EC and US Approaches to Consumer Protection—Should the Gap Be Bridged?*

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I. Introduction

Identifying the consumer stereotype upon which EC law is based has given rise to a fairly extensive discussion within consumer-law quarters during the present decade. Several authors from various countries have analysed the ways in which the consumer is perceived both by the European Court of Justice and by the authors of directives and other legislative measures in the consumer law field.

As information and transparency, as well as consumer choice on the internal market, seem to be central devices of EC consumer policy, the active internal-market-consumer[1] who can, and shall, decide on her own affairs at her own risk[2] has been presented as the dominant consumer image at Community level. Terms like the cognitively competent consumer have also been used.[3] EC consumer policy is said to be built on the idea of the consumer as an active and critical information-seeker.[4] The European Court of Justice, in its decisions relating to information requirements in various contexts, is also said to employ an image of the consumer as a person who, instead of hastily and relatively uncritically throwing a fast glance on advertisements and other written materials, critically and attentively makes use of all the information offered to her.[5]

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[1] C. Joerges and G. Brüggemeier, 'Europäisierung des Vertragsrechts und Haftungsrechts', in P.-C. Müller-Graff (Ed) *Gemeinsames Privatrecht in der Europäischen Gemeinschaft* (Nomos 1993) at 260.

[2] P. Hommelhoff, 'Zivilrecht unter dem Einfluss europäischer Rechtsangleichung', 192 *Archiv für die zivilistische Praxis* at 93–4 (1992).

[3] A. Höland, 'Leitbilder des europäischen Verbraucherrechts', in L. Krämer, H.-W. Micklitz and K. Tonner (Eds) *Law and Diffuse Interests in the European Legal Order* (Nomos 1997) at 201.

[4] T. Wilhelmsson, 'Consumer Images in East and West' in H.-W. Micklitz (Ed) *Rechtseinheit oder Rechtsvielfalt in Europa? Rolle und Funktion des Verbraucherrechts in der EG und den MOE-Staaten* (Nomos 1996) at 55.

[5] A. Hagen Meyer, 'Das Verbraucherleitbild des Europäischen Gerichtshofs—Abkehr vom "flüchtigen Verbraucher" ' 39 *Wettbewerb in Recht und Praxis* at 224 (1993).

This basic assumption of a well informed consumer has been criticized even from an internal market point of view; the development of a true internal market is said rather to require the creation of a confident consumer.[6] In fact existing EC materials are not without contradictions in this respect. Other approaches than those based on the information-seeker can be found within EC law as well. Although the EC law consumer is seen as a rational person able to make choices, to organize, to have a dialogue, and to seek her rights, nevertheless she is still considered to be in need of protection against health risks as well as economic risks.[7] Some cases at the European Court of Justice have been said to reflect the fact that consumers may be unable to process information[8] and take into account the special needs of weak consumer groups.[9] However, today these approaches rather seem like suppressed exceptions than reflections of the main principles underpinning EC law.

This emphasis on the active and information-seeking consumer in EC law is not necessarily, however, in line with the images adopted in national consumer law. The Nordic consumer-law image has been described as a passive glancer who, for example, makes her or his decisions on the basis of the overall impression received by a short glance at the advertisement.[10] The German approach seems to show similar features; the court practice concerning unfair competition is said to be built on the idea of the so-called '*flüchtige Verbraucher*' who uncritically receives advertising messages.[11] Of course the consumer images found in national law are also somewhat contradictory in the same way as is the case in EC law, and some materials for example from Nordic and German law certainly focus primarily on the active and information-seeking consumer. EC law just enforces this trend more strongly than the laws of at least some of the Member States.

The general trend to deregulate and develop self-regulatory practices in many countries may bring the active consumer more in focus also without the pressure from EC law. This does not necessarily affect the content of the rules and the consumer images on this level, although it can have effects here as well. It rather has to do with the enforcement of the rules. Private law remedies are increasing in importance all over Europe. A consumer policy of this kind relies on active consumers to voice their concerns rather than on public authorities. Such a development is not in conflict with the aims and freedoms of EC law.

One may, in other words, assume that EC law is at least to some extent strengthening the image of the active and information-seeking consumer in

[6] S. Weatherill, 'The Evolution of European Consumer Law and Policy: From Well Informed Consumer to Confident Consumer', in Micklitz (Ed), supra n 4.

[7] Höland, supra n 3, at 213.

[8] S. Weatherill, 'The Role of the Informed Consumer in European Community Law and Policy' (1994) *Consumer Law Journal* at 53, referring to Case 286/81 *Oosthoek's Uitgeversmattschappij* [1982] ECR 4575.

[9] T. Wilhelmsson, *Social Contract Law and European Integration* (Dartmouth 1995) at 168, with reference to Case 382/87 *Roger Buet* v *Ministère Public* [1989] ECR 1235.

[10] Wilhelmsson (1996) supra n 4, at 108.

[11] Meyer, supra n 5, at 224.

the mix of consumer policies in the European Union. Some examples supporting this thesis will be discussed below. The primary aim of this article is not, however, to prove a thesis which has already been put forward and defended by several authors. Our intention is to deepen the understanding of the implications and the risks involved in this development by comparing it to some aspects of and reasons behind American consumer law. This comparison should offer us some new tools for criticism of the present state of EC law and permit us to make suggestions for its improvement.

US consumer law is often understood as being built on the ideal concept of strong and active consumers interested in seeking and using information and actively defending their legal rights on their own initiative through private law. Many of the examples discussed in this article illustrate this assumption and show parallel trends in EC consumer law. This implies a tendency to bring consumer law in Europe closer to the American position. Our aim is to discuss whether such an 'Americanisation' of EC consumer law is desirable. Are there factors in the European society which make the American type solutions less workable and is there anything to be done to adapt such solutions to the European environment?

Our working hypothesis is the following. Americans do not trust their businesses nor their regulators. In Europe, on the other hand, people tend to believe that most businesses, or at least the big well-reputed ones, are ethical and that the State will offer protection against those that are not. The different attitudes towards the State on either side of the Atlantic seems to be an important distinguishing factor. On this basis we question whether rules which may seem at least somewhat effective in the American context can be expected to have similar effects in the European setting without additional measures to strengthen their effects. The European consumers have not learned the need to protect themselves in the way (some) US consumers, and consumer organizations, seem to have. Consumers in Europe have not yet become familiar with using private law remedies and the consumer movement has not learned how to participate fully in the changing climate.

Of course an analysis speaking about consumers in 'Europe' has to be very generalized, even if one restricts oneself to dealing with the European Union. Obviously the expectations of the Nordic people towards the State differ rather radically from those of Southern Europe. In the following we will hint at some of these differences, but obviously rather randomly. Our perspective on Europe will inevitably, because of our own nationalities, be a British-Nordic one.

II. The expectations of consumers and citizens

The way a US citizen fundamentally understands the State often appears as rather strange for a European. For an American the State is at least potentially an 'evil' against which one needs to be protected, at least from its worst excesses (with excesses being given a very broad definition to include some

activities Europeans would expect their State to perform). The civil liberties created to protect the citizen against the State occupy a very central place in American societal thinking. This attitude obviously has long roots in the American tradition. Many of the colonists had fled from the oppression of European States, based on religion or other reasons, to American freedom.

In this context one may refer also to Hirschman's well-known analysis of exit, voice and loyalty as modes of social behaviour.[12] Hirschman describes how 'exit' has been an integral part of the US culture, ever since the initial settlers chose to leave their country of origin, and how it continues today because of the vastness of the country.[13] He states that '[w]ith the country having been founded on exit and having thrived on it, the belief in exit as a fundamental and beneficial social mechanism has been unquestioning'.[14] This might explain why collective solutions to try to improve matters through regulation are less appealing than the markets solutions of choice based on disclosure provisions and litigation, which can itself be viewed as a form of exit, as it typically indicates a breakdown in the relationship between the parties.[15]

Returning to the US emphasis on civil liberties a comparison with Europe does not at first glance reveal strong differences. Of course civil liberties are important in European thinking as well. They even seem to have acquired a kind of a renaissance after the collapse of the socialist Europe. However, in much European thinking the State is still conceived as something potentially 'good' which is there to create better living conditions for the citizens. Social rights receive a more important place on the agenda; a well-known example is the '*Sozialstaatsklausel*' (social State clause) of the German constitution. The citizens expect the state to protect them from evil and assist them if evil occurs. Of course the degree of 'goodness' of the State varies in Europe. As mentioned above the Nordic countries seem to be the most 'extreme'—in consumer law the strong emphasis on the role of the public Consumer Ombudsman is just one example of this. In Southern Europe the attitude towards the State is probably more neutral.[16]

In line with these different views of the nature and role of the State there are also different expectations concerning the creation and defence of solidarity in society. Whilst Americans tend to put the emphasis on voluntary measures and the activities of private organizations, the European concept of the Welfare State clearly designates the public sector as being primarily responsi-

[12] A. Hirschman, *Exit, Voice and Loyalty* (Harvard UP 1970).
[13] Ibid, Chap 8.
[14] Ibid, at 112.
[15] It should be noted that Hirschman himself was more concerned about applying his theory to the political process.
[16] T. Tiilikainen in *Europe and Finland. Defining the Political Identity of Finland in Western Europe* (Ashgate 1998) has analysed the various attitudes towards the State in the European Union from the point of view of religious traditions. The Lutheran faith which prevails in the Nordic countries, and parts of Germany, has traditionally accepted the subjection of the church to the State and emphasized loyalty to the secular power and hence fostered a State-centred approach. Calvinism, preaching the idea of salvation through one's own deeds, rather forms a basis for individualistic liberalism, whilst the Catholic faith in the south of Europe by focusing on the Christian community leads to a more community-based approach.

ble for social welfare policy. Of course there are rather deep differences in Europe; there are at least three or four clearly distinguishable Welfare State models in the European Union.[17] In some of the Member States (especially those belonging to the 'peripheral model') the degree of involvement of the State is low. Even in the more welfarist countries, the Welfare States are said to be in a crisis and to face an uncertain future.[18] However, the development may look very different in different countries. The Nordic countries are still retaining a relatively high level of State protection, whilst the changes in the United Kingdom have been rather dramatic and the new Labour Government is if anything even keener than its Conservative predecessor to highlight the need for a fundamental re-orientation of the Welfare State. Anyway one may safely assume that in large parts of the European Union the citizens, who have internalized certain basic attitudes towards the 'good' State, still retain at least part of their Welfare-State expectations and will behave accordingly. The creation of the consumer protection mechanisms, which timewise and ideologically are quite closely connected with the maturing of the Welfare State, probably has implanted into the consumers similar expectations of State-offered protection.

Ironically the retraction of the Welfare State has also brought with it increased consumer protection rhetoric. Consumer values have been infused into public or recently privatized institutions[19] and consumer's individual rights have been emphasized as a makeweight for reduced public protection. However, this broadening of the consumer concept often to a considerable extent builds on the image of the active consumer. Therefore, also in this context there is a danger that consumers do not fulfil the new expectations the State has of them. They may not be equipped to respond to them either for psychological reasons or because they lack the institutions (such as lawyers and access to justice) to take the advantage of the new opportunities open to them.

The European trust in the State is obviously also connected with the more modest role of organizations and unorganized collective action in the European setting as compared to the American. Admittedly it has been claimed that postmodernity everywhere is an era of micropolitics during which various small groups and minorities emerge in central roles.[20] Such an analysis is not only presented by American social scientists. Also European scholars speak for example about 'citizen-initiative groups' and 'sub-politics' as key-words when describing the present time.[21] However, such activity does

[17] P. Kosonen, *European Integration: A Welfare State Perspective* (University of Helsinki Sociology of Law Series 8, 1994), at 72–4, distinguishes the Nordic model, the Continental model, the Peripheral model (Greece, Ireland, Portugal, and Spain) and Britain (a 'crisis model'?).

[18] On the crisis debate and on the decline of the European Welfare States, see, for example, Kosonen, supra n 17, 75–90.

[19] See C. Willett (Ed) *Public Sector Reform and The Citizen's Charter* (Blackstone Press 1996).

[20] F. Jameson, *Postmodernism, or, the Cultural Logic of Late Capitalism* (Verso 1991) at 318–31.

[21] U. Beck, 'The Reinvention of Politics: Towards a Theory of Reflexive Modernization', in U. Beck, A. Giddens and S. Lash, *Reflexive Modernization* (Polity Press 1994) 16–23.

seem to be more strongly emphasized, or at least to have different features in the American society. This goes especially for truly independent organizational as well as unorganized group activity. Many European organizations may be as strong or even much stronger (like in the case of trade unions) than their American counterparts, but such organizations are often closely interwoven with the State and sometimes even partially financed by the State. The organizations are related to the 'good' State.

The consumer field appears as one where such a difference between American and European attitudes can be noted. Whilst collective consumer activism has been a prominent feature of American consumer markets,[22] Naderism being the catchword in this context,[23] European consumer protection has in many countries been developed from above, by the State. The supervision of consumer markets is entrusted, for example in the very State-oriented Nordic countries, to State authorities as well. Also in the United Kingdom the regulators have confidence in State authorities, such as the Office of Fair Trading; the previous Conservative Government even refused to grant consumer organizations standing to seek injunctions under the Unfair Terms in Consumer Contracts Directive.[24] In countries like Germany where consumer organizations do fulfil an important supervisory function they are heavily subsidized by the State. Similarly in France the Government subsidies the Institute National de Consommation and the corporatist involvement of the Government in the field is also reflected in the fact that consumer groups which want to act legally for consumers have to register with the State.

This short sketch seems sufficient to explain the grounds for the assumptions on which this article is based. The expectations of European consumers—especially those from Northern Europe—are different from US consumers and therefore their behaviour is different from that of the Americans.

In a theory of the legal protection of expectations four levels are distinguished: persons, roles/institutions, programmes, and values.[25] Consumers

[22] This does not mean that American consumer organizations would be very strong in the sense of having a large number of members. Indeed it has been estimated that only one sixteenth hundredth of one per cent of consumers had joined the US National Consumers' League, see E. Schattschneider, *The Semi-sovereign People* (Holt, Rinehart and Winston 1960) 31 quoted in M. Olsen, *The Logic of Collective Action* (Harvard UP 1971) 142. It is more a question of the type and intensity of activism—both organized and unorganized—one can find in this area.

[23] See, for example, Y. Gabriel and T. Lang, *The Unmanageable Consumer* (SAGE Publications 1995) 159–62. It should be noted that the ideology of the naderist movement is based on strong individualism, H. Gorey in *Nader and the Power of Everyman* (Grosset and Dunlap 1975) 64 writes 'Nader genuinely believes in free enterprise. He likewise believes it no longer exists. He supports competition in the marketplace. Where true competition exists, he opposes govermental regulation.'

[24] OJ 1993 L 95/29, see R. Brownsword and G. Howells, 'The Implementation of the EC Directive on Unfair Terms in Consumer Contracts—Some Unresolved Questions' (1995) *JBL* 243. Things are, however, changing: the new Lord Chancellor is looking to establish an effective representative action procedure and plaintiff lawyers are becoming better organized to bring collective consumer disputes to the courts.

[25] V. Gessner, 'Europas holprige Rechtswege—die rechtskulturellen Schranken der Rechtsverfolgung im Binnenmarkt', in Krämer, Micklitz and Tonner (Eds) supra n 3, 174.

may buy because the seller is known to him (persons), because (s)he feels protected by the legal institutions and mechanisms (institutions) or by the consumer protection legislation (programmes) or because (s)he believes in the general business morals (values). All these elements are obviously present in various national contexts. In line with what has been stated above one may claim that the protection of expectations on the level of institutions and programmes would be typical for Northern Europe.[26] Again, one should also make the *caveat* concerning the differences in Europe: in Southern Europe the protection of the expectations on the level of persons is said to be dominating.[27] However, even in this case the consumer behaviour would rather depend on trust than on such a rational and critical (adversarial, distrusting) attitude that is assumed to be guiding American consumers.

III. Consumer safety

A. INTRODUCTION

The high profile of product liability actions in the United States marks consumer safety out as an area where our thesis may be readily tested. Following the introduction of the EC Product Liability Directive[28] the differences between Europe and the United States do not lie so much in the substantive law. Indeed it will be argued that if the principles set out in the Restatement (Third) of Torts: Products Liability[29] become accepted by the US courts, Europe may even have a stricter form of liability. Rather the important point to consider is the function the law performs.

It is well known that product liability damages in the United States often act as a surrogate for a Welfare State.[30] For many people in the United States tort damages are an important means to meet health care costs and replace lost income. However, we shall see that the United States is currently moving away from the vision of the producer as a social insurer on behalf of the users of his products and some element of real or presumed fault is increasingly becoming a pre-condition to receipt of tort damages. However, product liability actions also serve a regulatory function as a surrogate for the political process. The on-going tobacco litigation well illustrates this as compensation is only one aspect of the proposed global settlement. The settlement would also resolve a range of regulatory issues which have languished in the still waters of Congress for sometime.[31] In less contentious cases the deterrent threat of

[26] Gessner, ibid. [27] Ibid. [28] OJ 1985 L 210/29.

[29] We are working from the *Proposed Final Draft, 1 April, 1997* (American Law Institute, 1997) (hereafter ALI Draft). This has been adopted with only minor amendments, but the final text is not yet available.

[30] A. Bernstein, 'A Duty to Warn: One American View of the EC Products Liability Directive' 20 *AAL* (1991).

[31] See, *Proceedings and Papers of the Conference on the So-called Global Tobacco Settlement* (Institute for Legal Studies Working Paper, University of Wisconsin Law School, March 1998) and *Special Issue of Southern Illinois University Law Review* (forthcoming).

product-liability is seen as important to compensate for any weaknesses in the regulatory regime. The use of punitive damages in product liability actions is a clear expression of Americans' distrust of corporations. Consumer safety law in the United States will be surveyed to see to what extent this image of weak regulation and reliance on the individual to protect their own interests against potentially exploitative corporations matches up with reality. The position in Europe will then be compared to assess the extent to which it can still rely on its traditions as a regulatory Welfare State or whether liability rules have to be given an increased role in the protective regime.

B. UNITED STATES

(*i*) *Regulation*

It is somewhat ironic that US citizen's are sceptical of the ability of their regulators to assure consumer safety,[32] whilst US consumer safety regulation is at the same time held up as a model for others to emulate.[33] There are perhaps three explanations for this paradox. First, United States consumer safety may not be as ineffective as critics of the performance of government agencies in the US like to suggest. Second, the model of a consumer product safety agency with wide ranging and innovative powers as introduced with much fanfare in 1972 may remain more attractive to the outsider, who remembers these positive images, than it is to those who have seen its problems in the ensuing years. Third, whilst the US Consumer Product Safety Commission (CPSC) may have many positive features, these may be undermined by institutional weaknesses. It is hard for a national agency to deal with the many product safety issues which arise across a country the size of the United States[34] and the State Attorney Generals do not concern themselves with product safety matters in the same way as their work in protecting the consumer's economic interest complements the work of the Federal Trade Commission (FTC). Furthermore, the Consumer Product Safety Commission was subject to savage budget cuts during the Reagan years.

One of the undoubted strengths of the US system is its injury data collection systems of which the centre-piece is the National Electronic Injury Surveillance System (NEISS).[35] This relies on data recorded in a representative sample of hospital emergency rooms and was the inspiration for national sys-

[32] Our concern will be with consumer products in the sense of household and leisure goods. We will not look at specialist areas, such as food and pharmaceuticals.

