Norbert Reich
Diverse Approaches to Consumer Protection Philosophy

ABSTRACT. The paper distinguishes different approaches to consumer protection theory, namely pre-interventionist, interventionist, and post-interventionist. Developed market economies are undergoing a mixed rationality of consumer protection based upon a certain level of "acquis consommateur," especially with respect to information type remedies in consumer transactions. On the other hand, self-regulation as well as regulations based on a need concept have failed to be successful alternatives. Finally, the author discusses the consequences of an emerging body of autonomous consumer law for commercial transactions, representation of collective consumer interests, and environmental protection.

The topic to be covered in this paper is extremely broad; one should not expect a complete evaluation of different trends in the consumer impetus. It is almost impossible to cover the ever growing mound of literature on consumer protection problems in different countries. It is quite impossible to survey developments in legislation and case law, be it only for one country. Consumer protection aspects have now been introduced in so many areas of law that it is hard to find out where specific consumer concerns begin and where traditional standards are merely extended. Consumer protection issues have become more and more internationalised, especially within the EC and, lately, the OECD and the United Nations.

This paper has less ambitious goals:

1. To distinguish diverse approaches, which will be called *pre-interventionist* (the paradigm in developed market economies in the fifties and *sixties*), *interventionist* (*seventies*), and *post-interventionist* (*eighties*) consumer protection philosophy, as a means of finding both the "acquis consommateur" and new objects of theoretical research as well as practical solutions;
2. To draw parallels to developments in commercial law in order to allow for a closer discussion of interrelated trends.

Before developing points for reflection, there are several *caveats*. In distinguishing different paradigms of consumer protection philosophy, one should be well aware of the danger of over-simplifica-

Journal of Consumer Policy **14**: 257—292, 1992.

tion. These paradigms are used to re-direct thinking, not necessarily to describe reality.

This paper is not intended to meet the criteria of comparative legal research. It will use laws and cases only to illustrate a point. It will concentrate on developments in the EC and the Member States, most notably in German law, without denying the importance of developments in other developed countries. Problems of consumer safety and health legislation must be left out because they should be discussed in relation to product liability. Instead, this paper will focus on *economic* aspects of consumer protection.

Finally, it should be mentioned that the remarks apply only to a limited extent to developing countries where the basic needs of consumers are not yet met. Access to consumption, not consumer protection is the central problem there. This applies to some extent also to former socialist countries which are in a stage of transition to market economies where no verifiable results as to consumer protection can be reported yet even though some of them, like the former Soviet Union, have now adopted consumer legislation.[1]

PRE-INTERVENTIONIST CONSUMER PROTECTION PHILOSOPHY

Pre-interventionist consumer protection theory, and hence consumer protection law, developed from commercial and competition law (cf. Goldring, 1990). It critically analysed some basic presuppositions of civil law, like freedom of contract, *caveat emptor*, fault liability, etc.

It proposed "mild" solutions without imposing content-related standards into contractual relations, which of course had to be fitted into the diverse legal traditions. Two main trends and one "counter-movement" can be noted.

Information

Information was seen as the prime instrument for improving consumer autonomy, and hence the position of the consumer in legal, mostly contractual relations. Freedom of contract had to be reinstalled in favour of the consumer, thereby allowing an optimal allocation of resources whilst adhering to the basic principles of contract law. The classical remedies against deception, misrepresentation, etc., had to be reinforced and made more effective. Consumer

autonomy could also be increased by self-help information systems, like comparative testing and product criticism, and by government-monitored information systems, like labelling of products and, to a lesser extent, services.

In an important theoretical book on consumer protection which has considerably influenced German thinking, Konstantin Simitis (1976; cf. Reich, Tonner, & Wegener, 1976, pp. 19—25) has critically analysed this "Informationsmodell" of consumer protection.

Competition

In this context, *competition* was regarded as the "consumer's best friend" (v. Hippel, 1985, p. 146). Competition theory, based on models of workable competition, insisted on the improvement of consumer welfare as one of the objectives of competition policy. Kantzenbach (1967), a leading German microeconomist, won popular support with his adaptation of American workability concepts to European, especially German and EC competition policies. Competition policy did not focus merely on a model of "atomistic competition" or price theory, but on an overall functioning of markets, including technical progress, income distribution, and consumer welfare. It was satisfied with the existence of oligopolistic markets with a certain amount of product differentiation if they served overall consumer welfare. Price competition was not regarded as the prime objective of antitrust law, provided that other competitive mechanisms operated well, especially in the interest of technical progress (Reich, 1977, pp. 40—41). The Court of Justice of the European Communities (CJEC) has used this approach in justifying, e.g., selective distribution systems based on "objective, qualitative criteria."[2]

Planning

This analysis is incomplete insofar as many countries of the EC, e.g., France, Italy, Belgium, and the Netherlands, had rejected the competition model of consumer protection and preferred government monitored "planned-competition" systems, which catered for price control, quality control, etc. Competition law has, until recently, been traditionally weak in these countries. Many of its functions, such as guaranteeing fair prices, optimizing supply of goods and services,

etc., had long since been taken over by government price control systems. This tradition can hardly be called "pre-interventionist" since it presupposes an active role of the state in the economy. The state in the Colbert-like French tradition of regulating the economy did not specifically intervene in the interest of the consumer, but tried to safeguard the overall functioning of the economy, like income distribution, industrial and employment policy, balance of trade, protection of small traders, etc., by selectively using both elements of competition and of planning (for a critique, see Lipietz, 1984). Consumer aspects were just one (small) part of state intervention under this model. It can be shown that, under EC pressure, economic regulation based on the French model became and becomes more and more deregulated, and competition policy assumes its place (Galmot & Biancarelli, 1985; Reich & Leahy, 1990, pp. 43—50, 160—165). In these countries too, consumer policy has become more and more important.

A content analysis of the protective measures taken could show whether the paradigms used in this paper also apply to the French model of consumer protection.

THE INTERVENTIONIST APPROACH TO CONSUMER PROTECTION PHILOSOPHY

Characteristics

In using the label "interventionist" or "regulatory" approach, this writer is not trying to impose a value judgement in the positive or negative sense. The interventionist approach to consumer protection, similar to many other areas of social policy, is based upon a more activist state role in social relations. The "welfare state" ("Etat providence", "Sozialstaat") had to control and eventually to change the classical principles of freedom of contract, competition, and fault liability which are seen as mechanisms discriminating against consumers (and other "weaker" persons or groups in society, like tenants, small traders, and so on) (v. Hippel, 1982). The more activist role of the state was justified in three areas of thinking:

Welfare economics insisted on dealing with power aspects in market transactions and with externalities. This justified interventions in favour of the consumer, for instance, in trying to reestablish

bargaining power by compensatory mechanisms like imposing warranties or forbidding exemption clauses (FTC, 1980; cf. Reich, 1984a; Ramsay, 1985). Competition had to be regulated in order to fulfil the promises of workability.

Market failures became the justification for state intervention. The welfare state did not only promise a global approach to the economy in the Keynesian sense of demand side economics but also the imposition of certain standards on market transactions. The regulatory state had to grant "basic rights to consumers," like the right of safety and health, the protection against unequal bargaining power, the right of access to justice, and the right to participation (v. Hippel, 1986, pp. 218—219). These rights were first formulated by Kennedy's famous presidential message in 1962, were written into consumer action programmes of political bodies like the OECD, the Council of Europe, and the EC (Reich, 1992), were put into constitutions such as the Spanish (Uriarte Bofarull, 1985; Quintela Goncalves, 1986), and became the working basis for international organisations like the UN guidelines on consumer protection (Harland, 1987).

The *caveat emptor* principle of contract law, till then "mildly" corrected by certain information duties and by an active competition policy, was criticised mostly for reasons of *equity*. It should be noted that interventionism was characterised by a remarkable harmony between economic, political, and legal thinking: A basically *normative* discourse on different levels agreed on a reshaping of contractual relations in order to improve the position of the consumer.

Interventionism, at least as seen in the German discussion of the seventies and in several EC proposals of that time, has led to a set of new legal rules and arrangements trying to change the *caveat emptor* principle. Therefore, contract law banned exemption clauses and imposed certain minimum standards on contractual relations, e.g., warranties, rights of withdrawal. Product liability changed from negligence to strict liability. Competition law introduced "performance tests," thus giving rise to, e.g., controls on excessive prices and profits, and to limits on product differentiation through trade marks (for an overview of measures taken in the EC countries, cf. Reich & Micklitz, 1979).

