Hans-W. Micklitz and Stephen Weatherill Consumer Policy in the European Community: Before and After Maastricht

ABSTRACT. The purpose of this paper is to examine the extent to which the Treaty on European Union agreed at Maastricht will alter European Community consumer protection law and policy. Two aspects of the Treaty have attracted most interest from the consumer viewpoint: the potential forward impetus resulting from the inclusion in the Treaty of a specific Title devoted to consumer protection and the potential reverse impetus of the principle of subsidiarity. The paper surveys the broad scope of Community consumer protection law and policy and analyses subsidiarity as a means for sharpening the debate about responsibility for regulating the Community, not as a basis for renationalisation of Community competence. The paper attempts to build alongside the process of market integration a set of enforceable consumer rights to market regulation. This, more than the new Title, could give real shape to the notion of consumer rights, which in the earlier development of Community law has arisen only in the context of the consumer as the passive beneficiary of free trade.

MARKET INTEGRATION AND THE CONSUMER

The Concealed Place of Consumer Policy in the Treaty of Rome

Although explicit reference to the consumer is largely absent from the Treaty of Rome,[1] the Treaty proceeds on the basis that the consumer is the ultimate beneficiary of its economic objectives. The transformation of relatively small-scale national markets into a large single Community market will stimulate competition and induce producers to achieve maximum efficiency in order to protect, and *a fortiori* to expand, their market share. As a matter of economic theory, this intensification of competition should serve the consumer by increasing the available choice of goods and services, thereby inducing improvements in their quality and reduction in their price.

The Treaty offers no catalogue of consumer rights or interests which exists independently of the general notion that the consumer will benefit from the process of market integration. In this sense Community consumer law revolves around the application of the substantive provisions of the Treaty which act as an instrument for the achievement of the economically efficient integrated market. Provisions such as Articles 30, 48, 52 and 59, which are designed

Journal of Consumer Policy **16**: 285–321, 1993.

to remove barriers to the free circulation of goods, persons and services, and Articles 85, 86 and 90, the Treaty provisions which regulate the competitive conduct of commercial firms, are indirectly part of EC consumer law and policy.

Consumer Choice in the Court's Jurisprudence

On occasion, the Court has made explicit its view that one of the functions of substantive Community law is to abolish national rules which restrict consumer choice in favour of a freer market where widened consumer choice may act as a spur to the development of an efficient Community-wide market. The Court has declared that the legislation of a Member State must not

> crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to comply with them.

The Court has employed this phrase both in the context of fiscal rules which favour typical national products[2] and technical rules which exert a similar protectionist effect.[3] In *De Kikvorsch Groothandel*[4] the Court considered the compatibility with Article 30 of a Dutch rule which required beer marketed in the Netherlands to be made according to stipulated typical Dutch techniques. Such a rule impeded the marketing in the Netherlands of imported beers made according to different traditions. The Court insisted on the primacy of consumer choice over State regulation as a determinant of market availability. It declared that

> no consideration relating to the protection of the national consumer militates in favour of a rule preventing such consumers from trying a beer which is brewed according to a different tradition in another Member State and the label of which clearly states that it comes from outside the said part of the Community.

Consumer choice has also played a part in the interpretation of the application of the Treaty competition rules. In *Cooperatieve vereniging Suiker Unie UA and others* v *Commission*[5] arrangements which led to the isolation of national markets from cross-border competition were condemned. The Court ruled such practices to be "to the detriment of effective freedom of movement of the products in the common market and of the freedom of consumers to choose their suppliers."[6]

Consumer Rights in the Court's Jurisprudence

The expansion of consumer choice in the integrated market, underpinned by the application of legal rules which restrain States from obstructing trade, may be recast in terms of Consumer Rights. These rights recognised under EC law arise indirectly in the sense that the consumer has the right to benefit from the fruits of market integration by buying goods and services from other Member States while resident in his or her home State and by receiving information about goods and services available in other Member States. The cross-border activity in such cases, and any necessary litigation based on substantive EC trade law, is typically undertaken by the supplier of the goods or services. Beyond the right to receive goods and services as the passive beneficiary of market integration, the consumer also has the right to participate more actively in the process of market integration. In *GB-INNO-BM* v. *Confederation du Commerce Luxembourgeois*[7] the Court declared that

> Free movement of goods concerns not only traders but also individuals. It requires, particularly in frontier areas, that consumers resident in one Member State may travel freely to the territory of another Member State to shop under the same conditions as the local population.

The Court determined in *Luisi and Carbone* v *Ministero del Tesero*[8] that "tourists, persons receiving medical treatment and persons travelling for the purpose of education or business" are to be regarded as recipients of services who enjoy the right of free movement under Article 59. This seems to guarantee to the consumer as an economically active migrant rights of entry, residence and non-discrimination.[9] Moreover, the Court is prepared to draw an entitlement to attached social benefits in favour of the recipient of services, even where those benefits are not directly linked to the service being received. In *Cowan* v *Le Tresor Public*[10] the Court ruled that the French authorities had to make available compensation to a British tourist mugged in Paris on the same terms as would apply to a French resident. The decision is relevant to the Community law notion of consumer rights, yet it locates that notion in a broader context.[11] More generally, the completion of the internal market in accordance with Article 8a at the end of 1992 has in principle established the right of the private consumer to move freely across borders and to return home with whatever he or she pleases for his or her private consumption.

In this way, consumer rights may be drawn from the Treaty.

Discourse in terms of rights is important, not least in the light of the Court's own characterisation of the Treaty as the Constitution of the Community.[12] The rights described above are rights to integration, but it will be explained below that the consumer can also claim rights to regulation. This significantly deepens the constitutional structure of the Treaty.

Negative Law

Provisions of Community law which are directed at removing obstacles to cross-border trade are commonly termed "negative law." This refers to Community law's role in forbidding the application of national rules which obstruct the integration of the market. By contrast, positive Community law involves the adoption of Community rules to regulate the market. Negative law deregulates the market; positive law reregulates the market.

The application of negative law proceeds on the assumption that market liberalisation which suppresses obstructive national laws is in the consumer interest. Yet this may bring the law of market integration into conflict with national consumer protection initiatives which obstruct cross-border trade. "Negative law" involves a potential clash between Community consumer law and national consumer law.

The Court's ruling concerning the importation of French "Cassis de Dijon" into Germany provides a famous example.[13] German law imposed restrictions on the marketing of weak alcoholic drink, allegedly as an aspect of consumer health protection. The Court was unable to discern any coherent way in which such a rule could serve the consumer interest. The German measure simply denied the German consumer the opportunity to try a product made according to a different tradition. The national rule fell foul of Article 30 as unlawful State suppression of consumer choice.

Negative law extends consumer choice, even consumer rights, but its application is not unqualified. Under Community law, a State retains a degree of regulatory competence even where its exercise may cause market fragmentation within the Community. In contrast to the Cassis de Dijon ruling, the Court in *Aragonesa de Publicidad Exterior SA* (APESA) v *Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluna* (DSSC)[14] accepted the permissibility of national rules which restricted the marketing of strong alcoholic

drink. Such rules obstructed trade, but the Court was prepared to accept that the public interest in controlling strong drink was of sufficient weight to override free trade and consumer choice.

The limits of negative law may be further illustrated in the area of national rules controlling methods of advertising and sales promotion, where a permissive approach to a national rule in *Oosthoek's Uitgeversmaatschappij*[15] stands in contrast to the approach taken in *GB-INNO* v *CCL*.[16] In *Oosthoek* the Court recognised the risk of consumer confusion as a reason for upholding national laws which prohibited the offer of inducements as a method of sales promotion. In *GB-INNO* it perceived no sufficient justification for national laws which suppressed the provision of information making comparisons between goods supplied by different traders. Article 30, by setting bounds to the scope of national market regulation, obliges States to reassess established methods of intervening in the economy (e.g., Meyer, 1993).

The application of negative law to defeat national law involves a preference for the consumer advantages of free trade over the advantages for the consumer of national regulation which impedes trade (as in Cassis and *GB-INNO*). Upholding the national law, as in *APESA* and *Oosthoek*, amounts to a recognition that the State maintains certain powers and responsibilities which are not overridden by the process of market integration. Market fragmentation persists. In such circumstances the limits of negative law are reached, which implies a need to shift the emphasis towards positive law. Traditionally, this would take the shape of Community legislative action in the field to establish free trade on common rules throughout the Community while ensuring that an appropriate level of protection is also secured.

The balance between market integration and national consumer protection, enshrined in the judicially developed *Cassis* formula, is the key to the accommodation of the consumer interest in substantive EC law; yet it may be difficult to strike that balance in assessing the scope of national competence to regulate the market in individual cases. The Court's case law will not be explored in depth here (more fully, Reich, 1993, Ch.2; Weatherill & Beaumont, 1993, Ch.17), but a fine example of the tensions involved in applying this legal formula may be found in *Drei Glocken* v *USL Centro-Sud*.[17] The case concerned the compatibility with Article 30 of Italian rules governing the composition of pasta, which had the effect of denying German-

made pasta access to the Italian market. The Court found the rules to be a restriction on consumer choice which was incompatible with EC law. This ruling opened the Italian market to penetration by unfamiliar, imported pasta, just as the *Cassis* ruling opened up the German market to unfamiliar, weaker types of drink. However, in his Opinion Advocate General Mancini had urged precisely the opposite result. He argued vigorously that simple deregulation of the market would lead to hopeless consumer confusion and unfair competition between pasta producers. He would have upheld the national regulations pending a Community Directive establishing adequate common rules. Yet, despite his insistence on the need for positive law, the Court was content simply to achieve deregulation through the application of negative law.

