Status-related consumer protection in the digital economy

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Thesis submitted for assessment with a view to obtaining the degree of Master in Comparative, European and International Laws (LL.M.) of the European University Institute

Florence, 30 November 2017

European University Institute
Department of Law

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Researcher declaration to accompany the submission of written work
Department of Law – LL.M. Programme

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Summary

The thesis investigates the evolution of the status-related approach to consumer protection in the private law of the European Union and asks whether this traditional approach is still viable in the times of growing digitalisation. It explores, firstly, what consumer protection actually means and, secondly, whether instruments adopted for this purpose are also directed at the achievement of other policy goals. It shows that, in the most general understanding, consumer protection is linked to the position of "passive market participants", namely persons entering into legal relationships to satisfy their needs without producing the product or service themselves. It is usually, but not invariably, limited to the standard consumer notion, displays several overarching themes such as access, information, fairness and alternative dispute resolution and remains strongly intertwined with the internal market project. The thesis further asks whether, throughout the years, tensions associated with the status-related approach to consumer protection were identified and, if so, whether and how they were addressed. It touches upon the changing normative content of the term itself and points to several areas – most notably related to the provision of services – in which the notion of a "consumer" has partially been replaced (or supplemented) with other categories. It finally asks whether digitalisation is setting an end to the status-related consumer protection and attempts to draw the possible ways forward.

Table of contents

1. Introduction

Private law of the European Union has a unique and a somewhat peculiar nature. Understood in the broad sense, it refers to rules laid down by the EU legislator that seek to facilitate private law relationships while also being aimed at specific policy goals[1]. The framework can thus be described as function-oriented regulatory law and comprises both private and public law rules in the traditional, continental European understanding[2]. Due to competence limits of the EU under the principle of conferral, European private law cannot aspire to create a comprehensive system, but rather consists of a number of provisions, typically of a mandatory nature, designed for areas, which are most relevant from the point of view of its objectives. The focus of the present thesis is on the instruments which refer to consumer protection as an important part of their rationale. Broadly speaking it concerns the question of whether and, if so, how perception of the areas considered to be crucial from this point of view has evolved over time – from the beginnings of the consumer society to the digital age of today – and whether this development has had (or should have had) any effect on the ways in which the consumer protection aims along with concurrent policy goals have been pursued. It is based on the premise that, to investigate this matter fully, it is not sufficient to look at the type of practices and relationships addressed by particular acts or the regulatory techniques applied to safeguard consumer interests. An analysis of their personal scope is equally important and this is precisely the topic to which the present thesis is devoted.

Preliminary assessment of applicable EU measures pertaining to consumer protection carried out with this aspect in mind points to a repeated reliance on specific, formally defined categories of legal subjects, particularly those of a "consumer" and of a "trader". The former typically refers to a natural person acting outside his or her trade, business, craft or profession

[1] See generally: Hans-W Micklitz, 'The Visible Hand of European Regulatory Private Law – The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation' (2009) 28 Yearbook of European Law 3; Hans-W Micklitz, Yane Svetiev and Guido Comparato, 'European Regulatory Private Law – The Paradigms Tested' (2014) Working Paper EUI LAW 2014/04.

[2] Norbert Reich, *General Principles of EU Civil Law* (Intersentia 2014) 12; Vanessa Mak, 'The Consumer in European Regulatory Private Law' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016) 381.; Olha Cherednychenko, 'Private Law Discourse and Scholarship in the Wake of the Europeanisation of Private Law' in James Devenney and Mel Kenny (eds), *The Transformation of European Private Law: Harmonisation, Consolidation, Codification or Chaos?* (Cambridge University Press 2013) 148; Hugh Collins, 'The Hybrid Quality of European Private Law' in Roger Brownsword and others (eds), *The Foundations of European Private Law* (Hart Publishing 2011) 453. On the distinction between private in public law in the continental European legal orders: Mathias Reimann, 'The American Advantage in Global Lawyering' (2014) 78 Rabels Zeitschrift für ausländisches und internationales Privatrecht 1.

(hereinafter referred to as standard consumer notion)[3], while the latter is being defined as a natural or legal person acting for purposes relating to such activities[4]. A significant part of EU instruments in the analysed area only applies to relationships between these two categories of legal subjects, commonly referred to as business-to-consumer, or B2C, relationships. Regulation that links individual rights and duties with positions of this kind is sometimes described as status-based[5].

Status-based approach has been analysed and criticised from several perspectives[6]. The present project looks at it in the light of the objectives, which the analysed legal framework aims to fulfil. To do so, it is necessary to explore, firstly, what consumer protection actually means and, secondly, whether instruments adopted for this purpose are also directed at the achievement of other policy goals. The analysis is focused in particular on the "external" side of the consumer notion, namely the question whether a person can be called a consumer in legal terms at all and not whether a person classified as consumer in the legal sense is "worthy of protection"[7]. It shows that, in the most general understanding, consumer protection is linked to the position of "passive market participants", namely persons entering into legal relationships to satisfy their needs without producing the product or service themselves[8]. It is usually, but not invariably, limited to the standard consumer notion, displays several overarching themes and remains strongly intertwined with the internal market project (free movement of goods and services, but also – and importantly – of persons). The thesis further asks whether, throughout the years, tensions associated with the status-based approach to consumer protection were identified and, if so, whether and how they were addressed. It

[3] See e.g. Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64, Article 2(1).
[4] Ibid, Article 2(2).
[5] Fabrizio Cafaggi, 'From a Status to a Transaction-Based Approach? Institutional Design in European Contract Law' (2013) 50 Common Market Law Review 311, 327.
[6] See e.g.: Cafaggi (n 5); Jules Stuyck, 'Do We Need "Consumer Protection" for Small Businesses at the EU Level?' in Kai Purnhagen and Peter Rott (eds), *Varieties of European Economic Law and Regulation: Liber amicorum for Hans Micklitz* (Springer 2014) 359; Stefan Grundmann, 'Targeted Consumer Protection' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016) 226–229.; cf. Hans-W Micklitz, 'The Legal Subject, Social Class and Identity-Based Rights' in Loïc Azoulai, Ségolène Barbou des Places and Etienne Pataut (eds), *Constructing the Person in EU law: Rights, Roles, Identities* (Hart Publishing 2016) 290.
[7] The worthiness of protection, or the internal dimension of the consumer notion, is associated with the so-called "consumer model". On the differentiation between an external and an internal perspective see: Jakob Søren Hedegaard and Stefan Wrbka, 'The Notion of Consumer Under EU Legislation and EU Case Law: Between the Poles of Legal Certainty and Flexibility', *Legal Certainty in a Contemporary Context* (Springer 2016).
[8] Norbert Reich and Hans-W Micklitz, 'Economic Law, Consumer Interests, and EU Integration' in Norbert Reich and others (eds), *European Consumer Law* (Intersentia 2014) 53.

touches upon the changing normative content of the term itself and points to several areas – most notably related to the provision of services – in which the notion of a "consumer" has partially been replaced (or supplemented) with other categories. It finally asks whether digitalisation is setting an end to the status-related consumer protection.

2. The meaning of status

2.1. Henry Maine: from status to contract

Before entering into the heart of the matter, more light needs to be shed on the understanding of the term "status" emerging from existing legal literature. The discussion dates back to the influential work of Henry Maine *Ancient Law*, first published in 1861, in which the evolution of private law in progressive societies was described as a move "from status to contract"[9]. The aphorism appears to provide the necessary background for a proper understanding of the subsequent references to "status" in the legal discourse, including in the context of consumer law.

Although Maine himself did not elaborate in great detail on what he had meant by the phrase, and the present thesis cannot do justice to the entirety of the academic debate on that point[10], several observations in that respect can be made. First of all, the coining of the phrase by the English jurist is preceded by his extensive inquiry into the history of what he refers to as "primitive societies". An important conclusion therefrom is the identification of family as a key unit of such societies and the observation of the contingency of reciprocal rights and duties upon the status – of a son, of a female, of a slave – within the family. Maine's understanding of the "status" thus appears to correspond, at least broadly, with the definitions of the term developed in other social sciences. By way of illustration, the seminal work of Ralph Linton *The Study of Man* noted that the functioning of societies depends upon the presence of patterns for reciprocal behaviour between individuals or groups of individuals and

[9] Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (Henry Holt and Company 1906) 163–165.

[10] Frederick Pollock, *Introduction and Notes to Sir Henry Maine's 'Ancient Law'* (Murray 1914) 34–36; Alan Diamond (ed), *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal* (Cambridge University Press 1991); George Feaver, *From Status to Contract: A Biography of Sir Henry Maine, 1822-1888* (Prentice Hall Press 1969); Kingsley Bryce Smellie, 'Sir Henry Maine' (1928) 22 Economica 64; Robert Childres and Stephen J Spitz, 'Status in the Law of Contract' (1972) 47 New York University Law Review 1. For a recent overview see: Katharina Isabel Schmidt, 'Henry Maine's "Modern Law": From Status to Contract and Back Again?' (2017) 65 The American Journal of Comparative Law 145.

described statuses – ascribed or achieved – as "the polar positions in such patterns"[11]. The concept of an "ascribed" status, as defined by Linton, refers to positions "assigned to individuals without reference to their innate differences or abilities" while an "achieved" status was defined as "requiring special qualities and open to individual achievement"[12]. According to Katharina Schmidt, the notion used by Maine overlaps particularly strongly with Linton's definition of an ascribed status, although it is recognised that the latter concept is also marked by ambiguities of its own[13]. Be it as it may, for purposes of this project a more general understanding of Maine's aphorism seems sufficient, in which the retreat of the status relates to a gradual loss of importance of particular societal positions, particularly within family structures, in establishing rights and obligations of private parties.

What appears to be more relevant in the present context is the second part of Maine's aphorism related to the concomitant rise of the "contract". His understanding of that category seems to reflect the idea of a free agreement entered into by formally equal individuals[14]. Given that the author's work coincided with the Victorian period in the British intellectual history this markedly individualist outlook is not surprising[15]. Speaking more broadly, it remains in line with the emerging "mode of legal consciousness" associated with the period of Classical Legal Thought[16]. Admittedly, as Frederick Pollock notes, it is not readily apparent to what extent Maine regarded the movement he described as a phase of "the larger political individualism" and what he would have thought about the "reaction against this doctrine" observed in the subsequent decades[17]. Clearly, however, rather than being a simple description of the process, Maine perceived the move towards contract as a sign of a historical progress[18]. Possible interferences with the individual obligation in the abovementioned sense could then, at the very least, be treated with mistrust. Indeed, other parts of Maine's work, in

[11] Ralph Linton, *The Study Of Man. An Introduction* (Appleton Century Crofts, Inc 1936) 256.
[12] Ibid 128.
[13] Schmidt (n 10) 166; Irving S Foladare, 'A Clarification of "Ascribed Status" and "Achieved Status"' (1969) 10 The Sociological Quarterly 53.
[14] Maine refers, for example, to the disappearance of the status of Slave and its supersedence with a contractual relation of the servant and his master.
[15] Patrick Selim Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1979) 219–237. For a critical overview of that period see: Ellen Frankel Paul, 'Laissez Faire in Nineteenth-Century Britain: Fact or Myth?' (1980) 3 Literature of Liberty: A Review of Contemporary Liberal Thought 5.
[16] Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000' in David M Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006) 19.
[17] Pollock (n 10) 36.
[18] John W Burrow, 'Henry Maine and Mid-Victorian Ideas of Progress' in Alan Diamond (ed), *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal* (Cambridge University Press 1991) 55.

particular *Popular Government*[19], are considered to contain indications of the author's scepticism of the subsequent "regulatory legislation which restrict[ed] freedom of contract, and which assign[ed] rights and duties on the basis of factors other than free agreement between man and man"[20]. It is possibly this factor that led to the later rediscovery of Maine's aphorism with respect to activities of the welfare and, then, regulatory state[21].

2.2. Status-based protection

Despite the attribution of the status-contract parallel to an English author, neither the individualist philosophy which underlay its conception, nor the "socialist revival" which led to its later rediscovery, should be regarded as distinctly British phenomena. Also in the continental Europe, following the French Revolution, status-based positions were increasingly regarded as unfit to form the basis of rights and obligations. This left a clear imprint on the grand civil law codifications carried out throughout the 19th century. Both the French *Code civile* and the German *Bürgerliches Gesetzbuch* placed the individual as a main point of reference in the autonomous and coherent system of objective norms they aspired to create[22].

However, already at the turn of the century, several shortcomings of this approach appeared. The era of industrialization clearly showed that formal equality does not always establish real (material) equality and that negative consequences of liberally understood freedom of contract are not limited to isolated cases[23]. Individualist law was increasingly perceived as unable to provide adequate protection to certain social groups, particularly the workers. With the realisation of the latter's political claims, first codified "status-based" protections were

[19] Henry Sumner Maine, *Popular Government. Four Essays* (H Holt and company 1886).
[20] Alan Diamond, 'Introduction' in Alan Diamond (ed), *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal* (Cambridge University Press 1991) 22–23.
[21] In this context several authors referred to a reverse movement "from contract to status", see e.g. Friedrich Kessler, 'Contracts of Adhesion – Some Thoughts about Freedom of Contract' (1943) 43 Columbia Law Review 629; Harry W Jones, 'The Jurisprudence of Contracts' in Gabriel M Wilner (ed), *Jus et Societas: Essays in Tribute to Wolfgang Friedmann* (Springer 1979) 169; Alexander Bruns, 'Die Vertragsfreiheit und Ihre Grenzen in Europa und den USA – Movement from Contract to Status?' (2007) 62 JuristenZeitung 385. For a discussion of the concepts of welfare and regulatory state, see: Karen Yeung, 'The Regulatory State' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press 2010) 64.
[22] Micklitz, 'The Legal Subject, Social Class and Identity-Based Rights' (n 6) 287; Alessandro Somma, 'At the Roots of European Private Law: Social Justice, Solidarity and Conflict in the Proprietary Order' in Hans-W Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar 2011) 193–194.
[23] Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (2nd edn, Hart 2007) 166.

established[24]. Admittedly, the creation of special private law for the class of workers did not correspond with the original Maine's understanding of the status. Also in this context, however, the term could be used to signify a certain retreat of individualism and the liberally understood freedom of contract. Shifting focus from the individual towards his or her position within a pre-defined category of legal subjects, along with the use of mandatory rules, challenged the assumptions of these newly established private law frameworks and provoked reflections about historical circularity. Nevertheless, it was still possible to argue that, despite its strong reliance on civil law, labour law constituted a separate legal field, an exception to the rule. What best illustrates this way of thinking is the fact that provisions of labour law have never been incorporated into the civil codes of many European countries, including France and Germany, but continue to be enshrined in separate legal acts[25].

The move towards de-individualisation of the legal framework and the limitation of the freedom of contract did not stop here, however. After the Second World War, with the rise of consumer society, the question of imbalance of power went beyond the workplace and reached the consumption sphere. The focus shifted to the equilibrium between producers and consumers, or rather the lack thereof[26]. Over subsequent years the body of law purporting to ensure consumer protection has gradually increased, extending to both public and private law in the classical, continental European understanding. Interestingly, the pressure that consumer law puts on the public/private law divide does not appear to be most relevant for the present discussion. For example, a provision requiring that all products intended for "consumers" that "producers" place on the market are safe does not belong to the realm of classically defined private law, but can still be conceptualized as a status-related limitation of contractual freedom. The source of complexity is rather different and lies, among others, in the specific role of the European Union as an increasingly important actor in the analysed area[27].

2.3. European Union dimension

[24] Micklitz, 'The Legal Subject, Social Class and Identity-Based Rights' (n 6) 228.
[25] In France key labour law provisions are laid down in the Labour Code (*Code du travail*), in Germany a number of separate legal acts were adopted, such as Safety and Health at Work Act (*Arbeitsschutzgesetz*), Working Time Act (*Arbeitszeitgesetz*), etc.
[26] Hans-W Micklitz, Julien Stuyck and Evelyne Terryn (eds), *Cases, Materials and Text on Consumer Law* (Hart Publishing 2010) 2–3.
[27] Hans-W Micklitz and Dennis Patterson, 'From the Nation State to the Market: The Evolution of EU Private Law' (2012) Working Paper EUI LAW 2012/15.

Consumer society in the Western Europe, which began to develop in the 1960s, was initially nationally oriented. Post-war consumers benefited from a wider choice of products and services, yet most of them were produced and supplied in their Member States of residence, as globalisation and the internal market were still not in sight. National legislators responded to the needs of their national consumer societies by developing national policies and rules, more or less modelled on the American ideas. Klaus Tonner observes that consumers were at that time "an object of social welfare state", while consumer policy reflected "a shift from a liberal (…) to a Keynesian orientation of the economic policy"[28]. There was a common view that liberal markets led to market failures and that state intervention was necessary to make them work[29]. Consumer policies developed individually by Member States were, therefore, dominated by weaker party considerations, not the common market rhetoric. Nation states assumed a social role, which was to some extent similar to the one assumed in the field of labour law.

By contrast, integration within the European Economic Community (currently the EU) was, at that stage, almost exclusively market-related and focused on the implementation of four fundamental freedoms for the benefit of active market participants. New protective laws developed inconsistently at the Member States level did not fit very well into this approach as they inevitably created costs for companies and individuals wishing to sell goods or provide services across borders. Resolution of this apparent tension between the seemingly legitimate aims of particular national measures and the needs of market integration was sought before the European Court of Justice. The ECJ responded by developing a conceptual framework, under which practical guidance concerning the balance between both competing demands could be sought. At the same time, the scope of the Court's jurisdiction was extended significantly.

In its seminar *Dassonville* ruling, the ECJ broadened the concept of restriction of the free movement of goods by holding that "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are

[28] Klaus Tonner, 'From the Kennedy Message to Full Harmonising Consumer Law Directives: A Retrospect' in Kai Purnhagen and Peter Rott (eds), *Varieties of European Economic Law and Regulation: Liber amicorum for Hans Micklitz* (Springer 2014) 694–695; John Maynard Keynes, *The End of Laissez-Faire* (3rd edn, Leonard & Virginia Woolf 1927); John Maynard Keynes, *The General Theory of Employment, Interest and Money* (Macmillan, London 1936).

[29] Thierry Bourgoignie, 'Consumer Law and the European Community: Issues and Prospects' in Thierry Bourgoignie and David M Trubek (eds), *Consumer Law, Common Markets and Federalism in Europe and the United States* (de Gruyter 1987) 89–91.

to be considered as measures having an effect equivalent to quantitative restrictions" [30]. This logic was continued in *Cassis the Dijon*, in which the Court accepted the principle of consumer protection as an independent justification of national measures limiting the free movement of goods, but required it to follow the regular three-step test[31]. Firstly, the Court analysed whether the contested national measure impeded the free movement of goods between Member States. Due to a very broad *Dassonville* formula this condition was fulfilled rather easily. Secondly, it established whether national measure in question protected general interests, such as consumer protection. The third part of the analysis focused on the proportionality of the measure. Only if the third criterion was fulfilled, the national rule was considered to be in line with the free movement principle.

The role assumed by the Court is this early period is sometimes described as one of "a market regulator"[32] or "an engine of negative integration"[33]. However, it also had an impact on the process of positive harmonisation, which has not been assessed uniformly. Stephen Weatherill describes the path taken by the ECJ as a choice of an approach that "enhanced the significance of free movement law as means to cleanse the internal market of the trade-restrictive rules", which took place "at the expense of the need to introduce common harmonized EU standards"[34]. Tonner, however, appears more inclined to see the activism of the ECJ as an incentive for the European legislator to take initiative and considers consumer law as a good illustration of this dynamics[35]. There is, indeed, a certain coincidence in time between the *Cassis* ruling and the growth of the European body of rules affecting private law relationships. As these rules were (and still are) principally focused on the individuals' role in the market, "consumers" and "traders" – that is, passive and active market participants respectively – became their natural addressees.

