EUROPEAN CONSUMER PROTECTION

Theory and Practice

Edited by
JAMES DEVENNEY
and
MEL KENNY

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This volume analyses the theory and practice of European consumer protection in the context of consolidation initiatives seen, *inter alia*, in the revision of the consumer *acquis*, the Draft Common Frame of Reference and the proposal for an EU Consumer Rights Directive. The issues addressed are all the more significant given the passage of the Consumer Rights Directive, the appointment of an Expert Group on a Common Frame of Reference, the Commission's 2010 Green Paper on progress towards a European Contract Law and the proposal for a Common European Sales Law. The contributions to this volume point to the arrival of a contested moment in EU consumer protection, questioning the arrival of the 'empowered' consumer and uncovering the fault lines between consumer protection and other goals. What emerges is a model of polycontextual EU consumer protection law, a model that challenges the assumptions in both the 2010 Green Paper and more recent initiatives.

JAMES DEVENNEY is Professor of Commercial Law at the Law School, University of Exeter.

MEL KENNY is Reader in Commercial Law at Leicester Law School.

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could be provided in EU financial services law, taking account of the unfamiliar (and therefore riskier) cross-border market.

More generally, the proposed solution for financial services law could serve as a model for the review of other areas of EU consumer law. By adjusting the standard for the 'reference consumer' to the 'reasonably circumspect consumer' standard from the free movement case law, a step could be made towards greater coherence in the regulatory framework for financial services. At the same time, this approach would still enable the European legislature to secure high levels of consumer protection where they were deemed appropriate. It would be worthwhile to pursue further research in EU consumer law to see whether similar progress could be made to develop a systematised regulatory framework that suited the needs of businesses and consumers in the European consumer market.

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A modernisation for European consumer law?

CRISTINA PONCIBÒ

European consumer law between state and market

In the late 1990s European competition law underwent a process of modernisation.[1] This complex and fundamental process addressed both substantive issues and enforcement law and has evidently enhanced the role of private actors in effectively enforcing EU competition law in the Member States.[2] The aim of this chapter is to discuss whether European consumer law is now following a similar path by enhancing the role played by private actors (e.g. consumers' and traders' associations) to harmonise, implement and enforce the rules set out by EU consumer directives. In particular, the chapter discusses the cases of co-regulation and private enforcement by examining two examples: the representation of consumer interests before European standardisation organisations (ESOs) and the emergence of collective private enforcement in the Member States. In addition, in the fourth section of this chapter we consider the impact of networking in consumer matters by sketching some considerations about the network of public authorities established by the Consumer Protection Cooperation Regulation.[3]

In this section the chapter tries to outline some reflections about the EU model of consumer protection between state (i.e. greater harmonisation of consumer contract law) and market. On the one hand, the Commission has adopted the directive on consumer rights dealing with the 'hardcore' of consumer protection, namely consumer contracts.[4] The directive aims to

Lecturer, Faculty of Law, University of Turin, Italy.

[1] I. Van Bael and J. F. Bellis, *Competition Law of the European Community* (The Netherlands: Kluwer Law International, 2009), 1–5.

[2] Council Regulation no. 1/2003, [2002] OJ L 1/13.

[3] Council Regulation (EC) no. 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws [2004] OJ L 364/1.

[4] Council Directive 2011/83/EU on consumer rights, amending Council Directive 93/13/EEC and Council Directive 1999/44/EC and repealing Council Directive 85/577/EEC and Council Directive 97/7/EC [2011] OJ L 304/64–88.

merge four consumer directives, concerning the sale of consumer goods and guarantees (Directive 99/44), unfair contract terms (Directive 93/13), distance selling (Directive 97/7) and doorstep selling (Directive 85/577), into a single horizontal instrument to regulate the common aspects of these directives in a systematic way by simplifying and updating the existing rules, while removing the inconsistencies and closing the gaps.[5]

The Commission's directive immediately attracted the attention of private law scholars who have generally adopted a sceptical view towards the measure from different points of view.[6] The most controversial aspect of the proposal is the shift from the minimum to exhaustive harmonisation approach followed in the four existing directives to embrace a full harmonisation approach. Consequently, the level of consumer protection for the transactions which fall within the scope of the four directives will be fixed by the directive with no room left for regional or national variation (Article 4: 'Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection unless otherwise provided for in this Directive').

In doing so, the directive will have to slot into the legal framework created by national general contract law. But national contract laws still differ *inter se* and one of the advantages of the minimum harmonisation approach has been the possibility of retaining existing provisions unless they were not always consumer-specific rules. According to the literature, the principle of full harmonisation could thus produce a rather strange result. General contract law in the Member States could turn out to be more favourable in some respects than the legislation transposing the directive, leading to the paradox that it may be better for an individual not to be a consumer.

[5] G. Howells and R. Schulze, *Modernising and Harmonizing Consumer Contract Law* (Munich: Sellier, 2009); H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers, *EC Consumer Law Compendium* (Munich: Sellier, 2008).

