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## DEVELOPMENT OF CONSUMER PROTECTION IN THE EUROPEAN UNION

### Summary

In modern times, the mass of use of non-cash payment and minimizing the shadow economy is the priority targets of the states. As a result, in recent years, states pay more attention to the protection of consumers. In turn, the European Union improves the legislation in the field of protection of consumers. It is useful to learn the dynamics of development of the European Union's legislation in this area and improving local legislation in the future. The article explores the development of the European Union's legislation and ECJ key cases in the field of protection of consumers' rights.

**Key words:** *consumer protection, European law, e-commerce, Tobacco case*

### Introduction

While the European Community initially paid little attention to consumer protection, its position has changed considerably in recent decades. The evolution of consumer law can be broadly divided into three periods. (4, p.6) The first period lasted until the introduction of the Single European Act, and was mainly based upon the idea of the national welfare state and European market integration. Thus, consumer protection at the European level remained very limited until the 1970s. In the second phase, which extended up to the early 1990s, consumer rights were linked to the internal market and the European Community acquired a formal competence to legislate on consumer issues. The third phase, still underway, includes of two tendencies: full harmonization of consumer law by the EU on the one hand, and further recognition of consumer protection following the Charter of Fundamental Rights.

### The Treaty of Rome

In 1957, the Treaty of Rome was signed, establishing the European Economic Community (EEC), which aimed mainly at economic integration. Consumer issues were mentioned only in a few Articles and purely in relation to other policies, namely, the agricultural and competition policies. (6, p.20) The improvement of the common market through fundamental freedoms, such as free movement of goods, people, and services, was the absolute priority. The drafters of the Treaty implicitly assumed that consumer protection would automatically result from the development of the internal market. Two main legislative and jurisprudential trends became apparent: positive integration of consumer policy through both soft law and hard law mechanisms, and negative integration driven by the European Court of Justice. (5, p.114)

A second feature of the European system is that its consumer law has developed in an indirect manner through negative integration by the ECJ. This process of deregulation of national provisions meant that the ECJ abolished actions by Member States that would impede cross-border trade in the market. (5, p.116) The prohibition of discriminatory behaviour, the four freedoms, and competition law provisions, were the instruments for this approach which served to eliminate national protective barriers and, at the same time, constituted a source of new individual rights.

### The Single European Act

With the entry into force of the Single European Act (SEA) in 1987, the Community explicitly recognized consumer protection as an autonomous policy aim within the internal market. According to Article 100a SEA, the Commission must guarantee a high level of consumer protection. (2) In addition, the Single European Act introduced qualified majority voting for the adoption of Community actions proposed by the Commission in the European Council. This simplified the adoption of measures to approximate the legislation of the Member States and improve market functioning. However, the Single European Act did not provide a specific legal basis for secondary consumer legislation. As a result, numerous consumer directives were still adopted indirectly, under the general motivation of establishing and developing the internal market. The aim was to create a basic level of protective provisions, to enhance consumer confidence in cross-border trade thereby increasing market integration. (7, p.8) The ECJ played an important role in enhancing consumer information and choice in the integrated market through its case law.

### **The Treaty of Maastricht**

With the entry into force of the Treaty of Maastricht in 1993, a stronger commitment beyond market goals became apparent in the EU, made manifest by the insertion in the Treaty of explicit consumer protection objectives and new citizenship rights. Article 3 (s) of the European Community (EC) Treaty stated that ‘a contribution to the strengthening of consumer protection’ should be part of the activities of the Community. (7, p.4) The Community could now officially intervene according to Article 129 (a) (1) (b) EC to improve consumer protection, independently from measures taken in connection with the internal market. Practice revealed, however, the relatively low significance of the new legal basis for the development of consumer law. Only in rare cases have specific actions been based on Article 129 (a) (1) (b) EC, also there are many directives such as give the right to consumers. (3) The majority of directives continued instead to be adopted on the basis of the ‘market integration’ provision (Article 100(a) EC). However, these consumer measures had to be compatible with the Treaty, and the Member States were obliged to notify the Commission of them. Consumer policy was also influenced by Article 3 (b) (2) EC, which formally introduced the subsidiarity principle by stating that in areas of shared competence ‘the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can (...) be better achieved by the Community’. This principle aimed to clarify the division of competences and to control the increase in the Community’s harmonization measures, because it gradually restrained the powers of the Member States. (11, p.2) In conclusion, the Treaty of Maastricht constituted an important milestone because it conferred a legal competence to the EU in consumer protection. However, in practice, this changed little in legislative terms, because the EU continued to adopt consumer directives under Article 100 (a) EC, which required a market-making objective.