Critique of Interventionism by Economic Analysis of Law

The economic analysis of law (EAL), also known as the "new

economics," criticised some fundamental assumptions of regulation based upon welfare economics. It radicalised the efficiency criteria which had always been a part of microeconomics and made it the only guideline in evaluating legal rules. Its theoretical starting point is the "Coase theorem" (1960; for a critique, cf. Duggan, 1982) which with some simplification basically says that, provided there are no transaction costs, the parties involved will find the optimal allocation of property rights through voluntary exchange, notwithstanding their original distribution. The legal policy consequences of the Coase theorem were far reaching: Legal rules should only influence the *distribution* of property rights, while the allocation of resources be left to the parties themselves, provided that there are no transaction costs due, e.g., to the existence of information deficits (Schäfer & Ott, 1986, pp. 70—79). Interventionism therefore prevents an efficient allocation of resources and should be avoided.

The EAL discussion has somewhat neglected the fact that the Coase theorem can be used not only to make the case against regulations, but also to justify them for consumer protection reasons in cases of market failures or deficiencies, with the aim of minimising transaction costs and distributing property rights equitably.

Some adherents of the EAL, such as Posner (1977, pp. 11, 271; 1986, pp. 348—350) have gone much further than the Coase theorem in that they regard legal interventions beyond common law remedies as merely disturbing autonomous arrangements. Even information-type regulations, well-known in "pre-interventionist" consumer protection philosophy, were criticised because they provoke free-riding and oblige traders to provide unnecessary information. Consumers needing information will pay for it if there are specific "information markets", such as in comparative product testing; those not wanting it will come under the *caveat emptor* rule (Posner, 1969; Stigler, 1961). Other authors did not go so far because information type regulations save transaction costs and therefore make resource allocation much more efficient (Ippolito & Scheffman, 1986). All EAL adherents agreed that, if regulations are necessary, they should minimise transaction costs, i.e., by producing information and handling claims speedily, but leave allocation to the parties themselves. Criticism was voiced against economic regulation, notably concerning entry into certain protected markets like transportation or banking.

On the other hand, EAL rejected the *power distribution* argument

in consumer transactions for justifying interventions because the criteria were too vague and could not be empirically corroborated. If there is competition in the market in the limited sense of an absence of horizontal restraints on interbrand competition, the consumer is always free to choose whatever s/he needs or to opt out of the market. The power problem was reduced to a monopoly situation (Posner, 1986, pp. 9, 13). Her/his "willingness to pay" guarantees competition and thereby an efficient allocation of resources within the ambit of consumer protection. Specific remedies are an unnecessary intrusion into the consumer's autonomous decision-making and usually produce additional transaction costs: "There is no such thing as a free lunch"! Problems of equity and income distribution should not form part of competition policy and of economic analysis of law in general.

The shortcomings of the EAL model of consumer protection have been described many times (Henning-Bodewig & Kur, 1988, pp. 127—147; Kelman, 1979; Schmidt & Rittaler, 1986). This paper will merely summarise some results of this discussion. Many critical analysts of regulatory activities are certainly right in so far as they emphasise certain regulatory failures, for instance as activities impose unnecessary costs on enterprises without really helping the consumer, and provoke free-riding. But the EAL analysis is grounded not so much in an economic as in a *normative* perspective. Certain values become reified, others are neglected. If one considers consumer transactions only by criteria of efficiency, one might easily come to the conclusion that *caveat emptor* is a very "efficient" rule: It sees the consumer as the "cheapest cost avoider," who, if s/he is not deceived, can avoid damage by being careful or by not buying a certain good or service and it deters people from behaving opportunistically towards the contracting party (Posner, 1986, pp. 79—85). But one could also argue that *caveat emptor* may be inefficient if there are information barriers, as Akerlof (1970) has shown with the "market for lemons": If quality cannot be measured and if consumers are unaware of risks, only "lemon markets" will survive because "the good trader" faces disincentives to offer quality.

Crisis of the Welfare State?

The second type of criticism was developed by *political theory*. It insisted on so-called *overstrains* of the welfare state. This criticism

could come from neo-marxist or from neo-liberal authors or from adherents to system theory (for an overview, cf. Reich, 1984b). Although starting from different theoretical suppositions, all agreed that government, especially in times of economic crisis, had overstrained its scarce resources of power and legitimacy by intervening in different areas of social disputes. Their solution should be left to class-struggle, autonomy, or self-regulation, depending on the theory advocated. This criticism of the regulatory state was not limited to consumer protection philosophy, but certainly had a decisive impact on it. The state was to withdraw from areas which it had subjected to its grip.

This type of thinking found a well-known parallel in the Habermasian concept of "colonialisation of life-worlds" and the Luhmann concept of "autopoiesis" (Teubner, 1990). Both theorists insisted on the necessity of relieving autonomous social areas from the imperialism of state intervention. The authors, however, differed as to what areas were meant. Habermas, e.g., was not concerned with regulations of economic behaviour to protect the weak (like in labour or consumer law), but rather with the imperialism of state interventions destroying "life worlds," as in education or family relations. Luhmann, on the other hand, pointed to structural deficits of state intervention in the economy because the two systems followed different patterns: The economy was governed by the rule of money and could — as an autopoietic system — only understand its signals, while the state had recourse to power and law to establish norms, both of which were mere "environment" to the economic system. Teubner (1983) tried to merge these theoretical ideas by developing the concept of reflexive law (cf. for a critique Reich, 1988) which was opposed to interventionist, substantive law and insisted on a withdrawal of state and law from certain interventions including consumer law. Semi-autonomous arrangements should take over part of the role of government, like collective bargaining in labour law and government monitored codes of conduct with some consumer participation in the field of consumer law.

General or Special Private Law Theories?

A very specific criticism of consumer protection philosophy has arisen in German legal thinking and has no parallel in other legal orders. It is a criticism of so-called "Sonderprivatrechte." It is diffi-

cult to translate this notion into English because there is no equivalent in common law thinking. This criticism is closely related to the continental model of codified civil law. German and, to some extent, also French legal theory have seen the Civil Code not only as a conglomerate of legal rules coming from different sources and being put together in a systematic way, but as a basic pattern ("Strukturmodell") of civil transactions under the rules of freedom of contract and formal equality of legal subjects. The unity of civil law meant that every legal subject should be submitted to the same rules, unless specific notions of trade justified certain exceptions as a means of facilitating commercial transactions. Therefore, a special commercial code has not been regarded as a contradiction to the unity of civil law. On the other hand, any attempt to carve out from civil law separate legal orders like labour law, consumer law, landlord and tenant law has been criticised as putting strains upon the unity of the legal system. It was feared that the ruling principles of civil law, like freedom of contract, equality of legal subjects and fault liability would no longer be admitted in separate legal orders (Dauner-Lieb, 1983; for a more moderate view, cf. Westermann, 1978; for a discussion, cf. Brüggemeier & Hart, 1987).

This criticism was justified in so far as interventionism in law has segregated specific legal orders from the civil code without always developing convincing criteria as to why it did so (Joerges, 1981). Intervention was also limited to consumer transactions without having regard to the "spin-off"-effects in commercial law.

On the other hand, every protective piece of legislation, using whatever criteria, needs to specify its field of application and therefore to create separate spheres of law — a development well known in labour law. This specification was done either by the legislator or by courts or by legal thinking. Common law countries with their more pragmatic approach to the legal system have had few problems with this process and have had little discussion about "Sonderprivatrechte." Continental law has accepted long ago the separation of commercial from civil law; certain basic standards of protection are not applicable to merchants in order to facilitate commercial transactions. Nobody has really opposed this separation, which may take different forms, as shown by the French and German model, on the one hand, and the Swiss and US commercial codes, on the other, but which is rooted in different protective needs of commercial transactions and "general" transactions. There is no basic structural postu-

late concerning the unity or uniformity of law. The latter must be regarded as a mere legal construction which may be adhered to or not. Unity or uniformity has never convinced the legislator or courts in the presence of specific problems which law has to solve. If there is a political will or a normative requirement to protect the consumer against certain abuses in the market, law will have to adapt to this requirement and shape its rules accordingly.

On the other hand, in creating separate sub-systems of civil law, it becomes difficult to find precise criteria for distinguishing them. This problem is well known to *commercial and consumer* law in all countries. Shall certain protective provisions in consumer law be applicable not only to private persons, but also to small traders, to corporations which serve private needs like hobby and sports clubs, to liberal professions, and so on? The same problems exist in commercial law where the traditional criteria of the "merchant" ("Kaufmann") are basically outdated and do not necessarily apply to those sectors where the commercial code should now be applicable. The more modern doctrine borrows from antitrust and professional liability law and uses the concept of "undertaking" ("Unternehmen") and "profession" ("Beruf", "le professionel") to make commercial law applicable (Hopt, 1983). Once there is a deviation from the formal criteria of civil law such as legal subject, transaction, subjective rights, etc., one faces a surprising number of interpretation and delimitation problems. But this should be no reason to vote against the existence of a separate body of consumer law. It only makes integration between commercial and consumer law even more important.