The initial discussions concerning the private law dimension of the internal market project carried out at the Community level reflected the state of debate in the Member States and were driven by similar rationales, in particular the need to protect consumers due to their weaker position in the market. The narrowly defined (standard) consumer notion was one of

[30] Case C-8/74 *Dassonville*, ECLI:EU:C:1974:82, para. 5.
[31] Case C-120/78 *Rewe v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, ECLI:EU:C:1979:42.
[32] Miguel Poiares Maduro, 'Harmony and Dissonance in Free Movement' in Mads Andenas and Wulf-Henning Roth (eds), *Services and Free Movement in EU Law* (Oxford University Press 2003) 44.
[33] Geraint Howells and Thomas Wilhelmsson, *EC Consumer Law* (Ashgate 1997) 2.
[34] Stephen Weatherill, *The Internal Market as a Legal Concept* (Oxford University Press 2016) 56.
[35] Tonner (n 28) 700–701.

the consequences of that outlook. As the European private law acquis grew, it became increasingly apparent that the balance between market and social rationales needed to be struck differently in instruments related to different subject matters. As will be shown below, this led to a growing fragmentation of the personal scope of private/consumer law in the Union. Indeed, numerous measures which make use of traditional consumer protection tools or invoke consumer protection in the recitals have not integrated the standard consumer concept in their normative parts. Also where the term is used, its substantive (internal) dimension can differ quite significantly[36]. The wavering boundaries of consumer law and the "consumer" notion raise doubts about the use of the contract-to-status parallel in this context.

This, however, is not the only reason why the EU consumer law cannot easily be aligned with the status talk. As mentioned before, besides focusing on the pre-defined legal categories (de-individualisation), the status-contract dichotomy appears to be associated with traditional concepts of private law such as private autonomy and the freedom of contract. European private law, however, is not particularly concerned with these theoretical underpinnings, but rather instrumentalises them to achieve its objectives[37]. Even where consumer protection features prominently in the regulatory rationale, it is usually the internal market that plays the primary role, not least because most consumer protection rules are still based on Article 114 of the Treaty on the Functioning of the European Union (TFEU)[38]. Seen from a broader perspective, private law of the EU at the same time "establish[es] market freedoms and therefore increase[s] private autonomy" and "set[s] boundaries to this newly created autonomy"[39]. According to Hans-W. Micklitz, in doing so, the EU creates its own model of the freedom of contract characterised by the coexistence of these enabling and restricting (framing) dimensions[40]. In addition, it is equally important to observe that particular legal norms – for example information rules and rules affecting the content of legal relationships –

[36] Hedegaard and Wrbka (n 7) 76–77.
[37] Micklitz and Patterson (n 27) 12; Stefan Grundmann, Wolfgang Kerber and Stephen Weatherill, 'Party Autonomy and the Role of Information – an Overview' in Stefan Grundmann, Wolfgang Kerber and Stephen Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (de Gruyter 2001) 4. On the different role of private autonomy in the free movement law and in the secondary EU legislation, see: Stephen Weatherill, 'The Elusive Character of Private Autonomy in EU Law' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Involvement of EU law in Private Law Relationships* (Hart Publishing 2013). Gareth Davies, 'Freedom of Contract and the Horizontal Effect of Free Movement Law' in Ibidem
[38] Treaty on the Functioning of the European Union [2012] OJ C326/47 (consolidated version).
[39] Micklitz and Patterson (n 27) 12. See also: White Paper of the Completion of the Internal Market, COM (1985) 310 final.
[40] Hans-W Micklitz, 'On the Intellectual History of Freedom of Contract and Regulation' (2015) Working Paper EUI LAW 2015/09; see also: Reich, *General Principles of EU Civil Law* (n 2) 17.

affect private autonomy to a different degree[41]. Appreciation of the nuanced nature of this relationship can better inform the discussion about the role and the future of the "status-based" consumer protection in the European Union.

2.4. Interim conclusions

If the concept of status, which Henry Maine arguably had in mind when coining his famous aphorism, was to be understood literally, it would not seem suitable to describe the later developments in the area of labour and consumer law as a movement in the reverse direction. In my view, scholars have, nevertheless, used this parallel because: 1) introduction of certain types of mandatory rules protecting particular groups of legal subjects is liable to restrict private autonomy and, as such, can be contrasted with the "contract"; 2) categories thus created (worker, employer, consumer, trader) – although not completely aligned with Maine's original understanding – fall within the broad definition of a "status", which refers, on the one hand, to particular societal positions and implies, on the other hand, a certain degree of de-individualisation; 3) adaptation of Maine's aphorism did not seem to contradict his general worldview. Status could then be understood as a position in the society, which is normatively reflected by law, and to which mandatory, autonomy-restricting rules are attached.

Nevertheless, as has been shown above, this conception does not do justice to the complexity of the modern private law, particularly at the EU level. Therefore, for purposes of this project status will be understood simply as a category of legal subjects to which particular (especially mandatory) rules are attached. The following part of the thesis is meant as genealogy of these categories. Consumer status will refer to what I have earlier termed as a "standard consumer notion" encompassing natural persons acting outside their trade, business, craft or profession. Speaking of status-related consumer regulation I will thus mean regulation associated with this particular consumer status. Given the conception of the European private law as a function-oriented regulatory law, a look at the status-related consumer regulation from the point of view of its objectives appears particularly constructive. The project ultimately asks whether the objectives which have up till now been pursued by this approach – most notably

[41] Stefan Grundmann, 'Information, Party Autonomy and Economic Agents in European Contract Law' (2002) 39 Common Market Law Review 269.

ensuring consumer protection and improving the functioning of the internal market – can still be pursued in this way in the digital age.

3. Consumer status in the European private law

3.1. The rise of consumer status in the post-war consumer society

3.1.1. Historical background

The beginnings of EEC consumer policy date back to 1970s and are symbolically associated with the Council resolution on a preliminary programme for a consumer protection and information policy[42]. The 1975 document referred to the five basic consumer rights – the right to protection of health and safety, the right to protection of economic interests, the right to redress, the right to information and education, and the right to representation (to be heard) – and was followed by the second programme of 1981, in which the five rights were reasserted[43]. Shortly afterwards the European legislator began to adopt the so-called first generation of consumer directives focusing on the issues identified in the aforementioned policy documents. Some of them, like Directive 87/102/EEC on consumer credit[44], Directive 90/314/EEC on package travel[45], Directive 94/47/EC on timesharing[46] and, eventually, Directive 99/44/EC on consumer sales[47], referred to particular types of contracts. By contrast, Directive 84/450/EEC on misleading advertising[48] governed the broadly understood promotion of goods and services. Similarly, Directive 85/577/EEC on doorstep selling[49] and the later Directive 97/7/EC on distance contracts[50] focused not on the type of the contract

[42] Council resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy [1975] OJ C92/1.
[43] Council resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy [1981] OJ C133/1.
[44] Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit [1987] OJ L42/48.
[45] Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L158/59.
[46] Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis [1994] OJ L280/83.
[47] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12.
[48] Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising [1984] OJ L250/17.
[49] Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31.
[50] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19.

concluded, but rather on the factual context of the transaction. Further issues belonging to the core of national laws of obligations were addressed in Directives 85/374/EEC on product liability[51] and Directive 93/13/EEC on unfair terms in consumer contracts[52].

The following analysis will focus on several common themes, which emerge from the legal instruments adopted in this period. Particular attention will be drawn to the possible links between these overarching themes, their underlying objectives and the personal scopes of respective legal measures.

3.1.2. Informed decision-making

3.1.2.1. Introductory remarks

Providing market actors with an opportunity to inform themselves about the increasing variety and complexity of goods and services available on the market can be one of the tools used to correct the perceived asymmetry of information, and the ensuing imbalance of the bargaining position, between the party which has an easier access to the relevant information – usually the supplier of the characteristic contractual performance – and the recipient of that performance[53]. A combination of this general rationale with the welfare state logic of the post-war period resulted in the growing body of information rules adopted as consumer protection tools (i.e. instruments protecting, in particular, non-professional passive market participants). The approach fell on particularly fertile ground at the European level, for a number of reasons. First of all, it remained in line with the *Cassis* ruling, in which the Court gave preference to information rules over direct commands and prohibitions under free movement law[54]. Secondly, making information available to consumers was expected to improve their transactional choices and – through this – correspond to the proper functioning of the internal market, thus serving the principal EEC objective of market integration. Rules on consumer information also had another important advantage compared to alternative policy tools. Regarded as comparably least intrusive to the traditional private law method,

[51] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210/29.
[52] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.
[53] Similarly: Vincenzo Roppo, 'From Consumer Contracts to Asymmetric Contracts: A Trend in European Contract Law?' (2009) 5 European Review of Contract Law 315.
[54] Grundmann, Kerber and Weatherill (n 37) 18.

they were not only politically less controversial, but also less prone to variations following the changing currents in the political and intellectual debate in Europe[55].

As a result, information rules or, more generally, instruments aimed at improving decision-making capacities of passive market participants (especially the consumers) have, over time, established themselves as one of the most characteristic feature of the European private law. Instruments of this kind range from marketing standards for different products and services, over rules on pre-contractual disclosure, withdrawal rights as well as transparency and formal requirements found in contract law instruments, to less direct rules intertwined with liability provisions and fairness standards (discussed in relevant sections further below)[56]. The present section explores how these diverse rules began to develop and who were their respective addressees.

3.1.2.2. Misleading advertising

One of the first initiatives undertaken by the European legislator in order to ensure that market participants were able to take informed decisions with regard to envisaged transactions was related to the approximation of national rules on advertising. It resulted in the adoption of Directive 84/450/EEC, which aimed to protect "consumers, persons carrying on a trade or business or practising a craft or profession and the interests of the public in general" against misleading advertising and the unfair consequences thereof (Article 1). The act is noteworthy for two reasons. Firstly, it is clear from its preamble that the directive was directed, among others, at the protection of consumers and the fact that consumers were distinguished from "persons carrying on a trade or business or practising a craft or profession", on the one hand, and "the public in general", on the other, provides some initial hints as to who that term could

[55] This continues to be true and also applies to newer Member States. From a Polish perspective, for instance, the right to be informed can be aligned with the general principles guiding the performance of contractual obligations set out in Article 354 of the Civil Code, see: Act of 23 April 1964 – Civil Code (*Kodeks cywilny*), Dz.U. 2017 poz. 459 (codified version); Biruta Lewaszkiewicz-Petrykowska, 'Pojęcie Konsumenta' in Grażyna Rokicka (ed), *Model prawnej ochrony konsumenta* (Elipsa 1996) 88; Beata Pachuca-Smulska, 'Prawo do informacji i edukacji podstawą ochrony interesów konsumenta' in Maria Królikowska-Olczak (ed), *Ochrona konsumenta w prawie polskim i Unii Europejskiej* (CH Beck 2013) 44.

[56] Reich distinguishes four elements of the consumer right to information, namely: prohibition of misleading information, transparency of commercial statements and contract forms, information and disclosure obligations and a right of cancellation (cooling-off period), see: Norbert Reich, 'Crisis or Future of European Consumer Law' in Deborah Parry and others (eds), *The Yearbook of Consumer Law 2009* (Routledge 2008) 6. Other authors suggest that rules about whether the product fulfils the standard required by the Consumer Sales Directive are also "basically information rules", Grundmann, Kerber and Weatherill (n 37) 32.

possibly refer to. Since, however, consumers were only one group among protected legal subjects, the implicit status-related logic appeared to be of minor importance to the overall framework.

Indeed, while the directive necessarily focused on the activities of professional or commercial actors[57], the protection enshrined therein did not depend on any particular status of the parties to whom those activities were addressed. Misleading advertising was rather defined broadly as "any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor" (Article 2(2)). A subsequent provision clarified that the notion of a "person" referred to both natural and legal persons without mentioning the purposes for which those persons were to act.

Due to divergences between the Member States the degree of harmonisation achieved by the directive remained limited. The act did not introduce a general fairness concept; neither did it define the consequences of engaging in practices which actually fell under its scope in much detail. Essentially, Member States were required to ensure that "adequate and effective means exist for the control of misleading advertising in the interests of consumers as well as competitors and the general public" (Article 4). Several specific features of the procedures under which legal action against such advertising could be taken were also stipulated. The framework underwent significant modifications in the following years, which will be addressed in more detail further below.

3.1.2.3. Information rules in contract law instruments

Mandatory rules on pre-contractual disclosure can be found in most of the early European directives dealing with particular types of consumer contracts, such as Directive 87/102/EEC on consumer credit, Directive 90/314/EEC on package travel and Directive 94/47/EC on timesharing (later replaced with Directives 2008/48/EC [58], 2015/2302/EU [59] and

[57] See the definition of advertising in Article 2(1).
[58] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ L133/66.

2008/122/EC[60], respectively). Analogous provisions were also introduced to the instruments focused on the specific context of the transaction, such as Directive 85/577/EEC on doorstep selling and Directive 97/7/EC on distance contracts (both currently replaced with Directive 2011/83/EU on consumer rights[61]). Some of these rules were furthermore complemented by other instruments aimed to improve the informed decision-making such as formal requirements and withdrawal periods.

Financial services

Due to their long-term implications and a high level of complexity, financial services have traditionally been perceived as an area meriting special legislative attention. One of the first instruments adopted in this field at the EEC level was Directive 87/102/EEC on consumer credit, which provides a valuable insight into the regulatory approach, which the European legislator began to develop in this domain[62]. The approach at issue largely consists in rules aimed to improve consumers' decision-making capacities. Indeed, the directive provided for a number of information rules related to both pre-contractual (Article 6) and contractual stage (Article 4). The relevant disclosure duties were complemented by several formal provisions, pursuant to which all credit agreements and pre-contractual information had to be provided in writing. The rules in question applied only to agreements between "consumers" and "creditors", defined by reference to the standard functional-occupational criteria and could not be derogated from to the detriment of the former.

Tourism

Another group of agreements, which became a subject of specific European rules at a fairly early stage, were contracts concluded in the area of tourism. The interest of the European legislator in this field is understandable: tourism is both a manifestation of the free movement

[59] Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] OJ L326/1.
[60] Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts [2009] OJ L33/10.
[61] Directive 2011/83/EU (n 3).
[62] Similar elements could also be found in other instruments pertaining to the financial sector, for example in directives on payment services, insurance mediation or mortgage credit. Most of the currently applicable acts related to those issues also operate – at least partially – the formal consumer notion, even though, at an earlier stage, exceptions to this approach could be identified

of persons and has a clear economic dimension. Already in 1982 the Commission published its initial guidelines for a Community policy on tourism, in which it underlined the need to protect the tourists' interests "against any shortcomings in the services offered by travel agents, against the sometimes misleading advertisements about the accommodation offered and against the safety hazards in the places where they are staying"[63]. Taking account of these objectives the Commission foresaw the adoption of a draft directive "on the protection of consumers in connection with inclusive holidays", which took shape of Directive 90/314/EEC on package travel, package holidays and package tours. Four years later Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis was adopted, addressing yet another aspect of the Europeans' holiday mobility.

Both acts were based on Article 100a of the EEC Treaty referring to the establishment and the functioning of the internal market, even though in either case multiple references were also made to the protection of consumer interests. Similarly to Directive 87/102/EEC on consumer credit, these protective aims were pursued, among others, by means of detailed rules regarding the substance and the form of information to be communicated to consumers prior to the conclusion of the contract and contained in the contract itself. The Package Travel Directive also provided for some more elaborate rules on the marketing of holiday packages, by, firstly, requiring that the relevant marketing material does not contain any misleading information and by, secondly, stipulating the content and form of the information brochures provided to consumers (Article 3). These specific matters were, by contrast, not dealt under the Timesharing Directive. Consumers' ability to make informed transactional decisions was, nevertheless, safeguarded through another important mechanism – the right to withdraw from the contract. The right could be exercised without giving any reason within 10 calendar days from the contract being signed (Article 5).

Interestingly, the protection afforded by the original Package Travel Directive could not readily be described as status-based. The packages falling within its remit could be sold by an "organizer", defined as "a person who, other than occasionally, organizes packages and sells or offers them for sale, whether directly or through a retailer" (Article 2(2)), the latter being "a person who sells or offers for sale the package put together by the organizer" (Article

[63] Communication from the Commission to the Council – Initial guidelines for a Community policy on tourism, COM (82) 385 final.

2(3)). As a result, not only a sale of a package by a trader appears to have fallen under the act's scope[64]. Also the definition of the organizer's or retailer's counterparty, who the directive described as a "consumer", departed from the expected meaning of this term. The notion of consumer was rather defined as "a person who takes or agrees to take the package, or any person on whose behalf the principal contractor agrees to purchase the package or any person to whom the principal contractor or any of the other beneficiaries transfers the package" (Article 2(4)) and was therefore independent from the (professional or non-professional) nature of his or her activity. As a result, contracts between non-professional retailers and professional travellers could, theoretically, have fallen under directive's scope. The recent Directive 2015/2302, which replaced Directive 90/314/EEC, provided for some welcome clarification in that regard, through which it has, nevertheless, also brought the framework closer to the status rhetoric[65].

The broad personal and material scope of the Package Travel Directive stands in contrast to the Timesharing Directive, which is clearly limited to business-to-consumer transactions established by means of standard definitions. Status-related approach to consumer protection emerging from this act might be attributed to a certain degree of similarity between timesharing contracts and sale contracts, which is noticeable even at the terminological level. Indeed, Article 2 of Directive 94/47/EC referred to the protection of "purchasers", even if that essentially notion overlapped with the formal consumer definition known, for example, from the Consumer Credit Directive. Following the subsequent reform, the protection afforded by Directive 2008/122/EC is now explicitly linked to the consumer status[66].

Doorstep and distance contracts

Information rules also played a prominent role in the two directives aimed to address some of the risks associated with the growing consumer exposure to the modern marketing techniques. Directive 85/577/EEC related to the protection of consumers in respect of contracts negotiated away from business premises while Directive 97/7/EC pursued similar aims in respect of

[64] Howells and Wilhelmsson (n 33) 234.
[65] Directive 2015/2302 only applies to packages offered for sale or sold "by traders" and to linked travel arrangements facilitated "by traders". It maintains the extended personal scope on the other side of the transaction, but introduces an important terminological adjustment – the term "consumer" is replaced with the notion of a "traveller" (Article 3(6)). A limited range of business-to-business arrangements are left outside the scope of the act.
[66] Directive 2008/122/EC, Article 1(2).

distance contracts. Consumer's right to withdraw from the contract concluded during an excursion organized by the trader away from his business premises, or during a visit by a trader to consumer's home or place of work, was a central element of the former. This "cooling-off period" of at least 7 days was combined with a trader's obligation to provide a written notice of the consumer's right to cancel. A similar logic was followed in Directive 97/7/EC with respect to contracts concluded under an organized distance sales or service-provision scheme run by the supplier without the simultaneous presence of both parties (e.g. by telephone or on-line). Also here, the use of a specific marketing technique justified the introduction of a right to withdraw, which was further complemented by an expanded catalogue of information to be provided prior to the conclusion of the contract. What both directives had in common besides this overall scheme was their status-based approach to consumer protection. Both acts only applied to contracts concluded between formally defined "consumers" and "traders" (in the latter referred to as "suppliers"). Needless to say, both instruments were also based on the provisions of the Treaty related to the establishment of the internal market[67].

3.1.3. Safety

3.1.3.1. Introductory remarks

Improving safety of goods and services available on the market is another overarching theme related to consumer protection, which merits a closer examination. The need to take action in this area was already recognized in the preliminary consumer programme of 1975. The document explicitly referred to the socio-economic transformation, through which "the consumer, in the past usually an individual purchaser in a small local market, has become merely a unit in a mass market" as part of the justification for the envisaged legislative action[68]. The feeling that this development put consumer interests, including the most existential ones, at a greater risk was reinforced by a series of major scandals such as the widely publicised thalidomide tragedy. Over subsequent years a number of instruments, related in particular to the safety of products, were adopted, giving substance to the consumer's right to be protected against health and safety hazards, as well as, albeit to a

[67] This aspect appeared to be particularly dubious in case of the Doorstep Selling Directive due to limited cross-border dimension of such sales.
[68] Council resolution on a preliminary programme (n 42).

limited degree, against damage to his or her economic interests. Notably, even in the areas where the life and health of consumers were at stake, an overlap with the market-related rationales remained strong[69].

