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The Concept of Competitive Contract Law

Hans-W. Micklitz*

I. The Purpose of the Paper

European contract law has become one of the most fascinating subjects of legal theory. Thanks to the Commission's Communication¹ issued in summer 2001, civil lawyers all over Europe have eagerly rediscovered a long-forgotten subject. The Commission is sponsoring an international group of lawyers which has to develop ground rules on European contract law.² For the time being, the Commission is no longer striving for a full-fledged European Code on Contract Law that would substitute the national private legal orders. Instead, the Commission is striving for *A Common Frame of Reference*³ which could stand side-by-side with the national private legal orders and for whose application the parties are free to opt. The project, however, does not meet unanimous support and there is a growing critique against the lack of social justice within the project.⁴ The mandate, however, is clear and the time schedule, at least in the eyes of the Commission, is rather tight. Until 2009, the *Common Frame of Reference* has to be shaped and fueled out of two different sources of law:

- 1) a comparative analysis of the different national legal systems and

* University of Bamberg, Germany. I would like to thank Norbert Reich and Thomas Wilhelmsson for valuable comments on earlier drafts.

1. See STEFAN GRUNDMANN AND J. STUYCK, AN ACADEMIC GREEN PAPER ON EUROPEAN CONTRACT LAW, (Kluwer Law International, 2002).

2. The DG SANCO has urged the Van Bar group and the Acquis group to merge, as it was willing to sponsor one group only. In a way, the Commission has forged a research cartel. It remains to be seen whether this strategy will weaken the legitimacy of its findings.

3. Communication on European Contract Law and the Revision of the Acquis: the Way Forward, COM (04) 651 final.

4. See Study Group on Social Justice in European Private Law, *Social Justice in European Contract Law: a Manifesto*, 10 EUR. LAW. J. 653 (2004); see also Thomas Wilhelmsson, *Varieties of Welfarism in European Contract Law*, 10 EUR. LAW. J. 712 (2004).

2) a dense analysis of the *acquis communautaire*.

What to do with the already adopted EC directives and regulations which form the *acquis communautaire*? It is commonly known that the bulk of EC directives in the field of European contract law is consumer contract law. Despite Directive 2000/35/EC on Late Payment⁵ and Directive 86/553/EEC⁶ on Commercial Agents, at the end of the day, it is consumer contract law which lies at the heart of the matter.⁷ That is why social justice is at stake. While I sympathize with the “Manifesto,” my interest in writing this paper is different. I would like to show that European contract law is far broader than European consumer law and there is a paradigm behind the regulatory technique which ends up in a new understanding of the role and function of contract law.⁸ I would like to identify three other areas of contract law where the European Community has been active: 1) directives dealing with particular services (telecommunication, e-commerce and general services); 2) directives aiming at liberalizing formerly state governed markets (electricity and gas); and 3) Wettbewerbsvertragsrecht—*competition contract law* (vertical agreements).⁹ In stark contrast to European consumer law I would like to term it business contract law.

Setting aside efforts to integrate consumer law into a *Common Frame of Reference*, maybe even guided by the intention to downplay consumer law and its inherent principles which are so alien to traditional private lawyers all over Europe, the Head of Unit in the Directorate General for Santé et Consommation SANCO, who is in charge of the overall project, has a clear perspective in mind:¹⁰

1) An optional model which contains the ground rules in contract law matters

2) That is accomplished by binding European consumer law rules.

Such a perspective is not far-fetched. It seems realistic with regard

5. 2000 O.J. (L 200) 35.

6. 1986 O.J. (L 382) 17.

7. See Reiner SCHULZE ET. AL., *INFORMATIONSPFLICHTEN UND VERTRAGSSCHLUSS IM ACQUIS COMMUNAUTAIRE*, (Mohr Siebeck, Tübingen 2003).

8. Stefan Grundmann, *The optional European Code on the basis of the Acquis Communautaire—starting points and trends*, 10 EUR. LAW. J. 698, 704 (2004). “While it is certainly true that the *acquis* has gaps, it is much less fragmented than has been insinuated by virtually every commentator.” *Id.*

9. Another area of interest is public procurement, where competition law and private law are closely intertwined as well.

10. Personal statement of Dirk Staudenmayer, who is the father of the overall project, the driving force behind, the coordinator and head of the respective unit in DG SANCO.

to the first limb—a *Common Frame of Reference* on European contract law—and optimistic with regard to second limb—binding European consumer law rules. Realistic, because it might be difficult to achieve consensus over the adoption of a full-fledged European Civil Code. Optimistic, in that it is not at all clear whether and to what extent consumer contract law directives, as they stand today, could “survive” a possible *revirement* which would be necessary to bring consumer law rules into compliance with the *Common Frame of Reference*. In my view consumer contract rules would have to be amended in at least two ways. First, it is commonly agreed and widely accepted¹¹ that changes should be made with regard to the inner consistency of the rules. A second and more controversial change, involves the establishment of a conclusive body of European consumer contract law rules.¹² In its last consumer policy program DG SANCO has already indicated where the bind blows.¹³ Full harmonization of consumer contract law rules instead of minimum harmonization is the overall message. The debate is gaining momentum and is dominating European policy making more and more.¹⁴

I will not speculate over future politics. The existing body of — European Consumer Law is “real” and it is subject to constant development—most importantly by the European Court of Justice. What I have in mind is:

(1) To look into the inner mechanics of European consumer contract law, as it stands today and as it will stand probably for a long while;

(2) To demonstrate that steadily and silently a new paradigm in contract law theory is emerging, a paradigm which I have termed competitive contract law;

(3) To demonstrate that the concept of competitive contract law reaches far beyond European Consumer Law—that it is the leading

11. See STEFAN GRUNDMANN, PARTY AUTONOMY AND THE ROLE OF INFORMATION IN THE INTERNAL MARKET, (Walter de Gruyter 2001).

12. There is strong critique from the Scandinavian side. See Thomas Wilhelmsson, *Private Law in the EU: Harmonised or Fragmented Europeanisation?*, EUR. REV. OF PRIVATE LAW 77 (2002). But, there is some preparedness at least with regard to codifying European consumer law. See Walter Van Gerven, *Codifying European Private Law? Yes if . . .!*, EUR. L. REV. 156 (2002).

13. Consumer Policy Strategy, 2002 O.J. (C 137) 2.

14. Thomas Wilhelmsson, *European Consumer Law: Thesis of the Tasks of the Member States*; Stephen Weatherill, *Constitutional Ambiguities in European Consumer Law: Is Minimum Harmonisation an Oxymoron?* [both papers are to be published in: Hans W. Micklitz (ed.), *Verbraucherrecht in Deutschland—Stand und Perspektiven*, Schriftenreihe des VIEWS, Band 19, 2005, Nomos, Baden-Baden]; see also Stephen Weatherill, *Why Object to the Harmonisation of Private Law by the EC*, EUR. REV. OF PRIVATE L. 633 (2004).

philosophy of all European contract law rules; and

(4) To demonstrate that the concept of competitive contract law might neither be kept away from the *Common Frame of Reference* on European contract law, nor—and which might be more important—from the Member States' national private legal orders.

I will develop my thesis in four steps: Part II of this paper will explain what I understand by competitive contract law and why the paradigm is “new.” Part III will define my understanding of European contract law rules. Part IV will identify the major elements of European consumer contract law being understood as competitive contract law and then apply the very same approach to European business contract law. Lastly, in Part V, I would like to conclude my considerations with some sort of a stock-taking of where we are in the process of developing European contract law.

II. What is “New” in Competitive Contract Law?

Why *competitive* contract law and what is *new* in competitive contract law? I start from the premise that consumer contract law does not only constitute some eighty percent of European contract law, but that this European consumer contract law works as a forerunner in modernizing the national civil legal orders.¹⁵ There is ample evidence for such an understanding not only in national private legal orders where consumer law has become an integral part of the civil code, but also within the debate over the *Common Frame of Reference* where the same thoughts arise. Therefore, consumer law quite necessarily contains to a large extent what is “new” in contract law. There is, however, an important second premise. Member States have deliberately delegated away parts of the competence to adopt consumer contract law rules to the European Community, so far by means of minimum regulation. Thus, the new elements do not all derive from *national* consumer contract law, but, to a growing extent, from *European* consumer contract law. The new phenomena enshrined in consumer law, reappear in European business contract law as well, which will have to be demonstrated.¹⁶

15. See H. RÖSLER, *EUROPÄISCHES KONSUMENTENVERTRAGSRECHT* (CH. Beck 2004).

16. See also, Norbert Reich, *The tripartite function of modern contract law in Europe: Enablement, regulation, information*, *Das Schweizerische Privatrecht im Lichte des europäischen Gemeinschaftsrechts, Aktuelle Fragen aus dem Haftpflicht und Vertragsrecht* 145-172, 158 (Franz Werro & Thomas Probst eds 2004) (spillover effect of consumer law to general civil law); Stephen Grundmann, *Verbraucherrecht, Unternehmensrecht, Privatrecht—warum sind sich UN-Kaufrecht und EU-Kaufrechtsrichtlinie so ähnlich*, *Archiv für civilistische Praxis* 202 41-71, 57 (2002).