Figure 1 tries to give an overview of criteria used in determining the sphere of application in German and EC law. Law may have regard to more subjective criteria which are fixed negatively in different ways (left side of the figure), to more objective criteria insisting on the type of transaction (centre), to positive subjective criteria referring to the role of the consumer (centre right), and, finally as an exception, to need orientated criteria (right).

It should be noted, however, that under the influence of EC legislation (directives and agreements), a common notion of the consumer emerges. Art. 5 of the Rome Convention on the law applicable to contractual obligations,[3] which came into force on 1 April 1991, provides for specific consumer protection under conflict-of-law rules. The mandatory provisions of his or her country of

residence cannot be contracted out, "if the object of the contract is the supply of goods or services to a person (the consumer) for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object." Similar criteria are used by Art. 1 of the Doorstep Directive 85/557/EEC,[4] and Art. 1 of the Consumer Credit Directive 87/102/EEC.[5] In interpreting the notion of consumer in the context of doorstep contracts, the European Court has opted for a consumer specific interpretation which excludes activities of traders even if they do not belong to their regular business or professional activity. Member States may however opt for a broader concept[6] which would include protection of the small businessman.

POST-INTERVENTIONIST CONSUMER PROTECTION PHILOSOPHY: THE EMERGING OF BASIC PRINCIPLES ("ACQUIS CONSOMMATEUR")

The criticism of regulation, referring to efficiency, regulatory failure, and "Sonderprivatrecht," was not without consequence. It has not, however, led to the abolishment of consumer law. This shows that consumer law has been created to solve economic and social problems which really exist. It is not simply an inefficient intrusion of state and law into the economy. It is therefore correct to establish a certain "acquis consommateur" which may perhaps not justify the entire rights rhetoric used in the heyday of consumer protection, but which, on the other hand, will resist its deregulation impact. The forthcoming analysis shall insist on certain positive and negative aspects of consumer protection philosophy which should be regarded as part of this "acquis consommateur." The result seems to be, in all industrial countries, an emerging *mixed rationality* of consumer law (seeking second best solutions). In defining consumer policy as a complex issue, we can distinguish between four different approaches relating to a sort of regulatory mixture which will be analysed in the following (see also Harland, 1988, pp. 25—33).

Consumer Information

Information-type regulations have proved to be very robust against any type of criticism. It should be pointed out that the focus and consequences of information regulation have changed lately.

Object	Registered Merchant	Full Merchant	Small Merchant	Pro-fessions	Type of Contract	Person	Purpose	Income
Installment Contract Act (abolished 1990)	no	yes	yes	yes	including third party transactions	no	no	no
Consumer Credit according to High Court Case Law					installment credit, variable credit	no	partly, yes	?
EEC Directive on Consumer Credit 87/102					consumer credit transactions	consumer	?	big/small loans excluded
Consumer Credit Act of 1990					consumer credit transactions	consumer + trader not yet established	also for taking up business (DM 100,000)	small loans excluded
Code of Civil Procedure concerning Jurisdiction Clauses	no	no	yes	yes				no
Act on Unfair Contract Terms	no	no	no	yes	specific exceptions	negative	no	no
Act on Door-to-Door Sales					insurance contracts not included	negative	yes	no
EEC Directive on Door-to-Door Sales 85/577					insurance contracts; real estate not included	consumer	no	no

Civil Code Provisions on Travel Contracts					travel contracts	tourist	no	no
EEC Package Travel Directive 90/314					package tours	consumer	no	no
Insurance Contracts	yes	yes	yes	yes		every insured person		duty to contract
Landlord and Tenant Contract					rent	no	no	no as a rule
EEC Product Liability Directive 85/374						yes — all personal injury	yes — property damage	threshold 500 ECU
Convention of the Council of Europe						yes	no	
German Product Liability Act						yes — all personal injury	property damage	threshold
Protection against Seizures						debtors	wages and salaries	yes — exemption from seizure
Act on Restraints of Competition	yes	yes	yes	yes		enterprises, not consumers		
Rome Convention Art. 5	protection under conflict-of-law rules with the exception of insurance contracts				consumer contracts with the exception of "pure credit"	"passive" consumer	private	no

Fig. 1. Sphere of application of consumer and related regulation in the FRG and in EEC Directives.

Legislators or courts are not so much interested in whether consumers can genuinely obtain optimal information and therefore be capable of more rational decision-making.

On the one hand, regulations on labelling, instructions, warnings, notifications serve to avoid stricter standards and convince consumers that "something is done." This "something" may be highly symbolic.

On the other hand, information regulations may be used as a substitute to making the producer or trader liable even in those areas where ordinary rules of warranty or liability would not be applicable. This mushrooming of information duties is not limited to consumer law, but may also be found in other legal relations characterised by differences in bargaining power, e.g., between manufacturers and traders in franchising contracts (Joerges, 1991; Müller-Graff, 1988).

In any case, there seems to be agreement that in the very interest of the functioning of markets, consumers need certain basic information, and that contract and tort law should participate in "information generation." There also seems to be consensus that information-type remedies may serve as an alternative to *ex ante* setting of product standards and to licensing requirements in services. In the EC context it is important that these remedies are less restrictive on intra-community trade[7] than regulations limiting market access (for a similar account of the US-American regulation discussion, cf. Breyer, 1982, pp. 161—164). Their precise contents are of course subject to discussion.

Product liability. In product liability law the negligence doctrine has traditionally operated by imposing certain information duties on the manufacturer. They may be condensed into warning obligations. Under the strict liability scheme of the EC directive, this argument is written into the presentation of a product as a basis for defining a defect (Reich, 1986, p. 139). A failure to comply with information or even warning obligations will be regarded, under the negligence doctrine, as a violation of the duty of care or, in strict liability, as a product defect, both of which will make the manufacturer liable.

Contract law. Information based remedies play an important part in contract law, especially in the absence of mandatory standards. Some examples from different jurisdictions will suffice to indicate trends in the development of consumer law.

The *German* Federal Court has written a "transparency obligation" into the fairness test controlling contract terms under the German legislation on standard form conditions (Reich, 1991a). The best known examples concern manufacturers' warranties and charges levied by banks: In both cases, there is no regulation of the terms to be used by manufacturers and banks, respectively. However, according to recent case law,[8] the terms must be formulated in such a way that the "average consumer not having specific legal knowledge" will know exactly what will be her/his rights and obligations arising out of the contract. Transparency serves a double objective: to improve the position of the individual consumer vis-à-vis the supplier, and to increase competition in a more transparent market.

French law takes a different starting point, but reaches similar results. A study by Christianos (1987) unfolds an impressive set of information duties written by French courts into contractual or non-contractual relations, in order to safeguard certain basic standards. The courts may not justify the imposition of information duties by referring to the specific needs of the consumer, and they may extend these duties to other persons, but consumers are definitely protected by them.

Unlike continental law, *English* common law has been reluctant to apply a fairness test to preformulated contract terms. The Sales and Unfair Contract legislation covers only very specific clauses. The "Interphoto Picture Library" decision of the Court of Appeal[9] relies on the requirement of a "sufficiency of notice . . . whether it would in all the circumstances be fair (or reasonable) to hold a party bound by any condition or by particular condition of any stringent nature." Information duties serve as a substitute for substantive rules changing the *caveat emptor* principle, which had been developed by other jurisdictions, like US common law and German and French law, over a number of years (for an overview, see Hondius, 1987).

Australian law offers an interesting example of a combination of trade practices law aiming at preventing the dissemination of misleading information and the improvement of the legal position of the consumer who has entered into a transaction under the impression of deceptive conduct on the part of the supplier. The starting point for a reshaping of contractual relations has been s 52 of the Trade Practices Act which prohibits, in plain legal language, a corporation from engaging "in conduct that is misleading or deceptive or is likely to mislead or deceive." Because of the broad standing provision in s

80, whereby "any . . . person," including consumer associations, but also individual traders and consumers, may ask for an injunction, and the power of courts to grant damages under s 82 or to vary the terms of the contract under s 87, Australian trade practices law has overcome the limitations of remedies available under traditional common law (Harland, 1991).

