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The Consumer as Citizen – the Citizen as Consumer – Reflections on the Present State of the Theory of Consumer Law in the EU

„L’existence du droit de la consommation se fonde sur la nécessité de rétablir un équilibre dans les relations entre professionnels et consommateurs.“¹

„... Ce déséquilibre (entre professionnels et consommateurs, NR) a toujours existé Même si le militantisme des consommateurs s’est quelque peu atténué, le droit de la consommation fait désormais partie du paysage juridique de tous les pays de l’économie développée.“²

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¹ J. Calais-Auloy, *Propositions pour un nouveau droit de la consommation – Rapport de la commission de refonte du droit de la consommation* (La documentation française 1985), p. 11.

² J. Calais-Auloy/F. Steinmetz, *Droit de la consommation, 5e édition* (Daloz 2000), p. 1, 3.

I. Introduction

Fifteen years lie between the first two statements by the author to whom these lines are dedicated. They describe a paradox felt in France, Germany and beyond, in the EU. That is, the political drive behind consumer law has been gradually supplemented by a more systematic and „legalised“ approach. As a result, consumer law is becoming part of the legal „acquis“ of our national law and, still more, of Community law. This paradox, or rather paradigm change, is the focus of the following lines.

The most important change has occurred in EC law itself. Following an activist case law of the European Court of Justice (ECJ) and the adoption of several directives aimed at consumer protection, Art. 129a was inserted into the EC-Treaty in Maastricht³. This was even extended in the new reading of Art. 153 as introduced by the Amsterdam Treaty.⁴

Such a paradigm change must be regarded as recognition of the consumer as the „passive European market citizen“.⁵ European law, in guaranteeing the four freedoms, is not only concerned with „active market subjects“ who want to move, work, invest, produce and market freely. For it also covers consumers who want to buy goods, enjoy services and conduct transactions on a cross-border basis by using the increased choices offered to them by the internal market. Due to their „passive“ or – as J. Calais-Auloy puts it: „déséquilibrée“ – „unbalanced“ role, they are in need of legal rules guaranteeing them access to information, protection and justice. This reasoning has been taken over by the ECJ, who only recently in the words of its *Gabriel* judgment of 11.7.2002⁶ insisted that they are „economically weaker and less experienced in legal matters than (their) professional co-contractor“. There is no functioning internal market with increased competition and freedom of choice without a

³ H.-W. Micklitz/N. Reich, „Verbraucherschutz im Vertrag über die EU“, [1993] Europäische Zeitschrift für Wirtschaftsrecht (EuZW) p. 593.

⁴ N. Reich, „Verbraucherpolitik und Verbraucherschutz im Vertrag von Amsterdam“, [1999] Verbraucher und Recht (VuR) p. 3; N. Reich, „The rights of consumers enshrined in the Treaty“, in: Irish Dpt.of Trade, Enterprise and Employment (ed.), *Report of the Proceedings of the Dublin Forum on Consumer Policy and the Amsterdam Treaty*, 1998, at p. 16; J. Stuyck, „European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or Beyond the Internal Market“, [2000] Common Market Law Review (CMLRev) p. 357; N. Reich/H.-W. Micklitz, *Europäisches Verbraucherrecht*, 4. A., 2002, § 1.

⁵ N. Reich, „A European Concept of Consumer Rights“, in: Ziegel (ed.), *New Developments in International Consumer and Commercial Law*, (Hart 1998), p. 431.

⁶ Case C-96/00, *Rudolf Gabriel*, [2002] ECR I-0000 (11.7.2002)

substantial bulk of consumer law – some authors even think that there is too much consumer law on the market now!⁷

Consumer law thereby becomes part of „*economic citizenship*“, or, in the words of H.W. Micklitz: „Der europäische Verbraucher als Unionsbürger“ (the European consumer as Union citizen)⁸. This in turn allows us to take a look at a parallel development in the concept of European citizenship which had been inserted into the EC-Treaty in Arts. 8/8a also by the Maastricht Treaty and is now consolidated in Arts. 17/18 EC in the Amsterdam version. What are the interrelations between the role of the consumer and of the citizen in the EU? Where do we have similarities in the methods of protection, where do we see differences, where are blind spots in these concepts?

II. The importance of Mr. Cowan

Let us take as a starting point the famous *Cowan* case of the ECJ⁹. Mr. Cowan, a British citizen, travelled to Paris not to look for work or to make a business trip (when he would automatically have been protected by one of the four freedoms) but simply for a holiday in this wonderful city. On leaving the metro he was attacked, robbed and severely injured. He claimed victim's compensation which under the then existing French legislation was limited to French nationals, to foreigners with a „carte de résidence“ and to citizens of third countries with which France had agreed on reciprocal protection. None of these alternatives were applicable to Mr. Cowan. So normally his claim should have been dismissed.

But not under Community law! In his highly ingenious opinion, after referral of the case by the competent Paris Court to the ECJ, the German Advocate General Lenz looked at Art. 7 EEC-Treaty – now Art. 12 EC – providing that the prohibition of discrimination based on nationality applies „within the scope of application of this Treaty“. The denial of victim's compensation to Mr. Cowan amounted to a „discrimination based on nationality“. But did this discrimination come within the scope of application of EC-law which is concerned with active market citizens enjoying the four freedoms and which did not – at the time when the *Cowan* case was decided - even mention consumers? AG Lenz insisted that Mr. Cowan as a tourist and a consumer also

⁷ M. Martinek, „Systematische Überregulierung und kontra-intentionale Effekte im Europäischen Verbraucherschutzrecht“, in: Grundmann (ed.), *Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts*, (Mohr Siebeck 1999), p. 511.

⁸ H. W. Micklitz, *Münchener Kommentar zum BGB*, vor §§ 13/14 BGB Rdnr. 76 (4. A. Beck 2001).

enjoyed the four freedoms – the „passive“ freedom to receive services in another Member State, i.e. to travel freely, buy a ticket and take the metro in Paris – and that therefore he came into the „sphere of application of the Treaty“¹⁰. The Court followed this argument and flatly stated:

„When Community law guarantees a natural person the freedom to go to another Member State the protection of that person from harm in the Member State in question, on the same basis as that of nationals and persons residing there, is a corollary of that freedom of movement“ (para 17).