In this line of jurisprudence, the Court has claimed for itself a key role as a Community policy maker. Under Article 30, it balances the consumer interest in market liberalisation against the consumer interest in national protective initiatives. There is a perceived risk that the Court may over-emphasise the former in a way which will suppress even legitimate national consumer protection initiatives (Von Heydebrand, 1991). This may cause a "regulatory gap," where neither national initiatives are pursued nor is action taken at Community level (Bourgoignie & Trubek, 1986). More generally, concern has been expressed about the extent to which the Court has thrust itself overtly into the political arena (Rasmussen, 1986). However, for the purposes of this paper, the key observation relates to the central policy role of the Court in shaping the Community's legal order and therefore the development of its market. This phenomenon is relatively well recognised in connection with negative law and market integration, discussed above, but it will be elaborated below how the Court will also be increasingly drawn into the policy issues surrounding the development of structures for the regulation of the market.

MARKET REGULATION AND THE CONSUMER

The Indirect Nature of Community Consumer Policy

The first part of this paper explained how the consumer interest in market integration is not made explicit in the Treaty. This part shows how the consumer interest in market regulation is hindered by the

structure of the Treaty. The capacity of the Community to develop a consumer protection policy is subject to a fundamental constitutional impediment. The Treaty of Rome contains no explicit basis for the adoption of legislation in the field of consumer protection.

Measures with a significant impact on consumer protection have nevertheless been adopted, especially directives for the approximation of national provisions which directly affect the establishment or functioning of the common market under Article 100 and, after the coming into force of the Single European Act in 1987, measures for the approximation of national provisions which have as their object the establishing and functioning of the internal market under Article 100a. The market distortion caused by the existence of different consumer protection rules in different Member States has been viewed as a sufficient basis for introducing harmonised Community rules in pursuit of a "level playing field" and a liberalised market. More broadly still, Article 235 envisages action which is necessary to attain Community objectives and it too has been employed on occasion in making legislation of relevance to the consumer.[18]

There is no need here to provide an exhaustive list of Community measures which impinge on the sphere of national consumer protection (comprehensively, Reich, 1993). Illustrations must suffice, first in the sphere of consumer safety. Directive 85/374 approximates national laws on liability for defective products.[19] Directive 88/378 approximates national laws concerning the safety of toys.[20] Directive 92/59 is concerned with laws dealing with general product safety.[21] In the sphere of protection of consumers' economic interests, Directive 84/450 relates to the approximation of national laws concerning misleading advertising.[22] Directive 85/577 concerns the protection of the consumer in respect of contracts negotiated away from business premises – "doorstep selling."[23] Directive 87/102 approximates laws concerning consumer credit regulation[24] and was amended by Directive 90/88.[25] Most recently, Directive 93/13 on Unfair Contract Terms was adopted in March 1993.[26]

Such measures have an impact on the consumer interest. Directive 85/374 is concerned with approximation of liability laws, but by setting the rule in Article 1 that "the producer shall be liable for damage caused by a defect in his product" it improves the position of the injured consumer, especially in States such as the UK which have hitherto based liability rules on the fault of the producer rather than the defectiveness of the product.[27] Yet, constitutionally, the legal base

of Article 100/ 100a binds all of these measures primarily to the process of market integration and the establishment of a common/ internal market; for a fuller discussion, see Close (1984); Krämer (1986); Reich (1993). Such a market does not lack regulation designed to protect the consumer; an integrated market, compatible with the picture painted by Articles 2 and 3 of the Treaty, cannot exist without appropriate regulatory support. This paper does not accept that there is a field of market regulatory law which can exist independently of the process of market integration; accordingly this paper has more sympathy with the approach of Reich (1991) than that of Steindorff (1990).

However, the absence of a Treaty base devoted specifically to consumer protection laws has created a legal and political climate in the Community which has not been conducive to the promotion of the consumer interest *per se*. In this sense, the Community's competence in the consumer field has appeared incidental. An appreciation of this background is essential in any assessment of the impact of the Maastricht Treaty, which alters the picture by inserting for the first time a separate Title under which consumer protection legislation may be made.

COMMUNITY CONSUMER POLICY BEFORE THE SINGLE EUROPEAN ACT

Despite the exclusion of consumer protection from the explicit constitutional structure of the Treaty of Rome, its status as part of the developing structure of Community law and practice earned recognition, albeit, initially, largely at an informal level. In October 1972 the Heads of State or of Government called on the Commission to prepare a programme of consumer protection policy. This led to the Council Resolution of 14 April 1975 on a preliminary programme for a consumer protection and information policy.[28] The Resolution constitutes the first attempt to provide a systematic basis in Community law for the protection of the consumer interest. Its Annex insists that all individuals are consumers, but, more ambitiously, portrays the consumer interest as a distinctive element in society.

Point 3 of the Annex sums up consumer interests in a statement of five basic rights:

(a) the right to protection of health and safety,

(b) the right to protection of economic interests,
(c) the right of redress,
(d) the right to information and education,
(e) the right of representation (the right to be heard).

The assertion of this notion of consumer "rights" in the Resolution suggests an acceptance by the Council that the consumer interest transcends a purely economic, open-border focus. This would have elevated consumer policy far above its concealed place in the Treaty itself. However, Point 4 provides an immediate reminder of the Treaty's failure to include a consumer protection policy which exists independently of other Community policies. Consumer policy will be amplified "by action under specific Community policies such as the economic, common agricultural, social, environment, transport and energy policies as well as by the approximation of laws, all of which affect the consumer's position." It then fell to the Commission to prepare proposals for the implementation of the programme.

The 1975 Resolution was followed in 1981 by a further Council Resolution on a second programme for a consumer protection and information policy.[29] The 1981 Resolution is based largely on the same premises as those which underlie the first Resolution of 1975. These Resolutions have attracted the Court's recognition as part of the structure of Community law and policy despite their "soft law" status outside the list of formal acts in Article 189. In *GB-INNO* v *CCL*[30] the Court held that a Luxembourg law restricting the provision by a trader of information about prices was capable of impeding trade in goods from States where no such control was imposed – *in casu*, Belgium. The Court drew on the 1981 Resolution in asserting the close connection between consumer protection and consumer information. The decision supports the liberalisation of cross-border comparative advertising through the application of Article 30, even in advance of planned Community initiatives to harmonise national laws in this area.[31] The importance in Community law of the informed consumer, asserted in the 1975 and 1981 Resolutions and confirmed by the Court in *GB-INNO*, also finds a place in Community legislative policy. Measures harmonising national laws relating to the economic interests of consumers frequently emphasise improved transparency in the transaction in support of the informed consumer, in preference to establishing a body of uniform rules about substantive provisions in the transaction. Directive 85/577, which concerns the protection

of the consumer in respect of contracts negotiated away from business premises[32] – "doorstep selling" – requires a "cooling off" period after the conclusion of the contract, which the trader must bring to the consumer's attention. Directive 87/102 approximating laws concerning consumer credit,[33] amended by Directive 90/88,[34] is aimed principally at improving the transparency of the transaction rather than regulating the actual cost of credit.

The third programme in the series was constituted by a June 1986 Council Resolution concerning the future orientation of the policy for the protection and promotion of consumer interests.[35] The Resolution draws on a Commission paper entitled "A New Impetus for Consumer Protection Policy"[36] which confesses to a shortfall in performance thus far. The Council Resolution, although relatively brief, links the consumer interest to the benefits on offer as a result of completion of the internal market, planned for the end of 1992. The internal market process, like the common market process described above, should benefit the consumer as a consequence of the stimulation of competition in the economy. In December 1986 a further Council Resolution was devoted to the integration of consumer policy in the other common policies.[37] It readdressed the themes set out in the June 1986 Resolution and repeated the objective of taking greater account of consumers' interests in other Community policies.

Perhaps the most striking change between the 1986 Resolution and the 1975 and 1981 programmes is the diminution in the assertion of consumer "rights." The discourse has moved more towards the consumer as the beneficiary of the process of market integration. Consumer choice, rather than consumer rights, has emerged as the dominant theme (Reich, 1992b, p. 25). One of the purposes of this paper is to reinvigorate the debate about rights, rather than mere choice.

COMMUNITY CONSUMER POLICY AND THE SINGLE EUROPEAN ACT

The Single European Act came into force on 1 July 1987. It introduced several new Titles into the Treaty which consolidated the expansion of Community competence which had occurred incrementally over previous years. The additions included, for example, new Titles on Research and Technological Development and on

Environmental Policy. However, the Single European Act did *not* introduce a separate Consumer Policy Title. Consumer policy remained an element in other policies. Nonetheless, despite the absence of a major breakthrough in the recognition of a separate identity for consumer protection, the Single European Act had several important implications for the status of the consumer interest under Community law (European Consumer Law Group, 1987; Weatherill, 1988).

