The Notion “Consumer” in European Private Law

Masterproef van de opleiding
‘Master in de rechten’
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ACKNOWLEDGEMENTS

A word of thanks hardly seems sufficient to praise our beloved for all they have done. Yet, know that these few, silent words are nothing compared to a heart that speaks volumes. For it is through the unremitting support of others that we can achieve that which we thought was impossible. It is thanks to their belief in our capabilities that we keep on going when we feel like we can no more.

First and foremost I would like to thank my promotor, prof. dr. Maud Piers for having given me the opportunity to study this subject, for her guidance and patience. I owe Ms Isabelle Bambust my utmost gratitude for her constructive advice, supervision and insight. I would also like to thank prof. dr. Reinhard Steennot for his clear vision and unlimited availability in times of need.

This thesis would have been impossible without the continuous support of my mother and brother to whom I owe more than words can express.

Finally, I would like to express my gratitude towards my partner who stood by me with all of her heart and reading glasses.
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<tr>
<td>CFR</td>
<td>Common Frame of Reference</td>
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<tr>
<td>COM</td>
<td>(EU) Commission document</td>
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<td>EC</td>
<td>European Community</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>ECR</td>
<td>European Court Reports</td>
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<td>European Economic Community</td>
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<td>EU</td>
<td>European Union</td>
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<td>OJ L/C</td>
<td>Official Journal of the EU, series legislation or communication</td>
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<td>DCFR</td>
<td>Draft Common Frame of Reference</td>
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<td>SEA</td>
<td>Single European Act</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the EU</td>
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<td>CMLRev</td>
<td>Common Market Law Review</td>
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<tr>
<td>TVB</td>
<td>Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen</td>
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<tr>
<td>VuR</td>
<td>Verbraucher und Recht</td>
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The Sun provides the energy for these to grow
They make their own food in case you didn't know
Growing in the ground making vegetables and fruits
Animals and people eat them, even their roots
I know what it is let me tell you, sir... It's a **PRODUCER**.

They depend on producers for their food
Eating healthy plants and other animals dude
You are one of these and so is your dad
So go eat an apple before it goes bad
I know what it is let me tell you, sir... It's a **CONSUMER**.¹

INTRODUCTION

Today's society is one that thrives on the expansion of the economy. It's a society that needs us to buy as much as we can afford, and sadly enough, even beyond such a limit. In other words, it encourages consumption as an economic policy. The text above is part of a children's song which is frequently used to teach nine-year-olds the meaning of the word "producer" and "consumer". The lyrics of the song show that every age group is encouraged to consume, whether young or old.

Encouraging consumers to consume, however, is not without risk. Consequently, as it is with every game, there has to be a set of rules which keeps the game fair. The same is true for the functioning of the market. Without a decent set of rules, market failure\(^2\) is what awaits us. By virtue of rules regulating the market wherever necessary, actors will be able to "play" in relatively safe environment. The intent of this thesis is not to discuss all of the rules preventing market failures, but to examine one of the most important actors on the playing field, namely the consumer.

The consumer is protected by a set of rules referred to as a consumer law. These rules are in place to ensure consumers a minimum of protection while purchasing goods and/or services. The consumers are usually offered additional protection, as they are generally deemed to be the weaker party when entering into a contract with a trader or professional.

Evidently, the scope of the notion of "consumer" has to be restricted. With no restrictions everyone would be able claim to be in a weaker position and in need of additional protection. Such a situation would be unsustainable and would have an adverse effect, since courts would be flooded and legal certainty inexistent. Hence, the restricted consumer definitions drafted by the legislators. Due to those restrictions, not just anyone can claim the capacity of a consumer.

Our study focuses on the notion "consumer" within European Private Law, so the rules that are of significant importance to us are those that can be found in the existing Community legislation relating to consumer protection (hereinafter consumer *acquis*). The European legislator has adopted various consumer definitions in the consumer *acquis*. The purpose of my research is to able to provide a decent answer when asked "Who is a consumer?". In other words, to know when a person can be qualified as a consumer. This research should help create a higher standard of legal certainty with regard to the notion "consumer".