Doorstep contracts. Doorstep contracts have been on the consumer agenda for a long time, and already in the times of "pre-interventionism," the US Federal Trade Commission had issued a rule which gives the consumer a "cooling-off" period (Reich, 1984a). Many legislations, including the EC when adopting Directive 85/557, have taken over this principle which now forms part of the "acquis consommateur." The imposition of the cooling-off period has been and still is justified to increase consumer rationality. If the consumer has not been informed about his/her rights, s/he may withdraw from the transaction until it is finalised even if s/he is aware of his/her rights. Again, an information-type remedy is used (or, as others say, abused) to arrive at a certain protective level in contractual arrangements. Information remedies therefore are concerned not so much with information, but with changing the *caveat emptor* rule. The question arises, of course, whether this remedy is really sufficient to protect the consumer or whether, as the European Court suggested in the Buetcase,[10] especially vulnerable consumer groups need a more effective and therefore more intrusive remedy like a complete ban on canvassing.

Specificity of Consumer Law

Notwithstanding all critical comments, a separation of consumer-business relationships from general civil or commercial law can be observed in many countries. With the exception of some countries such as Spain (Uriarte Bofarull, 1985) and Brazil, there may not yet be developed a "consumer code" to equal a "commercial code" (cf. however the proposals of the French "Commission de refonte," Calais-Auloy, 1985, 1990). But the adherents of unity or uniformity of civil law are waging an old battle. This battle is already lost, as one can see in consumer credit regulations (Reich, 1991b). Given the complexity of business credit transactions, nobody really asks for complete regulation of the different types of business and bank

credit arrangements, provided that financial markets function efficiently (which presupposes some information-type regulations). Consumer credit on the other hand needs regulation based on *equitable* reasoning whether created by the legislature or the courts. It implies, as some legal observers have said, a discrimination against entrepreneurs when they enter into credit transactions, as they are not submitted to protective standards (Koziol, 1988, p. 187). But this is a problem of all protective standards, not only of consumer law.

The idea of a "Sonderprivatrecht," or to be more specific, of several separate bodies of law governing consumer transactions, seems inevitable. Even where the legislature tries to impose certain minimum standards on commercial relations, for instance in unfair contract terms legislation, it will still have to differentiate between consumer transactions and commercial transactions. Similar criteria may apply, but the specific protective standards will differ. This experience is somewhat ambivalently demonstrated by the almost fifteen-year period of implementation of the German Act on Unfair Contract Terms, where on the one hand the protective aim is clearly pursued in court practice, but on the other hand it can be shown that the courts try to impose standards borrowed from consumer contract relations on to commercial transactions, even if they are applied with more subtlety and caution. Consumer law may then be used to increase the overall fairness of market transactions without losing its specificity.

Today's problem is not really the carving out of separate bodies of law, but the identification of criteria for adequate remedies. Therefore, the following questions must be answered:

How does one differentiate consumer from non-consumer (commercial? professional?) transactions? Does one use a more objective, a more subjective, or a combined approach? Is it enough to differentiate between different situations of "inequality" ("Ungleichgewichtslagen") (Hart, 1987)? Is there not a general "Ungleichgewichtslage" in the sense of a *structural* imbalance between consumers and traders (manufacturers, suppliers, etc.)? What are the instruments of regulation: Does one rely more on information-type remedies which seem to carry a high amount of consensus but also have a rather symbolic character, or are stronger remedies needed such as imposing warranties, rights of rescission after conclusion of the contract, etc.? If protection is offered in one area of law, why does one leave out others? A good example is doorstep selling where EC and

German regulations cover all doorstep transactions with the exception of insurance contracts.

The US Federal Trade Commission, in its regulatory activism, had developed quite a sophisticated scheme of remedies which is still useful for analytical purposes (Reich, 1984a, p. 69); see Figure 2.

Alternative Approaches

The "acquis consommateur" in consumer transactions will probably exclude two rather opposing approaches — to be described in this section — which have been put forward by legal writers and politicians, but which have not been proven successful.

Self-regulation. It was advanced as an alternative to regulation at the end of the seventies and beginning of the eighties. Why impose bulky regulatory standards on business if more flexible means of soft law, implemented by responsible traders, could do the same?

It is impossible to cite all the different voices in the discussion or to give a resumé of its results (cf. Huyse & Parmentier, 1990). Most observers of the self-regulation movement in the consumer area (as well as in any other) will agree that it may be a useful instrument if properly set up, implemented, and monitored, but that it cannot be an alternative to regulation. There is always the problem of free-riding, that is to say, of traders who will not adhere to a certain scheme and therefore will profit from stricter standards imposed upon others. How can they be put under the self-regulation scheme? If the scheme is also made binding to third parties, it will be no different from traditional regulatory instruments, but it will have a cartel-like effect. If the standards are binding only to the parties to an agreement, they will not help the consumer who is harmed by a trader outside the scheme. Experience has shown that even well-meant self-regulation will function only if there is some legal backing. This experience relates especially to the implementation of the EC Directive on misleading advertising[11] where art. 5 in connection with art. 4 para 1 last sentence allows the imposition of self-regulatory schemes if there is an ultimate control by courts of law or by public authorities (Krämer, 1986, No. 205). Another case to be cited is the German practice of contract term recommendations which is an instrument of self-regulation supervised by the Federal Cartel Office:

Type of market failure	Information lags	Disparity in bargaining power	Consumer harm (through advertising)
Goal	Generate information	Improve "post-purchase" satisfaction	Regulate advertising
Regulatory remedy	Forbid "negative information" Remove barriers to "free flow of information" Prescribe specific disclosures Provide for cooling off	Prohit certain clauses Provide for trial period Mandate warranties Enforce refunds Rewrite contracts	Set standards Combine disclosures with bans Ban certain claims because of contents Ban advertising directed to certain persons (in certain media)
Legal theory sec. 5 FTC Act	Deception	Unfairness	Deception + Unfairness

Fig. 2. FTC policy concerning the relationship between market failures and consumer remedies as a continuum.

there have been several cases where certain clauses were approved but later regarded as unfair by the courts.[12]

A more recent discussion is less hostile to self-regulation if the latter provides for an effective dispute resolution mechanism. Encouraging experiences have been made in England and Australia where service providers have voluntarily established a banking or insurance ombudsperson to offer speedy complaint handling and redress which is not available under law or other regulations (NCAAC, 1990). If the scheme is supported by consumer organisations, if the ombudsperson is independent, and if he/she has the power to make awards that can be enforced upon financial institutions, there is no reason to criticise such a scheme under the classical argument against self-regulation. This point of view has been supported in EEC Directives 87/102 on consumer credit and 90/314 on package tours[13] where the establishment of consumer redress schemes is made an obligation of Member States and should be made effective in cooperation with traders and consumer organisations (Reich, 1991b).

Need orientation in civil law. On the other hand, consumer contract law based on *need aspects* ("Bedürfnisorientierung") is an interesting theoretical concept but difficult to implement. Such a concept has been voiced in Germany by Reifner (1979, pp. 291–317) and in the Scandinavian countries by Wilhelmsson (1987, 1990). It is not the goal of these authors to protect the consumer as an abstract notion: He/she may be rich or poor, wasteful or needy, a "yuppie" or a "household chief" responsible for ten persons. The need concept would be especially important in consumer credit transactions. For instance, if the debtor cannot repay his debt, there would be a defense based on "social force majeure" — barring any claims of the creditor — if the debtor has become needy through no fault of his own (loss of employment, illness, etc.). It might also be used to avoid discrimination against specific groups of consumers who deserve legal protection, like women, children, foreigners, etc.

There is no doubt that the legislature may create a remedy called "social force majeure" and that it may also impose non-discrimination rules on contractual relations. But there has to be an express political or constitutional decision to do so; general contract law, even under increased consumer pressure, is usually unable to absorb need concepts since market transactions vary only between con-

sumers and non-consumers, not between needy and "non-needy" consumers. The legislature will have many choices available to shape adequate remedies; this can simply not be done by courts of law or by legal doctrine based on vague principles like "soziale Auslegung" (social interpretation) (Reifner, 1979, pp. 91—100). Focussing on the problem of "social force majeure," the legislature must keep in mind that remedies cannot be restricted to consumer credit transactions but must apply also to other types of debt collection, such as tax and social security payments (Hörmann, 1987). The legislature may choose a bankruptcy model (US model), allow for an individual defense as in French law ("délai de grace"), or leave to the consumer only enough of her/his personal belongings to satisfy her/his basic needs in case of default, as in German law. It may encourage voluntary negotiations. Courts may even say that credit transactions foreseeing the repayment of instalments above the allowances established for wage seizure are void under the good morals standard.[14] But all these cases will be exceptions and cannot be put into a new paradigm of consumer policy, at least not under market conditions.

COLLECTIVE CONSUMER INTEREST

Possibilities and Limits of Collective Action of Consumers

There is a wide-spread criticism of consumer protection legislation and consumer protection philosophy which says that it relies too much either on the individual or on the state. If self-regulation is no alternative to regulation, should consumers not simply "get together" and use their aggregated market power to negotiate for better warranties, to avoid unfair marketing practices, and to recover damages in cases of harm to specific groups of consumers?