A. The "New" Consumer Contract Law

Consumer law in the hands of the European Community has changed its outlook. It is no longer social protection that legitimates market regulation to fight down imbalance of power, but economic instrumentalisation to establish the Internal Market. Despite all constitutional rhetoric the Internal Market philosophy is still the driving force behind European integration. Europe is not a state, it is at the very best a quasi-state with an independent legal order; it may even be considered "a constitutional charter" as the European Court of Justice has put it. This is not to blame the process of constitutionalising Europe, but to show that the governing philosophy behind rule-making in the European Community, in particular within (consumer) contract law, results from the Internal Market program. The little-known but highly influential Sutherland-report¹⁷ has paved the way for upgrading the role of the consumer in the Internal Market. The consumer plays an active part in establishing the Internal Market. One may easily attribute to such a political program a social element—there will or there should be no Internal Market without a social space—but even a social-orientated Internal Market cannot hide its roots. It is first and foremost a market that will have to be established *inter alia* by means of consumer law.¹⁸

The market bias of consumer contract law has far-reaching implications on the way in which contract law is conceptualized in that particular area. There is less room for an understanding of contract law as an integral part of the "Privatrechtsgesellschaft," which mirrors for the good and the bad the thinking which lies behind a society which is based on "rights, property and contract."¹⁹ European contract law is grounded in private autonomy, but its scope is narrower in extent than in general contract law because it applies to cross-border transactions, is limited to economic actors enjoying the economic freedoms of the European Community law, and does not relate to transactions with third countries.²⁰ That is why European law is much more market biased than national contract law. It suffices to recall the importance the ten new Member States have initially devoted to developing their own national private legal order.²¹ In the nineties it seemed as if nation building and

17. The Internal Market After 1992 Meeting the Challenge, Eur. Parl. Doc (SEC 92-final) 2277 (1992).

18. This is the critique that bears the Social Manifesto.

19. K. Günter, *Ohne weiteres und ganz automatisch? Zur Wiederentdeckung der Privatrechtsgesellschaft!*, Rechtshistorisches J. 473 (1992); M. Stollies, *Auferstanden aus der Wende: Die bürgerliche Gesellschaft und ihr Recht?*, RECHTSHISTORISCHES J. 500 (1992).

20. On the words of Norbert Reich, *supra* note 17, at 149.

21. See Norbert Reich, TRANSFORMATION OF CONTRACT LAW AND CIVIL JUSTICE IN

private law making were still closely intertwined.²² It is, however, equally striking that the new Member States quite often have not yet completed the reform of their national private legal order. Thus, one may wonder whether the link between *Privatrechtsgesellschaft*, private autonomy, and nation state building might lose importance, which thereby opens the door to a market focused European contract law. By now, however, contract law in the European Community is just one device among other areas of law and politics to foster European integration which means in essence—again and again—to complete the Internal Market.

The European legal order being understood as a *European Economic Constitution*²³ cannot overcome the differences in Member States' and European contract law making. In its *ordo-liberal* grounding²⁴ the concept is meant to constitutionalise the market freedoms and the competition rules. This is where private autonomy is read into market freedoms. However, even an Economic Constitution enshrined in the Treaty remains bound to a particular purpose—to European integration. Private autonomy cannot be a full-fledged constituent element of a “Europäische Privatrechtsgesellschaft,” because it does not—yet—exist. Even in a possible social welfare grounding, let us assume a *European Economic and Social Constitution*, the concept readily meets the limits of a European legal order where a “European state” is missing who could slip into the national social-welfare coat. The European Community cannot take over the “protective” outlook consumer law bears in national legal orders, although it often pretends to do so. Therefore, the European Economic Constitution is deficient at both ends, private autonomy and social protection. It cannot sustain without the Member States' legal order, in grounding private autonomy

THE NEW MEMBER STATES COUNTRIES: THE EXAMPLE OF THE BALTIC STATES, HUNGARY AND POLAND (RGSL, Working Paper No. 21, 2004).

22. Hans W. Micklitz, *Verbraucherschutz West versus Ost-Kompatibilisierungsmöglichkeiten in der Europäischen Gemeinschaft—Einige Vorüberlegungen*, Helmut Heiss (Hrsg.), *Brückenschlag zwischen den Rechtskulturen des Ostseeraums* 137 (2001).

23. See Christian Joerges, *Markt ohne Staat? Die Wirtschaftsverfassung der Gemeinschaft und die Renaissance der regulativen Politik*, R. Wildenmann (Hrsg.), *Staatswerdung Europas, Optionen einer Europäischen Union* 254 (1991); translated in *The Market without a State? States without Markets? Two Essays on the Law of the European Economy* (EUI Working Paper Law 1/96, 1996) available at <http://eiop.or.at/eiop/texte/1997-019> and [-020.htm](http://eiop.or.at/eiop/texte/1997-020.htm); *States without a Market. Comments on the German Constitutional Court's Maastricht-Judgment and a Plea for Interdisciplinary Discourses* (NISER Working Paper 1996); Jürgen Basedow, *Von der deutschen zur europäischen Wirtschaftsverfassung*, Mohr Siebeck, München (1992).

24. David Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the “New” Europe*, 42 AM. J. COMP. L. 25 (1994).

and in legitimating social policies.²⁵

That is exactly why the Internal Market philosophy remains so dominant and that is why the European Commission could so easily and so successfully relate the adoption of the consumer contract law directives to the Internal Market powers.²⁶ European consumer contract law has been realized in a pick-a-pack procedure, the Internal Market being the driving force and consumer contract law being no more than an appendix. The outcome of such a subordinate consumer contract law is striking. Consumer contract law is turned into a device to contribute to a higher political objective—that of realizing the Internal Market. Consumers shall play their part in the Internal Market. They, however, are able to do so only if they are equipped with the necessary rights and remedies.

Just like national consumer contract law rules, European consumer contract law rules continue to undermine “*pacta sunt servanda*.” The different perspectives, limiting private autonomy to guarantee protection to the weak and protection-needed consumer²⁷ and limiting private autonomy to create a consumer which is able to play an active part in completing the Internal Market evoke different notions of “contract law.” European consumer contract law—and this is my leading hypothesis—reflects its subordination to the Internal Market philosophy. This will have to be developed step by step in breaking down the European approach to regulating contract law into its seven constitutive elements. The outcome is *competitive contract law*, because the contract law rules are shaped so as to allow effective competition between suppliers in the Internal Market.

B. The “New” Business Contract Law

The very same phenomenon, though much less specific, can be

25. There is much discussion in particular on the legitimacy of a European contract law. See Thomas Wilhelmsson, *supra* note 14, at 88; Christian Joerges, *Zur Legitimität der Europäisierung des Privatrechts. Überlegungen zu einem Recht-Fertigungs-Recht für das Mehrebenensystem der EU*, in Christian Joerges & Gunther Teubner (Hrsg.), *Rechtsverfassungsrecht* 183 (2003), translated in, *On the Legitimacy of Europeanising Private Law: Considerations on a Justice-making Law for the EU Multi-level System*, ELECTRONIC J. OF COMP. L. 7:3 (September 2003), available at <http://www.ejcl.org/ejcl/73/art73-3.html>; Ius Commune Lectures on European Private Law 6 (EUI Working Paper Law 3003/2 2003).

26. See Bettina Heiderhoff, *Grundstrukturen des nationalen und europäischen VERBRAUCHERVERTRAGSRECHTS*, insbesondere zur reichweite und zur europäischen auslegung, Sellier, European law Publishers, München, (2003).

27. For a need-orientated approach, see Thomas Wilhelmsson, *SOCIAL CONTRACT LAW AND EUROPEAN INTEGRATION*, Dartmouth Aldershot, Brookfield USA, Singapore, Sydney (1995)

found in European business contract law. The regulatory mechanism and the regulatory philosophy is identical. While there is no Sutherland report, which has provided the ground for a consistent policy to instrumentalise European business law for completing the Internal Market via active, responsible and circumspect suppliers, most of European business contract law rules are guided by the same philosophy; the difference being that consumer contract law is subject related whereas business contract law is object-related.

The Internal Market Program, more particularly the 1985 “White Paper on the Completion of the Internal Market,”²⁸ turned out to be the driving force behind the expansion of European business contract law. The Commission rediscovered the respective competition rules on public undertakings in the Treaty, Articles 82 and 86 to initiate deregulation and privatization. There is a strong link between privatization and deregulation of public undertakings and the growing importance of private law. The most recent initiative is much younger and, again, it took place in competition law. In the late nineties the European Commission began to reframe its policy on block exemptions to enhance competition and most explicitly to strengthen the role of the consumer.²⁹ All of these policy fields have one element in common: the Commission reshapes the market order in particular fields of business by using the competition articles in the Treaty or its competence to adopt secondary legislation to reset the competitive environment,—thereby regulating as a by-product the private law relationship between the parties involved in the respective transaction.

III. The Existing Body of European Contract Law

Before entering into an analysis of what the elements of competitive contract law are, it is helpful to define the essence of European consumer contract law and European business contract law.

A. *Consumer Contract Law*

In a timely order, European consumer contract law³⁰ consists of Directive 84/450/EEC on misleading advertising, Directive 85/577/EEC on contracts concluded away from business premises, Directive 87/102/EEC on consumer credits as amended, Directive 90/314/EEC on

28. COM (85) 310 final.

29. The starting point is the so-called umbrella regulation 2799/2000.

30. Most of the directives are reprinted in three languages—German, English and French. *See* Europäisches Schuldrecht, Verordnungen und Richtlinien, European Law of Obligations, Regulations and Directives, Droit européen des obligations Règlements et Directives (Ulrich Magnus ed. 2002).

package tours, Directive 93/13/EEC on unfair terms in consumer contracts, Directive 94/47/EC on time sharing, Directive 97/7/EC on distant selling, Directive 97/55/EC on comparative advertising, Directive 98/27/EC on injunctions, Directive 99/44/EC on consumer sales, Directive 2000/31/EC on e-commerce, Directive 2002/65/EC on distant selling of financial services, and Directive 2004/39/EC on investment services. As the Commission starts in its Communication from a broad concept of contract law one might add the Directive 87/374/EEC on product liability as amended, the Brussels regulation 44/2001/EC, and the Rome Convention.

Important legislation is under way, the directive on unfair commercial practices will probably be adopted in June 2005,³¹ a regulation on sales promotion, a draft directive on services, a revision of the Rome convention (dealing with contracts), and the adoption of Rome II³² (dealing with tort law) should also occur in the near future. This list could easily be elongated and, at the very least, shows that the Commission is continually working hard to draft important legislation. The legislative machinery does not stop. There is no stand still period during which the *Common Frame of Reference* shall and will be developed. That is why the “*acquis communautaire*” is steadily growing, maybe not so much in the field of consumer law where DG SANCO has proclaimed its intention to publish revisions of the package tour and the time share directive only, but at the outer end of European contract law, in fields of the law where the inner link to traditional civil law matters is less obvious though existent.