\(^2\) In economics, market failure is the inefficiency of a free market in allocating goods or services.
The first chapter will therefore give a short overview of the history of European consumer policy, where I will discuss the *ratio legis* of European consumer, the consumer image and finally the European consumer policy itself.

In the second chapter I will examine the various consumer (and trader) definitions of the consumer *acquis*. After which I will examine the uniformity, or lack thereof, of the consumer definitions, as well as certain ambiguous aspects of the consumer definition.

In the third chapter I will examine all of the ECJ case law with regard to the consumer definition. In this chapter I will mainly discuss the ambiguities which have, or have not been, interpreted by the ECJ. At the end of this chapter I will give an overview of my findings in the form of a table, in light of the second and third chapter.

In the fourth chapter I will briefly discuss the necessity of uniformity and provide certain solutions to the issue.
CHAPTER 1: EUROPEAN CONSUMER POLICY

1 RATIO LEGIS OF EUROPEAN CONSUMER LAW

Since the middle of the 18th century the economic notion of consumer and producer have been put on opposing sides. The word “consumer” is the agent noun of the verb to consume, which is derived from the Latin word “consumere”\(^3\). This Latin word means to use up, eat or waste. Whereas the Latin word “produere” means to lead, bring forth or draw out\(^4\). This clearly states the economic reason for putting producers and consumers on opposing sides. Thus, from an economic point of view it seems straightforward who should be qualified as a consumer, namely he who uses up goods or articles.

The contradiction of those two actors is still accurate to date. Generally, consumer law is viewed as the branch of law that offers protection to consumers vis-à-vis producers, the latter also being a trader, seller or supplier. In order to restore the economical and legal imbalance between both parties.\(^5\)

By studying the ratio legis of European Consumer Law in its entirety we will have a better understanding of the underlying reasons of each consumer Directive individually. Which will result in a more complete view of consumer definition, especially its limited scope.

Helping and protecting the weak is a feature that is as old as time.\(^6\) Hence, it would certainly seem fair to adopt measures that protect certain categories of people that are, in relation to another party in a concrete situation, deemed to be the weaker party.\(^7\) Unfortunately the sense of justice, equality and altruism is not enough to justify the additional protection through government intervention. Government intervention is not without cost and an estimate should

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\(^6\) And we urge you, brothers, admonish the idle, encourage the fainthearted, help the weak, be patient with them all: 1 Thessalonians 5:14

be made of the costs and benefits of intervention, as well as that of the potential impact of a remedy on the market and the behaviour of those affected.\textsuperscript{8}

It is clear that one can be considered as a weaker party from many different points of view. One of those views is the economic view. The central economic rationale for government regulation is market failure.\textsuperscript{9} Market failure occurs when there is a failure of one of the conditions for the optimal operation of a competitive market.\textsuperscript{10} Such is the case when one of the economic actors in the market does not have perfect information about the nature and value of the commodities traded. Due to market failures, markets are not functioning as efficiently as they should and the weaker economic actor on the playing field is the one who primarily suffers the consequences. The consumer is that weak(er) actor. The market model of efficiency takes several factors as given, which means that when those assumptions are thought to fall significantly, the necessity for intervention appears\textsuperscript{11}. The consumers are considered to be rational actors with free choices, through which they act as a balancing factor.\textsuperscript{12} Therefore if consumers were to make bad or even irrational decisions due to the inequality of bargaining power, which is, inter alia, a consequence of the information failure, government intervention is justified. Without such intervention the market cannot reach an optimal point due to the lack of the balancing factor of the consumer.\textsuperscript{13}

It is not our intent to elaborate on the specificities of the various tendencies covered by the term "economic rationale" and therefore, to avoid confusion, the term "economic rationale" will hereinafter always refer to the inequality of bargaining power and its consequences for the market.