[33] See, H.-W. Micklitz, 'EC Product Safety Regulation—A Still Uncompleted Project' (1997) *Consumer Law Journal* 48 and G. Howells, *Consumer Product Safety* (Dartmouth 1998) especially Chap 4.

[34] The CPSC has its headquarters in Bethesda, Maryland, just outside Washington. There are three regional centres in New York (Eastern), Chicago (Central) and San Francisco (Western), staff in 35 other cities and 135 field workers.

[35] Howells (1998) supra n 33, Chap 4, s 2C and *The National Electronic Injury Surveillance System: A Description of its Role in the US Consumer Product Safety Commission* (Division of Hazard and Injury Data Systems March 1990).

tems in the United Kingdom, The Netherlands, and Denmark and eventually for the EHLASS system at the European Level (see below).[36] The American NEISS system remains the largest and most sophisticated product-related accident data collection system. The information collected is used to target information campaigns and regulatory activity.

It is in the area of regulatory activity that the Consumer Product Safety Commission has been least successful. The Consumer Product Safety Act (CPSA) of 1972[37] had included fairly strong and innovative powers permitting the Safety Commission to ban or issue mandatory standards governing consumer products.[38] But these powers became emasculated by the over bureaucratic procedures which came with them and the naïve approach of the Safety Commission in its early years.[39] This point is well illustrated by looking at two of the features which were abandoned in the 1981 overhaul of the rule-making procedures.[40]

The original procedures had included a petitioning process whereby any interested person could try to prompt the Consumer Product Safety Commission to act against products they considered to be dangerous and to seek a judicial hearing if they were unhappy with the Safety Commission's response. Fears that this procedure might overwhelm a fledging agency caused the legislators to build in a three-year delay after enactment, before this measure came into force, but the Safety Commission chose to ignore this breathing space. During the first three years the Safety Commission received 203 petitions, 51 under the Consumer Product Safety Act and petitions came to dominate the CPSC's work programme. This is unfortunate as a new agency with limited resources should have prioritized its work more systematically. The Consumer Product Safety Commission seems to have believed it had to accept any petition presenting an 'unreasonable risk of injury', even if other priorities were more compelling; it was also inexperienced in assessing what constituted an 'unreasonable risk' and underestimated what was involved in the standards procedure.[41] It had initially anticipated initiating proceedings for forty standards a year, but in reality found the procedures far slower. The petitioning process is now dealt with under the more relaxed procedures of the Administrative Procedure Act, but the Consumer Product Safety Commission had in any event been giving petitions a lower priority.

[36] See below n 107.

[37] On which see R. Rosen, 'The Consumer Product Safety Act: A Federal Commitment to Product Safety' 48 *St John's Law Review* 126 (1973).

[38] Note that the FTC also has a role by using its powers to deal with unfairness, deception, and advertising substantiation to control safety claims and even to require that safety information be provided: R. Petty, 'Regulating Product Safety: The Informational Role of the US Federal Trade Commission' 18 *Journal of Consumer Policy* 387 (1995).

[39] See T. M. Schwartz, 'The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade' 51 *George Washington Law Review* 32 (1982).

[40] Consumer Product Safety Amendments Act 1981: see E. Klayman, 'Standard Setting Under the Consumer Product Safety Amendments of 1981—A Shift in Regulatory Philosophy' 51 *George Washington Law Review* 96 (1982) and Schwartz, supra n 39.

[41] Schwartz, supra n 39, 47.

One of the reason for the slowness of the standards making process was the offeror procedure, under which the Consumer Product Safety Commission sought offers from outside bodies to develop standards. This was a bold attempt to democratize the standards making process, especially as there was provision for consumer organizations to be the offeror body or to participate in the process with government subsidies.[42] The offeror procedure was widely considered a failure. Certainly it was too drawn out, with long time lags for public participation and delays caused by the CPSC's practice of developing its own approach and entering into negotiations with the offeror. In retrospect it may have been more sensible for the offeror procedure to have been an option for the CPSC to invoke on appropriate occasions rather than a mandatory provision which had to be used no matter how complex the matter.

The rule-making procedures of the CPSC were therefore in need of an overhaul, but the 1981 amendments went far further than this and virtually disempowered the CPSC as a rule-making body. In addition to the reforms already discussed there were two other key elements to the 1981 reforms: the preference for performance rather than design standards and for voluntary rather than mandatory standards. There is nothing terribly startling about this for we shall see that Europe was moving in the same direction. However, the reforms had a dramatic character in the United States. For instance, the CPSC was not simply told to prefer performance standards, but rather was prohibited from enacting design standards. This was over dogmatic. The original CPSA had in any event required the CPSC to use performance standards whenever feasible and the CPSC had been cautious in its use of design standards.[43]

Since 1981 the CPSC can only promulgate a rule if it is satisfied that a voluntary standard is not suitable as it is either unlikely to eliminate or adequately reduce the risk of injury or there was unlikely to be substantial compliance with the standard. This central role for voluntary standards differs significantly from the function we shall see voluntary standards play in Europe in the EC's new approach to technical harmonization. Under the new approach, standardization takes place within a legal framework which establishes the main contours of the safety regime, whereas the CPSC has only a marginal role in supervizing the work of the standards bodies. American National Standards (ANS) issued by the American National Standards Institute (ANSI) have no status within the legal regime comparable to European standards which provide the means to establish conformity with new approach directives. Neither is the

[42] In fact consumer organizations were offerors in only a few instances, partly due to the CPSC's unwillingness as a a general rule to meet more than out of pocket expenses: see, generally, C. Tobias, 'Early Alternative Dispute Resolution in a Federal Administrative Agency: Experimentation with the Offeror Process at the Consumer Product Safety Commission' 44 *Washington and Lee Law Review* 409 (1987).

[43] Indeed the distinction between performance and design standards can easily breakdown when a particular design is needed to meet performance criteria: Klayman, supra n 40, 104–8 gives the example of a standard for swimming-pool edges requiring them to be designed so that they do not cut tissue, which would in effect require them to be designed without protruding or rough edges.

Consumer Product Safety Commission able to rely on a general safety obligation. Therefore no action can be taken against products failing to comply with standards, unless the product poses a substantial product hazard.[44]

US standards bodies are far more decentralized than their European counterparts. There are estimated to be 400 voluntary standards writing bodies in the United States.[45] A major concern is the lack of consumer involvement in the development of standards.[46] For instance, the largest standards writing body, the American Society for Testing and Materials (ASTM) publishes more than 9, 100 standards but only puts aside $50,000 to assist with consumer representation on its committees and ANSI's Consumer Interest Council is as much concerned with getting businesses to be aware of the value of understanding their customer needs as it is with being a vehicle for the consumer movement to voice its concerns. By contrast European consumer groups are active participants in the standardization process. This difference may partly be explained by the purely voluntary nature of standards in the United States. In Europe the more explicit role standards play in the legislative process has made it easier to justify calls for consumers to be involved in the process leading up to their adoption. However, this is not a sufficient excuse for the lack of consumer involvement in the United States. The US Government has clearly delegated responsibility to private standards bodies for the development of standards. It may also reflect a lack of interest on the part of US consumer groups in becoming involved in the standardization process. When giving evidence to the National Commission on Consumer Safety, which preceded the Consumer Product Safety Act 1972, the Technical Director of the Consumers Union talked about standardization committees in terms of it being 'fruitless to spend time and money to go to such meetings . . . Volunteerism and token consumer representation have been generally unsuccessful in protecting the consumer interest'.[47] Three decades later little seems to have changed to make the consumer movement more actively involved in the standardization process.

Positive features of the US regime are the reporting obligations placed on manufacturers, distributors and retailers to report potentially unsafe products to the Consumer Product Safety Commission. Originally this obligation only arose when a person obtained information that the product failed to comply with an applicable consumer product safety rule or contained a defect which could create a substantial product hazard. In an attempt to increase the rate of

[44] See below, 218.

[45] *Consumers, Product Safety Standards and International Trade* (OECD 1991) at 25. For a good, but somewhat dated, discussion of US standards-making see R. Hamilton, 'The Role of Non-governmental Standards in the Development of Mandatory Federal Standards Affecting Safety and Health' 56 *Texas Law Review* 1329 (1978).

[46] In more detail, see Howells, supra n 33, Chap 4, s 3C. In the early 198Os the FTC had proposed making these bodies more responsive to consumer concerns: see *Standards and Certification* (Federal Trade Commission, 1983).

[47] Cited in J. A. Brodsky and M. N. Cohen, ' "Uncle Sam", the Product Safety Man: Consumer Product Safety Standards in the Marketplace and in the Courts' 2 *Hofstra Law Review* 619 at 632 (1974).

reporting these grounds were extended by the Consumer Product Safety Improvement Act 1990 to include failure to comply with a voluntary product safety standard relied upon by the Consumer Product Safety Commission and situations where the product creates an unreasonable risk of serious injury or death. Manufacturers were also put under a new duty to report, in a less detailed manner, when their products had, within twenty-four months, been involved in three civil actions alleging death or grievous injury leading to settlement or judgment for the plaintiff. The civil penalties for failing to notify were also increased.[48] These reporting obligations are undoubtedly valuable both as a source of information for the Consumer Product Safety Commission and as a means for reinforcing on manufacturers and others involved in the supply of goods that they have responsibilities to ensure consumers are safe. However, it is disturbing that there are indications that traders fail to comply with this obligation. One would have imagined that the possibility of punitive damages being claimed, if it became known that a firm had knowingly failed to report suspicions, would have been a major incentive to comply; but it seems the risk of being dragged into product liability litigation of any sort was a major disincentive to admit any possibility of defects in one's products.

The decline in the CPSC's rule-making powers caused it to place more emphasis on its power to take remedial action against products posing a substantial product hazard. The Consumer Product Safety Commission can require public notice of the defect or that notice be given to manufacturers, distributors, or retailers, or any person known to have bought or had the product delivered to them. It can also order that the manufacturer, distributor, or retailer take one of the following actions: bring the product into conformity, repair the defect, replace the product with one that does not contain the defect or refund the purchase price. However, in possibly ninety-five per cent of cases a voluntary corrective plan is possible.[49] The Safety Commission has a sophisticated system of dividing the product hazards into three categories depending upon the degree of risk with appropriate responses being set out for each class.

In contrast to the position in Europe the Consumer Product Safety Commission does not have the benefit of a general safety duty or a general power to seek injunctions against dangerous products. However, it can take action against consumer products which pose an imminent and unreasonable risk of death, serious illness, or severe personal injury. One drawback of this power is that a court order is needed before the goods can be seized.

The regulatory landscape in the United States is not therefore as bleak as some critics would suggest. Indeed there are many who believe the Consumer Product Safety Commission has been too strict in its regulatory approach.[50] However, there must be some doubts about how effective enforcement in the

[46] On the 1990 amendments see C. D. Erhardt III, 'Manufacturers of Consumer Products, Beware!' (1992) *Product Liability International* 66.

[47] Ibid, 67.

[48] See K. Viscusi, *Regulating Consumer Product Safety* (American Enterprise Institute 1984).

field can be when placed in the hands of a national agency, particularly given the size of the United States. Moreover, since the 1981 reforms it has been difficult for the Consumer Product Safety Commission to impose demanding standards because of the policy of favouring voluntary standards. US standards bodies remain far more private sector bodies than their European counterparts which have taken on a corporatist role.

Product safety regulation in the United States has many valuable elements, some of which are even envied by European consumer-safety agencies. However, many of the weaknesses arise from trying to regulate product safety for a large economy from one central agency. As Europe becomes a more unified market, the US experience may serve to illustrate the need for a decentralized enforcement approach; although equally Europe might take note that a central agency can perform valuable functions. The US Consumer Product Safety Commission has, for instance, developed extensive accident data collection systems. In a different political climate, than that which existed during the last two decades, one suspects that the Safety Commission had the potential to be an even more effective protector of the consumer interest. Indeed the record of the Safety Commission shows significant consumer gains in the face of financial and political restrictions and perhaps suggests that some of the critics of regulatory action in the United States may be motivated more by political values than empirical assessment. In truth there is probably a natural inclination in the American spirit to prefer to rely on individual responsibility backed up by the threat of product liability action.

(*ii*) *Product liability*

This individual responsibility has two dimensions. It refers to the expectations that consumers will look after their own interests. This explains the heavy reliance on information duties, both in standards and as the basis for imposing product liability. But it also imposes on producers a responsibility to ensure their products do not harm consumers. This is not based on a natural belief in the benevolence of businessmen. Indeed the whole development of strict liability can be viewed as an attempt to impose higher standards on businesses than would have resulted from a duty of care in negligence.[51] The most marked evidence of this is the award of punitive damages.

Although having roots in the common law imported from England, punitive damages are far more widely available in the United States than in England or other European countries and the amounts awarded (by US juries) are certainly far higher than such awards by European courts.[52] In the product-liability sphere one instantly thinks of the *Ford Pinto* case where a jury awarded $125 million punitive damages because of the faulty design of its fuel

[51] J. Montgomery and D. Owen, 'Reflections on the Theory and Administration of Strict Liability for Defective Products' 27 *South Carolina Law Review* 803 (1976) at 809–10 'Negligence liability is generally insufficient to induce manufacturers to market adequately safe products.'

[52] See Law Commission, *Aggravated, Exemplary and Restitutionary Damages—A Consultation Paper*, Working Paper No. 132 and subsequent Report *Aggravated, Exemplary and Restitutionary Damages* No. 247, Cm 346 (1997).

system which caused the vehicle to erupt into flames after a rear-end collision.[53] US courts permit punitive damages even for unintentional torts 'where the defendant's conduct constitutes a conscious disregard of the probability of injury to others'.[54] Some States have barred punitive damages, made their recovery more difficult or limited the award to a compensatory basis.[55] Empirical research has also found that, in personal injury cases, punitive damages are not awarded as frequently or on as large a scale as is often imagined.[56] Nevertheless it is clear that they are sufficiently prevalent to be of real concern to US industry; indeed the mere possibility that punitive damages might be sought has a significant deterrent effect.

It is interesting to consider the policy reasons the California Court of Appeals gave in the *Pinto* case for imposing punitive damages. It sought to prevent 'objectionable corporate policies' whereby manufacturer's find it profitable to factor compensatory damages into the price of he product. Significantly, for our thesis, it noted that governmental standards and the criminal law had failed to protect consumers.[57] Punitive damages were seen as providing consumers with an incentive to enforce laws and to recoup their expenses for doing so.[58]

There is no doubt that the modern trend towards strict product liability originated in the United States. Section 402A of the Restatement (Second) of Torts (1965) provided that 'One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property . . .'.[59] Although clearly pushing the frontiers of liability rules, rather than simply 'restating' the majority position, the Restatement soon became widely applied across the United States.[60]

Although other countries have subsequently adopted strict liability it is true to say that product liability remains a truly American phenomenon. Whilst section 402A has been litigated in thousands of reported cases over the last three decades[61] product liability litigation remains sparse elsewhere. There are

[53] *Grimshaw* v *Ford Motor Co* 119 Cal App 3d 757, 174 Cal Rptr 348. The amount was subsequently reduced to, the still not insubstantial sum of, $3.5M.

[54] Ibid.

[55] G. Christie, 'Current Trends in the American Law of Punitive Damages' 20 *AAL* 349 (1991).

[56] M. Peterson, S. Sarma and M. Shanley, *Punitive Damages, Empirical Findings iii* (RAND 1987) and S. Daniels and J. Martin, 'Myth and Reality in Punitive Damages' 75 *Minnesota Law Review* 1 (1990).

[57] For criticism of the regulation of the car industry see R. Nader, *Unsafe at any Speed* (Grossman 1965).

[58] *Grimshaw*, supra n 53.

[59] For more detailed discussion of the development of US products liability, see G. Howells, *Comparative Product Liability* (Dartmouth 1991) Chap 12, J. Stapleton, *Product Liability* (Butterworths 1994) Chap 2; W. P. Keeton, D. Owen, J. Montgomery, M. Green, *Products Liability and Safety* (Foundation Press 1989) and J. Phillips, N. Terry and F. Vandall, *Product Liability* (Michie 1994).

[60] Only Delaware, Massachusetts, Michigan, North Carolina, and Virginia did not adopt strict liability by statute or case-law: see D. Owen, 'American Products Liability Law Revisited' (1998) *Consumer Law Journal* forthcoming.

[61] In 1992 a conservative estimate was that no fewer than 3,000 court decisions cited Section 402A, see J. Henderson and A. Twerski, 'A Proposed Revision of Section 402A of the Restatement (Second) of Torts' 77 *Cornell Law Review* 1512 (1992).

several explanations for this. It is undoubtedly true that there is a greater need for some Americans to use their private law remedies to meet health-care costs, which in most European countries are met through universal health-care services. However, the US system also creates incentives for individuals to litigate. We have already noted the availability of punitive damages, but even the compensatory damages awarded by US juries tend to be far more generous than their counterparts in Europe. The lower level of damages in Europe combined with wider availability of social insurance partly explain why less product liability litigation takes place in Europe. However, the access to justice questions are also decisive. In the United States it is common for product liability claims to be taken on a contingency fee basis. Whether this is desirable is another debate, but it certainly encourages litigation, as does the general rule that costs do not follow the event—so consumers do not have a fear of having to pay the other party's legal fees if they lose. These rules seem to underpin a belief that individuals should be able to make use of the private law to protect their own interests and certainly the United States is a more litigious society than Europe.[62] Product liability also plays a more political role in the United States than it does in Europe. This is well illustrated by the recent tobacco litigation which is as much about achieving a regulatory solution to the public-health issues surrounding smoking in the face of political deadlock as it is with the question of compensation.[63]

The context within which product liability operates in the United States is more significant than the rules of substantive law. It is arguable that Europe now has stricter product liability rules than the United States and yet product liability remains a more powerful force in the United States despite a weakening in the principles of strict liability because tort damages are both higher than their European counterparts and serve a more strategic social function because of the absence of a developed social welfare system.

By the late 1980s, empirical research was finding that the courts were becoming increasing sympathetic to defendants.[64] Although federal legislation has been proposed on several occasions, but never enacted,[65] many States have introduced reforms to assist defendants.[66] Most significantly the American Law Institute has issued a Third Restatement of the Law of Torts: Product Liability (hereafter Third Restatement). Section 1 of the Third Restatement sets out what looks like a strict liability regime, by imposing on businesses who sell or distribute a defective product liability for harm to persons or property caused by the *defect*. The real character of the Third

[62] Cf. B. Markesinis, 'Litigation-Mania in England, Germany and the USA: Are We So Very Different? 49 *CLJ* 233 (1990) who found that whilst the US was more litigious than England, Germany was more similar to the US; the English may simply settle disputes without issuing writs.

[63] See material cited in n 31.

[64] J. Henderson and T. Eisenberg, 'The Quiet Revolution in Products Liability' 36 *UCLA Law Review* 479 (1990).

[65] See, L. Lipsen, 'The Evolution of Products Liability as a Federal Policy Issue' in P. Schuck (Ed) *Tort Law and the Public Interest* (Norton and Co 1991).

[66] See J. Phillips *et al*, supra n 59, 873–901.

Restatement is, however, discovered in Section 2. This differentiates between manufacturing, design, and inadequate instructions or warnings and reserves 'true' strict liability for manufacturing defects, whilst placing recovery for design and failure to warn defects on a basis akin to negligence.[67] We suspect that what lies behind attempts to restrict strict liability to manufacturing defects is a fundamentally different conception of the rationale for strict liability to that which inspired the early pioneers. It is an approach which sees strict liability as a pragmatic solution to an evidential problem rather than as a means of socializing risk.[68] Section 3 of the Third Restatement does in fact contain a form of *res ipsa loquitur* which permits an inference that the harm was caused by a product defect when it was of a kind that ordinarily occurs as a result of a product defect and was not solely the result of causes other than a product defect.