For my purposes, it suffices to quite formally classify the existing body of law in a general part and a specific part. It is said to be formal because it does in no way consider the differences in the reach and importance of the directives. The general part consists of the unfair terms Directive 93/13//EEC and the four directives dealing with selling modalities (Directive 85/577/EEC on doorstep selling, Directive 97/7/EC on distant selling, Directive 2000/31/EC on e-commerce and Directive 2002/65/EC on distant selling of financial services). All these directives commonly start from a horizontal perspective. They are, in theory, applicable to all sorts of contracts provided they are concluded between a consumer and a supplier. There specific parts cover all directives that define particular types of contracts: Directive 87/102/EEC on consumer credit, Directive 90/314/EEC on package tours, Directive 94/47/EC on

31. A common position has been reached in November 2004.

32. See Hamburg Group for Private International Law, *Comments on the European Commission's Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations*, 67 *RebelsZ* 1-56 (2003).

time sharing, Directive 99/44/EC on consumer sales, and Directive 85/354/EEC on product liability. Directive 98/27/EC on injunctions falls apart, although it underpins one characteristic of European contract law—the close link between substantive contractual rights and the need for appropriate remedies. I will come back to this fairly neglected relationship later on.

Seen in such a perspective European consumer contract law demonstrates a remarkable consistency, which results from the first and the second European consumer policy program.³³ Legal doctrine likes to use metaphors to describe the existing state of European contract law, such as mere islands in the deep and dark sea of contract law, a mosaic of legal rules, or a puzzle. I do not fully share such a *sotto voce* pejorative finding. While it is true that European consumer law rules lack consistency, it suffices to recall the differences in the shaping of information rights and the deviating periods for the execution of the right to withdrawal. European consumer contract law rules form a relatively close body of rules which mirror the major policy problems of the last two decades, and, what is much more important for the purpose of this paper, the rules suffice to identify the key elements of a new paradigm in contract law theory which is not bound to consumer law alone.

B. *Business Contract Law*

At first hand sight, there are only two directives which are normally attributed to regulating contract law in B2B relations, Directive 86/553/EEC on commercial agents and Directive 2000/35/EC on late payment. These two directives, however, do not constitute European business law! In order to liberalize the market for insurance services,³⁴ job employment,³⁵ telecommunication, energy (electricity and gas) and transport (aviation, railway, public transport), the Commission has developed a mixed approach which consists of firstly applying the competition articles of the Treaty to break off the market and secondly to regulate and shape the so opened markets via secondary EC legislation. The different pieces of secondary legislation are dealing *inter alia* with contractual relations.

Passing the last twenty years in review (since the adoption of the

33. The Commission is constantly reviewing its policy, the name is sweeping between action plan, new impetus, new impulse etc. The basic ideas, however, are still to be found in the first two consumer programmes; 1975 O.J. (C 92) and 1981 O.J. (C 133).

34. While insurance contracts might be a good testing field, it will be set aside as it is governed by particular rules, which are difficult to compare. See Jurgen Basedow & Till Fock (Hrsg), *Europäisches Versicherungsrecht*, Band 1 und 2 (2002) Mohr Siebeck, Tübingen, (show the particularities of EC insurance law).

35. See Case C-41/90, Höfner, 1991 E.C.R. I-1979.

White Paper on the Completion of the Internal Market), the Commission set the tone in the way in which it regulated the telecommunication sector. Directive 89/522/EEC,³⁶ preparing the ground for Directive 2002/21/EC³⁷ and Directive 2002/22/EC³⁸ on universal services, worked as a blueprint for regulating the e-commerce in Directive 2000/31/EC³⁹ and the draft proposal on services,⁴⁰ which is meant to become an umbrella regulation for all those services which are not covered by particular EC secondary law rules. The three directives are to be characterized by a strange—seen from a continental lawyer's perspective—mixture of public (competition) and private (contract) law to lay down ground rules for a market of telecommunication services, of e-commerce services and of all remaining services outside particular EU rules. This should, ideally, guarantee free access to the Internal Market for new competitors, which could be done by breaking down national public monopolies in the telecommunication sector, or by setting aside national barriers to get access to particular professions in the draft directive on services, or by framing ground rules on newly emerging markets such as in the e-business. Public law historically sets a regulatory frame and private law historically gets the already established market going. Emphasis is certainly put on public law rules, mainly on competition law even if it appears in a new device. However, the three directives, the telecommunication Directive 89/522/EEC read together with Directives 2002/21/EC and 2002/22/EC, the E-Commerce Directive 2001/31/EC and the draft proposal on services, contain to a varying degree provisions shaping directly or influencing indirectly contract making in B2B relations as well as in B2C relations.

The telecommunication sector was the first to be privatized in the aftermath of the adoption of the Single European Act. Thus, in a way, Directive 89/522/EEC served as a pattern to deregulate the energy market, such as electricity and gas, and maybe even the water supply in

36. Council Directive (89/552/EEC) on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298), *amended by* Directive 97/36/EC of the European Parliament and of the Council Amending Council Directive 89/552/EEC on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1997 O.J. (L 202) 60.

37. 2002 O.J. (L 108) 33.

38. 2002 O.J. (L 108) 51.

39. Directive 2000/31/EC of the European Parliament and of the Council of on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market 2000 O.J. (L 178) 1 [hereinafter Directive on Electronic Commerce].

40. Proposal for a Directive on Services in the Internal Market, COM (04) 2 (SEC 04) 21.

the near future. The commonality between all three of these sectors is that the Commission has an established policy of separating the transmission system from the distribution system, which enables particular cross-border competition in between operators of the transmission system and in between operators of the distribution system. The most recently revised directives, Directive 2003/54/EC⁴¹ on electricity and Directive 2003/55/EC⁴² on gas, pay tribute to the difficulties the Commission faces in arriving at a fully operational and competitive internal market. The primary addressee of the two directives are the Member States through their competent regulatory agencies. These are entrusted powers, which have to be regarded as regulatory powers similar to competition rules, all meant to open up the transmission and distribution system, to unbundling the systems and to organize and grant access to the systems. That is why the two directives are usually seen as regulatory means outside contract law. This is, however, only half the truth. Indirectly, the two directives affect private law relations on the energy market. This comes particularly clear in the rules which are meant to guarantee customer—not consumer—protection. Here, Member States are requested to guarantee a minimum standard of choice and fair contract conditions, not only to consumers, but also to customers as such.⁴³ Regulation 1228/2003⁴⁴ on conditions for access to the network for cross border exchanges in electricity as well as its counterpart in the gas sector, which has not yet been adopted,⁴⁵ are both meant to promote the cross-border trade in electricity and gas. They define fair, cost-reflective, transparent rules, which are directly applicable. In essence the two regulations affect the way in which the parties to such a cross-border trade are allowed to shape (calculation) and to present (the conditions of price shaping) their prices. Theoretically the two domains, competition and civil law are kept separate; in practice they are closely intertwined.

Last but not least, reference should be made to the most recent initiative of the Commission to review its policy on block exemptions. Here, similar tendencies may be reported. Block exemptions are a well

41. Directive 2003/54/EC of the European Parliament and the Council Concerning Common Rules for the Internal Market in Electricity and Repealing Directive 96/22/EC 2003, O.J. (L 176) 37.

42. Directive 2003/55/EC of the European Parliament and the Council Concerning Common Rules for the Internal Market in Gas and Repealing Directive 98/30/EC, 2003 O.J. (L 176) 57.

43. Primary addressee seems to be the final consumer. Article 3(5), however, refers to Annex A as follows: "as regards at least household customers, i.e. the addressee is not only the final consumer but also the customer."

44. 2003 O.J. (L 176) 1.

45. COM (04) 760 final.

established means used by the Commission to shape the borderlines of vertical agreements by means of competition law. The diverse regulations on exclusive and selective distribution, the umbrella regulation 2790/1999,⁴⁶ the regulation 1400/2002⁴⁷ on the car sector, and the regulation 772/2004⁴⁸ on technology transfer, however, intervene indirectly into contract-making and indirectly, because the parties to the vertical agreement are free to define their contractual relations. In practices, however, the content of the rights and duties in vertical agreements is determined by the block exemptions. The parties will even literally copy the articles in the block exemptions into their contracts to avoid discrepancies between the EC rules and the contractual rights.⁴⁹

IV. The Key Elements of Competitive Contract Law

I would like to distinguish seven elements which may be drawn from European consumer law: 1) the protective-instrumental device, 2) commercial communication and conclusion of contract, 3) competitive and contractual transparency, 4) standard form contracts via information duties, 5) fairness as market clearance, 6) post contractual cancellation rights and 7) effective legal protection.⁵⁰ These elements will be analyzed by first taking into consideration the existing body of consumer law, before the very same findings may be contrasted with similar or identical developments in European business contract law.

A. *The Protective-Instrumental Device*

It is a common characteristic of EC law dealing with B2C or B2B relations that the dispersed rules are dominated by a particular regulatory perspective. It is not contract law such as which is submitted to EC law, but contract law is used in a particular way by the EC regulator to

46. 1999 O.J. (L 336) 21.

47. Commission Regulation (EC) No 1400/2002 of 31 on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerned Practices in the Motor Vehicle Sector, 2002 O.J. (L 203) 30.

48. 2004 O.J. (L 123) 11.

49. Stephen Grundmann, *EUROPÄISCHES SCHULDVERTRAGSRECHT*, Walter de Gruyter, Berlin, New York, 936 (1999); T. Schumacher, *RECHT DES KFZ-VERTRIEBS IN EUROPA*, CH. Beck, Müncehn, (2005).

50. The distinction is based on previous research, I have undertaken in the field of competitive contract law. *Perspektiven eines europäischen Privatrechts—Ius Commune Praeter Legem?*, ZEuP 257-273 (1998); *The New German Sales Law—Changing Patterns on the Regulation of Product Quality*, J. OF CONSUMER POL'Y 379-401 (2002); *Der Vertragsbegriff in den Übereinkommen von Brüssel und Rom*, in Reiner Schulze & Hans Schulte-Nölke in Verbindung mit L. Bernardeau (Hrsg.), *Europäisches Vertragsrecht im Gemeinschaftsrecht, Schriftenreihe der Europäischen Rechtsakademie Trier, Herausgeber der Schriftenreihe, Wolfgang Heusel*, 39-83 (2002).

achieve a particular purpose, mainly with regard to open up markets or to enhance competition. That is why EC contract law rules maybe characterized as being “instrumental” and “protective.”