[6] J. M. Smits, 'Full Harmonisation of Consumer Law? A Critique of the Draft Directive on Consumer Rights', 1 March 2009, TICOM Working Paper on Comparative and Transnational Law 2009/2; C. Poncibò, 'Some Thoughts on the Methodological Approach to EC Consumer Law Reform' (2009) 21(3) *Loyola Consumer Law Review* 353–71; R. Sefton-Green and J. Rutgers, 'Revising the Consumer Acquis: (Half) Opening the Doors of the Trojan Horse' (2008) 3 *ERPL* 427–42; S. Whittaker, 'Form and Substance in the Reception of EC Directives' (2007) 4 *ERCL*, 381–409; M. B. M. Loos, 'The Influence of European Consumer Law on General Contract Law and the Need for Spontaneous Harmonisation' (2007) 4 *ERPL* 515–31.

To summarise, some adjustment as a result of any harmonisation measure is inevitable, but legal scholars underline that, far from ensuring that consumers recognise the benefit of the internal market, consumers might instead come to resent the erosion of national consumer rights as a result of the directive. In the light of these critiques, the directive has found very little consent in private law scholarship.[7]

On the other hand, while the Commission has recently striven for greater harmonisation, it has also shown a sort of 'market orientation'. The Commission has under certain circumstances adopted an approach based on the belief that an information-seeking, self-reliant consumer can be adequately protected by an effectively operating market.[8] According to the EU, empowered consumers have the capacity to understand and process the information available to them; moreover, they know and exercise their rights and seek redress when these rights are violated.[9]

Central to this view is the notion of the average consumer elaborated by the European Court of Justice (ECJ)[10] and then included in the Unfair Commercial Practices Directive (UCPD) which gives this notion statutory authority, standing and permanence.[11] The UCPD is intended to harmonise fully disparate Member State measures which seek to curb unfair commercial practices harmful to the economic interests of the consumer. It has the twofold aim of contributing to the smooth functioning of the internal market and providing consumers with a high level of protection. The UCPD protects the *benchmark* consumer: 'the reasonably well-informed and reasonably observant and circumspect consumer, taking into account social, cultural, and linguistic factors, as interpreted by the Court of Justice (recital 18)'. Consequently, it does not protect the consumer who is distracted or uninformed about the goods or services which are the subject matter of a commercial practice. Nor does it protect those consumers who naively allow themselves to be convinced by deceptive exaggerations in advertising.

In more detail, the UCPD employs a general clause which is designed to preclude unfair commercial behaviour by traders, with a few exceptions,

[7] *Ibid.*

[8] K. J. Cseres, *Competition Law and Consumer Protection* (The Hague: Kluwer Law International, 2005).

[9] Commission Staff working document, Second Consumer Markets Scoreboard, Brussels, 28 January 2009, SEC (2009), 76, Part 3, 1.

[10] Case C-210/96, *Gut Springenheide GmbH, Rudolf Tusky* v. *Oberkreisdirektor des Kreises Steinfurt-Amt fur Lebensmittel überwachung* [1998] ECR I-4657, at §31.

[11] Council Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149/22.

and which divides questionable practices into two categories: those which are misleading and those which are aggressive (Article 5). A practice is found to be unfair when it both fails to respect the professional standards of accuracy and disclosure required, or that would be customary in a given field and influences significantly the economic behaviour of the *average* consumer, precluding him or her from dispassionately using the pertinent information to evaluate a commercial proposal, thereby inducing the consumer to take an economic decision that he or she might not have otherwise taken. Both misleading and aggressive practices are defined relative to the perceptions of the *benchmark* consumer.

Self and co-regulation in consumer protection

In the market-oriented model for consumer protection introduced in the previous section there is space for hybrid solutions to protect consumers' interests: instruments that combine governmental and non-governmental actors and create new patterns of interaction to enable social actors to organize themselves. I think of the examples of self-regulation and, particularly, co-regulation that are gaining in influence to pursue some important goals that are discussed in the next sections and that include the harmonisation of product safety standards in the internal market and the implementation and enforcement of the rules set forth in the consumer directives.

Legal scholars are quite sceptical about self-regulation in consumer issues, primarily because private initiatives only work if it is assumed that the consumer is well informed, empowered and confident. They note that 'for the time being [i.e. 2003] we should be cautious about over reliance on these methods, not least because their effectiveness has yet to be demonstrated'.[12] Notwithstanding these concerns, these tools are often used at EU and national levels, and there is some evidence that self-regulation and co-regulation are gaining influence in consumer matters. For example, in England and Wales we encounter varieties of self-regulation in the codes of practice associated with the Office of Fair Trading (OFT), co-regulation of advertising by the Advertising Standards Authority, the OFT and OFCOM, private groups and standards in consumer safety, a banking code of practice and internet codes.

[12] G. Howells and T. Wilhelmsson, 'EC Consumer Law: Has it Come of Age ?' (2003) 28 *ELR* 370–88 at 370.

More importantly, the final report concerning *Self-regulation Practices in SANCO Policy Areas*, published in 2008, describes a variety of private initiatives in this area and, in considering a number of cases, shows that consumer protection 'standards' are quite often provided by large sellers across the internal market instead of being imposed by the Member States. The document examines a number of self-regulation activities within consumer affairs, public health and food safety to analyse evidence of impediments to effective self-regulation in terms of the effectiveness of these experiences. With respect to consumer affairs the report focuses on the following areas: selling (i.e. direct marketing, direct selling, distance selling), informing consumers (i.e. labelling), advertising and standardisation. From the analysis it is clear that self-regulatory practices differ in the extent to which they are compulsory or voluntary. Some codes of practice or guidelines are purely voluntary and there is no monitoring and no complaint handling; these practices are just meant to help companies, and are more a kind of advice or guideline which may be followed. But some self-regulatory practices emerge that are compulsory for the members of the self-regulatory scheme; these practices are in certain cases heavily monitored and sanctioned (e.g. the Code of Ethics and alternative resolution scheme of the OTE (Organisation for Timeshare in Europe) includes a part about complaints handling and sanctions, including suspension and expulsion from membership). The examples indicated in the report show that the picture is rapidly changing and, in certain cases, self-regulation is not limited to providing guidelines, but also includes complaint procedures and sanctions for non-compliance.