Whether liability for unforeseeable defects is recoverable is often used as a touchstone of how strict a liability regime is. Some of the most influential commentators on the Second Restatement had favoured imputing knowledge of risks.[69] As the Third Restatement predicates liability for design and instruction defects on the principle of 'foreseeable risks of harm' then this clearly does not countenance liability being imposed for development risks, which by definition were unforeseeable at the time of supply. Thus it is possible that if the Third Restatement is widely accepted,[70] then EC Member States, especially those which do not permit the development risks defence, will have a more rigorous strict liability regime than exists in the United States. Indeed, we will suggest that the socialization of risk remains a more central objective of product liability theory in Europe, although ironically the practical impact of product liability litigation remains more socially important in the United States.

C. EUROPE

Product liability still remains the main regulatory tool in the United States to ensure product safety and provide compensation for those injured by defective products. Europe has imported the concept of strict product liability.

[67] The reporters views on this subject were well known in advance of their appointment, see Henderson and Twerski, supra n 59. Plaintiff-oriented lawyers dispute it accurately reflects case law see M. Shapo, 'In Search of the Law of Products Liability: The ALI Restatement Project' 48 *Virginia Law Review* 631 (1995) and suggest that because of this the influence of the Restatement will diminish J. Phillips 'Restatement (Third) of Torts: Product Liability' (1998) *Consumer Law Journal* forthcoming.

[68] This approach seems evident in *Comment a* which states: 'In many cases manufacturing defects are in fact caused by manufacturer negligence but plaintiffs have difficulty proving it. Strict liability therefore performs a function similar to the concept of res ipsa loquitur.' ALI Draft, supra n 29 at 13.

[69] P. Keeton, 'Products Liability—Inadequacy of Information' 48 *Texas Law Review* 398 (1970) and J. Wade, 'On the Nature of Strict Tort Liability for Products' 44 *Mississippi Law Journal* 825 (1973). Although it has subsequently been said that Professor Keeton has since stated he no longer believes what he said and Professor Wade never meant what he said; see Keeton *et al*, supra n 59, 461.

[70] Which is by no means certain: see Phillips, supra n 67.

Liability laws are likely to play an increasing role in providing compensation, but Europe still retains a strong regulatory regime for assuring product safety.

(*i*) *Product liability*

In the wake of the thalidomide tragedy several European countries improved their pharmaceutical licensing regimes. Germany went further and introduced a special liability regime, whilst the Nordic countries developed voluntary insurance based schemes for drug-induced injuries.[71] In Spain a form of strict liability for dangerous products was introduced by the Consumer Protection Act 1984 following the 'Colza oil-toxic syndrome'.[72] In several other countries the introduction of strict liability was recommended by official commissions[73] but no action was taken because industry was able to persuade governments not to place domestic producers at a competitive disadvantage. By providing a level playing field, Europe was able to undercut these objections. A Directive was adopted in 1985,[74] but the competitive argument was still able to influence its form as the Commission had to accept the exclusion of development risks from the strict liability regime, whilst giving Member States the option of not providing for the development risks defence in their implementing legislation.[75] Only Finland (which has a strong tradition of consumer protection)[76] and Luxembourg (which has little industry) have removed the defence entirely. In Spain the defence is not available for high-risk products. This might appear paradoxical, given that it is these industries to which the defence is most likely to be applicable, but is explained by the historical context of the 1984 Spanish Consumer Protection Act and makes sense if one takes the position that these industries should be held to higher standards than those not at the cutting edge.[77] Although France has yet to implement the Directive, it is likely to adopt a law in the near future, which places liability for

[71] See J. Fleming, 'Drug Injury Compensation Plans' 30 *AJCL* 297 (1982), Howells (1991), supra n 59, at 136–41 and 164–9 and on the voluntary schemes see C. Oldertz, 'The Patient, Pharmaceutical and Security Insurances' in C. Oldertz and E. Tidefelt (Eds) *Compensation for Personal Injury in Sweden and other Countries* (Juristforlagert 1988).

[72] I. Bofarull, 'The Spanish Act on the Protection of the Rights of Consumers and Users' 8 *Journal of Consumer Policy* 169 (1985).

[73] See in UK, Pearson, *Royal Commission on Civil Liability and Compensation for Personal Injury*, Cmnd 7054 (1978) and in France, J. Calais-Auloy, *Vers un nouveau droit de la consommation* (La documentation française 1984).

[74] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products: OJ 1985 L 210/29.

[75] Other options refer (i) to the introduction of a ceiling of not less than 70M ECU for personal injury damages caused by identical items with the same defect (included in the German, Spanish, and Portuguese laws) (ii) the inclusion of primary agricultural produce and game (only included in Finland and Luxembourg, but Commission has recommended that the Directive be amended in the wake of the BSE scare to include such products: see COM (97) 478). In its ten-year review of the Directive the Commission was exceedingly brief and did not foresee any major revisions, except for the question of agricultural produce: COM (95) 617.

[76] See T. Wilhelmsson, 'Product Liability in Finland—a Maximalist Version of the Product Liability Directive' 14 *Journal of Consumer Policy* 15 (1991).

[77] I. Vega, 'The Defence of Development Risks in Spanish Law' (1997) *Consumer Law Journal* 144.

development risks on producers. This would be in line with the current position under domestic French law.[78]

It is worth reflecting on whether the policy of emphasizing liability laws, which clearly underpins the introduction of strict liability is to be welcomed. At the very least this makes it clear that the European Welfare States accept that they can not rely on the social security system to compensate accident victims. Thus the possibility of a New Zealand-style accident compensation system being adopted, becomes ever more remote.[79] Indeed if the conventional view of the Directive as a maximalist directive is correct then the introduction of such schemes is no longer possible. Instead product-liability plaintiffs become a privileged group of accident victims (so long as they can pin liability on another party) and are certainly better provided for than those in similar circumstances whose suffering is due to natural causes. Yet, with no obvious alternative, product liability must probably be welcomed as a means to provide a decent standard of living to at least some injured people. Whilst there need be no objection to governments trying to recoup social security benefits from tortfeasors[80] this should not be allowed to detract from the principle that the Welfare State should provide adequately for its sick and disabled.

We have already commented on the significant differences between health-care provision in Europe and the United States, which mean that in Europe product-liability actions are not normally motivated by a need to cover health-care costs. However, the position might be changing. State health-care systems are short of cash due to government budgetary restraints, increased demands for health care, and expensive new treatments. In the United Kingdom the National Health Service (NHS) trusts are considering suing tobacco companies for the costs of treating smokers. The English Law Commission has floated the idea of the National Health Service being able to sue tortfeasors.[81] The average citizen may feel little effect of this change—instead of paying more taxes he will pay higher insurance premiums—and a few lawyers and insurers will earn some money along the way. Some of the poorer members of society may bear an increased burden as they will have to pay higher insurance premiums, whereas increased direct tax burdens would not normally be imposed with equal force on the poorest in society. Nevertheless the source of revenue is important, for whereas citizens will blame governments for tax increases the causal link to higher insurance premiums is less strong. As Peter Cane has written in the context of benefit recoupment 'the difference between public expenditure and private expenditure is of great political importance'.[82] Thus

[78] Howells (1991), supra n 59, Chap 7.

[79] In New Zealand most tort actions for personal injuries are abolished and accident victims receive social security payments instead, see Howells (1991), supra n 59, Chap 16.

[80] Although it could be objected that this is wasteful as what the taxpayer saves on the one hand he will pay for through increased insurance premiums.

[81] *Damages for Personal Injury: Medical, Nursing and Other Expenses*, Law Com. No. 144. see G. Howells, 'Tobacco Litigation on the US—Its Impact in the United Kingdom' *Southern Illinois University Law Journal*, forthcoming.

[82] P. Cane (5th edn.) *Atyah's Accident Compensation and the Law* (Butterworths 1993) 329.

once again product liability, although not ideal, can be accepted as a means of generating extra money for socially desirable purposes which the Welfare State does not seem capable of providing.

Thus product liability may be necessary as an important source of revenue for individuals and health-care providers. In the United States product liability has other regulatory function, namely deterrence and providing a vehicle for politically sensitive issues. We would contend that European regulators retain sufficient effectiveness that these goals need not be as prominent in Europe. We shall see how the EC's new approach to technical harmonization, although having some weaknesses, represents a balanced approach to regulation which can be built upon. This is not to say that product liability cannot play a complementary role, especially if resources for regulatory supervision are reduced in the future. We would simply suggest that there is not the same regulatory vacuum as exists in the United States. Equally the recent agreement to adopt a directive on tobacco advertising, shows how Europe is still able, admittedly amidst some controversy, to regulate through the political process even highly politicized products, like tobacco, without the same necessity to resort to litigation strategies.[83]

When Europe adopted strict liability it chose a consumer expectation defectiveness standard which provided that:

> A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:
> (a) the presentation of the product;
> (b) the use to which it could reasonably be expected that the product would be put;
> (c) the time when the product was put into circulation.[84]

The most controversial aspect of the Directive was the inclusion of the development risks defence. Article 7(e) of the Directive provides the producer with a defence if he proves: 'that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered.' Even with the burden of proof being placed on the producer, many commentators believe the inclusion of the defence sits uneasily besides the risk-speading and cost-internalization rationales for strict liability and is tantamount to the reintroduction of fault.[85] Indeed the defence was not included in the draft directive and was introduced against the Commission's wishes. The Commission has, however, not subsequently been pro-active in seeking the removal of this optional defence.[86]

Last year, in *European Commission* v *United Kingdom*,[87] the European Court of Justice held that the United Kingdom had not been shown to have improperly implemented the Product Liability Directive. Its implemeneting

[83] This does not mean that litigation can not be one strategy adopted by pressure groups, certainly some of the tobacco litigation can be viewed in this light.

[84] Art 6(1).

[85] C. Newdick, 'The Future of Negligence in Product Liability' 104 *LQR* 288 (1987) and J. Stapleton, 'Products Liability Reform—Real or Illusory' 6 *OJLS* 392 (1986).

[86] See COM (95) 617.

[87] Case C-300/95 [1997] ECR I-2649.

legislation provided a defendent with a defence where he proved: 'that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they are under his control'. The Commission had argued for a narrow defence based on what was objectively discoverable and argued that the UK's defence introduced subjective elements. In upholding the UK law the Court of Justice essentially took a very strict approach to what amounted to knowledge, but qualified this by adding the requirement that the knowledge had to have been accessible. Thus it is quite strict in stating that the defence does not relate to sectorial practices or safety standards, but rather at the most advanced level of scientific and technical knowledge at the time the product is put into circulation.[88] It goes on to provide that the defence is not based on the knowledge the producer subjectively was or could have been apprised of, but rather on the basis of objective knowledge of which the producer is presumed to have been informed. Central to this is the notion that the information must have been accessible. Although there are important debates as to what amounts to knowledge[89] it is regrettable that the Court of Justice did not address that question directly but rather chose to superimpose—with no obvious justification—the requirement that the knowledge be accessible, leaving open the question of whether knowledge is to be viewed as variably accessible to different producers.

Advocate General Tesauro was clearly keen to reject the Commission's submission that the defence could be defeated by one person, irrespective of his country and language, being capable of discovering the defect. He gave the example of a Manchurian academic publishing in a local scientific journal in Chinese being less well-known than the work of a US researcher publishing in an English language international journal.[90] This of course misses the point that if the Manchurian scientist discovered the defect, then presumably it was also possible for others to have done the same. Rather than justifying the additional requirement of accessibility, this merely shows sympathy for a less strict form of product liability. This is a little surprising for earlier in his Opinion, when discussing the concept of knowledge, the Advocate General had appeared sensitive to the policy issues involved in strict liability. For instance, he had argued that the state of scientific and technical knowledge had to be identified with the most advanced level of research, not that expressed by the majority of learned opinion, and that once a risk was foreseeable (by which he must have meant foreseeable by those with the most advanced knowledge) the producer must bear those risks either by taking the preventative measure of stepping up research or taking out civil liability insurance. It is difficult to know

[88] Case C-300/95 [1997] ECR I-2649, 2670, para 26.

[89] C. Newdick, 'The Development Risks Defence of the Consumer Protection Act 1987' 47 *CLJ* 455 (1988) and 'Risk, Uncertainty and "Knowledge" in the Development Risks Defence' 20 *AAL* 309 (1991)

[90] See supra n 87, Opinion, paras 23–4.

what to make of this for it appears that the Advocate General contemplates producers should continue to market defective products, at least when he suggests taking out insurance as one means of responding to a foreseeable risk.[91] Nevertheless this also shows appreciation of the need for compensation to be paid on grounds other than fault. In other words the social function of strict liability is appreciated, in a manner which is not evident in the Third Restatement. Product liability in the United States may once have had this social dimension, to-day it may still serve social functions in practice but increasingly this will only happen when a defendant can be found to have been blameworthy.

(*ii*) *Product safety*

Europe was as concerned as the United States that product regulation should not stiffle innovation. It was also anxious that national regulations should not impede the development of the internal market. However, it realized that the answer could not be a purely deregulatory approach. The EC Treaty might be used to remove those national laws which were simply disguised barriers to trade, but European States are permitted to maintain regulations necessary to protect the health and safety of their citizens and it was obvious that they intended to continue to regulate for consumer safety.[92] Moreover the European Community is not simply concerned with the promotion of free trade but also has as one of its objectives the promotion of consumer protection.[93] Indeed the creation of consumer confidence can be viewed as an important prerequisite for a healthy internal market.[94] The European answer was a new style of regulation—the new approach to technical harmonization.[95]

The new approach involves adopting directives which cover a particular sector rather than individual products. These avoid detailed regulation. Each directive includes a general clause stating that such products may only be marketed if they do not endanger safety. An annex contains 'essential safety requirements' which the product must comply with. Producers can benefit from a presumption of conformity by complying with harmonized standards adopted to implement the directive; alternatively they can meet the essential safety requirements by other means, but then third party assessment is usually required. By complying with the conformity assessment procedures specified in each directive, producers can attach the 'CE' marking to their product, which should be their passport to the entire internal market. However, due to

[91] Indeed this is symptomatic of a failure to relate the development risks issue to the question of whether the product is actually defective. For a suggestion that the defectiveness standard can actually perform many of the legitimate functions claimed for the development risks defence, see Howells and Mildred, supra n 29.

[92] Howells (1998), supra n 33, and S. Weatherill, *Law and Integration in the European Union* (OUP 1995) Chap 5.

[93] Howells and Wilhelmsson, *EC Consumer Law* (Dartmouth 1997) 6–13. See new Art 129a Amsterdam Treaty.

[94] Weatherill (1996), supra n 6.

[95] See Council Resolution of 7 May 1985 on a new approach to technical harmonisation and standardisation, OJ 1985 C 136/1.

a safeguard clause, Member States remain free to take action against products which pose a risk to safety.

This system is by no means perfect.[96] Although the political decisions as to the appropriate level of safety appear to be made by the politicians when they fix the essential safety requirements, in practice the standards-drafting process is far from being a simple technical exercise and many of the hard decisions are delegated to this level. Criticisms of the standards process can be made. It was never intended to have such a heavy workload and there have been problems in developing standards quickly enough. Also standards bodies can be viewed as closely associated with industry and some have been slow to involve social partners, like consumers. The conformity assessment procedures can also be criticised for too often relying on manufacturer's self-declaration of conformity and for inconsistent application of the standards.[97] The 'CE' marking can be too easily misunderstood by consumers as being a safety symbol, when in fact it simply connotes conformity with new approach directives. The reactive approach to enforcement which the new approach encourages can also be viewed as a matter of concern.

However, when the European position is compared to the United States, one can conclude that the Community has made a fairly good stab at reconciling the demands for free trade and deregulation with the needs of consumer protection. There has been a determined effort to place voluntary standards within a legal framework which both determines the objectives standardization is seeking to fulfil and provides States with the ability to step in when products nevertheless reach or threaten to reach the market in a condition that poses a threat to safety. Although standards will tend to be performance standards, there is no blanket prohibition (as there is in the United States) on design specifications. Furthermore the Community has emphasized the need for standards bodies to be open to social partners and has subsidized consumer participation. Although not wholly satisfactory, consumer participation is clearly given a higher priority than in the United States and also has a different character, being based far more on the principle that the role of consumer organizations is to voice consumer concerns.[98]

Technical harmonization is complemented by a general product safety directive[99] which imposes an obligation that consumer products be safe, i.e.

[96] For more detailed assessment see Howells (1998) supra n 33, Chap 2.

[97] This is covered by the Council Resolution of 21 Dec 1989 on a global approach to conformity assessment: OJ 1990 C 10/1.

[98] See B. Farquhar, 'Consumer Representation in Standardisation' (1995) *Consumer Law Journal* 56 and G. Howells, 'Consumer Safety and Standardisation-Protection Through Representation?' in Krämer, Micklitz and Tonner (Eds) supra n 3. For a US view on the different character of consumer representation on either side of the Atlantic see 'A Conversation with Nancy Harvey Stoerts' , *ANSI, Oct/Nov 1996* at 5–6 (she is chair of ANSI's Consumer Interest Council).

[99] Council Directive 92/59/EEC on general product safety, OJ 1992 L 228/24. The relationship between the general directive and vertical directives is unclear. Whilst in principle the general directive does not apply to products covered by vertical directives, it might apply to safety aspects not addressed in vertical directives and provide post-market controls where such provision is not found in vertical directives: see Howells (1998), supra n 33, Chap 2, s 9C.

'not present any risk or only the minimum risks compatible with the product's use, considered as acceptable and consisent with a high level of protection for the safety and health of persons'.[100] To satisfy this obligation producers must provide consumers with information to assess the product's risks and to keep themselves informed of risks which the product might present; distributors must support these efforts, in particular by participating in post-market monitoring and co-operating with action taken to avoid any risks.[101]

One of the most significant features of the Directive is the requirement that Member States provide enforcement authorities to ensure products are safe. The Northern European countries already had such authorities, but this has led to the development and strengthening of consumer enforcement agencies in Southern Europe. The Directive requires these authorities to have extensive powers to monitor the market, put in place pre-market controls, impose temporary and permanent prohibitions on the sale of products, and organize the withdrawal of products already on the market.[102] Although the US Consumer Product Safety Commission has some strong powers, the European Community requirements are more all embracing, particularly as they can all be used to ensure the general requirement is satisfied that only safe products are placed on the market.

The main focus for enforcement under the Directive is the national (or possibly according to national traditions the local level). There is an emergency community procedure, but its scope is very limited.[103] For the most part the Commission role is simply to co-ordinate[104] and act as the medium for the exchange of information between national authorities.[105] There have been calls for the establishment of a European Product Safety Agency.[106] This might give a welcome focus for research and strategic planning work. Indeed this might help overcome one weakness which European product regulation has when compared to the United States, namely the lack of a large-scale integrated region-wide product-related accident database which could be used to inform policy.[107] But whilst the US Consumer Product Safety Commission

[100] Art 2(b). Note how this adopts a risk:benefit analysis cf. Product Liability Directive, see G. Howells, 'Consumer Safety in Europe—In Search of the Proper Standard' in B. Jackson and D. McGoldrick (Eds) *Legal Visions of the New Europe* (Graham and Trotman 1993).

[101] Art 3.