European consumer law is not primarily meant to protect the weaker party, in the sense given to it by most private national legal orders. The instrumentalisation of consumer contract law to complete the Internal Market, however, does not mean that consumer law is entirely deprived of its protective device. It is the direction of protection which differs from national law. This is where consumer protection law is being understood as a necessary element of the social welfare state thinking. Consumers are regarded as being *per se* in an underprivileged situation when it comes down to conclude a contract. The European legislator uses the protective-device only as a mere starter or even worse as a pretext to pursue the overall concept of European integration, more specifically to realize the Internal Market.⁵¹ This is why it might be correct to speak of a “protective-instrumental” device. The means to be used are similar, the substance, however, is different. The differences maybe condensed in the debate around the role and function of the so-called “Verbraucherleitbild.” The European legal order starts from a normative concept under which the average consumer is idealized as being “responsible and circumspect.” The rights and remedies granted are shaped along the line of such a fictitious figure, at a time where “information economics” and “behavioural economics” is beginning to take into consideration how consumers really behave.⁵² In the ideal world of a responsible and circumspect consumer, the true needs of protection fall apart. Thus, there is a growing conflict between the normative concept of the consumer in the European legal order and the factual concept still in existence in a number of Member States. The former is market bound, the latter is social policy bound. The strive for maximum harmonization in combination with the country of origin principle provides evidence that EC consumer law is, more than ever, focusing on the overall dimension of completing the Internal Market, but not—and how can it be—the formation of a European Privatrechtsgesellschaft.

European business contract law starts from the same premise. This means that a protective device may be identified. It may be more or less

51. That is why Thomas Wilhelmsson has identified an abuse of the concept of confident consumer. See Thomas Wilhelmsson, *The Abuse of the “Confident Consumer” as a Justification for EC Consumer Law*, 27 JCP 317-337 (2004).

52. Joseph E. Stiglitz, *Information and the Change in the Paradigm in Economics*, 92 THE AM. ECONOMIC REV. 460 (2002); Andreas Oehler, *Behavioural Finance, Theoretische, empirische und experimentelle Befunde unter Marktrelevanz*, ÖBA 978 (2000).

explicit. Directive 86/553/EEC⁵³ on self-employed commercial agents serves as a starter. The intention was to provide the self-employed commercial agents with mandatory rights to claim remuneration from the principal.

Directive 2000/35/EC was meant to fight down late payment which place “heavy administrative and financial burdens on business, particularly small and mediums seized ones.”⁵⁴ The same thinking might be found in recital 2 of Directive 2004/54/EC on electricity and Directive 2004/55/EC on gas which runs as follows:⁵⁵ “concrete provisions are needed to ensure . . . that *the rights of small and vulnerable customers* are protected . . .” (emphasis added). Newcomers in the market, this is the regulatory philosophy, need to be protected to be able to play their role in a more competitive market. Recital 9 of regulation 1400/2002 on vertical agreements and concerted prices in the motor vehicles directives says:⁵⁶ “In order to strengthen the independence of distributors and repairers from their suppliers. . . .” That means distributors and repairers are not regarded as *per se* weak, but only with regard to a particular perspective, i.e., within the field of vertical agreements where they are said to need regulatory protection to fulfill the mission, the Commission would like to see realized. The umbrella regulation 27/1999 and the regulation 772/2004 on technology transfer do not contain similar outspoken statements on the potential addressees.

There seems to be a common policy behind the directives and regulations. They all refer to an image of business which is not too far away from the protective-instrumental device in consumer related matters, thereby following the blueprint of the commercial agents directive. Again, there is this obvious intention of the European Commission to provide rights to an identified group of businesses in order to make them use their rights in a very particular way, i.e., to open up the Internal Markets or to keep it open. It presupposes that those addressed, i.e., small and medium seized business, are able, competent and circumspect to make use of their rights. As in consumer law, the concept of business is a normative one.

53. 1986 O.J. (L 382) 17.

54. 7th Recital of Directive 2000/35/EC.

55. Directive 2003/54/EC of the European Parliament and the Council Concerning Common Rules for the Internal Market in Electricity and Repealing Directive 96/22/EC, 2003 O.J. (L 176) 37.

56. Commission Regulation (EC) No 1400/2002 of 31. July 2002 on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerned Practices in the Motor Vehicle Sector, 2002 O.J. (L 203) 31.

B. Advertising, Pre-contractual Information and Contract Conclusion

The European directives and regulations at stake here constantly repeat the “credo” that the European rules do not intervene into national private legal orders which still determine the interplay of offer and acceptance and the moment at which the contract is concluded. The Commission failed to regulate contract making in the e-commerce directive, where it had in mind to install the so-called double click procedure which would have Europeanized offer and acceptance. This domain is seen as being in the realm of the Member States’ competence. Such a reading, however, of the EC law is not correct and actually is misleading.⁵⁷ European directives and regulations, mostly in consumer law, really downgrade the function and the importance of offer and acceptance in contract law. In EC law, rules, advertising, pre-contractual information, and contract making are legally not clearly separated—they are interlinked. Therefore, it is more correct to start from the premise that under EC law, advertising, pre-contractual information, contract-making, and even post contractual duties are regarded as a continuum, where the moment at which the contract is concluded loses importance. In so far EC law is liquefying contract law. The same tendencies, although less outspoken, might be identified in the field of business contract law.

The Commission has always used the emergence of new technologies to introduce new regulatory techniques in consumer law which might turn into a common trend. It did so in the field of the information technologies where Directive 97/7/EC on distant selling, Directive 2001/31/EC on e-commerce, and Directive 2002/65/EC on distant selling of financial services set the tone. At the same time advertising, or in EC jargon “commercial communication” became a favorite field of EC action to shape *inter alia* contract law, which is legitimated by the overall need to strive for common rules in the Internal Market to set aside barriers to trade resulting from different marketing standards.

The first technique to downplay offer and acceptance is to Europeanize the *invitatio ad offerendum* via pre-contractual information duties which are imposed on the supplier prior to the conclusion of the contract. The policy can be traced back to the door step selling directive and has been more fully developed in the general distant selling directive, the e-commerce directive, and the directive on distant selling of financial services. The supplier, therefore, is obliged to provide the consumer with basic information on products and services if they are

57. See Reich, *supra* note 16, at 149.

subject to particular selling arrangements outside business premises or subject to the use of particular communication means. There might even exist a general duty to disclose information.⁵⁸

The second technique is closely linked to the particular European understanding of the inter-relationship between trade practices law and contract law. There is good reason to conclude that Directive 84/450/EEC on misleading advertising imposes an information-like duty on the supplier contrary to most of the legal orders of the Member States, at least in the meaning given to it by the European Court of Justice.⁵⁹ The two pieces under way, the common position on unfair commercial practices and the draft regulation on sales promotion, push the development even one step further. Whereas the draft regulation might set up scrutinized information obligations, the common position on unfair commercial practices comes close to the Scandinavian tradition which imposes information duties on the advertiser in prohibiting Europe-wide misleading omissions. The borderline between omission and action is sweeping and so is the difference between a prohibition not to mislead the consumer via unfair omissions and the duty to provide information.⁶⁰

In European business contract law, the very same tendency can be recognized, although the existence of information duties which intervene into commercial communication remains very much context-related.

Nevertheless, pre-contractual information duties are becoming more and more common. It remains to be recalled that the e-commerce Directive 2000/31/EC is equally applicable to B2B relations. Article's 5 and 6 impose information duties on the service provider in the pre-contractual stage. Article 9 obliges the member States to ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having made by electronic means. This very broad rule might allow the European Court of Justice to decide when an electronic contract does or does not exist.⁶¹

Specific pre-contractual information duties may likewise be found

58. See *infra* Part IV.G.

59. Norbert Reich & Hans W. Micklitz, *Europäisches Verbraucherrecht*, 4 Auflage, 2003, Nomos, Baden-Baden, § 6.10.

60. Hans W. Micklitz & J. Keßler, *Europäisches Lauterkeitsrecht—dogmatische und ökonomische Aspekte einer Harmonisierung des Wettbewerbsverhaltens im europäischen Binnenmarkt*, GRUR INT. 885-901 (2002); Hans W. Micklitz & J. Keßler, *Die Harmonisierung des Lauterkeitsrechts in den Mitgliedstaaten der Europäischen Gemeinschaft und die Reform des UWG*, Band 12, VIEWSchriftenreihe (2003), Nomos, Baden-Baden.

61. See Reich, *supra* note 16, at 150.

in the telecommunication and the energy sector. Directive 2002/22/EC obliges the addressed companies to provide the “subscriber”⁶² with information on the control of the expenditure, Article 10 together with Annex I; or the “consumer,” respectively, the “end-user”⁶³ with information on the content of the contract, Article 20 and Article 21 with Annex II. Similar rules may be found in the Directive 2003/54/EC and Directive 2003/55/EC, respectively the annex; on common rules for the internal market on electricity and gas. They contain outspoken provisions on the electricity and gas suppliers’ duties to provide basic contractual information in promotional materials to final customers that are meant to be household customers and non-household customers.⁶⁴ Last but not least, the different block exemptions have to mentioned—where information duties can be detected.

The relationship between commercial practices and contract law seems to be less tight. This might be due to the fact that the European Commission has now started to separate B2C commercial practices law from B2B commercial practices law. The common position on unfair commercial practices does not cover B2B relations. Directive 84/450/EC on misleading advertising, however, remains applicable to all type of relations notwithstanding the status of the addressee. That is why the rulings of the European Court of Justice, whether along the line of Articles 28 and 30 of the Treaty of Rome or along the line of the concept of “misleading advertising” in Directive 84/450/EEC, are, in principle, applicable to B2B relations as well. So far, the Court has not yet had an opportunity to dwell on possible differences between consumers and suppliers to the degree in which they may be misled by insufficient or non-existent information. An extension of the project on unfair commercial practices to B2B relations would considerably enhance the impact of European trade practices law on European contract law. The Commission has left the door open to take that step at a later stage.