This economic rationale can be found in the programme of 1975, where the primary rationale for consumer law seems to be the inequality of bargaining power.\textsuperscript{14} The imbalance in power, in

\textsuperscript{8} I. RAMSAY, Rationales for intervention in the consumer marketplace, Great Britain, Office of Fair trading, 1984, 3.1.;Consumers are certainly not an isolated case, a quick view at e.g. the Brussels I regulation reveals additional protection for employees, policyholders and consumers.
\textsuperscript{9} I. RAMSAY, Rationales for intervention in the consumer marketplace, Great Britain, Office of Fair trading, 1984, 3.1.
\textsuperscript{10} I. RAMSAY, Rationales for intervention in the consumer marketplace, Great Britain, Office of Fair trading, 1984, 3.1.
\textsuperscript{11} For many more assumptions: I. RAMSAY, Consumer law and policy: text and materials on regulating consumer markets, 61.
\textsuperscript{12} In other words, this is the economic rationale of consumer sovereignty, which assumes that the consumer is ultimately in control: W.H. HUTT, Economists and the public: A Study of Competition and Opinion, London, J.Cape, 1936, 377 p.
\textsuperscript{13} Even Adam Smith (author of the invisible hand theory) recognised the concept of inequality of bargaining power, specifically in regard to workers: A. SMITH, An Inquiry into the Natura and Causes of the Wealth of Nations, IV, Of Systems of political Economy, Dublin, Whitestone, Chamberlaine, W. Watson, 1776, 349.
\textsuperscript{14} Official Journal C 092 , 25/04/1975 P. 0002 – 0016, General considerations; This was generally the primary rationale in the 1960s and 1970s: I. RAMSAY, Consumer law and policy: text and materials on regulating consumer markets, 53.
extremis, prevents the consumer's free choice. Consequently, the aim of the economic rationale was to empower the consumer as a rational actor with free choices as balancing factor and driving force for the common market.

Initially the economic rationale was the sole driving force behind European consumer policy. Both the economic and the political rationale use the basic principles of contract law and share the same philosophical roots and assumptions about individual freedom of choice. This allowed the combined development of economic and political reasoning in limited and connected areas. However, due to the ever-changing political rationale the connection between the latter and the economic rationale became more and more vague. The political rationale proclaimed a deep connection with European citizenship and thus the necessity of limiting the scope beyond the economic reasoning occurred. Aside from the political motives, it was also necessary to secure legal certainty and at the same time protect as many customers as possible. To do so the scope of the legal definition of “consumer” had to be limited by creating an abstract definition. This automatically meant that not every weaker party could be included, and inversely, that some would benefit from consumer protection law even though they were the stronger party in a concrete case. A further disadvantage of this reasoning is that by not distinguishing between the different types of consumers, no special attention is given to particularly weak consumers or groups of consumers.

Consequently, not only has the political rationale lost its connection with the economic rationale, it is in fact conflicting. Given that the economic rationale means to offer additional protection to all buyers, purchasers, etc. that face inequality of bargaining power, thus without limiting the scope to natural persons and/or persons acting outside their professional or trade activities. One must not forget that the consumer is not a genuine legal but an economic construct, one that has evolved over the years from buyer to customer and finally to consumer.

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19 Ibid.

20 This is not a typographical error. The use of the word “customer” rather than “consumer” is meant to stress the fact that, initially, all customers that face an imbalance in bargaining power are to be protected and therefore included in the legal definition of a consumer.


from an economic point of view the permanent exclusions of legal persons and persons acting in pursuance of a trade or professional activity does not appear justified.

Embedding the citizens/consumers in the European project is part of the political approach of the European Commission (hereinafter Commission). That is why Schüler notes that the reason for the limitation of consumers makes perfect sense from a political perspective, since consumer law is an instrument for reconnecting European citizens with the European project. However, to do so, consumer law needs to provide a clear and visible link. Nevertheless, Schüler does consider the combination of both rationales to lead to inconsistencies within the European consumer approach.

We are obliged to stress that the economic rationale all too easily considers consumers as rational beings. The following section shall reveal that through the findings of behavioural studies it can be concluded that consumers are far from rational market actors. Consequently, the “revised” economic rationale shall rather regularly lead to the conclusion that the assumption of the consumer as a rational actor has not been met and therefore the need for intervention is expected.