Many countries can claim rather interesting and extremely diverse experiences of aggregating the consumer interest. There are collective-type remedies like class actions in the United States and in some Canadian provinces, group actions of consumer organisations as in Germany or in France, or collective settlements under judicial supervision, as in the Thalidomide case in Germany or in the Opren case in the United Kingdom (C. Dehn, 1989). The frequently disappointing experiences vary and can hardly be transferred to other legal areas.

It should be borne in mind that any type of collective remedy

needs more profound rethinking of what has been discussed in social science for a long time through resort to theories of activating and aggregating diffuse interests (Handler, 1978; Weisbrod, 1978; Wilson, 1980). Consumers are not a homogeneous group, and their economic (and health!) interests are extremely diverse. This would be true even if there were more equality in the distribution of property rights. The collective interest cannot be organised as such, but requires, as Olson (1965, 1982) has pointed out, either selective incentives or trustees ("political entrepreneurs" as they have been called by Wilson, 1980, pp. 357—360), which act in the name of the group, even if they do not have a democratic mandate. The legitimacy of such trustees is always precarious and will vary between countries and times.

To some extent, this trusteeship function of consumer organisations and other social movements contrasts sharply with the traditional role of the interventionist state. In "post-interventionist" thinking, the state is not so much seen as guaranteeing the protection of the aggregated consumer interest, but as a captured partisan of special interest groups against which consumer, ecological, civil rights, feminist, and other social movements must take action. The implementation of collective action rights by consumer groups is a result of the regulatory failures mentioned above (Mitnick, 1980, pp. 206—240). As an expression of "self-help," it must therefore be regarded as a useful tool for social movements in enforcing protective standards (Reich, 1984a, p. 138).

Trade Unions and Cooperatives

All attempts to achieve a still greater "collectivisation" of the consumer interest have so far not been too successful. This is true even for those countries which, like the United States, the United Kingdom, and the Netherlands, have large and important consumer organisations with a great number of members. But they fit well into the selective incentive scheme of Olson, because they sell their members certain services, especially comparative testing.

Trade unions had been regarded by some authors as trustees of the consumer movement. It was argued that the consumer was a mere *alter ego* of the worker, moving from the sphere of production to the sphere of reproduction (Tonner, 1979; cf. also Reich & Micklitz, 1981, No. 7). It is true that in the early days of the labour

movement, many workers adhered to cooperatives which were run by the labour unions as self-help organisations. But they covered only part of the population. As an expression of self-help, the cooperative movement has been on the decline even in those countries where it is still strong, such as in the Scandinavian countries. Cooperatives, even though their umbrella organisation is still a member of the Consumers' Consultative Council of the EC, have become marketing organisations which offer their goods and their services to almost everybody, not only to members.

Collective Consumer Actions

Another theory has been put forward by Reifner and Volkmer (1988) in an attempt to overcome the traditional dilemma of consumer organisations. They want to avoid the organisational problems of the consumer movement by forging in cases of joint harm the aggregation of individual consumer interests into a collective interest. A collective interest is said to exist if the individual acts not only in her/his own interest but also in the interest and on the behalf of others (known as the solidarity model in labour law). This model has been ambitiously demonstrated in what has been called the "unfair credit action" in Germany: Consumers having suffered from extortionate credit transactions with consumer credit banks (Teilzahlungsbanken) have joined together under the leadership of a legal "entrepreneur" cooperating with a Consumer Advice Centre either to recover the money overcharged or to bar unjustified bank claims against them. Litigation was used as a means of mobilising consumers, quite similar to US class actions, even though German law does not know this procedural device. The final decision in a test case ("Musterprozeß") at the Federal High Court on extortionate credit transactions in favour of the consumer[15] could be used as a weapon for negotiations with such consumer credit banks.

The lessons gained from the experiment are quite interesting,[16] but Reifner's optimistic views cannot be shared by this author. Consumers did not so much show a collective, cartel-like power but aggregated their claims under skillful leadership. Consumers have not been transformed from individual profit maximisers to agents of solidarity. Their litigation has hopefully had positive "spin-off"-effects on other consumers and on consumer influence in general, but can hardly be used for solidarity and mobilisation purposes over

a longer period of time. This sceptical view should not preclude the legal system from encouraging such collective litigation in cases where a certain number of consumers have been injured in a similar way, even in cases where such actions are not based on the principle of group solidarity but on individual preference. "Musterprozesse," frequently used in commercial and competition litigation, should certainly be encouraged in consumer cases, too (Koch, 1990). Traditional legal procedure in Germany has been little responsive to such types of collective consumer action. But it must always be kept in mind that the consumer will fight for a true collective only to a limited extent, and rather more for *his/her own interest.* Collective actions create a collective consumer interest only under exceptional circumstances. They mainly aggregate consumer power and make recovery against vested interests more easily available.

Consumer Participation

A theory of consumer law which is based on the principles of participation and mobilisation has been put forward by Bourgoignie (1988). His theory is all the more remarkable because it is based on a near-complete analysis of the thinking and practice of consumer law in developed countries during the last twenty years. He insists on a "modèle mixte, adaptif et participatif" of consumer law (p. 179). To date this model, however, is only reflected in areas of self-regulation, not in other areas of consumer law where state action is still needed (p. 181). Self-regulation, which is regarded quite critically by Bourgoignie, is justified only if there is collective consumer participation (p. 183).

An important field of collective consumer action in a broad sense has been legal aid ("aide juridique") where the author has made some remarkable contributions to both the theory and practice of Belgian, as well as EC, law, thereby suggesting "la constitution d'un modèle collectif d'aide juridique en complément, sinon en remplacement, du modèle individualiste proposé par le système de droit classique ou libéral" (Bourgoignie, Delvaux, Dumont-Noert & Panier, 1981, p. 34). Unfortunately, the theoretical postulates and the current practice in (EC and Belgian) law differ widely. There seems to be more optimism in theory than in practice.

As far as Bourgoignie's theory is concerned, it is even more surprising to see the differences between his reliance on some sort of

a collective, participatory consumer interest on the one hand, and his "somewhat ambivalent" consumer notion on the other. He insists on a subjective approach to consumer protection theory having regard for the consumer as a person and not only as an object of market transactions. However, in his attempt at a definition, the consumer is seen only in his economic role as a physical or legal person who does *not* produce or market goods or services for commercial purposes (Bourgoignie, 1988, p. 60). The consumer is the "negative alter ego" of the producer and distributor. But this economic construct called the consumer will find it difficult to aggregate his or her diffuse interests (Reich & Leahy, 1990) into a collective interest justifying participation.

THE IMPACT OF CONSUMER PROTECTION PHILOSOPHY ON COMMERCIAL TRANSACTIONS

Relationship Between Commercial and Consumer Transactions

The consumer protection movement and consumer protection legislation usually had the relationship consumer — supplier in mind, not, as in product liability law, the relationship consumer — manufacturer. Consumer legislation concerning unfair contract terms or warranties, for instance, tries to improve the position of the consumer by imposing certain minimum standards on warranties, by forbidding disclaimers and exemption clauses, by imposing information duties on the seller of goods or the supplier of services. There are hardly any equivalent remedies as regards the relationship between the supplier and his seller (manufacturer, importer, exclusive dealer, etc.). Freedom of contract, a highly cherished principle in contract law, would enable disclaimers and exemption clauses in commercial transactions, even though the final supplier might not be able to exonerate him/herself in his/her relations to the consumer.

This classical model of privity of contractual relations has to be reconsidered for a number of reasons, and some jurisdictions have already started to do so. Selective distribution systems may serve as an example to demonstrate the complex relationship between competition, commercial, and consumer law (Joerges, Hiller, Micklitz, & Holzscheck, 1985). Since there exists an EC block exemption for certain types of selective distribution systems concerning the sale

of new cars and of spare parts used in after-sales service,[17] one will have to consider problems which have emerged in a liberal EC practice concerning selective distribution systems in spite of their negative effects on competition and which have not yet found a satisfactory answer.

Manufacturer's Guarantees

EC law, in its aim to promote intra-brand competition and avoid market segregation, has developed ingenious rules in competition law to curb abuses made possible by excluding the validity of guarantees in trade with "unauthorised" dealers (e.g., parallel importers). There is a *per se* interdiction in EC competition law to employ guarantees in exclusive or selective distribution or in franchising systems in such a way that they contribute to market segregation and suppression of intra-brand competition (Reich & Leahy, 1990, pp. 147—148). Therefore, a product marketed by parallel importers outside the selective distribution system cannot be totally excluded from the guarantee. This rule has been severely criticised by EAL adherents in that it creates incentives for free riding by dealers and importers outside the system. Manufacturers and authorised dealers will be tempted to bypass EC competition law and not honour guarantees by consumers who have acquired the goods outside approved outlets, e.g., through parallel imports.

