Thomas Wilhelmsson

The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law

ABSTRACT. A reference to the need to create confident cross-border consumers who can contribute to the strengthening of the internal market has often been used as one of the main arguments for EC consumer policy and legislation. The argument has been presented in order to justify both the creation of a minimum safety net for consumers (the minimum confidence argument) and the current turn towards more total harmonisation of consumer protection (the harmonised confidence argument). In the paper these lines of argument are critically evaluated with reference to common sense knowledge about the behaviour of consumers as well as on the basis of Eurobarometer data concerning consumer confidence. In this light the substantive minimum harmonisation measures which have been justified with reference to the need for promoting consumer confidence seem only to a limited extent relevant with respect to the creation of such confidence. The current turn towards total harmonisation most certainly cannot be justified in this way. Other substantive measures, facilitating the access to a counterparty, would be more important in order to create consumer confidence in cross-border shopping, but the Community has almost systematically avoided adopting such measures.

A CONVINCING JUSTIFICATION?

The "European legal area" has become an important catchword in the European vision, especially after the conclusion of the Treaty of Amsterdam and after the decisions at the Tampere summit during the Finnish presidency in 1999. The vision sees Europe as "an area of freedom, security and justice" (European Commission, 1998). Worrying over the legitimacy of a Union which appears distant from its citizens, European lawmakers emphasise the need to focus on the citizens when building the European legal area. The protection and support of consumers in the Union is seen as one way of gearing EC law more towards a recognition of the needs and wants of individuals.

As is well known, consumer law is one of the areas in which harmonisation – or rather minimum approximation – of the substantive law of the Member States has been most intense. The European legal

Journal of Consumer Policy **27:** 317–337, 2004.

area here appears as a field in which the substantive rules are becoming increasingly harmonised.[1] In the light of the vision of a legal area focussing on the needs of its citizens the following very general question could be posed: Is the increasing approximation – and in the future even a possible total harmonisation of large areas – of substantive consumer law in Europe what the consumers really need?

As I will show in the next section of the paper, especially in recent years affirmative answers to this question in the legislative procedure have often been based on an interesting combination of the consumer interest argument and internal market reasoning. It has been possible to build such a combination of arguments by focussing on the consumer as cross-border shopper. According to this view, through harmonising consumer law measures EC law attempts to increase the confidence of consumers in their possibilities to make use of the internal market. It has been seen as a new and important aim of EC consumer policy to create confident cross-border consumers who can contribute to the strengthening of the internal market.[2]

In my paper I will discuss how convincing this line of reasoning really is. The focus is on the weight of the reasoning as such, not on the juridical question whether the argument is sufficient for creating a basis for action according to the Treaty.[3] I will ask whether both the harmonisation measures made so far and the recent turn in Community consumer policy towards favouring total harmonisation measures can convincingly be based on the consumer-confidence argument. As can be expected, my stance towards the correctness of the argument is basically critical. I will pursue the criticism along two lines.

Firstly, I claim that the substantive harmonisation measures which have been justified with reference to the need for promoting consumer confidence in reality only to a limited extent are relevant with respect to the creation of such confidence. The current turn towards total harmonisation most certainly cannot be justified in this way.

Secondly, I suggest that other substantive measures than the ones adopted would be more important for creating consumer confidence in cross-border shopping. I have collected some views on such measures under the heading "easy access to a counterparty." It is interesting to see that the Community has almost systematically avoided adopting these measures, although several proposals have been made. The consumers have not been helped in ways which really could have an impact on their confidence.

THE "CONFIDENT CONSUMER" AS A JUSTIFICATION

EC consumer law and policy has been characterised as Janus-faced, on the one hand aiming at creating a common internal market, on the other hand striving at some protective goals as well (Reich, 1996, p. 56). Already for constitutional reasons the secondary legislation originally had to be justified with reference to internal market reasons, as there was no basis in the Treaty for a protective policy in this area. Therefore the preambles of the directives often included arguments according to which the measure in question was needed because the existing disparities in the law between the Member States created barriers to trade within the internal market and/or distorted competition between businesses from different Member States (Howells & Wilhelmsson, 1997, p. 299 ff.). The focus of the justification was on the needs and activities of the businesses. Businesses should not be prevented by differences in national consumer laws from trading on the whole internal market and the conditions of competition between businesses should be fair.

The other side of the Janus face, the goal of protecting the consumer, was underlined more clearly in the various consumer protection programmes of the Community (Wilhelmsson, 1995, pp. 117–118). The constitutional recognition of this policy was achieved through the Treaty of Maastricht, which expressly noted the development of consumer protection as one of the aims of the Community.[4] In its present form the Treaty, already in the enumeration of the activities of the Community, provides that those activities shall include a contribution to the strengthening of consumer protection (Art. 3(t)). According to the specific provision on consumer protection, in Art. 153 (ex Art. 129a), the Community shall contribute to protecting the health, safety, and economic interests of consumers, and consumer protection requirements shall be taken into account in defining and implementing other Community policies. The legislative measures to achieve this, however, should primarily be made on the basis of the internal market provision in Art. 95 (ex Art. 100a), in which there is an explicit reference to the goal of a high level of consumer protection. In the legislative activity both sides of the Janus face are already tied together on the level of the Treaty.