[102] Regrettably the UK has seen fit to stop short of introducing a power of recall, arguing that the Directive only requires it to deal with products on the market (in the sense of being exposed for sale), not products which have reached the consumer. This seems an illegitimate interpretation of the Directive: see Howells (1998) supra n 33, Chap 5, s 3L.

[103] Its legality withstood a court challenge by Germany, Case C-359/92 *Germany* v *Council* [1994] ECR I-3681.

[104] See also its role under Council Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulation: OJ 1983 L 109/8 (as amended)

[105] See general product safety directive: Art 7 (non-emergencies) and Art 8 and annex (emergencies—RAPEX).

[106] See J. Falke, 'Zur Errichtung und zu den Aufgaben einer Europäischen Agentur für Produktsicherheit' (Typoscript Bremen, 1992, unpublished) cited in Micklitz, supra n 33.

[107] The European Home and Leisure Accident Surveillance System (EHLASS) has been run on an *ad hoc* basis, with some countries, notably Germany, not being prepared to establish reporting

shows the value of a central agency for some functions, there is also clearly value in keeping enforcement as close to the market as possible. However, Europe could also learn form the United States in terms of the reporting obligations and the recall procedures which could help to involve producers and suppliers more intimately in the post-market control of product safety.

IV. Economic interests

A. INTRODUCTION

In the last section we saw how both the US and European legal systems sought to ensure only safe products reached the market. Although we commented upon the different regulatory approaches, it was noticeable that there was broad agreement that it was the function of the law to ensure that dangerous products do not harm consumers. When one looks at the protection of the consumers' economic interests one might expect there to be less consensus about the role law should play, as what is at stake is not the health of consumers, but simply how they benefit from market exchanges. Clearly in this context one's view of the market mechanism and different consumer images can lead to very different legal regimes. A strong adherent to the market and individual autonomy might only require that adequate information be provided, so that informed choices can be made. Those who view the market as a potential threat to the vulnerable would argue for more direct forms of contract regulation. It is therefore interesting to see that whilst the law tends to be less prescriptive when regulating economic interests,[108] there is nevertheless a fair degree of intervention (usually justified in terms of redressing an inequality of bargaining power) on both sides of the Atlantic.

We shall consider three issues in order to assist in our discussion:

(i) controls on product quality and guarantees,
(ii) general controls over contract terms and
(iii) specific controls on interest rates in consumer credit contracts.

We shall conclude that the rules on disclosure seem more elaborate in the United States.[109] Equally we shall see that at least some in the US system have at times seen the need to place controls on the market through unconscionability doctrines and rate regulation. The US system also puts in place

systems based on hospital emergency room admissions; latest reform proposals are discussed in *Evaluation Study of the EHLASS System* Contract No. AO-2600196/0062. Of course some Member States already had their own data-collection systems and EHLASS has encouraged this activity in other States, but an integrated system which allowed data to be accumulated would be of great value.

[108] One possible future development in the UK might prove to be an exception to this, for the Director General of Fair Trading has proposed that standards be developed to set out the obligations of traders (although these are likely to be voluntary and minimal in character): see, *Raising Standards of Consumer Care* (Office of Fair Trading February 1998).

[109] See also the discussion on truth-in lending, 259–63 below.

incentives for the use of private law. These features should be borne in mind by those who argue for a laxer regulatory regime in Europe. However, we will see that Europe is more consistent in its controls on contract terms and also sees contract regulation as more of a public function. We will argue that in the European context it is better to continue this policy in tandem with more effective disclosure laws rather than jettisoning them in favour of a US-style regime, whose main regulatory tool is the provision of information to facilitate informed decision-making backed-up by the imposition of severe sanctions for serious abuses to ensure market probity. European disclosure rules are not sufficiently well-developed to permit too strong a reliance to be placed on information as the sole means of consumer protection. Particularly as European consumers often have a residual faith in the ethics of reputable traders and trust in their State agencies to ensure, at least mainstream, commerce is conducted responsibly. There are also not sufficient incentives for either private individuals or their lawyers to litigate small-scale consumer economic claims. Nor are the sanctions available in Europe for infringement of the consumer's economic interests sufficient to rely on private litigation as a means of exerting regulatory control in the area of economic interests.

B. QUALITY TERMS AND GUARANTEES

Most legal systems have some form of implied quality warranty. In the United States the Uniform Commercial Code (UCC) implies warranties of merchantability and fitness for particular purpose.[110] EC Member States reach similar results by various different means. In the United Kingdom the implied condition of merchantable quality has been made more consumer-friendly by redrafting it as a term of satisfactory quality and by specifying relevant aspects of the product which can be taken into account.[111] In continental Europe these minimum quality requirements are seen as imperative rules of law.[112] However, there is sufficient similarity between the rules in the Member States for the EC Commission in its draft directive on the sale of consumer goods and associated guarantees[113] to suggest a harmonized principle that when assessing conformity with the contract goods should be fit for normal purposes and any particular purpose made known to the seller as well as being of satisfactory quality and performance.[114]

[110] § 2-314-315. The Code is presently being revised with the results due in summer 1998, see *Symposium*: *Consumer Protection and the Uniform Commercial Code* 75 *Washington University Law Quarterly* 1–672 (1997). Latest version of the Code can be found at <http://www.law.upenn.edu/library/ulc/ulc/htm>. Space does not permit us to consider all aspects of sale of goods law, which includes questions relating to the content of the legal rights, who they are enforceable against and by whom and all the issues related to remedies.

[111] G. Howells and S. Weatherill, *Consumer Protection Law* (Dartmouth 1995) 127–40.

[112] COM (95) 520 at 11.

[113] Ibid, for detailed discussion see H. Beale and G. Howells, 'EC Harmonisation of Consumer Sales Law—A Missed Opportunity?' 12 *Journal of Contract Law* 21 (1997).

[114] Art 2. This is based on Art 35 of the United Nations Convention on Contracts for the International Sale of Goods.

The major difference between Europe and the position under the US Uniform Commercial Code comes in relation to the excludability of such warranties. In the national law of the Member States such laws are generally non-excludable and this would be the position under the proposed directive.[115] Under the Uniform Commercial Code the warranties can be excluded—in the case of merchantability if the exclusion is in writing it must be conspicuous and in the case of the fitness warranty, it must be in writing and must be conspicuous.[116] Even under the proposed revision of the UCC this warranty would still be disclaimable, although the element of unfair surprise would be alleviated by requiring the agreement be a real express agreement.[117] We see here a trend in US law (at least at the federal level)[118] of being reluctant to intervene in the content of the contract so long as the consumer can be deemed to have been informed and the result is not too outrageous.

In practice the position is not so bleak for US consumers—the courts have used various techniques to side-step purported exclusion. They can hold that the exclusions was not conspicuous enough, construe the language narrowly, or hold that an allegedly exclusive remedy—such as free repair—has in fact 'failed its essential purpose' so that the full range of remedies are available.[119] In such circumstances the buyer would be able to revoke his acceptance of the goods and reject them so long as he can show that the non-conformity substantially impairs their value to him.[120] The need to prove substantial impairment of value is side-stepped in States which have adopted 'lemon laws'. These typically allow the purchaser of new motor vehicles to reject cars which have had to be repaired for the same warranty problem four or more times in the warranty period or first year of service (whichever expires first) or if the vehicle is out of service for more than thirty days during this period.[121] Some States have even enacted laws making the implied warranty obligations non-excludable.[122] Moreover when a written warranty is offered the federal

[115] Art 6

[116] § 2–316. It is even stated that all such warranties are presumed to be excluded by the use of phrases such as 'as is'. §1–102 only prevents the exclusion of good faith, diligence, reasonableness, and care and even in those contexts allows the parties to determine the standards by which performance of such obligations is measured, so long as such standards are not manifestly unreasonable.

[117] § 2–407(c). See, G. Hillebrand, 'The Uniform Commercial Code Drafting Process: Will Articles 2, 2B and 9 be Fair to Consumers' 75 *Washington University Law Quarterly* 69 at 101–4 (1997).

[118] See below section C, 236–40. [119] § 2–719. [120] § 2–608.

[121] See R. Honigman, 'The New "Lemon Laws" Expanding UCC Remedies' 17 *Uniform Commercial Code Law Journal* 116 (1984).

[122] The FTC booklet, *A Businessperson's Guide to Federal Warranty Law* (FTC, 1987) cites the following States as having such a law: Alabama, Connecticut, Kansas, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Hampshire, Vermont, Washington, West Virginia, and the District of Columbia. See D. Clifford, 'Non-UCC Statutory Provisions Affecting Warranty Disclaimers and Remedies in Sale of Goods' 71 *North Carolina Law Review* 1011 (1993) who distinguishes between States that have placed a total ban on disclaimers and those which simply place obligations, of varying strictness, to draw the exclusion to the consumer's attention. Of the latter style of Act California's Song-Beverly Act has acted as a model for some States which whilst not totally banning disclaimers have also wanted to deal with other matters in relation to consumer warranties.

Magnusson-Moss Warranty—Federal Trade Commission Improvement Act (MMW Act) prevents the disclaimer or modification of implied warranties.[123]

The MMW Act was enacted in 1975 and is another example of innovative consumer legislation adopted in the United States in the late 1960s/early 1970s, which perhaps did not fulfil their expected potential. It is 'primarily a detailed disclosure law',[124] but as it seeks to build upon the implied warranty law and to enhance the quality of information available about additional warranties granted by warrantors or sellers it need not be subject to the criticism that disclosure is being used as a second-best option rather than regulating the substance of the transaction.

The Act does not require that any warranty be given, but if a written warranty is given for a consumer product costing more than $10 it must be titled as either a 'full' or 'limited' warranty.[125] To be designated a 'full' warranty[126] the warrantor must agree to a remedy within a reasonable time and without charge in the case of a defect, malfunction, or failure to conform to warranty. This means the warrantor must also meet such costs as returning, removing, and reinstalling goods. The duration of implied warranties should not be limited. Any exclusion or limitation of consequential damages must appear conspicuously on the face of the warranty. Warranty service should be available to anyone owning the product during the warranty period. If the warrantor fails to repair a defect or malfunction after a reasonable number of attempts the consumer should be offered a refund or replacement. Apart from notification, the consumer should not be placed under any duties as a pre-condition for servicing unless these can be proven to be reasonable—requiring the return of a registration card is an unreasonable duty which would prevent a warranty being a 'full' warranty.[127]

All written warranties on consumer goods over $15 must contain prescribed information.[128] This includes details of who is covered, what is covered, what the warrantor will do, duration of the warranty, how the consumer can invoke the warranty, and how State laws affect the consumer's rights including the boilerplate disclosure that 'This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.'[129] Also for consumer products costing more than $15 the written warranty must be available for them to inspect before purchase.[130] The advertising of guarantees is not

[123] MMW Act, § 108, the duration of an implied warranty can be limited to that of a written warranty of reasonable duration.

[124] J. Spanogle, R. Kohner, D. Pridgen, and P. Rasor (2nd ed) *Consumer Law, Cases and Materials* (West Publishing 1991).

[125] MMW Act, § 103.

[126] Ibid, § 104.

[127] See 16 CFR 700.7 (Interpretations of Magnusson-Moss Warranty Act).

[128] MMW Act, § 102 and 16 CFR 701 (Disclosure of Written Consumer Product Warranty Terms and Conditions).

[129] The approach of the FTC in allowing contract exclusions whilst requiring this and other boilerplate clauses pointing out that such limitations may not apply to the consumer because of State law have been criticized by Clifford, supra n 122, 1054–6 for possibly causing consumers to remain ignorant of their more extensive rights under State law.

[130] MMW Act, § 102(b) (1) (A) and 16 CFR 702 (Pre-sale Availability of Written Warranty Terms).

regulated by the MMW Act, but instead is subject to the general FTC control against 'unfair or deceptive acts of practices in or affecting commerce' and special guidance has been issued.[131]

The motivation behind the MMW Act was to enable consumers to have complete information about warranties before buying in the hope that competition on the basis of warranty coverage would then ensue which would in turn encourage the production of better quality products as strong warranties would not accompany poor quality products.[132] It seems premised on the signal theory which suggests that consumers process warranty information when assessing product quality.[133] For these signals to be effective there must be both accurate disclosure and the use of concepts which are easily comprehensible and meaningful to consumers—hence the use of the definitions of 'full' and 'limited' warranties. An early study of the Act's impact found that, whilst disclosure had improved, in most sectors there had not been much change in warranty coverage. Nevertheless in one sector studied (refrigerators) the Act had stimulated competition on guarantee terms, but equally—although not common—there had been a few signs of producers reducing cover or no longer offering guarantees.[134] A 1979 study by the FTC found that there were more full warranties after the MMW Act was enacted and attributed this to the disclosure requirement.[135] Nevertheless nowadays anecdotal evidence suggests that 'limited warranties' have become the norm in many sectors. Thus the legislation can, in one sense, be considered a failure but at least this approach can make some consumers aware that they have only limited protection and ensures they are not misled by puff claims which use the term warranty or guarantee in an exaggerated manner. It also does not rule out the possibility of consumers demanding full warranties if that is what is desired.[136]

Within the national laws of the Member States of the European Community there has been less regulation of guarantees which are given voluntarily. One exception to this which echoes the approach in the MMW Act is that found in the Code of Good Conduct by the Danish Ombudsman Concerning the Commercial Guarantees.[137] Although this code only has a 'soft law' status, pro-

[131] 16 CFR 239 (Guides for the Advertising of Warranties and Guarantees). For FTC Control, see 249.

[132] FTC, supra n 122, Spanogle *et al*, supra n 124.

[133] See, G. Akerlof, 'The Market for "Lemons": Quality, Uncertainty and the Market Mechanism' 84 *Quarterly Journal of Economics* 488 (1970); G. Stigler, 'The Economics of Information' 69 *Journal of Political Economy* 213 (1961); A. Spence, *Market Signalling* (Harvard UP 1974) and the discussion in G. Priest, 'A Theory of the Consumer Product Warranty' 90 *YLJ* 1297 (1981).

[134] M. Wisdom, 'An Empirical Study of the Magnuson-Moss Warranty Act' 31 *Stanford Law Review* 1117 (1979).

[135] Federal Trade Commission Staff Report, *Impact of the Magnusson-Moss Warranty Act: A Comparison of Forty Major Consumer Product Warranties from Before and After the Act* (1979).

[136] The MMW Act had also intended to improve redress by encouraging the development of informal dispute settlement procedures; § 110 and 16 CFR. 703 (Informal Dispute Settlement Procedures): these are said not to have been successful in promoting the adoption of such schemes because of the relative stringency of the required standards, see I. Ramsay, *Consumer Protection* (Weidenfeld and Nicolson, 1989) 451.

[137] Reprinted as Annex III to *Green Paper on Guarantees for Consumer Goods and After-sales Services*, COM (93) 509.

viding guidance on what a guarantee should (and should not) include, it can be taken into account when determining whether there has been a breach of the Marketing Practices Act requirement that the trader should not make use of false, misleading, or unreasonably incomplete information. This of course is not as sophisticated as the MMW Act regime, which tries to differentiate between different levels of warranty, but nevertheless does seek to improve consumer information, by giving a standardized minimum content to any guarantee. Generally, however, the national law of Member States has left the contents of guarantees to the marketplace, whilst in some instances requiring that the guarantee mention that there are also rights granted by law,[138] or requiring that the guarantee should not restrict legal rights,[139] or forbidding the use of the word guarantee for a commitment which does not clearly improve the consumer's position in comparison with mandatory and non-mandatory law.[140] Indeed an attempt in the United Kingdom to introduce legislation based on the MMW Act model which would have created a system of 'total' and 'limited' warranties was roundly rejected by the previous Conservative Government.[141]

The EC's Green Paper on guarantees for consumer goods and after-sales services had seemingly adopted the disclosure/signal theory approach in order to encourage the development of a European guarantee by proposing to create a label or designated protection for the expression 'Euroguarantee' and prohibiting the use of any confusing designations or claims.[142] This is not found in the draft directive, which strangely professes a rationale of promoting cross-border sales but does little to address the particular problems of such sales.[143] Its provisions on guarantees mirror the MMW Act in so far as it requires that a written document must set out the essential particulars for making a claim[144] and that this document should be freely available for consultation before purchase.[145] It also requires that any guarantee should place the beneficiary in a more advantageous position than under national sale of goods law; this requirement is not found in the MMW Act.[146] It does not, however, go so far as the Danish Ombudsman's guidelines and lay down minimum requirements for guarantees and it certainly does not seek to emulate the MMW Act approach of promoting competition amongst guarantors through the use of

[138] E.g. France Decree of 24 March 1978, United Kingdom, Consumer Transactions (Restrictions on Statements) Order 1976, S.I. 1976/1813.

[139] S 5 of the UK's Unfair Contract Terms Act 1977 prohibits guarantees from excluding negligence liability of someone involved in the manufacture or distribution of goods.

[140] See the position in the Nordic countries, B. Dahl and P. Møgelvang-Hansen, *Garantier* (Jurist-og økonomforbundets forlag 1985) 117–34.

[141] See, C. Willett, 'The Unacceptable Face of the Consumer Guarantee Bill' 54 *MLR* 552 (1991) and G. Howells and C. Bryant, 'Consumer Guarantees: Competition and Regulation?' (1993) *Consumer Law Journal* 3. These proposals were based on the National Consumer Council's report, *Competing in Quality* (1989).

[142] COM (93) 509 at 99.

[143] See, Beale and Howells, supra n 113.

[144] Although the list of factors is less extensive simply covering the duration, territorial scope of the guarantee and the guarantor's name and address.

[145] Art 5(2).

[146] Art 5(1).

gradated labels. In a preliminary draft of the directive a compromise position had been put forward.[147] This had provided that where the term 'guarantee' or similar expression was used the guarantor would remain free to decide the scope of the guarantee. However, if a guarantee document was not provided (or the document did not make it clear that different rules applied) then certain default rules would apply. These would have provided that goods should be covered in their entirety for one year; that the beneficiary should be entitled to repair or replacement, inclusive of all costs; that any replacements carry a new guarantee and the guarantee shall be automatically extended for a period corresponding to the repair period. This approach would place the onus on producers to specify deviations from this regime. However, this default regime could be deviated from by clear wording and this deviation from the 'norm' would not have to be expressly drawn to the consumer's attention.

Businesses often confuse rules defining the necessary content of voluntary guarantees if particular labels are to be used, with a compulsion to offer such guarantees. Laws like MMW Act do not directly require any guarantee be made. What they do is to ensure that if such a guarantee is offered the consumer can appreciate its terms. The detailed disclosure rules and ability to obtain a copy in advance are likely to be of only theoretical value as few consumers are likely to take advantage of these opportunities. More significant is the control on the use of the phrase 'full warranty'. Most consumers will be impressed by the fact there is a guarantee without enquiring more and it is important that the expectations engendered by the use of such phrases are supported by reality. The MMW Act has a much more developed system of disclosure than exists in most European countries. If consumer information is to be a meaningful aspect of EC consumer policy then as a minimum the Consumer Guarantees Directive should incorporate the preliminary draft's approach of establishing default rules which can be invoked if the guarantee is silent on a matter. However, it must be concluded that the MMW Act has a greater impact on the disclosure of terms than in improving the level of guarantees through competition. Another explanation for the rather muted success of the MMW Act is that it does not have the same range of private law remedies as many consumer protection statutes. Whilst class actions are possible and attorney fees are recoverable, there are no minimum, multiple or punitive damage claims, warrantors must be allowed to attempt to cure defects and there are even bars on small claims.[148]

C. CONTROLS ON UNFAIR TERMS

One of the perennial debates related to controls on unfair terms is the extent to which control should seek merely to eradicate procedural unfairness (in the various guises of unfair surprise, lack of choice, duress, exploitation of the vul-

[147] This built on ideas in the Green Paper, supra n 137, at 96–8.