The centrepiece of Community policy in the late 1980s was the task of completing the internal market by the end of 1992, defined in a new Article 8a, inserted by the Single European Act, as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty." In pursuit of the completion of the internal market, the Single European Act introduced amended legislative procedures, particularly Article 100a under which measures designed to achieve the completion of the internal market may be passed by qualified majority vote in Council. This shift towards qualified majority vote, rather than unanimous vote, was seen as essential in order to ensure the adoption of the package of controversial legislation necessary to remove internal borders. Since national consumer protection laws were among the range of measures which had been shown to obstruct market integration and which had accordingly been harmonised on the basis of Article 100, the introduction of Article 100a had a significant, though indirect, impact on the climate for Community consumer protection law and policy. It means that a qualified majority in Council is enough to secure the replacement of divergent national consumer protection laws by a common Community rule. States have no veto under Article 100a(1).

A controversial element in this procedure is the capacity conferred on the Community to adopt common rules in the pursuit of free trade which might depress existing standards of social protection, including consumer protection, in a minority of outvoted Member States. This concern is reflected in Article 100a. Article 100a(4) establishes a procedure whereby States may rely on "major needs" in order to justify setting standards higher than the Community norm adopted under Article 100a(1). The precise scope of the provision remains obscure (Ehlermann, 1987; Flynn, 1987), but this potential "opt-out" was, in effect, a concession to persuade States to agree to qualified majority voting under Article 100a(1). The notion of major needs under Article 100a(4) appears to cover the protection of consumers' health and

safety, but not their economic interests. Of broader relevance to the consumer interest is Article 100a(3), which provides that

> The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection.

Although this provision is plainly designed to allay fears that the Community rules may undercut existing national standards of, inter alia, consumer protection, its limitations in that regard should be noted. It is addressed to the Commission, not to the Council which is responsible for the adoption of legislation. Moreover, it requires only that a high level of protection be taken "as a base," which implies that it may be adjusted downwards in subsequent negotiation. In any event, the notion of a "high level" lacks precision and its interpretation may vary between Member States. The justiciability of Article 100a(3) is unclear and has never been tested. Its flavour is more political aspiration than independently enforceable legal norm. It has, however, played a part in the reasons advanced for the introduction of Community measures impinging on consumer protection. For example, Directive 90/88,[38] made under Article 100a and amending Directive 87/102 in the field of consumer credit, refers in its Preamble not only to rationales for its adoption which are based on the functioning of the internal market but also explicitly to the desirability of ensuring "that consumers benefit from a high level of protection."

Article 100a(3), although a recognition of the consumer as an interested party in the Community legislative procedure, was not accompanied by any institutional amendment of the Treaty in favour of the consumer (for criticism, see Goyens, 1992, pp. 77–80). The voice of the consumer in the Community legislative process is not guaranteed anywhere in the Treaty of Rome. The constitution of the Economic and Social Committee under Article 193 makes no explicit reference to the consumer. In 1973, the Commission established a Consumers' Consultative Committee[39] which was redefined and retitled in 1989 as a Consumers' Consultative Council,[40] but even this has no legislative right to be consulted. Moreover, its consultative role within the Commission is of limited effect given that its view is sought systematically by the Consumer Policy Service, but not by other units within the Commission which may be concerned with areas relevant to the consumer, such as competition policy and agriculture. More fundamentally, neither it nor any other consumer

representative body has a direct input into the decision making process in Council, which is the institution ultimately responsible for the adoption of legislation in the European Community.

Beyond the Single European Act

After the Single European Act, which still had not introduced a specific Consumer Protection title, there followed further soft law initiatives. A Council Resolution of 9 November 1989 on future priorities for relaunching the consumer protection policy[41] constituted a consolidation of pre-existing policy. Referring to Article 100a(3), it emphasised the link between consumer protection policy and the effective completion of the internal market and, more generally, the consumer benefit which would accrue from the completion of the internal market. This was followed by the Commission's publication in May 1990 of a three-year action plan of consumer policy (1990–1992).[42] Part A of this document briefly covered "Consolidation of Progress." Part B provided a "Three Year Action Plan" comprising four main areas of focus, selected because of their contribution to building consumer confidence necessary to support the realisation of the internal market. These were consumer representation, consumer information, consumer safety and consumer transactions.

The first two parts of this paper provide the background to an assessment of consumer protection policy in the Community prior to the Treaty on European Union. The first part showed how substantive Community law acts as an instrument of consumer policy by promoting market liberalisation. Then followed a survey of a series of legislative initiatives which contribute further to the process of market integration while also serving to establish Community-wide regulatory controls. Soft law adds to the patchwork of Community consumer policy, introducing themes such as the informed consumer which have been relied upon by the Court. There remains no independent Consumer Protection Title in the Treaty; yet there is an accretion of a substantial amount of material relevant to consumer policy.

THE TREATY ON EUROPEAN UNION: NEW TITLE ON CONSUMER POLICY

The New Title

The Treaty on European Union, signed at Maastricht on 7 February 1992, will come into force only when it is ratified by all twelve Member States. Once ratified, it will convert the EEC Treaty into the EC Treaty.[43] A number of amendments are effected to the structure of the Treaty of Rome as amended by the Single European Act (more fully, Weatherill & Beaumont, 1993). From the perspective of the consumer interest, the most striking change is the inclusion in the Treaty for the first time of a separate Title devoted to Consumer Protection. There will be a new Title XI, Consumer Protection, which will comprise a new provision, Article 129a:

1. The Community shall contribute to the attainment of a high level of consumer protection through:
   (a) measures adopted pursuant to Article 100a in the context of the completion of the internal market;
   (b) specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers.
2. The Council, acting in accordance with the procedure referred to in Article 189b and after consulting the Economic and Social Committee, shall adopt the specific action referred to in paragraph 1(b).
3. Action adopted pursuant to paragraph 2 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.

The elevation of consumer protection to the status of a Community common policy is confirmed by an addition to Article 3 which now provides that "the activities of the Community shall include . . . (s) a contribution to the strengthening of consumer protection."

The first paragraph of Article 129a commits the Community to the attainment of a high level of protection, whereas Article 100a(3) committed only the Commission to that task. This then underpins Articles 129a(1)(b) and 129a(2), which establish for the first time a competence to act in the field of consumer protection which is formally independent of the process of legislating to complete the internal market, the subject of separate reference in Article 129a(1)(a).

The availability of this new base may diminish the vitality of arguments against Community action to protect the consumer which are founded on legal competence. For example, the diversity of national controls over the marketing of tobacco products has provided a rationale for Community legislative intervention in the field covering

labelling requirements. Article 100a formed the base for Directive 89/622,[44] extended by Directive 92/41.[45] The Commission has proposed further Community action in the field which would impose severe restrictions on advertising of tobacco products.[46] These proposals have been based on Article 100a with specific reference to the high level of health protection mentioned in Article 100a(3) and to the 1986 Council Resolution on an EC programme of action against cancer.[47] An adequate majority in Council has not been assembled, however, amongst other things because of objections that action of the type proposed reaches beyond the objective of market integration and pursues the objective of health protection in respect of which the Community lacks competence (discussed by Reich, 1992c). The legal force of this rather restricted view of Community competence has not been tested; cf. the discussion of Reich (1991) vs. Steindorff (1990) as well as Barents (1993, especially pp. 106–109). It seems likely, however, that, in political practice at least, it exerts an inhibitive effect on Community action. The availability of Article 129a as a base for such action seems capable of removing legal objections to Community competence in the field, although naturally, political and economic objections to formal Community rules in such a sensitive area will remain.

Generally, then, the insertion into the Treaty of Article 129a liberates pursuit of the consumer interest from the constraints of enforced linkage to internal market policy. This holds the potential at the formal, legal level to clear the way for a significant increase in the level of Community consumer policy making, whether connected with substantive law or with procedural matters such as access to justice (on Community competence in the field of procedural law, pre-Maastricht, see Storme, 1992). However, the elimination of formal legal obstacles to such expansion, in so far as they existed, has no necessary bearing on the political climate. It is true that the opportunity to act under Article 129a(2) by a qualified majority[48] means that developments need not be tied to the pace of the slowest member, but the assembly of even a qualified majority in Council requires a significant political commitment by most of the Member States to specific measures constituting an active Community consumer protection policy. The practical test of the impact of Article 129a as a basis for increasing the profile of formal Community action will be measurable only some years in the future by reference to the list of measures adopted under it.

Constitutional Oddities

Under the new Consumer Protection Title, there arise problems at the technical level. One only will be mentioned here (more fully, Reich & Micklitz, 1993). It arises in the demarcation between Article 129a(2) and Article 100a as bases for the adoption of legislation. It may be difficult to determine when a legislative initiative touching on consumer protection is properly viewed as a contribution to internal market policy or as a contribution to the objectives indicated in Articles 129a(1)(b). Not infrequently, measures will perform both functions! However, the distinction will be important in law, because although Articles 100a and 129a(2) employ the same legislative procedure, they differ in the flexibility accorded to Member States wishing to introduce more stringent measures in the field covered by the Directive. Article 129a(3) is more permissive than Article 100a(4). It may accordingly prove necessary for the Court of Justice to determine whether a measure relevant to both consumer protection and the completion of the internal market is correctly based on Article 129a(2) or 100a.