In conclusion, the reason why it often seems unfair to protect one weaker party, but not the other has to do with the fact that the economic rationale was the starting point for consumer law. Which considers the need to protect every weaker market actor, in order to prevent market failures. Yet, due to the political influence, that strongly refers to citizenship and sought legal certainty, this connection with the economic rationale seems blurred and rather conflicting. Moreover, as seen above, the consumer is not a genuine legal but an economic construct. Nevertheless, the current legal reasoning behind European consumer law is to counter the imbalance in power and to reconnect the European citizens to the European project. Both goals should help ensure the functioning of the internal market.

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24 Which means, according to Schüler, that only natural persons can be citizens and thus consumer law should only apply to them: J. DEVENNEY AND M. KENNY (eds.), European consumer protection: theory and practice, 127.

25 Schüler considers that the economic rationale should lead to a consumer definition that is as wide as possible whereas the political rationale leads to a rather narrow definition in order to reconnect the citizens with the EU. Schüler accidently mixes those rationales: J. DEVENNEY AND M. KENNY (eds.), European consumer protection: theory and practice, 128.

26 By “revised economic rationale” we mean an economic rationale that takes account of a new discipline in economics, namely behavioural economics.

2 The image of the European Consumer

A clear distinction has to be made between the image of the consumer and the notion of the consumer. The notion of the consumer limits the personal scope of consumer law, whereas the image of the consumer is based on certain perceptions of reality, such as the intellectual capacity of a consumer. The consumer image should also be distinguished from the ratio legis of European consumer law. The ratio legis of European consumer law is the answer to the question why the government should intervene in the market. The consumer image on the other hand reveals the characteristics of a consumer. The ratio legis, however, cannot be seen in isolation from the consumer image, since the latter with regard to certain circumstances reveals the necessity or lack thereof of consumer law.

It is self-evident that every consumer policy is closely connected to a certain consumer image on which consumer law is built. The consumer image is necessary to determine the circumstances under which and the extent to which the legislator has to intervene. Thus the consumer image directly contributes to the development of consumer law. A short overview of the evolution of the consumer image should therefore help us understand consumer law.

The image of the European consumer has, since the beginning of European consumer policy, been that of a circumspect, well-informed and a well-to-be-informed consumer who can and shall decide on her or his own affairs at her or his own risk. Such is the consumer image that was presented in the Cassis de Dijon case. That is why it should not surprise us that information is a central device of this policy. This is also illustrated by the European legislator's clear preference for procedural measures over substantive measures in contract law over, inter alia, information requirements.

The emphasis on the active and critical approach of the consumer also appeared in several decisions of the ECJ, which confirmed the average, circumspect and well-informed consumer.

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28 Even though our study is aimed at consumer directives which are less affected by the consumer image than in cases of protectionist measures. It still has its use to discuss it here, since the consumer image influences the cases in which the legislator has to intervene and to what extent: A. VERMEERSCH AND M. DE WITTE, Europees Consumentenrecht, 15, No. 8; E. TERRYN, Het herroepingsrecht als instrument van consumentenbescherming, unpublished, Doctoral thesis, Law K.U. Leuven, 2005, 97, No. 205.

29 E. TERRYN, Het herroepingsrecht als instrument van consumentenbescherming, 97.

30 Of course it is also very important for the ECJ to know what kind of consumer is in need of protection, in order to rule whether a restrictive measure of the free movement of goods or services is justified. In that respect: E. TERRYN, Het herroepingsrecht als instrument van consumentenbescherming, 97; C-120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein [1979] ECR 649 [ cassis de dijon].


32 C-120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein [1979] ECR 649 [ cassis de dijon] "the active and critical information-seeker".


34 E. TERRYN, Het herroepingsrecht als instrument van consumentenbescherming, 99.
The European consumer image, however, is not all that straightforward, and thus the introduction of a nuance is in order. Firstly, the ECJ accepts that the influence of diverse factors, such as social, cultural and linguistic factors, should be considered. Since the consumer image is that of the average, circumspect and well-informed consumer, it is certainly not unlikely that the image varies between Member States. Secondly, the ECJ also seems to accept that when a specific group of consumers is being targeted, the specific weaknesses of that group of consumers can be taken into consideration.

Notwithstanding, several authors point out that the consumer image is a legal and normative concept in which empirical data only plays a secondary role. Clearly not all consumers are average, circumspect and well-informed consumers. Through the usage of the aforementioned image, European consumer law forces consumers to retrieve the information necessary to come to a balanced decision.