### **The Treaty of Amsterdam and the Tobacco Advertising case**

Since the mid-1990s, policy-makers have begun trying to pursue consumer protection as a distinct EU goal. Product scandals during this period, such as ‘Bovine Spongiform Encephalopathy’ (BSE), hormone-treated beef, and toys treated with phthalates, provided an opportunity for the EU to define a pro-consumer agenda. The Treaty of Amsterdam responded to such needs for stronger consumer protection, by enlarging the competence of the Union in consumer law. Article 153(1) EC stated that the Community ‘shall ensure a high level of consumer protection’ by contributing ‘to protecting the health, safety and economic interests of consumers’ and ‘promoting their right to information, education and to organise themselves in order to safeguard their interests’. The right to information, education, and organization were new consumer rights, which did not exist in the Treaty of Maastricht. (8, p.384) However, according to some scholars, the practical impact of this provision has remained limited. Article 153 (3) EC provided two different legislative competences for the EU, which already existed in the Treaty of Maastricht. Thus, the Community could take either ‘(a) measures adopted pursuant to Article 95 in the context of the completion of the internal market’, or ‘(b) measures which support supplement and monitor the policy pursued by the Member States’. The first type of measures allowed the EC to harmonize the laws of Member States to improve market functioning. This implied that directives should be adopted only if there was a need to harmonize the law in order to establish or improve the functioning of the internal market. In contrast, the second type of measures could be used by the Community for consumer protection initiatives independently of a market integration objective. Regarding these measures Member States kept the right of the Treaty of Maastricht to introduce ‘more stringent’ consumer protection rules (Article 153(5) EC). Indeed, under the Amsterdam Treaty, the EU had only limited powers to adopt measures, as Article 5 EC required that the Community act within the limits of the powers conferred upon it by this Treaty. In addition, the principle of subsidiarity established in the Treaty of Maastricht had not been altered. This meant that, regarding areas of shared competences, the EU was only allowed to take measures ‘in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can (...) be better achieved by the Community’. (5, p.118)

Therefore, in the late 90s, Member States were becoming increasingly less tolerant towards the growing competence of the EU. This was for example reflected in the ‘Tobacco Advertising’ judgment, where Germany sought the annulment of Directive 98/43/EC which banned the advertising and sponsorship of tobacco products. (p.192) This directive had been adopted under Article 100(a) EC (later Article 95 EC) presented as a measure of harmonization to improve internal market functioning. However, Germany argued *inter alia* before the ECJ that the legal basis applied for this directive was incorrect, because this measure did not actually contribute to the improvement of the internal market, and its true objective was to protect public health. The ECJ annulled the directive, because of its invalid legal basis. According to the Court, Article 95

EC does not give a general power to the Community to regulate the internal market. This would also be incompatible with Article 5 EC that provides that ‘the powers of the Community are limited to those specifically conferred on it’. However, the ECJ specified that the fact that harmonizing measures have a positive effect on health does not exclude Article 95 EC as a legal basis. In order to assess its validity, it is ‘necessary to verify whether the directive actually contributes to eliminating obstacles to the free movement of goods and to the freedom to provide services, and to removing distortions of competition’. In the Court’s view the ban on advertising imposed by the directive was too broad. While in principle, the prohibition on advertising of tobacco products for the written media might be based on Article 95, with the aim of improving the free movement of press products, numerous other prohibitions, for example regarding advertising on posters, parasols, and ashtrays did not help to facilitate trade in the product concerned. Therefore, the Court considered that an outright prohibition of advertising was disproportionate and the measure was not apt to eliminate appreciable distortion of competition. This case had an important impact on EU law-making on the basis of Article 95 EC. The Commission has become more aware of its limited competence and has dedicated more effort to carefully justify new actions by establishing a stronger link to market-functioning objectives. Accordingly, after the annulment of the Tobacco Advertising Directive 98/43, a more restrictive measure was adopted by the EU in 2003 and this time the Commission shaped the directive so as to expressly underline the market-integration aim that was previously missing. Although the more recent case law of the ECJ has revealed a rather permissive approach to new EU legislation, a number of former consumer directives based on Article 95 EC have become constitutionally vulnerable according to Weatherill, because of their weak links to the required market-building objectives. (10, p.497) This in turn has created uncertainty over the effective division of competences between the EU and Member States in developing consumer protection. All these issues, according to some scholars, would require an open debate on Treaty reform for a clearer competence in consumer law. In conclusion, since the Tobacco Advertising case, it has become more difficult to adopt harmonization measures for consumer protection based on Article 95 EC (now Article 114 TFEU), unless they contain an explicit market-integration objective. While adding yet another focus on market integration, this was not the last piece of an already complex mosaic. The Lisbon Treaty and, eventually, the Charter of Fundamental Rights, provide new elements to consumer law, which will be analyzed in the following section and chapters of this article.