This chapter specifically examines the case of co-regulation and argues that this tool should be conceived as *something different* from pure self-regulation. Legal scholars conceive of co-regulation as a mixture of hard law and private initiatives and as an instrument for dealing differently with old problems, such as the harmonisation and the regulation of European contract law. In the context of EU law, co-regulation is usually regarded rather as an implementing mechanism, presupposing the prior adoption of a piece of European legislation.[13] Consequently, co-regulation assumes the direct involvement of a public actor in this regulatory process, which is usually not the case with self-regulation.

[13] E. Hondius, 'The future of self-regulation in consumer matters on a European level', Working Paper presented at the European University Institute, 25 October 2003; G. Howells, 'The Function of Soft Law in EC Consumer Law', in P. Craig and C. Harlow (eds.), *Law Making in the European Union* (The Hague: Kluwer Law International, 1998), 310–31.

For this reason, this instrument can be said to situate itself somewhere between legislation and 'pure self-regulation' by constituting some form of 'conditioned self-regulation'.[14]

In this respect it is possible to see a parallel to the experience with competition law where the process of modernisation has included a shift towards self-regulation by undertakings in relation to their compliance with the prohibition concerning anti-competitive agreements; undertakings evaluate their agreements under Article 101 TFEU in its entirety and decide whether an agreement falls within the provision and, if it does, whether or not it can qualify for exemption. But such self-assessment occurs in the shadow of the law, with the potentially significant consequences of failing to assess correctly. In such cases the agreement is rendered void and unenforceable. As a consequence, the undertakings could be subject to large fines, while, in some Member States, individuals could face fines and/or imprisonment or could be banned from holding directorships for up to five years. Furthermore, the undertakings could face private actions for damages.

From a functional perspective, it should be noted that both self-regulation and co-regulation are, at present, used to reach three fundamental goals relevant for the protection of the consumers' interests. The goals include:

1. the implementation of certain consumer directives in the Member States;
2. the enforcement of consumer rights; and
3. the harmonisation of product safety standards.

The latter point will be carefully examined in the next section.

With respect to the first point, certain directives in consumer protection leave specific issues of regulation to private actors by asking for their cooperation and by sponsoring their initiatives in the transposition of the principles set forth in the directive.[15] Thus the codes of conduct have become an integral feature of the EU legal landscape. A number of industries have moved to adopt codes of conduct, for example, the directive on misleading advertising states that:

> This Directive does not exclude the voluntary control of misleading advertising by self-regulatory bodies and recourse to such bodies by the persons or organisations referred to in Art. 4 if proceedings before such bodies are in addition to the court or administrative proceedings referred to in that Article (Article 5).[16]

[14] L. Senden, 'Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet ?' (2005) 9(1) *EJCL*, 111–13; D. M. Trubek and L. G. Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Coordination' (2005) 11 *ELJ* 343–56.

[15] K. Armstrong and C. Kilpatrick, 'Law, Governance, or New Governance? The Changing Open Method of Coordination' (2007) 12 *Columbia Journal of European Law* 649–50.

The later directive takes an even more encouraging stance:

> This Directive does not exclude the voluntary control, which Member States may encourage, of misleading or comparative advertising by self-regulatory bodies and recourse before such bodies are in addition to the court of administrative proceedings referred to in that Article.[17]

The Directive on Electronic Commerce provides that the codes of conduct shall be used as an aid to implement Articles 5 and 16, comprising fair commercial practices, but also contractual provisions (Articles 9 and 10).[18] Moreover, within the framework of the UCPD,[19] self-regulation plays a role in defining what constitutes a misleading practice. The responsibilities are normally clear when a binding code of conduct is in place and a general principle is introduced: when a firm has committed itself to a code of conduct, non-compliance will be considered a misleading practice if the commitment is firm and verifiable and the trader has indicated in its commercial practice that it is bound by the code.

As regards the second point, it should be noted that co-regulation is relevant to the enforcement of consumer rights. The Communication concerning the enforcement of the consumer *acquis*, published in 2009, stresses that new forms of enforcement are emerging in the Member States to ensure compliance with the consumer *acquis* and indicates among them alternative dispute resolution (ADR) and out-of-court settlement mechanisms. Accordingly, they can be an expedient and attractive alternative for consumers who have been unsuccessful in informally resolving their dispute with a trader.[20]

In the same Communication, the Commission specifically encourages businesses, in collaboration with Member States and consumer

[16] Council Directive 84/450/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, [1984] OJ L 250/17–20.

[17] Council Directive 97/55/EC amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising [1997] OJ L 290/18–23.

[18] Council Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market [2000] OJ L 178/1–16.

[19] Council Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149/22.