Perhaps as a consequence of this, despite the fact that consumer protection by the Treaty revisions has formally been liberated "from the constraints of enforced linkage to internal market policy"

(Micklitz & Weatherill, 1993, p. 299), secondary consumer legislation is still usually primarily justified with reference to internal market arguments. From the 1990s onwards a reasoning which attempts to combine the two sides of the Janus face in a new way has been introduced. Although consumer protection measures could now have been directly justified with protective arguments, and indeed in some cases are justified in this way,[5] the EC lawmaker has preferred to relate also the need for protection to the aim of creating a dynamic and functioning internal market, obviously drawing on the Sutherland Report's insistence on the need for more consumer certainty and confidence to achieve this aim (European Commission, 1992). The argument is as follows: Consumer protection must be developed throughout the internal market, as in this way one can stimulate the consumers to shop across the borders and this will in turn activate the internal market.

This new type of argument adopts the internal-market purpose, but puts the activity of the consumers into focus. The consumer is "viewed as a market player whose action (or inaction) is vital in constructing the single market" (Oughton & Willett, 2002, p. 303). The responsible consumers have been given an important task of their own in making the internal market work (Micklitz, 2003, p. 5). Therefore consumers should not be prevented, or scared, from making use of the internal market by differences or inadequacies in national consumer laws. A protection of consumers which functions well throughout the Community reduces the reluctance of consumers to engage in cross-border shopping, and this is desirable, as such cross-border activity contributes to the constitution of the internal market. The well-protected "confident consumer" is seen as important for internal-market reasons.

In this paper I will focus on this argument. I will analyse the use and the truthfulness of the argument related to the confidence of consumers as a justification for EC consumer law. As the use of the argument is not necessarily needed for constitutional reasons – as the business-related arguments were before the Treaty of Maastricht – it should be taken seriously as an indication of how the legislators in the EC really understand the purpose of the legislation. It is therefore worthwhile to discuss whether this argument really has the convincing force its users seem to believe.

Before turning to the criticism the object of criticism has to be substantiated, by showing the actual use of the consumer confidence

argument. First, the argument can be found in preambles to Directives. The first good example is in the preamble of the Unfair Contract Terms Directive:[6]

> Whereas, generally speaking, consumers do not know the rules of law which, in Member States other than their own, govern contracts for the sale of goods or services; whereas this lack of awareness may deter them from direct transactions for the purchase of goods or services in another Member State.

The Commission seems to believe in this argument especially when harmonising provisions of contract law. The other important contract law directive besides the Unfair Contract Terms Directive, namely the Consumer Sales Directive, also contains a similar reference to the confidence of consumers as one of the main reasons for the legislation:[7]

> Whereas the creation of a common set of minimum rules of consumer law, valid no matter where goods are purchased within the Community, will strengthen consumer confidence and enable consumers to make the most of the internal market.

In the Financial Services Distance Marketing Directive the legislator has attempted to give the confidence in the internal-market argument additional consumerist force by tying it to the consumer's basic right to a freedom of choice:[8]

> In order to safeguard freedom of choice, which is an essential consumer right, a high degree of consumer protection is required in order to enhance consumer confidence in distance selling.

These justifications mainly regard substantive consumer law.[9] In addition, procedural measures have been justified with references, *inter alia*, to the confidence of consumers. The Injunctions Directive notes that difficulties in bringing about the cessation of unlawful practices that are harmful to collective consumer interests "are likely to diminish consumer confidence in the internal market"[10] and offers some approximated provisions on injunction procedures as a solution. The measures aiming at approving the consumers' access to justice in cross-border matters, such as the ADR Recommendation,[11] the Consensual Resolution Recommendation,[12] and the Extra-Judicial Network Resolution[13] also mention consumer confidence in the internal market as an important justification. As I will note later, in this context the consumer confidence argument is indeed more

plausible. This paper, however, is focussed on the use of the argument in relation to substantive harmonisation measures.

The Directives I have mentioned here, which have at least partially been justified with reference to the need to create consumer confidence in the internal market, have an important common feature: They are *minimum directives*, allowing for more stringent consumer protection provisions in national law. This is, as is well known, clearly stated in the Unfair Contract Terms Directive, the Consumer Sales Directive, and the Injunctions Directive. The Financial Services Distance Marketing Directive at the outset seems to be based on a different philosophy, as it lacks a general minimum provision. However, as more stringent provisions of the Member States at least for the time being are allowed concerning the information requirements – which are most central to the Directive – this Directive still cannot be seen as a clear move away from the road of minimum harmonisation. So far the use of the consumer-confidence argument seems mainly to have been connected with the idea of creating a minimum safety net for consumer protection throughout the Community.