[148] Individual claims must be for more than $25 and class actions have to be for in excess of $50,000 or have more 100 named plaintiffs: §110(3).

nerable) or whether control of the substance of the agreement is needed. We will not be able explore all the contours of this debate, but will see that the United States is prepared to impose substantive controls, even in the absence of procedural unfairness. However, this intervention is restricted to extreme situations. In particular we sense a sensitivity to the problems faced by consumers shopping in ghetto areas.[149] This is perhaps not such an extreme problem in Europe. We will suggest that at the EC level, the emphasis on the procedural aspects has forced the legislators to shy away from substantive controls of the main elements of the contract, i.e. the price and core terms. However, there has also been an appreciation that procedural safeguards will only protect consumers against those terms in which they are interested, i.e. the price and core terms. This has led the legislator to provide the means to ensure that ancillary terms (exclusion clauses, clauses which give one party control over the interpretation or performance of the contract, etc.) are subject to substantive control. Thus we have the irony that EC law permits goods and services to be sold at any outrageous price so long as the trading terms are otherwise fair, whereas in the United States there is relatively little control so long as one does not act in an extreme manner. Of course some European national laws, particularly in the Nordic countries, do impose substantive controls. We shall also see that Europe has adopted public law means of enforcement to supplement the private law. The United States does give the Federal Trade Commission some important powers in this area, but has again sought to bolster private redress as its main vehicle of regulatory control.

Section 2-302 of the UCC permits a court if it 'finds the contract or any clause of the contract to have been unconscionable at the time it was made . . . [to] refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.' Comment (a) states that 'the basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable' and it goes on clearly to state that 'the principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power'. Three famous cases, however, illustrate how the courts have at times come close to performing the latter function, admittedly in rather extreme circumstances.

In *Williams* v *Walker-Thomas Furniture Co*[150] the United States Supreme Court used the unconscionability provision to hold unenforceable a term which had the effect of creating a security over all goods previously purchased until all debts had been paid off. The court used procedural language talking about the consumer's lack of bargaining power and hence little real choice and characterized him as having little or no knowledge of the terms. But the terms

[149] D. Caplovitz, *The Poor Pay More: Consumer Practices of Low Income Families* (Free Press 1963).

[150] 350 F 2d 445 (Dist of Col Circ) (1965).

were clearly set out and the court was in effect imposing substantive control, because of the context of the type of poorly educated consumer involved.[151] This was even more obvious in *Jones* v *Star Credit Corporation*[152] when the Supreme Court of New York found it to be unconscionable to sell for $900 ($1,234.80 when credit, insurance, and taxes are added) a freezer worth no more that $300. Justice Wachtler talked in terms of the law fighting back against those who took advantage of the poor and illiterate and spoke about recognizing the importance of a free enterprise system whilst providing legal armour to protect and safeguard prospective victims. In *Perdue* v *Crocker National Bank*[153] the Supreme Court of California was clearly impressed by the two thousand per cent differential between the cost to the bank of dealing with a cheque drawn against an account with insufficient funds ($0.30) and the $6 charge, but there were also procedural justifications for not enforcing such charges due to lack of transparency.

In *Best* v *United States National Bank*,[154] a similar solution to the same problem as in *Perdue* was achieved by using Section 1-203 UCC which provides that 'Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement'. Although the Supreme Court of Oregon hinted that a price could be set so high that it breached good faith on that basis alone, it actually held that the charge was not so high as to justify intervention on that ground. Nevertheless it found there had been bad faith breach of the reasonable contractual expectation that the charges would be fixed only to recover processing costs plus a reasonable profit.[155]

The good faith provision in the Uniform Commercial Code is a general principle for which no specific sanction for non-compliance is specified. However, the regulatory value of such a provision comes from the deterrent threat of an action for punitive damages for the tort of bad faith breach of contract. Such claims are most common in the insurance sector where they are seen as necessary to chasten insurers who, if found wrongly to have failed to meet a claim, would otherwise merely have to pay out the amount they should have done in the first place. Outside the insurance sector there is normally, in the consumer context, the need to show evidence of deception or an intentional breach causing particular injury to the consumer. Indeed there is a trend to restrict consumer claims for bad faith breach of contract to the insurance context.[156]

[151] Cf. J. Harrison, 'Piercing Pareto Superiority: Real People and the Obligations of Legal Theory' 39 *Arizona Law Review* 1 (1997).

[152] 59 Misc 2d 189, 298 NYS 2d 264 (1969).

[153] 38 Cal 3d 913, 216 Cal Rptr 345, 702 P 2d 503 (1987).

[154] 303 Or 557, 739 P 2d 554 (1987).

[155] J. Nehf, 'Bad Faith Breach of Contract in Consumer Transactions' in R. Brownsword, N. Hird and G. Howells (Eds) *Good Faith in Contract: Concept and Context* (Dartmouth, forthcoming).

[156] Nehf, supra n 155, citing the decision of the Supreme Court of California to that effect in *Freeman Mills, Inc* v *Belcher Oil Co* 44 Cal Rptr 20 (1995) and the Indiana Supreme Court decision in *Miller Brewing Company* v *Best Beers* 608 NE 2d 975 (Ind 1993) (need to prove independent tort), *Erie Insurance Co* v *Hickman* 622 NE 2d 515 (Ind1993) (creating tort of breaching insurer's duty to deal with insured in good faith).

An element of public control derives from the FTC power under section 5 of the FTC Act to take action against unfair acts or practices. In a 1964 statement[157] the Federal Trade Commission identified three factors to consider when applying the unfairness standard; is the practice

(a) immoral, unethical, oppressive, or unscrupulous,
(b) in violation of established public policy and
(c) does it cause substantial injury to consumers (competitors, or other businessmen).[158]

A consideration of how consumer injury is understood is quite revealing of the FTC's approach.[159] In particular it is interesting to note that the FTC is only concerned with instances of substantial harm. Also it will only intervene when consumers could not reasonably have avoided the injury. The normal expectation is that the market will be self-correcting through consumer choice and the Federal Trade Commission does not seek to second-guess the wisdom of particular consumer decisions, but 'to halt some form of seller behaviour that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision-making.'[160] The Federal Trade Commission powers are useful, because they provide for a very flexible redress regime, but are in practice used very restrictively because the Federal Trade Commission is only interested in substantial instances of harm. The Federal Trade Commission can seek consumer redress when it has made a cease-and-desist order for rule violations and carrying on unfair or deceptive practices.[161] However, these powers are in practice rarely used as the provisions contain many ambiguities and because of the need to prove that a reasonable man would have known that the act or practice was dishonest. To some extent this problem has been alleviated by the courts deciding that when seeking a permanent injunction ancillary relief can be granted to provide for consumer redress.[162] However, there is no private right of action for breach of the FTC Act, although this is indirectly achieved through State-trading laws which do provide for private redress and generally use FTC case-law as a reference point.

Recognition that the Federal Trade Commission could only deal with the large-scale consumer problems and also the desire by some States to adopt a more active consumer protection policy led to many States adopting there own little FTC Acts.[163] Some of these follow the model of the FTC Act and have

[157] Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed Reg 8324 (1964).

[158] Criteria approved by Supreme Court in *FTC* v *Sperry and Hutchinson Co*, 405 US 233 (1972). See below, 249, for discussion of the currently more restrictive interpretation.

[159] See FTC Policy Statement on Unfairness (reproduced as appendix 9A to D. Pridgen, *Consumer Protection and the Law* (Clark Boardman 1986)).

[160] Ibid.

[161] S 19 FTC Act allows the Commission to seek 'rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification.'

[162] See *FTC* v *Singer*, 668 F 2d 1107 (9th Cir, 1982).

[163] Pridgen, supra n 159, has described this as the 'balkanization of consumer law' (at ix), see Chaps 3–6 and see M. Greenfield (2nd ed) *Consumer Transactions* (Foundation Press 1983) Chap 3.

a broad prohibition of unfair and deceptive practices, others prohibit deception and numerous specific practices, whilst a third category are consumer fraud acts, dealing with deception, fraud, misrepresentation, concealment, etc. As the Federal Government became less active in consumer regulation during the 1980s these State laws and the work of the State Attorney-General's in enforcing them became increasingly important. The existence of these laws and method of enforcement should be borne in mind when we consider, below, the controls on advertising and marketing.[164] For present purposes we will concentrate on how these laws underline the US belief in private enforcement.

The State laws contain many elements which encourage private litigation. The ability to bring class actions in the United States for consumer complaints is well known.[165] Many States seek to use the damages regime to provide incentives for consumer litigation.[166] One technique is to provide for minimum damage awards which can be awarded even if no actual loss can be proved. Pridgen describes how such rules existed in eighteen States providing for minimum damages ranging between $25 and $2,000. Another approach is to provide for the doubling or trebling of actual damages. In some States this is mandatory whenever a plaintiff prevails, in others it is left to the court's discretion, whilst others require there to have been intentional or wilful violation. In several States punitive damages are available to deal with extreme cases either because the statute expressly authorizes them or because the courts find an implied authority. We have already seen that the availability of punitive damages for the tort of bad faith breach of contract has been an important vehicle for challenging trader conduct. Reliance on private enforcement requires both that there are sufficient incentives for individuals to litigate and for lawyers to take the cases on. Unless consumer claims can be combined in a large-scale class action the amounts involved in consumer litigation for economic losses are unlikely to be so great as to make contingent fees attractive to practitioners. Instead the solution widely adopted is to break with the tradition in US litigation of both sides bearing their own legal costs and permit successful consumer plaintiffs to recover their reasonable attorney fees.[167]

At the European level the Unfair Terms in Consumer Contracts Directive is undoubtedly the most important piece of Community legislation controlling the fairness of terms in consumer contracts.[168] The exact nature of the controls

[164] Pridgen, ibid, at ix describes how the State Attorneys General have even begun to take on national advertisers.

[165] Pridgen, ibid, at 6–33 to 6–42. Many State 'little-FTC' Acts permit the Attorneys General to bring class actions on behalf of affected consumers.

[166] Pridgen, ibid, 6–13 to 6–21.

[167] Pridgen, ibid., 6–21 to 6–33. See also W. Lovett, 'State Deceptive Practice Legislation 46 *Tulane Law Review* 724 at 744 (1972).

[168] Council Directive 93/13/EEC on unfair terms in consumer contracts, OJ 1993 L 95/29. For discussion by the same authors see Howells and Wilhelmsson, supra n 93, 88–115; R. Brownsword, G. Howells, and T. Wilhelmsson 'The EC Unfair Contract Terms Directive and Welfarism' in *Welfarism in Contract Law* (Dartmouth 1994) and 'Between Market and Welfare: Some Reflections on Article 3 of the EC Directive on Unfair Terms in Consumer Contracts' in C. Willett (Ed) *Fairness in Contract* (Blackstone Press 1996).

imposed by the Directive is still uncertain. It seeks to control unfair terms, but the extent to which unfairness relates to procedural or substantive controls remains moot. The restriction of scope to contract terms which have not been individually negotiated would seem to suggest the mischief being addressed lies in the realms of the procedural abuses which can flow from standard form contracting. Unfairness is defined as consumer detriment flowing from a term which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations.[169] The Commission fought for a reference to good faith to be retained in order to increase consumer protection by tapping into the continental traditions, which have developed around concepts such as *'Treu und Glauben'* in German law.[170] But it is hard to see how the consumer's burden is eased by having to demonstrate a breach of good faith as well as a significant imbalance, even if it is possible to find that a significant imbalance amounts to a breach of good faith.[171]

The preamble to the Directive also indicates a procedural reading of good faith for it states:

> whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer, whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account.[172]

However, whilst it is perfectly possible to see procedural aspects as being important—the Directive certainly places emphasis on transparency and requires terms be drafted in plain and intelligible language and adopts a *contra proferentem* rule of construction[173]—nevertheless it is also possible to argue that good faith can be breached through the consumer having a lack of choice of possible contract terms. Indeed it is probably true to say that there are some contract terms which are so unconscionable—for example, an exclusion of liability for personal injury caused by negligence—that their mere inclusion could be viewed as a breach of good faith. The Directive in fact includes an annex of indicatively unfair terms and it can be surmised that without some special justification the use of such terms would be a breach of good faith. The fact that the Directive provides for a system of abstract control through an injunction procedure suggests that there are grounds for a substantive interpretation of good faith or at the very least one not linked to the subjective attitudes or conduct of the trader.[174]

[169] Art 3(1).

[170] M. Tenreiro, 'The Community Directive on Unfair Terms and National Legal Systems' 3 *ERPL* 273 at 276 (1995).

[171] G. Howells, 'Good Faith in Consumer Contracting' in Brownsword, Hird and Howells (Eds) supra n 155.

[172] Recital 16.

[173] Art 5.

[174] A substantive approach is advocated by H. Collins, ''Good Faith in European Contract Law' 14 *OJLS* 229 at 250 (1994) and Wilhelmsson (1995) supra n 9, 141.

The fact that the imbalance must be 'significant' before a term is held to be unfair might be thought to put in place a high threshold which must be reached before the Directive will intervene. In practice we do not think this will be a serious hurdle and should not, for instance, be compared to the substantial injury requirement before the Federal Trade Commission will challenge unfairness. Nevertheless, many of the most serious imbalances cannot be addressed through the Directive for it is made clear that assessment of the unfair nature of terms shall relate 'neither to the main subject matter of the contract nor to the adequacy of the price and remuneration'.[175] However, this exclusion of the 'core terms' only applies in so far as they are in plain and intelligible language and these terms can be taken into account when assessing the fairness of other contract terms. In fact the Directive seems to aim its fire at the ancillary contract terms precisely because these are terms which the consumer party can not be expected to bargain over. Thus it works to a model of informed market exchange,[176] but appreciates the limits of market controls about aspects of the contract which are of relatively little interest to consumers amidst the excitement of purchase. In this respect it is more sensitive to the practical need for consumer protection than the US system, which even under the proposed revisions of the Uniform Commercial Code would still allow a great deal of freedom to contract on any terms so long as they are drawn to the consumer's attention.

Of course it should be remembered that the Unfair Terms in Consumer Contracts Directive is a minimal directive and builds upon the existing laws of the Member States.[177] National approaches to contractual fairness clearly differ within the Member States. The most interventionist stance is probably found in section 36 of the Nordic Contracts Acts which provides that if a contract term or its application would be unfair, it may be adjusted or left unapplied. When considering unfairness, the whole content of the contract, the position of the parties, the circumstances when the contract was made and thereafter, and other circumstances shall be taken into account. Price is to be considered one possible term for adjustment. However, even in the Nordic countries one sees debates about the balance between procedural and substantive justice.[178] This is also clearly evident in Germany where the statutory controls on unfair terms only apply to standard form contracts.[179] However, in general the European legal systems have been willing to strike out certain sorts of contract terms no matter how much disclosure is given to them and regard-

[175] Art 4. Recital 19 further provides that 'assessment of the unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio'.

[176] This delineation was only included by the EC Council at the final stages in order to exclude from the Directive's scope 'anything resulting directly from the contractual freedom of the parties.' Document giving the Council's reasons is published at 15 *Journal of Consumer Policy* 483 (1992).

[177] See, E. Hondius, *Unfair Terms in Consumer Contracts* (Molengraaff Institute voor Privaatrecht 1987) who provided an analysis of Member States laws which informed the process of developing the law.

[178] J. Pöyhönen, 'Procedural and Substantive Fairness in Finnish Contract Law' in Brownsword, Howells and Wilhelmsson, supra n 168.

[179] Gestz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen 1976, BGBl 76 I 3317.

less of any apparent assent by the consumer. Typically these would include clauses which purported to waive the right to obtain goods meeting certain legal minimum standards and the exclusion of liability for death and personal injury caused by negligence. Thus there has always been a willingness to regulate the ancillary terms. However, only in a few countries, like the Nordic States, are there the means to control core terms, absent procedural impropriety.

Litigating unfair terms in individual cases is of course often not a realistic proposition as the amounts involved are frequently insignificant. The US solution was to provide incentives to individuals and lawyers to bring such cases. Europe has tackled this problem by the development of public law means of enforcement. The Nordic countries use the Consumer Ombudsman to control the use of unfair terms both through his role as a negotiator with enterprises and by means of injunctions obtained in market courts.[180] The German law has provided for consumer groups to seek injunctions against unfair terms.[181] The French established a Commission des Clauses Abusives. This can recommend that the Conseil d'État issue a decree declaring that certain terms are unfair. It has only made one such recommendation, in 1978. More influential has been its power to issue soft-law recommendations concerning terms used by professionals. It has produced more than thirty such recommendations. The Government did not want to make it illegal to use terms which conflicted with the recommendations and so instead bolstered the system by permitting registered consumer groups to bring actions before the courts to challenge terms in standard form contracts.[182] The Unfair Terms in Consumer Contracts Directive continues this trend by requiring that:

> persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair.

There has been some debate as to whether this requires consumer groups to be given standing. The previous Conservative Government in the United Kingdom had restricted standing to the Director General of Fair Trading, but the new Labour Government has settled a case that was being brought before the European Court of Justice by the Consumers' Association by agreeing to grant standing to consumer groups. Nevertheless, whilst the debate as to whether the primary enforcement role should be played by the State or private consumer organizations is an important one, there is clearly a common desire in Europe to deal with the problem of unfair terms in Europe through regulation rather than litigation. Consumer groups or agencies are likely to use their power to seek injunctions sparingly, but will rely on them as a means to back

[180] T. Wilhelmsson, 'Administrative Procedures for the Control of Marketing Practices—Theoretical Rationale and Perspectives' 15 *Journal of Consumer Policy* 159 (1992).

[181] Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen 1976, BGBl, 76 I 3317.

[182] J. Calais-Auloy and F. Steinmetz (4th ed), *Droit de la consommation* (Dalloz, 1996) at 166–79.

up negotiations with industry. The aim is to create dialogue leading to a consensus. This is a quite different philosophy to the United States where businesses are left with greater freedom, but punished severely if they abuse their power to an excessive extent.

D. USURY CONTROLS

We have noted a general reluctance to intervene in the essential elements of the substantive bargain struck in the absence of some form of procedural unfairness. The exceptions to this rule discussed so far have in many countries been limited to rather extreme examples of imbalance. However, one important instance of substantive controls are usury laws. Without wishing to explore in detail the vexed questions surrounding the form, worth, and efficacy of usury laws,[183] we do think it is significant to discuss the important role interest-rate ceilings have played (at least historically) in the United States and to compare this with the position in Europe.

The United States inherited usury ceilings as part of its English law heritage. When England repealed its general usury law in 1867 only Massachusetts and a few other States followed suit; a few Western States allowed interest rates of ten to twelve per cent but most States had ceilings of around six per cent at the turn of the century.[184] Legal lending at these rates was not profitable and companies started to devise schemes which fell outside the legal controls, such as the Morris Plan.[185] All the States (except Arkansas) responded by adopting a law providing for much higher rates on small consumer loans, often inspired by the Uniform Small Loan Act of 1916. The courts also helped by developing the 'time-price doctrine' which removed credit sales from usury laws.[186] The drafters of the Uniform Consumer Credit Code (U3C) were keen to let the cost of credit be determined by the market, but instead of making a clean break with the past it preferred to pitch interest-rate ceilings at a far higher level and encourage competition within those parameters. It also staged the ceilings so that thirty-six per cent could be charged on the first $300, twenty-one per cent on the next $700, and fifteen per cent on balances over $1,000.[187] The drafters of the Uniform Consumer Credit Code attempted to put in place a 'rate and

[183] For a recent discussion by one of the authors see G. Howells, 'Seeking Social Justice for Poor Consumers in Credit Markets' in I. Ramsay (Ed) *Consumer Law in the Global Economy* (Dartmouth 1997) cf. D. Cayne and M. Trebilcock, 'Market Considerations in the Formulation of Consumer Protection Policy' 23 *University of Toronto Law Journal* 396 (1973).