C. *Competitive and Contractual Transparency*

The transparency principle bears a twofold connotation: 1) it is related to the bilateral relationship between the parties to the contract—this is what I would like to term *contractual transparency*, and 2) it is related to the multilateral relationship of all those possible consumers

62. As defined in Art. 2 (k) Directive 2002/21/EC (any natural person or legal entity who or which is party to a contract with the provider of publicly available electronic communication services for the supply of such services).

63. End-user means a user not providing public communication networks or publicly available electronic communication services. Directive 2002/21/EC, Art. 2 (n).

64. A final customer is per definitionem not only the private consumer but a business party who consumes the energy. See *id.* at Art. 2 No. 9.

who would like to benefit from the transparency in making a full-fledged decision—this is what I would like to term *competitive transparency*. This distinction is equally found in B2C and B2B relations. Transparency is much less context-related, it turns out to become a generally applicable principle notwithstanding its reference in secondary Community law. Such a principle governs the continuum of contract making in EU law. It determines the way in which pre-contractual information duties are provided, it might even have an impact on advertising and sales promotion as far as they cover information which has to be disclosed or transmitted to the consumer or to the supplier.

Competitive transparency is deeply rooted in competition law. The idea here is to establish equal conditions for all competitors to guarantee effective competition. What is much less developed is the role and function competitive transparency might and should play with regard to consumers. While the European Court of Justice has most recently, in *Courage*,⁶⁵ reopened the debate on the relationship between competition law and consumer protection, the more innovative impact results from secondary law making—in the context of contract making which includes, to my understanding, the different directives on unfair and misleading commercial practices. Since its insertion in Article's 4 and 5 of the unfair terms Directive 93/13/EEC, the transparency principle has made its way in the consumer contract law directives and more strikingly in the unfair market practices rules. It suffices to look into the draft regulation on sales promotion. After all, the transparency principle can be regarded as a well-established legal principle, reaching even beyond the particular context of a consumer contract law directive.

In *Cofinoga*,⁶⁶ the European Court of Justice explicitly recognized the twofold function of the transparency principle. Thus, it has clarified the relationship between transparency and information. The transparency principle provides criteria on the way in which the information has to be given—with regard to the contracting partner and with regard to interested consumers. Its impact is far reaching as it is applicable to all sorts of information which has to be made available to consumers. Along the line of the Directive 2002/65/EC on distant selling of financial services, three types of information might be distinguished: information on the supplier, on the service and on the contract. The standards to be applied under an all-embracing transparency principle are the same, lower in that the information standards remain less explicit

65. Case C-453/99, *Courage v. Crehan*, 2001 E.C.R. I-6297; K. J. Cseres, *Competition Law and Consumer Law: A Love-Hate Relationship* (2004) (Ph.D. Thesis, University of Utrecht).

66. Case C-264/02, *Cofinoga Méridien SA v. Sylvain Sachithanathan*, 2004 E.C.R., I-nnv.

with regard to the three-fold distinction and higher in that the information provided must meet the particular challenge of competitive transparency.

An example might serve to explain what is meant. The supplier has to inform the consumer on the price of the product or services. This is particularly sensitive in the field of services. The classical legal distinction would be:

1. Price information in advertising or sales promotion—general provisions in the draft regulation on sales promotion and the draft directive on unfair commercial practices; more particular rules in the distant selling directives;
2. Price information prior to the conclusion of the contract via price indication or price information—no general rules on price indication for services. However, particular rules in diverse service related consumer contract law directives; and
3. Price information at the time of the conclusion of the contract either in writing or on a durable medium—particular rules in diverse service related consumer contract law directives.

An overall transparency principle enshrines all three stages of contract making both in a bilateral and a multilateral dimension—bilateral with regard to the possible contracting party and multilateral with regard to possible interested persons who ask for information to be able to compare the price of products and services.

The principle of transparency has been equally codified in the three directives on telecommunication, energy and services. They are much less explicit in the regulations on block exemptions, although the establishment of a transparent framework has always been of major concern for the European Commission. Otherwise competition would not be enhanced but hampered.

The principle of transparency is the governing rule in e-commerce Directive 2000/31/EC and will be introduced in the project on a general directive on services. Directive 2002/22/EC on universal services and the two directives, Directive 2004/54/EC and Directive 2004/55/EC on common rules for an internal market on electricity and gas, have even upgraded the role of transparency—in particular with regard to transparent tariffs for access to electricity or gas networks or with regard with to transparent tariffs on electronic communication services.⁶⁷ These

67. Recital 13 and 14 Directive 2003/54/EC of the European Parliament and the Council Concerning Common Rules for the Internal Market in Electricity and Repealing Directive 96/22/EC, 2003 O.J. (L 176) 37; Recitals 4 and 14 of Commission Regulation

provisions express literally the dual character of the transparency principle. Information on tariffs should be disclosed prior to the conclusion of the contract, to enhance competition and to put all parties concerned on an equal footing when it comes down to concluding the contract. It is tempting to argue that the principle is context-bound. On the other hand, tariffs and price shaping constitute “the” decisive feature in contract making as the quality of the products do not vary to a great extent. Thus, the principle of transparency governs the internal market on gas and electricity.

D. Standardizing Contract Making

While there is a common trend in both fields of contract law, the strategy is different. In consumer contract law, contracts are standardized indirectly via information duties.⁶⁸ The same approach exists in business law, however, the block exemption regulations intervene more directly into the way in which the contract should be shaped. Within its recent communication on European contract law, the European Commission is advocating for the elaboration of standard business conditions in B2B relations and in business to public authorities obligation, but not in B2C relations.⁶⁹

It is common knowledge that the European Community has partly reversed the responsibilities on information supply in consumer contracts. In consumer contracts, which are concluded by electronic means, the consumer is free from seeking the necessary information. The consumer can rely on the supplier, which the directives have imposed a remarkable set of information duties. The situation, however, is different in the consumer sales’ Directive 99/44/EC, where the consumer remains responsible for bringing the necessary information together. More specific information duties in particular via voluntary guarantees did not get the approval from the Member States.⁷⁰

The way in which the information duties in Directive 2002/65/EC on the distant selling of financial services are grouped together might be path-breaking. The threefold distinction, *supplier related information*, *product/service related information* and *contract related information*,

No. 1228/2003 on Conditions for Access to the Network for Cross-border Exchanges in Electricity, 2003 O.J. (L 176) 1; Recital 3 and 31 Directive 2002/22/EC on Universal Service and User’s Right to Electronic Communications Networks and Services 2002 O.J. (L 108) 51 [hereinafter Universal Services Directive].

68. This goes back to the famous Cassis-de Dijon judgment. See Reich, *supra* note 16, at 162.

69. See COM (04) 651 final at 6-9.

70. See Christian Twigg-Flesner, CONSUMER PRODUCT GUARANTEES (Ashgate, Aldershot, Burlington 2003).

can easily be transferred to the consumer contract law directives already adopted, as well as be used for a more general concept of information supply in consumer contracts.⁷¹

What really matters in my context, however, is not so much the diversity of information, but its consequences for contract making. Even a wilful supplier faces considerable differences to fully meet the information standards in areas, where the requirements differ although the marketing strategies for which the information is used are closely intertwined. It suffices to compare the information requirements on direct marketing strategies with those on distant marketing strategies. In commenting on the distant selling directive we have tried to develop a standard information format.⁷² This was not only a challenging task, it was, at the same time, a striking self-experience as we realized that we ended up shaping a standard format on distant selling. The European Commission is far ahead in that it had proposed as early as 1976 a standard formula on notifying the consumer on his right to withdrawal in contracts concluded away from business premises. The German legislator went down exactly that way in 2002 after painful experiences, when it introduced such a standard format to the benefit of the consumer and the supplier. The shaping of the notification requirements have been subject to an endless stream of judgments.

The European Commission is advocating for the development of standard format contracts on a voluntary basis though. The results, in the field of package tours and time sharing, are not promising, however. On the other hand, there are limits to standardizing consumer contracts. They result from possible anti-competitive effects, in case standardizing consumer contracts leads to standardized consumer products and consumer services. Insurance contracts are one notable example.⁷³

In business contract law, two distinct strategies can clearly be distinguished. On the one hand, the European legislator imposes information duties on the parties to a B2B contract. On the other hand, the whole contract is predetermined under the disguise of setting a common European frame for enhanced competition in particular policy fields.

It lasted until the adoption of the e-commerce Directive, Directive 2000/31/EC, before information duties turned into a common element of B2B contract making. The very same approach is easily identifiable in Directive 2002/12/EC on universal services and in the draft directive on

71. See Rösler, *supra* note 15.

72. See Hans W. Micklitz & Klaus Tonner, *Vertriebsrecht, Handkommentar* [The Law on Distribution—Hand Comment] 284-289 (2002), Nomos, Baden-Baden.

73. See Art. 6 of Regulation EC No. 358/2003 of the Commission on the Application of Art. 81(3) of the Treaty in the Insurance Sector, 2003 O.J. (L 53) 8.

services. In the privatization directives the starting point was different, maybe with the exception of Directive 89/522/EEC. A new market was to be created, enabling newcomers to benefit from competition where it did not exist before. Therefore, information is premature as the legislator pointed out in recital 2 of the electricity directive, "concrete provisions are needed to ensure . . . that information on energy sources for electricity generation is disclosed as well as reference to sources, where available, giving information on their environment."⁷⁴

The set of information made available is then specified all over the directives with regard to the production and distribution of energy. Quite detailed rules have been adopted addressing the transmission and the distribution systems operator.

The different regulations on block exemptions claim not to infer into private law making. As has already been explained, quite the contrary is true. It appears safe to conclude that private autonomy is severely restricted under the garment of competition law. The block exemptions have been led and will yield standardized vertical agreements and technology agreements whenever the block exemptions apply.