However, there are strong attempts to move European Community consumer policy away from the traditional approach of minimum harmonisation. The Commission strives at total (maximum) harmonisation concerning a broad range of issues. The Consumer Policy Strategy 2002–2006 wants to "move away from the present situation of different sets of rules in each Member State towards a more consistent environment for consumer protection across the EU" and to progressively adapt present minimum directives to "full harmonisation" measures (European Commission, 2002a, pp. 11, 12 respectively). In more concrete terms this strategy has already been formulated in the Green Paper on European Union consumer protection, describing the option of "establishing clear EU-wide rules through harmonisation" of provisions on commercial practices (European Commission, 2001a, p. 11), as well as in the Follow-up Communication to the Green Paper, which opts for a framework directive bringing about "maximum harmonisation with a high level of consumer protection" (European Commission, 2002b, p. 8).[14] The attempts to redirect Community consumer policy in the maximalist direction is also visible in the Communication from the Commission on sales promotions in the Internal Market (European Commission, 2001b), in which a detailed regulation is proposed, as well as in the recent Proposal for a Directive of the European Parliament and of the Council on the harmonisation

of the laws, regulations, and administrative provisions of the Member States concerning credit for consumers, aiming at total harmonisation of the area (European Commission, 2002c).

Much can be said about this shift of policy on the part of the Commission (see generally Howells & Wilhelmsson, 2003). However, I will here only look at the relationship between this new policy and the consumer confidence argument. Has this argument, which was previously used for justifying the creation of a consumer minimum safety net throughout the internal market, been used also in connection with the new policy of total harmonisation? At the outset a total harmonisation policy seems to be primarily in the interest of the businesses and their possibilities to operate smoothly in the internal market. Has the consumer confidence argument been used to connect the two sides of the Janus face, internal-market reasoning and consumer protection, also when justifying the new consumer policy?

This is indeed the case. The Consumer Policy Strategy 2002–2006 states very clearly in this respect:

> It is also important that consumers have comparable opportunities to benefit fully from the potential of the internal market in terms of choice, lower prices, and the affordability and availability of essential services. Barriers to cross-border trade should therefore be overcome in order that the consumer dimension of the internal market can develop in parallel with its business dimension. EU consumer policy therefore aims at setting a *coherent and common environment ensuring that consumers are confident in shopping across borders throughout the EU* (European Commission, 2002a, p. 7, emphasis as in the original).

Also the Green Paper on European Union consumer protection claims that, "[f]or consumers, the lack of clarity and security over their rights is an important brake on their confidence and trust" and such a lack of clarity follows from a situation in which 15 sets of national rules are applied (European Commission, 2001a, p. 9). The Communication on sales promotions in the Internal Market even assumes that the fragmented regulatory framework in the area "may well explain why cross-border consumer demand in the European Union remains marginal" (European Commission, 2001b, p. 7), and the Proposal for a Directive concerning credit for consumers speaks about the need to have consumers and guarantors feel more confident (European Commission, 2002c, p. 7). The consumer-confidence argument is also repeatedly used by Commission officials attempting to justify the new policy. The variations in consumer protection from country to country is said to be an obstacle to consumers beginning to make use of the

internal market, as consumers do not trust the protection against failures in other countries.[15] I have personally heard Commission officials describe maximalist measures as steps towards the completion of the internal market for consumers.[16]

The "consumer dimension of the internal market" in other words is claimed to require not only the establishment of a minimum safety net covering the whole internal market, but also a more thorough harmonisation of consumer law within this market. The confidence and trust of consumers in the internal market require – so the argument goes – the eradication of the differences between the Member States so that consumers know that they will have the same level of protection wherever they shop within the Union. To be fair, one should mention that this claim is usually connected with an express presumption that the harmonised EC legislation will ensure a "high level of consumer protection."

This is how the consumer-confidence argument has been used in defending, at first, the development of a minimum safety net for consumer protection on the internal market (*the minimum confidence argument*) and, later, the turn to a more total harmonisation of the rules on consumer protection within the Community (*the harmonised confidence argument*). I will now turn to the reality of these arguments. Are they purely ideological justifications or do they have some substantive merits?

THE JUSTIFICATION AND REALITY

At the outset the consumer confidence reasoning seems to be very plausible. Consumers may indeed be reluctant to acquire goods and services abroad because of a lack of confidence in the protection offered to them in foreign markets. One may also present empirical evidence concerning the existence of confidence problems. For example, a consumer survey carried out in 1991, at the time when the consumer-confidence argument entered the scene, showed that the main reasons mentioned by consumers for not buying from another Member State were difficulties relating to the exchange or repair of the goods or the settlement of disputes (Gibson, 1992, p. 409). In the second proposal for a consumer sales directive (European Commission, 1995, pp. 3–4) the Commission also mentions a Eurobarometer survey from 1993,[17] in which 52% of the consumers mentioned

difficulties in exchange or repair as the main barrier to cross-border shopping, and 34% mentioned difficulties in the settlement of disputes.

Looking more closely at these reasons, they primarily seem to relate to various kinds of problems of access. I will return to these problems in the next section of the paper. The consumer-confidence argument, however, has been prominently used in connection with measures aiming at substantive harmonisation of consumer law. Both of the most important measures concerning substantive consumer contract law, the Unfair Contract Terms Directive and the Consumer Sales Directive, have been justified, *inter alia*, with reference to the consumer-confidence argument, in this case the minimum confidence argument. The turn towards a total harmonisation strategy in EC consumer policy also primarily affects substantive consumer law. The harmonised confidence argument is an argument about the harmonisation of substantive rules in the internal market. Is it acceptable to use the consumer-confidence argument, as the EC legislator does, as a justification for substantive approximation and harmonisation measures?

