

From the Board

Forty Years of EU Consumer Protection: Where Does It Stand Now?

It is almost forty years ago to the day that the then European Community adopted its first Consumer Protection Programme on 14 April 1975.¹ This Preliminary Programme recognized that the needs of consumers required special consideration in the development of the European Economic Community (EEC). Accordingly, it summed up consumer interests through a statement of five basic rights that followed President Kennedy's famous message to the US Congress in 1962.²

This was the first time that the EEC specifically addressed consumer interests. The Treaty of Rome did not provide a specific legal basis for consumer protection and it made only a few references to the position of the consumer.³ Although consumer interests were gradually addressed by the EEC in the 1970s, it remained unclear whether the Community had competence to take specific measures of consumer protection. But after the first programme, the European Commission actively engaged in creating consumer law and policy even though there was no specific legal basis in the EEC Treaty.

It was with the adoption of the Single European Act in 1985 that consumer protection was formally recognized with a legislative basis that was laid down in Article 100a EEC (later Article 95 EC and now Article 114 Treaty on the Functioning of the European Union (TFEU)) even though this constitutionally anchored it within the internal market legislative framework. A Second Action Plan was adopted in 1981⁴ and from then on the Commission became the driving force for consumer protection in the Community⁵ and also behind the

¹ OJ 1975, C 92/1

² 93 – Special Message to the Congress on Protecting the Consumer Interest. 15 Mar. 1962. The right to health and safety protection, the right to protection of economic interests, the right of redress, the right to information and education and the right of representation (the right to be heard).

³ In fact, the word 'consumer' was only used in two places: as one of the several beneficiaries of a common agricultural policy Arts 39 and 40 EEC (now Arts 38–44 TFEU) and in the field of competition Art. 85 EEC (now Art. 101 TFEU).

⁴ OJ 1981, C 133/1 It repeated the five fundamental consumer rights and emphasizing the relevance of their effective exercise.

⁵ The Council Resolution of 23 Jun. 1986 further underlined the significance of a high level of consumer protection, especially in terms of quality and safety and stressed the relevance of information and education of consumers in order to enable them to benefit from the completion of the internal market. OJ 1987 C3/1.

development of national consumer laws. In the 1990s consumer protection was established as an autonomous area of EU law and policy with the adoption of the Maastricht and Amsterdam Treaties. As the case of the Product Liability Directive illustrated, the Commission not only took up the task of shaping and creating consumer law but it also turned this policy area into a significant constituent of the European integration process.⁶ This intimate relationship with the internal market has, in fact remained unchanged even with the adoption of the Lisbon Treaty and the implementation of Articles 12 and 169 TFEU.⁷

This is not the place to extensively analyse the law and policy that the EU created throughout the past forty years, but a short reflection on how the regulatory landscape has changed and shaped the role consumers play in the European integration process does reflect on where EU consumer law stands today.

It has often been emphasized that European consumer law and policy developed in the shadow of a strong integration process and consumer law was merely a by-product of the common market program. Its underlying rationale was to create a 'level playing field' and a common set of rules for business in order to take advantage of the internal market. The harmonization of consumer rules was thus not an end in itself.⁸ EU consumer law has been characterized as instrumental⁹ to the completion of the internal market and this has significantly influenced its protective function, shifting the European normative concept closer to free market mechanisms than social policy concepts.

This regulatory approach has gained a new impetus as global economic restructuring processes and technological changes expanded consumer markets and the emerging deregulatory policies began to address consumers as active market actors. The government's position became decentralized by shifting regulatory

⁶ In many of the Member States product liability had been on the agenda since the 1960s. Shortly after the acceptance of the EC's first consumer programme, the Commission took over the political initiative and made an attempt to combine the different national regulations. The Directive on product liability started the process of delegating consumer policy issues in the area of private law away from Member States to the European Commission.

⁷ Article 12 TFEU reads 'consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities'. The Lisbon Treaty has not brought any changes either in relation to the extent of the competence of the EU nor regarding the legislative procedure that is applicable in Art. 169 TFEU. The legislative procedure that applied under Arts 114 and 169 TFEU is the co-decision procedure, post-Lisbon called the ordinary legislative procedure.

⁸ Most of the directives were based on Art. 114 TFEU and thus their stated rationale was to combat market fragmentation. Early directives regulated misleading advertising, doorstep selling, consumer credit, package travel, distance selling. S. Weatherill, *Justifying Limits to Part Autonomy in the Internal Market – EC Legislation in the Field of Consumer Protection*, in *Party Autonomy and the Role of Information in the Internal Market* (S. Grundman, W. Kerber & S. Weatherill eds, de Gruyter 2001).

⁹ H.-W. Micklitz, *An Expanded and Systemized Community Consumer Law as Alternative or Complement?*, 13 EBLR 583–598 (2002).

powers from the state to, among others, consumers.¹⁰ The state's protective role was rolled back and consumers were put in the driving seat of market regulation.