[20] Commission Communication of 2 July 2009 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the enforcement of the consumer *acquis*, COM (2009) 330 final.

organisations, to develop self-regulatory measures in the form of a code of conduct to set up complaint handling systems which are credible and work efficiently. This position is based on the idea that co-regulation and self-regulatory measures, which include monitoring mechanisms and complaint handling procedures, can reinforce industry's commitment in securing a high level of compliance and work as an alternative, or better, as a complement to formal legislation. The Commission indicates the examples of the 'Toy Safety Pact' and the 'Citizen's Energy Forum'.

In the proposed approach public enforcement actions and enforcement actions by self-regulatory bodies complement one another, the former providing a supportive legal and judicial context and the latter extra resources for straightforward cases. Again, the UCPD is a good example of this because it maintains the view that self-regulation can support judicial and administrative enforcement and clarifies the role that code owners can play in enforcement. Member States may rely on self-regulatory dispute settlements to enhance the level of consumer protection and maximise compliance with the legislation. But the UCPD also clarifies that self-regulation cannot replace judicial or administrative means of enforcement. It reinforces the effectiveness of codes of conduct by requiring Member States to enforce the self-regulatory rules against traders who have undertaken to be bound by the codes. As a result, the bodies that police self-regulatory codes can maximise the impact of limited resources provided they meet the criteria of efficacy, legitimacy, accountability and consistency.

The new legislative framework

The most interesting example of co-regulation relevant in protecting the interests of consumers concerns product safety standardisation and, particularly, the 'New Legislative Framework' (NLF) which entered into force in January 2010.[21] It is well known that the revitalisation of the single market in the 1980s required not only reform in the legislative process, which was achieved through the Single European Act 1986, but also a new approach to harmonisation to facilitate the passage of these measures; traditional Community harmonisation techniques were slow and generated excessive uniformity.

[21] Council Regulation (EC) no. 764/2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision no. 3052/95/EC.

A new regulatory technique and strategy was laid down by the Council Resolution on the new approach to technical harmonisation and standardisation (1985).[22] Under the new approach, directives specify only the essential elements for safe products, while optional technical requirements for compliance are specified in the harmonised standards developed by the non-profit ESO. By adopting such techniques 'the ECCommission apparently found in the 1980s a magic tool to reach the goal of a common market: private standards'.[23]

The NLF for products extends the principles of the new approach to almost all products areas from January 2010. Evidently, this is a fundamental development for European standardisation.[24] The NLF aims to bring together into a single legislative package all the legislative instruments needed for ensuring the placing on the market of safe products and for providing effective surveillance of the market and control of products from third countries.

Thus, the package brings together provisions on accreditation of conformity assessment bodies, on market surveillance, competence criteria and selection process (notification), definitions, obligations for economic operators, consolidated conformity assessment procedures and rules for their use, as well as provisions on marketing. In the field of market surveillance the new framework sets out some very clear obligations on Member States and national authorities to intervene on non-conforming or dangerous products in the areas covered by European harmonisation legislation for the first time. In particular, national authorities must have the power, authority and means to withdraw, or have withdrawn, from the market dangerous or non-conforming products. They must even have the authority to have a product destroyed if necessary.

The regulation in its relations with existing legislation attempts to put into place a seamless system for all products and therefore does not make any distinction between consumer and non-consumer products. An important element in the new framework is that it brings together, into one single legislative environment, market surveillance and the control of products from third countries; in many Member States today they are not necessarily brought together and yet they are complementary pillars

[22] Council Resolution of 7 May 1985 on a New Approach to Technical Harmonisation and Standards, OJ 1985 C136.

[23] G. Spindler, 'Market Processes, Standardisation, and Tort Law', (2008) 4:3 *European Law Journal* 316–336 at 316.

[24] H. Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Oxford: Hart Publishing, 2005).

of the edifice for safe products. The new framework will entail putting into place new communication channels between national authorities and the Commission. For example, the 2009 Communication on the enforcement of the consumer *acquis*[25] specifies that the General Product Safety Directive and the NLF require the establishment of an EU market surveillance framework to assist Member States' authorities in monitoring products and establishes a rapid alert system (Rapex) between market surveillance authorities through which Member States have to inform each other when measures are taken against consumer products posing a serious risk to consumers' health and safety.

The NLF will be developed gradually, but, according to the opinion of the Secretary General of the European Association for the Coordination of Consumer Representation in Standardisation (ANEC), the consequence of its adoption will be that 'more and more European product legislation will rely on supporting European standards to provide easiest means of achieving compliance with the law' and, thus, the NLF places 'new demands on the European standardisation system'.[26]

Legal scholars have always tended to criticise the paralegal structure of private standards;[27] in particular, Schepel has published a first comprehensive study on the production of product standards and has described such processes as a case of 'private governance'.[28] Schepel notes that against the ongoing process of globalisation, the state generally loses its centrality in the activity of government; accordingly, the law derives from different sources not necessarily limited to parliamentary law-making and extends its validity beyond the nation state.

With respect to this framework, the literature has often underlined that consumers' interests should be involved in the standards-making process.[29] The European Commission has stated this on numerous occasions and this is also the position of the European standardisation bodies. ANEC advances the European consumer voice in standardisation by representing and defending consumer interests in such a process.[30] The organisation is composed of national representatives (one from each of

[25] Commission, Communication on the enforcement of the consumer acquis, 2 July 2009, COM (2009) 330 final.
[26] ANEC, GA Open Session, 11 June 2009, Secretary's General Statement at 4.
[27] Spindler, 'Market Processes' at 328.
[28] Schepel, *The Constitution of Private Governance*, 11.
[29] Howells and Wilhelmsson, 'EC Consumer Law', 386–87.
[30] J. Davies, 'Entrenchment of New Governance in Consumer Policy Formulation: a Platform for European Consumer Citizenship Practice ?', (2009) 32 *Journal of Consumer Policy* 245–67, 257.

the EU and EFTA Member States) chosen by the national consumer organisations recognized by the EU Commission and EFTA.