However, it should be clear that the current consumer image is not without controversy. The core of the classic view in consumer behaviour about how consumers make decisions is based on the idea that a consumer is an information processing machine. In other words, it is based on the idea that a consumer, when making decisions, acts rationally with regard to the available information. Recent behavioural studies and their results have shown that consumers do not necessarily decide in a rational manner. When making a decision the consumer is influenced by far more than the information concerning the goods or services in question. Generally, personal factors, such as mood, time pressure, etc. play a fair part in the consumer’s decision-making.

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37 E. TERRYN, Het herroepingsrecht als instrument van consumentenbescherming, 98; C-220/98 Estée Lauder Cosmetic v Lancaster Group, ECR I-117, paragraph 29.
38 E. TERRYN, Het herroepingsrecht als instrument van consumentenbescherming, 99; H.W. MICKLITZ, N. REICH and P. ROTT, Understanding EU consumer law, Antwerp, Intersentia 2009, 45; C-282/87 Buet and Educational Business Services v Ministère Public, [1989], ECR 1235. (In the light of minimum harmonization measures, it is up to the Member States to provide an appropriate protection for those disfavoured or minority groups.)
40 Ibid.
42 M. SOLOMON et al., Consumer behaviour: a European Perspective, 345.
43 M. SOLOMON et al., Consumer behavior: a European Perspective, 62; Instant gratification can also be considered as such a factor, sometimes also described as bounded willpower, which results in consumers acting against their long-term interests: hyperbolic discounting: I. RAMSAY, Consumer law and policy: text and materials on regulating consumer markets, Oxford, Hart, 2007, 72.
Moreover, it is virtually impossible to carefully identify every alternative before choosing, due to the lack of resources, mainly time. Therefore a consumer will often settle for a solution that is just good enough, the so-called bounded rationality.\textsuperscript{44} In addition, consumers often make biased decisions\textsuperscript{45}. It should also be noted that the category of consumers that is most likely to search less and thus to be less informed, is a category of consumers that is in need of more protection, namely the lower-income shoppers.\textsuperscript{46}

Consequently, a consumer is not unlikely to make an irrational decision based on little information, hence the current consumer image is not consistent with the reality. Furthermore, information as a central device of consumer policy will not necessarily lead to consumers that can act as a balancing factor.\textsuperscript{47} Fortunately the Commission is aware of the hiatus between the existing consumer image and the consumer image based on reality.\textsuperscript{48} The awareness can be seen in the consumer policy programme of 2007 in which the Commission expressed the need for the development of a more sophisticated understanding of consumer behaviour in order to devise better regulation.\textsuperscript{49} Its concern for a better understanding of consumer behaviour continued with the consumer policy programme of 2014, where the Commission stressed the further development.\textsuperscript{50} Moreover, the various consumer Directives concerning different goods or services prove a certain awareness that the situation matters.\textsuperscript{51} One last example is that of the cooling-off periods, since this is an answer to the problem of bounded willpower, where consumers are enticed by the promise of instant gratification without considering the long-term interests.\textsuperscript{52}

Finally, we should look at several ECJ cases. Since, those cases seem to indicate a different approach, one that is more in line with the findings of behavioural studies. Micklitz refers to two cases, the Océano case\textsuperscript{53} and the Gabriel case\textsuperscript{54,55} In the first case the ECJ argued that a consumer