This is, as the late Judge Mancini once said, „one of its (the ECJ's) shrewdest judgments“¹¹. The AG and the ECJ simply add the position of consumer to that of the Union citizen (both concepts not officially written into the Treaty at this time) and develop a very broad and general *right of non-discrimination* which is extended to situations “not related to the exercise of economic rights strictly understood”, as Tridimas has correctly observed.¹² This entails substantial consequences for receiving social compensation.

But the approach of the Court is not without problems:

- How close must the relationship of a citizen be to the four freedoms in order to come under the non-discrimination rule?
- Is there a „*de minimis*“-rule, i.e. how intense must the contact of the person be to the receiving Member State in order to be protected by Community law?
- What about the relation to special rules which is mentioned in Art. 7 EEC/12 EC itself whereby the non-discrimination proviso applies „without prejudice to any special provisions contained therein“ (in the Treaty)?
- How can one distinguish social welfare benefits coming under special EC-regulations from „social compensation“ as in *Cowan*?
- What about tourists as consumers coming from a third country? What about nationals of association countries?

The Court did not have to approach these questions since Maastricht, as we mentioned, introduced into EC law the new concepts of consumer and citizen which in turn were reinforced by the Amsterdam Treaty. We look now to parallel and to different developments of

⁹ Case 186/87 [1989] ECR 195.

¹⁰ At p. 211 para 40.

¹¹ [1989] 29 CMLRev 595.

¹² Tridimas, *Principles of EU Law*, (Oxford 1999), p. 84.

these two concepts which are central to Community law in general – and to consumer law in particular.

III. Similarities: Recognition of subjective rights

1. Generalities: direct effect

The most important legal development both in the concept of consumer and that of citizenship is the recognition of *subjective rights* under Community law itself.¹³ This is what the theory of *direct effect* is claiming. Since both concepts have their root in the internal market provisions which are the „strongest ones“ in Community law, as we could show by reference to the *Cowan* case, they share their „legal value“. We will not go into detail.

In the meantime their „vertical direct effect“ vis-à-vis the (Member) state has become uncontested. Provisions of primary and secondary Community law do not only have a „negative effect“ insofar as the state cannot impose its infringing rules against its citizens. Indeed, they also enjoy a „positive effect“ by removing restrictions of access to benefits which state law has reserved to its own citizens, as *Cowan* and the later *M. Sala* case¹⁴ show. With regard to consumer law this effect is not without problems because it may remove a more protective national rule if it is in conflict with Community law¹⁵, unless a minimum harmonisation clause allows otherwise. This issue is at the moment being hotly debated in electronic commerce. where, the so-called „country of origin-principle“ of Directive 2000/31/EC of 8. June 2000¹⁶ has been interpreted as forbidding all additional pre-contractual information requirements of the national law of the consumer's residence even if justified by consumer protection requirements.¹⁷

¹³ Cf. Reich, „System der subjectiven öffentlichen Rechte“ in der EU – A European Constitution for Citizens of Bits and Pieces, in: European University Institute (ed.), *Courses of the Academy of European Law*, (Nijhoff 1998), p. 157; same, *Bürgerrechte in der EU*, (Nomos 1999).

¹⁴ Case C-85/96 *Maria Martinez Sala/Freistaat Bayern* [1998] ECR I-2691; critical comment by C. Tomuschat, [2000] 37 CMLRev 449.

¹⁵ Cf. case C-386/00 *Axa Royale Belge/ Georges Ochoa and Strategic Finance* [2002] ECR I-0000 (5.3.2002) concerning additional information requirements in life insurance policies.

¹⁶ OJ L 178/1 of 17.7.2000.

¹⁷ E. Crabit, „La directive sur le commerce électronique – Le projet „Méditerranée“, *Revue du droit de l'Union européenne* 2000, 749 at 795; contra: N. Reich, „Elektronischer Geschäftsverkehr und Grundfreiheiten“, in: Deutsche Gesellschaft für Recht und Informatik (Hrsg., Otto Schmidt 2002), p. 21 at 47-49.

The case law is not quite that clear with regard to „horizontal direct effect“, i.e. the direct application of Community law vis-à-vis private parties, especially enterprises. With regard to primary Community law, the ECJ has insisted that the rules on free movement of persons (including consumers!) enjoy direct effect at least against collective restrictions.¹⁸ With regard to secondary law, the well known *Faccini Dori*-case¹⁹ concerning the Doorstep Directive 85/577/EEC²⁰ has flatly refused its direct effect vis-à-vis a trader. This is because, under the Community system of legal instruments, a directive cannot of itself, unlike a regulation per Art. 249 EC, impose obligations on individuals and cannot therefore be relied upon as such against an individual. The later *El Corte Inglés* case²¹ made clear that the introduction of Art. 129a on consumer protection by the Maastricht Treaty did not change this state of affairs. What about Art. 153? Does it reinforce consumer rights contained in directives to have horizontal direct effect, as some authors have argued?²² The ECJ has not yet had a chance to comment on this.

But, as is well known, the ECJ has opened two paths which may lead to the same results as direct effect. That is, (1) the so called „interpretation of national law in the light of the wording and the purpose of the directive“ as an obligation of Member state courts „as far as possible“, and (2) state liability as a secondary remedy. Both alternatives have played a role in German consumer law: In *Heininger*²³, the ECJ rejected a German rule that restricted the right of withdrawal in doorstep-contracts when the credit was secured by immovable property. In its follow-up decision, the German Bundesgerichtshof²⁴ ingeniously distinguished the different interpretation options which German legislation on doorstep contracts and consumer credit left open and selected the one which was closest to the ruling of the ECJ. It however flatly refused to consider that the cancellation of the credit contract had any influence on the sales contract for which the credit was entered into – a ruling which is contrary to the Community law spirit of effective protection.²⁵

¹⁸ Case C-281/98 *Roman Angonse/Case di Risparmio di Bolzano* [2000] ECR I-4139 para 32; C-309/99 *Wouters et al./Algemene Rad von de Nederlandse Orde van Advocaaten* [2002] ECR I-0000 para 120 (19.2.2002).