3.1.3.2. Safety of goods

In the area of goods the abovementioned objectives were pursued in two distinct ways. First path consisted in the technical harmonisation measures setting out safety requirements for a variety of products placed on the European market. These initially took shape of detailed product-specific rules, but were later replaced by the so-called "new approach", according to which products for which the essential safety requirements could be specified in common were to be grouped together in Council directives, while the elaboration of detailed specifications was entrusted to competent standardisation bodies[70]. The remaining gaps were eventually addressed with an act of a more horizontal nature, namely Directive 92/59/EEC on general product safety[71], which was later replaced with Directive 2001/95/EC[72].

The central provision of Directive 92/59/EEC was its Article 3(1) obliging producers to place only safe products on the market. The required standard of safety reflected the emerging European concept of justice, which had already began to develop in the area of product liability, discussed below. A safe product thus referred to one which "under normal or reasonably foreseeable conditions of use" did not present any risk or presented only minimum risks considered as acceptable in the light of relevant circumstances (Article 2(b))[73]. The norm was complemented by several information obligations, related, in particular, to the risks of the product. The term "producer" was given an extended interpretation, covering not only the manufacturer of the product and other persons presenting themselves as the manufacturer, but also the manufacturer's representative or the importer, when the manufacturer was not

[69] Howells and Wilhelmsson (n 33) 48.
[70] Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards [1985] OJ C136/1; see also: Jacques Pelkmans, 'The New Approach to Technical Harmonization and Standardization' (1987) 25 Journal of Common Market Studies 249.
[71] Council Directive 92/59/EEC of 29 June 1992 on general product safety [1992] OJ L228/24.
[72] Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety [2002] OJ L11/4.
[73] Hans-W Micklitz, 'Principles of Social Justice in European Private Law' (1999) 19 Yearbook of European Law 167; Hans-W Micklitz, 'Legitime Erwartungen Als Gerechtigkeitsprinzip Des Europäischen Privatrechts' in Ludwig Krämer, Hans-W Micklitz and Klaus Tonner (eds), *Law and Diffuse Interests in the European Legal Order: Liber amicorum Norbert Reich* (Nomos 1997) 245.

established in the Community, as well as other professionals in the supply chain, insofar as their activities may have affected the safety properties of a product placed on the market. By contrast, the act did not identify the formally defined "consumer" as the intended beneficiary of its provisions. Its scope of application was admittedly limited in Article 2(a) to the products which were "intended for consumers or likely, under reasonably foreseeable conditions, to be used by consumers even if not intended for them" and were "supplied or made available, whether for consideration or not, in the course of a commercial activity, and whether new, used or reconditioned". However, both the reference to the likelihood of consumer use as well as the lack of any formal consumer definition suggest that the scope of protection was intended to be comparably broad.

The second path through which the protection against health and safety hazards was to be achieved consisted in rules for the compensation for the harm occasioned by the use of the product[74]. This direction is best illustrated by Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. Interestingly, the initial plan, outlined already in the preliminary programme, also referred to the protection of consumers against damage caused by defective services. However, the respective legislative proposal never became law[75]. By contrast, Directive 85/374/EEC is still in force.

Similarly to the general product safety framework the focus of the Product Liability Directive remains on the producer, whom Article 1 holds liable "for damage caused by a defect in his product". Article 6 specifies when a product is to be regarded as defective. Interestingly, also in this regard, a certain link to the information paradigm can be identified. Pursuant to Article 6 a product is defective when it does not provide the safety "which a person is entitled to expect" taking all circumstances into account, *inter alia*, "the presentation of the product". As in the product safety law, producers are thus incentivised to provide information about the product's intended method of use, as provision of that information reduces the risk that the damage caused by a misuse of the product will give rise to consumer claims[76]. At the same time, the use of the concept of legitimate expectations seeks to strike a balance between the

[74] Howells and Wilhelmsson (n 33) 33.
[75] Proposal for a Council Directive on the liability of suppliers of services. COM(90) 482 final.
[76] Stephen Weatherill, 'Justifying Limits to Party Autonomy in the Internal Market – EC Legislation in the Field of Consumer Protection' in Stefan Grundmann, Wolfgang Kerber and Stephen Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (de Gruyter 2001) 178.

interests of consumers and of producers, in line with the emerging European principle of justice situated somewhere in between "the social justice-driven consumer protection law and an allocative justice-driven private law"[77]. The protective element is underscored by the fact that the liability of the producer is independent from his fault (Article 4) and may not, in relation to the injured person, be limited or excluded by a provision limiting his liability or exempting him from it (Article 12).

Personal scope of Directive 85/374/EEC can only be established on a closer inspection. The notion of producer used in the directive was, again, given an extended definition similar to that found in the general safety framework (Article 3(1)). This reflects an assumption that effective compensation of consumers for the damage incurred due to a defect of a product requires a wider pool of potential defendants[78]. While it might not be clear at first sight, the range of addressees of consumer claims is primarily meant to cover commercial and professional suppliers. In some instances this interpretation flows directly from the relevant definition (Article 3(2)), whereas in other situations the nature of defendant's activity becomes relevant as part of his defence. According to Article 7(c) the producer shall not be liable as a result of the directive if he proves that "the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business". It is worth pointing out that the original proposal did not contain an exemption of this kind, which shows that linking liability to the commercial or professional character of the activity was a conscious policy choice[79]. Normative content of the notion of a producer nevertheless remains slightly different from that typically associated with the notion of a "trader" since for the defence to be successfully invoked both conditions have to be fulfilled cumulatively[80].

Personal scope of the Product Liability Directive is also not immediately apparent with respect to the plaintiffs' side. While the term "consumer" is mentioned numerously in the recitals, the normative part of the directive refers more broadly to an "injured person". As it turns out, however, the *prima facie* broad scope of protection is, in fact, limited to the compensation of the damage caused by death or personal injury occasioned by the use of the

[77] Micklitz, 'Principles of Social Justice in European Private Law' (n 72) 172, 193–194.
[78] Geraint Howells, *Comparative Product Liability* (Dartmouth 1993) 30.
[79] Proposal for a Council Directive Relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, COM(76)372 final.
[80] The defence is therefore not available, for instance, to non-professional manufacturers, Howells, *Comparative Product Liability* (n 78) 42.

product (Article 9(a)). The situation is different for the property damage. Damage to the defective product itself is regarded as pure economic loss and excluded from the scope of directive altogether. As far as damage to other property is concerned, only damage to, or destruction of, an item of property, which is of a type ordinarily intended for private use or consumption, and which was used by the injured person mainly for his own private use or consumption is covered (Article 9(b)). This seems to be the main area in which consumers' economic interests are being taken into account. In this respect, the range of potential plaintiffs is significantly narrower and comes closer to the consumer status known, for example, from the Consumer Credit Directive.

Compensation rules discussed above only refer to the damage caused by the defects in a product and, as such, appear to be strongly interlinked with the sales paradigm. As mentioned before, the idea to adopt a similar measure with respect to defective services was consciously rejected by the Member States. A focus on the sale of goods is also apparent from the general product safety framework. While all of these measures are aimed to protect consumers, their reliance on the status-related (functional-occupational) elements is not fundamental. Directive 92/59/EEC on general product safety admittedly focuses on the products "intended for consumers", but fails to define this notion. Its scope of application is furthermore extended to products "likely to be used by consumers". Since neither of these elements has been amended or clarified as part of later reforms, this more general approach to consumer protection appears to be intentional[81]. Personal scope of protection granted by Directive 85/374/EEC is similarly opaque. While at first sight it may seem that the act is not dependent on the status-related criteria, a closer analysis shows that this is only true to a certain extent. As regards the defendant's side, the list of exemptions reveals the desire to impose liability mainly on commercial or professional suppliers. At the same time, broader range of potential plaintiffs only refers to the compensation for death or personal injury. To justify this disparity a distinction between existential and economic interests can be made[82]. Only with respect to the former – health and safety – the scope of the directive is extended significantly beyond the status-based category, which brings the consumer notion used in its recitals closer to the broader concepts such as citizen or legal subject. However, the same logic does not apply to

[81] Directive 2001/95/EC on general product safety.
[82] Existential consumer interests may, however, also have economic nature, as seen in the aftermath of the financial crisis. More on the distinction see: Grundmann, 'Targeted Consumer Protection' (n 6) 231–234.

the protection of consumers' economic interests, in respect to which the status-related approach reappears.

3.1.4. Contractual fairness

3.1.4.1. Introductory remarks

The third overarching theme of the early measures pertaining to consumer protection will hereinafter be discussed under the heading of contractual fairness. The discussion refers, on the one hand, to Directive 93/13/EEC on unfair terms in consumer contracts (UCTD) and, on the other hand, to Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees. Both instruments share a number of common features, most prominently a higher degree of intrusion in the parties' ability to define the content of the bargain – compared, in particular, with the rules concerned with informed decision-making[83] – and a strong reliance on status-related elements.

3.1.4.2. Fairness dimension

Unlike the case of product safety law, considerations of justice which lead to the involvement of the two directives in the legal relationships between private parties falling under their scope were not associated with health policy grounds, but with a more economically-oriented aspect of fairness in contractual relations[84]. Fairness dimension of Directive 93/13/EEC is already clear from its title. The act establishes a framework for a fairness control of a range of terms in pre-formulated B2C contracts. Key parameters of this assessment are laid down in Article 3(1), pursuant to which "a contractual term that has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer". Further guidance is provided in the preamble of the act, where a certain link

[83] Stephen Weatherill, *EU Consumer Law and Policy* (2nd edn, Edward Elgar 2013) 143–171.

[84] This is not to say that elements related to personal integrity are not taken into account, note point 1(a) of the Annex to Directive 93/13/EEC, which refers to fairness control of contractual clauses excluding or limiting trader's liability in the event of the death or personal injury of a consumer. It is also recognized that economic loss may, in certain circumstances, put the existential interests of consumers at risk. See in particular: case C-415/11 *Mohamed Aziz*, ECLI:EU:C:2013:164; Hans-W Micklitz and Norbert Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 Common Market Law Review 771; Grundmann, 'Targeted Consumer Protection' (n 6) 231–234.

between the concept of good faith and that of legitimate expectations is established[85] echoing the European concept of justice mentioned already in the discussions of the product safety and liability[86]. Only the terms defining the main subject matter of the contract and the price or remuneration escape the evaluation and, moreover, only provided that additional transparency conditions are fulfilled. In the remaining respects, the information asymmetries are considered to be insurmountable[87]. Consequently, in line with Article 6(1), contract terms which fall short of the fairness standard prescribed in the directive are not binding on the consumer.

To gain a better understanding of this fairness dimension of Directive 93/13/EEC a look into the legislative developments surrounding its adoption is useful. Particularly interesting is the contrast between the two proposed drafts and the final text of the directive. The fairness control mechanism was originally more expansive and also extended to individually negotiated contracts. The test itself went further as well and additionally covered situations when performance of the contract was "significantly different from what the consumer could legitimately expect" or was "unduly detrimental to the consumer"[88]. As mentioned before, the eventual outcome focuses on the principle of good faith, read in conjunction with legitimate expectations, and on the balance between rights and obligations; henceforth, as it would seem, commutative and substantive justice[89]. Since, however, fairness control is limited to pre-formulated terms only and is accompanied by important provisions related to the process of arriving at an agreement (e.g. transparency[90]), its procedural justice element remains at least as strong[91].

[85] In particular the preamble indicates that "the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account"

[86] Micklitz, 'Principles of Social Justice in European Private Law' (n 73) 195–196.

[87] Stefan Grundmann, 'European Contract Law(s) of What Colour?' (2005) 1 European Review of Contract Law 194.

[88] Proposal for a Council Directive on unfair terms in consumer contracts, COM(90) 322 final, Article 2(1); Amended proposal for a Council Directive on unfair terms in consumer contracts, COM(92) 66 final, Article 3(1) and 4(1).

[89] Wojeciech Sadurski, 'Social Justice and Legal Justice' in Hans-W Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar 2011) 61–79.

[90] On the role of the transparency requirements set out in Article 5 of the Directive see e.g. Manfred Wolf, 'Party Autonomy and Information in the Unfair Contract Terms Directive' in Stefan Grundmann, Wolfgang Kerber and Stephen Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (de Gruyter 2001) 321, 325–326.

[91] Thomas Wilhelmsson, 'Various Approaches to Unfair Terms and Their Background Philosophies' (2008) 14 Juridica International 51; Chris Willett, 'General Clauses and the Competing Ethics of European Consumer Law in the UK' (2012) 71 Cambridge Law Journal 412, 422.

A look at the legislative process preceding and following the adoption of Directive 93/13/EEC also reveals a certain conceptual proximity between that instrument and Directive 99/44/EC on consumer sales. One example, related to the inclusion of performance-oriented elements in the original unfairness test, has already been mentioned. Furthermore, the amended proposal for the UCTD provided for a number of basic rules on the conformity of goods, commercial guarantees as well as quality requirements for services, the exclusion or limitation of which would have been considered unfair in all circumstances[92]. The provision was nevertheless withdrawn during legislative negotiations. The only reminder of this discussion is provided in point (b) of the Annex, which now contains a merely indicative list of potentially unfair terms[93]. Consequently, terms which "inappropriately exclude or limit the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations" are among those which can, in particular, be considered unfair. Despite this significant confinement of the scope of harmonisation, the discussion recreated above points to the existence of fairness arguments in the subject matter of both directives.

In view of the above one may be surprised that the fairness dimension of Directive 99/44/EC does not go further, possibly in the shape an objective market standard based on consumer's "reasonable expectations" as envisaged in the preceding policy documents[94]. The eventual outcome is, by contrast, largely modelled on the United Nations Convention on Contracts for the International Sale of Goods, designed for sales between businesses[95]. The central provision of Directive 99/44/EC is its Article 2, which, firstly, requires the seller to deliver goods to the consumer which are in conformity with the contract of sale, and, secondly, lists a number of conditions, which – if fulfilled cumulatively – create a rebuttable presumption that the goods meet the standard agreed by the parties. These include elements such as compliance with the description given by the seller, fitness for purposes set out in the directive as well as quality and performance features which are normal in the goods of the same type and which can reasonably be expected by the consumer given the nature of the goods and, importantly, any public statements regarding their specific characteristics made not only by the seller, but

[92] Amended proposal (n 88), Article 6 in conjunction with point 1(b) of the Annex.
[93] On the so-called indicative list see: Hans-W Micklitz, 'Unfair Terms in Consumer Contracts' in Norbert Reich and others (eds), *European Consumer Law* (2nd edn, Intersentia 2014) 155–157.
[94] Commission Green Paper of 15 November 1993 on guarantees for consumer goods and after-sales services, COM(93) 509 final.
[95] Stefan Grundmann, 'Consumer Law, Commercial Law, Private Law: How Can the Sales Directive and the Sales Convention Be so Similar?' (2003) 14 European Business Law Review 237.

also the producer or his representative (Article 2(2)). This shows that the concept of legitimate expectations has not been withdrawn completely, but constitutes one of the criteria for establishing the conformity of goods with the contract. If non-conformity is established, a number of remedies laid down in the directive become available. Elements such as the reversal of the burden of proof concerning the fact that the non-conformity existed at the time of delivery (Article 5(3)) aim to further assist consumers in pursuit of their claims. Overall, however, the fairness dimension is considerably less pronounced in the final act than it was previously envisaged.

3.1.4.3. Status-based approach

In addition to the abovementioned inroads in the content of the contractual bargain based on (more or less pronounced) considerations of contractual fairness, Directives 93/13/EEC and 99/44/EC are also characterised by similarly construed personal scopes. Based on standard definitions of "consumers" and their respective counterparts (sellers or suppliers), and applicable only to contracts concluded between these two types of parties, both acts can be regarded as prominent representatives of status-based consumer regulation[96].

The status-related approach makes the overall assessment of the analysed regimes somewhat ambivalent. An instrument in which, like in the case of Directive 93/13/EEC, a great deal of importance is attached to procedural justice could generally be seen as one seeking to restore material freedom of contract and cure asymmetries specific to standard-form conditions[97]. At the same time, the fact that the directive only applies to business-to-consumer relationships underlines its different rationale related to the imbalance of bargaining power which is not only the result of information asymmetries, but also of the presumed economic disadvantage of consumers vis-à-vis their professional counterparts[98]. It is also along these lines that the directive has been interpreted in the more recent ECJ case law[99]. Similarly, Directive 99/44/EC on consumer sales contains a number of elements which could easily be applied outside the B2C scenario and, as demonstrated by *Putz/Weber*, does not necessarily seek to

[96] Articles 2(b) and 2(c) of Directive 93/13/EEC; Articles 1(2)(a) and 1(2)(b) of Directive 99/44/EC, respectively. On the linguistic difference between "purposes which are outside trade, business or profession" and "purposes not related to those activities" see: Hedegaard and Wrbka (n 7) 78.
[97] Micklitz, 'Principles of Social Justice in European Private Law' (n 73) 196. Grundmann, 'Information, Party Autonomy and Economic Agents in European Contract Law' (n 41) 275.
[98] Wilhelmsson (n 91).
[99] Case C-137/08 *Pénzügyi Lízing*, ECLI:EU:C:2010:659, para. 46.

place consumers in a more favourable position than they could claim under the contract of sale [100]. In a considerable part of the Court's jurisprudence, however, the status-related approach has proven to have impact on the choice of the (more protective) line of reasoning[101].

3.1.5. Interim conclusions

As seen from the above, first two decades of the European involvement in the field of consumer protection have led to the emergence of several overarching themes such as informed decision-making, safety and contractual fairness. The initial impulse for establishing rules directed at these aims came from the national level, where protection of the weaker party, particularly in the context of sales, was the main rationale. Directive 85/577 on doorstep selling is one of the prime examples. At the same time, already in this early phase, and especially after the adoption of the Single European Act, a growing intertwinement of protection and market-oriented elements in the European law-making activity can be observed. This tendency is reflected, among others, in the increasing use of information paradigm as a tool of consumer protection[102]. As seen from the above, information rules had already been used in the early phase of harmonisation and – together with other elements characteristic for what Hans-W. Micklitz has later termed as "access justice"[103] – become more and more significant in the subsequent years. What is more, also where protective considerations, associated with safety or fairness, are more outright, the interaction between market and protection as well as the search for a balance between the interests of different market actors are visible. The concept of legitimate expectations found is several legal acts and the evolution of consumer sales law are a good illustration of that point. Consumer as a weaker party in need of special protection has not vanished completely and appears most

[100] Joined cases C-65/09 and C‑87/09 *Weber/Putz*, ECLI:EU:C:2011:396, para 60.
[101] See e.g. case C-404/06 *Quelle*, ECLI:EU:C:2008:231, para. 35–36; case C-497/13 *Faber*, ECLI:EU:C:2015:357, para. 42–47; case C-149/15 *Wathelet*, ECLI:EU:C:2016:840, para. 39–40.
[102] Its different manifestation is the concept of an "average consumer": Vanessa Mak, 'The "Average Consumer" of EU Law in Domestic and European Litigation' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Involvement of EU law in Private Law Relationships* (Hart Publishing 2013) 333–356.
[103] Hans-W Micklitz, 'Social Justice and Access Justice in Private Law' (2011) Working Paper EUI LAW 2011/02.

prominently in Directive 93/13/EEC on unfair contract terms, as interpreted by the Court of Justice[104].

What also emerges from the discussion of abovementioned instruments is the gradual development of a consistent consumer "status". The category which features most prominently in this context is that of a natural person acting outside his or her trade, business, craft or profession. Occasionally other categories of legal subjects appear. Particularly interesting from this point of view is Directive 90/314/EEC on package travel whose normative part referred directly to a "consumer", but understood this term differently. Finally, in some of the legal acts considered above, the reliance on status-related elements is less pronounced. It has been observed, for instance, that the Product Liability Directive refers numerously to the notion of a consumer in its preamble, but opts for a more general category of an "injured party" in its normative part. Nevertheless, even in this framework elements associated with the standard consumer notion are not insignificant – as demonstrated by the scope of liability for the damage to property.