My answer is basically negative. The use of the consumer-confidence argument in this context can be criticised on the basis of common sense, of self-evident knowledge about how consumers act in the marketplace. Some empirical evidence related to the criticism can be presented as well. In the following I will draw on some interesting results of a recent Eurobarometer report measuring European consumer-confidence, cited hereafter as *Consumers Survey*.[18]

The basic common sense argument against using the consumer-confidence argument as a justification for harmonisation measures relates to doubts about consumers' knowledge of their rights even on a national level and about the impact of such (a lack of) knowledge on their behaviour. One may assume on good grounds that most consumers do not know the content of their own legal system. However, this lack of awareness as such does not deter them from shopping in their national surroundings. Why would their lack of knowledge about the law of other Member States then be such an important deterrent to making use of the marketplace in those states?

One might put forward a sectoral counterargument to this criticism. Even though consumers do not in general know their law, a considerable number of them might in some sectors of high value, like the credit and insurance sector, have acquired a practical knowledge which they suspect lacks value in other Member States.[19] If this is true,

however, it only supports harmonisation measures within such specific sectors – which still have to be identified – but it does not suffice as an argument for the more general views under scrutiny here.

There is, however, also an obvious counterargument of a more general nature to the criticism mentioned above. This counterargument emphasises the importance of beliefs rather than knowledge. Even though consumers do not know their own system in detail, and have no knowledge about the systems of others, they may still believe or suspect that their own system of protection is better than that of other Member States. Already such a "nationalistic" belief, which reflects a way of thinking that is often very typical of at least lawyers, could prevent consumers from making full use of the internal market, and a general understanding that the systems are substantively similar – even though the concrete knowledge concerning their content is lacking – may support attitudes which are favourable to cross-border shopping.

According to recent empirical evidence, in very general terms the consumers of the internal market indeed seem to believe that their own protection systems are better than those of their neighbours. Of the respondents in the Consumers Survey, 31.5% thought that their consumer rights would be well or very well protected in a dispute with a seller or manufacturer in another Member State, whilst 55.6% thought the same about a dispute in their own country. However, looking at the attitudes of consumers in different Member States, the picture becomes much more complex. Consumers of some countries, especially in the south of Europe, seem to trust foreign systems better than their own. The report mentions Italy, Greece, and Portugal as such countries. As countries where the situation is reversed the report mentions as particularly obvious Germany, Sweden, and Denmark. Consumers in my own country, Finland, could well be mentioned here as well: Although 27.5% of Finnish consumers – somewhat more than in the three countries just mentioned – feel at least well protected when shopping elsewhere in the Community, they believe more strongly than any other consumers in the EU in their own system of protection, reaching the figure of 82% feeling at least well protected.[20]

The argument that consumers refrain from shopping elsewhere because they believe in the superiority of their own system does receive some support in the Consumers Survey. However, the value of the argument is not as general as one could assume. The trust of the

European consumers in their own consumer laws is not in all cases greater than the trust in the laws of other Member States. Consumers in some Member States, especially in the South, even trust the law of other states more than their own. There are strong reasons to believe that the list of such countries would be much longer if the survey were made after the accession of the new Member States in 2004. In addition to these limitations as to the geographical relevance of the argument, one should also note a temporal limitation: The problem of consumer-confidence in the systems of others is obviously shrinking, as younger people trust their protection in other Member States much more than the elderly.[21] Finally, the value of the empirical evidence is in general diminished by a high rate of "don't know/no answer" reactions to this question.[22]

The argument concerning "nationalist" consumer beliefs has some force, but, as just mentioned, it is limited locally and probably also temporally. As the question posed was fairly general, asking for the opinions on the protection of consumer rights, it is also not clear whether the answers relate to problems of substantive law or to problems of access. Still the data might perhaps give some limited support to the minimum confidence argument. There seems to be room for an argument that a collection of minimum rules is useful for promoting consumer-confidence as it helps to decrease the number of situations in which consumers feel themselves to be subject to severe injustice, when they attempt to use the legal machinery in other Member States. Such situations – which may also be observed by the media – can certainly have negative consequences for the trust in the systems of the others. If terms which are generally considered unfair would be upheld in some Member States or if the consumer would not have the remedies against a seller which are usual in most Member States this might indeed cause problems of confidence, especially if the cases were reported and noted by a larger public. Although it is a weak argument, the consumer-confidence argument (in this case the minimum confidence argument) is not totally out of place in the context of the Unfair Contract Terms Directive and the Consumer Sales Directive. It should be mentioned, that in the 1993 Eurobarometer survey 31% of the consumers indeed mentioned uncertainty with regard to the terms as a barrier to cross-border purchases (European Commission, 1995, p. 4).