¹⁹ Case C-91/92 *Faccini Dori v. Recreb* [1994] ECR I-3325.

²⁰ OJ L 372/31 of 31.12.1985.

²¹ Case C-192/94 *El Corte Ingles v. Blanquez Rivero* [1996] ECR I-1281.

²² Reich *supra* note 4 at p. 7.

²³ Case C-481/99, *Georg und Helga Heininger/Bayrische Hypo- und Vereinsbank* [2001] ECR I-9945 = [2002] EuZW p. 80 with annotation by Reich/Rörig.

²⁴ Bundesgerichtshof (BGH) [2002] Neue Juristische Wochenschrift (NJW) p. 1881 with annotation by Rörig [2002] Monatsschrift des Deutschen Rechts (MDR) p. 894.

²⁵ cf. the annotation by Rörig at p. 895, referring to v. Gerven, „Of rights, remedies and procedures“ [2000] 37 CMLRev p. 501 at 531. This has now been changed by the German legislator.

In *Dillenkofer*,²⁶ Germany was held liable for not having implemented the Package Holiday Directive 90/314/EEC of 13.6.1990²⁷ with regard to its Art. 7. This puts an obligation on the organiser of a tour to „provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency“. This rather unspecific obligation is turned into a subjective right of compensation by the Court. Germany had not implemented this proviso in time and was thereby held liable for breach of Community law.

These two instruments developed by an ingenious Court practice ensure that the consumer can effectively enforce rights given under Community law. This operates in two ways: either under the rules of „directive conforming interpretation of national law“ against the professional carrying the primary obligation – which is obviously impossible against an insolvent tour operator, or against the state as being subsidiarily liable. The only (?) inconvenience for the consumer is the necessity to take two different proceedings.

In all cases the implicit requirement consists in defining whether the directive is specific and unconditional enough to really give the consumer a legally protected „right“, or whether it is meant mainly as a general programme to be implemented by more specific legislation. The Court, in its case law both on citizenship and on consumer protection, has been very generous in interpreting rather general provisions into subjective rights. This is true, e.g., with regard to the above mentioned Art. 7 of Dir. 90/314. The Court even extended this right to a situation where the damage was caused by an intervening third person (a hotel owner who demanded double payment from the tourist because he would not get paid from the bankrupt tour operator).²⁸ With regard to citizenship, the rather loose link of German resp. Austrian nationality sufficed to give two car drivers violating Italian road traffic law in the region of Alto Adige the right to trial in the German language which in this region was reserved to the minority of German speaking Italian citizens.²⁹ Does this right also extend to Finnish citizens speaking German better than Italian?³⁰

²⁶ Joined cases C-178 et al/94 *Dillenkofer v. Germany* [1996] ECR I-4845.

²⁷ OJ L 158/59 of 23.6.90.

²⁸ Case C-364/96 *Verein für Konsumenteninformation v. Österreichische Kreditversicherungs-AG* [1998] ECR I-2949.

²⁹ Case C-274/96 *Criminal proceedings against H. O. Bickel and U. Franz* [1998] ECR I-7637; comment Bultermann [1999] 36 CMLRev 1325.

³⁰ Cf. Reich, *Union citizenship – Yesterday, today and tomorrow*, RGSL Working Papers Nr. 3, 2001 at p. 21.

2. *The principle of effective judicial protection*

But Community law does not stop with simply granting subjective rights to consumers on information and citizens on free movement, per Art. 153 (1) on the one hand and Art. 17/18 on the other. The most important corollary is the right to adequate and effective judicial protection. In his seminal paper former Advocate General van Gerven extended this right also to granting effective and adequate *remedies* even if the procedures are left to the Member states.³¹ He distinguishes between the „remedy of setting aside national measures“, the „remedy of compensation“, the „remedy of interim relief“, and the „remedy of restitution.“ We could not agree more with this careful analysis taken from the practice of the ECJ even if procedural law is still a matter of Member state autonomy .

With regard to the four freedoms, the ECJ has developed this right directly out of primary Community law.³² The argument is simple yet convincing: if a citizen wants to enjoy market and civil freedoms, such aspirations must be protected by law against any infringement. This protection is also part of the Community respect for the European Convention on Human Rights under Art. 6 EU.³³ Art. 47 of the European Charter on Fundamental rights grants „everyone whose rights and freedoms guaranteed by the law of the Union are violated ... the right to an effective remedy before a tribunal ...“³⁴

With regard to consumer law, Art. 153 is silent on that point, but secondary law has been quite explicit on guaranteeing consumers effective legal protection by the Member state in which they reside. The Court made this principle effective against jurisdiction clauses in its *Océano Grupo* decision with the following words:³⁵

„... where a jurisdiction clause is included, without being individually negotiated, in a contract between a consumer and a seller or a supplier and where it confers exclusive jurisdiction on a court in the territorial jurisdiction of which the seller or supplier has his principal place of business, it must be regarded as unfair ... It follows that *effective protection* (italics NR) of the consumer may be attained only if the

³¹ Loc.cit. note 25.

³² Case 222/86 *Unectef v. Heylens* [1987] ECR 4097; C-43/95 *Data Detecta v. MSL Dynamics* [1996] ECR I-4661

³³ Case 222/84 *Johnston v. Constable of Royal Ulster Constabulary* [1986] ECR 1651

³⁴ For the importance of this right for standing in Community law proceedings cf. case T-177/01 *Jégo Quéré/Commission* [2002] ECR II-0000 para 42 (3.5.2002) and the opinion of AG Jacobs in Case C-50/00 P *Union de pequeños agricultores v Council* of 21.3.2002 para 39; unfortunately this was not taken over by the Court in its judgment of 25.7.2002, [2002] ECR I-0000.