The new regulatory architecture positions consumers as influential market actors who can directly regulate firm behaviour and indirectly influence market performances. Public policies shifted a certain degree of accountability to consumers as market actors who actively search markets, monitor firms and switch providers and who may even drive out dishonest, incompetent firms. Their purchasing decisions are key to the proper functioning of markets: they, in fact, regulate markets. In this regulatory role, consumers even bear a certain degree of accountability for this new market governance model, which builds on the consumers' active participation in the markets and their contribution to both the competitiveness and the legitimacy of market processes.¹¹

This new 'regulatory' role of the consumer is present in various new regulatory architectures in the telecommunications, the energy market, as well as in many areas of the so-called sharing economy.¹²

In the EU, marketization of public services led to a new set of consumer rules in the European public utilities sectors. Consumers have been entrusted with public law tasks such as activating competition, contributing to energy efficiency or realizing a digital single market.¹³

For example, the Commission's recent Communication on the Energy Union set the goal of giving EU consumers – households and businesses – secure, sustainable, competitive and affordable energy, where citizens take ownership of the energy transition, benefit from new technologies to reduce their bills and participate actively in the market.¹⁴

¹⁰ De- and re-regulation led to so-called de-centred regulation, where governments share regulatory powers with international and national organizations, independent agencies, NGOs and individuals, i.e., consumers. J. Black, *'Decentring Regulation: Understanding the Role of Regulation and Self-regulation in a "Post-regulatory" World'*, 54 *Current Leg. Probs* (2001).

¹¹ In fact, regulators use regulatory functions and consumers' purchasing power as the source of justifying and legitimizing the market processes. T. Williams, *Empowerment of Whom and for What? Financial Literacy Education and the New Regulation of Consumer Financial Services*, 29 *L. & Pol.* 226–256 (2007).

¹² Sharing economy is defined as companies who deploy accessibility based business models for peer-to-peer markets and its user communities. This type of business model is not limited to specific industry sectors, because it can, in theory, act as a broker between consumers, for any consumer owned product or service. Whereas in the conventional situation consumers would buy products and become the owners, in an accessibility-based system consumers pay for temporary access-rights to a product. Business Innovation Observatory, *The sharing economy, case study 12*, EU, Sep. 2013, available: http://ec.europa.eu/enterprise/policies/innovation/policy/business-innovation-observatory/files/case-studies/12-she-accessibility-based-business-models-for-peer-to-peer-markets_en.pdf

¹³ V. Jourová, Speech – 16 Mar. 2015, Putting the consumer at the centre: More freedom, more rights, more choice, available at: ec.europa.eu/commission/2014-2019/jourova/announcements/putting-consumer-centre-more-freedom-more-rights-more-choice_en.

¹⁴ The Commission plans to prepare an ambitious legislative proposal among others to enable full participation of consumers in the market notably through demand response. European Commission,

Accordingly, the emerging consumer rules are based on public law goals of competition, market regulation and EU integration. This is a new 'horizontal' regime of consumer (contract) law, which consists of regulatory law to complete the internal market and strengthen competition.¹⁵

This new regulatory approach reveals a number of challenges for the forty year old EU consumer law. First of all, the public policy discourse on consumers' accountability for regulating markets conflicts with their legal position and behavioural limitations to fulfil this role.¹⁶

EU public policies moved from addressing consumers as passive beneficiaries of free trade and market integration to (pro)active drivers of European integration. However, the active or even pro-active role of consumers has not been implemented in legal provisions. It can be questioned whether the existing normative concept of the 'average' consumer¹⁷ as developed in the Courts' case law and the definition of the consumer¹⁸ as laid down in the consumer law Directives and the numerous information provisions do in fact provide the appropriate legal framework for exercising these roles.

For example, consumers may adopt various roles in markets such as prosumers in the energy markets who not only consume but also produce energy.¹⁹ Consumers may also more frequently enter so-called mixed transactions.²⁰ For these situations EU law is not yet inclusive enough.

Energy Union Package, A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM(2015) 080 final.

¹⁵ While this regulatory law addresses the consumers it, in fact, transcends the internal relationship between producers or service providers and consumers to the external dimension of the well-functioning of markets. Reich, N. *Harmonisation of European Contract Law: With Special Emphasis on Consumer Law*, 1 China-EU L.J. 55–94, 71 (2011).

¹⁶ *A European Consumer Agenda – Boosting confidence and growth . . .* Consumer policy as an essential contribution to Europe 2020 COM(2012) 225 final.

¹⁷ The normative concept of the EU consumer developed in the CJEU's free movement case law. According to this jurisprudence EU law relies on the benchmark of an 'average consumer', who is a well-informed, reasonable and circumspect market actor. This concept puts the emphasis on consumers' ability to process and use information and therefore it has given preference to rules that require information disclosure instead of intervention in the market.

¹⁸ It has often been questioned, whether the definition should be widely or narrowly construed. The narrow notion defines consumers as natural persons acting for purposes outside their trade, business or profession. The wider concept defines consumers as natural persons acting primarily outside their trade. The definition of the consumer is relevant as it provides who can rely on consumer protection rules and thus it represents the underlying regulatory model. The CJEU (the Court of Justice of the European Union) has consistently held that the definition of the consumer should be narrowly interpreted. The Consumer Rights Directive also implemented a narrow definition in Art. 2(1).