There is therefore evidence that the representation of consumers' interests in the process of standardisation is quite limited, given that it finds the obstacles discussed below.[31] My point here is that the substantive legitimacy of the NLF, and not only its formal legitimacy, should be assessed. The legitimacy of the NLF will depend on the capability of the standardisation process effectively to include all the interests involved, and specifically, the interests of the consumers. Moreover, the 'battle for standards' is not limited to the ESOs but has a global dimension.[32] The situation is similar to that at the International Standardisation Organisation (ISO) and the ESOs are obliged to follow up the ISO norms and to incorporate them formally into their own projects.

Unfamiliarity of consumer organisations

The ESOs have a specialized vocabulary and 'jargon' and the perception is that standards are for industry. ANEC Strategy states that consumer interests are only marginally represented in many countries.[33] Moreover, the consumer voice in the European Committee for standardisation (CEN) and the European Committee for Electrotechnical Standardisation (CENELEC) is represented through national delegations and ANEC underlines the need to establish a truly effective platform of European interests alongside the traditional grounding on national delegations.

Lack of awareness

The lack of awareness by consumers and their associations of how standards ensure consumer protection is one of the biggest hurdles. In many countries, consumer organisations work to influence their governments to pass and enforce laws to protect them. However, this might not be the only answer. The following examples show the ways in which standards can support legislation: consumers' representatives, by appointment to a technical committee, subcommittee or working group developing a standard or standards in a particular field, could shape and

[31] C. Poncibò, 'The Challenges of EC Consumer Law', European University Institute, Max Weber Program Working Paper no. 2007/24.
[32] M. Blair, A. Williams and L.-W. Lin, 'The Roles of Standardization, Certification and Assurance Services in Global Commerce', May 2008, CLPE Research Paper no. 12/2008.
[33] ANEC, Strategy 2008–2013, 11 June 2009.

influence the standard at issue in the interest of the consumers (i.e. better, safer, or more environmentally friendly products).[34] Standards can also provide a valuable indicator for minimum criteria to protect vulnerable markets; it is easy to forget that some consumer protection laws may be increasingly difficult to enforce due to market deregulation and globalisation of trade. The 'dumping' of substandard products across borders is one unfortunate result in these cases.

Consumer organisations that are not yet organised

Consumer organisations may realise the value of standards – but are not yet organised effectively for this work. On the one hand, they need to interact either with the national standards body, or with regional or international consumer organisations, on standards issues. On the other hand, they need to organise and brief the people who will be dealing with the standards activity.

Evidently, in such a context, technical expertise is needed and, according to available data, ANEC can rely on approximately two hundred volunteer experts engaged in the technical committees and working groups of the European standards organisations. Nevertheless, consumers' representatives involved at the national level in standardisation usually have both a low commitment to the process and insufficient knowledge. But even when a consumer representative is willing and able to participate, an obstacle may be insufficient training and briefing available for the representative to make an effective impact. Providing support in this area is normally the shared responsibility of national standards bodies and consumer associations.

Insufficient recognition by national standards bodies

According to the ANEC strategy as outlined above, there is often insufficient recognition by national standards bodies of the value of consumer participation. A national standards body needs to ensure that adequate consumer representation happens at various levels. Consumer representatives may also have an impact on European standardisation by participating in policy or technical groups that decide national

[34] Examples of 'consumer friendly' standards are ISO 8317, Child-resistant packaging – Requirements and testing procedures for reclosable packages; ISO10002, Customer Satisfaction – Guidelines for complaints handling; ISO 22000:2005, Food safety management systems – Requirements for any organisation in the food chain.

priorities, and which set overall work programmes, and related policy, to be advanced at EU level.

Funding

Some of the most frequent obstacles which consumer organisations encounter are limited financial resources and human resources with appropriate expertise. Consumer representatives often rely on national standards bodies themselves to help defray the costs of attending meetings, while other sources of support are government agencies or outside donor agencies. This problem, which will be more evident in the NLF, has been confirmed by ANEC. And while ANEC is trying to find alternative funding solutions, such as establishing partnerships, it has recognised that it 'must build alliances in order to achieve its mission of improving consumer protection and welfare. We have to recognise that we do not have the resources – either in terms of money or people – to go it alone. We literally cannot afford to be a lone voice.'[35]

Collective private enforcement

This chapter tries to pursue a unitary perspective and, thus, it includes two sections on enforcement law. The idea is that EU consumer law should be considered *in relation to the consistency* of consumer law enforcement.

In this regard collective redress refers to the means by which individuals are able to group together to use a single (judicial or non-judicial) mechanism to claim monetary or non-monetary compensation arising from an event in which each member of the group has similar interests. This ought not to be seen exclusively through litigation; it is a much wider concept, and policy-making and law-making ought to see it as such. Redress, and also collective redress, can be provided using public enforcement mechanisms, litigation, alternative dispute resolution (ADR) mechanisms, tribunals, compensation schemes and funds (both statutory and voluntary) and other voluntary mechanisms.