³⁵ Joined cases C-240-244/98 *Océano Grupo Editorial v. Roció Murciano Quintero et al.* [2000] ECR I-4941 paras 24-26; annotation by Stuyck, [2001] CMLRev, p. 719

national court acknowledges that it has power to evaluate terms of this kind of its own motion“.

However, Community law, in conjunction with Art. 6/13 of the ECHR and Art. 47 of the European Charter on Fundamental Rights, can only impose an „obligation de moyens“ but cannot by itself provide the necessary legal sanctions and procedures. This is an obligation of the Member states – an obligation difficult to enforce. The Court may criticise procedures if they do not guarantee effective protection, but it cannot substitute them by more adequate instruments. It is here that national consumer law has its primary role to play, and that the work of Jean Calais-Auloy has been particularly important.³⁶

IV. Differences in contents and beneficiaries

1. Contents and its extensions

a. Consumer law: beyond information

The content of consumer rights is obviously different from those granted to Union citizens. Art. 153 and 17/18 EC respectively show us the divergent approaches which we have to keep in mind. Consumer law is mostly concerned with a right to information in order to compensate the „déséquilibre“, the „faiblesse“ or, as we would prefer to say, the „asymmetry“ of the position of the consumer vis-à-vis the professional on the market. Consumer rights are rights of „passive market citizens“. Information has something to do with competition³⁷. However important a right to information may be, it is not sufficient where consumers expect something more than merely information. This is the case in areas where consumers should be guaranteed certain quality or safety standards with regard to products or services, which cannot simply be

³⁶ It should be mentioned that my first meeting of Jean Calais-Auloy was in conjunction with a conference organised by him and the law faculty of Montpellier on judicial protection in 1974. Cf. Reich, “Bericht BRD: The Judicial and Quasi-Judicial Means of Consumer Protection”, *Symposium, The Montpellier Faculty of Law and Economics* (Brussels 1976), pp. 231-270. He came back to this topic in the mélanges dedicated to this author, cf. „Les actions en cessation exercées dans l’intérêt des consommateurs (droit français, droit communautaire)“, in: L. Krämer/H.-W. Micklitz/K. Tonner (eds), *Law and diffuse Interests in the European legal order – Liber amicorum N. Reich*, (Nomos 1997), p. 789. For a modern account, cf. Calais-Auloy/Steinmetz loc cit.note 2 at pp. 517 ff.; Reich note 13 at p. 366-390. The recent ECJ decision of 1 October 2002, case C-167/00 *Verein f. Konsumenteninformation/K.H. Henkel* [2002] ECR I-0000 greatly strengthens cross border group actions by submitting them to Art. 5 (3) of the Brussels Convention on tort claims, thus allowing to take action at the place where the (Austrian) consumers were injured by unfair practices coming from a German trader.

³⁷ Reich, „L’information du consommateur: condition de la transparence du marché“, in: Y. Serra/Calais-Auloy, *Concurrence et consommation*, (Dalloz 1994) p. 23.

fulfilled by mere disclosure rules. Micklitz³⁸ and Wilhelmsson³⁹ have developed a „right to the protection of legitimate expectations“ to be implemented by mandatory contract or tort law rules.

Some modern authors like Grundmann⁴⁰ nevertheless tell us that mandatory information rules should be preferred to substantive mandatory law because the first strengthen party autonomy while the second may unduly restrict it. Mandatory information rules are thereby in line with the liberalising tendencies of EC-internal market law, while mandatory substantive rules may impede consumer free choice and therefore be counterproductive. This direction is expressly welcomed in a recent contribution by Grundmann, Kerber and Weatherill:⁴¹

„...even in European re-regulation, there are strong mechanisms against unduly heavy restrictions on party autonomy. This is even a general characteristic of European contract law....there is an important difference between mandatory information rules and mandatory substantive rules. The latter reduce variety – to one possibility only or to a smaller range of possibilities... Reducing variety means reducing offers which match individual preferences. Individual preferences, however, are nowadays the basic point of reference for economic theory building (normative individualism). Substantive mandatory rules can be justified only if an information rule cannot remedy the market failure. This is so because information rules may be mandatory by construction – the duty to disclose is not subject to party autonomy -, but they are always aimed at enabling the parties to take an autonomous decision in substance.“

This point of view cannot be accepted. It seems to overlook that Art. 153 (1) itself contains more than a mere right to information: it includes a contribution to the protection of consumers with regard to their „health, safety and economic interests“. This protection may not flow directly out of primary Community law and has not yet been put into the legal shape of a subjective right. But it has been implemented by specific directives, e.g., Dir. 1999/44/EC of 25.5.1999⁴² on certain aspects of the sale of consumer goods and associated guarantees, where the right of the consumer to receive a product which is in conformity with the contract for sale, per Art. 2 (1), may not be contracted out of, per Art. 7 (1), even by reference to a third country law, per Art. 8. In determining whether a conforming product has been sold to the consumer or not, certain information delivered by the seller or even the producer will be

³⁸ *Internationales Produktsicherheitsrecht*, 1995, p. 169: *ibid*, „Legitime Erwartungen als Gerchtigkeitsprinzip des europäischen Privatrechts“ in : L. Krämer et al. note 36, 245.

³⁹ In: Howells/Wilhelmsson, *EC Consumer Law*, (Ashgate 1997) 320

⁴⁰ This position has been most clearly taken by Grundmann, „Information, Party Autonomy and Economic Agents in European Contract Law“, [2002] 39 *CMLRev* 269; for an opposing view cf. Wilhelmsson, *European Contract Law and Social Values*, (Dartmouth 1995); *ibid*, „Private law in the EU: Harmonised or Fragmented Europeanisation?“, [2002] *European RevPrL* p. 77.

⁴¹ *Party Autonomy and the Role of Information in the Internal Market* (de Guyter 2001) at p. 7

⁴² OJ L 171/12 of 7.7.1999.

important, but this does not exclude the mandatory substantive character of the provisions of the sales directive.