Consumers will insist on the overall validity of the guarantee. Unfortunately for them, EC competition law does not have direct effect in contractual relations with the consumer[20] (Korah, 1984). The consumer who has bought a good from a non-authorised dealer has no rights arising out of the guarantee, if the manufacturer has restricted its use to authorized outlets approved in one Member State. This is true, even if by doing so the manufacturer has disobeyed competition rules, as was evident in the Cartier decision by the German Federal High Court.[21] Competition and consumer law rules have the same objectives, namely to avoid market segregation as a result of different ways of honouring guarantees, but they do not come to a joint solution. Commercial law is asked to fill the gaps left by the inconsistency of competition and consumer law.

A solution can be found only by rewriting the doctrine of manufacturers' guarantees. Some Member States distinguish between sellers' warranties ("garantie légale", Gewährleistung) which are

imposed or implied by law and cannot be disclaimed, at least in consumer contracts, and manufacturers' guarantees ("garantie contractuelle", "Garantie") which are a unilateral, voluntary act of the manufacturer only subject to his marketing interests. Although EC competition law imposes a rule of non-discrimination on the use of guarantees in selective distribution systems, it does not create an automatic contractual relation to the consumer and it does not prescribe a certain minimum content of guarantees. Therefore, the consumer will have no direct action, even if the principle of non-discrimination has been written into Art. 5 (1) No. 1a of Regulation 123/85/EEC concerning selective distribution systems of car manufacturers.

Since the consumer always has a remedy which under sales law usually cannot be contracted out, his own seller, who is a distributing agent in a selective distribution system, must be able to make the manufacturer liable. French courts have used the instrument of "action directe" to skip over the privity doctrine and allow the consumer to recover directly from the manufacturer (Ghestin, 1983, No. 324; Calais-Auloy, 1986, No. 156). This "action directe" puts contractual responsibility in a vertical distribution system whence it originates. French courts of course had to solve the problem of unfair disclaimers in the contractual relations between manufacturers and traders. The Australian Trade Practices Act of 1974 as amended in 1978 and 1986 extends contractual-type remedies to persons who subsequently come to own the goods and thereby makes the manufacturer directly liable for supplying goods of merchantable quality. It allows the retailer to recover the expenses incurred by him from the manufacturer and forbids any contracting out of his right to reimbursement (Harland, 1981). Thereby the Act as amended abolished the traditional privity rule (Goldring, Maher, & McKeough, 1987, p. 109).

German courts, on the other hand, have not allowed a direct action under sales law. They were confronted with the problem of whether disclaimers in standard contracts between manufacturers and distribution agents would be void under unfair contract law. The Act on Unfair Contract Terms gives no direct answer but directs the judge to apply a reasonableness test. The Federal Court has held that, at least in selective distribution systems, the seller must be able to get reimbursed under the guarantee in so far as the product defect originates in the manufacturing sphere.[22] The Court thereby tries to

harmonise consumer and commercial law rules concerning exemption clauses. This coordination of rules originating in consumer and in commercial law has not yet been achieved because legal warranties under commercial law are subject to a number of restrictions. If consumer law wants to improve the position of the consumer, commercial law must correspondingly improve the position of the intermediate trader and reject the *caveat emptor* principle which has always been justified in commercial relations on the grounds of efficiency and legal security. There seems to be a new tendency now in court practice concerning unfair contract terms to limit exemption clauses also in commercial relations.

This writer wonders whether the present discussion concerning guarantees should not be readjusted in order to regain the necessary harmony between commercial and consumer law. The doctrine of free contractual will of the manufacturer in offering his guarantees should be reshaped. He is, and this reflects the state of law in most developed countries, not only negatively responsible if his guarantees are misleading or deceptive, but should also be made positively liable for the quality of his goods which are marketed by him or under his name or trade mark. Law should follow the Australian and French model and extend liability of the manufactured also to merchantable quality and fitness for purpose, thereby applying similar principles to quality as to safety aspects which are covered by product liability legislation. The manufacturer should fulfill his obligation as to merchantable quality by offering guarantees (cf. for unsuccessful FTC activism in this direction, Reich, 1984a, pp. 79—85).

Franchisees in the distribution chain should be regarded not only as sellers[23] but also as *agents* fulfilling both their own obligation to merchantable quality and a similar obligation owed by the franchisor to the consumers. The obligation of the latter is based on his allowing the use of his trade-mark and know-how, thereby creating the impression that he backs up the quality of the products marketed under the franchise. Such a double role of the franchisee would also allow for a coordination with competition law as mentioned above. The law should prescribe the minimum content of such guarantees.

One might object to this solution on the grounds that it does not correspond to the contractual will of the parties and to the present arrangements of contract law. EAL would probably object that it amounts to an imposed insurance system creating moral hazards

because everybody has to pay the premiums and only a few — mostly careless — consumers can use the guarantee (Posner, 1986, pp. 91—101). Therefore it would not meet the efficiency criteria of contract law (Priest, 1981; critized by Nicks, 1987). On the other hand, this quasi-insurance concerning quality is an incentive for the manufacturer not to market "lemons." It saves transaction costs in avoiding a doubling of disputes in consumer-franchisee and franchisee-franchisor relations. From a legal point of view it should be mentioned that suppliers in selective distribution, exclusive dealership, and franchising systems may at the same time fulfil different functions, for instance as commercial agents, as sellers, as suppliers of services, and so on. Their role should be such as to improve the position of the consumer and to internalise the contractual responsibility for defects at their source, i.e., with the manufacturer.

ECOLOGICAL ASPECTS OF CONSUMER PROTECTION THEORY

"Ecological Infection" of Contract Law?

The final remarks, having to do with ecological aspects of consumer protection philosophy, must remain very vague and speculative. The discussion of how to coordinate competition, commercial, and consumer law has somewhat left behind the ecological challenge felt in many areas of the law. Consumer law is subject to this problem insofar as it facilitates consumer transactions and therefore may create incentives but more likely disincentives for an ecologically motivated design and marketing of products and services. Quite obviously, it is not contract law but government (or EC) regulation which has to set the standards under which products are produced, packed, labelled, and marketed. If regulations ask for recyclable containers, contract law has to make sure that these obligations can be imposed upon manufacturers and/or traders. If recycling is to be achieved by introducing a return bottle, its non-provision would be a defect under sales law. Winter (1988, p. 665) proposes an "ecological infection" of contract law, thereby suggesting that products containing substances not hazardous to the health of the buyer but to the environment may be defective. To give an example: The marketing strategy of fast food chains or soft drink producers with their wasteful packaging is clearly harmful to the environment and should

not only be regulated by administrative law, but also be regarded as putting "defective goods" into circulation. The problem under sales law would, of course, be that the consumer "knows" about the defect and therefore traditionally has no remedy. On the other hand, the consumer may not be aware of the synergistic effects of marketing strategies producing waste. Therefore her/his individual knowledge should not exclude a contractual remedy. Even if s/he may not use these remedies, they could be employed in class or group actions.

Travel Contracts as an Example

A conflict of standards for the protection of the consumer and of the environment can be discovered in travel contracts. The consumer movement has been active in imposing certain quality standards on tour operators which cannot be waived. In Germany, there is a special law protecting tourists. The EC has adopted Directive 90/314/EEC on package travel. These regulatory initiatives propose to create a basic right of the consumer as tourist to enjoy his vacation without "defects." The standards of "non-defectiveness" in holiday contracts are very much defined by Western life styles and vacation habits. Similar quality standards are expected in both developed and in developing countries. Western tourists have paid for these standards, and the tour operator has advertised them or given an implied warranty of fitness for (Western) use. If this is not the case, the tour operator should either refund part of the money paid or be liable for moral damages for "lost holiday" enjoyment. German courts, for instance, have been very ingenious in finding defects and in allocating refunds and/or damages to the consumer whose quality interest in his holiday was harmed due to noise, unclean water or lack of water, untidy rooms, or unusable swimming pools.

But establishing consumer protection in a developed country necessarily creates externalities towards African or South-Asian consumers, as Derleder (1984) has said in a provocative paper. It forces the tour operator to impose Western standards on his subcontractors. The latter will do everything to draw resources from countries in need, for instance concerning water quality, power supply, food, and accommodation. The concern for consumer protection in the life-style of developed countries is only possible through the exploitation of scarce resources in developing countries. As a compromise solution, Tonner (1991) suggests the imposition of

information duties on the tour operator relating to the quality standards to be expected when making holidays in developing countries. If the operator has provided adequate information about these standards, than the consumer cannot claim that the service provided to him was defective.