An argument of this type cannot, however, be put forward for total (maximum) harmonisation. Especially when discussing the harmon-

ised confidence argument it is easy to question the relevance of harmonisation with regard to consumer confidence: If consumers do not exactly know the content of their own law – which is certainly the case for most consumers – it cannot be relevant for them to know that the law of another Member States is more or less identical to their own law.[23] The harmonised confidence argument cannot be based on the loose empirical findings of the Consumers Survey either. As the Survey shows, consumers in different countries have very different expectations and beliefs, some believing very strongly in their own system of protection – with Finnish consumers being the most trustful – whilst others are very sceptical concerning their protection at home – with the Greeks and the Portuguese as the leading sceptics – and the differences between these poles are enormous.[24] A complete harmonisation might therefore lead, for consumers in Member States with a high degree of local confidence, to a decrease in their confidence in their own market. This is most certainly not an acceptable way to persuade consumers to shop abroad.

In more general terms, a functioning consumer protection needs to have a close understanding of the expectations of consumers and the prevailing consumer culture. These are not uniform throughout the Union: As has been shown by many, the consumer expectations concerning protection are quite different in Northern and Southern Europe (Gessner, 1997, esp. at p. 174), and the variations will become still greater with the accession of the new Member States in 2004 (see many of the interesting papers in Micklitz, 1996). It is easy to see that total harmonisation measures in such an environment most certainly would bring consumer law of the internal market further away from the expectations and culture prevailing in at least some of the national markets. This again would rather increase than decrease the confidence of consumers in their local marketplace, and perhaps as a consequence also in the internal market as a whole.

As to the substantive rules, it is more important for consumers to have good rules than to have harmonised rules. Total harmonisation by necessity leads to less protection than before at least for some consumers.[25] Consumers in some countries may of course lose more in this process than consumers in other countries.[26] For the losers the harmonised, but less protective rules do not increase consumer-confidence in the internal market.

WHAT THE CONFIDENT CONSUMER REALLY NEEDS: EASY ACCESS TO A COUNTERPARTY

According to some of the empirical evidence which I have mentioned above – which is rather obvious also in a common sense perspective – consumers may refrain from shopping in other Member States because of difficulties connected with the exchange and repair of products and with the solving of conflicts. As I have just noted, the problem does not seem to be connected with substantive law, as long as there are some decent minimum rights of the consumers in place. A natural interpretation of this problem would rather be practical/procedural. The consumer refrains from shopping abroad because of fear of practical problems and problems of access to justice following from the fact that the consumer and the seller are located in different countries. Even if substantive law of another Member State would offer consumers a high level of protection, and even if consumers planning to engage in cross-border shopping would know this, they still would on good grounds fear difficulties in making claims away from their own country, and perhaps in a foreign language. Therefore I believe, and I think most consumers would agree, that access issues should be at the centre of interest in attempts to enhance consumer-confidence in the internal market.

Recently there has been a great deal of focus on issues concerning access to justice in EC consumer policy.[27] I have mentioned the ADR Recommendation, the Consensual Resolution Recommendation, and the Extra-Judicial Network Resolution above. The creation of the EEJ-NET, and the parallel network for financial disputes FIN-NET, for channelling disputes to appropriate ADR bodies aims at facilitating problem-solving in a cross-border context. For the reasons just mentioned measures of this kind are in line with the idea of creating confident internal-market consumers. The development of access to ADR systems across borders can have a positive effect on confidence. The references to consumer-confidence in the documents in this field certainly seem more closely connected with reality than similar references in documents aiming at harmonising substantive consumer law.

However, it is only a very small minority of consumer problems that are solved legally, or even with the help of various kinds of ADR systems. In most cases the exchange or repair of a product is based on a direct contact between the consumer and the seller (or sometimes the

producer), without involvement of any ADR bodies or intermediaries. The mentioned empirical evidence seems to indicate that the difficulties in establishing such contacts and informal agreements, when the seller is elsewhere, is seen as an important obstacle to acquiring goods in another country. In other words, access to justice, even in a broad understanding of the term, is not sufficient to reassure a consumer who fears practical difficulties in getting consumer problems sorted out efficiently abroad. Consumers want a sufficiently close counterparty to complain to without the need for recourse to more or less formal dispute resolution. Easy access to a counterparty is probably one of the most important prerequisites for increasing confidence in the internal market.

When speaking about consumer goods, one should also bear in mind the fact that the use of remedies attached to non-conformity in most cases requires the consumer to return the goods to the supplier. This fact alone makes the easy access to a counterparty crucial for many consumers. Returning the goods to a counterparty in an area in which the consumer anyway is resident is usually much easier, with regard both to practical measures and to risk, than to wrap the goods and send it elsewhere (Bradgate & Twigg-Flesner, 2002, pp. 351, 354).

The Community has done very little to create easier access to a counterparty in cross-border situations. Only the standardised form for complaints may be mentioned as a small step in this direction. This form, which the consumers can use in contacts with businesses in other Member States, and which can to a large extent be filled out by ticking boxes, may help overcome some language problems. The form is still fairly new and certainly not well-known among consumers, but it might in the long run contribute to consumer-confidence by making access to the original counterparty easier in some situations. However, it is still a relatively formal device and cannot be compared to the direct access consumers have to businesses in their own country.

At this point one may ask, what more can be done? If the parties are in different countries the law cannot bring them closer to each other. This is of course true. There are, however, some legal devices by which new legal relationships can be created and such devices might in certain situations reduce the problems at hand. More easily accessible counterparties within the same distribution network as the seller may be brought into the relationship with the consumer.