The most recent initiative of the European Commission on standard business conditions has not yet lead to tangible results. The Commission has in mind to set up a website to promote the development and use of EU wide STC (standard terms and conditions). The website invites market participants to exchange information. The relationship of STC's with competition law needs to be clarified. The Commission has not yet published guidelines on how to meet EU cartel law.⁷⁵ It has withheld the right to submit STC's to European cartel law. However, the Commission intends to examine, together with interested parties, what legislative obstacles to EU-wide STC exist in the Member States, with a view to eliminating them where needed and appropriate. All in all the whole process is still at an infant stage.⁷⁶

74. Directive 2003/54/EC of the European Parliament and the Council Concerning Common Rules for the Internal Market in Electricity and Repealing Directive 96/22/EC, 2003 O.J. (L 176) 37.

75. It refers, however, to its Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Co-operation Agreements, Commission Note No. 2001/C3/02, 2001 O.J. (C 3) 2.

76. Hugh Collins, *The Freedom to Circulate Documents: Regulating Contracts in Europe*, 10 EUR. L.J. 787 (2004) (Mr. Collins pleads for an essential fifth element for a modern market to operate efficiently and competitively, the freedom to circulate documents, comprising standard form contracts).

E. Fairness as Market Clearance

Fairness of contract law is easily associated with fairness in consumer contracts. Fairness, here, deals with the question of whether the parties have struck a fair balance between the rights and duties or whether one party, usually the supplier, takes advantage of his superseding power to influence the contract terms to his advantage. The same issue appears in B2B relations, usually between bigger companies on the one side and small and medium sized companies on the other. However, in the context of my analysis a new issue appears, resulting from the Commission's policy to open up markets. The competitive newcomers must be granted access to the market and the conditions to be met are linked to the concept of fairness. The terminology used in the privatization directives, however, is different. Access to the market must be discrimination free, transparent and at fair costs.

Directive 93/13/EEC on unfair terms has introduced the principle of good faith, which is far from being commonly accepted in the Member States. There is no room and no need to discuss the intricacies of the good faith principle and its relationship to different legal tradition and legal cultures. It means, in essence, to control the substance of the contract if it is laid down in standard contract terms, maybe even to some extent in individual contract terms.⁷⁷ In a European perspective, the indicative list of prohibited contract terms seems of utmost importance. It provides an overall yardstick of control, which is relatively easily accessible even for Member States which face difficulties in applying the good faith test in practice. Therefore, it is not at all surprising that the respective enforcement authorities are using the "black list" of prohibited contract terms to clear the market. This is what the Office of Fair Trading, a late comer in the unfair contract term business, has been doing over the last years. In essence, Directive 93/13/EEC has harmonized the conditions under which suppliers might get access to a European law determined process of contract making.

The regulatory approach, first adopted with regard to unfair terms in consumer contracts, has equally been applied to insurance contracts. Regulation 358/2002 contains a whole set of contract terms for which the block exemption, with regard to standard contracts, does not apply. To me the non-exempted contract terms in the Regulation must be understood as being equally unfair in the sense of Directive 93/13/EEC. Outside insurance contracts, there are provisions to be found in most of

77. The German legal culture binds the control to standard business conditions, the common law and the Scandinavian countries to the imbalance of power, i.e., notwithstanding whether the contract terms have been individually negotiated or not.

the consumer contract law directives, which might easily be read so as to prohibit certain market practices.⁷⁸ If these provisions are contract-related, they do not distinguish between standard contract terms and individual terms, as is the case in the directive 99/44/EC on consumer goods.

A further step towards market clearance will probably result from the adoption of the directive on unfair commercial practices. The regulatory approach of the envisaged directive on unfair marketing practice is similar if not identical to the unfair contract terms Directive 93/13/EEC. The general verdict put on unfair commercial practices is concretized by way of an annex in which incriminated marketing strategies are blacklisted. The effects of the unfair commercial practices directive might therefore be comparable to those of the unfair terms directive. The common law countries, but not these countries alone, will face difficulties in applying the general clause, although the key concept behind is not "good faith," but "unfairness."⁷⁹ The very same countries, however, will be happy to have the list of incriminated commercial practices which will facilitate enforcement.

In European business contract law there is no general principle of fairness, not even restricted to the control of unfair (standard) contract terms. However, it is striking to see that the privatization directives have established the principle of discrimination-free access to the net, which shall facilitate the conclusion of the contract. The first steps have been taken in Directive 2002/12/EC on universal services. Annex VIII gives shape to the conditions under which the net must be opened to competitors. The three principles, non-discrimination, cost-orientation and transparency have become the common credo, now governing all net-bound services. In the words of Directive 2003/54/EC:

Recital 7: In order to complete the internal electricity market, non-discriminatory access to the network of the transmission or the distribution system operator is of paramount importance

Recital 14: In order to facilitate the conclusion of contracts... Member States and, where appropriate, national regulatory authorities should work towards more homogenous conditions and the same degree of eligibility for the whole of the internal market.

The anti-discrimination principle is supplemented by the principle of

78. Market practices are meant to cover unfair contract terms and unfair commercial practices (unfair and misleading advertising).

79. Hans W. Micklitz & Jurgen Keßler (eds.), *Marketing Practices Regulation and Consumer Protection in the EC Member States and the US*, Band 10, VIEW SCHRIFTENREIHE (2002), Nomos, Baden-Baden.

fair-pricing for cross-border tariffication and the allocation of available interconnection capacities.⁸⁰

Recital 4: Fair, cost-reflective, transparent and directly applicable rules, taking into account a comparison between efficient network operators from structurally comparable areas... should be introduced with regard to cross-border tariffication and the allocation of available interconnection capacities, in order to ensure effective access to transmission systems for the purpose of cross-border transactions.

The hardcore restrictions in the block exemptions are similar to the indicative list of incriminated unfair terms in Directive 93/13/EEC or unfair commercial practices in the envisaged directive. Hardcore restrictions shall disappear from the market. While these restrictions have been adopted under the competition garment, they are equally important in private law relationships. There would be a lot to say in favor of regarding hardcore restrictions as unfair contract terms—if not under the non-applicable Directive 93/13/EEC, then under the respective national laws as far as they provide for control of standard contracts or contract terms as such in B2B relations.

F. Post-Contractual Cancellation/Rescission and Termination Rights

The European Community has no explicit power to regulate remedies. The EC legal order is based on the premise that the material rules of EC law are endorsed by remedies foreseen in the national legal orders of the Member States. That is why, in principle, there should not be a need to introduce EC specific remedies. Such an understanding complies with the overall policy of the Commission not to interfere into the basics of the national private legal orders. However, the story EC contract law tells us is different. While it is correct that European contract law has remained context bound, because Article 95 requires a link between law-making and completing the Internal Market, the European Commission managed to link to its context bound measures appropriate EC law remedies. The outcome of this disparate policy demonstrates a relatively consistent set of rules which might be united in the perspective that contractual agreements should not tie the parties together beyond what is necessary for effective competition. This is where the concept of competitive contract law is abundantly clear.

The consumer contract law directives grant consumers two different types of rights enabling them to get out of a contract—rights outside and

80. Recital 4 and 14 of Commission Regulation No. 1228/2003 on Conditions for Access to the Network for Cross-border Exchanges in Electricity, 2003 O.J. (L 176) 1.

beyond the traditional remedy of avoidance:⁸¹

1. The right to rescission in case the product or the service is defective, and
2. The right to cancellation (withdrawal from a contract), which is an unconditional right in the sense that the consumer may simply change his mind and decide to get rid of the binding arrangement.

The right to cancellation (withdrawal) is well established in the four directives regulating the direct and distant selling arrangements and may be inserted into the consumer credit directive which is under revision. The overall legitimacy is taken from the particular circumstances under which the contracts are concluded. They do not allow for the consumer to compare prices and performance. The right granted, under the four directives, to cancel the contract has to compensate the consumer's long term involvement. Although numerous circumstances may explain why a consumer changes his or her mind, the consumer must conclude the contract long before it will be executed.

Usually, the consumer does not have to bear any consequences by annulling the contract. In theory, such a regulatory model seems to be the ideal type of competitive contract law. The consumer, even after concluding the contract, may, on whatever basis, believe that he has made an unfavorable decision and that better products and better suppliers with more beneficial conditions are available. If so, the consumer may withdraw from the binding arrangement and engage in a better contract.

The second set of rights is bound to the existence of a defective product—in the consumer sales Directive 99/44/EC—or defective services—in the case of the package tour Directive 90/314/EEC and time sharing Directive 94/47/EC. Here, obviously the starting point is different. If the product bears a defect, there must be remedies granted to consumers to compensate for these deficiencies. The consumer, in principle, remains bound to the party with whom he has concluded the contract. The consumer, however, may have a right to rescission. In this case, the mutually exchanged performances have to be returned. Whether and to what extent the consumer may use the right to rescission for competitive purposes depends to a large extent on the set of legal requirements the consumer must meet. If the standard is high, the advantage is on the supplier's side, and if the standard is low, the consumer might be in a better position to revise an uncomfortable transaction decision.

81. Reich & Micklitz, *supra* note 59.

Both together, the unconditional right to withdrawal and the comprehensive right to rescission, are not easily to be made compatible with *pacta sunt servanda*. Legally, there may be justifications for each and every particular context, in practice, the borderlines are sweeping. Consumers tend to think that they are free to return the product and get their money back, even if the product is not defective at all. Thus, there is an overall trend to enlarge easily accessible rescission and cancellation rights beyond the existing boundaries—and further undermine the principle of *pacta sunt servanda*.