The writer is not sure that the dilemma between the need of consumer protection and the imperative to save environmental resources can be solved that way. It should merely be kept in mind that consumer law may sometimes be *too* effective in its implementation. It may deteriorate the environment while protecting consumers. If one asks industry and government to internalise externalities produced or permitted by them, consumers must do the same so as to increase protection of third parties outside contractual relations. Free consumer choice, a cherished principle of the entire consumer protection philosophy, be it pre-interventionist, interventionist, or post-interventionist, may have to be substantially redefined in a time of ecological crisis.

NOTES

[1] Isvestija of 8 June 1991.
[2] Cf. Judgment of the CJEC of 27 October 1977, case 27/76, (1977) ECR 1875 at 1905, expressly referring to the concept of workable competition as the basis for a "rule of reason approach" to vertical restraints; the argument was repeated in Judgment of 22 October 1986, case 75/84, (1986) ECR 3021 — Metro/Saba II.
[3] OJ EC L 266/1 of 9.9.80.
[4] OJ EC L 371/31 of 31.12.85.
[5] OJ EC L 42/48 of 17.2.87.
[6] Judgment of 14.3.91, case C-361/89 — not yet reported.
[7] Cf. CJEC Judgment of 20 February 1979, case 120/78, (1979) ECR 649 at p. 664 — Cassis de Dijon and later cases.
[8] BGH NJW 1988, 1727; 1989, 582.
[9] 1 All ER 348 (1988).
[10] Judgment of 16 May 1989, case 382/87, (1989) ECR 1235 at 1252.
[11] Directive 84/450/EEC of 10 September 1984, OJ EC L 250/17 of 19 September 1984.
[12] BGH NJW 1987, p. 2818 concerning the conditions of car repairs, even though the German automobile drivers' association (ADAC) took part in negotiating the recommendations; less spectacular, but equally important has been the litigation resulting in the invalidation of prepayment clauses in travel contracts based upon a recommendation of the relevant trade association, BGH NJW 1987, p. 1931.
[13] OJ L 158/59 of 23.6.90.
[14] LG Lübeck, NJW 1987, p. 959; this doctrine was however rejected by the Federal Court which did not use "need" criteria, but opted for a quite stringent control of credit costs by comparing contractual and average market rates.

[15] Cf. BGH NJW 1987, 944 concerning so-called debt rescheduling ("Umschuldung durch Kettenkreditverträge"); the case was brought by an individual consumer though supported by consumer organisations as a test case!
[16] The author was a member of the advisory board of this project.
[17] Regulation 123/85 of 12 December 1984, OJ L 15/16 of 18 January 1985, supplemented by a communication of the Commission in OJ C 17/4 of 18 January 1985.
[18] At least as far as intra-brand and price competition is concerned, cf. the leading Saba/Metro I and II cases of the CJEC cited in Note 2.
[19] Judgment of 10 December 1985, Case 31/85 (1985) ECR 3939 at p. 3944 — ETA unless "motivated by the decision to maintain a network of specialised dealers able to provide specific services for technically sophisticated, high quality products"; the scope of this exception is not clear and was not included in the Judgment of 22 February 1984, Case 86/82 (1984) ECR 883 at p. 905.
[20] Judgment of 18 December 1986, Case 10/86 (1986) ECR 4071 — Magne (the case concerned commercial contracts but would also apply to consumer contracts).
[21] BGH WRP 1988, p. 296.
[22] BGH NJW 1985, p. 623 (626 concerning clause 8 in the Opel dealer contracts where the manufacturer reserved his right to change unilaterally the obligation towards a consumer arising out of a guarantee — which was not held unfair — and out of his warranty towards his buyer, i.e., the car dealer — which was held unfair).
[23] A different position has been taken by EG regulation 4087/88 of 30.11.88 on franchising agreements, OJ L 359/46 of 28 December 1988.

REFERENCES

Akerlof, G. (1970). The market for "lemons": Quality uncertainty and the market mechanism. *Quarterly Journal of Economics, 84*, 488–501.
Bourgoignie, T. (1988). *Eléments pour une theorie du droit de la consommation.* Brussels: Story-Scientia.
Bourgoignie, T., Delvaux, A., Domont-Naert, L., & Panier, F. (1981). *L'aide juridique aux consommateur.* Brussels: Story-Scientia.
Breyer, S. (1982). *Regulation and its reform.* Cambridge, MA: Harvard University Press.
Brüggemeier, G., & Hart, D. (1987). *Soziales Schuldrecht.* Bremen: University of Bremen.
Calais-Auloy, J. (1985). *Propositions pour un nouveau droit de la consommation.* Paris: Documentation française.
Calais-Auloy, J. (1986). *Droit de la consommation.* Paris: Dalloz.
Calais-Auloy, J. (1990). *Propositions pour un code de la consommation.* Paris: Documentation française.
Christianos, V. (1987). *L'obligation d'informer dans la vente des produits mobiliers.* Brussels: Story-Scientia.
Coase, R. (1960). The problem of social cost. *Journal of Law and Economics, 3*, 1–15.
Dauner-Lieb, B. (1983). *Verbraucherschutz durch Ausbildung eines Sonderprivatrechts für Verbraucher: Systemkonforme Weiterentwicklung oder Schrittmacher der Systemveränderung*? Köln: Heymanns.
Dehn, C. (1989) Open-Problems, Solutions and More Problems. *Journal of Consumer Policy, 12*, 397–413.

Derleder, P. (1984). Wirtschaftstheorie und Ethik des rechtsgeschäftlichen Handelns. In: H. P. Schneider (Ed.), *Festschrift R. Wassermann*, pp. 643—658. Neuwied: Luchterhand.

Duggan, A. (1982). *The economics of consumer protection — A critique of the Chicago School against intervention.* Adelaide: Law Review. Research Paper No. 2.

FTC (1980). *Post purchase consumer remedies.* Washington, DC: Federal Trade Commission. FTC Discussion Paper.

Galmot, Y., & Biancarelli, J. (1985). Les réglementations nationales en matière de prix au regard du droit communautaire. *Révue trimestrielle du droit européen, 22*, 269—311.

Ghestin, J. (1983). *Conformité et garanties dans la vente.* Paris: Libraire générale de droit et de jurisprudence.

Goldring, J. (1990). Consumer law and legal theory: Reflections of a common lawyer. *Journal of Consumer Policy, 13*, 113—132.

Goldring, J., Maher, L. W., & McKeaugh, J. P. (1987). *Consumer protection law in Australia.* Third edition. Sydney: Butterworths.

Handler, J. (1978). *Social movements and the law.* Madison, WI: University of Wisconsin Press.

Harland, D. (1981). The liability to consumers of manufacturers of defective goods — An Australian perspective. *Journal of Consumer Policy, 5*, 212—227.

Harland, D. (1987). The UN Guidelines for Consumer Protection. *Journal of Consumer Policy, 10*, 425—440.

Harland, D. (1988). The legal concept of unfairness and the economic and social environment: Fair trade, market law, and the consumer interest. In: E. Balate (Ed.), *Unfair advertising and comparative advertising*, pp. 15—52. Brussels: Story-Scientia.

Harland, D. (1991). Misleading or deceptive conduct: The breadth and limitations of the prohibition. *Journal of Contract Law, 4*, 107—120.

Hart, D. (1987). *Alternativkommentar zum BGB. Allgemeiner Teil, vor § 116.* Neuwied: Luchterhand.

Henning-Bodewig, F., & Kur, S. (1988). *Marke und Verbraucher*, Vol. 1. Weinheim: Chemie.

Hippel, E. v. (1982). *Der Schutz des Schwachen im Recht.* Tübingen: Mohr.

Hippel, E. v. (1986). *Verbraucherschutz.* Third edition. Tübingen: Mohr.

Hondius, E. (1987). *Unfair terms in contract law.* Utrecht: Molengraaf Institute for Private Law.

Hopt, K. (1983). Nichtvertragliche Haftung außerhalb von Schadens- und Bereicherungsausgleich — Zur Theorie und Dogmatik des Berufsrechts und der Berufshaltung. *Archiv für die zivilistische Praxis, 183*, 608—720.

Hörmann, G. (1987). *Verbraucher und Schulden.* Baden-Baden: Nomos.

Huyse, L., & Parmentier, S. (1980). Decoding codes: The dialogue between consumers and suppliers. *Journal of Consumer Policy, 13*, 253—272.