Unfortunately, the recent case law of the ECJ has severely cut back the protection of legitimate interests in product safety as foreseen by the Product Liability Directive 85/374/EEC of 25 July 1985.⁴³ The cases concerned Greek, French and Spanish implementation legislation which in some regards was “better” than the protection offered by the directive. In the case of Spain, *Ms. Sanchez* had suffered Hepatitis C from contaminated blood produced by the defendant and wanted compensation for bodily injury not available under the implementing legislation but only under the earlier regime of the Consumer Protection Law of 1984.⁴⁴ In the case against France⁴⁵ several points of the implementing legislation were criticised by the Commission, including the introduction of a product monitoring duty in Art. 1386-12 Code civil as amended in order to avoid strict liability also for development risks within the meaning of Art. 7 (e) of the Directive. In its highly formalistic argumentation the ECJ points to “complete harmonisation” by the directive which leaves to the Member States only limited means to improve consumer protection. Unlike other consumer protection directives, the objective of the directive is seen to “ensure undistorted competition between traders, to facilitate the free movement of goods and to avoid differences in levels of consumer protection” (para 17 of the judgment against France). Art. 153 EC is interpreted as not allowing the adoption of more consumer protective Member State laws because it is just “an instruction addressed to the Community concerning its future policy and cannot permit the Member States, owing to the direct risk that would pose for the *acquis communautaire*, autonomously to adopt measures contrary to the Community law contained in the directives...” (para 15). Art. 13 of the Directive only allows, together with the general regimes of liability under contract or tort law, the maintenance of specific schemes limited to a given sector of production (para 23), not of general rules on strict liability, even though the directive does not explicitly say so. The option left for Member States like France under Art. 15 to choose whether or not to take over the development risks defence does not allow an intermediate solution. The states cannot “alter the conditions under which the exceptions are applied” (para 47): *aut – aut, non a majore at minus*, the Court seems to be saying. The judgment, contrary to what Jean Calais-Auloy⁴⁶ had written before, allows EU consumer law to lower existing Member State consumer protection

⁴³ OJ L 210/29 of 7.8.1985.

⁴⁴ Case C-183/00 *Maria Victoria Gonzalez Sanchez/Medicina Asturiana* [2002] ECR I-0000 (25.4.2002).

⁴⁵ Case C-52/00 *Commission/France* [2002] ECR I-0000 (25.4.2002).

⁴⁶ *Supra* note 2 at p. 320.

without having regard to the product monitoring obligations introduced by Dir. 92/59/EC of 29.6.92 on General Product Safety.⁴⁷ Instead of increasing his rights by adoption of the Product Liability Directive, the European consumer finds himself deprived of existing levels of protection.

b. Citizenship: beyond free movement

Citizenship is mostly concerned with free movement, as Art. 18 EC shows. Its extension to political rights to vote and stand as a candidate in European and communal elections has remained an exception. We are here more concerned with *social rights*. This, in our opinion, is the consequence of the free movement rights which were already granted to active market citizens under the four freedoms and extended to consumers by the *Cowan*-doctrine. The inclusion of the concept of „Union citizenship“ into the EC-Treaty transfers the original free movement rights to an „everybody“ right not depending on the economic position of the entitled person, whether he or she be an active or passive market subject. Since Community law has a dynamic tendency, today citizenship has developed into a general *right to non-discrimination* – a right already postulated by the French Advocate General Léger in *Boukhalfa*⁴⁸. This has been finally recognised by the Court in its *Grzelczyk* judgment of 20.9.2000⁴⁹ where it wrote:

„Union citizenship is destined to be the fundamental status of nationals of the member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality....“ (para 31)

This equality of treatment includes certain social rights like student benefits in *Grzelczyk* which are normally not covered by secondary EC-law. Tideover allowances have been included in *D’Hoop*⁵⁰ in favour of migrant nationals, thus creating *migration rights* of citizens. Citizenship is therefore supplemented by an element of *solidarity* which was perhaps not intended by its authors when they amended EC law by the Maastricht Treaty. This solidarity does not root in the market place which determines the position of the consumer, but in a common sharing in rights and risks which is the heart of citizenship.⁵¹

⁴⁷ OJ L 228/24 of 11.8.92.

⁴⁸ Case C-214/94 *Boukhalfa v. Bundesrepublik Deutschland* [1996] ECR I-2253 at 2271 para 63.

⁴⁹ Case C-184/99 *Rudy Grzelczyk v. le Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* [2000] ECR I-6193; comment by Iliopoulou/Toner [2002] 39 CMLRev 609.

⁵⁰ Case C-224/98 *Marie Nathalie D’Hoop and Office national d’Emploi* [2002] ECR I-0000 (11.7.2002).

2. Beneficiaries

a. Consumer rights: residence and other criteria

Consumer rights in the EU are not expressly limited in their personal sphere of application, as far as Art. 153 EC is concerned. Therefore, the general rules of private international law and jurisdiction determine the potential beneficiaries. These rules usually take as a starting point the criteria of domicile or, more recently, residence. In its recent *Gabriel* case⁵², the Court had a chance to clarify these criteria with regard to the special jurisdiction for consumer contracts under Art. 13 (1) Nr. 3 of the Brussels Convention. The case at hand concerned a cross-border promise of a financial benefit by a trader from Germany conditional on a sales contract entered into by the Austrian consumer. The „close connection“ with the home jurisdiction of the consumer was produced by the fact that the trader had made the promise via personalised mail-order in the consumer’s country of domicile:

„.....the consumer and the professional vendor were indubitably linked contractually once (the consumer) Mr. Gabriel had ordered goods offered by Schlank & Schick thereby demonstrating his acceptance of the offer – including all conditions attaching thereto – which that company had sent to him in person.“

The point of „localising“ consumer contracts has been debated with particular intensity with regard to electronic commerce where it may be difficult to exactly locate the trader and the consumer. Art. 15 (1) c) of the „Brussels“ Regulation 44/2001/EC of 22.12.2000⁵³ provides now that it is sufficient that the commercial activity is *directed* towards the consumer’s domicile or residence.