It is the policy of the European Commission to cut down long-term B2B contractual arrangements, be it via primary or secondary Community law. Around the time of negotiating the Single European Act in 1985 the European Commission launched an infringement procedure against the Federal Republic of Germany because of its restricted insurance law.⁸² The largely affirmative judgment paved the way for cutting down long-term contractual arrangements either via the competition articles or via secondary Community law in numerous markets.⁸³

This overall policy is best reflected in the privatization directives. Private contractual arrangements shall not be used to undermine the Commission's policy of granting access to newcomers on the newly established markets. If these newcomers are not "protected" against market abuse, the whole policy may fail. The remedies enshrined in the directives are shaped so as to match the Commission's policy. The most invasive "remedy" is unbundling of transmission and distribution system operators. It is not a private law remedy, but it has private law effects. The second, more general remedy is condensed in the principles of transparency and non-discrimination which are constantly reiterated in Directive 2002/12/EC on universal services, Directive 2003/54/EC on electricity, and Directive 2003/55/EC on gas. These directives have to make sure that the access to the newly established market has to be kept open and any long-term agreements between unbundled companies run afoul to such a policy. More specific private law related remedies may be found, for example, in regulation 1228/2003 on conditions for access to the network for cross-border exchanges in electricity. Again, the particular context dominates the regulatory mechanism. As has already been said, the regulation is meant to guarantee that tariffs for the cross-border transmission of energy are fair, cost-reflective, transparent and

82. Case 205/84, 1986 E.C.R. 3793.

83. See Case 125/03, Commission v. Germany, 2004 E.C.R. I-nyr (the ECJ held that subsidies which have been granted under violation of EC law, have to be repaid, i.e., the underlying contract has to be rescinded. In so far EC cartel law prevails over national contract law).

directly applicable. Therefore, transmission system operators shall receive compensation for costs incurred as a result of hosting cross-border flows of electricity to their networks. Compensation payments may be, if there is need, adjusted *ex post*.⁸⁴ Such a ruling, which is now mandatory Community law, affects *pacta sunt servanda*, even if price adjustments may be allowed in the national private law orders within general principles of law.⁸⁵

A similar concern arises in Regulation 1400/2000 on vertical agreements in the motor vehicle sector. The EC legislature is concerned with guaranteeing that termination rights are not misused to restrict competition. That is why Article 3(5) allows the manufacturer to choose between a five-year contract, which can be terminated in case of non-prolongation six months in advance, and an unlimited contract with the right to terminate the contract at least two years in advance. While these rules might be read as considering the interests of the manufacturer, recital 9 makes it clear that the right to termination shall equally protect the distributor or repairer:

In order to prevent a supplier from terminating an agreement because a distributor or repairer engages in pro-competitive behavior, such as active or passive sales to foreign consumers, multi-branding or subcontracting of repair and maintenance services, every notice of termination must clearly set out in writing the reasons which must be objective and transparent. Furthermore, in order to strengthen the independence of distributors and repairers from their suppliers, minimum periods of notice should be provided for the non-renewal of agreements concluded for a limited duration and for the termination of agreements of unlimited duration.⁸⁶

The overall policy behind these termination rules is the intention to guarantee competition. Contract law, in particular, long term agreements shall not be used, neither from the supplier nor from the distributor or repairer to hinder competition.

G. Effective Legal Protection

It is one characteristic of European law that the substantive law cannot be separated from procedural law. EC law in general and contract law in particular is “rights” based. These rights, however, have to be enforced. The European Court of Justice has created a European legal

84. Art. 3(3) Commission Regulation No. 1228/2003 on Conditions for Access to the Network for Cross-border Exchanges in Electricity, 2003 O.J. (L 176) 3.

85. See Reinhard Zimmermann & Simon Whittaker, *Good Faith in European Contract Law* 532, 546 (Cambridge University Press 2000).

86. 2002 O.J. (L 203) 31.

order which is based not only on the availability of rights to the benefit of consumers and business, but also on “effective” rights which need to be enforceable.⁸⁷ The European Court of Justice has rooted the concept of effective legal protection of rights in the Convention on Human Rights.⁸⁸

Article 153 of the Treaty of Rome may be interpreted as granting consumers a right to information and a right to set up a consumer organization. These “rights,” however, need to be given shape by secondary Community law. They do not stand for themselves. Without any consumer contract law directives, the “rights” granted under Article 153 remain meaningless.

Passing the set of consumer contract law directives in review, the set of unquestionable rights established *de lege lata* is impressive already by now:

1. The right to transparency in contractual relations;
2. The right to information on the supplier, on the product/service and on the contract; and
3. The right to cancel (withdraw) the contract and/or to rescind a contract.

More challenging “rights” could easily be formulated. Is there something like a “right” to be offered a fair contract? The European Court of Justice has proven to be innovative and that is why the list of unquestionable rights should not be regarded as a closed shop.

Ubi ius ibi remedium,⁸⁹ where there is a right, there must be a remedy, is the essence of the principle of effective judicial protection. The right to effective legal protection is recognized as a common principle of the European legal order and deserves no particular codification in secondary Community law, which is deeply rooted in the Human Rights Convention. The consumer contract law directives reflect the quest for effective legal protection to a different degree. In the most advanced version, Directive 2002/65/EC refers to sanctions that must be “deterrent, proportionate and dissuasive.” This wording goes back to the European Court of Justice’ case law in anti-discrimination matters. The importance and the reach of the principle of effective legal protection in relation to the unquestionable consumer rights is less clarified. Thus far,

87. See Reich, *supra* note 16, at 151, 162.

88. Case 222/84 Johnston v. Chief Constable of the Royal Ulster Constabulary, 1986 E.C.J. 1651, 1682.

89. Walter Van Gerven, *Of Rights, Remedies and Procedures*, 37 COMMON MKT. L. REV. 501 (2000).

the European Court of Justice has had few occasions to decide on consumer contract law issues, but the few that have been decided provoked strong reaction. The most controversial judgments turn around the reach of the right to withdrawal under the doorstep selling directive.⁹⁰

The potential power of the right to information linked to the principle of effective legal protection is being discussed more and more in legal doctrine.⁹¹ This is particularly important as the directives do not further specify what sort of remedies the Member States must be made available. Most recently *Thomas Wilhelmsson* has developed the hypothesis that there is a general obligation under EC law to disclose relevant contractual information. If the supplier fails to comply with these requirements, the consumer is said to invoke that the contract has no binding effect. Such a reading would reach beyond existing rights to information as well as rights to cancel (withdraw) and rescind and grant the consumer one overarching power to sanction a supplier who does not comply with the law.

If information disclosure can and must be understood so as to serve both ends of the transparency principle, contractual and competitive transparency, then the potential of the emerging new paradigm comes clearer and clearer. Information to be made available to the consumer at the pre-contractual, the contractual, or the post-contractual stage could be used by consumers to enhance competition not only before having concluded a contract but also—at least to some extent—after having concluded the contract.

The interrelationship between rights and remedies is less tight in European business contract law, perhaps with the exception of Article 4 of Directive 99/44/EC. There is uncertainty at both ends, at the level of enforceable rights and at the level of effective legal protection.

The right to transparency, the right to information, and the right to terminate a contract exists—however, only in certain areas. These rights are context related. Transparency is closest to becoming a legal principle. Information rights play an ever increasing role. It would, however, be too bold to start from a general right to information of “weaker” suppliers towards “stronger” suppliers. Information rights exist only in particular areas of European business contract law, where

90. Case 481/99, *Heininger v. Bayerische Hypo and Vereinsbank AG*, 2001 E.C.R. I-9945; see also Case 350/03, *Schulte* 2005 E.C.R. I-nyr at <http://europa.eu.int>.

91. See *Thomas Wilhelmsson, Private Law Remedies against the Breach of Information Requirements of EC Law*, in Reiner Schulze et. al., *INFORMATIONSPFLICHTEN UND VERTRAGSSCHLUSS IM ACQUIS COMMUNAUTAIRE* 245-266 (2003); Hans-Peter Schwintowski, *Informationspflichten und effet utile—Auf der Suche nach einem effektiven und effizienten europäischen Sanktionssystem*, in Reiner Schulze et. al., *INFORMATIONSPFLICHTEN UND VERTRAGSSCHLUSS IM ACQUIS COMMUNAUTAIRE* 267-290 (2003).

privatization and liberalization has led to the establishment of new markets for products or services. While there is a heavy impact on cutting down long-term contracts mainly resulting from competition law, there are only a few remedies available that grant rights to terminate contractual relations. The three rights exist, as in consumer contract law, but they are less stable and far away from becoming part of fully fledged legal principles.

One notable exception may be reported from Directive 99/44/EC on consumer sales. Article 4 strengthens the position of the final seller against the resellers and the manufacturer. There is no agreement on what Article 4 exactly means and whether it compels Member States to introduce mandatory recourse systems.⁹² However, one thing is for sure; Article 4 implies that the final seller shall not bear the economic burden alone resulting from a consumer who is marking use of his warranty rights.

It is a common characteristic of all secondary Community law, which is meant to open up markets, that it addresses first and foremost the Member States. Whether and to what extent these public law based privatization directives or regulations on block exemptions affect private law relations is subject to a constant struggle between the Member States and the Commission, as well as between the Member States and the private parties. This is true for substantive law and it is all the more true with regard to effective legal protection. Provisions in secondary Community law, if there are any, are either directly aimed at protecting the rights of private suppliers against regulatory actions of the public authorities in charge to implement the liberalization rules or are unclear with regard to its potential effect on private law relations between private suppliers, i.e., companies. There is an overall contradiction between the well-established overarching principle of effective legal protection and its concrete shaping in the directives or regulations at stake notwithstanding the addressee.

Nevertheless, several references may be found. They can broadly be classified into two different categories. Either there are provisions, like in Directives 2003/54/EC and 2003/55/EC on common rules for the internal market in electricity and gas where it is not clear whether they are addressed to the Member States, or there are no provisions at all as in the regulations on block exemptions. Euro-speak hides the uncertainty

92. See Reich, *supra* note 16, at 160; see also G. Brüggemeier, *Zur Reform des deutschen Kaufrechts—Herausforderungen durch die EG-Verbrauchergüterkaufrichtlinie*, *Juristenzeitung* 529 (2000); Ulrich Magnus, *Der Regressanspruch des Letztverkäufers nach der Richtlinie über den Verbrauchergüterkauf*, in Jürgen Basedow & Isaak Meier (eds.), *Liber Amicorum Kurt Siehr* 431 (2000).

on the potential addressee in the opaque concept of “sanctions,” which must be “effective, proportionate and dissuasive.” In so far as the respective provisions are more outspoken. Although the gas and the electricity directives, Directives 2003/54 and 55/EC, do not really touch upon “sanctions” and “effective legal protection,” there is a European complaint procedure⁹³—the complementary Regulation 1228/2203 on conditions for access to the network for cross-border exchanges refers to “penalties” thereby reiterating the formula already known from Directive 2002/65/EC.⁹⁴ There is some stretching necessary to derive from the available rules on liberalized markets that the suppliers are given the right to effective legal protection, not only against national enforcement authorities but against the contracting partner.

