nassehi, Muster – Theorie der digitalen Gesellschaft, 2021, in English Patters, Theory of the digital Society, 2024.
* Prof. Dr. Hans-W. Micklitz, European University Institute, email: Hans.Micklitz@eui.eu.