[184] Spanogle *et al*, supra n 124, 631.

[185] Under which a loan would be repaid at the highest lawful rate and in addition under a separate transaction additional payments would be made into a separate bank account. This trend continues up to to-day with new forms of selling, like rent-to-own contracts emerging to avoid regulation: see J. Nehf, 'Effective Regulation of Rent-to-Own Contracts' 52 *Ohio State Law Journal* 751 (1991).

[186] See *Hogg* v *Ruffner*, 66 US 1 (Black) 115, 17 L Ed 38 (1861). These type of contracts are now normally regulated through Retail Instalment Sales Acts which the States enacted during the 1940s and 1950s.

[187] See R. Johnson, 'The New Law of Finance Charges: Disclosure, Freedom of Entry and Rate Ceiling' 33 *Law and Contemporary Problems* 671 (1968).

reform' package with gave increased rates, but also increased debtor protection.[188] Whilst few States adopted the balanced package envisaged by the Uniform Consumer Credit Code, it did serve for a model of rate regulation reform which was widespread amongst the States during the late 1970's and early 1980s.[189] This deregulation was particularly effective because of the US Supreme Court decision in *Marquette National Bank v First of Omaha Corporation*[190] that national banks were allowed to export the rates of their home-office State. There have also been federal moves to pre-empt State-usury laws. In 1980 Congress permitted federally insured State banks, savings and loans associations, and credit unions to charge interest at one per cent above the federal reserve discount rate for ninety-day commercial paper.

Yet even with all these reforms one still sees that the United States has only relaxed and not removed entirely the constraints imposed on the free market by interest-rate ceilings. What is to be made of this? Certainly there are some in the United States who see usury laws as a way of redressing inequalities of bargaining power.[191] We have already noted a concern to protect poor ghetto consumers, but the rates ceilings remain too low only to assist this type of creditor. One senses that the tide of US policy is to favour greater emphasis being placed on market forces[192] rather than regulating interest charges through statutory controls. The fact it is taking a long time to shed the protective rules which history provided is no doubt partly due to the elusive nature of credit as a consumer product which is hard to value and easy to over-consume, especially by those least able to repay it. This makes policy changes in this area very sensitive. In the US context it may also be connected to competition policy. Many States have a 'convenience and advantage' test before granting a license to credit institutions and this has been used as a barrier to entry. Also the historical evolution of consumer-credit laws based on each segment sponsoring its own laws has resulted in 'creditor competition [being] primarily intra-segment, rather than inter-segment'.[193]

Nevertheless to an English lawyer, the US regime of rate regulation seems remarkably interventionist. The United Kingdom has rejected interest-rate ceilings in favour of an unconscionability approach, which permits extortionate credit bargains to be re-opened if they require grossly exorbitant payments or otherwise grossly contravene ordinary principles of fair dealing. The protection offered by this approach is notoriously ineffective and reform has been proposed, but is unlikely to include the adoption of interest-rate ceilings.[194]

[188] W. Warren, 'Consumer Credit Law: Rates, Costs and Benefits' 27 *Stanford Law Review* 951 (1975).
[189] Spanogle *et al*, supra n 124, 703–4.
[190] 439 US 299, 99 S Ct 540, 58 L Ed 2d 534.
[191] G. Wallace 'The Uses of Usury: Low Rate Ceilings Re-examined' 56 *Boston University Law Review* 451 (1976) and R. Morris, 'Consumer Debt and Usury: A New Rationale for Usury' 15 *Pepperdine Law Review* 151 (1988).
[192] See truth-in lending laws discussed below, 259–63.
[193] Spanogle *et al*, supra n 124, 698 and 632–3.
[194] See Office of Fair Trading Report, *Unjust Credit Transactions* (1991)

Elsewhere in Europe interest-rate ceilings are, however, common.[195] In France the ceiling is fixed by the Conseil National de Credit. It calculates the average effective charge for various categories of loans and a loan becomes usurious when it is exceeds this ceiling by one third. Germany abandoned administratively determined ceilings in 1967, however, the German courts have found interest rates to be incompatible with good morals when they are 'double the average' or, in times of high interest rates, twelve per cent above the average. The policy underlying these forms of regulation is rather nebulous. It is far from clear whether what is being objected to is the outcome itself or whether the apparently unfair outcome is viewed as evidence of some procedural abuse. It is interesting that the German Supreme Court decision which started its modern jurisprudence in this area did so on the basis of unconscionability reasoning as it was able to develop previous case-law dealing with the exploitation of personal circumstances to cover more general notions of exploitation of weak consumers caused by imperfect markets.[196]

In continental Europe there is clearly a feeling that the central term in credit contracts—the interest rate—should be subject to some direct regulation to map out the contours of market competition. This is not currently present in the United Kingdom and we detect this policy is waning in the United States. The EC Commission has proposed consideration being given to harmonized European usury laws being introduced and states a preference for laying down maximum interest rates.[197] It has tried to suggest this may be needed as part of the package of measures needed for monetary union, but no definite proposals have been made.

The sections on unfair terms and usury laws have been included because they might be viewed by some as running counter to our thesis that the United States does not seek to regulate the content of consumer transactions. The usury laws are perhaps the most important example of the States intervening in the market, as historically the ceilings have been pitched at low levels which do not simply affect marginal transactions. However, we have shown that the trend is away from reliance on usury laws in favour of disclosure. The examples of courts invoking the unconscionability doctrine are quite startling, but only affect a few marginal extreme examples of abuse, typically in the context of ghetto-shops. For the most part US law gives traders a broad discretion as to the contract terms they adopt, subject to disclosure requirements.

By contrast European legal systems are willing to impose more substantive regulation. One sees administrative systems for setting interest rate ceilings

[195] G. Howells, 'Controlling Unjust Credit Transactions: Lessons from a Comparative Analysis' in G. Howells, I. Crow and M. Moroney (Eds) *Aspects of Credit and Debt* (Sweet and Maxwell 1993).

[196] [1981] *NJW* 1206.

[197] Report on the operation of Directive 87/102/EEC for the approximation of the laws, regulations, and administrative provisions of the Member States concerning consumer credit: COM (95) 117 at 80–1.

operating at the national level. The German courts (far from retreating) have developed strong usury controls in recent years. The idea of usury controls is being talked about at the EC level and even the weak UK law is recognized as being in need of reform. The Unfair Terms in Consumer Contract Directive shows a willingness to try to impose substantive regulation on all but the core contract terms.

In Europe it is perceived as being the role of the State (or in some countries consumer organizations sponsored by the State) to regulate contracts through negotiation and injunction procedures. By contrast in the United States the emphasis is far more on litigation. It is true that some State Attorney Generals also play an important role under their little-FTC Acts, but the use made of these powers varies widely and also the emphasis seems to remain on damages and civil and criminal penalties for the worst excesses rather than a general attempt to upgrade consumer contracts in a consistent and principled manner.

V. The regulation of advertising

A. INTRODUCTION

As the almost explosively growing importance of advertising and marketing is one of the key features of the consumer society and given that the regulation of marketing is closely related to how one perceives the consumer's ability to understand advertising and the ways in which she responds to marketing, this field of regulation is a focal area for testing our thesis. In fact the examples of varying consumer images mentioned in the introduction relate mainly to the regulation of advertising.[198]

However, the law in the EC Member States is not very homogeneous on this point. When the EC rules on marketing were prepared, great differences existed. At one extreme there was the English system mainly based on common law, containing only specialized legislation concerning questions of detail, and depending to a great extent on soft-law methods of control, in the middle the German law—with similar solutions in some other continental countries—which in this area started its development from the legislation on unfair competition to which consumer protection thinking was later added, and finally, at the other extreme the Nordic (then represented by Denmark) model with a stronger emphasis on consumer protection as the basic starting point, giving the Consumer Ombudsmen relatively broad powers to interfere against unfair advertising. In contrast to the common law system both the

[198] The cases concern negative harmonization based on Art 30 of the Treaty of Rome. Such cases will not be analysed further in this article: the relevance of this practice is now uncertain, after the European Court of Justice has changed the direction of the development of Community law in the famous *Keck* decision. See, Joined Cases C-267/91 and 268/91 *Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.

German and the Nordic legislation provided broad general unfairness clauses on which the courts could base their decisions.[199]

EC legislation has only to a limited extent managed to harmonize these approaches. The Community legislation only concerns certain questions, like misleading advertising, or advertising through certain media, like TV advertising. In 1984 the Council Directive relating to the approximation of the laws, regulations, and administrative provisions of the Member States concerning misleading advertising (the Misleading Advertising Directive)[200] was adopted. It was recently amended to also cover comparative advertising.[201] The Council Directive on the co-ordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the pursuit of television broadcasting activities (the TV Directive) was adopted in 1989.[202] These are the most important Directives concerning advertising. Other provisions in this field will be passed over.[203]

The punctual and incomplete nature of the EC rules on advertising has caused concern in the Commission. The Commission has very recently adopted a Green Paper on Commercial Communications in the Internal Market.[204] The Paper focuses on the regulation of advertising, direct marketing, sponsorship, sales promotion, and public relations. The key findings of the Green Paper are:

(1) cross-border commercial communications are growing;
(2) differing national regulations may create obstacles for businesses and problems for consumers;
(3) these divergences could give rise to barriers;
(4) this risk is accentuated by the new services in the Information Society, and
(5) the availability of information about regulatory measures is becoming more important.[205]

The central ethos of the Green Paper seems to favour deregulation. It underlines the need to remove, as far as possible, the national barriers to commercial communications within the internal market. The concrete proposals of the Green Paper, however, are relatively few, as it rather purports to function as a basis for discussion.

[199] See for a comparison F.-K. Beier, 'Entwicklung und gegenwärtiger Stand des Wettbewerbsrechts in der Europäischen Wirtschaftsgemeinschaft' *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* (*GRUR Int*) 61 (1984).

[200] Directive 84/450/EEC, OJ 1984 L 250/17.

[201] Directive 97/55/EC of European Parliament and of the Council of 6 Oct 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising, OJ 1997 L 290/18. The name of the Directive was thereby changed to Directive concerning misleading and comparative advertising.

[202] Directive 89/552/EEC, OJ 1989 L 298/23.

[203] See Howells and Wilhelmsson, supra n 93, 121–64.

[204] COM (96) 192.

[205] COM (96) 192 at 1b.

In the United States advertising at the federal level is supervised by the Federal Trade Commission. Its powers are based on broadly worded legislation. According to Section 5(a)(1) of the FTC Act 'unfair or deceptive acts or practices in or affecting commerce' are declared unlawful. In the practice of the Federal Trade Commission there seems to have been a change of policy in the 1960s and 1970s, showing more reliance on the consumers' ability to check the validity of potentially misleading price claims and shifting the emphasis of the regulation to other areas.[206] We have already seen how the Supreme Court in *Federal Trade Commission* v *Sperry & Hutchinson Co*[207] approved the FTC approach of, when assessing unfairness, taking into account (a) public policy, (b) ethics and morality and (c) injury to the consumer. However, in face of criticism of its attempts to introduce a Children's Advertising Rule in 1978[208] the Commission restated its position in its 1980 Policy Statement on Unfairness.[209] The ethical limb was said to be redundant, the main justification for intervention was consumer injury with public policy playing a secondary, mainly supportive role. Furthermore to be actionable the injury must be substantial, not outweighed by any countervailing benefits and not reasonable avoidable by consumers. In 1983 the Commission issued its Policy Statement on Deception.[210] This required that there be a material representation, omission, or practice that is likely to mislead the consumer. Significantly the Commission considered that the act or practice should be considered from the perspective of the 'reasonable consumer'. Some features of the new policies seem to illustrate our thesis well. We will in the following compare some of these features with similar details of EC law.

We are not pretending to offer any complete comparison between US and European approaches. For example, the issue concerning constitutional limitations on advertising regulation—freedom of speech versus 'commercial speech'[211]—is passed over, although the strong American constitutional tradition may lead to differences in legal emphasis compared to many European countries. Although the issue is connected with the theme of this article an adequate analysis would require the introduction of constitutional law materials which would transcend the scope of the article.

[206] R. Pitofsky, 'Beyond Nader: Consumer Protection and the Regulation of Advertising' 90 *Harv LR* 661 at 701 (1977), I. Ramsay, *Advertising, Culture and The Law* (Sweet and Maxwell 1996) 25. Although the change is recognizable, one may of course question to what extent it is of more permanent nature and in what regard the developments are dependent of the actual members of the FTC, where membership changes fairly rapidly, see Spanogle *et al*, supra n 124, 39. In this short analysis we have to pass over the interesting issue concerning the influence of the changes in the political make-up of the Commission. Compare, for example, B. A. Silverglade, 'A New Enforcement Approach for a New Era in FTC Consumer Protection Regulation', 7 *Advancing the Consumer Interest*, Number 1, 23 at 26 (1995) who connects the changes in the 1980s to the Reagan administration.

[207] 405 US 233 (1972).

[208] See Ramsay (1997), supra n 183, 100.

[209] This is reproduced as Appendix 9A to Pridgen, supra n 159; see also N. Averitt, 'The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act' 70 *Georgetown Law Journal* 225 (1981).

[210] Reproduced as appendix 9B to Pridgen, supra n 159.

[211] See on US law, for example Spanogle *et al*, supra n 124, 84–96.

B. METHODS OF ENFORCEMENT

The Misleading Advertising Directive does not only fix the substantive rules to be followed. It also—and this might at least in some countries be the most important effect of the Directive—prescribes a control mechanism to fight misleading advertising. According to Article 4(1) of the Directive, Member States shall ensure that adequate and effective means exist to combat misleading advertising and for the compliance with the provisions on comparative advertising in the interests of consumers as well as competitors and the general public. The type of means which should exist is, however, not determined by the Directive. Various administrative or court based judicial means are possible, as long as they can be deemed adequate and effective. The choice is in the main left to national law. The vagueness of the provisions on control is due to the fact that the systems in force were very different in the Member States. A special problem was posed by the United Kingdom, whose system was mainly based on self-regulation.[212] The question, whether this could be considered sufficient is addressed by Article 5 of the Directive. Although the Directive, according to the Preamble, wants to encourage voluntary control exercised by self-regulatory bodies, self-regulation is not accepted as the sole means of control.[213] In the United Kingdom the Directive therefore led to the empowerment of the Director General of Fair Trading to take action in the area by instituting injunction proceedings before a court.[214] However, as far as other types of potentially unacceptable advertising (besides misleading and comparative advertising) are concerned, the system still rests mainly on self-regulation. The EC Directive does not force the Member States to recognize standing for consumer organizations; it suffices that such organizations can make complaints at an administrative authority which can initiate the proceedings.

As the EC Directive is a minimum Directive and since it in any event leaves the questions of enforcement largely to be determined by national law, it cannot have any direct deregulatory impact on enforcement. However, EC law may have such an impact in certain countries as far as the regulation of television cross-border advertising is concerned.[215] As the rules on TV advertising vary considerably between the Member States and as, in addition, the efficiency of enforcement also may show considerable variations, it is an important question from the point of view of the advertiser to know under which system of rules he has to work and which enforcement agency has the power

[212] For a rather positive assessment of the system, see P. Thomson, 'Self-Regulation in Advertising—Some Observations from the Advertising Standards Authority' in G. Woodroffe (Ed) *Consumer Law in the EEC* (Sweet and Maxwell 1984). C. Munro, 'Self-Regulation in the Media' (1997) *PL* 6 at 13 finds it 'not wholly implausible to regard the design as successful'.

[213] According to Art 4(1) the Member States are, however, allowed to require prior recourse to self-regulation before turning to administrative or judicial control.

[214] See G. Howells and S. Weatherill, supra n 112, 359.

[215] The Green Paper on Commercial Communications seems to favour similar effects in other areas of marketing as well.

to interfere against his advertisements. In theory the supervision of transnational advertising can be effected by the enforcement agency in the transmitting State, applying its rules (home-country control), or it may be subject to the authorities and rules of the receiving State (host-country control). The Directive has adopted the principle of home-country control (Article 2). It is therefore clear that advertisements in TV satellite channels are subject to control by the authorities and rules in the country from which the broadcast is sent. Furthermore, as the Directive in Article 2(2) prescribes that Member States, as a rule, shall ensure freedom of reception and shall not restrict retransmission on their territory of television broadcasts from other Member States, it seems as if host-country control would be excluded. In cases where the home-country control is considerably more lenient than the host-country control, this principle would be problematic from a consumer point of view. However, this conclusion is not unquestionable. There are several arguments which can be relied on in favour of allowing a certain host-country control by the authorities in the receiving country.[216] The European Court of Justice has recently confirmed that a Member State in cross-border television cases is not precluded from taking measures against an advertiser on the basis of domestic legislation, if such measures are deemed necessary and proportionate and the same aims could not be met by less restrictive measures.[217] EC law therefore only restricts to some extent the activities of national regulators in this area.

As the methods of enforcement vary considerably in the EC, and the harmonization efforts in this area are not very strong, it is very difficult to compare the US enforcement structures to those in the European Community. In the Community the Misleading Advertising Directive has forced all Member States to institute an 'adequate and effective' method of enforcement, at least related to the types of advertising covered by the Directive, which has improved the situation in some of the Member States. The actual regulatory work is, however, completely left to the very differing Member State regulatory agencies. On the other hand, in the United States one finds a central controlling agency on the federal level. This agency, the Federal Trade Commission, may take action against advertising not considered acceptable. The focus of the work of the Federal Trade Commission is naturally on national campaigns (mainly TV advertisements), while local advertising regulation is taken care of by state authorities (often the attorney generals), based on State legislation supplementing the FTC Act. There is a wide variation as to the content of this legislation across the country.[218] So, despite the fact that one at least formally encounters the same type of reliance on State supervision as in Europe, the practical effects may be different. Although the regulation on the federal level

[216] See Howells and Wilhelmsson, supra n 93, 154–6.

[217] Joined Cases C-34/95 *Konsumentombudsmannen* v *De Agostini* (*Svenska*) *Förlag AB* and C-35/95 and C-36/95 *Konsumentombudsmannen* v *TV-Shop i Sverige AB* [1998] 1 CMLR 32. Compare the EFTA Court decision in Cases E-8/94 and E-9/94 *Forbrukerombudet* v *Mattel Scandinavia A/S and Lego Norge A/S* [1996] 1 CMLR 313.

[218] Spanogle *et al*, supra n 124, 70.

in the United States at least has been considered to be relatively strong—the Federal Trade Commission in the 1970s claimed to have instituted 'a large number of proceedings challenging major advertising campaigns as false, misleading or unfair'[219]—its work has a comparatively limited scope, considering how large the US market is. The patchy enforcement picture on the local level may by necessity produce a greater need to rely on individuals protecting themselves—in fact many of the State laws provide for private actions by consumers[220]—and less faith in regulators than is the case in Europe where the main regulators work on the Member State level with closer contact to the relevant local markets.