The *Gabriel* judgment suggests a broad reading of this proviso. It should be enough for the consumer to be allowed to invoke his home jurisdiction in that the trader, by his own decision, is present on the market of the consumer. This will usually be the case where a website can be activated in his country of residence⁵⁴. In these cases the consumer will be granted protection

⁵¹ Reich, „Unionsbürgerschaft – Metapher oder Quelle von Rechten?“ In: Festschrift D. Schefold, p. 279 at 283-285 (Nomos 2001).

⁵² Case C-96/00 *Rudolf Gabriel* [2002] ECR I-0000 (11.7.2002) para 58

⁵³ OJ L 12/1 of 16.1.2001.

⁵⁴ Reich/Gambogi, „Gerichtsstand bei internationalen Verbrauchervertragsstreitigkeiten im e-commerce“, [2001] VuR 269; contra Vallelersuni, „Le commerce électronique“ [2001] Revue du droit de l’Union Européenne“ 1.

by his home jurisdiction and, under the similar provisions of Art. 5 (2) of the Rome Convention on applicable law to contractual obligations⁵⁵, by reference to his law of residence.⁵⁶

b. Citizen's rights: nationality

In establishing citizenship, the Maastricht Treaty did not want to give the Community a right of its own to establish criteria for determining who is a citizen of the Union or not. Since the Union is not a (federal) state, it has no right to determine who its members are. This is left to the States themselves as constituent elements of the Union. Thereby, Art. 17 in the Amsterdam version introduced the following clarification into the EC-Treaty:

„Citizenship of the Union shall complement and not replace national citizenship“

In its *Micheletti* judgment⁵⁷ the Court made clear that Member States, and only Member States, may determine the creation and abolition of nationality. They may however not put restrictions on it if another Member State has already granted nationality. This also holds true with regard to persons enjoying dual nationality.

There is a debate in legal literature on whether citizenship should be based on residence and extended beyond traditional nationality concepts.⁵⁸ This question has however to be addressed to the Member States and not to the EU. The EU can, by virtue of Art. 63 (4) EC extend certain rights inherent in free movement to third country nationals. The Commission has submitted a proposal on creating the status of „long term legal resident“⁵⁹ which would create a quasi-citizenship position. But this proposal needs unanimity in the Council which at the time of writing seems difficult to get.

On the other hand, the Court has read into certain provisions of the Europe-Agreements with candidate countries to membership in the Union a directly applicable non-discrimination rule

⁵⁵ OJ L 266/1 of 9.10.1980.

⁵⁶ For a discussion cf. Reich/Halfmeier, „Consumer Protection in the Global Village: Recent Development in German and European Law“, [2001] 106 Dickinson LRev 111 at 125. In para 42 of the *Gabriel* judgment, the Court expressly referred to the Giuliano/Lagarde report on the Rome Convention even though it does not (yet) have jurisdiction to interpret it.

⁵⁷ Case C-369/90 *Micheletti v. Delegación del Gobierno de Cantabria* [1992] ECR I-4239; case C-192/99 *The Queen and Secretary of State for the Home Office ex parte Mangit Kaur* [2001] ECR I-1237.

⁵⁸ M.C. Garot, *La citoyenneté dans l'Union européenne* (Harmattan 1999); H. Staples, *The Legal Status of Third Country nationals resident in the EU* (Kluwer 1999).

⁵⁹ Com (2001) 127 final of 13.3.2001.

which is similar to the one under Community law.⁶⁰ This is true with regard to establishment and to legally employed persons from association countries. It does not imply their full entry and integration into the social environment of EU countries, but is a first step in this direction, at least in the case of self-employed persons,⁶¹ key personal of companies, and workers having received a work permit.⁶² The Member states retain certain rights to avoid abuses but they must respect the principles of Community law, namely guarantee of fundamental rights, proportionality, and legal protection.⁶³

c. Merging consumer and citizen protection?

As a result of this discussion, the position of the consumer as „market citizen“ with regard to information and protection of legitimate expectations is somewhat stronger than that of the „Union citizen“ with regard to non-discrimination. The first does not depend on nationality but simply on residence if some „close connection“ exists. On the other hand, only if the consumer is a citizen of an EU country or, to a limited extent, an association country, can he or she enjoy the full scope of rights under EU-law. But in an area without internal borders he or she may at least be welcomed as a tourist or may use means of electronic communication to look for a best buy in the (internal) market. Recital 3 of the Directive on electronic commerce of 8 June 2000⁶⁴ therefore reads:

Community law and the characteristics of the Community legal order are a vital asset to enable European citizens and operators to take full advantage, without consideration of borders, of the opportunities afforded by electronic commerce; the Directive therefore has the purpose of ensuring a high level of Community legal integration in order to establish a real area without internal borders for information society services.“

Free movement has similar importance for, and should be granted on similar terms to, consumers and citizens alike. From a Community point of view, *the ideal EU-citizen is the consumer highly mobile in the entire internal market*. So why restrict citizenship to nationals?

V. Lacunae: Absence of duties

⁶⁰ Reich/Harbacevica, „The Stony Road to Brussels“, [2002] *Europarättslig Tidskift* p. 411 at 420 with further references.

⁶¹ Cases C-63/99 *The Queen and Secretary of State for the Home Office ex parte Wieslaw and Elzbieta Glozdzuk*, C-235/99 *ex parte Kondova* and C-257/99 *ex parte Julius Barkosi and Marcel Malik*, [2001] ECR I-6369, 6427, 6557.

⁶² Case C-162/00 *Land Nordrhein-Westphalen/Beata Pokreptowicz-Meyer* [2002] ECR I-0000 (29.1.2002).

⁶³ cf. Reich/Harbacevica, *supra* note 60 at p. 426.

⁶⁴ OJ L 178/1 of 17.7.2000.