The devices I refer to are part of substantive law and therefore of special interest in this paper, as it is focussed precisely on the har-

monisation of substantive law as a means of creating consumer confidence. It is interesting to note that although easy access to a counterparty is a key element in creating consumer-confidence in the internal-market, Community law has almost actively refrained from using its possibilities in this respect. I say actively, because proposals in this direction have been made and discussed in connection for example with the drafting of the Consumer Sales Directive, but have been dropped during later stages of preparation. I will here mention three examples.[28]

First, in the course of drafting the Consumer Sales Directive the proposal was put forward that the manufacturer of the goods should be jointly liable with the seller in case of non-conformity of the goods. In the analysis of this issue in the Green Paper on guarantees for consumer goods and after-sales services the arguments for such a joint liability were emphasised. In the reasoning the changing character of consumer confidence in societies of today was noted: "In modern consumer societies, based on systems of mass production and distribution, consumer confidence concerns the product as such, and is bound up more with the consumers' faith in the manufacturers than in the sellers" (European Commission, 1993, p. 86). In the internal-market context the need of easy access to a counterparty was one of the main arguments for a liability of a manufacturer. Acknowledging the difficulties in returning the goods to a foreign seller, the Green Paper expressly noted that it normally will be "a lot easier" for the consumer "to address a representative or a branch of the manufacturer in his own country" (European Commission, 1993, p. 87).

Despite these arguments, despite the fact that many Member States already give the consumer a direct action against the manufacturer,[29] and despite the practice of many manufacturers to assume liability by issuing commercial guarantees, manufacturer liability was not included in the adopted version of the Directive. Convincing reasons for this move are hard to imagine. It seems that the lack of success of the proposal followed from formalistic juridical views in some countries emphasising the lack of "legal basis" for a contractual claim against a manufacturer who was not in a contractual relationship with the consumer. Be it as it may, the solution shows that the proclaimed emphasis on consumer confidence in the preamble to the Consumer Sales Directive is misleading in the sense that one of the most important provisions from the point of view of consumer confidence

was not included in the Directive. At least for the time being: According to Article 12 of the Directive, the Commission shall in its review of the application of the Directive in 2006 again examine the case for introducing the producer's direct liability.

Secondly, in the Green Paper the idea of a kind of network liability within selective distribution systems was also presented. The Commission found worthwhile to consider "establishing the joint and several liability of all vendors belonging to a selective distribution network set up by the same manufacturer," as this would "enormously facilitate application of producer's guarantees, notably in the context of cross-border shopping" (European Commission, 1993, p. 97).

Again, despite the fact that such a solution would facilitate the access to a counterparty and hence improve consumer confidence in the internal market, and despite the existence of such rules in some competition law regulations,[30] no network liability was introduced in the Consumer Sales Directive. In many lines of business, such as for example cars and mobile phones,[31] manufacturers do give guarantees which can be used by the consumers in relation to authorised dealers in their home country irrespective of whether the goods was bought there or elsewhere in the Union. A measure that was really dedicated to boosting consumer-confidence could have codified such a practice, thereby extending it to other areas as well.

Finally, the Green Paper in an interesting manner discussed the need for making the manufacturer liable for keeping spare parts in stock for a certain period (European Commission, 1993, p. 100). Such a rule on after-sales liability, which certainly would have been a practically important way to strengthen the consumer position in general in an economy producing new variations of consumer goods at an increasing speed, could have had effects on the confidence in the internal market as well, as it would have supplemented the manufacturers' liability and the network liability mentioned above. Needless to say, nothing of this sort was included in the adopted Directive.[32] It has been said that "this *lacuna* ... from the scope of harmonisation, i.e., to encourage clients to buy cross-border, seems to be the most inconsistent" (Grundmann, 2002, p. 23). The reason given for the omission, a reference to the subsidiarity principle (European Commission, 1995, p. 7), is not very convincing in the light of all the matters the Commission in practice does feel it possible to regulate.

CONCLUSION

Many legislative measures, both as regards substantive consumer law and procedural law, have been expressly justified with reference to the need to boost consumer-confidence in the internal market, to create confident cross-border consumers. However, when looking more closely at the measures undertaken, the sincerity of this justification seems doubtful. This is especially true when looking at the measures in the realm of substantive consumer law. On the one hand, the use of the consumer-confidence argument in connection with substantive harmonisation measures seems unconvincing. On the other hand, EC law has not made use of substantive legislative measures which could have helped building consumer confidence.

The consumer is more confident when he can discuss with an easily accessible (and reliable[33]) counterparty, without having to resort to cumbersome procedures. If difficulties occur, the distance – geographical as well as cultural – to the seller is considered a problem by many consumers planning to engage in cross-border shopping. This problem could have been reduced by suggested rules on manufacturers' liability, network liability, and after-sales liability. Despite the emphasis in the justification of the Consumer Sales Directive on the consumer-confidence argument, the Directive did not offer these devices to protect the consumer.