The Court insists that the choice of legal base must be made according to objective factors amenable to judicial review.[49] In its June 1991 *Titanium Dioxide* decision involving the choice between Article 100a and Article 130s (Environmental Policy), the Court suggested a judicial preference for the former.[50] Directive 89/428 dealing with programmes for the reduction of pollution caused by waste from the titanium dioxide industry contributed to the realisation of the internal market, so the proper legal base was Article 100a despite the incidental pursuit of environmental objectives. If this preference were to prove enduring and to be transplanted to the choice between Articles 100a and 129a, then the independent status of Article 129a as a base for consumer protection legislation might be undermined, calling into question the advance apparently made in the Treaty of European Union towards an independent Consumer Protection policy. However, it seems that the Court's preference for Article 100a in *Titanium Dioxide* may have been dictated by institutional considerations pertaining to the protection of the privileges of Parliament under the competing legislative procedures (Crosby, 1991). Such issues would be irrelevant in a choice between Articles 100a and 129a and therefore in such circumstances the Court may prove to be less prone to favour Article 100a over Article 129a than it was in *Titanium Dioxide*

to favour Article 100a over Article 130s. Moreover, the priority apparently placed on Article 100a in *Titanium Dioxide* seems to have been lightened in a March 1993 ruling[51] where the Court found that Directive 91/156 on Waste Management was validly adopted under Article 130s rather than Article 100a because its main object was environmental protection, with the effect on the market merely ancillary. A survey of this jurisprudence induces doubt whether it discloses a choice of legal base according to objective factors, of which the Court aspires to be the adjudicator[52] (Weatherill, 1992, pp. 309–314; see also Lennaerts, 1991). However, it is gratifying that the bias towards Article 100a displayed in *Titanium Dioxide*, which would undermine the independent vitality of several common policies including consumer protection under Article 129a, does not seem firmly entrenched.

The Rise and Rise of Minimum Harmonisation

The minimum harmonisation formula, now constitutionalised in the third paragraph of Article 129a, is already familiar from earlier specific consumer protection directives. For example, Directive 84/450 relating to the approximation of national laws concerning misleading advertising[53] provides in Article 7 that the Directive does not preclude the application of provisions of "more extensive protection." Directive 85/577 regulating the protection of the consumer in respect of contracts negotiated away from business premises[54] declares in Article 8 that the Directive "shall not prevent Member States from adopting or maintaining more favourable provisions to protect consumers in the field which it covers." Stricter controls are not excluded by the Directive, although they must conform to Article 30. Accordingly in *Buet* v *Ministere Public*[55] the Court ruled that an absolute prohibition on "doorstep selling" under French law was not excluded by the Directive, nor was it incompatible with Article 30 of the Treaty despite its restrictive effect on cross-border trade. Similarly in *Di Pinto*[56] the Court ruled that the Directive does not preclude the extension of national laws against canvassing to business, rather than consumer, transactions. Further illustrations of the technique of minimum harmonisation may be found in Article 8 of Directive 90/314 on Package Travel[57] and Article 15 of Directive 87/102 approximating laws concerning consumer credit.[58]

The minimum harmonisation model may be taken as an expres-

sion of an unwillingness to surrender national competence unilaterally to improve consumer protection even after the establishment of common Community rules (Mortelmans, 1988). The formula is plainly potentially detrimental to market integration and it represents a departure from classic notions of Community pre-emption (Falke & Joerges, 1991). It shares this characteristic with Article 100a(4), although in detail it is more permissive of State action than that rather obscure procedure (for a discussion of Art. 100a(4)'s murkier aspects, see Ehlermann, 1987; Flynn, 1987). A Community rule sets a floor of regulation, but States may build further levels of varying altitudes upon that floor up to the ceiling imposed by Article 30. That structure retains the problems of judicial assessment of stricter national measures in the light of Articles 30–36 which is excluded under "classic" pre-emption theory where the Community rule sets both floor and ceiling.

The minimum harmonisation formula had appeared in the Single European Act in relation to working conditions under Article 118a(3) and in the environmental field under Article 130t. Minimum harmonisation provides that, even after the Community has legislated in a field, both States and the Community hold continuing responsibilities for market regulation. From this perspective, it is an example of shared or overlapping competence. Thus, Krämer (1993) refers to "shared competence" in the environmental field; see also Jadot (1990) for further discussion, including comparison between Articles 130t and 100a(4). Contrary to classic ideas of pre-emption, which confer exclusive competence on the Community, minimum harmonisation accepts that there is a role for national regulatory initiatives alongside Community legislation in developing the shape of the regulation of the Community market. Its inclusion in the Treaty under Article 129a(3) strongly suggests that this approach will be of increasing importance in the future. The technique is given an even higher profile in the Overall Approach to the application by the Council of the subsidiarity principle, annexed to the conclusions of the Presidency, Edinburgh European Council, December 1992:

> where it is necessary to set standards at Community level, consideration should be given to setting minimum standards, with freedom for Member States to set higher standards, not only in the areas where the treaty so requires . . . but also in other areas where this would not conflict with the objectives of the proposed measure or with the Treaty.

In the field of consumer protection, the minimum Community standards must presumably be fixed with due regard to the refer-

ences to a "high level" of protection which are found in Articles 129a(1) and 100a(3). This "high level" then acts as a floor below which standards cannot be driven by the process of competition between States in choosing for themselves their preferred intensity of market regulation (cf. Reich, 1992a).

The Role of Article 5

The new legal base provided by Article 129a, enshrining the minimum harmonisation formula, represents the major explicit boost to Community consumer policy supplied by the Treaty on European Union. It is, however, possible that Article 129a will have a yet deeper impact. This possibility arises through the linkage of Article 129a to the increasingly influential role of Article 5 in the Community's constitution. Article 5 commits Member States to "take all appropriate measures . . . to ensure fulfilment of the obligations arising out of this Treaty . . . They shall facilitate the achievement of the Community's tasks." This may be summarised as a duty of Community solidarity. The insertion into the Treaty of a Title on Consumer Protection has the consequence that Member States are now obliged under Article 5 to further the objectives in the new Title, including a commitment to the attainment of a high level of consumer protection. Even in advance of the changes effected by the Treaty signed at Maastricht, the combination of legislative initiatives, Article 100a(3) and the consumer policy programmes, which have been judicially acknowledged,[59] may have been sufficient to trigger Article 5 obligations on Member States to act in support of Community Consumer Policy, but the development of such obligations is put on a sounder basis by the new Article 129a.

The nature of the obligations cast on Member States by Article 5 is affected in specific cases by the allocation of competences between the Community and the Member States, which will vary according to the subject matter. For example, States are required not to obstruct the application of the Treaty competition rules.[60] In areas less developed than Community competition policy, the Court has been prepared to draw from Article 5 obligations of trusteeship imposed on Member States,[61] even in the absence of formal Community action. Yet the mere fact that the insertion into the Treaty of Article 129a triggers obligations drawn from Article 5, however inexplicit and flexible, emphasises the *Community* context within which national

consumer policy is administered. It represents a significant, if inexplicit, deepening of the impact of the new Article 129a.

Article 5 has become increasingly visible in the Court's jurisprudence (Temple Lang, 1991). The Court has shown a readiness to draw from it obligations cast on the Commission to cooperate with national authorities,[62] quite contrary to its explicit wording which is directed only at Member States. Article 5 is being used to break down the Community/State divide and to emphasise that all bodies, Community, national and regional, have a role to play in the development of the Community framework (Weatherill, 1993). More broadly still, Article 5 is a key instrument in the Court's quest to assert itself as a constitutional court responsible for upholding the rule of law in the Community. The Court appears increasingly to be operating on the basis that it holds inherent jurisdiction, transcending the structure of specific powers attributed by the Treaty (Arnull, 1990; Barents, 1993). In the context of this paper, the most striking general feature of this examination is that the Court has claimed a role as policy maker which goes far beyond that already observed in connection with mere negative integration. The Court is concerning itself with the allocation of competence and responsibility for the regulation of the Community market. More broadly still, the Court is concerned to defend the Community's constitution, which, after Maastricht, includes an explicit commitment to Consumer Protection.

SUBSIDIARITY - UP TO AND INCLUDING MAASTRICHT

The Nature of Subsidiarity

The previous part of this paper concentrated on positive elements in the development of Community consumer policy which may be drawn from the new Article 129a. This part examines the principle of subsidiarity, enshrined in the new Article 3b of the Treaty, and considers whether subsidiarity undermines the advances referred to earlier, representing two steps back where the inclusion of a separate Consumer Protection title represented one step forward. It should be noted that exactly the same concerns have been expressed in relation to other areas of Community regulatory activity, e.g., environmental protection (Institute for European Environmental Policy, 1992). Is the subsidiarity doctrine the means which the Treaty has

previously lacked for halting the gradual expansion of Community competence?

Debate about the subsidiarity principle gives the impression that it means most things to most people (generally Constantinesco, 1991; Emiliou, 1992). Politically, that imprecision is its allure, as a basis for reaching agreement (or, perhaps, disguising the absence of it). Legally, that imprecision is its lurking danger, as a notion which may dilute the acquis communautaire. Because subsidiarity is a chameleon, changing colour in the eye of the beholder, there is a pressing need for the lawyer, if not for the politician, to place it within a general theory of the development of the Community and its legal order (Micklitz, 1993).

It should first be appreciated that subsidiarity is not new. This observation applies to the Community legal order generally (Cass, 1992; Wilke & Wallace, 1990), but it applies equally to the consumer field. In 1990 the Commission declared in its three-year action plan[63] under the heading "Subsidiarity Principle" that "Practical consumer policy must be effectively managed in the Member States on an ongoing basis with the management and control of safety, information and redress being adapted in each instance to local needs. It would be unrealistic to undertake such tasks continuously at a Community level."