These differences between the European and the American model, however, seem to be shrinking, as the centre of gravity of advertising control in the United States is shifting to the State authorities, because of serious cuts of the FTC budget during recent years. Just as in the case of the European Community, this might have positive effects from the consumer point of view; consumer representatives have endorsed the claim that 'State attorney generals are closer to the people and are cognisant of their needs and concerns'[221] and that they have been able to move more quickly against unfair trade practices than the Federal Trade Commission.[222] Traditionally the States have followed FTC approaches and interpretations when applying little FTC Acts. It will be interesting to see if this continues given the more restrictive approach of the Federal Trade Commission in recent years.

However, we will not further discuss these efficiency issues, as to which comparison is very difficult, but rather turn to the content of the activity, to see whether the American regulators expect different things from their consumers than do the Europeans.

C. CONTENT

According to Article 2(2) of the EC Misleading Advertising Directive

> 'misleading advertising' means any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor.

At least in some Member States this type of provision has been interpreted rather strictly. Even small departures from literal truth have been considered unacceptable, if they in some way can be imagined to affect the behaviour of consumers. The supervising authorities have to some extent focused on

[219] Pitofsky, supra n 206, 669. The view is an insider's view: Pitofsky was head of the consumer protection branch of the FTC in the 1970s and is the current Chairman.

[220] Spanogle *et al*, supra n 124, 70.

[221] B. A. Silverglade, 'Comments by a Consumer Advocate at the CSPI', in P. E. Murphy and W. L. Wilkie (Eds) *Marketing and Advertising Regulation, The Federal Trade Commission in the 1990s* (University of Notre Dame, London, 1990) 25.

[222] Pridgen, supra n 159; Silverglade (1995) supra n 221, 26.

niceties concerning words and terminology.[223] Relating this to Iain Ramsay's proposal to distinguish three narratives on law's truth and advertising[224]—'Truth in Advertising', 'Advertising as Information', and 'Preference Manipulation'—this practice seems principally to belong to the first category. This European attitude may, at least in some countries, be explained by a certain commitment to ethical standards. As Ramsay points out, the truth-in-advertising idea 'recognises the value in holding consumer markets to relatively high ethical standards and attempting to maintain a moral order in the market.'[225]

In the United States regulation previously seemed to follow similar patterns. In the 1950s and the 1960s the Federal Trade Commission 'characteristically became entangled in nit-picking, literalistic disputes over the meaning of words in ads.'[226] However, later the attitude of the Federal Trade Commission changed. It rather tended to adopt an advertising-as-information approach.[227] This meant adopting a perspective in which supervision of advertising 'should not be a broad, theoretical effort to achieve Truth, but rather a practical enterprise to ensure the existence of reliable data'.[228] The ethos of this practice was economical instead of ethical. The data should be there to 'facilitate an efficient and reliable competitive market process.'[229]

This meant a reduced emphasis on previously important areas like fictitious comparative price advertising and discount advertising as well as advertising using phoney mock-ups.[230] The new approach clearly contrasts with practice in many European countries where for example misleading price advertising has been an important target of intervention.[231] As an explanation for the more limited interest in policing the issue of misleading price advertising in the United States has been mentioned the consumers' opportunity to check the validity of the claims and to ignore ambiguous claims.[232] This is in line with the opinion of the Federal Trade Commission that it should only reluctantly interfere against deceptive advertising concerning a product or service which is inexpensive and frequently purchased, as market incentives—the encouragement of repeat purchases—here will restrain the likelihood of deception.[233]

In other words, as to its basic approach US regulation today seems to be built on the image of the consumer as a market actor, whose activities should be supported by the authorities, whilst European law still to some extent relies on the State to guarantee acceptable ethical behaviour in the marketplace. The ethical demand for precise truth in advertising should in the new US approach

[223] For the Finnish situation, see T. Wilhelmsson, *Konsumentskyddet i Finland* (Juristförbundets Förlag 1989) 128. As to EC law, see the *Nissan* case, infra 255–6.
[224] Ramsay (1997), supra n 183, Chap 2.
[225] Ibid, 20.
[226] Pitofsky, supra n 206, 674.
[227] Ramsay (1997), supra n 183, 23.
[228] Pitofsky, supra n 206, 671.
[229] Ibid.
[230] Ibid, 687–92.
[231] Ramsay (1997), supra n 183, 25. So also, for example, in Finnish law, Wilhelmsson (1989) supra n 223, 133–6.
[232] Ramsay (1997) supra n 183, 25.
[233] FTC Policy Statement on Deception (reproduced as appendix 9B to Pridgen, supra n 159).

be policed by the consumers themselves, as far as it concerns issues like comparative pricing regarding which the consumers are considered well-equipped for this task.

In order to call something misleading one has to know relevant facts about the product or service advertised. However, in many cases it is not easy to ascertain, without proper testing, whether the qualities promised exist or not. From the point of view of the efficiency of the control the question of the burden of proof becomes essential in such cases. The rule in the EC Directive is formulated as a procedural provision (Article 6):[234] the courts or administrative authorities shall have powers enabling them in civil or administrative proceedings to require the advertiser to furnish evidence as to the accuracy of factual claims in advertising, if, taking into account the legitimate interests of the advertiser and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case. From this rule, however, follows an indirect rule on the burden of proof: the courts or administrative authorities shall have the power to consider factual claims as inaccurate if the evidence demanded is not furnished or is deemed insufficient by the court or administrative authority. This provision of the Directive is not a full-fledged rule on the reversal of the burden of proof, as it operates only if the court actively has required certain information; in addition such a requirement can be made only if it appears appropriate. Some national laws go further in this respect by applying, for example, a fairness principle: a business which uses factual statements in advertising without being able to prove their correctness, is acting unfairly.[235]

The same rule has been developed in US practice based on the broad unfairness provision in the FTC Act. The Federal Trade Commission has implied a duty of sellers to substantiate product claims.[236] In this context there does not seem to be great differences between the American and European approach.[237] However, the basic philosophy may nevertheless be partially different. The European approach is perhaps to a greater extent justified by ethically-based fairness reasoning, whereas the US rule has been given—at least by one involved actor—an economical justification. The substantiation duty is said to have been created 'because the Commission viewed as economically irrational the alternative arrangements whereby consumers conduct necessary tests or investigations in order to determine whether product claims are true.'[238] From this economic perspective it has also been alleged that substan-

[234] The first Commission proposal of 1978, OJ 1978 C 70/4, had a clearer rule in this respect: when the advertiser makes a factual claim, the burden of proof that his claim is correct shall lie with him (Art 6).

[235] This is the situation in Finland, see Wilhelmsson (1989) supra n 223, 127.

[236] *Pfizer, Inc* 81 FTC 23, 62–4 (1972); FTC Policy Statement Regarding Advertising Substantiation Program, 104 FTC. 648 (Appendix)(1984).

[237] The Misleading Advertising Directive can be criticized for stopping halfway in the protection of consumers, but this may be explicable by the fact that it does not contain any general fairness provision.

[238] Pitofsky, supra n 206, 670–1.

tiation requirements related to concerns other than health and safety have an uncertain value.[239]

In other words, in the United States the provision on the burden of proof has been justified by focusing on the consumers' ability to police advertising issues. In the European context this cannot be in the forefront of the reasoning; for example in the Nordic countries the rule is a part of the fairness-based equipment of the Consumer Ombudsmen.

As to the question concerning the prevailing consumer images, the problem of the relevant consumer groups is important. Should the advertisement have to be misleading for the average, normal consumer in order to be condemned, or should one focus rather on how the uneducated, stupid or otherwise weak consumers understand the advertisement? The national approaches within the European Community are traditionally diverging concerning this question. The credulous, stupid, uneducated consumers have received the understanding of the German and Nordic regulators. For example, according to German law already when ten to twenty per cent, sometimes perhaps less, of the consumers are likely to be misled, the advertisement should be forbidden.[240] Also in Nordic law the passive glancer rather than the active and critical information-seeker is the dominant consumer image in the regulation of advertising.[241] In the United Kingdom, on the other hand, the focus is rather on the average consumer. For example, in false trade description cases the relevant test is based on the understanding of the ordinary man,[242] as put very clearly by Judge Gower QC, in *Burleigh* v *Van den Berghs and Jurgens Ltd.*:[243] 'It is important that we should remember that we are dealing with the average person. It is not enough that we should be sure that an unusually careless person might be misled . . . [or] a person who is dyslexic, illiterate, short-sighted, or of less than average intelligence.'

In its practice the European Court of Justice seems to favour the latter approach, looking more at the reactions of the average consumers (which are perceived as being active and rational). This is relatively clearly indicated in the judgment in the *Nissan* case, where the Court had to assess whether the advertising of parallel imported cars as 'cheaper' was misleading with regard to the fact that the lower price was to some extent due to these cars having a smaller number of accessories. The Court stated: 'such a claim can only be held misleading if it is established that the decision to buy on the part of *a significant number of consumers* to whom the advertising in question is addressed was made[244] in

[239] Ibid, 683.

[240] See J. Möllering, 'Das Recht des unlauteren Wettbewerbs in Europa: Eine neue Dimension' 36 *Wettbewerb in Recht und Praxis* 1 at 10 (1990), N. Reich (3rd ed) *Europäisches Verbraucherrecht* (Nomos 1996) 313.

[241] See Wilhelmsson (1996) supra n 4, 56.

[242] See R. J. Bragg, *Trade Descriptions* (Clarendon Press 1991) at 43.

[243] [1987] BTLC 337 at 339.

[244] This formulation, that actual misleading should be established, is in direct contradiction with the wording of the Directive and must be regarded as an error by the ECJ. See also for a similar criticism, H. Piper, 'Zu den Auswirkungen des EG-Binnenmarktes auf das deutsche Recht gegen den unlauteren Wettbewerb' *Wettbewerb in Recht und Praxis* 685 at 691 (1992).

ignorance' of the said fact.[245] This view, which is in line with the emphasis on the idea of the rational consumer in Community law,[246] obviously is less favourable for the more vulnerable consumers than the German-Nordic approach. As the Misleading Advertising Directive is a minimum Directive the decision of the Court of Justice need not affect those more far-reaching, national practices. However, a certain pressure from Community law towards diminishing the protection afforded to vulnerable groups will certainly be felt in these countries as well. In addition, in the cases where national regulation amounts to an indirect obstacle to trade, and may therefore be outlawed by the Court of Justice,[247] the attitude of the Court may directly affect the national practices. The different opinions of the German Supreme Court and the European Court of Justice in the recent *Clinique* case illustrate this very well.[248]

The economic approach of US law would seem to leave little room for special regard to the needs of credulous consumer groups. From a general economic point of view focusing on the deception of such groups might appear as counterproductive, as it diminishes the information offered to better-equipped consumers.[249] Despite this US regulation was previously founded on the understandings of credulous consumers; the protection was thought to protect 'that vast multitude which includes the ignorant, the unthinking and the credulous'.[250] In *Charles of the Ritz* the truthfulness test was given a very strict interpretation: according to a much-cited passage the advertising should be so clear that 'in the words of the prophet Isaiah, "wayfaring men, though fools shall not err therein" '.[251] However, with the adoption by the Federal Trade Commission of the 1983 Deception Policy Statement it adhered to a formula according to which it should interfere only with representations which were 'likely to mislead reasonable consumers under the circumstances'. This brought the needs of credulous consumers largely outside the primary focus of the federal authority,[252] although the Statement acknowledged the need for special standards concerning marketing targeted to children, the elderly and

[245] Case C-373/90 *Complaint against X* [1992] ECR I-131 at 150 (emphasis added). The result of the case may in spite of this be understandable from a consumer policy point of view, as one may suspect that the primary aim of the Court was to support parallel importers, to the benefit of at least some consumers.

[246] This approach does not necessarily apply to children. One may assume, like the EFTA Court has done, that 'in considering whether an advertisement is misleading or not, higher standards would normally apply if the advertisement is specifically targeting children', see Cases E-8/94 and E-9/94 *Forbrukerombudet* v *Mattel Scandinavia A/S and Lego Norge A/S* [1996] 1 CMLR 313 at 330.

[247] As mentioned earlier, the *Keck* decision has strongly restricted the possibilities of the ECJ to interfere in the advertising area on the basis of Art 30 of the Treaty of Rome.

[248] Case C-315/92 *Verband Sozialer Wettbewerb eV* v *Clinique Laboratories SNC* [1994] ECR I-317. In this case the ECJ banned as a barrier to trade which could not be justified a German measure which prohibited the use of the name 'Clinique' for certain cosmetics. According to the German reasoning consumers might believe that it was a product with pharmaceutical properties.

[249] Ramsay (1997) supra n 183, 22.

[250] *Aronberg* v *FTC* 132 F 2d. 165, at 167 (7th Cir. 1942). See also Spanogle *et al*, supra n 124.

[251] *Charles of the Ritz, Distributors Corp* v *FTC* 143 F 2d. 676, at 680 (2d. Cir. 1944).

[252] The new interpretation of deception by the FTC has not been accepted at the State level in many States, see Silverglade (1995) supra n 201, 26.

the terminally ill. As the dissenting opinion of Commissioner Bailey noted, the adoption of the formula of the reasonable consumer could 'seriously jeopardize this guiding principle of deception law, which has permitted and encouraged the Commission to spread its protective mantle over the uninformed and the credulous, those with understandable but often unreasonable hopes, those with limited reasoning abilities . . .'[253] The new concept has been emphasized by the Commission in its practice after the adoption of the Statement.[254] The Federal Trade Commission has also not, as mentioned below, been very interested in focusing on exploitation of vulnerable consumer groups in the application of the general fairness standard.

As far as European (national) regulation is concerned with the needs of weak and vulnerable consumers it obviously presupposes government policing. One cannot, within this perspective, expect strong independent activism by consumer groups. On the other hand, the fact that recent US regulatory practice has shown relatively little interest in the needs of weak groups of consumers could indicate a growing trust in reasonable (and active) consumers in that country.

In EC law there is no general principle forbidding unfair marketing. For example suggestive advertising, discriminatory advertising, advertising interfering with privacy, denigratory advertising and the giving of inadequate information in advertising[255] are not subject to any general Community legislation. Although there was a general prohibition concerning unfair advertising in the first Commission proposal for a directive,[256] it was later dropped. This delimitation of the scope of the Directive seems to reflect very well the prevailing consumer image in the Community: as misleading advertising may distort the function of the assumed rational consumer, it should be forbidden, while other forms of unfairness connected with suggestive advertising, which often are especially problematic for more irrational and vulnerable consumers, are not addressed.

In this context it should be mentioned that various kinds of unfairness clauses are in use in several of the Member States. For example, in Nordic law the most important legal basis for the work of the Consumer Ombudsmen is a general clause forbidding unfair marketing.[257] Also in Germany, with its starting points in the law of unfair competition, the basic substantive rule has a fairly broad scope.[258] In other words one encounters the tendency, mentioned already in the introduction, of EC law to step in more reluctantly in favour of the more irrational consumer than for example German and Nordic law. EC

[253] Spanogle *et al*, supra n 124, 61. [254] Ibid, 56.

[255] These types of advertising are enumerated by U. Bernitz, '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* (Story Scientia 1988) 61 *et seq* as the major types of unfair advertising.

[256] OJ 1978 C 70/4.

[257] For example, the Finnish Consumer Protection Act (38/78) Chap 2 s 1 and the Swedish Marketing Act (1995:450) s 4.

[258] For a more detailed comparison, see Beier, supra n 199.

law is here more in line with the law in the United Kingdom,[259] where interference with advertising on grounds other than that it is misleading is still mainly left to self-regulation by the Advertising Standards Authority.[260]

However, even in EC law there are a number of substantive rules on advertising in the TV Directive which could come under the heading of unfair advertising. For example the advertising provisions of the TV Directive start with a rule on the recognisability of advertising. According to Article 10 television advertising shall be readily recognizable as such and kept separate from other parts of the programme service by optical and/or acoustic means. In addition it is prescribed, among other things, that advertising shall not use subliminal techniques, and that surreptitious advertising shall be prohibited. There are also provisions on the allowed content of advertising in the TV Directive which concern the effects of advertising on the development of our social values in general. According to Article 12 of the TV Directive television advertising shall not prejudice respect for human dignity; include any discrimination on grounds of race, sex or nationality; be offensive to religious or political beliefs; or encourage behaviour prejudicial to the protection of the environment. The protection of minors is dealt with in Article 16 of the Directive. According to this provision television advertising is not allowed to cause moral or physical detriment to minors. It shall therefore comply with the following criteria: it shall not directly exhort minors to buy a product or a service by exploiting their inexperience or credulity; it shall not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised; it shall not exploit the special trust minors place in parents, teachers or other persons; and it shall not unreasonably show minors in dangerous situations.[261]

The broad legal basis on which the US agency can rely has been mentioned earlier. In Section 5 of the FTC Act there is an express unfairness provision, cited above. The disjunction in the words 'unfair *or* deceptive' in this provision gives the Federal Trade Commission an independent unfairness ground for action.[262] The US Supreme Court has given this provision a broad interpretation in *Federal Trade Commission* v *Sperry & Hutchinson Co*:[263] the Federal Trade Commission should enforce the provision 'like a court of equity' and take into account whether a measure 'without necessarily having been previously considered unlawful, offends public policy'; is 'immoral, unethical, oppressive, or unscrupulous'; or causes 'substantial injury to consumers'. In spite of these broad powers the Federal Trade Commission already before its change of policy was not very eager to develop a fairness-based practice.

[259] The originally proposed unfairness clause was left out from the Directive because of resistance from the UK, see L. Krämer, *EEC Consumer Law* (Story Scientia 1986) 153 and Reich, supra n 240, 312.

[260] See, for example, Munro, supra n 212, 9.

[261] Even stricter measures against television advertising to children could be thought of. In some countries like Greece and Sweden as well as Norway such advertising is prohibited during certain hours of the day or altogether.

[262] Spanogle *et al*, supra n 124, 64.

[263] 405 US 233 (1972).

Although it has the power to take action against claims that tend to exploit vulnerable groups, it did not engage in developing much practice against such exploitation.[264] The fairness provision has often been used in connection with claims concerning coercion and deception[265] and, going further, to create rules on information disclosure.[266] In other words it has been used to create devices to support (competent) consumers on the marketplace. The unfairness doctrine is said to have 'lost its original intuitive meaning based on moral considerations, and has become more of a cost-benefit analysis, with a slant toward consumer sovereignty.'[267] In its own words, the Federal Trade Commission in its practice 'seeks to ensure simply that markets operate freely, so that consumers can make their own decisions.'[268] However, as its earlier broader approach to unfairness has been approved by the Supreme Court it is theoretically possible that it could in the future choose to adopt a more interventionist approach, but this seems unlikely in the present climate.

The US fairness-based practice seems, despite the broad powers of the Federal Trade Commission, to be more geared towards protecting active consumers with rules on information than, for example, Nordic and German practice. One may here again catch an impression of the contrast between a primarily economical and a primarily ethical approach. However, it should also be mentioned that in many large US cities there are consumer protection agencies which effectively target unfair practices which affect poorer members of society.

D. POSITIVE DISCLOSURE REQUIREMENTS

The previous sections concerned controls on those advertising statements which traders voluntarily chose to make about their products and services. A common feature of both EC and US consumer legislation has been the imposition of compulsory disclosure requirements. This is evident in several areas. For example food producers are required to disclose their ingredients, labels, and instructions must be attached to various articles and health warnings must be included in tobacco advertisements. We will, however, use truth in lending as our prime example as it is taken to epitomize the US approach to disclosure regulation and has also come to play a major role in EC consumer credit policy.