The different regulations on block exemptions do not contain rules on effective legal protection. There is no such formula as in Directive 2002/65/EC, not even a weaker or more hidden one. The reason might be found in the decentralized enforcement of competition law, where Member States’ authorities have a more important role to play now. This, however, does not fully explain why there is no reference to effective legal protection at all. Maybe the reason lies in the impact of the regulations on private law relations. If the legislator would have picked up “effective legal protection,” it would have had to define the relationship between cartel and civil law, between the vertical agreements and the implementing private law arrangements. The complete disregard for this makes it all the more important that the principle of effective legal protection applies notwithstanding its adoption in the secondary Community law. Its reach has not yet been tested, but the ECJ has paved the way for further action.⁹⁵

V. Stock Taking and Preliminary Conclusions

Some stock-taking might help to define where we are in European contract law. It will have to be demonstrated that European consumer contract law is no longer law in the books—it is becoming more and more law in action. The subjects dealt with seem to be of minor importance, but its practical impact is much broader. This is particular true in countries which have decided to use consumer contract law as a basic pattern for laying down fundamental principles for national contract law as such.

European consumer contract law and European business contract

93. See Directive 2003/54/EC, Art. 23(5).

94. Directive 2003/54/EC, Art. 12 and Regulation 1228/2003, Art. 12.

95. See Norbert Reich, *The Courage-Doctrine: Encouraging or Discouraging Compensation for Antitrust Injuries?* 42 COMMON MKT. L. REV. 35 (2005).

law is and might remain for a long while incrementalistic. Its incrementalistic character shall not be underestimated, though. The “new” law bears “new” elements and these elements will grow irrespective and independent from all efforts to draft a coherent and systematic *Common Frame of Reference*. The legislative machinery will not come to a halt unless the European integration process itself would be in jeopardy. And the European Court of Justice will keep the development going. A constant stream of judgments directly or even indirectly affecting European contract law pay tribute to the overall need to give full effect to Community (contract) law—as the Court has put it.

A. *European Consumer Contract Law*

The presentation of EC contract law may be blamed for being one-sided and for leaving aside counter-movements mainly in the European consumer contract law. Instead, I would like to present the hypothesis that it remains for the Member States to maintain a concept of contract law which reaches beyond the emerging paradigm of competitive contract law. That is why the Commission’s intention to fully harmonize consumer contract law deserves utmost attention.

The analysis here presented is mainly based on the texts and documents of the European Community and the European Commission, as well as on legal doctrine. The European Court of Justice had little opportunity so far to raise its voice on the numerous issues. To determine the state of the art, it seems indispensable to look into the seven elements of competitive contract law separately:

1. Instrumental-protective device: there is little or no case-law at hand where the Court has explicitly shaped the borderline between consumer law and consumer protection law or between the responsible and the weak consumer. *Océano* has already been mentioned. Here, the Court seems willing to go beyond the image of the circumspect consumer which complies best with the concept of competitive contract law.

2. Commercial communication and conclusion of contract: the joining together of the two different fields of law might be the policy of the Commission as recognized in legal doctrine. However, case-law is largely missing. In *Gabriel*,⁹⁶ the Court gave an explanation of when a contract is concluded as a precondition to allowing one party to take legal action against the other for fulfillment of (complementary) obligations arising out this contract—concerning

96. Case C-96/00, *Gabriel v. Schlank & Schick GmbH* 2002 E.C.R./I-6367.

gifts attached to a sale. *Engler*⁹⁷ points into the same direction. All in all, the Court seems willing to start from a broad understanding of “contract” which leaves room for the integration of advertising.

3. Contractual and competitive transparency: while the Court has identified the twofold dimension of the transparency principle, there are no cases to be reported where the importance of the concept could have been tested. In *Axa Royale*,⁹⁸ the Court showed preparedness to oblige the supplier to inform the consumer on his or her rights in standard business conditions. The decision seems to be a promising start for the hypothesis here defended—but no more than that.

4. Standard form contract via information duties: the key player seems to be the legislator, i.e., the European Community and/or the European Commission. The Commission demonstrates a growing preparedness to advocate for the development of standard business terms, however, not in B2C relations. Considerations to rely on standardization institutions to play a key role within the new approach type regulation failed.⁹⁹

5. Fairness as market clearance: the challenge for the EU law will be the notion of good faith and unfairness. So far, the Court had no occasion to give its own understanding of what good faith in the EU context could mean. *Océano* has been read as if the Court seems willing to protect the weak consumer and to enter into a concept of contract law which reaches beyond competitive contract law. It should not, however, be forgotten that in *Océano* the Court had to decide on jurisdiction clauses which were prohibited in the indicative list. So what the Court did was just market clearance. Thus, there is no contradiction between *Océano*¹⁰⁰ and *Freiburger Kommunalbauten*,¹⁰¹ where the Court refrained from submitting standard business terms to a general fairness test. This task should remain—according to the European Court of Justice—for the national courts.

6. Post contractual cancellation rights: the key player certainly is the European Court of Justice. In *Dietzinger*¹⁰² and *Heininger*¹⁰³ the

97. Case C-27/02, *Petra Engler v. Janus Versand GmbH*, 2005 E.C.R. I-nyr.

98. Case C-386/00, *Axa Royale Belge SA v. Geores Ochoa und Stratégie Finance SPRL*, 2002 E.C.R. I-2209.

99. In the context of regulating multi-level marketing there were efforts to involve CEN and CENELEC.

100. Combined cases C-281/98 to C-244/98, *Océano Grupo Editorial und Salvat Editores*, 2000 E.C.R. I-4941.

101. Case C-237/02, *Freiburger Kommunalbauten v. Hofstetter*, 2004 E.C.R. I-nyr.

102. Case 45/96, *Bayerische Hypotheken and Wechselbank AG v. Dietzinger*, 1998

Court caught legal doctrine by surprise. In these two cases the Court has given shape to the right to withdrawal. It remains to be seen, however, whether the European Court of Justice in *Schulte*¹⁰⁴ and *Crailsheimer Volksbank*¹⁰⁵ manages to withhold its strong commitment to protect deceived consumers or whether it will stay away and leave it for the Member States' courts to decide over the concrete effects of the cases at issue. In terms of the concept of competitive contract law, whether the Court is courageous enough to go beyond competitive contract law or whether the Court will limit EC law to set up a competitive environment which has to be fueled by the national courts.

7. Effective legal protection: The European Court of Justice has not had a chance to raise its voice with regard to effective legal protection in consumer affairs, perhaps with one promising exception—*Cofidis*.¹⁰⁶

As European consumer contract law will develop, the balance between the EC concept of competitive contract law and Member States' social justice based concepts can only be withheld if the European legal order provides leeway for the Member States. The Commission, however, seems willing to abolish minimum harmonization and to insert maximum harmonization as the necessary counterpart to the optional European Civil Code. It remains to be seen what maximum harmonization really means. There is ample evidence that even maximum directives provide for escape rules or intermediary solutions. In essence a new regulatory effort would end up in a reversal of the burden of argumentation, i.e., contrary to minimum harmonization where the Commission has to prove that Member States legislation reaching beyond the minimum is incompatible with EC law principles, now the Member States would have to justify if they deviate from maximum standards. The policy shift from minimum to maximum harmonization could become the breakeven-point for European contract law theory in that it will decide over the degree to which Member States may defend a concept of consumer contract law reaching beyond competitive consumer contract law.

E.C.R. I-1199.

103. Case 481/99, *Heininger v. Bayerische Hypo and Vereinsbank AG*, 2001 E.C.R. I-9945.

104. Case 350/03, *Schulte*, 2005 E.C.R. I-nyr.

105. Case C-229/04, *Crailsheimer v. Volksbank*, pending case.

106. Case C-473/00, *Cofidis*, 2002 E.C.R. I-875.

B. European Business Contract Law

The fields of European business contract law here presented have not been the subject of litigation. A stock-taking of the Court's case-law along the line of the seven elements would make no sense.

The only area where the Court had the chance to raise its voice is in the commercial agents directive. Quite a number of rulings provide evidence on the Court's preparedness to realize the protective-instrumental device inherent to the directive. It suffices to point to *Ingmar*.¹⁰⁷ Most of the directives analyzed have not yet led to case-law, maybe because the directives are simply too young. If there is case-law, such as *Agostini*,¹⁰⁸ it is focusing on the public law side of the respective rulings. The same is true with regard to case-law dealing with the block exemptions. The potential impact of the respective directives on European private law and the potential resulting from the interplay of rights and remedies needs to be discovered. The already existing case-law in the field of consumer contract law might one day or the other affect European business laws too, when it comes down to give shape to the other six elements of competitive contract law.

Even if European business law still is in an infant stage, it should be fully considered in the project of drafting a Common Frame of Reference on European contract law. European business law, however, cannot only be found in directives where the contractual bias is evident. European business law may be discovered in rather strange areas, sometimes as a mere by-product or in the disguise of secondary Community law which does not indicate its private law impact. There is a simple lesson to learn from my survey. It is not helpful to put established national categories over the growing European business law. The European legislator pursues an instrumental approach to each and every field of law. Private law issues are covered either directly or indirectly—if there is need to foster the completion of the Internal Market.

107. Case C-381/98, *Ingmar Ltd. v. Eaton Leonard Technologies Inc.*, 2000 E.C.R. I-9305.

108. Combined cases C-34/95, C-35/95 and C-36/95, *Konsumentenombudsmannen v. Agostini Förlag and TV-Shop i Sverige*, 1997 E.C.R. I-3843.