1. *Is there a duty to loyalty of citizens?*

Community law has been generous with granting rights to consumers and citizens. This lives up to the liberal spirit in which EC has been drafted and which has been considerably extended by the case law of the ECJ. But what about *duties* which are at least inserted in Art. 17 EC with regard to citizens but not even mentioned with respect to consumers. Can this *lacuna* be filled by referral to general principles of citizen's loyalty or „abus de droit“?

The question of a duty of loyalty is usually discussed in the relationship between Community respectively Union and Member State institutions, not between the Union resp. States and its citizens. Article 10 EC is a basis for such a mutual loyalty obligation. There is no similar duty imposed on individuals. As Shaw⁶⁵ correctly remarks:

„The tendency of any discourse of citizenship duties is to construct the figure of the citizen in the light of some conception - however vague - of moral virtue.“

This „moral virtue“ has not yet been transposed into a legal obligation, and it is hardly realistic that this will be done in the near future. It would be contrary to the *liberal spirit* of EC law and Union citizenship itself which focuses exclusively on rights and not on duties. For example, EC law has greatly extended consumer rights but has done little to impose corresponding environmental obligations, as Krämer and Wilhelmsson have rightly and critically pointed out.⁶⁶ As mentioned, the package holiday directive 90/314 has developed extensive tourist rights including a directly applicable safety net in case of the insolvency of the tour operator, but no corresponding obligations relating to environmental protection.⁶⁷ As another example, the packaging waste directive 94/62/EC of the EP and the Council of 20.12.94⁶⁸ makes it an indirect duty of the consumer/citizen to participate in waste management and prevention, for example through information about recycling systems, but does not prescribe a moral, even less a legal obligation to limit waste.⁶⁹

⁶⁵ J. Shaw, „Citizenship in the Union: towards Post-National Membership“ in: *European University Institute supra* note 13 at 344

⁶⁶ In this sense the critique of Krämer, „On the interrelation between consumer and environmental policies“, [1993] 16 *Journal of Consumer Policy* 455; Wilhelmsson, „Consumer Law and the Environment: From Consumer to Citizen“, [1998] 21 *Journal of Consumer Policy* 45

⁶⁷ For an attempt to develop such duties see the contributions of Derleder, „Touristenschutz contra Umwelterhaltung“ and Tonner, „Europäische Tourismuspolitik und nachhaltige Entwicklung“, in: Reich/Heine-Mernik (Hrg.), *Umweltverfassung und nachhaltige Entwicklung in der EU*, 1997 at 89 and 99.

⁶⁸ OJ L 361/10 of 31.12.94.

⁶⁹ Reich (1999) *supra* note 13 at 412-413; Krämer, *EC Environmental Law* (Sweet & Maxwell, 4th ed. 2000) at 256-257 is silent on that point.

Citizens' duties are indirectly contained in EC directives on waste, eg. Art. 9 of Dir. 75/439/EEC of 16 June 1975 on used oils⁷⁰ and Art. 8 of Dir. 75/442/EEC of 15 July 1975 on waste.⁷¹ They impose obligations on Member States which consequently have to make citizens responsible for orderly waste management. They cannot directly put duties upon citizens due to their character as *leges imperfectae*, following the absence of horizontal direct effect of Community directives. The only exception to our knowledge where obligations are imposed directly on citizens is Art. 9 of Reg. 338/97 of 9 Dec. 1996 on the protection of species of wild fauna and flora by regulating trade therein⁷², banning movement of certain live specimens which also obliges private persons and is not limited – unlike Art. 8 – to commercial activities.

A similar discussion took place when the question of state liability for not transposing the Package Holiday Directive 90/314 was before the Court in *Dillenkofer*.⁷³ Could it not be said that a tourist acted negligently in not taking advantage of the possibility under the then existing German case law of not paying more than 10 % of the total travel price before obtaining documents of value? The Court flatly rejected this argument in saying that the Directive did not require the Member States to adopt specific provisions to protect package travellers from their own negligence. It allowed however the argument that the consumer had an obligation (in German: *Obliegenheit*) to avoid or mitigate the loss or damage by showing reasonable care.

In consumer law, the new proposal of the Commission of 11.9.2002⁷⁴ for a directive on consumer credit, supplementing Directive 87/102/EEC of 22.12.1986⁷⁵ contains an Art. 6 (1) which obliges the consumer and the guarantor to reply accurately and in full to such request for information on their financial situation and their ability to repay. This is to my knowledge the first time a consumer law directive not only contains rights but also obligations in the sense of “*Obliegenheiten*” which, of course, must be implemented by the Member States. The proposal does not say anything about the consequences of a possible breach of this duty by the consumer or guarantor. But it may be a reason for the creditor to cancel the credit agreement without default notice according to Art. 24 (2). Since this directive aims at total harmonisation, per Art. 30, the Member states have no power to avoid imposing this duty on their citizens.

⁷⁰ OJ L 194/31 of 25.7.75.

⁷¹ OJ 194/47 of 25.7.75.

⁷² OJ L 61/1 of 3.3.97.

⁷³ at note 24 paras 70-73.

⁷⁴ Com (2002) 443 final.

⁷⁵ OJ L 42/48 of 12.2.87.

2. „*Abus de droit*“ by consumers and citizens as inherent limitation to rights?

A liberal concept of citizenship and subjective rights of citizens which is the one adhered to by the EU should at least develop a minimalist concept of limiting these rights in case of obvious abuse. It would be interesting to enter into the debates of the 19th century where the concept of „abus de droit“, supplemented by a broader theory of „social function of rights“, first evolved in French law,⁷⁶ was then taken over by German and Swiss law and even introduced into post-revolutionary Soviet law.⁷⁷ It imposed a certain „socialisation“ of individual rights originally created in favour of the „bourgeois“ in the spirit of a liberal theory of law and state – a concept quite close to the beginnings of a distinctive European law and polity.