There has, over the past year, been an active debate as to how best to promote revised collective redress procedures across the Union, particularly in the area of competition claims. In particular, private enforcement before national courts to protect subjective rights under Community

[35] ANEC Strategy.

law, especially 'by awarding damages to the victims of infringements' (recital 7), is explicitly mentioned in the Regulation no. 1/2003 (the Competition Modernisation Regulation). The Commission has expressly issued the Green Paper on Damages actions for breach of the EC antitrust rules.[36] These proposals were then published in April 2008 by way of a White Paper.[37]

Collective redress has, then, become a live issue in EU consumer law that again takes the same path previously taken by competition law. The Green Paper on consumer collective redress was published on 27 November 2008 to put forward four options, ranging from no action to a court-based collective action, while contemplating some role for ADR and oversight of reparation by public regulatory authorities.[38] Then, the Commission produced a follow-up to its Green Paper on consumer collective redress (8 May 2009). The new consultation presented the first look at the impact of the policy options, drafted on the basis of the responses to the Green Paper. The responses indicated that no single option provided in the Green Paper was satisfactory for achieving the objectives of improving access to effective means of redress for mass consumer claims in the EU, and improving the functioning of the internal market by making it more competitive. Rather, a common trend emerging from the responses was that a combination of several instruments was the best way forward. In August 2009 the Commission published a feedback statement summarising the responses to the consultation on consumer collective redress.

My point here is that central to the debate between academics, practitioners, consumer associations and the industry is the possibility of developing a judicial group action procedure.[39]

Recently, a number of mechanisms have proliferated in the Member States establishing a form of national experimentalism in the absence of

[36] Commission, Green Paper on damages actions for breach of the EC antitrust rules, 19 December 2005, COM (2005) 672, 19.

[37] Commission, White Paper on damages actions for breach of the EC antitrust rules, 2 April 2008, COM (2008) 165.

[38] Commission, Consultation Paper for discussion on the follow-up to the Green Paper on consumer collective redress, May 2009, at 15. Commission (EC), Green Paper on consumer collective redress, COM (2008) 794, 27 November 2008.

[39] A. Stadler, 'Group Actions as a Remedy to Enforce Consumer Interests', in F. Cafaggi and H. Micklitz (eds.), *New Frontiers of Consumer Protection: the Interplay between Private and Public Enforcement* (Antwerp: Intersentia, 2009); F. Cafaggi and H.-W. Micklitz, 'Administrative and Judicial Enforcement in Consumer Protection: the Way Forward', in Cafaggi and Micklitz, *New Frontiers*.

a common European framework.[40] It is well known that such experiments take three main forms: the test case (England and Wales, Germany); the model of action provided by the Injunctions Directive with some improvements (Italy, Spain and France) and, finally, the class action model with some modifications (Sweden).[41]

If we examine the responses to the consultation two positions are of particular interest in the discussion of judicial group action: the European Consumers' Organisation (BEUC) and the OFT. BEUC gave its full support to the creation of a new, judicial group action procedure. It argued that this should permit claims on an opt-out basis, have as wide a scope as possible, be open and creative when it comes to compensating consumers, apply to both domestic and cross-border litigation and be accompanied by efficient funding mechanisms. However, BEUC did recognise the need to give courts discretion over the admissibility of any particular claim – a gate-keeping function of the sort already described.[42]

This pro-reform position has also been articulated by regulators such as the OFT, the UK's consumer and competition authority. I note that, in its response, the OFT stated its support for a 'binding, effective system that delivers redress to consumers, a Europe-wide legal process accessible by consumers and consumer groups'. It suggested that such a procedure should permit some claims (those brought by designated representative groups) to be brought on an opt-out basis. It should be possible for consumers to claim against multiple defendants at a time, but the mechanism should be limited to cross-border disputes for an initial period. The OFT also suggested limiting defendants' ability to recover their legal costs if they won, to prevent vulnerable and other consumers being deterred by the fear of having a defendant's legal costs imposed on them, while representative bodies should be able to recover their costs in full on any successful claim.

At this stage, the Commission is considering the responses to the Green Paper and will probably proceed in the next few months. This phenomenon represents a fundamental shift from the traditional

[40] Poncibò, 'Some Thoughts'; R. D. Kelemen, 'American-Style Adversarial Legalism and the European Union', European University Institute, RSCAS Working Paper No. 2008/37; R. Alderman, 'The Future of Consumer Law in the United States – Hello Arbitration, Bye-Bye Courts, So-Long Consumer Protection', 19 September 2007, University of Houston Law Center Working Paper No. 2008-A-09; C. Hodges, *Multi-Party Actions* (Oxford University Press, 2001).

[41] Poncibò, 'Some Thoughts'.

[42] Stakeholders' responses at: http://ec.europa.eu/consumers/redress_cons/response_GP_collective_redress_en.htm (last accessed 1 February 2010).