Ippolito, P., & Scheffman, F. (Eds.) (1986). *Consumer protection economics. Proceedings of the Bureau of Economics in April 1984.* Washington, DC: Federal Trade Commission. FTC Discussion Paper.

Joerges, C. (1981). *Verbraucherschutz als Rechtsproblem.* Heidelberg: Recht und Wirtschaft.

Joerges, C. (1991). Franchising and the Law — Theoretical and Comparative Approaches in Europe and the US. Baden-Baden: Nomos.

Joerges, C., Hiller, E., Micklitz, H.-W., & Holzscheck, K. (1985). *Vertriebspraktiken im Automobilersatzteilsektor.* Frankfurt: Campus.

Kantzenbach, E. (1967). *Die Funktionsfähigkeit des Wettbewerbs*. Second edition. Köln: Heymanns.
Kelman, S. (1979). Consumption theory, production theory, and the Coase theorem. *Southern California Law Review, 52*, 669—723.
Koch, H. (1990). *Verbraucherprozeßrecht*. Heidelberg: Müller.
Korah, V. (1984). *Exclusive dealing*. Oxford: Clarendon.
Koziol, G. (1988). Sonderprivatrecht für Konsumentkredite. *Archiv für die zivilistische Praxis, 188*, 183—229.
Krämer, L. (1986). *EEC consumer law*. Brussels: Story-Scientia.
Lipietz, A. (1984). *L'audace or l'enlisement — Sur les politiques économiques de la gauche*. Paris: Presses Universitaires de France.
Mitnick, B. (1980). *The political economy of regulation*. New York: Columbia University Press.
Müller-Graff, P. (1988). A case of long-term contracts. *Journal of Institutional Economics, 67*, 122—144.
NCAAC, National Consumer Advisory Council of Australia (1990). *New directions in consumer financial services*. Canberra: National Forum.
Nicks, S. (1987). Speak no evil: Known defects in the FTC used car rule. *Journal of Consumer Policy, 10*, 69—88.
Olson, M. (1965). *The logic of collective action*. Cambridge, MA: Harvard University Press.
Olson, M. (1982). *The rise and decline of nations*. New Haven, CT: Yale University Press.
Posner, R. (1969). The Federal Trade Commission. *University of Chicago Law Review, 47*, 37—89.
Posner, R. (1977). *Economic analysis of law*. Second edition. Boston: Brown/Little.
Posner, R. (1986). *Economic analysis of law*. Third edition. Boston: Brown/Little.
Priest, J. (1981). A theory of consumer product warranty. *Yale Law Journal, 90*, 1297—1378.
Quintela Goncalves, T. (1986). *La protección de los consumidores y usuarios y la constitución espanola de 1978*. Madrid: Universidad Complutense.
Ramsay, I. (1985). Framework for regulation of the consumer marketplace. *Journal of Consumer Policy, 8*, 353—372.
Reich, N. (1977). *Markt und Recht*. Neuwied: Luchterhand.
Reich, N. (1984a). *Staatliche Regulierung zwischen Marktversagen und Politikversagen*. Heidelberg: Müller.
Reich, N. (1984b). The regulatory crisis: Does it exist and can it be solved? *Environment Planning C: Government and Policy, 2*, 177—195.
Reich, N. (1986). Product safety and product liability. *Journal of Consumer Policy, 8*, 133—154.
Reich, N. (1988). *Reflexive law and reflexive legal theory: Reflections on postmodernism in legal theory*. Bremen: Centre for European Legal Policy. ZERP Discussion Paper 3/88.
Reich, N. (1991a). Le principe de la transparence des clauses limitatives relatives au contenu des prestations dans le droit allemand des conditions générales des contrats. In: J. Ghestin (Ed.), *Les clauses limitatives ou exonératoires de responsabilité en Europe*, pp. 79—83. Paris: Libraire générale du droit et de jurisprudence.
Reich N. (1991b). Die Verwirklichung von Verbraucherschutz in Kreditbereich, in W. Hadding, & K. Hopt (Eds.), *Das neue Verbraucherkreditgeretz*. Frankfurt/M.: Westpapier-Mitteilungen, 29—48.

Reich, N. (1992). Protection of consumers' economic interests by the EC. *Sydney Law Review*. Forthcoming.
Reich, N., & Leahy, D. (1990). *Internal market and diffuse interests. Volume 1: Entry and choice*. Brussels: Story-Scientia.
Reich, N., & Micklitz, H.-W. (1979). *Consumer legislation in the EC countries — A comparative analysis*. Wokingham, Berkshire: Van Nostrand.
Reich, N., & Micklitz, H.-W. (1981). *Consumer legislation in the Federal Republic of Germany*. Wokingham, Berkshire: Van Nostrand.
Reich, N., Tonner, K., & Wegener, H. (1976). *Verbraucher und Recht*. Göttingen: Schwartz.
Reifner, U. (1979). *Alternatives Wirtschaftsrecht am Beispiel der Verbraucherverschuldung*. Neuwied: Luchterhand.
Reifner, U., & Volkmer, H. (1988). *Neue Formen der Verbraucherrechtsberatung*. Frankfurt: Campus.
Schäfer, B., & Ott, C. (1986). *Lehrbuch der ökonomischen Analyse des Recht*. Heidelberg: Springer.
Schmidt, I., & Rittaler, R. (1986). *Das wettbewerbstheoretische und politische Credo der sog. Chicago-School*. Baden-Baden: Nomos.
Simitis, K. (1976). *Verbraucherschutz — Schlagwort oder Rechtsprinzip?* Baden-Baden: Nomos.
Stigler, G. (1961). The economics of information. *Journal of Political Economy, 69*, 213—225.
Teubner, G. (1983). Reflexive law. *Law and Society Review, 19*, 239—260.
Teubner, G. (1990). *Autopoietisches Recht*. Frankfurt: Suhrkamp.
Tonner, K. (1979). Verbraucherpolitik als gewerkschaftliche Aufgabe. *Journal of Consumer Policy, 3*, 252—260.
Tonner, K. (1991). *Reiserecht in Europa*. Baden-Baden: Nomos.
Uriarte Bofarull, I. (1985). The Spanish act on the protection of the rights of consumers and users. *Journal of Consumer Policy, 8*, 169—182.
Weisbrod, B. (Ed.) (1978). *Public interest law*. Berkeley, CA: University of California Press.
Westermann, H. (1978). Sonderprivatrechtliche Sozialmodelle und das allgemeine Privatrecht. *Archiv für die zivilistische Praxis, 178*, 196—230.
Wilhelmsson, T. (1987). *Social civilrätt* (Social civil law). Helsinki: University of Helsinki Press.
Wilhelmsson, T. (1990). "Social force majeure" — A new concept in Nordic consumer law. *Journal of Consumer Policy, 13*, 1—14.
Wilson, J. Q. (Ed.) (1980). *The politics of regulation*. Berkeley, CA: University of California Press.
Winter, G. (Ed.) (1988). *Perspektiven des Umweltrechts*. Köln: Schmidt.

ZUSAMMENFASSUNG

Unterschiedliche Theorien zum Verbraucherschutz. Der Beitrag unterscheidet drei unterschiedliche Theoriemodelle und Phasen von Verbraucherschutz: vor-interventionistisch, interventionistisch, und nach-interventionistisch. Entwickelte Marktwirtschaften zeichnen sich heute durch eine gemischte Rationalität aus, die ein bestimmtes Schutzniveau als gegeben hinnimmt, insbesondere im Bereich von informationsbezogenen Rechtsbehelfen. Auf der anderen Seite konnten sich andere Theoriemodelle, seien es solche einer Selbstregelung oder umgekehrt einer Bedürfnisorientierung,

nicht durchsetzen. Der Beitrag diskutiert dann die Auswirkungen dieser Verbraucherschutztheorie auf das Handelsrecht, auf die Vertretung kollektiver Verbraucherinteressen, und auf deren Umweltverträglichkeit.

THE AUTHOR

Norbert Reich is Professor of Civil, Commercial, and EC Law at the University of Bremen, Universitätsallee, D-2800 Bremen 33, Germany, and at the time of writing Allen, Allen, & Hemsley Visiting Fellow at the University of Sydney Law School.

The paper was originally presented to the Fourth Biannual Meeting of the International Academy of Commercial and Consumer Law, Melbourne, 23 to 26 August 1988. Upon suggestion of the Guest Editor, it was updated and amended without changing the basic argument.

The author wishes to express his thanks to his colleagues Hans Micklitz, Lesley Jane Smith, and Gerlinde Thomann, Centre for European Legal Policy, for help in elaborating and editing earlier drafts of the paper. David Harland, University of Sydney, gave valuable suggestions in revising the paper. As usual, the responsibility for the paper rests exclusively with the author.