The extensive grant of rights to European citizens, especially in the free movement area as the strongest pillar of EU-law, should at least in a theory of „socialisation of law“ be protected against unilateral abuse. This „immanente Schranke“ (inherent limitation) was recognized by the Court in the *Paletta-II*-case where it refers to having „consistently held that Community law cannot be relied on for purposes of abuse or fraud“.⁷⁸ At the same time the Court insisted that the defence of „abus de droit“ should not make impossible the exercise of Community rights. Therefore it is up to the person charging „abuse or fraudulent conduct“ to give adequate proof that this is the case; mere allegations are not sufficient in that respect. The Court did not develop objective criteria for specifying “abus de droit”, such as preventing a circumvention of protective provisions justified by fair labour conditions, perhaps fearing that the mere use of Community freedoms could already be regarded as an “abuse”.

The Court repeated its case law in its well known *Centros*-judgment of 9 March 1999.⁷⁹ The case concerned the registration of the Danish branch of a private limited company formed in accordance with British law with the intention to do business mainly in Denmark. AG La Pergola as well as the Court rejected the argument of the Danish authorities that the sole purpose of the company formation was to circumvent the application of the national law governing private companies aimed at protecting creditors. While AG La Pergola gave a

⁷⁶ For an account cf. Grimm, *Solidarität als Rechtsprinzip* (Athenäum 1972).

⁷⁷ cf. for a development in socialist law Reich, *Sozialismus und Zivilrecht* (Athenäum 1972) at 175-186

⁷⁸ Case C-206/94, *Brennet v. Paletta*, [1996] ECR I-2357 at 2391 para 24; cf. also AG Cosmas relying on the Roman law principle „fraus omnia corrumpit“ at 2373 para 51; in *Günaydin v. Freistaat Bayern*, case C-36/96, [1997] ECR I-5143 the Court did not find „abus de droit“ by Turkish migrant workers who had signed a paper agreeing on their only temporary work permit and later wanting to remain in the receiving country.

⁷⁹ Case C-212/97, *Centros v. Erhvervs-og Selskabsstyrelsen*, [1999] ECR I-1459; comment Roth [2000] 37 CMLRev p. 147

sweeping support of the theory of “competition of legal orders”⁸⁰, the Court in a more cautious fashion referred to its earlier case law forbidding an improper circumvention of national legislation under cover of the rights created by the Treaty. As a result, the Court confirmed the opinion of the AG in holding that:

“(t)he right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent, in a single market, of the freedom of establishment guaranteed by the Treaty.⁸¹”

This argument however misses the point since the case did not concern the establishment of branches as such, but more specifically the intention of a company to do its main national business through a branch as “principal establishment” while the main office was merely chosen to avoid the more restrictive company legislation of the host country.⁸² Moreover, in *TV 10*⁸³ the ECJ ruled that Member States may take measures against a TV company which established itself in Luxembourg in order to escape Netherlands legislation.

As a result of *Paletta II* and *Centros*, the Court recognises the possibility of “*abus de droit*” of Union citizens invoking their rights guaranteed by the Treaty against restrictive but still justified Member State provisions, but is not willing to flesh it out more specifically in the sense of an inherent and implied duty as a corollary to the effective granting of free movement and consumer rights.⁸⁴ Such a one-sided concept of citizenship and consumer law may satisfy an exclusively liberal reading of Community law. But it is naive to conceptualise rights without duties, as Art. 14 of the German Fundamental Law so clearly demonstrates: “*Eigentum verpflichtet* – property imposes obligations”! In an environment which is characterised by a growing dependence of citizens on each other, by the evolution of elements of solidarity inherent in the concept of citizenship itself, and by the principle of “proportionality”, per Art. 5 (3) EC-Treaty which requires the balancing of different rights, this unilateral liberal reading of citizenship merely generating rights and setting aside duties becomes dated and will need reshaping by “post-modern” legal theory.⁸⁵

⁸⁰ At 1477; cf. for a differentiated reading of this concept: Reich, “Competition between Legal Orders – A New Paradigm of Community Law?” [1992] 30 CMLRev p. 861; C. Barnard, “Social dumping and the race to the bottom: some lessons for the EU from Delaware?”, [2000] 25 ELRev p. 57.

⁸¹ At 1493 para 27.

⁸² cf. The critique of Schilling, „*Bestand und allgemeine Lehren der bürgerschützenden allgemeinen Grundsätze des Gemeinschaftsrechts*“, [2000] Europäische Grundrechtszeitschrift (EuGRZ) p. 3 at 39.

⁸³ Case C-23/93 *TV 10/Commissariaat van de Media* [1994] ECR I-4795.

⁸⁴ Schilling *supra* at not 82 .

⁸⁵ Cf. Reich, “Reflexive Law and Reflexive Legal Theory”, in: Gedächtnisschrift für A. Argyriadis (Athens 1996), p. 773 at 786. For a philosophical discussion cf. D. Selbourne, *The Principle of Duty* (Abacus 1997) at 152-164.

It remains to be seen whether the express reference to the concept of “*abuse of rights*”, as used in Art. 17 ECHR, by Art. 54 of the European Charter of Fundamental Rights will provoke a change of thinking in the direction as suggested here. The case-law of the ECHR so far has treated only extreme situations where eg. the right to freedom of expression was used by radical movements denying democratic values as such.⁸⁶ Community law which is much closer to everyday entitlements of citizens therefore needs a more focused approach on a theory of “*abus de droit*” which still awaits development.

VI. Perspectives: Is there a uniform concept of economic and social citizenship?

This paper has shown that there exist similarities, but also differences, between economic citizenship granted to consumers and social citizenship granted to nationals. Both have rights which have been considerably extended in Court practice, even though some recent setbacks may be discerned. The circle of beneficiaries differs, and a concept of corresponding duties awaits its elaboration. Hopefully Jean Calais-Auloy will be able to continue his work in this direction.

⁸⁶ Cf. J. Frowein/M. Peukert, *EMRK-Kommentar*, 2. A. (Engel 1995) Art. 17 Rdnr. 2.