Noteworthy is furthermore the original intention of the European legislator to also address the protection of consumer health and safety in connection with the provision of services. The relevant proposal did not gain the necessary support from the Member States, however. Similarly, no measure addressing the quality of services in a way comparable to Directive 99/44/EC on consumer sales has so far been adopted or even proposed, even though performance of services contracts had been considered in the proposal for the UCTD. The European harmonisation efforts thus appeared to be particularly successful where they either picked up on existing national discussions or, conversely, where they focused on entirely new market developments, which did not affect the core of national frameworks, such as timesharing or distance sales. This does not mean that the Community legislator has left the interests of service recipients entirely unprotected. European involvement in the area of services has, however, followed a distinctly different path. The relevant developments are discussed in more detail further below. Before turning to this discussion, several observations regarding the application and the evolution of the consumer status in directives of first generation are made.

[104] Hans-W Micklitz, 'The Consumer: Marketised, Fragmentised, Constitutionalised' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016).

3.2. The consolidation and fragmentation of consumer status in the services society

3.2.1. Consolidation of consumer status in the areas covered by the acts of first generation

3.2.1.1. Consumer status in case law of the Court of Justice

As the European consumer *acquis* expanded, the Court of Justice was increasingly called upon to interpret new rules. This included the very basic questions of personal scope posed in several different contexts – from *Di Pinto*[105] and *Dietzinger*[106] on doorstep selling and *Idealservice*[107] on unfair terms to *Benincasa*[108], *Gruber*[109] and, more recently, *Česká spořitelna*[110] on jurisdiction. In all of these cases the Court appeared to prioritize legal certainty over flexibility and opted for a restrictive interpretation of the consumer notion. In the three latter cases the Court's restrictive view could be linked to the fact that the privileged position of consumers under the Brussels Convention[111] (currently regulation[112]) constituted an exception to the rule of *actor sequitur forum rei* and, for the sake of procedural certainty, had to be interpreted narrowly. However, a similar reasoning is not necessarily transferable onto other contexts[113]. Why, then, were arguments about the notion of consumer so easily rejected in cases like *Di Pinto*? Here the question referred was whether a trader canvassed with a view to the conclusion of an advertising contract concerning the sale of his business could be regarded as a consumer for purposes of the Doorstep Selling Directive. Interestingly, both the Commission and the Advocate-General argued in favour of such an interpretation, submitting that a trader in the situation at hand "finds himself in an unprepared state similar to that of an ordinary consumer"[114]. The Court was not convinced, however, and decided to place more value on the objective elements. It noted, in particular, that the general wording of

[105] Case C-361/89 *Di Pinto*, ECLI:EU:C:1991:118.
[106] Case C-45/96 *Bayerische Hypotheken- und Wechselbank v Dietzinger*, ECLI:EU:C:1998:111.
[107] Joined cases C-541/99 and C-542/99 *Cape and Idealservice*, ECLI:EU:C:2001:625.
[108] Case C-269/95 *Benincasa v Dentalkit*, ECLI:EU:C:1997:337.
[109] Case C-464/01 *Gruber*, ECLI:EU:C:2005:32.
[110] Case C‑419/11 Česká spořitelna ECLI:EU:C:2013:165.
[111] Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, English version: OJ [1978] L 304/ 36
[112] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.
[113] Reich and Micklitz (n 8) 53.
[114] Case C-361/89 *Di Pinto*, para. 17.

the consumer definition made it impossible "to draw a distinction between normal acts [of a business] and those which are exceptional in nature"[115]. It follows that, other than in the context of dual purpose contracts, and also there only under fairly strict conditions[116], a connection between the transaction at issue and one's commercial or professional activity disqualifies a person as a consumer. Against this background the judgment in *Idealservice*, in which the ECJ was asked if, under any circumstances, a legal person could be regarded as a consumer pursuant to the UCTD, does not come as a surprise. The Court did not go into much detail in its response, but replied with a plain no. However, there was already more room for discretion in *Dietzinger*, which involved a son giving a guarantee to a bank in favour of his father's business. Still, the ECJ refused to treat the son as a consumer. Possibly in all of these cases the Court was simply unwilling to add another layer of complexity to the already complicated picture arising under the, then dominant, minimum harmonisation approach and attached greater importance to the potential review of national disparities (both in the B2C context beyond the minimum standard and in contexts other than B2C) under free movement law. In the meantime this very approach was coming under an increased pressure from the European Commission, as discussed below.

3.2.1.2. Legislative dimension

First two decades from the entry into force of particular consumer directives adopted throughout 1980s and 1990s was also a good time for the European legislature to reassess their practical implications and ask whether any adjustments to the emerging regulatory method should be made. A number of processes which created a new context for such an assessment were mentioned in the Consumer policy strategy 2002-2006: growing importance of the services sector, expansion of the Internet, adoption of the single currency and the imminent Community enlargement[117].

Prima facie these intensified discussions did not have a profound effect on the aspect of consumer legislation which remains the focus of this examination. In nearly all of the areas

[115] Case C-361/89 *Di Pinto*, para. 15.
[116] In this respect the Court has so far only had a chance to address this question in the context of jurisdiction, see case C-464/01 *Gruber*, para. 39. A somewhat different interpretation flows from the more recent legislative initiatives such as Directive 2011/83/EU on consumer rights (recital 17).
[117] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – Consumer Policy Strategy 2002-2006, COM(2002) 208 final.

discussed above the status-related approach to consumer protection appeared to stabilise. Personal scope of the newly adopted acts continued to be limited to business-to-consumer transactions only and the consumer notion was more and more consistently associated with its standard meaning. This can be observed, *inter alia*, in the area of marketing law, where a framework with a more limited subject-matter (misleading advertising), but a broader personal scope was replaced with a status-related regime for "unfair commercial practices" conceived more broadly[118]. The fact that Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (UCPD) is liable to generate spill-over effects upon relationships falling outside their scope[119] and that it allows for a more nuanced application at the internal level[120] remains without prejudice to the present point.

A process of consolidation and expansion of the consumer status can also be observed with respect to other rules aimed at improving consumers' decision-making capacities. In this respect a move from a modest set of status-based rules towards more robust and more clearly defined frameworks can be seen. By way of an example, status-based approach underlying the 1987 directive on consumer credit was maintained in the subsequent Directive 2008/48/EC on credit agreements for consumers. As a result of the reform, the scope of information duties imposed on creditors was significantly expanded. The same approach was also applied in the newly adopted Directive 2002/65/EC concerning the distance marketing of consumer financial services[121]. Finally, a similar process occurred with respect to timesharing. To better reflect to status-based nature of the framework, Directive 2008/122/EC even replaced the term "purchaser" with the standard "consumer" definition.

The desire to reserve the consumer notion for its standard meaning led to somewhat different consequences in the area of package travel. As mentioned before, the original Directive

[118] This pushed the framework established by Directive 84/450/EEC in another status-related direction, namely that encompassing the relationships between traders themselves, see: Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising [2006] OJ L376/ 21.

[119] Thomas Wilhelmsson, 'Scope of the Directive' in Geraint Howells, Hans-W Micklitz and Thomas Wilhelmsson (eds), *European Fair Trading Law : The Unfair Commercial Practices Directive* (Ashgate 2006) 65, 67; Ulf Bernitz, 'The Unfair Commercial Practices Directive: Its Scope, Ambitions and Relation to the Law of Unfair Competition' in Stephen Weatherill and Ulf Bernitz (eds), *The Regulation of Unfair Commercial Practices Under EC Directive 2005/29: New Rules and New Techniques* (Hart Publishing 2007) 41.

[120] At the internal level, the framework established by the UCPD is more nuanced and refers, on the one hand, to an "average consumer" and, on the other hand, to "consumers who are particularly vulnerable to the practice or the underlying product" .

[121] Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC [2002] OJ L271/16.

90/314/EEC referred to a "consumer" but associated this term with a different (broader) meaning. This inconsistency was corrected in Directive 2015/2302, which replaced the consumer notion with that of a "traveller". The directive can thus be seen as a sign of consolidation of the consumer category, in that it acknowledges its existence and makes a clear distinction therefrom. At the same time it forms a manifestation of the growing multiplication of statuses under EU law, which has become increasingly discernible in the area of services[122].

In all of the instruments mentioned above the intertwinement of consumer policy and market integration not only remained strong, but appeared to gain further momentum[123]. The shift first took place at the level of policy documents. One of the key aims identified in the Consumer policy strategy 2002-2006 was thus the creation of "a more consistent environment for consumer protection" which would no longer focus on the protection, but rather on making it possible for consumers and business "to realise the benefits of the internal market"[124]. Consequently, despite the Treaty reforms that occurred in the meantime, most notably resulting in the inclusion of a separate legal basis referring to consumer protection (current Article 169 TFUE) [125], most legislative initiatives affecting the position of consumers have not only continued to derive their legal basis from the provisions related to the proper functioning of the internal market, but have also sought to move away from the principle of minimum harmonisation[126]. Continuous reliance on (what is now) Article 114 TFUE in this area along with the aforementioned push for a full harmonisation highlights the importance of

[122] A similar process can be observed with respect to payment services. Initially the legal framework in this area was not related to a consumer status, but introduced the category of a customer to which it attached both mandatory and, interestingly, non-mandatory disclosure rules, see: Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers [1997] OJ L43/25. The successive directives on payment services continue to apply a broader category (of a payment service user) but also introduce the consumer category, for whom disclosure rules are always mandatory, see: Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC [2007] OJ L319/1; Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L337/ 35.

[123] To the extent that consumer law began to be associated more with trade practices or market behaviour law, see: Norbert Reich, 'From Contract Law to Trade Practices Law: Protection of Consumers' in Thomas Wilhelmsson (ed), *Perspectives of Critical Contract Law* (Dartmouth 1993) 55; Hans-W Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic' (2012) 35 Journal of Consumer Policy 283.

[124] Consumer Policy Strategy 2002-2006 (n 117); see also: Dirk Staudenmayer, 'The Place of Consumer Contract Law Within the Process on European Contract Law' (2004) 27 Journal of Consumer Policy 269.

[125] Hans-W Micklitz and Norbert Reich, 'Verbraucherschutz Im Vertrag Über Die Europäische Union – Perspektiven Für 1993' (1992) 3 Europäische Zeitschrift für Wirtschaftsrecht 593.

[126] Weatherill, *The Internal Market as a Legal Concept* (n 34) 210.

market considerations in the consumer policy[127]. It also sheds more light on the functions of the harmonisation policy in general. These, according to Weatherill, have gradually been associated not only (or not so much) with the removal of barriers to trade stemming from the co-existence of different national tools of consumer protection, but rather with the promotion of "consumer confidence" in the viability of the border-free market[128]. Such an approach envisages a consumer who wishes to engage actively in the increasingly integrated market. This view appears to be supported by the type of legal tools applied to protect consumer interests, many of which do not really aim at the protection of the weaker or at social redistribution, but rather at the creation and safeguarding of "access justice"[129]. Apparently, however, confidence of the European consumers does not prevent them from relying on their national legal frameworks when engaging in the internal market, or the consumers are at least not expected to inform themselves about the content of the minimum standard established by the EU law – otherwise the push for full harmonisation would be difficult to explain from this point of view. This leads to a number of contradictions. Consumer law turns into market behaviour law and makes use of the instruments which could be equally useful for other market participants, but remains distinctly status-based. At the same time, the full harmonisation approach effectively prevents Member States from imposing a higher standard of protection in areas where an increased social protection could possibly be needed[130]. All this is done with a view to improving the coherence of European private law, while neither the potential fragmentation between the rules for B2C and other types of legal relationships (be it business-to-business or consumer-to-consumer), nor the risk of growing incoherence at national level appears to be a concern[131]. The following section looks into the parallel developments in the areas concerned more specifically with the provision of services and seeks to identify and assess an alternative approach emerging from there.

[127] Micklitz, 'The Consumer: Marketised, Fragmentised, Constitutionalised' (n 104).
[128] Weatherill, 'Justifying Limits to Party Autonomy in the Internal Market – EC Legislation in the Field of Consumer Protection' (n 76) 194–196.
[129] Micklitz, 'Social Justice and Access Justice in Private Law' (n 103). Hans-W Micklitz, 'Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought Provoking Impulse' (2013) 32 Yearbook of European Law 266, 310.
[130] Hans-W Micklitz and Norbert Reich, 'Crónica de Una Muerte Anunciada: The Commission Proposal for a "Directive on Consumer Rights' (2009) 46 Common Market Law Review 471.
[131] See, in particular: Green Paper on the Review of the Consumer Acquis, COM(2006) 744 final; Communication from the Commission to the European Parliament and the Council - A more coherent European contract law - An action plan, COM(2003) 68 final; Stephen Weatherill, 'Consumer Rights Directive: How and Why a Quest for Coherence Has (Largely) Failed, The' (2012) 49 Common Market Law Review 1279.

3.2.2. Fragmentation of consumer status in the areas specifically concerned with the provision of services

3.2.2.1. Introductory remarks

As mentioned before, the emerging consumer policy of the European (Economic) Community appeared to focus on the consumer's transformation from "an individual purchaser in a small local market"[132] to an addressee of "articles for mass consumption"[133] – and therefore essentially on the sale of goods. At the same time, and particularly as the European policy in that area had developed later than in its Member States, it could not fail to be aware of the growing role of services sector. Already in the second consumer programme from 1981 the Commission underlined the increasing importance of services and announced an expansion of Community action in that area[134]. It distinguished between: 1) commercial services connected with products, 2) commercial services not connected with products, and 3) public and quasi-public services in sectors such as energy, transport and telecommunications (later referred to as electronic communications). With respect to the first group, actions aimed at improving the quality of after-sales services were envisaged, but did not result in broader legislation[135]. The second category referred to areas such as tourism, credit and insurance, and here a number of specific measures had indeed been adopted. However, as pointed out before, more general initiatives concerning the safety or the conformity of services with the contract had not been successful despite several attempts to bring these issues back on the table[136]. The situation was different with respect to the third category, where the EC level measures have had a lasting impact on the whole sectors of economy. Before turning to the discussion of the digital market, it is useful to first draw attention to the developments observed in the two regulated network markets, energy and electronic communications, followed by a brief discussion of the E-Commerce and Services Directives. This is due not only to the interesting patterns in

[132] Preliminary programme 1975
[133] The Community's industrial policy. Commission Memorandum to the Council COM(70) 100, p. 5.
[134] Council resolution on a second programme (n 43); see also, among others: Consumer Policy Strategy 2002-2006 (n 117); Communication from the Commission – Priorities for consumer policy 1996-1998, COM(95) 519 final; Communication from the Commission to the Council and the European Parliament – An Internal Market Strategy for Services, COM(2000) 888 final; Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, COM(2002) 208 final.
[135] Hans-W Micklitz and Norbert Reich, 'Sale of Consumer Goods' in Norbert Reich and others (eds), *European Consumer Law* (2nd edn, Intersentia 2014) 168–169; Grundmann, 'Consumer Law, Commercial Law, Private Law' (n 95).
[136] See e.g.: Commission three year action plan of consumer policy in the EEC 1990 1992, COM(90) 98 final; Consumer Policy Strategy 2002-2006 (n 117).

personal scopes of relevant legal acts, but also to the new overarching themes and objectives emerging from these frameworks.

3.2.2.2. Regulated network markets

3.2.2.2.1. From liberalisation to re-regulation

Services provided in the large network markets are linked to the concept of "services of general interest", defined as "services which the public authorities class as being of general interest and subject to specific public service obligations"[137]. The term covers both economic activities and non-economic services. The former, referred to as "services of general economic interest" (SGEI), cover "economic activities which deliver outcomes in the overall public good that would not be supplied by the market without public intervention"[138].

The notion of SGEI was initially developed for purposes of competition law. Article 90 of the EEC Treaty recognised possible derogations from competition rules for services of general economic interest and the same term and logic can currently be found in Article 106(2) TFEU. Over time, also the European legislator became more actively involved in the field of SGEI and in the network sectors more broadly[139]. From mid-1980s onwards opening the heavily regulated national markets to competition and, gradually, creating a competitive European single market in those areas became a key objective. The further course of action largely relied on the presumption that the interests of consumers – in the form of increased choice, lower prices, security of supply, better quality and more innovation – would be best advanced by means of free trade, competition and liberalisation[140]. To the extent that these forces failed to protect or empower consumers, specific provisions were to be applied[141].

[137] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Quality Framework for Services of General Interest in Europe, COM(2011) 900 final, 3.
[138] Ibidem.
[139] Pierre Bauby, 'From Rome to Lisbon: SGIs in Primary Law' in Erika Szyszczak and others (eds), *Developments in Services of General Interest* (Springer 2011) 24–25.
[140] Angus Johnston, 'Seeking the EU "Consumer" in Services of General Economic Interest' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016) 109.; Albert Nijenhuis, 'Electronic Communications and the EU Consumer' in Frank Benyon (ed), *Services and the EU citizen* (Hart Publishing 2013) 51–54.
[141] Nijenhuis (n 140) 49. Hans-W Micklitz, 'Universal Services: Nucleus for a Social European Private Law' in Marise Cremona (ed), *Market Integration and Public Services in the European Union* (Oxford University Press 2011) 63.

The result of this approach was a gradual development from liberalisation, accompanied by varying degrees of market regulation at the EU level, to specific measures aimed directly at the protection of service recipients. A similar pattern can be observed in a number of areas where services were initially provided by public and quasi-public entities and were highly regulated at national levels. This is true, for example, for services relating to energy, electronic communications or transport[142].

In the energy sector first liberalisation directives were adopted in 1996 (electricity) and 1998 (gas), followed by the second phase realised in 2003 and a third package of currently applicable acts adopted in 2009[143]. Liberalisation of the telecommunication sector began in 1988 and, over the following decade, extended to particular market segments: from terminal equipment to a growing variety of telecommunication services such as satellite communications, cable television, mobile communications and, eventually, voice telephony. In parallel to this process a harmonised telecommunications framework was gradually established[144]. In 2002 a more extensive package of harmonised measures was adopted, which continue to form the basis of the present legislative landscape. Of particular relevance to this thesis are Directives 2002/22/EC on universal service and users rights relating to electronic communications networks and services [145] and 2002/58/EC on privacy and electronic communications[146]. Similarly to the remaining parts of the package, both acts were amended in 2009[147]. A more extensive reform of the electronic communications framework is currently underway, following the 2016 adoption of the proposals constituting the so-called

[142] For transport and tourism see: Mikko Huttunen, 'The Development of the Air Transport Policy of the European Union From the Point of View of the Consumer: From the Creation of the Internal Market to the Regulation of Consumer Rights Proper' and Jens Karsten, 'Travel and Tourism' in Frank Benyon (ed), *Services and the EU citizen* (Hart Publishing 2013).
[143] Angus Johnston and Guy Block, *EU Energy Law* (Oxford University Press 2012).
[144] See generally: Paul Nihoul and Peter Rodford, *EU Electronic Communications Law: Competition and Regulation in the European Telecommunications Market* (2nd edn, Oxford University Press 2011) 7–9. Antonio Bavasso, *Communications in EU Antitrust Law: Market Power and Public Interest* (Kluwer Law International 2003) 47–54.
[145] Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) [2002] OJ L108/51.
[146] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L201/37.
[147] Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws [2009] OJ L337/11.

connectivity package[148]. Narrower issues, with the most notable example of roaming surcharges, have been addressed in separate paths by means of directly applicable regulations[149].

Interestingly, in each of these fields protection is often granted to a broader range of legal subjects than the standard consumer category and shares a number of common themes[150]. These relate, *inter alia*, to the strengthening of the ability of service recipients to change the supplier in search of a better offer by means of choice- and information- enhancing instruments as well as to the possibility of settling any unresolved disputes out of court. At the same time, the perceived vulnerability of certain consumer/customer groups has led to the establishment of specific access-oriented protections. Another relevant topic – emerging, in particular, from the electronic communications framework – is linked to the protection of privacy and personal data. Due to its growing importance in the information society the latter issue will be addressed more extensively at a later stage of this thesis.