This may be taken as an example of administrative subsidiarity – or subsidiarity from within (Micklitz, 1993). As a general manifesto it is rather uncontroversial. It is no more than common sense that consumer policy be administered at "grass roots" level. That, after all, is where consumer problems arise. The Commission's observation indeed reflects developing practice where, increasingly, administrative cooperation is being established between national and local agencies in different States (Weatherill, 1991). The deeper dangers of subsidiarity lie in a rather different aspect: that of political subsidiarity – or subsidiarity from without (Micklitz, 1993). This aspect of subsidiarity would not stop at insisting on locating primary responsibility for administration at national and local level, but would also push for law and policy making too to be returned to national capitals. The subsidiarity principle enshrined in Article 3b would be employed as part of an argument that the Community's competence to act in the field is diminished. Such an argument, if successfully advanced, would plainly undermine the vigour of Article 129a(2). It would suggest regulatory fragmentation amid market integration.

The purpose of this paper is not to argue that this is wrong as a *political* choice, but to show that a number of *legal* arguments may be employed against this renationalising interpretation of subsidiarity. Fundamentally, it improperly disturbs legal responsibility for the regulation of the Community market. In advance of the elaboration of this argument, it is necessary first to examine the development of the subsidiarity principle since the Treaty on European Union was agreed at Maastricht in December 1991.

Subsidiarity Post-Maastricht

In December 1992, a year after agreement in Maastricht, the European Council met in Edinburgh. Ratification of the Treaty on European Union remained highly problematic, in Denmark and the United Kingdom in particular. Turmoil on international money markets had even in advance of ratification threatened the Treaty's commitment to Economic and Monetary Union. Against this uncertain background, the Edinburgh European Council sought above all to administer an injection of stability. The prevailing view was that part of the reason for resistance to ratification of the Treaty in Denmark and the United Kingdom lay in a fear of undue increase in the power of the Community. The principle of subsidiarity was now seized on urgently as a means of overcoming such fears. At Edinburgh an attempt was made to put flesh on the bones of the subsidiarity skeleton.

The European Council agreed an overall approach to the application of the subsidiarity principle, which was annexed to the Conclusions of the Presidency. It invited the Council to seek an inter-institutional agreement between the European Parliament, the Council and the Commission on the effective application of Article 3b by all institutions. It includes reference to subsidiarity as a contribution to "respect for the national identities of Member States." In addition, a report submitted to the European Council by the Commission was annexed. This report contained the first fruits of the Commission's review of existing and proposed legislation in the light of the subsidiarity principle.

The Commission declares that it has withdrawn three proposals for directives in the light of the demands of the principle of subsidiarity. One of these impinges on consumer policy. It is a directive dealing with compulsory indication of nutritional value on the packaging of foodstuffs. Consideration is being given to withdrawing

several further proposals. A third group of proposals is singled out because of the inclusion of excessive detail. These will be redrafted in a more general style. This batch includes proposals relating to the liability of suppliers of services and comparative advertising. Existing rules will be scrutinised during 1993. Directives containing excessively detailed specifications may be altered to conform to the New Approach and to the technique of setting minimum requirements. These Directives lie principally in the area of foodstuffs.

An even more severe attack on Community consumer protection initiatives was envisaged in a list prepared by the German government of measures which should be dropped for lack of competence.[64] The list covered more or less every consumer protection measure under consideration. This ran counter to the tenor of a Council Resolution of 13 July 1992 on future priorities for the development of consumer protection policy.[65] The Resolution closely followed the June referendum in which the Danish people had narrowly voted against the Treaty on European Union agreed at Maastricht. The Resolution confirmed the principles of the consumer protection policy, probably in part as a response to the sudden doubts which surrounded the future of the Treaty, and included an invitation to the Commission to develop the policy further, initially by proposing a further action plan. This, coupled to more specific initiatives such as the adoption of the Directive on Unfair Contract Terms in March 1993,[66] suggests that the German list was simply an opening gambit and subject to compromise. Moreover, the announcement by Commissioner Scrivener at the start of May 1993 that a new three year action plan will be launched suggests that the Commission will not acquiesce in a loss of momentum. Nevertheless, the readiness of the German government to issue such a list stimulates fears about the likely vigour in practice of Article 129a and the perspectives for an independent consumer protection policy.

Subsidiarity in Action: Management of Product Safety

This may suggest that subsidiarity will severely hinder the growth of Community consumer protection policy, but in order properly to judge the impact of the principle of subsidiarity in the Community legal order, it must not be taken in isolation. Subsidiarity is but one aspect of Community policy generally and Community consumer policy in particular. The point can be illustrated with reference to

Directive 92/59 on General Product Safety, adopted in June 1992.[67] The Directive is concerned to approximate national laws which govern product safety. A Key component of the structure envisaged by the Directive is the institutional support and enforcement techniques. The issue of the powers of the Commission caused much of the controversy about the several draft proposals which were rejected prior to the final successful adoption of the Directive in June 1992. Title III, "Obligations and powers of the Member States," assumes action taken at national level and attempts to locate that action within a framework which is shaped by the influence of Community law at both substantive and administrative level. More controversially, Title V of the Directive deals with "Emergency situations and action at Community level" and confers powers on the Commission to act in the sphere of product safety. Articles 9–11 concern the powers of the Commission to act. These are rather narrow. They arise where there exists

> a serious and immediate risk from a product to the health and safety of consumers in various Member States.

That condition is necessary but not sufficient. Article 9 also includes a list of four further hurdles, (a)–(d), all of which must be crossed. These hurdles concern a requirement of prior action taken against the product by at least one Member State; divergence between Member States on the adoption of measures; inability to deal with the risk under other procedures; and the requirement that the risk can be eliminated effectively only by the adoption of appropriate measures applicable at Community level. These hurdles satisfied, the Commission must then consult the Member States and must receive a request from at least one of them. It may then adopt a decision requiring Member States to take temporary measures drawn from those listed in arts.6(1)(d) to (h). The decision is to be adopted in accordance with the procedure set out in Article 11, which requires the Commission to submit proposed measures to a Committee on Product Safety Emergencies, composed in accordance with Article 10 of the representatives of the Member States. As a matter of Community institutional practice, this is a regulatory committee,[68] whereas the Commission had originally proposed a management committee.

Articles 9–11 of the Directive envisage a "Europeanisation" of product safety policy, involving an alteration in structures of decision making which were previously strictly the preserve of authorities

within the Member States. A network of cooperation and decision making which combines national authorities and the Commission is envisaged. These provisions of the Directive may be explained as contributions to market integration because of the risk of divergence if Member States were alone competent to act, but they also serve to improve the structure of consumer protection in the Community. However, the process of "Europeanisation" is relatively underdeveloped (Joerges, 1989). The Commission's powers under Articles 9–11 are subject to significant threshold criteria. Earlier drafts of the Directive included lower threshold criteria for Commission action. The Commission's 1989 draft[69] required neither prior action to have been taken against the product by at least one Member State nor divergence between Member States on the adoption of measures. It is a striking confirmation of the sensitivity of competence allocation in this area that even the relatively narrow competence to act conferred on the Commission by Article 9 of the Directive as adopted has provoked a challenge to its validity by Germany.[70] (For a restricted view of Community competence in this matter, see VerLoren van Themaat, 1990, but see also the discussion earlier in this paper of Article 129a and the extent to which the availability of this base may diminish objections relating to competence.) It seems that it will fall to the Court to determine whether Article 100a permits the substitution of Community powers for Member State powers, rather than mere approximation of national provisions, where a contribution to both market integration and public safety will result.

These provisions have been dutifully described as subsidiarity in action by officials of the Commission's Consumer Policy Service (Gielisse, 1992, p. 62; Lorz, 1990, p. 81; cf. Joerges, 1990b). The relatively high threshold criteria for Commission action are a concession to the freedom of Member States to decide what they will do to achieve appropriate levels of product safety. However, they do not concede to States a freedom to decide *whether* they will act to achieve such objectives. States have leeway in choice of administrative action, but must effectively achieve the objectives of Community policy in the field. This is the impact of Article 5, which operates alongside Article 3b and underlies the specific objectives of the Directive. Subsidiarity may mean that the implementation of Community policy initiatives should be devolved more readily to national and local level, thereby reducing the administrative capacity of the Community institutions, but the national bodies assume respon-

sibilities to fulfil Community policy. There is a shared responsibility (see generally Micklitz, Roethe, & Weatherill, forthcoming). Viewed from this perspective, one may appreciate the Commission's disappointment that the threshold criteria were raised to a level which will in practice restrict the frequency with which Commission competence will arise (Micklitz, 1992a, pp. 266–267) and that, more technically, the Council preferred a regulatory committee to a management committee (Gielisse, 1992, p. 63), but these shifts do not undermine the fact that national authorities are exercising powers in the light of Community policy objectives and are as such responsible for the development of Community policy. Powers have not been (re-)nationalised.

Subsidiarity and Efficiency

Subsidiarity under Article 3b operates alongside Articles 3, 5 and 129a. The principle of subsidiarity is improperly perceived simply as a means of reducing the scope of Community obligations. Its focus is efficient administration. It is, as Sir Leon Brittan (1992, p.574) has insisted, a "best level" principle. Member States may be bound by obligations on several levels under Article 3b. Where Community action is shown to be more efficient than national action, it may be argued that Article 3b imposes a duty to empower the Community. Where national action is more efficient, that may reduce the scope of the Community's power to intervene directly, but it may also impose obligations as a matter of Community law on Member States to take appropriate action, *a fortiori* in fields such as consumer protection where the Community, after ratification of the Maastricht Treaty, possesses a common policy.