¹⁹ S. Pront-van Bommel (2011). *De elektriciteitsconsument centraal?* In S. Pront-van Bommel (Ed.), *De consument en de andere kant van de elektriciteitsmarkt: inleidingen op het openingscongres van het Centrum voor Energievraagstukken Universiteit van Amsterdam op 27 januari 2010* (pp. 18–61).

²⁰ This consumer definition is problematic in so-called mixed transactions or dual purpose contracts, where the contracting party acts both for professional and personal purposes, for example self-employed persons buy objects for both professional and personal use such as a computer.

Regulatory approaches developed from consumer protection towards consumer empowerment stressing the relevance of information provisions and consumers' active participation in markets in order to realize the public policy goals. The Commission has frequently emphasized that confident, informed and empowered consumers are the motor of economic change as their choices drive innovation and efficiency.²¹ Commissioner Jourová very recently stressed the relevance of a 'consumer-centred European economy'.²²

However, at the moment EU consumer law is a 'vertical' regime limited to contract law and not at public law goals of market regulation. It builds on the internal relationship between consumers and business and on general EU law concepts such as the normative concept of the 'average' consumer. These concepts reflect the role a consumer may adopt in a specific transaction, but not the external goal of regulating markets.²³ Additionally, the widening of consumer markets, technological developments have significantly increased the amount and complexity of information consumers have to process when entering transactions in the global marketplace. The empirical research emerging from behavioural economics questioned both the behavioural model of the rational consumer as well as the underlying regulatory framework.²⁴ Regulatory approaches implementing behavioural economics have been developed question the effectiveness of information disclosure and instead argued for implementation of so-called choice architectures framing consumer decision making.²⁵

²¹ A *European Consumer Agenda* – Boosting confidence and growth . . . Consumer policy as an essential contribution to Europe 2020 COM(2012) 225 final; Commission Staff Working document on knowledge-enhancing aspects of consumers empowerment 2012–2014 SWD(2012)235 final, 19 Jul 2012.

²² V. Jourová, Speech – 16 Mar. 2015, Putting the consumer at the centre: More freedom, more rights, more choice, available at: ec.europa.eu/commission/2014-2019/jourova/announcements/putting-consumer-centre-more-freedom-more-rights-more-choice_en.

²³ N. Reich, *Harmonisation of European Contract Law: With Special Emphasis on Consumer Law*, 1 China-EU Law Journal, 55–94, at 71 (2011).

²⁴ This stream of economics points to the institutional constraints on individual choice by showing how individuals make decisions and respond to law and policy. Behavioural economics demonstrates that consumer decision making is affected by several biases and heuristics, such as bounded rationality and information overload, risk perception biases, self-serving biases, status quo biases, time-related biases, contexts and framing, anchoring and adjustment, and bounded will-power make individuals to deviate from rational choice. It deals with these endogenous aspects of consumer decision-making and provide empirical evidence on consumers' imperfect information processing skills. Empirical research shows that consumers either do not use or only limitedly use the information at their disposal. D. Kahneman & Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 *Econometrica*, 263–292 (1979); D. Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 5 *Am. Econ. Rev.* 1449–1475 (2003). G.F. Loewenstein, 'Emotions in Economic Theory and Economic Behavior', 2 *Am. Econ. Rev., Papers and Proceedings* 426–432 (2009).

²⁵ For example, soft paternalism nudges individuals into welfare enhancing decisions without imposing a particular choice on individual consumers. When biases, heuristics and non-rational influences on behaviour render individual consumer decision-making suboptimal, light handed intervention strategies may enhance these decisions. Individuals can be de-biased, nudged into rational decisions by

These issues signal a growing gap between policy and law and may lead to regulatory ineffectiveness and legal uncertainty. These concerns also call for a conceptual reflection on the present body and goal of EU consumer law. This reflection would encompass integrating the horizontal and vertical regimes and reviewing the normative concept and definition of consumer accordingly. If anything, such an approach may indeed be the next phase of the consumer law of the EU single market. This is, in fact, what Kennedy's 1962 speech formulated as '[T]he march of technology – affecting, for example, the foods we eat, the medicines we take, and the many appliances we use in our homes – has increased the difficulties of the consumer along with his opportunities; and it has outmoded many of the old laws and regulations and made new legislation necessary.'

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for instance providing less and better information. 'Nudges' is an acronym which stands for six subtle methods for improving choice, devising a good choice architecture: incentives, Understanding mappings, Defaults, Giving feedback, Expecting errors, and Structuring complex choices. See R.H. Thaler & C.R. Sunstein (2008) *Nudge Improving Decisions about Health, Wealth and Happiness* (Yale U. Press 2008); H. Luth, H. *Behavioural Economics of Consumer Policy, The Economic Analysis of Standard Terms in Consumer Contracts Revisited*, (Intersentia 2010).