### **The Lisbon Treaty**

The Lisbon Treaty was signed in 2007 and entered into force on 1 December 2009 to reform the foundations of the European Union following the two waves of enlargement. (13) It replaced the draft Constitutional Treaty, which was rejected in 2005, and amended the Treaty on European Union (TEU) and the Treaty establishing the European Community, renaming the latter, Treaty on the Functioning of the European Union (TFEU). The Lisbon Treaty introduced structural and institutional changes and strengthened the role of fundamental rights. While some Treaty provisions bring modest substantive innovation, others may influence consumer protection in new ways, in particular regarding regulatory participation, access to justice, and fundamental rights protection. A number of key aspects of the Lisbon Treaty which are relevant to consumer protection are described here, whereas broader changes will be considered in more detail in the following chapters. Since the Lisbon Treaty reforms, the division of competences between the European Union and Member States has become to a certain extent more transparent. The TFEU sets out three main categories of competences: exclusive, shared, and supporting competences. (1, article 2,6) Another set of Treaty provisions expressly mentioning consumer protection do not, at first sight, seem to bring major substantive innovations. Nonetheless a change in the placement of the consumer protection provision in the Treaty and its recognition in the binding Charter may entail a distinct qualitative improvement. (12, p.116) Article 12 TFEU, as under the pre-Lisbon provision (ex Article 153 (2) EC), states that ‘Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities’. Such integration is already most evident in specific areas of competition policy, where consumer interests are applied as the ultimate standard to assess whether the practice of a dominant undertaking is legitimate under competition law. (6, p.20) For example, a dominant market position of a business may be accepted if the overall balance in terms of consumer interests is positive. A core provision of consumer protection comes under Title XV and its Article 169(1) TFEU and remained substantially unchanged, besides the renumbering. It states, like Article 153 EC previously, that the Community has the power to ‘contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests’. Article 169 (2) TFEU then specifies that these goals can be achieved either by ‘(a) measures adopted pursuant to Article 114

TFEU in the context of the completion of the internal market'; or '(b) measures which support, supplement and monitor the policy pursued by the Member States'. Here no modification in wording or strategy is apparent. Therefore, with the adoption of the Treaty of Lisbon, the Charter has now become legally binding for EU institutions and for most Member States applying EU law, acquiring an equal status with EU Treaties. At the same time, the Charter is not designed to extend the competence of the EU as circumscribed in the Treaties (Article 6 (1) TEU). Another significant innovation in terms of human rights is provided by Article 6 (2) TEU, which stipulates that the EU shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, without affecting the Union's competences established in the Treaties.

### Conclusion

Thus, the optimal balance between consumer protection and market development could be reached via a mix of full and minimum harmonization. Consumer law in the EU should, in general, be based upon a minimum-harmonization approach and only be regulated exceptionally at a full-harmonization level, the reason being that a minimum-harmonization approach at the EU level is often more favourable for consumers, as it would fit the diverse protective requirements that consumers have in different Member States and allow a higher level protection at national level, if required. This approach would also be more suitable to maintain a multi-level system and adapt to the fact that there is not one unique harmonizer, but a process involving many actors with different objectives.

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