3.2.2.2.2. Choice and information

Instruments aimed at enhancing the choice of service recipients can be applied both as part of the process of liberalisation and at the subsequent stage of harmonisation. In the former case they typically amount to the removal of regulatory barriers and, naturally, only apply where such barriers had earlier been present. The second group of measures – which forms a logical consequence of the former and is more directly relevant to the present discussion – focuses on contractual barriers to switching between service providers and is often complemented by information rules.

By way of illustration, the early goal of the liberalisation policy in the energy sector was to gradually enable customers and producers across Member States to conclude contracts directly with each other, which had often not been possible under non-integrated national frameworks. Consequently, the first Internal Energy Market (IEM) package focused on the

[148] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society, COM(2016) 587 final.
[149] Nijenhuis (n 140) 52.
[150] Paul Nihoul, 'The Status of Consumers in European Liberalisation Directives' in Annette Nordhausen and Geraint Howells (eds), *The Yearbook of Consumer Law 2009* (Routledge 2008); Johnston (n 140) 96–97.

ability of the so-called "eligible customers" to choose between suppliers[151]. In line with this approach, eligibility of customers was established according to their energy needs: below the defined consumption thresholds, which were reduced over time, it was not possible to access the free market[152]. At the same time, already from the second IEM package onwards, an increased emphasis has been placed on the facilitation of the switching process in contractual terms so that the choice could be exercised effectively.

By contrast, the liberalisation of the electronic communications sector focused strictly on the supply side and did not distinguish between different customer groups[153]. Similarly to the energy sector, the increase in choice resulting from the opening of the market was subsequently complemented by a range of instruments addressing the contractual side of switching. One of the most notable examples is the number portability solution provided for in Article 30 of Directive 2002/22/EC[154].

In parallel to the abovementioned process a gradual expansion of information rules took place. This is understandable as, indeed, availability and transparency of service-related information can be considered as one of the enablers of effective switching. The functional proximity between rules of both types in the analysed network sectors is nevertheless more far-reaching. This is because protection of service recipients is in neither case an end in itself. There is rather an implicit presumption that, by making use of this toolbox, the demand side actors will gradually assume an active role in creating and facilitating the competitive process, thus becoming the agents of liberalisation[155].

Speaking more generally, as the liberalisation agenda advanced, the protection of service recipients was becoming its increasingly important component. This also gave rise to first terminological complexities. As regards energy, Member States were required to "take appropriate measures to protect *final customers*" and "ensure high levels of *consumer* protection". They were also to ensure that there are "adequate safeguards to protect

[151] Angus Johnston, 'Maintaining the Balance of Power: Liberalisation, Reciprocity and Electricity in the European Community' 17 Journal of Energy and Natural Resources Law 121.
[152] Article 19 of Directive 96/92/EC and Article 18 of Directive 98/30/EC
[153] The liberalisation consisted in the gradual removal of exclusive rights of national operators in particular market segments, see: Nihoul and Rodford (n 144) 42.
[154] The link between switching and the protection of customers' choice has been reaffirmed by the ECJ in cases C-438/04 *Mobistar*, ECLI:EU:C:2006:463, para. 25 and C‑99/09 *Polska Telefonia Cyfrowa*, ECLI:EU:C:2010:395, para. 17.
[155] Nihoul (n 150) 74, 86–87. Johnston (n 140) 115.

vulnerable customers" as well as that "*eligible customers*" are in fact able to switch between suppliers. Finally, specific measures on "*consumer* protection" were set out in the annexes attached to electricity and gas directives[156]. In the electronic communications sector notions such as consumers, subscribers and end-users were often used side by side[157].

The rights of service recipients in the energy sector – including those related to information and choice – were further expanded and particularised in the third IEM package. As of 2007, all energy customers, including those at a household level, are considered "eligible" to choose their energy provider[158]. Member States' responsibility in this respect now includes an obligation to ensure that the change is effected within three weeks and that customers are entitled to receive "all relevant consumption data"[159]. Personal scope of other information provisions appears to be less clear. For example, pursuant to Article 3(9) of Directive 2009/72/EC Member States shall ensure that electricity suppliers provide in or with the bills and in promotional materials made available to "final customers" information on the contribution of each energy source to the overall fuel mix of the supplier over the preceding year, environmental impact of such mix as well as rights as regards the means of dispute settlement. Furthermore, availability of the electricity service at an "easily and clearly comparable, transparent and non-discriminatory price" is a part of the universal service obligation which Member States may impose on suppliers with respect to "household consumers" and, "where they deem it appropriate, small enterprises". Last but not least, Article 3(7) of the Directive 2009/72/EC refers to the Member States' obligation to "ensure high levels of *consumer protection*, particularly with respect to transparency regarding contractual terms and conditions, general information and dispute settlement mechanisms"[160]. Some of the measures which should be adopted to that end, "as regards at least household customers", are further specified in Annex I. These include, among others, a right to a contract with an obligatory set of basic stipulations, transparent information on applicable

[156] Article 3(5) of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC - Statements made with regard to decommissioning and waste management activities [2003] OJ L176/37; Article 3(3) of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L176/57.
[157] Nijenhuis (n 140) 55–60.
[158] Article 21 of Directive 2003/54/EC and Article 23 of Directive 2003/55/EC.
[159] Article 5a of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55; Article 6a of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94.
[160] See an analogous formulation in Article 3(3) of Directive 2009/73/EC.

prices and tariffs, standard terms and conditions, actual electricity consumption and costs as well as a right to be notified of any intention to modify contractual conditions, the corresponding right to withdraw from the contract and the right not to be charged for changing the energy supplier. The notion of a household customer appears to be linked to private consumption and, as such, approaches the standard consumer status known from the European consumer *acquis stricto sensu*. Member States may, nevertheless, also apply these provisions to other customer groups.

A set of rules similar to the ones discussed in the final part of the preceding paragraph can also be found in Article 20 of Directive 2002/22/EC with respect to electronic communications. The provision establishes an analogous "right to a contract" with an undertaking or undertakings providing access to a public communication network or providing publicly available electronic communications services. It further specifies a set of mandatory particulars which should be included in such a contract along with some basic transparency requirements. Member States should furthermore ensure that subscribers – and, therefore, not only consumers – have a right to withdraw from their contract without penalty upon notice of modification to the contractual conditions, provided to them at least one month in advance, by the undertakings providing electronic communications networks or services.

It is worth pointing out that in the original version of the Universal Service Directive personal scope of the right to a contract and of the stipulations related to its content was similar to that of the above-discussed energy law and, by default, extended only to "consumers" while allowing Member States to also include other end-users. The 2009 amendment introduced an important change in that regard, as a result of which the discussed provisions were to apply equally to consumers and "other end-users so requesting". The preamble pointed out that the possibility of this extension was primarily meant to protect micro as well as small and medium-sized enterprises "which may prefer a contract adapted to consumer needs"[161]. To avoid the complexity related to the definition of an SME the notion was not used in the legal text, yet the burden imposed on the providers was to be limited in that the provisions would only apply at an end-user's request. Member States were, in turn, encouraged to take appropriate measures to promote awareness of this possibility among SMEs. Also this solution must not have been evaluated as optimal considering that further regulatory

[161] Recital 21 of Directive 2009/136/EC.

adjustments have recently been proposed as part of the so-called connectivity package. Most notably, the proposed directive establishing the European Electronic Communications Code[162] seeks to align the information requirements set out in Directive 2002/22/EC with the information requirements established in the European consumer *acquis stricto sensu*. Article 95 of the proposal thus particularises the information duty contained in Articles 5 and 6 of Directive 2011/83/EU on consumer rights. This particularised duty, as well as several additional information obligations, would only be mandatory in respect of contacts between service providers and classically defined "consumers". Pursuant to Article 95(3) of the proposal, information duties set out in the preceding paragraphs would also apply to "micro or small enterprises as end-users" unless they have explicitly agreed to waive them. Additionally, the proposal includes a number of further provisions aimed at improving the availability of services-related information, while not being the part of the contractual relationship between the two parties. These include, *inter alia*, facilities designed to monitor and control the usage of particular electronic communication services (Article 95(5)), independent tools for comparing and evaluating prices and tariffs as well as the quality of service performance (Article 96), which would serve the protection of all end-users.

A further fragmentation of the personal scope of protection under the proposed framework of electronic communications can also be observed with respect to the removal of contractual barriers to switching. The rights to switch between providers, to port numbers and to terminate the contract, without incurring costs, upon notice of changes would be maintained and strengthened under the proposed framework and would continue to apply to all end-users (Articles 98(3) and (4), 99 and 100). However, two additional provisions, which relate to the length of the initial commitment period in contracts for the provision of certain electronic communication services and the right to termination of automatically prolonged contracts (Articles 98 (1) and (2)), would only apply to the standard category of "consumers".

It follows that the European legislator recognises, at least partially, the problems associated with the co-existence of sector-specific norms and consumer *acquis stricto sensu*, or, more specifically, with their differing personal scopes. This overlap is inevitable as sectoral rules generally apply without prejudice to the EU rules on consumer protection, such as Directive 93/13/EEC on unfair terms, Directive 2005/29/EC on unfair business-to-consumer

[162] Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Recast), COM(2016) 590 final.

commercial practices or the said Directive 2011/83/EU on consumer rights (which repealed and replaced, among others, Directive 97/7/EC on distance sales)[163]. Even after the link between the two regimes had, to some extent, been elaborated by the Court of Justice[164], the potential for a fragmentation of the consumer/customer notion and the resulting level of regulatory complexity remains high. Efforts of the European legislator to streamline these frameworks should thus be welcomed. Whether multiplication of particular statuses (consumers, micro- and small enterprises) should be the way forward, is a question for another debate. Be it as it may, what remains clear even (or especially) after the proposed amendments to the electronic communications framework, is that a number of areas remain in which the standard consumer notion is perceived as unfit to describe the right addressee for the legal action and in which broader categories, such as end-user, are utilised instead.

3.2.2.2.3. Alternative dispute resolution

Effective enforcement of formally established rights and obligations ensures that the relevant provisions do not only exist on paper, but can indeed be relied upon by individuals. In the system of regulatory law, where the granting of rights is linked to further policy aims, enforcement also plays an important role in the realization of these objectives. From the point of view of the effectiveness of EU law this would then ideally amount to the harmonization of national procedural laws. However, in line with the principle of procedural autonomy, Member States generally enjoy broad discretion as to the choice of means for the enforcement of rights and obligations established under EU law[165]. Starting from the late 1990s the Commission began to recognize that the differences between the established procedural rules in traditional areas such as judicial dispute resolution or administrative enforcement may impede the effectiveness of the European private law initiatives, and directed its attention to extra-judicial bodies[166]. This led to the adoption of rules on the mandatory establishment of

[163] See e.g. Article 1(4) of Directive 2002/22/EC (as amended), Annex I to Directive 2009/72/EC; see also: Chris Willett, 'General Clauses on Fairness and the Promotion of Values Important in Services of General Interest' in Christian Twigg-Flesner and others (eds), *Yearbook of Consumer Law 2008* (Ashgate 2007).
[164] For energy see: case C-92/11 *RWE Vertrieb*, ECLI:EU:C:2013:180 and joined cases C-359/11 and C-400/11 *Schulz and Egbringhoff*, ECLI:EU:C:2014:2317; for electronic communications see: case C-522/08 *Telekomunikacja Polska*, ECLI:EU:C:2010:135.
[165] See generally: Diana-Urania Galetta, *Procedural Autonomy of EU Member States: Paradise Lost? A Study on the 'Functionalized Procedural Competence' of EU Member States* (Springer 2010) 7–32. Basic elements of such procedures can, however, be established at the European level, see e.g. Article 4 of Directive 84/450/EEC concerning misleading advertising
[166] Marta Cantero Gamito, 'Dispute Resolution in Telecommunications: A Commitment to Out-of-Court' (2017) 25 European Review of Private Law 387.

out-of-court dispute resolution schemes, initially limited to disputes at the wholesale level of regulated sectors[167]. At the same time there was a growing tendency towards fostering the use of alternative dispute resolution (ADR) with respect to consumer claims, which was reflected *inter alia* in the adoption of two Commission recommendations devoted to this topic[168]. Over time, provisions on the mandatory establishment of ADR mechanisms have gradually been inserted in a number of directives affecting the position of consumers in the market[169]. This tendency was by no means limited to the regulated sectors, even though the solutions adopted in these areas, particularly in the field of electronic communications, belonged to its early and also fairly elaborate manifestations.

Consequently, Article 34(1) of Directive 2002/22/EC on universal service required Member States to ensure that "transparent, simple and inexpensive out-of-court procedures are available for dealing with unresolved disputes, involving consumers, relating to issues covered by this Directive". The relevant procedures should allow for a fair and prompt settlement of disputes and may include "a system of reimbursement and/or compensation". What is more, according to recital 47, Member States should take full account of Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, namely the principles of impartiality, transparency, effectiveness, legality, liberty, representation and the adversarial principle. This implies, as confirmed by the ECJ in *Alassini*, that procedures envisaged in Directive 2002/22/EC should involve "an active intervention of a third party who proposes or imposes a solution" and not merely "an attempt to bring the parties together to convince them to find a solution by common consent"[170]. The Court furthermore held that, while Directive 2002/22/EC and the principle of liberty laid down in Recommendation 98/257/EC require that the right to bring an action before the courts is maintained, Member States are, in principle, free to make the admissibility of legal proceedings concerning the rights conferred by the directive conditional

[167] Article 9(5) and Article 17 of Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) OJ L 199 , 26/07/1997 P. 32 – 52.

[168] Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes [1998] OJ L115/31 (98/257/EC); Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes [2001] OJ L109/56.

[169] Nihoul (n 150) 90. Non-binding references to ADR were also included, for example, in Article 11(4) of Directive 97/7/EC on distance contracts and in recital 25 of Directive 1999/44/EC on consumer sales. In some of the subsequent instruments, such as Directive 2008/48/EC on consumer credit the establishment of such procedures was already made mandatory, while in 2013 two horizontal instruments devoted to consumer ADR were adopted.

[170] Joined cases C‑317/08, C‑318/08, C‑319/08 and C‑320/08 *Alassini*, ECLI:EU:C:2010:146, para. 33–35.

upon an attempt to settle the dispute out of court, provided that a number of procedural safeguards are respected[171]. The judgment in *Alassini* is believed to have paved the way for the subsequent legislative developments in the field of consumer ADR, which will be addressed further below[172].

For purposes of the present discussion it should be stressed that the reference to the term "consumer", provided for in the discussed provision, is linked to its standard definition, set out in Article 2(2) of Directive 2002/22/EC. Such a reading is further supported by the fact that Article 34(1) *in fine* allows Member States to "extend these obligations to cover disputes involving other end-users". Directive 2009/72/EC concerning common rules for the internal market in electricity is less clear on that point and only provides, in Article 3(13), that Member States shall ensure that "an independent mechanism such as an energy ombudsman or a consumer body is in place in order to ensure efficient treatment of complaints and out-of-court dispute settlements". Nevertheless, the overall context of that directive, in particular recital 42 and point 1(f) of the Annex, suggest that such mechanisms should be available at least to household customers. This could point to a certain consistency as regards personal scope of sectoral rules on ADR. Such a view, however, does not hold in the light of the more specific acts like Regulation 531/2012 on roaming on public mobile communications networks[173]. This is particularly interesting considering an explicit reference to the Universal Service Directive made in that regulation. Pursuant to its Article 17(2), in the event of an unresolved dispute involving "a consumer or end-user" Member States shall ensure that procedures laid down in Article 34 of Directive 2002/22/EC are available. As a result, also personal scopes of sectoral rules concerning out-of-court dispute resolution did not escape a trend towards fragmentation.

3.2.2.2.4. Access

Another overarching theme in the regulation of network services is linked to their particular status as services of general interests and pertains to ensuring their general accessibility – in

[171] See also case C‑75/16 *Menini and Rampanelli*, ECLI:EU:C:2017:457, concerning a similar issue under the later Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L165/63.
[172] Gamito (n 166) 416.
[173] Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union [2012] OJ L172/10.

both geographical and financial terms – without compromising the quality of the service. This is also the dimension of SGEI which is explicitly addressed in the Charter of Fundamental Rights[174] and which reveals the embracement of a certain social role by the EU. Indeed, as Peter Rott powerfully observes "consumer protection through information and choice neglects the needs of those who are of no interest to the service providers, be it because of their geographical location or because of their financial capacities"[175]. Relying on such tools would then lead to a situation where certain groups of (more vulnerable) citizens would struggle to gain access to services that are necessary for the satisfaction of their essential needs, such as power or heating[176]. Instruments related to access discussed in the present section should thus be distinguished from the rights associated with the concept of access justice, which encompass the abovementioned elements of information, choice and enforcement, and which are rather aimed to increase consumers' confidence in the internal market, allow them to "reap the benefits" of market integration and become actors of liberalisation[177].

Energy

In light of the above, already the first energy liberalisation directives recognised that the imposition of public service obligations (PSO) upon energy suppliers in some Member States may be necessary to ensure "security of supply and consumer […] protection", including "regularity, quality and price of supplies", if these could not be guaranteed by the mechanisms of free competition[178]. Such obligations needed to be take full regard of the relevant provisions of the Treaty, be clearly defined, transparent, non-discriminatory and verifiable and be notified to the Commission. Compliance with Article 90 of the Treaty (current Article 106 TFUE) presupposed that the principle of proportionality is respected, namely that the restrictions of competition are imposed only in so far as is necessary to achieve the general economic interest objectives pursued[179].

Particularly interesting from the point of view of this thesis is relevance of EU law for the personal scope of possible national measures undertaken within the public service framework.

[174] Article 36 of the Charter of Fundamental Rights of the European Union [2012] OJ C326/391.
[175] Peter Rott, 'Consumers and Services of General Interest: Is EC Consumer Law the Future?' (2007) 30 Journal of Consumer Policy 49, 55.
[176] Green Paper on Services of General Interest, COM(2003) 270 final.
[177] See generally: Micklitz, 'Social Justice and Access Justice in Private Law' (n 103) 23.
[178] Recital 13 and Article 3(2) of Directive 96/92/EC and Recital 12 and Article 3(2) of Directive 98/30/EC
[179] Marcus Klamert, *Services Liberalization in the EU and the WTO: Concepts, Standards and Regulatory Approaches* (Cambridge University Press 2015) 116.

The question has been addressed by the ECJ in *Federutility* with respect to national rules on retail gas prices[180]. According to the Court, while the interpreted Directive 2003/55/EC did not prevent national measures from being applied both to household customers and to undertakings irrespective of their size, account needed to be taken of the differences between the situation of undertakings and that of domestic consumers and hence between the objectives pursued and the interests present in both contexts. Attention was also drawn to the "objective differences" between the undertakings themselves, on account of their size. The Court thus concluded that the requirement of proportionality would not, in principle, be complied with if the national measure undertaken within the public service framework was to "benefit individuals and undertakings in an identical manner, in their capacity as final consumers of gas".

The differentiation between particular customer groups is even more apparent in the concept of a "universal service" introduced in the second IEM package with respect to electricity and maintained in the currently applicable Directive 2009/72/EC. The concept is essentially a concretisation of the PSO conceived as an individual right of customers vis-à-vis public authorities "to be supplied with electricity of a specified quality at reasonable, easily and clearly comparable, transparent and non-discriminatory prices"[181]. More specifically, Member States are required to ensure that the universal service in the above meaning is enjoyed "by all household customers, and, where Member States deem it appropriate, small enterprises"[182]. The preamble clarifies that the national measures applied to that end may differ according to whether they are aimed at household customers or small enterprises[183]. In the light of *Federutility*, one may wonder whether such a differentiation is not only allowed, but in fact encouraged.