As to harmonisation measures in general, the consumer-confidence argument may offer some weak support for creating a European minimum level of protection (the minimum confidence argument), and it is therefore not totally out of place as a part of the justification of the Unfair Contract Terms Directive and the Consumer Sales Directive. However, as a reason for turning to total (maximum) harmonisation (the harmonised confidence argument) it is not valid. The proposed turn towards total harmonisation is based on the needs of businesses rather than of consumers.[34] This might be legitimate in some cases – and can sometimes prove to be an indirect advantage to consumers as well, because of increased competition – but it should not then be justified with references to consumer confidence!

NOTES

[1] As is well known Ewoud Hondius has been one of the important contributors to this development. His comparative analysis (Hondius, 1987) laid the foundation

for the preparation of the Unfair Contract Terms Directive, referred to later in this paper.

[2] Perhaps the first to draw academic attention to this new way of justifying Community consumer law and the one to whom the term "confident consumer" is usually attributed is Stephen Weatherill (Weatherill, 1996).

[3] For doubts concerning the value of the argument in the latter respect, see Weatherill (2002).

[4] Arts. 3(s) and 129a.

[5] An example is Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers, which – in contrast to the other consumer protection directives – was adopted directly on the basis of the consumer protection article (then Art. 129a, now Art. 153) and mainly refers to the need for consumer protection in its preamble.

[6] Directive 93/13/EEC on unfair terms in consumer contracts.

[7] Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, preamble, (5).

[8] Directive 2002/65/EC concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, preamble, (3).

[9] The Financial Services Distance Marketing Directive also, rather loosely, prescribes the "promotion" of out-of-court redress mechanisms (Art. 14).

[10] Directive 98/27/EC on injunctions for the protection of consumers' interests, preamble, (5).

[11] Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, preamble: "the need to boost consumer confidence in the functioning of the internal market."

[12] Commission Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, preamble (2): "particular attention be paid to generating the confidence of consumers."

[13] Council Resolution 2000/C 155/01 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes, (2): "reaffirms its concern as regards strengthening consumers' confidence in the functioning of the internal market."

[14] The Communication admits, however, that "it is not politically realistic to expect the Member States to abandon the minimum clauses in existing consumer protection directives without addressing these underlying differences" (differences of approach to consumer protection in the Member States) (European Commission, 2002b, p. 10).

[15] Agne Pantelouri, in Helsinki 30.1.2003 (Hufvudstadsbladet 31.1.2003).

[16] This attitude is even reflected in the recent Communication from the Commission, *A More Coherent European Contract Law* (European Commission, 2003, p. 23), where the development of an optional instrument in the area of European contract law is in passing defended with its alleged importance in facilitating the active participation of consumers in the internal market. See also the Communication, p. 10, on the dissuasiveness for consumers of the present situation. According to the press release concerning the Action Plan, Health and Consumer Protection Commissioner David Byrne again emphasised the consumer-confidence argument in this context.

[17] Eurobarometer No 39, September 1993.

[18] Flash Eurobarometer 117, "Consumers Survey," Results and comments, January 2002.

[19] When consumer organisations in their reactions concerning harmonisation of contract law complain about the uncertainties for consumers following from disparities in

national contract laws, see European Commission (2003, p. 31), they probably have such sectoral problems in mind (the example mentioned in the text refers to the credit sector).

[20] These data can be found in Consumers Survey, pp. 33–37.

[21] Consumers Survey, p. 39: 42.3% in the group aged 15–24 felt themselves to be very well or well protected, whilst only 24% of those aged 55 and over had this feeling.

[22] Consumers Survey, p. 37.

[23] I do not therefore believe, unlike Oughton & Willett (2002, p. 304), that the aim of promoting consumer confidence in cross-border shopping has any relevance when discussing interpretations of, for example, the Consumer Sales Directive.

[24] Whilst 82% of the Finns feel themselves to be well protected, only 21% of the Greek and Portuguese do so (Consumers Survey, pp. 32–33).

[25] Examples are easy to give. Recently the very unfair threshold for damage to property in the Products Liability Directive (Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products), Art. 9(b) – unfair because it in fact leaves consumers unprotected in a majority of the cases in which they should have a claim – has gained some attention, as both France and Greece have been condemned by the European Court of Justice for having tried to avoid the implementation of this rule, see Case C-52/00 *Commission* v. *France* [2002] ECR I-3827 and Case C-154/00 *Commission* v. *Greece* [2002] ECR I-3879.

[26] Micklitz (2003, p. 11) counts the Scandinavian countries as possible losers in the process of consumer law harmonisation.

[27] See also European Commission (2002d), with a more general scope.

[28] Beale & Howells (1997, pp. 39–45), mention *inter alia* these examples under the heading "missed opportunities." Bradgate & Twigg-Flesner (2002) provide arguments for and elaborate details of a producer liability and a network liability which should be taken into account in the 2006 assessment of the Consumer Sales Directive.

[29] In European Commission (1993, p. 87), France, Belgium, and Luxembourg are expressly named. Finland and Norway (within the EEA) could also be mentioned in this context; Sweden offers direct action only for a limited range of situations. On the different Nordic solutions, see, e.g., Herre (1999, pp. 52–54).

[30] Regulations 123/85 and 4087/88 are expressly mentioned in European Commission (1993, p. 97).

[31] So, for example, the manufacturer's guarantee issued by Nokia.