European consumer protection that in many countries has been developed from above, by the states, and not from below by consumer activism and, sometimes, consumer litigation.[43] The Commission itself states that 'The traditional view of enforcement of consumer protection has been that public authorities apply hard law. Today, alternatives exist where consumers may directly seek redress.'[44]

Enforcement networks

According to the literature,[45] one of the most distinctive features of the reformed institutional architecture of EU competition law is the European Competition Network (ECN) that has been established to facilitate cooperation between the competition authorities of the Member States and to protect the consistent enforcement of competition policy. At this stage, the ECN has received some preliminary but generally positive comments by the scholars.[46]

Interestingly, a network of public authorities has also been established to manage the increasing number of cross-border consumer complaints in the single market by the Consumer Protection Cooperation (CPC) Regulation (also CPC and CPC Network).[47] The 2009 Communication on the enforcement of the consumer *acquis* expressly mentions the CPC Network.[48] The idea of network governance has attracted the attention of the legal scholars who note that, while networks have been a feature of governance for a long time, the scope, range and intensity of governmental networks have expanded and that this expansion is what is new.

One commentator has analysed the way in which networks have transformed the global political order, explaining how networks are a prevalent feature of that order, ranging from the environment to security, from financial regulation to international trade and from policing to

[43] Cafaggi and Micklitz, 'Administrative and Judicial Enforcement'.

[44] Commission, Communication on the enforcement of the consumer *acquis*, 2 July 2009, COM (2009) 330 final.

[45] I. Maher, 'Regulation and Modes of Governance in EC Competition Law: What's New in Enforcement?' (2008) 31 *Fordham International Law Journal* 1713–40.

[46] F. Cengiz, 'The European Competition Network: Structure, Management and Initial Experiences of Policy Enforcement', European University Institute Max Weber Programme Papers no. 2009/05.

[47] Council Regulation (EC) no. 2006/2004 of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws [2004] OJ L 364/1.

[48] Commission Communication on the enforcement of the consumer *acquis*.

macroeconomic policy.[49] In particular, Slaughter adopts a broad view of the network, using it to capture 'all the different ways that individual government institutions are interacting with their counterparts either abroad or above them'. She defines a network as a 'pattern of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the "domestic" from the "international" sphere'.

For our purposes, one may distinguish different types of network, while recognising that some networks may have more than one role. For example, there are enforcement networks, designed to render enforcement more efficacious across international boundaries; information networks, aimed at the exchange of information between governmental agencies or the like, on matters as diverse as security, the environment, policing, and health; and harmonisation networks, designed to foster closer uniformity in regulatory standards.

Relevant in the perspective of this contribution is, for instance, the International Consumer Protection and Enforcement Network (ICPEN), a membership organisation consisting of the trade practices law enforcement authorities of more than three dozen countries, most of which are members of the OECD. The mandate of ICPEN is to share information about cross-border commercial activities that may affect consumer interests, and to encourage international cooperation between law enforcement agencies.[50]

Networks of national officials play an important role in the development of Community policy.[51] On some occasions it has been the Member States, acting through the Council, that have driven such developments, while on other occasions the Commission has been the driving force. The best-known example of national network influence on Community policy-making is the comitology system.[52] The most formal networks exist where there is the strongest EU incentive for effective enforcement across national borders. The Commission will normally be in the driving seat and will press for measures that enhance the

[49] A. M. Slaughter, *A New World Order* (Princeton University Press, 2004), 548.

[50] ICPEN is a network of governmental organisations involved in the enforcement of fair trade practice laws and other consumer protection activities.

[51] P. Craig, 'Shared Administration and Networks: Global and EU Perspectives', paper presented at the workshop on comparative administrative law held at Yale Law School, 7–9 May 2009.

[52] C. Bergstrom, *Comitology: Delegation of Powers in the European Union and the Committee System* (Oxford University Press, 2005).

enforcement capacities of the relevant national agencies to render the Community regulatory regime more effective.

For the purposes of this chapter I will focus on the three networks that the EU Commission has specifically adopted at various stages to enforce consumers' rights: the European Consumer Centres Network (ECC-Net), the FIN-Net and, more important and recent, the Enforcement Network.

The ECC-Net is an EU-wide network with local contact points launched by the EU Commission in 2005 and designed to promote consumer confidence by advising citizens on their rights as consumers and providing easy access to redress, particularly in cases where the consumer has made a cross-border purchase.[53] The aim of the ECC-Net is to provide consumers with a wide range of services, from providing information on their rights to giving advice and assistance with their complaints and the resolution of disputes. It is present in all the Member States and it is located in host organisations (i.e. public or non-profit-making bodies designated by the Member State and agreed by the EU Commission). The ECC-Net has the task of advising on out-of-court-settlement procedures for consumers throughout Europe and on cooperating with each other and with other European networks. Similar to the ECC-Net is the FIN-Net launched by the EU Commission in 2001 which provides a financial dispute resolution network of national out-of-court complaints schemes across the European Economic Area countries.[54]

The most important mechanism is the network established under the Consumer Protection Cooperation Regulation or CPC Network[55] which brings together national public authorities responsible for the enforcement of the EU consumer *acquis*. This CPC Network, which gives authorities the means to prevent businesses undertaking cross-border activities that are harmful to consumers, sets out a common framework under which these authorities are to work together and provides for minimum investigative and enforcement powers.[56] Precisely, it partially harmonises the authorities' investigative and enforcement powers and lays down the mechanisms for exchanging relevant information and/or

[53] ECC-Net was created by merging two previously existing networks: the European Consumer Centres or Euroguichets, which provided information and assistance on cross-border issues, and the European Extra-Judicial Network or EEJ-Net which helped consumers to resolve their disputes through alternative dispute resolution schemes using mediators or arbitrators.