Careful reading of the regulatory framework reveals which groups of customers Member States should seek to protect in particular, namely those considered as "vulnerable". In the energy law the notion of a "vulnerable customer" is present from the second liberalisation

[180] Case C-265/08 *Federutility*, ECLI:EU:C:2010:205; Johnston (n 140) 134–136.
[181] Article (3) of Directive 2003/54/EC and Article (3) of Directive 2009/72/EC. On the (not entirely uncontroversial) question of individual rights see: Peter Rott, 'A New Social Contract Law for Public Services? – Consequences from Regulation of Services of General Economic Interest in the EC' (2005) 1 European Review of Contract Law 323, 342–344.
[182] Article 3(3) of Directive 2003/54/EC defined small enterprises as enterprises with fewer than 50 occupied persons and an annual turnover or balance sheet not exceeding EUR 10 million. The same definition is provided in Article 3(3) of Directive 2009/72/EC.
[183] Recital 24 of Directive 2003/54/EC and Recital 45 of Directive 2009/72/EC.

package onwards. References thereto have been maintained and even expanded in the currently applicable Directives 2009/72/EC (electricity) and 2009/73/EC (gas). By way of illustration, Article 3(7) of the former requires Member States to "take appropriate measures to protect final customers", and, in particular, to "ensure that there are adequate safeguards to protect vulnerable customers". Definition of the concept is left to Member States, even though several indications of the factors which may give rise to such vulnerability are provided. These include "energy poverty", the risk of disconnection of electricity in "critical times" as well as difficulties of supplying energy to "remote areas". Not only the definition of the concept – which may be both broader and narrower than the standard consumer category – but also the choice of measures applied in this context, are largely left to Member States (subject to a proportionality test)[184]. The concept of the vulnerable thus appears to cut across the external and internal dimension of the consumer notion and can refer both to a sub-group of consumers (e.g. low income consumers acting in their private capacity), as is also the case of the Unfair Commercial Practices Directive[185], and to natural and legal persons acting for purposes relating to their trade, business, craft or profession (e.g. traders pursuing their business activities in remote areas).

Electronic communications

Specific needs of particular groups of legal subjects, established by reference to criteria other than those present in the standard consumer notion, are also considered in the electronic communications framework. Indeed, provisions concerning the universal service found in Directive 2002/22/EC are similar to those discussed above in the context of electricity. A catalogue of services, with respect to which universal service obligations may be imposed, includes services such as connection at a fixed location to a public communications network, provision of a publicly available telephone services and provision of public pay telephones. The list has been significantly reduced in the proposed directive establishing the European Electronic Communications Code, which instead focuses on the basic broadband internet access, defined by reference to a list of online services usable over a broadband connection[186]. Interestingly, unlike in the energy sector, the scope of beneficiaries of the universal service

[184] Johnston (n 140) 115–117.
[185] Article 5(3) of Directive 2005/29/EC; see also: Norbert Reich, 'Vulnerable Consumers in EU Law' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016) 151.
[186] Article 79(1) of the proposed EECC

framework in the electronic communications sector, also under the proposed amendments, is not limited to households or small enterprises. In this respect the scope of its potential beneficiaries – viewed from the external perspective – remains broad. At an internal level, the idea of vulnerability reappears[187]. By way of illustration, Article 9 of Directive 2002/22/EC refers to the affordability of services provided under the universal service scheme to users "on low incomes or with special social needs". Recital 7 provides a further guidance on what could possibly be covered by this term and includes elements such as location (rural or geographically isolated areas), age (elderly) and disability. Specific needs of disabled end-users are also addressed throughout the directive. One may indeed observe that most of these groups will, in practice, constitute a sub-category of the standard consumer notion. Elements associated with that notion are, nevertheless, not decisive.

3.2.2.3. E-Commerce and Services Directives

For a long time initiatives concerning network sectors, such as the ones described above, have dominated the European activity with respect to services liberalisation. This has changed at the turn of the century when the two important instruments were adopted: Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market (ECD)[188] and an even more horizontally applicable Directive 2006/123/EC on services in the internal market[189]. Despite their clear focus on the facilitation of cross-border provision of services both directives also include a number of provisions affecting private law relationships falling under their scope.

The E-Commerce Directive derives its legal basis from both Articles 47(2) and 55 of the EC Treaty (current Articles 53(2) and 62 TFEU), referring to the free movement of services, and Article 95 of the EC Treaty (current Article 114 TFEU), referring to the establishment of the internal market. Information society services are defined by reference to an even earlier

[187] Reich, 'Vulnerable Consumers in EU Law' (n 185) 150–151.
[188] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L178/1.
[189] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36.

instrument, Directive 98/34/EC as amended[190], and refer to "services normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services". Particular elements of this definition are further clarified in the preamble of the E-Commerce Directive as well as case law of the Court of Justice[191]. For example, recital 18 of the ECD classifies "selling goods on-line" as an information society service.

Material scope of the E-Commerce Directive reflects the lifecycle of e-commerce activities. It defines the country of origin principle applicable within the coordinated field and requires Member States not to make the provision of information society services subject to a prior authorisation[192]. Furthermore, it imposes a general information duty referring, in particular, to the service provider's identity and contact details, sets out rules on transparency of commercial communications and unsolicited commercial communications as well as on the formation, validity and transparency of electronic contracts. Finally it establishes liability exemptions for certain intermediary service providers followed by a number of rules on implementation, codes of conduct and dispute resolution.

As a general rule, the E-Commerce Directive covers all information society services[193], irrespective of the professional or non-professional status of the parties involved. Key notions, which determine the directive's personal scope, are those of "a service provider" and "a recipient of the service". The former is defined as any natural or legal person providing an information society service, while the latter refers to any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible. Nonetheless, pre-contractual information duties (Article 10) as well as rules related to the placing of an order (Article 11) are not mandatory in business-to-business relations. This leads to the following two observations: firstly, unless explicitly waived the relevant provisions also apply to transaction between businesses; secondly, nothing prevents their application in the peer-to-peer context. Furthermore, a status-related notion – that of a "consumer" – also appears in Article 17(2) of

[190] Currently repealed and replaced by Directive 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services [2015] OJ L241/1.
[191] On the classification of services for which the service provider is remunerated, not by the recipient, but by income generated by advertisements see case C-291/13, *Sotiris Papasavvas*, para 30.
[192] On the interpretation of the country-of-origin principle see: joined cases C‑509/09 and C‑161/10 *eDate Advertising and Others*, paras 53-68.
[193] Activities excluded from the scope of the E-Commerce Directive are defined in Article 1(5), see also: case C‑108/09, *Ker-Optika*, para. 23-40.

the directive concerning extra-judicial dispute resolution. Overall, however, this is a very open-ended norm which merely requires Member States "not to hamper" the use of out-of-court schemes and to "encourage" bodies responsible for extra-judicial resolution of "in particular, consumer disputes" to operate in a way which provides adequate procedural guarantees for the parties concerned.

Legislative works concerning the Services Directive, which was meant to close the gap in the area of services liberalisation, have originally followed a similar pattern. The 2004 proposal introduced the country of origin principle, according to which service providers would be subject to the law of their home country, provided that the standards contained in the directive were met[194]. Adoption of this solution would amount to a significant transfer of the regulatory competence from the national to the European level, giving a clear priority to the removal of barriers to cross-border trade in services over its possible social implications[195]. In response to the criticism, the Commission presented an amended draft in 2006. Shortly afterwards, Directive 2006/123/EC on services in the internal market was adopted.

The principal objective of the Services Directive remained unchanged since the first proposal – the act aims to facilitate the exercise of the freedom of establishment for service providers and the free movement of services. Its scope is seemingly broad and extends to "services supplied by providers established in a Member State" (Article 2(1)). However, subsequent provisions stipulate a number of exceptions, which refer, *inter alia*, to financial services, electronic communications services and transport services[196]. As a result, of sectors discussed above only tourism appears to be clearly within the directive's scope[197]. The terms "service provider" and "service recipient" are analogous to those found in the E-Commerce Directive. The notion of a "service" is linked to its established definition from primary law and refers to "any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty (current Article 57 TFEU)". In line with the relevant case law the

[194] Proposal for a Directive of the European Parliament and of the Council on services in the internal market, COM(2004) 2 final.
[195] Armin Hatje, 'Services Directive: A Legal Analysis' in Fritz Breuss, Gerhard Fink and Stefan Griller (eds), *Services Liberalisation in the Internal Market* (Springer 2008) 3; Weatherill, *The Internal Market as a Legal Concept* (n 34) 218–219.; Jeff Loder, 'The Lisbon Strategy and the Politicization of EU Policy-Making: The Case of the Services Directive' (2011) 18 Journal of European Public Policy 566.
[196] This regulatory approach can be subject to criticism, see e.g.: Klamert (n 179) 181–183.
[197] Directive 2006/123/EC on services in the internal market, recital 33; as regards energy sector services covered by Directives 2009/72/EC and 2009/73/EC are excluded from the scope of the key provision related to the freedom to provide services, namely Article 16 of Directive 2006/123/EC.

decisive factor in the classification of a given activity as a service is its economic character, meaning that it must not be provided for nothing[198]. This, however, does not mean that a service provider needs to act "for purposes relating to his or her trade, business, craft or profession" or that he or she necessarily needs to seek to make a profit[199]. Similarly, even though the aim of consumer protection is mentioned repeatedly in the recitals, Directive 2006/123/EC applies equally to business and private recipients[200].

Aside from the material requirements concerning the liberalisation of the trade in services, the directive also includes a number of provisions aimed at safeguarding the interests of service recipients. No distinction between different types of service recipients is made even as regards the mandatory or default nature of specific legal norms. The two overarching themes emerging from this framework are, again, access and information. A key provision concerning the former, though unfortunately not particularly effective in practice[201], is Article 20 establishing the principle of non-discriminatory access on grounds of nationality or place of residence. Interestingly, recital 95, which elaborates on that norm, explicitly refers to the standard consumer notion and states that "access by a recipient, and especially by a consumer, to a service on offer to the public may not be denied or restricted by application of a criterion, included in general conditions made available to the public, relating to the recipient's nationality or place of residence". The issue of non-discriminatory access in the digital economy will be elaborated on further with regard to the so-called geo-blocking. Of importance to service recipients are further the provisions of Chapter V devoted to the quality of services, including the information requirements which service providers are obliged to fulfil, either of their own motion or at the recipient's request (Article 22). Attention should finally be drawn to a considerable emphasis placed on the information concerning the possibility of the recourse to non-judicial means of dispute settlement (Article 22(3)(e), Article 27(4)), even though a mandatory establishment of these mechanisms is not envisaged.

3.2.3. Interim conclusions

[198] Case C‑281/06 *Jundt*, ECLI:EU:C:2007:816, para. 32

[199] Case C-157/99 *Smits and Peerbooms*, ECLI:EU:C:2001:404, para. 50 and 52; case C‑281/06 *Jundt*, para. 33.

[200] Directive 2006/123/EC on services in the internal market, recital 33.

[201] European Commission, Mystery Shopping Survey on Territorial Restrictions and Geo-Blocking in the European Digital Single Market. Preview of Key Findings, 2016. <http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/geoblocking-exec-summary_en.pdf>

A striking conclusion flowing from the analysis of the different instruments concerning the provision of services is the apparent lack of consistency as regards their personal scopes. Two examples have already been mentioned in the previous chapter: Directive on consumer credit is a distinctly status-related instrument applicable to business-to-consumer transactions only, while Directive on package travel does not take consumer status as its point of reference. Instruments related to financial services (payment, insurance, investment), transport services and e-commerce reveal a similarly fragmented picture. Status-based approach is also significantly less pronounced in the directives that are primarily aimed at liberalisation. Services Directive with its broad personal scope is here a prime example, although it must be observed that not only a number of important sectors are excluded from the act's scope, but also its private law dimension is fairly limited[202]. More fully-fledged provisions concerning the protection of service recipients in liberalised markets – also departing from the standard consumer notion – emerge from sector-specific acts. Instruments belonging to that group share a number of common themes, most notably associated with the concept of access justice (choice, information, enforcement by means of alternative dispute resolution). The scope of beneficiaries of relevant rights (to be informed, to port numbers or to terminate the contract following its modification) is usually broader than the standard consumer notion would imply. The same is true for other rights, not discussed in depth in the preceding sections, such as those related to roaming or to compensation for delayed flights in the air transport sector. This appears to be linked to an active role which the service recipients are expected to perform – as responsible, circumspect and increasingly mobile participants of the internal market as well as agents of liberalisation, not very different from small enterprises. Admittedly, the aforementioned trend is not as prominent in all sectors. In energy, the scope of several key provisions is limited to "household customers" while the importance of the scope *ratione personae* of national measures on retail gas prices was highlighted by the Court in its *Federutility* judgment. At the same time, the ECJ found no infringement of the principle of proportionality when assessing the validity of Regulation 717/2007 on roaming on public mobile telephone networks, which also imposed price regulation measures applicable to both private and business customers[203]. It similarly did not challenge the personal scope of protection granted to passengers of cancelled flights and even extended the right of

[202] Weatherill, *The Internal Market as a Legal Concept* (n 34) 218–219.
[203] Case C-58/08 *Vodafone and Others*, ECLI:EU:C:2010:321; Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC [2007] OJ L171/32.

compensation established in Regulation 261/2004 to cover long delays[204]. What is more, irrespective of specific adjustments proposed in the ongoing reform of Directive 2002/22/EC, it is still the "end-user" – or, at the very least, both a traditionally conceived "consumer" and a micro or small enterprise as an end-user – that appears as the addressee of most rights enshrined in that legal act. Given the importance of the electronic communications sector for the digital economy and the observed convergence of electronic technologies[205], this finding is not insignificant. At the same time, both in this and in other areas where services used to be provided by public and quasi-public entities and are considered to be of general interest to the society, additional social protections are being introduced. It is in this context that the notions of a universal service as well as of a vulnerable customer appear, bringing more subjective elements – perhaps too easily rejected by the ECJ in its early case law – back into play.

Is there any logic to this fragmented picture? A possible explanation is that when the internal market is a prime consideration – in particular where the consumer/customer is acting as an agent of liberalisation or is exercising his or her own freedom of movement – broader notions are more likely to be used. Where the protective elements come to the fore and the regulation of the underlying legal relationships between private parties, rather than market liberalisation, is the principal aim, the standard consumer notion often reappears. Still, as has been demonstrated above, even in these areas the tools applied to protect the consumer often belong to the similar overarching themes as in the area of liberalisation – information being the most notable example. The importance of the internal market rationale and the confident consumer as its collateral are also visible in the more recent push of the European Commission towards full harmonisation. At the same time, regulation of network markets shows that there is an alternative to that approach in the form of more targeted instruments addressing the needs of the vulnerable. The choice of specific instruments has largely been left to Member States, subject to a proportionality check by the ECJ. This, to a certain extent, resembles the balance between European and national lawmakers reached under the minimum harmonisation principle, upon which the EU action in the area of consumer protection used to

[204] See in particular joined cases C-402/07 and C‑432/07 *Sturgeon*, ECLI:EU:C:2009:716, joined cases C-581/10 and C-629/10 *Nelson*, ECLI:EU:C:2012:657; Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004] OJ L46/1.

[205] Digital Convergence and Beyond. Innovation, Investment and Competition in Communication Policy and Regulation for the 21st Century. 2016 Ministerial Meeting on the Digital Economy Background Report, OECD Digital Economy Papers No. 251, 2016.

be based[206]. The following section will try to assess whether any lessons have or could be drawn from the earlier discussions in connection to the process of digitalisation.

3.3. The decline of consumer status in the information society?

3.3.1. Introductory remarks

Online sector has always fitted well into the EU internal market agenda. Harmonisation of laws referring to online activities was potentially less controversial since in many respects diverging national provisions were not yet in place[207]. Additionally, online trade in goods and services promised a significant potential for an increased cross-border activity and economic growth.

It is therefore not surprising that the European legislator became involved with the online sector at a rather early stage. Explicit recognition of the "information society" came with the 1993 White Paper considering the challenges and ways forward into the 21st century[208]. Opportunities and threats of digitalisation as well as necessary regulatory responses were further outlined in the respective action plan[209]. Growing interest in this topic was also reflected in the policy documents concerned with consumer protection. Already the second consumer programme took note of the potential impact, which the use of "new data processing and telecommunications technology" may have on consumption patterns and relationships between market participants[210]. Measures designed to "enable consumers to benefit from the opportunities presented by the information society" had been envisaged as one of the priorities for consumer policy in 1996-1998[211]. These early policy documents bore fruit in the shape of above discussed Directives 97/7/EC on distance contracts and 2000/31/EC on electronic commerce. Directly related to this domain was also the emerging privacy and data protection framework composed of Directive 95/46/EC on the protection of

[206] See e.g. cases 382/87 *Buet*, C-361/89 *Di Pinto*; Weatherill, *The Internal Market as a Legal Concept* (n 34) 209.
[207] The same reasoning had already been applied at the early stage of consumer policymaking, leading to the successful adoption of the harmonised rules on timeshare and doorstep selling, see: Tonner (n 28) 702.
[208] White Paper, Growth, competitiveness, employment. The challenges and ways forward into the 21st century COM(93) 700 final.
[209] Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Europe's way to the information society. An action plan COM(94) 347 final.
[210] Council resolution on a second programme (n 43).
[211] Communication from the Commission, Priorities for consumer policy 1996-1998, COM (95) 519 final.

individuals with regard to the processing of personal data and on the free movement of such data[212] (as of 25 May 2018 repealed and replaced with General Data Protection Regulation 2016/679[213]) and Directive 2002/58/EC on privacy and electronic communications (currently under review). After a period of a less intense legislative activity, the position of consumers in the information society has received renewed attention, first with the revision of Directive 97/7/EC and its replacement with Directive 2011/83/EC on consumer rights (CRD) as well as with the adoption of Directive 2013/11/EU on consumer ADR[214] and Regulation 524/2013 on consumer ODR[215]. Most recently, the publication of the 2015 Digital Single Market (DSM) strategy marked the return of the digital agenda back as a top priority for the European lawmakers[216]. Besides substantive considerations related to the undeniable cross-border dimension of online trade, at least two additional political reasons appeared to favour such a move. Similarly to the early discussions on Directive 97/7/EC, the strategy was perceived as a fresh and relatively uncontroversial idea which could send a much-needed positive signal from Brussels in the era of growing euroscepticism. The intensification of legislative works is some of the areas of interest was furthermore linked to the failure of the Commission's previous initiatives, such as originally much more ambitious plans for the Consumer Rights Directive or the proposed regulation for a Common European Sales Law[217]. Especially important for the present discussion are two proposed directives, relating to the contracts for the sale of goods[218] and for the supply of digital content[219], the proposed regulation addressing the issue of so-called geo-blocking[220], new initiatives in the electronic

[212] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.
[213] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.
[214] Directive 2013/11/EU on consumer ADR (n 171).
[215] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [2013] OJ L165/1.
[216] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Digital Single Market Strategy for Europe, COM(2015) 192 final.
[217] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final; see also: Hugh Beale, 'The Story of EU Contract Law – From 2001 to 2014' in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar 2016).
[218] Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, COM(2015) 635 final and amended proposal COM(2017) 637 final.
[219] Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, COM(2015) 634 final.
[220] COM (2016) 289: Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of

communications sector such as Regulation 2015/2120 laying down measures concerning open internet access[221] as well as the proposed E-Privacy Regulation[222], which would replace Directive 2002/58/EC on privacy and electronic communications along with several soft law measures. Rather that describing these initiatives one by one, the following part seeks to link the applicable and emerging instruments with the overarching themes identified above – according to the lifetime of a legal relationship – and draws special attention to their personal scopes.

3.3.2. Access

3.3.2.1. Open internet access

Besides the shift of focus of the universal service framework in the proposed European Electronic Communications Code towards basic broadband internet access, the importance of access to the digital single market has also been highlighted by the Regulation 2015/2020 on open internet access. A key novelty brought about by this act is that it does not refer to relationships between citizens and the state, but rather those between the providers of internet access services and users of these services. Most notably, it establishes a right of all end-users to access and distribute information and content, to use and provide applications and services and to use terminal equipment of their choice, without discrimination, via their internet access service (Article 3(1)). As a starting point, end-users and internet access providers remain free to agree on tariffs for specific data volumes and speeds. Recital 7 indicates, however, that the agreements should not limit the exercise of end-users' right to open internet access, which, in turn, is subject to scrutiny by national regulatory agencies. What is more, providers of internet access services are obliged to treat all traffic equally, that is, for instance, not to prioritize or interfere with particular types content or over-the-top services, in line with the principle of net

establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, COM(2016) 289 final.