The discussions at Edinburgh in December 1992 can helpfully be viewed from this perspective of subsidiarity as shared responsibility; as a framework within which Community tasks can be allocated to the most efficient level. In the Overall Approach to the Application by the Council of the Subsidiarity Principle and Article 3b of the European Union, annexed to the Conclusions of the Presidency, it is stated that

> Subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows Community action to be expanded where circumstances so require, and, conversely, to be restricted or discontinued where it is no longer justified.

This is followed by an important statement of the role of Article 3b

as one of the several general principles of Community law, rather than as a "trump card" leading to renationalisation:

> Where the application of the subsidiarity test excludes Community action, Member States would still be required in their action to comply with the general rules laid down in Article 5 of the Treaty.

Further opposition to renationalisation *via* subsidiarity derives from the European Parliament's Committee on the Environment, Public Health and Consumer Protection. Its February 1992 report calls on the Commission to develop further Community consumer policy beyond the present "patchwork quilt."[71] Later in 1992, an outspoken report argued that the virtues of Community consumer policy have been inadequately presented and that this has led to calls for "repatriation under the guise of the subsidiarity doctrine."[72] The Committee believes that this would upset the structure of the internal market, referring explicitly to the risk of "regulatory gaps" (Bourgoignie & Trubek, 1986; cf. our discussion in the section on "Negative Law," above) which would diminish effective consumer protection. In November 1992 the Economic and Social Committee added its voice to those expressing fear about regulatory gaps and referred to risks of "abuse" of the subsidiarity principle.[73] On 19 January 1993 the Parliament itself approved a resolution emphasising the importance of the Community's consumer protection policy.

Subsidiarity and Responsibility

This paper contends that subsidiarity, as part of the general network of Community law obligations arising under Article 5, involves responsibilities cast on Member States. More ambitiously, it is further submitted that those responsibilities may be framed as specific, enforceable obligations which are capable of forming the subject matter of litigation. They may be translated into individual rights in the hands of, inter alia, consumers (Micklitz, 1991; Micklitz, Roethe, & Weatherill, forthcoming).

This quest for rights is of formidable importance. Under EC law rights are usually assumed to arise as rights to market freedom in connection with the process of market integration. It has been observed that this emphasis on free trade under EC law may override State market regulation, the consequence of negative law, although the Community by no means replaces at Community level the lost patterns of State regulation. (For similar fears about the evaporation of national

human rights protection in consequence of market integration without the Community assuming responsibility for protection Community-wide, see Clapham, 1990.)

There may hence develop, in the evocative phrase of Joerges (1990a), a Market without a State, wherein neither States nor Community can be fixed with responsibility for regulating the market. Yet if enforceable rights to regulation can be developed in Community law, a more balanced constitution will be created in which neither Community nor Member States evade responsibility for reregulating what is being created by deregulation. This paper, then, is a specific attempt to show that rights to a regulated market as well as to an integrated market can be drawn from the Treaty, specifically from Articles 3b, 5 and 129a.

An illustration may be drawn from the division of responsibilities under the Directive on General Product Safety, discussed above. Imagine an unsafe product appears on the market of State A. State A is obliged under both the Directive and Article 5 of the Treaty to act effectively against the product (Hoffman, 1992). If it fails adequately to do so and a consumer is injured, then the State has violated its Community law obligations to regulate the market. This should apply whether the consumer is injured on its territory or on the territory of another Member State. If it has failed to regulate its own market adequately with the result that a product released on to the market has caused injury, then the logic of the border-free market is that its responsibilities do not end at its own borders. It is under a duty to all Community consumers. The consequences of this breach of duty seem to have been rendered all the more significant in practice by the European Court's ruling in *Francovich* v *Italian State*.[74] The Court ruled that a State may be liable in damages to an individual suffering loss caused by the State's failure to implement a directive and this ruling is in principle capable of being developed into a general proposition that a State's violation of EC law is capable of giving rise to liability in damages before a national court (Ross, 1993; Schockweiler, 1992; Steiner, 1993). Moreover, liability may attach not only to the State, but also to the Commission, which may be the subject of proceedings before the European Court under Articles 178/215(2) in so far as it may be held responsible for loss caused by its failure to act effectively. This may arise if, for example, the Commission mismanages the flow of information envisaged by the Directive on General Product Safety.[75]

The notion of State responsibility owed to all consumers of goods in the Community can be readily extended in principle to the supply of services, where, equally, cross-border commercial activity occurs in the shadow of Community regulatory rules. Recent legislative initiatives in the field of banking and insurance have concentrated on establishing Community structures whereby a home State is able to license a firm to operate throughout the Community, without further control being exercised by the host State.[76] Like the Court's *Cassis de Dijon* formula, this legislation envisages a general shift from host to home State control. The corollary of this pro-integrative structure should be that the home State is responsible for regulating that firm. If the State supervises the firm inadequately and the firm's activities cause loss to consumers throughout the Community, the State should assume liability for the loss suffered by consumers. In effect each State becomes a regulator of activities on its own territory with responsibility for consumers throughout the Community. Precisely the same structure may be applied to allocate responsibility for the regulation of cross-border misleading advertising (Reich, 1992d). Article 5, coupled to Community measures in the field, is in this way employed to fix responsibilities on national authorities actively to fulfil responsibilities relating to the regulation of the wider Community market.

Responsibilities, Rights, and Remedies

The notion that Article 5 converts national bodies into bodies acting on behalf of the Community legal order is already well established in application to a particular type of national agency: the judiciary. Rulings of the European Court such as *Francovich* v *Italian State*,[77] *Marleasing*[78] and *Factortame*[79] are all based on Article 5 and all require national courts effectively to protect rights arising under Community law, even if that means abandoning established approaches under national law (Curtin, 1992). National courts become Community courts; this same prescription may be addressed to national administrative authorities. Moreover, where national agencies fall under a duty to act, individuals, including consumers, may be able to claim a right to such action; a right to regulation of the Community market.

The notion of an individual's right to regulation may seem overambitious. It may even have the feel of an esoteric flourish in the face of widespread insistence on the primacy of market integration. It is also right to acknowledge that it is too early to identify any

consistent pattern in the ripples caused by the *Francovich* ruling. This paper does not pretend that its structure of State responsibilities yielding individual rights and remedies is as yet fully formed in the Court's jurisprudence. Yet the emphasis of Community law on individual rights may be traced as far back as the first landmark decision on the principle of direct effect, *Van Gend en Loos*.[80] The cases mentioned above dealing with effective protection of Community law rights concern the realisation in practice of individual rights. They constitute a deepening of the constitutional process initiated by *Van Gend en Loos* by focussing on national law remedies, not just Community law rights. *Van Gend en Loos*, litigation arising out of the unlawful imposition of customs duties on imported urea-formaldehyde, was concerned with rights to an integrated market, as were many subsequent leading cases, including *Cassis de Dijon*. *Francovich* is especially important as a concretisation of an individual right to regulation of the market, rather than integration. The case arose in connection with Italy's failure to implement a Directive designed to offer protection to workers in the event of their employer's insolvency. *Francovich* is all the more striking in its insistence on the place of individual rights to regulation enforceable against the State when it is appreciated that the Directive in question did not even satisfy the normal Community law requirements for individual rights – the Directive was not directly effective.

As a practical point, it must be conceded that rights to regulation, even if shown to arise in principle, will frequently be violated in circumstances which do not readily give rise to litigation. The interests of the consumer are notoriously diffuse (Reich, 1993; Reich & Leahy, 1988). Even instances of large aggregate loss may not provoke litigation where each individual has suffered relatively small loss. By contrast, the right of the trader to an integrated market is often asserted in the context of a dispute about the importation of a specific product, ideally suited for litigation. Moreover, just as the consumer in State A wishing to complain about trade practices in State B must confront significant obstacles (see several contributions to *Journal of Consumer Policy, 15*, No. 4, 1992: Symposium on cross-border complaints), the consumer or the consumer representative organisation in State A wishing to complain about violation of the regulatory responsibilities of State B is likely to encounter a range of complex problems arising in private international law. It may prove formidably difficult to frame claims of this type in a way which national

courts will be prepared to recognise. This paper cannot investigate in depth issues of consumer access to justice, which are certainly of major practical relevance to the assertion of consumer rights in the Community (Goyens, 1992). However, despite these practical obstacles to widespread litigation founded on the "right to regulation," it is submitted that this paper has done enough to show that the Community's political institutions are not the sole motor for the development of an active consumer policy. The European Court too is willing and able to engage in policy making and the elaboration of constitutional rights.

CONCLUSION

The conclusion is inescapable that the principle of subsidiarity will become an increasingly prominent element in the political debate in the Community. Its "constitutionalisation" under Article 3b of the Treaty makes it impossible to discount the possibility that it may also be tested before the Court, perhaps in a challenge to the validity of adopted legislation (Jacque & Weiler, 1990). More subtly, the principle can assist in addressing, if not yet resolving, questions of "allocation of competence" between States and the Community, which are central to the political debate about the future of the Community. The subsidiarity debate may help to bridge the gulf between British lawyers, who tend to think about parliamentary sovereignty when presented with questions about legal competence, and lawyers from other Member States more accustomed to federal structures. In fact, it is because subsidiarity is an attempt to bridge that fundamentally important gap and reshape discourse about the future of the Community that it has generated such passion.