\textsuperscript{45} For more examples I refer to: J. DEVENNEY AND M. KENNY (eds.), European consumer protection: theory and practice, 132.
\textsuperscript{46} Cathy J Cobb and Wayne D Hoyer, "Direct observation of search behaviour", Psychology and marketing 2 (Fall 1985): 161-79.
\textsuperscript{47} J. DEVENNEY AND M. KENNY (eds.), European consumer protection: theory and practice, 141.
\textsuperscript{48} Meaning the reality found by virtue of behavioural studies.
\textsuperscript{51} J. DEVENNEY AND M. KENNY (eds.), European consumer protection: theory and practice, 142.
\textsuperscript{52} Ibid.
\textsuperscript{53} C-240-244/98, Océano Grupo Editorial v Quintero et al, [2000], ECR I-4941.
\textsuperscript{54} C-96/00, Rudolf Gabriel [2002] ECR I-6367.
should not lose the protection provided by the Unfair Contract Terms Directive, solely due to his ignorance with regard to the unfairness of certain contract terms. In the second case the ECJ considered the consumer to be economically weaker and less experienced in legal matters. Both those arguments appear to suggest a consumer image of a weak and ignorant consumer who is not all that circumspect. Terryn argued that ECJ’s approach in those cases is not necessarily the beginning of an alternative consumer image.\(^{56}\) Both cases concerned the access to justice. Therefore, it is not unreasonable that the ECJ might consider the access to justice to be of such importance that not only the average, circumspect and well-informed consumer should be protected, but also the weak and ignorant consumer.

Evidently, a well-informed consumer is in need of less protection than an uninformed consumer. Considering the average consumer as a well-informed consumer implies a lower level of consumer protection. Nevertheless, the importance of information in European law should not necessarily be looked upon negatively. Drexl points out that the paradigm of the informed consumer can prevent paternalism and can contribute to a beneficial decision making process for the consumer.\(^{57}\) The fact that the consumer image also aims to ensure the functioning of the internal market does not necessarily contravene consumer interests, since a well-functioning internal market can increase the consumer’s choice. Nevertheless, in order for the consumer policy to work, it is imperative that the consumer image used by the European Union is in line with the empirical consumer image.\(^{58}\)

In conclusion, the current European consumer image is still that of an average, circumspect, well-informed consumer. Nevertheless, it seems that the findings of behavioural studies are gradually beginning to have more influence. Furthermore, the current European consumer image is not always interpreted strictly, especially when it concerns the access to justice.

### 3 History of European Consumer Policy

In the very beginning there was no specific consumer policy and only five incidental references to consumers were made in the original Treaties of Rome of 1957. It was seen as somewhat redundant, since the creation of a well-functioning internal market would lead to a market

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\(^{56}\) E. TERRYN, Het herroepingsrecht als instrument van consumentenbescherming, 101, No. 215.


\(^{58}\) E. TERRYN, Het herroepingsrecht als instrument van consumentenbescherming, 102, No. 219.
where consumers would be sufficiently protected. Consumer protection was thus seen as a by-product of the creation of an internal market.

The situation began to change following the Paris Summit in 1972 where the Heads of State and Governments emphasised, under the development of the social policy, that they attached much importance to strengthening and co-ordinating measures of consumer protection. Following that event, the Council of the European Union (hereinafter Council) adopted a resolution in 1975 that, for the first time, explicitly stressed the protection of health, safety and economic interests of consumers. In addition, the Council approved the principle of a consumer protection and information policy and the principles, objectives and general description of action to be taken at Community level.

Shortly after, a preliminary programme for consumer protection and information policy was adopted, in which the Council recognised the consumer as the weaker party due to the shift from being an individual purchaser in a small local market to a mere unit in a mass market. Even though such mass markets certainly have their advantages, consumers were no longer able to fulfil the role of a balancing factor in the economic system due to the loss of bargaining power. Consequently, consumer interests were in need of protection. Those interests were summed up by a statement of five basic rights:

- the right to protection of health and safety
- the right to protection of economic interests
- the right of redress
- the right to information and education
- the right of representation (the right to be heard).

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63 Hereinafter referred to as “the programme of 1975”.

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Thus, in essence the programme of 1975 proposed to break through the inequality of contracting parties in consumer sales in order to create a market based on true equality by offering additional protection to the weaker party. Therefore, making it possible for the weaker party to fulfil his role in the market.

The second programme of 1981 confirmed the approach of the programme of 1975. Furthermore, the Council of the European Union emphasised in its second programme that the purpose of the second programme was to enable the Community to continue and intensify measures taken in the European Consumer Law field, as well as creating conditions under which an improved form of consultation between consumers on the one hand and manufacturers and retailers on the other hand. In other words, the second programme built upon the first programme and deepened it.

The implementation of the consumer programmes, however, had its difficulties in the early 1980s. The adoption of positive harmonisation measures required Council unanimity. This legal restriction which the Council faced, was one of the main reasons why progress was slow.