[221] Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union [2015] OJ L310/1.

[222] Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), COM(2017) 10 final.

neutrality (Article 3(3))[223]. More specific norms concerning the contractual relationships between both types of actors can be found in Article 4. Interestingly, all of these provisions are linked to other overarching topics discussed before and are neatly aligned with the concept of access justice. First of all, in line with the established legislative technique, a list of information particulars which internet access providers should include in their contracts with end-users is specified. Most of them refer to rather technical issues such the impact of a variety of factors on the internet access service as well as specific information concerning upload and download speed. Contracts concluded with consumers – and this is the only context in which this status-based category appears – should furthermore include a clear and comprehensible explanation of the remedies available to consumers in case of any continuous or regularly recurring discrepancy between the actual performance and the parameters which are mandatorily specified in the contract. Finally, providers of internet access services are required to put in place transparent, simple and efficient procedures to address complaints of end-users concerning the subject-matter of the discussed regulation.

While it is still too early to assess the impact of regulation its overall framework is certainly noteworthy. The act appears to combine the elements of universal access – appearing more as citizen's than as consumer's rights[224] – with the elements of access justice, in which the key concept is also not the standard consumer notion but rather a broader end-user category. Connections to the consumer law *acquis stricto sensu* are established where the legislator deems it necessary. A distinctly social layer, and especially a direct reference to the vulnerable, appears to be missing, yet this aspect is addressed by Directive 2002/22/EC on universal service (and the proposed European Electronic Communications Code). Such a regulatory approach could present a promising avenue for the digital age.

3.3.2.2. Geo-blocking

Another instrument relating to the access of end-users to the digital market is the proposed regulation on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market, tabled in

[223] Both rights and duties are subject to several limitations defined in the regulation linked to issues such as: compliance with legal obligations (e.g. concerning the lawfulness of content), safeguarding integrity and security of the network and congestion management.
[224] Cf. Lee A Bygrave, *Internet Governance by Contract* (Oxford University Press 2015) 121–125.

May 2016. Similarly to the acts discussed above, the proposal is based on Article 114 TFUE and aims to eliminate unjustified discrimination – both direct and indirect – in the internal market. It does so by defining situations, in which different treatment cannot be justified, for example, where customers from specific Member States are prevented from accessing an online interface of a trader or are automatically redirected to a different version of that interface (Article 3). This seems to amount to a general prohibition of the blocking or limiting of access to online interfaces to customers from the Union, whenever such access in provided to customers from other Member States, and is aimed to increase the general market transparency[225]. A similar solution is applied to the redirection to other interfaces, for which an explicit consent of the customers is required. The only exception applies when the blocking or redirection is necessary to ensure compliance with specific legal requirements of EU law or the law of a Member State which the trader is subject to and, even then, has to be accompanied by a clear explanation. The proposal furthermore identifies three situations in which traders are prevented from applying different general conditions of access to their goods or services to customers from different Member States (Article 4). First, such discrimination is prohibited in the case of sale of physical the goods are delivered to or collected at a location in a Member State to which the trader offers such options in his general conditions of access. The same applies to electronically supplied services, other than services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter or the selling of protected subject matter in an intangible form. Finally, if services are provided in a physical location within the territory of a Member State where the trader operates, different treatment for reasons related to nationality, place of residence or place of establishment of the customer is equally prohibited. Last but not least, situations in which the application of different conditions of payment cannot be justified are described.

The proposal constitutes *lex specialis* in relation to Article 20(2) of Directive 2006/123/EC on services in the internal market discussed above. Admittedly, its personal scope is slightly different than that of the directive as it refers only to the discriminatory treatment of consumers and businesses acting as end-users, and not of service recipients more generally[226]. It is, nevertheless, still significantly broader than one established by means of the standard consumer notion. Also the material scope of the act is more nuanced than that of the directive

[225] COM(2016) 289 final, recital 14.
[226] Cf. Article 2(c) of the proposed regulation and Article 4(3) of the Services Directive.

as it covers both the sale of goods and the provision of services and, on the other hand, excludes a number of services from the scope of its core provision[227]. The former is understandable given the blurring of the boundaries between the sales and services in the digital market[228]; the latter, by contrast, appears to be an outcome of a political decision.

3.3.3. Informed decision-making: distance contracts, privacy and data protection

As seen from above, both the regulation on open access and the proposed regulation on geo-blocking, although mainly aimed at enhancing customer access to the DSM, are also linked to certain information rules. As has been demonstrated throughout this thesis, protection through information is one of the most established techniques of European private (consumer) law. With respect to the digital market, the use of this technique dates back to Directive 97/7/EC on distance contracts, which has already been discussed before. At this stage it suffices to recall that the directive aimed not only at online transactions, but referred more broadly to contracts concluded under an organised distance scheme run by the supplier with an exclusive use of the means of distance communication. It established a number of rules concerning, among others, prohibition of the so-called inertia selling, pre-contractual disclosure duties, relevant time of performance and the consumer's right to withdraw from a contract. As mentioned before, personal scope of the act was limited to legal relationships between consumers and traders, defined by reference to the standard functional-occupational criteria.

Following a subsequent reform, Directive 97/7/EC was replaced with Directive 2011/83/EC on consumer rights. The high-sounding title of the latter is a reminiscence of the more ambitious agenda which the European Commission was originally pursuing. The failure of that plan was largely due to the Commission's insistence on the principle of full harmonisation. Strong criticism of the initiative – in both political and academic circles – led to a radical curtailment of the act's material scope, without backtracking from the principle, however. As a result, the new act is essentially streamlining the existing framework, most notably with respect to online contracts, this time on the basis of full harmonisation.

[227] Article 4(1)(b) and (c). Note that in the digital market the boundaries between the sales and services become blurred as, for example, selling goods online is classified as an information society service pursuant to Directive 2000/31/EC on electronic commerce, and the use of products is increasingly being offered as a service, particularly in the context of the Internet of Things.

[228] Note, for example, that selling goods online is classified as an information society service pursuant to Directive 2000/31/EC on electronic commerce

Notwithstanding the controversy surrounding the adoption of the CRD, the fact remains that the directive belongs to the most recent fruits of the European law-making in the area of interest to this project and has been preceded by a range of policy analyses and an extensive debate in legal literature[229]. One may thus assume that the choices it makes with respect, for example, to the personal scope reflects the current consensus on that matter reached at the EU level. Bearing this in mind, it should primarily be highlighted the new act maintains the overall status-related logic and is limited to contracts concluded between consumers and traders. In line with the established legislative practice, the notion of a consumer found in the normative part of the CRD refers to natural persons acting for purposes which are outside his or her trade, business, craft or profession. Arguably, however, the directive also leaves scope for additional flexibility in that regard.

First of all, recital 34 draws on the earlier discussions concerning the vulnerability and requires that traders, in providing the information mandated by the directive, "take into account the specific needs of consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader[s] could reasonably be expected to foresee". A references to consumer's vulnerability is thus combined with another characteristically European notion – that of reasonable (legitimate) expectations. Unfortunately, despite a significant potential offered by this solution, especially in the times of detailed profiles of consumers created by the businesses operating in the digital economy, a similar wording has not made it to the act's normative part[230]. Furthermore, as if the new idea was not uncertain enough, the preamble further stipulates that consideration of such specific needs "should not lead to different levels of consumer protection", which gives rise to further doubts.

Secondly, recital 17 explicitly refers to contracts concluded for purposes partly within and partly outside one's trade and clarifies that if the trade purpose of such a dual purpose contract is "so limited as not to be predominant in the overall context of the contract" the person

[229] On the original plans of the Commission, according to which the new directive would incorporate a number of other directives including Directive 93/13/EEC on unfair terms and 1999/44/EC on consumer sales, see: Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Sellier 2009). Elizabeth Hall, Geraint Howells and Jonathon Watson, 'The Consumer Rights Directive – An Assessment of Its Contribution to the Development of European Consumer Contract Law' (2012) 8 European Review of Contract Law 139. Beale (n 217).
[230] Reich, 'Vulnerable Consumers in EU Law' (n 185) 150.

should be regarded as a consumer. This appears to go against the abovementioned ECJ ruling in *Gruber*, reinforcing the view expressed in the literature that the interpretation provided in that ruling does not necessarily need be extended beyond the questions of jurisdiction[231]. As a matter of fact, also in its original context, the interpretation of *Gruber* is currently subject to a possible reinterpretation. This, indeed, appears to be the suggestion made by the Advocate-General Bobek in the pending *Schrems* case[232]. Aside from the question of dual purpose contracts, the AG also makes a number of interesting points concerning the potential dynamism of the consumer notion in long-term relationships. In this regard, he appears to support a presumption that, if a contract was concluded in one's capacity of a consumer, that status remains valid throughout the lifetime of a legal relationship. Nevertheless, if the aim of a contract is not specified or the contract is open to different uses and there is "a clear evolution" of the type of the capacity in which the party makes use of the contract, a possibility of losing the consumer status over time cannot be excluded[233]. Of course, it remains to be seen whether the reasoning presented by the AG will ultimately be followed by ECJ. Given the Court's continuously strict stance concerning the interpretation of the consumer notion in the matters of jurisdiction, it may well appear that only the less consumer-friendly parts of the Advocate-General's reasoning will find support in the Court.

What appears to be settled – both under the Consumer Rights Directive and in the Court's case law – is that parties other than natural persons cannot qualify as consumers. Admittedly, recital 13 of the CRD expressly reaffirms the competence of Member States to apply the directive's provisions to areas not falling within its scope, for example by extending its application to certain business-to-business transactions, particularly those involving non-governmental organisations, start-ups or small and medium-sized enterprises. Although not mentioned in the recitals, a possible transposition of the directive into the general contract law of a Member State cannot be excluded either. Given the overall increase in the number of contracts concluded in the digital economy as well as the blurring of the boundaries between their particular types[234], one may ask whether the European lawmaker – in its quest for a

[231] Micklitz and Reich, 'Crónica de Una Muerte Anunciada: The Commission Proposal for a "Directive on Consumer Rights' (n 130) 482.
[232] See opinion of Advocate General Bobek in case C‑498/16 *Schrems v Facebook*, ECLI:EU:C:2017:863, para. 58–59.
[233] Ibid, para. 34-41, 59.
[234] Notably in the context of the so-called sharing economy, see e.g. Kai Purnhagen and Stefan Wahlen, 'Der Verbraucherbegriff Im 21. Jahrhundert. Verbraucherbürger Und Verbraucherproduzent' (Sachverständigenrat für Verbraucherfragen 2016).

coherent set of rules supporting the development of the internal market – has not fallen into its own trap and created a potential for further fragmentation – this time between national rules addressing B2C and other contracts. The recent *Europamur* ruling, in which the ECJ was faced with a similar problem, can only be helpful on an *ad hoc* basis[235]. A possible alternative would have been a more integrated approach covering both consumer and other contracts, possibly using the notions of a consumer or of an SME as sub-categories, and paying due regard to the mandatory or default character of the rules. Especially when it comes to the curing of information asymmetries, the existing European *acquis*, most notably the E-Commerce and Services Directives, already provide for examples of rules which are not status-based – the directive could thus be used as an opportunity to streamline these provisions.

On a more general note, rather than expanding the list of standard information duties and stabilising the status-related divide, more attention could have been devoted to the question of how the negative effects of information asymmetries can effectively be countered, to the benefit of all market participants. In this respect, the digital tools are a source of both dangers and opportunities. As mentioned before, the proposed regulation on geo-blocking attempts to counter some of the transparency problems created by technology – an approach which certainly deserves recognition. Further issues are linked, among others, to the blurring of the boundaries between products and services, particularly in the context of the Internet of Things (IoT) where the product usage is increasingly offered as a service[236]. In order to use the connected device according to its purpose users are typically required to enter into several contractual arrangements, including with third parties (e.g. copyright holders), agree to privacy policies, etc. The exact relationship between these different agreements often remains unclear. By way of illustration, despite the fact that, under the CRD, traders are required to provide consumers with a confirmation of an online contract on a durable medium, end-user license agreements tend to be perceived as falling outside the scope of that directive[237]. Addressing the challenges posed by the IoT requires a holistic approach which looks not only

[235] In *Europamur* the Court of Justice considered itself competent to rule on a case involving a business-to-business practice under the UCPD. It did so, however, not because of a new interpretation of the consumer status, but rather through a classification of the relevant national provision as an act of transposition beyond directive's material scope and the application of the *Nolan* jurisprudence; Case C-295/16 Europamur Alimentación, ECLI:EU:C:2017:782, case C-583/10 Nolan, ECLI:EU:C:2012:638.

[236] Christiane Wendehorst, 'Consumer Contracts and the Internet of Things' in Reiner Schulze and Dirk Staudenmayer (eds), *Digital Revolution: Challenges for Contract Law in Practice* (Nomos/Hart 2016). Rolf H Weber and Romana Weber, *Internet of Things: Legal Perspectives* (Springer 2010).

[237] Christiane Wendehorst, 'Verbraucherrelevante Problemstellungen Zu Besitz- Und Eigentumsverhältnissen Beim Internet Der Dinge' (Sachverständigenrat für Verbraucherfragen 2016) 69.

in to consumer law, but also in the intellectual property and data protection law. Symptomatically, only one of these three domains is status-based.

An even greater challenge arises from the use of artificial intelligence and big data analytics for purposes of advanced consumer targeting and personalised marketing[238]. One may argue that the informational advantage which businesses using such techniques can possess over customers is no longer limited to the product or service, but also extends to the characteristics and, especially, vulnerabilities of customers themselves. The mechanisms of protection through information known from consumer law do not appear to be fit to deal with this problem either; henceforth, answers are again sought within the framework of data protection law – a non-status-related instrument[239].

As of 25 May 2018 the European data protection framework will rely on the General Data Protection Regulation. Based solely on Article 16 TFUE, introduced in the Lisbon Treaty, the GDPR focuses on the protection of the fundamental right of natural persons in relation to the processing of personal data. This, of course, includes but is not limited to formally defined consumers. The act stipulates, among others, in which circumstances the processing of information relating to an identified or identifiable natural person can be qualified as lawful. One of such conditions – and a predominant one when it comes to the processing of special categories of personal data, which can, to some extent, be aligned with the concept of vulnerability – is the data subject's freely given, specific, informed and unambiguous consent. Article 7 of the GDPR specifies further conditions for a valid consent, requiring, for example, that the request for consent is clearly distinguishable from other matters and is communicated "in an intelligible and easily accessible form, using clear and plain language". The act also requires the controller – that is the person determining the purposes and means of the processing – to inform the data subject about a number of matters such as the identity and contact details of the controller, the purposes and the legal basis for the processing and data subject's rights.

[238] Mireille Hildebrandt and Serge Gutwirth (eds), *Profiling the European Citizen: Cross-Disciplinary Perspectives* (Springer 2008). Rolf H Weber, 'Internet of Things: Privacy Issues Revisited' (2015) 31 Computer Law & Security Review 618.

[239] Philipp Schmechel, 'Verbraucherdatenschutzrecht in Der EU-Datenschutz-Grundverordnung' (Sachverständigenrat für Verbraucherfragen 2016). On the potential role of the UCPD see: Natali Helberger, 'Profiling and Targeting Consumers in the Internet of Things' in Reiner Schulze and Dirk Staudenmayer (eds), *Digital Revolution: Challenges for Contract Law in Practice* (Nomos/Hart 2016).

Admittedly, in view of the availability of other legal bases for the lawful processing of persona data, the practical relevance of consent is a matter of dispute. With or without consent, the GDPR endows data subjects with a number of rights, of which they cannot be deprived[240]. This highlights the importance of data protection in the EU as a fundamental right, visible already in the legal basis of the GDPR (though not equally recognized to in other jurisdictions)[241]. It has been submitted that a similar process of constitutionalisation has begun to take place, via the case law of the ECJ, with respect to some areas of consumer law, most notably those where existential interests of consumers are at stake[242]. Also in this respect the tenuity of the standard consumer notion might be seen – it seems that it is not the activity for private purposes, but the rather the nature of the interests at stake and particular vulnerability of an individual that plays the role in constitutionalisation.

Last but not least, it should be emphasised that technology be regarded not only as a source of new risks, but can also offer solutions to some of the emerging consumer problems. Christoph Busch, for instance, points to the potential of the big data as a tool for providing consumers with information "tailored to their situations, personalities, demographic characteristics and cognitive capabilities"[243]. A further example, which is easier to envisage in a more immediate time frame, relates to the role of online platforms as information intermediaries. Interestingly, initial hints in that direction have already been made in the guidance document accompanying the CRD as well as in the updated guidance on the UCPD. The interpretation provided in the latter is particularly noteworthy as it draws attention the possibility of applying a status-related instrument to improve transparency of contractual environments other than B2C. According to the guidance, online platforms should not only enable third party traders, by designing their web-structure, to indicate that they are traders, but should also communicate to "all platform users" that they will only benefit from protection under EU consumer and marketing laws in their relations with those suppliers who are traders. "Consumers" should furthermore be informed whether and, if so, what criteria operators of online platforms apply to select the suppliers and whether and, if so, what checks they perform in relation to their

[240] On the analogous question under the earlier framework, see: Bygrave (n 224) 118.
[241] Gloria González-Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU* (Springer 2014).
[242] Micklitz, 'The Consumer: Marketised, Fragmentised, Constitutionalised' (n 104).
[243] Christoph Busch, 'The Future of Pre-Contractual Information Duties: From Behavioural Insights to Big Data' in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar 2016) 232.

reliability[244]. While the UCPD could potentially only justify the existence of such an obligation vis-à-vis consumers defined by means of the standard consumer notion, the importance of this information for all market participants is obvious, not only from the inconsistent wording used by the Commission itself. Notwithstanding the above, and even though a number of other unresolved issues remain – concerning, for example, the role of reputational feedback systems, particularly in view of the lack of the harmonised law on the quality and safety of services[245] – the document is certainly a valuable starting point. Inspiration concerning the possibilities of leveraging the technological potential to improve the conditions for informed decision-making beyond the B2C can, again, be drawn from the data protection framework. In this respect, besides the ideas of data protection "by design" and "by default" introduced in the GDPR[246], an interesting picture emerges from the proposed regulation on privacy and electronic communications with respect to the so-called cookies, to which I now turn.

The purpose of the e-privacy framework is to particularise and complement the general data protection law taking into account the specific features of the electronic communications sector. At the time of this writing, the relevant framework is still based on Directive 2002/58/EC on privacy and electronic communications, although legislative works on new act – the E-Privacy Regulation – are already quite advanced. In several important respects the scope of both the old act and the new proposal goes beyond that of the general data protection law. Most notably, both instruments are not limited to the protection of data concerning identified or identifiable natural persons, but refer more generally to the content exchanged by end-users by means of electronic communications services and to associated metadata[247]. Importantly from the point of view of this examination, such data may concern both natural

[244] Commission Staff Working Document, Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, SWD(2016) 163 final, 126–127, 132.

[245] Christoph Busch, 'Crowdsourcing Consumer Confidence. How to Regulate Online Rating and Review Systems in the Collaborative Economy' in Alberto De Franceschi (ed), *European Contract Law and the Digital Single Market: The Implications of the Digital Revolution* (Intersentia 2016). Marta Cantero Gamito, 'Regulation.com: Self-Regulation and Contract Governance in the Platform Economy: A Research Agenda' (2017) 9 European Journal of Legal Studies 53.

[246] In line with the principle of data protection by design, the implementation of data-protection principles should occur by means of appropriate technical and organisational measures implemented by the controller. What is more, the relevant measures should ensure that, by default, only personal data which are necessary for each specific purpose of the processing are processed (Article 25); Similarly Article 34 as regards data security.