[54] FIN-Net at http://ec.europa.eu/internal_market/finservices-retail/finnet/index_en.htm.

[55] Commission Communication on the enforcement of the consumer *acquis*.

[56] Davies, 'Entrenchment of New Governance'.

taking enforcement action to stop infringements in cross-border situations. It obliges Member States to act upon mutual assistance requests addressed to them and to ensure that adequate resources are allocated to the network's authorities to meet those obligations.

The CPC Regulation further provides a broader framework for the development of administrative cooperation initiatives for which the Commission provides funding. The obligation of the watchdogs to engage in mutual assistance, including the possible exercise of investigative and/or enforcement powers, applies when there are intra-Community infringements of the national laws transposing the consumer *acquis* and as listed in the annex of the regulation. It includes fourteen directives and one regulation, including the Doorstep Selling Directive[57] and the Air Passengers Regulation;[58] as with any list-based system, it must be constantly updated as legislation is adopted (e.g. the UCPD).[59]

The Commission has issued a report to analyse the initial years of operations under the CPC Network for the years 2007 and 2008.[60] The report underlines that, following a relatively slow start, its activity quickly accelerated to reach a total of 719 mutual assistance requests in two years. The majority of the cases are requests for information (39 per cent of the total number) and requests to take enforcement measures to stop a confirmed breach of legislation (37 per cent of the total number). In addition, the CPC Network has carried out two joint market surveillance and enforcement exercises which took the form of internet inquiries; one on websites selling airline tickets in 2007 and one on websites offering ring tones for mobile phones in 2008. The majority of infringements concerned misleading advertising provisions (close to a third of the total number of cases) and online commercial practices (e.g. internet and mailings). In terms of sectors, the two EU sweeps contributed to increasing the number of mutual assistance requests in

[57] Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L 372/31.

[58] Council Regulation (EC) no. 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) no. 295/91 [2004] OJ L 46/1.

[59] Art. 16 of the Directive 2005/29 amends the 2004 Regulation to add itself to the list.

[60] Commission (EC), Report from the Commission to the European Parliament and to the Council on the application of Regulation (EC) no. 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, Brussels, SEC (2009).

the sectors where the authorities carried out their inquiries, namely transport and communication.

In consideration of the above, such an instrument, if carefully designed, could represent a positive force to improve the current unsatisfactory level of enforcement of consumer rights in cross-border cases.

Conclusion

The expression 'modernising European consumer law' has appeared in the White Paper *A Better Deal for Consumers* issued by the UK government.[61] This chapter pointed out that, although we are not facing the enforcement turbulence which has visited EU competition law, the picture is also changing with respect to EU consumer law. These two areas of European law, often indicated by legal scholars as 'two wings of the same house', enjoy a common destiny that consists, primarily, in reliance on the role that private actors can play, the emergence of the private enforcement and the adoption of new instruments such as the ECN and the CPC Networks.[62] Moreover, this chapter has tried to show that co-regulation is used as a means to implement consumer directives, to harmonise standards and enforce rules. In the landscape here described the consumer is conceived of as an active, empowered consumer rather then a 'victim' who needs to be protected. This new role for the consumer raises practical issues: is the model of the empowered consumer credible if we consider behavioural science studies in consumer decision-making?[63]

Finally, the chapter adopts a unitary perspective to include enforcement law. This approach aims to underline that the confidence of the consumer depends primarily on the possibility of obtaining an effective protection of the rights granted by EU consumer law. In consideration of these developments, this chapter stresses the need to reconsider and strengthen the representation of the consumers' interests when using co-regulation and to develop the private collective enforcement of consumer rights.[64]

[61] HM Government, *A Better Deal for Consumers: Delivering Real Help Now and Change for the Future*, 2 July 2009.

[62] Cseres, *Competition Law*.

[63] C. Poncibò and R. Incardona, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution' (2007) 30 *Journal of Consumer Policy* 21–38.

[64] R. Van den Bergh and L. Visscher, 'The Preventive Function of Collective Actions for Damages in Consumer Law' (2008) 1(2) *Erasmus Law Review* 5–30.

Although the quasi-public standards of the new approach and the NLF seem to be a very good tool for achieving the goal of European integration, this chapter underlines that the institutional governance of such organisations has to incorporate consumers' interests in the process of enacting standards. There is a growing awareness of the fact that standards overcome the boundary between merely technical issues and normative definitions of risks and safety and, thus, that we have to seek institutional designs that keep the advantages of standard setting while ensuring a sort of democratic control. Such an important process cannot be limited to a unilateral approach. Moreover, an effective (collective) private enforcement of consumer rights could contribute to forcing organisations into adopting 'adequate standards'. Furthermore, it may also play a dual role by providing incentives against organisations disregarding the consumer's interests and, even though it is problematic to contest such standards before the courts, by providing a measure of indirect judicial control over them.

Unless the legal effects attributed by the directives to the standards of CEN and the other ESOs are more 'powerful' than 'normal' voluntary standards the point here is that they should be subject to judicial control. This contribution does not say that the process of modernisation envisaged here would be necessarily good for consumers, but these developments deserve more attention. Consumer law at EU level has certainly not come of age,[65] but it is entering a new phase. We should be sensitive to the complexity of the regulation of consumer markets and expand our horizons.

[65] Howells and Wilhelmsson, 'EC Consumer Law'.