This paper argues that, post-1992, it is both rational and legally well-founded to think of shared responsibility for the regulation of the Community market. Its thesis holds that subsidiarity, far from dictating "renationalisation," fits that model of shared responsibility. A deeper commitment to the effective regulation of the Community market may serve to encourage consumer confidence in cross-border purchasing which would bring alive the law of market integration described in the first part of this paper and give real impetus to the law of market regulation described in the second part. More broadly and ambitiously, this may engender greater public confidence in the Community itself.

Article 129a, examined above, was not in any sense the core of the Maastricht controversy, yet the consumer policy debate is a testing ground for more general discussion about the Community's future role. The last part addressed that general issue and provides a legal framework for analysing and enforcing shared regulatory responsibilities in the light of the subsidiarity principle, and for recasting them as consumer rights.

NOTES

[1] To be found only in Arts. 39, 40, 85(3) and 86.
[2] Case 170/78 *Commission* v *United Kingdom* [1980] ECR 417.
[3] Case 178/84 *Commission* v *Germany* [1987] ECR 1227.
[4] Case 94/82 [1983] ECR 947.
[5] Cases 40–48, 50, 54–56, 111, 113 & 114/73 [1975] ECR 1663.
[6] Para. 191 of the judgment.
[7] Case C-362/88 [1990] ECR I-667.
[8] Cases 286/82 & 26/83 [1984] ECR 377.
[9] Foreshadowed in Art. 1(1)(b) of Directive 73/148, OJ 1973 L172/14.
[10] Case 186/87 [1989] ECR 195 comment by Weatherill (1989).
[11] For further Community action relevant to tourism, see Directive 90/314 on Package Holidays, OJ 1990 L158/59; and Council Decision 92/421 on a Community action plan to assist tourism, OJ 1992 L231/26. See generally Tonner (1991).
[12] Opinion 1/91 on the draft Treaty on a European Economic Area [1992] 1 CMLR 245.
[13] Case 120/78 *Rewe Zentrale* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649; see Falke and Joerges (1991, pp. 84–106); Stuyck (1984).
[14] Cases C-1, C-176/90 judgment of 25 July 1991.
[15] Case 286/81 [1982] ECR 4575.
[16] Case C-362/88 [1990] ECR I-667.
[17] Case 407/85 [1988] ECR 4233.
[18] E.g., Dec. 86/138 concerning a demonstration project with a view to introducing a Community system of information on accidents involving consumer products, OJ 1986 L109/23.
[19] OJ 1985 L210/29.
[20] OJ 1988 L187/1.
[21] OJ 1992 L228/24
[22] OJ 1984 L250/17.
[23] OJ 1985 L372/31.
[24] OJ 1987 L42/48.
[25] OJ 1990 L61/14.
[26] OJ 1993 L95/29.
[27] There is no need here to explore the more detailed issue of the extent to which the proconsumer, "strict" liability theory of Art. 1 of the Directive is diluted in practice by the definition of "defectiveness" and/or the (optional) "development risk" defence; see Howells (1993); Newdick (1987).
[28] OJ 1975 C92/1.

[29] OJ 1981 C133/1.
[30] Case C-362/88 [1990] ECR I-667.
[31] Proposal of 21 June 1991 OJ 1991 C180/1 extending and amending Dir. 84/450 n.22 above.
[32] OJ 1985 L372/31.
[33] OJ 1987 L42/48.
[34] OJ 1990 L61/14.
[35] OJ 1986 C167/1.
[36] COM (85) 314.
[37] OJ 1987 C3/1.
[38] OJ 1990 L61/14.
[39] Dec. 73/306 OJ 1973 L283/18.
[40] Dec. 90/55 OJ 1990 L38/40.
[41] OJ 1989 C294/1.
[42] COM (90) 98.
[43] Art. G(a)(1). In force as of 1.11.93.
[44] OJ 1989 L359/1.
[45] OJ 1992 L158.
[46] Proposal of June 1991 for a Council Directive (OJ 1991 C167/3); amended in April 1992 to accommodate the views of Parliament (OJ 1992 C129/5).
[47] OJ 1986 C184/19.
[48] Art. 189b, although it is unclear whether the full legislative procedure is necessary for action outside the list of formal acts in Art. 189; the phrase "specific action" in Arts. 129a(1)(b) and 129a(2) remains obscure.
[49] Case 45/86 *Commission* v *Council* [1987] ECR 1493, Case 68/86 *United Kingdom* v *Council* [1988] ECR 855.
[50] Case C-300/89 *Commission* v *Council* judgment of 11 June 1991.
[51] Case C-155/91 *Commission* v *Council* judgment of 17 March 1993.
[52] See Note 49.
[53] OJ 1984 L250/17.
[54] OJ 1985 L372/31.
[55] Case 328/87 [1989] ECR 1235.
[56] Case C-361/89 judgment of 14 March 1991.
[57] OJ 1990 L158/59.
[58] OJ 1987 L42/48.
[59] Case C-362/88 [1990] ECR I-667.
[60] Case 311/85 *Van Vlaamse Reisbureaus* v *Sociale Dienst* [1987] ECR 3801.
[61] Case 325/85 *Ireland* v *Commission* [1987] ECR 5041; see further Micklitz, Roethe, & Weatherill (1993, Ch. 1).
[62] Case C-2/88Imm *Zwartveld* [1990] ECR I-3365, Case C-234/89 *Stergios Delimitis* v *Henninger Brau* [1991] ECR I-935.
[63] COM (90) 98.
[64] Published in *Verbraucher und Recht* 1/1993.
[65] OJ 1992 C186/1.
[66] OJ 1993 L 95/29.
[67] OJ 1992 L228/24.
[68] Procedure III (b) of "Comitology," Decision 87/373/EEC OJ 1987 L197/33.
[69] OJ 1989 C193/1.
[70] Case C-359/92 OJ 1992 C288/10.
[71] PE DOC A3-60/92.
[72] PE DOC A3-380/92.

[73] OJ 1993 C19/22.
[74] Cases C-6/90, C-9/90 judgment of 19 November 1991.
[75] Especially under Art. 8 and the Annex. Cf. the circumstances giving rise to the litigation in Cases 326/86 and 66/88 *Francesconi* v *Commission* [1989] ECR 2087, discussed by Micklitz (1992b) and Micklitz, Roethe and Weatherill (forthcoming).
[76] Banking: Directive 89/646 OJ 1989 L386/1; Insurance: Directive 92/49 OJ 1992 L228/1 (Non-Life), Directive 92/96 OJ 1992 L360/1 (Life).
[77] Cases C-6 & 9/90 judgment of November 19, 1991.
[78] Case C-106/89 [1990] ECR I-4135.
[79] Case C-213/89 [1990] ECR I-2433.
[80] Case 26/62 [1963] ECR 1.

REFERENCES

Arnull, A. (1990). Does the Court of Justice have inherent jurisdiction? *Common Market Law Review, 27*, 683–708.

Barents, R. (1993). The Internal Market Unlimited: Some observations on the legal basis of community legislation. *Common Market Law Review, 30*, 85–109.

Bourgoignie, T., & Trubek, D. (1986). *Consumer law, common markets and federalism*. Berlin: Walter de Gruyter.

Brittan, L. (1992). The institutional development of the European Community. *Public Law*, 567–579.

Cass, D. (1992). The word that saves Maastricht? The principle of subsidiarity and the division of powers within the European Community. *Common Market Law Review, 29*, 1107–1136.

Clapham, A. (1990). A human rights policy for the European Community. *Yearbook of European Law, 10*, 309–366.

Close, G. (1984). The legal basis for the Consumer Protection Programme of the EEC and priorities for action. In: G. Woodroffe (Ed.), *Consumer law in the EEC*, pp. 1–24. London: Sweet and Maxwell.

Constantinesco, V. (1991). Who's afraid of subsidiarity? *Yearbook of European Law, 11*, 33–55.

Crosby, S. (1991). The Single Market and the rule of law. *European Law Review, 16*, 451–465.

Curtin, D. (1992). The decentralised enforcement of Community law rights: Judicial snakes and ladders. In: D. Curtin & D. O'Keeffe (Eds.), *Constitutional adjudication in European Community and national law*, pp. 33–49. Dublin: Butterworths (Ireland).

Ehlermann, C.-D. (1987). The internal market following the Single European Act. *Common Market Law Review, 24*, 361–409.

Emiliou, N. (1992). Subsidiarity: An effective barrier against "the enterprises of ambition"? *European Law Review, 17*, 383–407.

European Consumer Law Group (1987). Consumer protection in the EEC after the ratification of the Single Act. *Journal of Consumer Policy, 10*, 319–334.

Falke, J., & Joerges, C. (1991). *"Traditional" harmonisation policy, European consumer protection programmes and the New Approach*. Florence: European University Institute. EUI Working Paper 91/13.

Flynn, J. (1987). How will Article 100a(4) work? A comparison with Article 93. *Common Market Law Review, 24*, 689–707.

Gielisse, R. (1992). La nouvelle directive relative a la securité générale des produits. *Revue du Marché Unique Européen, 3*, 49–71.

Goyens, M. (1992). Consumer protection in a Single European Market: What challenge for the EC agenda? *Common Market Law Review, 29*, 71–92.

Hoffman, D. (1992). Product safety: Recent developments in Community law. In: B. Stauder (Ed.). *La securité des produits des consommation*, pp. 5–22. Zurich: Schulthess Polygraphischer Verlag.