[247] The e-privacy directive referred to analogous types of data, yet it provided for a different (narrower) definition of an electronic communication service. The proposed regulation follows the approach of the proposed directive on EECC which redefines the notion of the ECS from "services which consist wholly or mainly of the conveyance of signals" to cover internet access services, interpersonal communications services – including those provided "over the top" – and services consisting wholly or mainly in the conveyance of signals (e.g. machine-to-machine communication).

and legal persons. Issues addressed in this context include, among others: confidentiality, lawfulness of the processing of electronic communications data – with a prominent role of consent – as well as protection of information stored in end-user's terminal equipment. The latter topic is linked to the vigorous debate concerning the placing of "cookies" and other local storage technologies used, for example, to facilitate the provision of information society services or measure web traffic. The existing solution, emphasizing the importance of the user's consent, expressed "having been provided with clear and comprehensive information", has led to ubiquitous pop-up windows of limited practical value. An interesting amendment in that regard is now proposed as part of the ongoing reform. The use of local storage techniques would continue to require end-user's consent, which he or she would be able to express by appropriate technical setting of a software application enabling access to the internet[248]. What constitutes a novelty is that in the proposed regulation shifts the focus to the role of the suppliers of such software (e.g. internet browsers), including as information providers. Pursuant to Article 10 of the proposal, software placed on the market shall offer the option to prevent third parties from storing information on end-user's terminal equipment, shall inform the end-user upon installation about the privacy settings options and require him or her to consent to a setting. The e-privacy framework thus provides an example of a new approach to citizen/consumer/user protection – as regards both its personal scope and the tools upon which it relies.

3.3.4. Contractual and commercial fairness

3.3.4.1. Sales of goods and supply of digital content

Two legislative proposals adopted under the DSM programme relate to key areas of contract law such as conformity of contractual performance, remedies for non-conformity as well as modalities of their exercise. This is especially true for the amended proposal for a directive on certain aspects concerning contracts for sales of goods, which is, in fact, largely based on Directive 1999/44/EC and, if adopted, would replace that directive. After the scope of the proposal has recently been extended to cover both distance and face-to-face sales, the main difference between the proposed and the existing framework is the level of harmonisation. A

[248] This has already been the case under the existing framework, particularly after the 2009 reform, cf. Article 5(3) of Directive 2002/58/EC as amended, recital 66 of Directive 2009/136/EC, Articles 8(1) and 9(2) of the proposed regulation

similar set of issues linked to the performance of contractual obligations is addressed by the second proposal presented in December 2015, concerning contracts for the supply of digital content. Due to the nature of contractual performance it addresses – namely the supply of data produced and supplied in digital form and the provision of services allowing consumers the creation, processing, storage of, or access to data in digital form or allowing the sharing of or any other interaction with data in digital form provided by the consumer or other users of the service[249] – the proposal brings an important element of novelty not only to the European contract law framework[250], but also to most national legal orders[251].

Crucially from the point of view of this examination, both the amended proposal for the sale of goods and the proposed directive on the supply of digital content maintain the status-related approach known from the Consumer Sales Directive. A careful reader may observe that the definition of a "seller" used in both instruments contains an additional stipulation, found already in Directive 2011/83/EU on consumer rights, clarifying that the seller might be acting "through any other person acting in his name or on his behalf". Interestingly, it is by reference to this formulation that the Commission suggested, in its guidance document to the CRD, that an operator of an online platform used by traders to conclude contracts with consumers "shares, in so far as he is acting in the name of or on behalf of that trader, the responsibility for ensuring compliance with the directive"[252]. The interpretation itself appears quite tenuous and is even more unlikely to be applied to trader's obligations under the sale contract. What the framework of sales law can do, however, is to provide the operators of such platforms with additional incentives to inform consumers about their role and status. In this respect attention should be drawn to a recent *Wathelet* case, in which the ECJ extended the notion of a "seller" under Directive 1999/44/EC to a professional intermediary acting on

[249] During on-gong legislative works the definition of "digital content" will likely be aligned with that found in Directive 2011/83/EU on consumer rights; see: Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (First reading) – General approach.

[250] The proposal largely builds upon the unsuccessful proposal for a regulation on a Common European Sales Law.

[251] Geraint Howells, 'Reflections on Remedies for Lack of Conformity in Light of the Proposals of the EU Commission on Supply of Digital Content and Online and Other Distance Sales of Goods' in Alberto De Franceschi (ed), *European Contract Law and the Digital Single Market: The Implications of the Digital Revolution* (Intersentia 2016) 145–162.

[252] DG Justice Guidance Document concerning Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, 2014, 24, 30–32.

behalf of a private individual[253]. The Court reached that conclusion by focusing on the way in which a (professional) party acting as an intermediary presented itself to the buyer. It concluded that if the intermediary does not inform the buyer of the fact that the owner of the goods sold is a private individual, that intermediary may in itself be treated as a "seller" under the analysed directive. Justifying its position, the Court emphasised the existence of significant information asymmetries between a consumer and a professional intermediary and stressed that effective consumer protection requires buyers to be aware of the identity and capacity of their contractual partners[254]. Notwithstanding the question of potential remedies, the *Wathelet* case underlines the need for an increased transparency in multi-party relationships – an outcome, which would certainly be beneficial not only for consumers, but for market participants more generally, especially in the context of sharing economy.

As regards the broader question of "contractual fairness", the observations made before in the context of Directive 1999/44/EC remain valid under the new proposal. This includes the view that the fairness dimension in both acts is, in fact, not as strong as it may seem at first sight and that a number of solutions found therein could potentially be applied outside the B2C scenario. The market orientation is even more pronounced in the digital content proposal, even if one needs to admit that specifics of this act, including the conformity standard, are currently subject to a heated legislative debate[255]. In fact, the supposed preference of market over protection appears to be one of the reasons why prominent consumer organisations are so vocally opposed to the proposed set of fully harmonised rules[256]. While this is certainly not the place to formulate broader proposals concerning the desirable shape of contract law in Europe, without doubt the questions of personal scope and the level of harmonisation have to be considered together if the European framework is indeed to provide an equilibrium between the freedom (party autonomy) and protection[257] adequate for the digital economy, which appears to be essential both from the point of view of its legitimacy and the successful realisation of its policy aims.

[253] Case C-149/15 *Wathelet*, ECLI:EU:C:2016:840, paras. 34–35.
[254] Ibid, paras. 36–37 and 40–41.
[255] Statement of the European Law Institute on the European Commission's Proposed Directive on the Supply of Digital Content to Consumers, 2016, pp. 10-12
[256] See e.g. BEUC, Consumer rights in online sales of goods can't be weakened, 20.06.2016 <www.beuc.eu/press-media/news-events/consumer-rights-online-sales-goods-can%E2%80%99t-be-weakened>
[257] Grundmann, 'European Contract Law(s) of What Colour?' (n 87) 209; Hannes Rösler, 'The Transformation of Contractual Justice – A Historical and Comparative Account of the Impact Consumption' in Hans-W Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar 2011) 348.

3.3.4.2.Unfair terms and practices

The digital economy has also shed new light on another distinctly status-related instrument which was earlier discussed under the heading of contractual fairness, namely Directive 93/13/EEC on unfair terms. It has been argued that the limitation of the scope of the instrument to pre-formulated terms only underlines the importance of procedural justice in the overall framework and shows that the weaker position of consumers is not the only reason for their protection. A second important consideration relates to the safeguarding of material freedom of contract under the standard-form conditions and remains equally valid for B2C and other contracts. This has led a number of national legislators, such as German one, to extend the scope of their unfair terms laws to also cover standard form contracts between businesses[258]. As a matter of fact, this logic is also not entirely alien to the European lawmaker as well, who attempted to include a similar solution in the failed proposal for a Common European Sales Law[259].

Standard terms are much more ubiquitous in the on-line environment than in the analogue world and their factual readership and control largely remains fictitious[260]. Substantive control of standard terms, which appears to be the most pronounced "protective" element of the UCTD thus yields limited results. If one considers this to be a problem, its sources could be sought in the insufficient level of enforcement, and from that point of view initiatives aimed to improve detectability of unfair standard terms in online contracts, especially with the use of technological means, are particularly noteworthy[261]. One may also alternatively repeat the plea for an increased transparency. Inspiration in that regard could be sought, for example, in the duty to raise awareness of not individually negotiated terms laid down in Article 70(1) of the (failed) CESL proposal as well as in a specific rule of incorporation applicable to

[258] Matthias Lehmann and Johannes Ungerer, 'Save the "Mittelstand": How German Courts Protect Small and Medium-Sized Enterprises from Unfair Terms.' (2017) 25 European Review of Private Law 313. Stuyck (n 6) 360–361.
[259] COM(2011) 635 final, chapter 8.
[260] Marco Loos and Joasia Luzak, 'Wanted: A Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers' (2016) 39 Journal of Consumer Policy 63. Marco Loos, 'Transparency of Standard Terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law' (2015) 23 European Review of Private Law 179. Maartje Elshout and others, 'Study on Consumers' Attitudes towards Terms and Conditions (T&Cs). Final Report' (European Commission 2016). Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 Journal of Law and Society 349.
[261] Hans-W Micklitz, Przemysław Pałka and Yannis Panagis, 'The Empire Strikes Back: Digital Control of Unfair Terms of Online Services' (2017) 40 Journal of Consumer Policy 367.

"surprising standard terms" under § 305c(1) of the German Civil Code[262]. It is worthy of note that none of these solutions is limited to B2C transactions.

On a different note, as has been mentioned before, the European marketing law has meanwhile made a transition from an instrument with a broader personal, but narrower material scope (Directive 84/450/EEC) to a more fully-fledged framework relating to unfair commercial practices of all types, yet limited to business-to-consumer relationships only (with a certain potential for spill-over effects). The debate on commercial fairness outside the B2C scenario has always been more limited, and controversial[263], priority being given to the competition law mechanisms. Only one instrument, Directive 2011/7/EU on combating late payment in commercial transactions, departed from this approach. Interestingly, is that in the said instrument unfair terms and unfair practices between businesses have been considered jointly[264].

Notwithstanding all the controversies, it appears worthy of note that the matter of contractual and, more broadly, commercial fairness beyond the B2C has recently returned on the European agenda, the current focus remaining on the so-called "platform-to-business" relationships[265]. Also in this respect unfair terms and unfair practices seem to be considered together. While it is difficult to predict whether these initiatives will yield any results, both the ubiquity of "invisible standard terms"[266] and the renewed focus on the imbalance of power beyond B2C show that the European fairness standards might need to be rethought (again) and that consumer defined by means of the standard notion should not be taken for granted as their exclusive addressee.

[262] Similarly: Christiane Wendehorst, 'Sale of Goods in the Digital Age – From Bipolar to Multi-Party Relationships' in UNIDROIT (ed), *Eppur si muove: The Age of Uniform Law. Essays in honour of Michael Joachim Bonell to celebrate his 70th birthday* (2016).
[263] Hans Schulte-Nölke, 'No Market for "Lemons": On the Reasons for a Judicial Unfairness Test for B2B Contracts' (2015) 23 European Review of Private Law 195. Stuyck (n 6) 359–368. Martijn Hesselink, 'SMEs in European Contract Law' in Katharina Boele-Woelki and Willem Grosheide (eds), *The Future of European Contract Law. Essays in honour of Ewoud Hondius* (Kluwer Law International 2007).
[264] Article 7 of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions [2011] OJ L48/1.
[265] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review on the implementation of the Digital Single Market Strategy A Connected Digital Single Market for All, COM(2017) 228 final.
[266] Rodrigo Momberg, 'Standard Terms and Transparency in Online Contracts' in Alberto De Franceschi (ed), *European Contract Law and the Digital Single Market: The Implications of the Digital Revolution* (Intersentia 2016).

3.3.5. Alternative dispute resolution: ODR

The last topic discussed in this thesis is related to dispute resolution. As mentioned before, already since late 1990s, and especially after the *Alassini* judgment, the European legislator has been taking consecutive steps to promote and gradually harmonise the mechanisms of out-of-court dispute settlement in Europe. One of these measures included Directive 2008/52/EC on mediation in civil and commercial matters, which, however, did not require Member States to establish a comprehensive framework but rather aimed to facilitate the use of already existing schemes in the cross-border context. Particularly interesting from the point of view of the present thesis is, however, a parallel process initiated with the adoption of 1998 and 2001 recommendations mentioned above. It focused on the alternative resolution of consumer disputes and eventually led to the adoption the two instruments related to alternative and, especially, online resolution of such disputes. Interestingly, none of these instruments mentions the specificity of consumer claims as a prominent part of its regulatory rationale[267]. Both in Directive 2013/11/EU and in Regulation 524/2013 the benefits of extra-judicial dispute resolution in terms of ease, efficiency, speed and cost are taken more or less for granted. Much more emphasis is placed on the need to improve "consumers' confidence" that potential disputes with the traders can be resolved in such an easy, efficient, fast and inexpensive way and thereby to achieve "citizens' trust" essential for the completion of the internal market. Both acts mention numerously the increasing importance of online commerce, but none of them elaborates what about this development makes ADR so important[268]. A plausible explanation is, of course, linked to the increasing cross-border dimension of online commerce, which makes the judicial enforcement of individual rights and obligations significantly more complex[269]. The acts, however, do not look deeper into the transformation brought about by the process of digitalisation, but are satisfied with the conclusion that, if a potentially growing number of business-to-consumer disputes arises from an online activity, then the mechanisms for their extra-judicial resolution should also be

[267] By contrast, in Recommendation 98/257/EC, a specific focus on consumer claims was justified by arguments relating to the frequent disproportion between the economic value at stake and the costs and difficulties associated with judicial proceedings, traditional redress mechanisms may not always be optimal for consumer claims.

[268] See also Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Single Market Act. Twelve levers to boost growth and strengthen confidence. "Working together to create new growth", COM(2011) 206 final, p. 9-10.

[269] Not least due to the questions related to applicable law under Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

available online. This should be achieved through the establishment of a centralized European ODR platform designed to facilitate the settlement of disputes between consumers and traders – identified by means of standard status-related definitions – through ADR entities and with the use of procedures established according to Directive 2013/11/EU[270].

Directive on consumer ADR and Regulation on consumer ODR might, again, be considered as a missed opportunity. This is not only due to continuous reliance on the status-based approach, which, as has been argued before, is subject to increasing tensions in the digital economy[271]. The instruments do not even seek to engage, for instance, with the question of in-built dispute resolution mechanisms provided by certain online platforms. In reality, however, these are the means which currently present the most promising avenue for the settlement of conflicts related to online transactions – not only between consumers and traders, but even more importantly between private parties engaging in the so-called "sharing economy". This is because online platforms are acting as gatekeepers of important segments of the market and therefore, unlike the European ODR framework, are able to offer effective incentives for both parties to engage in dispute settlement[272]. At the same time, existence of such mechanisms raises questions concerning the privatization of justice, making the research of this topic increasingly important [273].

4. Conclusions

The analysis of the evolution of European private/consumer law reveals the following three approaches concerning personal scope:

1. The predominant, status-related approach, found in EU consumer *acquis stricto sensu*, encompassing business-to-consumer relationships. The approach can be associated with several overarching topics, most notably related to informed decision-making (information rules, formal requirements, withdrawal rights, protection from

[270] Jorge Morais Carvalho and Joana Campos Carvalho, 'Online Dispute Resolution Platform. Making European Contract Law More Effective' in Alberto De Franceschi (ed), *European Contract Law and the Digital Single Market: The Implications of the Digital Revolution* (Intersentia 2016).
[271] Inmaculada Barral Viñals, 'E-Consumers and Effective Protection: The Online Dispute Resolution System' in James Devenney and Mel Kenny (eds), *European Consumer Protection. Theory and Practice* (Cambridge University Press 2012) 83–86.
[272] Cantero Gamito (n 245) 61.
[273] Ibid 66.

misleading practices), contractual and commercial fairness (unfair terms and practices) and, more recently, alternative dispute resolution.

2. One-sided extension to protect customers more generally, found, in particular, in sector-specific frameworks in which liberalisation was followed by EU-level re-regulation. Overarching topics include information, choice, (universal) access and alternative dispute resolution. The scope of particular provisions is often more nuanced.
3. Two-sided extension found in instruments dealing with more fundamental interests, such as safety or data protection, or in areas related more broadly to liberalisation, such as Services Directive. Information, (non-discriminatory) access, choice (data portability) and alternative dispute resolution again appear as recurring themes.

EU law directed at the digital economy follows all three of the abovementioned approaches. A number of rules, particularly those based on previously applicable instruments, follow a status-based approach, with a more recent tendency towards an increased flexibility. Other rules, particularly those which have their origin in the electronic communications framework, take a more nuanced path and often include businesses as end-users. The third category encompasses the E-Commerce Directive, with its broad personal scope, but a limited contractual dimension. Interestingly, a recent initiative based on the Services Directive – the geo-blocking proposal – does not maintain the personal scope of its predecessor, but rather follows the intermediary approach, more characteristic of the electronic communications framework.

On the whole one can observe a growing involvement of the European legislative authority with its specific policy objectives – most notably related to the functioning of the internal market – in the area of private law. Due to globalisation, which is further enhanced by digitalisation, this tendency is likely to continue.

The importance of the internal market rationale is reflected in the following elements/processes: 1) the image of consumer (responsible/circumspect), 2) instruments adopted to protect his or her interests (information rules, withdrawal rights, facilitation of switching, alternative dispute resolution), 3) values/aims to be realized by these instruments (access justice, building consumer confidence), 4) the push for full harmonisation.

This leads to several inconsistencies. Firstly, as the principle of full harmonisation does not cover personal scope, Member States remain free to extend the rules to also cover other actors. This could possibly create a new source of fragmentation, thereby undermining the policy aims of the European law-maker. One of the questions which could merit further examination in that context is the potential role of the ECJ, both on the grounds of the free movement law and the *Nolan*/*Europamur Alimentacion* jurisprudence. Secondly, and more importantly, the consumer addressed by an important part of EU rules under analysis – those related to access justice – does not appear to be so different from a small businessperson. Bearing this in mind one may ask, whether it is justified to exclude the latter from the scope of the legal rules. Indeed, there is already a certain tendency to expand the consumer notion – sometimes even in contrast to the ECJ case law like in the case of dual purpose contracts. However, the protection of businesses as end-users continues to be limited to the area of services. Given the significant cross-border potential of the digital economy, the blurring of the boundaries between categories like consumers and traders or goods and services, as well as the fact that the digital consumer is most likely to actually correspond with the responsible/circumspect model which the EU has created for him, perhaps it is time to look for new techniques. The question is not limited to the well-known debate on business-to-business fairness. What has rather been underlined is that the elements related to access, information and dispute resolution can be equally relevant for all market participants and that different types of tools can be employed to reach these objectives – to the benefit of the EU policy aims and the digital single market project.

Finally, as has been demonstrated, a number of rules remain more faithful to the original "weaker party protection" rationale or are linked more broadly to citizen's rights. This refers, on the one hand, to several traditional areas such as safety or unfair terms and practices and, more recently, to the questions of universal services and data protection. In the area of safety the scope of applicable rules is not limited to status-related consumers, possibly due to existential interests at stake. High ranking values may, however, also come into play in other (more economic) contexts, as demonstrated by the *Aziz* case. One of the possible ways forward is to focus on the concept of the vulnerable, acknowledging the digital economy is associated with vulnerabilities. The tools for addressing their different faces can be diverse – with respect to internet access, for instance, the universal service approach might be most adequate, with respect to new types of vulnerabilities resulting from the the use of big data,

artificial intelligence and algorithmic decision-making, data protection law or a more technological approach might turn out to be more promising.

The regulatory nature of the European private law and the co-existence of the framing/enabling dimensions already calls the usefulness of the Maine's into question. Embracing the process of constitutionalisation, developing an integrated approach with the neighboring domains such as data protection law and focusing on access justice beyond consumer status would provide further arguments against such comparisons.

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