[264] Pitofsky, supra n 206, 683–5. The FTC tried to take some measures against advertising to children, but these efforts had to be aborted due to legislative intervention in 1980, see Spanogle *et al*, supra n 124, 65.

[265] See FTC Policy Statement on Unfairness, supra n 209.

[266] Pitofsky, supra n 206, 685–7, Spanogle *et al*, supra n 124 and FTC Policy Statement on Unfairness, supra n 209. This practice seems to be in line with the strong legislative emphasis on compulsory disclosure of information, for example in the field of credit, see the well-known and much-discussed Truth in Lending Act discussed below at section V/D, 260.

[267] Spanogle *et al*, supra n 124, 65.

[268] The Commission's opinion in *In re International Harvester Co.* 104 FTC 949 (1984). As the Commissioners puts it in its Policy Statement on Unfairness: 'we rely on consumer choice'.

The push for disclosure laws in the United States came in the 1960s. During this period the Truth In Lending Act (TILA) was enacted[269] The first draft of this Act would have merely required the interest rate to be disclosed as a simple annual rate on a declining balance. However, industry sought clarification of matters such as what counts as interest and how to calculate the appropriate rate. It became clear that no statute could be as specific as industry wanted; instead when this Act was enacted in 1968 it gave the Federal Reserve Board the power to issue regulations to deal with any problems or ambiguities.[270] These rules are found in Regulation Z.

Central to truth-in-lending legislation is the notion of the annual percentage rate (APR). This has to be disclosed in contract documentation, but we shall restrict ourselves for the most part to the rules requiring its disclosure in advertisements.[271] The basic thrust of US and EC regulation is the same; whenever aspects of the credit agreement are advertised the APR should be stated. In the United States this disclosure applies when any specific terms of open end credit plans (revolving credit) are advertised[272] or for other credit if mention is made of the amount of any down payment, instalments, the dollar amount of the finance charge, number of instalments, or period of repayment.[273] The EC Consumer Credit Directive requires the APR to be disclosed when any advertisement or offer displayed at business premises indicates a rate of interest or any figures relating to the cost of credit.[274] We will not go into the details of how the APR should be calculated, which raise issues of which elements should be included in the definition of interest and which mathematical formula should be used. Save to say that our impression is that both the European Community and the United States seek to include in the APR, all charges which can be viewed as objectively forming part of the cost of credit. This is different from the approach of the Australian Consumer Credit Code, for instance, where the policy is to give consumers an APR which does not take into account fees and charges which are listed separately.[275]

There has been much criticism of the truth-in-lending regulatory approach. It has been suggested that it is relatively ineffective because the information it

[269] 15 USCA § 1601 *et seq.* At about the same time the Fair Packaging and Labelling Act 15 USCA § 1451 was introduced. Enacted in 1966, this supplemented rules found in the Federal Food, Drug and Cosmetic Act, 21 USCA § 301 *et seq.*

[270] However even this was complicated and 'it became great sport among consumer lawyers to nit-pick disclosure statements for violations', Spanogle *et al*, supra n 124, 107. The law was simplified by the Truth in Lending Simplification and Reform Act 1980: see R. Rohner, 'Truth in Lending "Simplified": Simplified?' 56 *New York University Law Review* 999 (1981).

[271] There are criticisms that disclosure in contract documentation is too late, for at that time the consumer is too interested in the main subject-matter of the contract. These forms of disclosure may nevertheless be useful as a 'contract synopsis' that can be referred to by the consumer during the lifetime of the agreement: see Ramsay (1989) supra n 136, 332.

[272] § 143. [273] § 144.

[274] Council Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (as amended): OJ 1987 L 42/48, Art 3.

[275] For criticism of this approach see E. Lanyon, 'Cassandra's Curse: Disclosure under the Australian Consumer Credit Code' (1997) *Consumer Law Journal* 178.

assumes to be important, i.e. the cost of credit, is not in fact too influential in the debtor's decision-making process.[276] Sometimes it is even suggested that consumers can suffer from 'information overload'.[277] Equally such disclosures may be of little value to poor consumers with no opportunity to obtain cheaper credit.[278] One might argue that as it is a relatively non-interventionist (and ineffective) form of regulation, disclosure requirements are simply a sop to consumer pressure which nevertheless fails to address the real inequities of the consumer market.[279] We have indeed been critical of information strategies which are purely formalistic. We have argued elsewhere for a greater role for cancellation as this allows the consumer to respond to the information after the contract has been signed and the implications of the information have begun to sink in.[280] Nevertheless, whilst recognizing that there is still not a high degree of awareness of the APR,[281] the truth-in lending approach may have some beneficial effects so long as it forms only one plank of a broader consumer-protection strategy. Consumer education can help raise the profile of the APR and in the long term, at least, may encourage consumers to comparative shop for lower interest rates.[282] Disclosure of extremely high interest rates may 'alert' some consumers to the disadvantages of the transaction they were contemplating entering.[283] Even if only some consumers actively use this information, this may influence creditor behaviour.[284] For those who do wish to comparative shop truth-in-lending legislation at least creates common terminology so that like can be compared with like.[285]

[276] W. Whitford, 'The Function of Disclosure Regulation in Consumer Transactions' (1973) *Wisconsin Law Review* 400 at 422–7.

[277] J. Landers and R. Rohner, 'A Functional Analysis of Truth in Lending' 26 *UCLA Law Review* 711 at 722–6 (1979); cf. A. Schwartz and L. Wilde, 'Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis' 127 *University of Pennsylvania Law Review* 630 at 675–7 (1979).

[278] H. Kripke, 'Gesture and Reality in Consumer Credit Reform' 44 *New York University Law Review* 1 (1969); and Note, 'Consumer Legislation and the Poor' 76 *YLJ* 745 (1967).

[279] Whitford, supra n 276, 436–7, who ultimately believes that there is more to it than simple political expediency and cites the fierce seller opposition sometimes generated to disclosure laws: see P. Hart, 'Can Federal Legislation Affecting Consumers' Economic Interests Be Enacted?' 64 *Michigan Law Review* 1255 (1966).

[280] Howells and Wilhelmsson, supra n 93, 311–12. Many EC Member States provide for cooling-off periods for consumer credit contracts in some situations, but there is no right at the EC level, although the Commission has announced its intention to study whether there should be harmonized rules on cooling-off periods: see COM (95) 117 at 76. Cooling-off periods for consumers exist under the EC directives on doorstep selling, distance selling, timeshares, and the Third Life Assurance directive. In the US the Federal Consumer Credit Protection Act (of which truth in lending is part) contains a cooling-off period where security is taken in the consumer's dwelling house (§ 1635). The U3C (and several State laws) provides for cooling-off periods for sales made in the consumer's home (§ 3.501–5). The FTC has introduced a Rule Concerning Cooling-Off Period for Sales Made at Homes or Certain Other Locations (16 CFR § 429). In the US the cancellation period is normally briefer (three days) than in Europe where a period of 7–14 days is usually prescribed: see B. Sher, 'The "Cooling-Off" Period in Door-to-Door Sales' (1968) *UCLA Law Review* 717.

[281] See I. Crow, G. Howells, and M. Moroney, 'Credit and Debt: Choices for Poorer Consumers' in Howells, Crow and Moroney (Eds) supra n 190, 36.

[282] Landers and Rohner, supra n 277, 750–1.

[283] Ibid, 737–9.

[284] Schwartz and Wilde, supra n 277.

[285] This is said to have been the greatest single gain of the legislation in the US: Spanogle *et al*, supra n 124, 174. Although it has been difficult to achieve a common method of calculating the

However, for present purposes it is more important to discern what are the policies motivating adoption of truth-in-lending strategies rather than assessing the merits of this approach. There seems to be a deepening ideological commitment on both sides of the Atlantic to disclosure as a preferred method of regulation. In the United States the policy seems to be premised on the assumption that a free competitive market produces the best terms for consumers through competition. Disclosure is the mechanism through which the market messages can be transmitted to consumers.[286] Regulators seek to give consumers the means to make the 'best buy' the market will allow.[287] The European work on the theoretical justifications for truth-in-lending is less well developed, but seems to follow the same approach. At least the Preamble to the Consumer Credit Directive suggests that information on the APR is part of a policy based on the consumer's right to have adequate information on the conditions and cost of credit and his obligations.[288]

It is the active, educated consumer who is likely to have an awareness of the APR and the ability to make use of that information.[289] Other measures are better suited to the needs of other consumer groups. It would be too ambitious for us to survey the whole of consumer credit laws, but two obvious additional methods of consumer protection to support truth-in lending legislation would be cancellation provisions (but again these would be of most use to the more educated and confident consumers) and in particular substantive interest rate controls. EC law provides for neither a right of cancellation in credit contracts nor interest rate ceilings.[290] The EC Consumer Credit Directive has been criticized for being primarily based on an information strategy[291] and with respect to both these provisions is more limited than the laws of many Member States. The US Uniform Consumer Credit Code contains a three day cancellation period for home solicitations.[292] The regulation of interest rates have been considered above.

APR in Europe, now this has been achieved it will be possible for consumers to compare interest rates in different Member States.

[286] It might be queried why creditors with low interest rates did not disclose this voluntarily? The answer is probably because sufficiently few consumers were heavily influenced by this information: see Stigler, supra n 133. Of course it is in the interest of creditors to compete on factors other than price, so even if, for example, low-income consumers have a choice of several creditors there may be little difference in the price of credit: see Crow, Howells and Moroney, supra n 195.

[287] Whitford, supra n 276, 424. He rejects (at 405) the argument that the legislation sought to increase compliance, without affecting consumer behaviour (he cites as authority for this view R. Pullen, *The Impact of Truth in Lending Legislation*: *The Massachusetts Experience 5–6*, Research Rep. No. 43 to Federal Reserve Bank of Boston).

[288] Recital 9.

[289] We disagree with the Opinion of Justice Benson of the New York Supreme Court in *State* v *Terry Buick Inc*, 137 Misc 2d 290, 520 NY 2d 497 that: 'Truth in lending laws were not adopted for the canny shopper. They were made for the gullible and those easily led.'

[290] Although both are being discussed, COM(95) 117 at 76 and 78–81 we see little prospect of such dramatic reforms in the near future. For earlier discussion of interest rate ceilings see s IVD, 244.

[291] Wilhelmsson (1995) supra n 9, 133.

[292] § 3.502.

Enforcement of truth-in-lending in advertisements is through regulatory action in both the European Community and the United States. When one turns to truth-in-lending requirements in the contract itself one perceives a difference in the nature of enforcement between Europe and the America. If a contract fails to mention the APR or the APR is calculated improperly in Europe the consequence is most likely to be regulatory action or possibly the courts ensuring that the contract is enforced in a fair manner.[293] In other words private law is not viewed as the main stick with which to beat delinquent creditors. In the United States the position is rather different. In the early years consumer advocates had sport at trying to attack truth-in-lending disclosures. The US legislation provides the consumer with a wide array of powers if the creditor fails to fulfil his duties.[294] In addition to the actual damage suffered an individual can be awarded twice the amount of any finance charge (or in the case of a lease twenty-five per cent of payments, but no less than $100 or more than $1,000). A class action procedure is contemplated with no minimum individual amount being recoverable, but a maximum of the lesser of $500,000 or one per cent of the net worth of the creditor. Particularly important in the context of encouraging access to justice is the rule that the costs of the action and reasonable attorney's fees, as determined by the court, are recoverable if any action for the above damages or to rescind the contract are successful.

VI. Conclusions

When surveying a field of activity as broad as consumer protection one is bound to find many countervailing approaches being adopted and opinions expressed. This is particularly so in our present study because we have encompassed a wide number of legal regimes (in the United States, the Federal system and fifty State jurisdictions and in Europe, EC law and the laws of EC and EFTA Member States) and have drawn our examples from different historical periods in the development of consumer law and policy. Thus we should be cautious about making any categoric statements, for it will usually be possible to uncover exceptions which prove the rule. Nevertheless we think we have enough evidence to support our characterizations of consumer law in the United States and Europe and to suggest some tentative implications for the development of consumer policy in Europe (we leave others more familiar with US society to consider if America can learn anything from our exposition).

US consumer law can be seen as having the goal of providing consumers with adequate information to permit them to make rational decisions in the market. In recent years regulation has been aimed at protecting the reasonably

[293] For example in Finnish law breach of the precontractual obligation to provide information concerning the APR has no private law sanction, Wilhelmsson (1989) supra n 223, 273.

[294] § 1640.

educated consumer. The possibility that vulnerable consumers might be confused or misled has not been allowed to detract from the free flow of information which facilitates market exchanges. Of course there are some limits on this—there are powers to deal with products that pose serious safety threats and some of the unconscionability cases evidence a concern to ensure the free exercise of market power does not lead to exploitation of individuals. Nevertheless, it is not, for instance, seen as the role of federal agencies to shape the ethical basis of the market. They concentrate on tackling the worst abuses. Of course the Consumer Product Safety Commission takes any dangerous product seriously, but the Federal Trade Commission concentrates on large scale national problems. State attorney-generals are seen as having an important role in protecting consumer economic interests in line with the local culturally determined conception of consumer rights. However, an important control function is exercised through private litigation, rather than State control. The role of product liability litigation is infamous, but even in the area of economic rights laws permitting the recovery minimum, multiple and punitive damages, the availability of class actions, and the ability of a successful plaintiff to recover attorney fees (which is exceptional in US law) mean that consumer litigation can have serious regulatory effects.

At the level of EC law one might discern certain parallels between EC and US law. The emphasis on disclosure is a main plank of EC consumer policy, almost to the exclusion of significant substantive regulation in some areas, like consumer credit. The European Court of Justice also seems guided by a concern to protect the average rather than the vulnerable consumer. But even at the EC level one detects a greater concern to influence the contours of market activity. For instance, the new approach to technical harmonization has ambitions beyond merely eliminating blatant dangers and the Unfair Terms in Consumer Contracts Directive would seem capable of striking down some terms no matter how clearly the consumer's attention is drawn to them. Most significantly the European Community is concerned to put in place administrative procedures to ensure compliance with its rules, witness the duty to establish enforcement authorities under the General Product Safety Directive and the injunction procedures under, *inter alia*, the advertising and unfair contract terms directives. Admittedly the Product Liability Directive has led to heightened awareness of private remedies for defective products, but there has been no litigation explosion[295] and certainly regulation remains an important element of consumer safety policy. However it should be remembered that the European Community is in many cases, especially in Northern Europe, simply building on to the existing legal systems of the Member States. Many States have traditionally had a more interventionist consumer policy than that established by the Community and given the trend to introduce minimum directives in the consumer field (outside the areas of technical harmonization and product liability) it is important to see EC law as setting a minimum frame-

[295] See M. Goyens (Ed) *Directive 85/374/EEC on Product Liability: Ten Years After* (Centre de droit de la consommation 1996).

work for the development of consumer policy rather than as epitomising consumer protection values in Europe.

The US 'information and litigation' model is clearly influencing thinking in Europe. So far this restrictive approach is more evident at the EC than the national level, but there are obvious possibilities that this way of thinking will spill over to the national level and manifest itself in either deregulation or a failure to develop new regulations. Before this new approach takes too firm a grip we believe that the context within which the United States rules work should be analysed to decide how far the European Community would be wise to move away from its model of 'regulation and administration'. Such analysis requires consideration of the substantive goals of consumer law, the means of achieving those goals and the institutions underpinning them.

Freedom of choice is an important consumer value. But with the standardization of products, services and contract terms it is increasingly recognized that consumers have little real choice and the sophisticated nature of many products and services leaves consumers without the expertise to make many decisions in an informed manner. Thus the law has in recent years intervened to lay down minimum standards for products, services and contract terms and has imposed restrictions of advertising. This has happened in both Europe and United States. The difference has been a matter of degree and has concerned questions of the extent to which particular concern should be shown for vulnerable consumers and whether in the final result disclosure can be an adequate safeguard. We would suggest that Europe should hesitate before abandoning too readily its tradition of substantive regulation in favour of disclosure. This does not mean there should not be debates about the extent of regulation and the processes by which it is produced (witness the development of the new approach to technical harmonisation).

European citizens have become accustomed to the State confining entry to the market to those businesses which meet basic standards. The internal market poses new potential dangers to consumers from traders originating from other Member States which operate according to different traditions. In this context minimum regulatory standards are needed more than ever to maintain confidence in the consumer market.[296] Also it is important to recognize that the US system operates within a context which provides more radical solutions should consumers be harmed by miscalculations. Where responsibility can be placed on a trader there are serious civil law sanctions, which also act as an incentive for traders to ensure they do not harm consumer welfare. As a last resort, bankruptcy is a far more common and acceptable solution for the consumer who has made grave errors in her personal finances.[297]

The United States uses private law litigation as an important regulatory technique. The development of strict product liability is an obvious example of Europe imitating this approach. Privatizing both the means of compensation

[296] See, Weatherill (1996) supra n 6.

[297] N. Huls, 'American Influences on European Consumer Bankruptcy Law' 15 *Journal of Consumer Policy* 125 (1992).

and law enforcement is a seductive regulatory strategy in times of restricted public expenditure. However, we would counsel against Europe placing too much faith in such policies, at least if this is to the exclusion of traditional regulation. Partly, this is due to the inefficiency of private law solutions, but we also wonder if Europe has the institutional structure to support solutions primarily based on private law. To the extent that such a solution works in the United States[298] it is based on a system which relies on an active plaintiff trial bar, which is well remunerated by the contingency fee system, which itself feeds off a generous damages system. Europe does not possess such a system. It does have a strong tradition, at least in Northern Europe, of relatively effective administrative agencies who impose administrative controls on rogue traders and work with the reputable to promote a consensus about market ethics. All—especially the business community—should take a deep breath before jettisoning this for a more deregulatory strategy based on 'information and litigation'. Of course a switch from regulation to information combined with a lack of litigation may appeal to business leaders, but then policy-makers should be aware that they would be adopting only half of the US package.

There are many calls nowadays for the creation of EC institutions to co-ordinate and organize consumer policy at the European level. Whilst we welcome initiatives to co-ordinate enforcement policy and the exchange of information[299] and even see some advantage in the further development of European agencies, we would use the United States as a siren counselling against too much centralization of power. The Federal Trade Commission shows how a centralized agency cannot be expected to regulate local matters. Within Europe, national and local enforcement is needed both for efficiency reasons and in order to adapt consumer policy to local conditions.

Finally, we would suggest that the importance of the debate between the 'information and litigation' US strategy and the 'regulation and administration' European approach is not restricted to the United States and Western Europe. As the two pre-eminent models of consumer protection law in the world to-day many countries in, for example, Central and Eastern Europe and the developing world, are looking to these legal systems for inspiration. They have a difficult task to decide whether they can more easily build up the administrative structures required by the European model or the individual responsibility and private litigation philosophy required by the US model. The costs, both financially and politically, are greater under the European approach. This perhaps explains why Europe is relaxing this model in some respects and introducing some aspects of the US model. Ultimately we believe, however, that European consumer markets have worked relatively

[298] Cf. D. Sugarman, *Doing Away with Personal Injury Law* (Quorum, 1989).

[299] See the work of the International Network, I. Edwards,'Le réseau international de contrôle des pratiques commerciales' *European Consumer Law Journal* 135 (1993) and at the European level the work of Prosafe in the product safety field and the RAPEX system, see Howells (1998) supra n 33, Chap 2.

efficiently from both the consumer and business perspective and that there should be hesitation before the positive aspects of this system are replaced by the more confrontational style of US consumer policy. We prefer a system in which consumers can place trust in their traders and State rather than one which sees the State as ineffective and the trader as someone only to be suspicious of.