Howells, G. (1993). Consumer safety in Europe: In search of the proper standard. In: B.S. Jackson & D. McGoldrick (Eds.), *Legal visions of the new Europe*, pp. 293–310. London: Graham and Trotman.

Institute for European Environmental Policy (1992). *Maastricht and the environment*. London: IEEP.

Jacque, J.-P., & Weiler, J. H. H. (1990). On the road to European Union – A new judicial architecture: An agenda for the Intergovernmental Conference. *Common Market Law Review, 27*, 185–207.

Jadot, B. (1990). Mesures nationales de police de l'environnement, libre circulation des marchandises et proportionnalité. *Cahiers de Droit Europeen, 26*, 408–442.

Joerges, C. (1989). The new approach to technical harmonisation and the interests of consumers: Reflections on the requirements and difficulties of a Europeanization of product safety policy. In: R. Bieber, R. Dehousse, J. Pinder, & J. H. H. Weiler (Eds.), *1992: One European market?*, pp. 175–226. Nomos: Baden-Baden.

Joerges, C. (1990a). *Markt ohne Staat? Die Wirtschaftsverfassung der Gemeinschaft und die Renaissance der regulativen Politik*. Florence: European University Institute. Working Paper Law No. 91/15.

Joerges, C. (1990b). Product safety law, internal market policy and the proposal for a directive on general product safety. In: M. Fallon & F. Maniet (Eds.), *Securité des produits et mécanismes de controle dans la Communauté européenne*, pp. 177–214. Brussels: Story Scientia.

Krämer, L. (1986). *EEC consumer law*. Brussels: Story Scientia.

Krämer, L. (1993). Environmental protection and Article 30 EEC Treaty. *Common Market Law Review, 30*, 111–143.

Lennaerts, K. (1991). Some reflections on the separation of powers in the EC. *Common Market Law Review, 28*, 11–35.

Lorz, B. (1990). The amended proposal for a Directive on General Product Safety. In : M. Fallon & F. Maniet (Eds.), *Securité des produits et mécanismes de controle dans la Communauté européenne*, pp. 79–84. Brussels: Story Scientia.

Meyer, A. H. (1993). Das Verbraucherleitbild des Europäischen Gerichtshofs – Abkehr vom "flüchtigen Verbraucher". *Wettbewerb in Recht in Praxis, 39*(4), 215–224.

Micklitz, H.-W. (1991). Consumer rights. In: A. Cassese, A. Clapham and J. H. H. Weiler (Eds.), *Human rights and the European Community: The substantive law*, pp. 53–112. Florence: European University Institute/Baden-Baden: Nomos.

Micklitz, H.-W. (1992a). Die Richtlinie über die allgemeine Produktsicherheit vom 29.6.1992. *Verbraucher und Recht, 7* (5), 261–267.

Micklitz, H.-W. (1992b). Organisierte Rechtsdurchsetzung im Binnenmarkt. *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft, 75*(2), 172–191.

Micklitz, H.-W. (1993). The Maastricht Treaty, the principle of subsidiarity and the theory of integration. *Lakimies* (The periodical of the Association of Finnish lawyers), *4*, 508–539.

Micklitz, H.-W., Roethe, T., & Weatherill, S. (forthcoming). *Federalism and responsibility*. Baden-Baden: Nomos.

Mortelmans, K. (1988). Minimum harmonization and consumer law. *European Consumer Law Journal*, 2–18.

Newdick, C. (1987). The future of negligence in product liability. *Law Quarterly Review, 103*, 288–310.

Rasmussen, H. (1986). *On law and policy in the European Court of Justice*. Dordrecht: Martinus Nijhoff.

Reich, N. (1991). Binnenmarkt als Rechtsbegriff. *Europäische Zeitschrift fur Wirtschaftsrecht, 2* (7), 203–210.

Reich, N. (1992a). Competition between legal orders: A new paradigm of EC law? *Common Market Law Review, 29*, 861–896.

Reich, N. (1992b). Protection of consumers' economic interests by the EC. *Sydney Law Review, 14*, 23–61.

Reich, N. (1992c). Rechtsangleichung und Verbraucherschutz – Werbung, Vertragsrecht, Haftung, Vertrieb. In: *Europäische Integration, Perspektiven der Verbraucherarbeit*, pp. 197–218. Düsseldorf: Verbraucher-Zentrale NRW.

Reich, N. (1992d). Rechtsproblem grenzüberschreitender irreführender Werbung im Binnenmarkt. *Rabels Zeitschrift für ausländisches und internationales Privatrecht, 56*, 444–520.

Reich, N. (1993). *Verbraucherrecht*. Baden-Baden: Nomos.

Reich, N., & Leahy, D. (1988). *Internal market and diffuse interests: An introduction to EC trade law*. Brussels: Story Scientia.

Reich, N., & Micklitz, H.-W. (1993). Verbraucherschutz im Vertrag über die Europäische Union – Perspektiven für 1993. *Europäische Zeitschrift für Wirtschaftsrecht, 19*, 593–598.

Ross, M. (1993). Beyond Francovich. *Modern Law Review, 56*, 55–73.

Schockweiler, F. (1992). La responsibilité de l'autorité nationale en cas de violation du droit communautaire. *Revue Trimistrielle du Droit Europeen, 28*(1), 27–50.

Steindorff, E. (1990). *Grenzen der EG-Kompetenzen*. Heidelberg: Verlag Recht und Wirtschaft.

Steiner, J. (1993). From direct effect to Francovich: Shifting means of enforcement of Community law. *European Law Review, 18*, 3–22.

Storme, M. (1992). The legal authority of the European Community to intervene in the matter of group actions for consumers and the choice of legal instrumentation. In: T. Bourgoignie (Ed.), *Group actions and consumer protection*, pp. 179–209. Brussels: Story Scientia.

Stuyck, J. (1984). Free movement of goods and consumer protection. In: G.-Woodroffe (Ed.), *Consumer law in the EEC*, pp. 77–102. London: Sweet and Maxwell.

Temple Lang, J. (1991). Community constitutional law: Article 5 EEC Treaty. *Common Market Law Review, 27*, 645–681.

Tonner, K. (1991). *Reiserecht in Europa*. Berlin: Luchterhand Verlag.

VerLoren van Themaat, P. (1990). Some comments of a former Advocate General at the Court of Justice of the EC. In: M. Fallon & F. Maniet (Eds.) *Securité des produits et mécanismes de controle dans la Communauté européenne*, pp. 129–134. Brussels: Story Scientia.

Von Heydebrand u.d. Lasa, H.-C. (1991). Free movement of foodstuffs, consumer protection and food standards in the European Community: Has the Court of Justice got it wrong? *European Law Review, 16*, 391–416.

Weatherill, S. (1988). 1992 and consumer law: Can free trade be reconciled with effective protection? *Trading Law, 6*, 175–185.

Weatherill, S. (1989). Note on *Cowan* v *Le Tresor Public*. *Common Market Law Review, 26*, 563–581.

Weatherill, S. (1991). Reinvigorating the development of Community product safety policy. *Journal of Consumer Policy, 14*, 171–194.

Weatherill, S. (1992). Regulating the internal market: Result orientation in the House of Lords. *European Law Review, 17*, 299–322.

Weatherill, S. (1993). *Subsidiarity and responsibility*. Nottingham: Nottingham University, Department of Law. Research Paper in Law No. 6.

Weatherill, S., & Beaumont, P. (1993). *EC law*. London: Penguin Books.

Wilke, M., & Wallace, H. (1990). *Subsidiarity: Approaches to power-sharing in the European Community*. London: Royal Institute of International Affairs. Discussion Paper No. 27.

ZUSAMMENFASSUNG

Verbraucherpolitik in der europäischen Gemeinschaft: Vor und nach Maastricht. Der Beitrag beschäftigt sich mit der Frage, wie stark sich der Unionsvertrag von Maastricht auf Recht und Politik des Verbraucherschutzes der Europäischen Gemeinschaft auswirken wird. Zwei Aspekte des Vertrages haben aus Verbrauchersicht das stärkste Interesse auf sich gezogen: zum einen mögliche förderliche Wirkungen durch die Einbeziehung eines speziellen Titels in den Vertrag, der dem Verbraucherschutz gewidmet ist, und zum anderen mögliche hinderliche Wirkungen durch das Subsidiaritätsprinzip. Der Beitrag bietet einen Überblick über die gesamte Bandbreite der Verbraucherschutzgesetzgebung und der Verbraucherpolitik der Gemeinschaft und analysiert Subsidiarität eher als Hilfe zur Schärfung der Debatte über die Verantwortlichkeit für Regulierung und nicht so sehr als Ausgangspunkt für eine Re-Nationalisierung der Zuständigkeiten der Gemeinschaft. Er versucht, entlang des Integrationsprozesses einen Satz von durchsetzbaren Verbraucherrechten in Hinblick auf Marktregulierung zu entwickeln. Dem Konzept der Verbraucherrechte könnte dieser Ansatz besser eine realistische Gestalt geben als der neue Titel im Vertrag.

THE AUTHORS

Hans-W. Micklitz is Professor of European Law at the Fachhochschule für Wirtschaft Berlin, Badensche Straße 50–51, D-10825 Berlin, Germany. Stephen Weatherill is Reader in European Community Law at the University of Nottingham, Department of Law, University Park, Nottingham NG7 2RD, U.K.