[32] It should be mentioned that the Commission has again taken up the question of responsibilities in the after-sales period (European Commission, 2002b, p. 9). As it does not fit very well in this context the attempt will probably be unsuccessful.

[33] In those few areas where there is a co-ordinated supervision of the businesses allowed to operate in the market, this may have some positive effects on consumer confidence as well.

[34] The criticism of the principle of minimum harmonisation has in the context of the discussion on European contract law been forcefully put forward by the business sector, see European Commission (2003, p. 14).

REFERENCES

Beale, H., & Howells, G. (1997). EC harmonisation of consumer sales law – A missed opportunity? *Journal of Contract Law, 12*, 21–46.

Bradgate, R., & Twigg-Flesner, C. (2002). Expanding the boundaries of liability for quality defects. *Journal of Consumer Policy, 25*, 345–377.

European Commission (1992). *The Internal Market after 1992: Meeting the challenge. Report to the EEC Commission by the High Level Group on the Operation of the Internal Market*. Brussels: European Commission.

European Commission (1993). *Green Paper on guarantees for consumer goods and after-sales services*. Brussels: European Commission. COM(93) 509 final.

European Commission (1995). *Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees*. Brussels: European Commission. COM(95) 520 final.

European Commission (1998). *Communication from the Commission: Towards an area of freedom, security and justice*. Brussels: European Commission. COM(1998) 459 final.

European Commission (2001a). *Green Paper on EU consumer protection*. Brussels: European Commission. COM(2001) 531 final.

European Commission (2001b). *Communication from the Commission on sales promotions in the Internal Market*. Brussels: European Commission. COM(2001) 546 final.

European Commission (2002a). *Consumer policy strategy 2002–2006*. Brussels: European Commission. COM(2002) 208 final.

European Commission (2002b). *Follow-up Communication to the Green Paper on EU consumer protection*. Brussels: European Commission. COM(2002) 289 final.

European Commission (2002c). *Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers*. Brussels: European Commission. COM(2002) 443 final.

European Commission (2002d). *Green Paper on alternative dispute resolution in civil and commercial law*. Brussels: European Commission. COM(2002) 196 final.

European Commission (2003). *Communication from the Commission to the European Parliament and the Council: A more coherent European contract law, an Action Plan*. Brussels: European Commission. COM(2003) 68 final.

Gessner, V. (1997). Europas holprige Rechtswege – die rechtskulturellen Schranken der Rechtsverfolgung im Binnenmarkt. In: L. Krämer, H.-W. Micklitz, & K. Tonner (Eds.), *Law and diffuse interests in the European legal order*, pp. 163–176. Baden-Baden: Nomos.

Gibson, L. (1992). Access to justice and consumer redress within a single market. *Journal of Consumer Policy, 15*, 407–415.

Grundmann, S. (2002). Introduction. In: M. C. Bianca & S. Grundmann (Eds.), *EU Sales Directive, Commentary*, pp. 13–52. Antwerp: Intersentia.

Hondius, E. (1987). *Unfair terms in consumer contracts*. Utrecht: Molengraaff Instituut voor Privaatrecht.

Herre, J. (1999). *Konsumentköplagen* (*Consumer purchase law*). Stockholm: Norstedts Juridik.

Howells, G., & Wilhelmsson, T. (1997). *EC consumer law*. Aldershot: Dartmouth.

Howells, G., & Wilhelmsson, T. (2003). EC consumer law – Has it come of age? *European Law Review, 28*, 370–388.

Micklitz, H.-W. (Ed.), (1996). *Rechtseinheit oder Rechtsvielfalt in Europa? Rolle und Funktion des Verbraucherrechts in der EG und den MOE-Staaten*. Baden-Baden: Nomos.

Micklitz, H.-W. (2003). Zur Notwendigkeit eines neuen Konzepts für die Fortentwicklung des Verbraucherrechts in der EU. *Verbraucher und Recht,* No. 18, 2–12.

Micklitz, H.-W., & Weatherill, S. (1993). Consumer policy in the European Community: Before and after Maastricht. *Journal of Consumer Policy, 16*, 285–321.

Oughton, D., & Willett, C. (2002). Quality regulation in European private law. *Journal of Consumer Policy, 25*, 299–328.

Reich, N. (1996). *Europäisches Verbraucherrecht*. Baden-Baden: Nomos.
Weatherill, S. (1996). The evolution of European consumer law and policy: From well informed consumer to confident consumer? In: H.-W. Micklitz (Ed.), *Rechtseinheit oder Rechtsvielfalt in Europa? Rolle und Funktion des Verbraucherrechts in der EG und den MOE-Staaten*, pp. 423–471. Baden-Baden: Nomos.
Weatherill, S. (2002). The Commission's options for developing EC consumer protection and contract law: Assessing the constitutional basis. *European Business Law Review, 13*, 497–515.
Wilhelmsson, T. (1995). *Social contract law and European integration*. Aldershot: Dartmouth.

THE AUTHOR

Thomas Wilhelmsson is Professor of Civil and Commercial Law at the University of Helsinki. Postal address: Department of Private Law, P.O. Box 4, 00014 University of Helsinki, Finland. Fax: +358-9-1912-3108; e-mail: thomas.wilhelmsson@helsinki.fi.