It is important to note that, contrary to the European legislator, the European Court of Justice (hereinafter ECJ) did not suffer such a restriction and significantly influenced the development of consumer policy during this period. Prior to the innovative Cassis de Dijon case of 1979, the ECJ did not directly deal with cases of consumer interests. This had to do with the fact that before the Cassis de Dijon case, restrictions on the free movement of goods in the interests of consumer protection could only be justified in so far as such restrictions served to protect the health or life of the consumer. The judgment in Cassis de Dijon widened this protection to include economic interests of the consumer. The acknowledgment that consumer protection was as equally important as the fundamental freedoms was groundbreaking, as it went far beyond the state of Community law at that time. By having done so, the ECJ raised the policy of consumer protection to an objective of Community law and thus legitimized both measures

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70 Ibid.
taken by Member States and the Community.\textsuperscript{71} This was basically an early implementation of the programme of 1975 that formulated rights available to the consumer, which included the consumer's right to protect his economic interests and his right to information.\textsuperscript{72} The Cassis de Dijon case also widened the consumer's choice by introducing the principle of mutual recognition.\textsuperscript{73}

The third programme is often referred to as "A Impetus for Consumer Protection Policy", which is the title of a paper published by the European Commission (hereinafter Commission) in June 1985.\textsuperscript{74} This paper reviewed the progress in the light of the objectives of the programme of 1975 and concluded that progress towards the realization of those objectives fell short. The paper was welcomed by the Council resolution of 6 May 1986.\textsuperscript{75}

The delay in progress would last through to 1987 when the Single European Act came into force under influence of the Commission’s paper "A New Impetus for Consumer Protection Policy".\textsuperscript{76} Not only was the Single European Act the first treaty to expressly mention the protection of consumer interests, it also significantly altered the relationship between consumer policy and the process of approximation of laws since it affected the functioning of the internal market. In particular the addition of Article 114 TFEU (Article 95 EC), it required the institutions to "take as a base a high level of protection" in proposals concerning “health, safety... and consumer protection” and procedurally introduced qualified majority voting for adoption in Council.\textsuperscript{77} In a certain sense the Single European Act can be marked as the actual beginning of serious progress in the legislative development of the consumer acquis and thus of the definition of a consumer. For the sake of completeness, it should be noted that the authors of the Single European Act did not introduce an explicit legal basis regarding the competence of the Community in the field of the promotion of consumer interests.

\textsuperscript{71} Ibid. Since the reasoning was based on the principle of mutual recognition and the protection of the economic interests of consumers was considered a justified ground for protection: a Member State was able to restrict the free movement of goods on the condition that it is necessary to protect their consumers if the rule is prop and non-discriminatory.

\textsuperscript{72} R. H. SCHULZE, H. SCHULTE-NOLKE and J.M. JONES (eds.), \textit{A casebook on European consumer law}, 37.

\textsuperscript{73} Which means that goods that were marketed legally in one Member State must be given access to the market of any other Member State, regardless of compliance with the regulatory framework in force in the other Member State and applicable to its domestic goods. : S. WEATHERILL, \textit{EU Consumer Law and Policy}, 7.


\textsuperscript{77} J. DAVIES, \textit{The European consumer citizen in law and policy in consumption and public life}, 29.
The European Single Act expressly mentioned the protection of consumers, but it was not until the signing of the Maastricht Treaty in 1992 that consumer protection was acknowledged as an independent principle under Community law as per Article 129a. The latter article clarified that the consumer policy was based on a double foundation: as an internal market policy on the one hand and on the other hand as a specific action to support consumer policy measures taken by Member States. By doing so the consumer policy seems to have been freed from the internal market policy. The Maastricht Treaty also set out in Article 3(b), that the Community’s power is not exclusive, but bound by the principles of subsidiarity and proportionality.

The next step was the Treaty of Amsterdam that came into force in 1999. Former Article 129a was amended by Article 153 EC that established autonomous consumer rights and extended the Community’s power. Interesting to note is that Article 153 EC introduced the integration principle. The integration principle makes it so that consumer protection requirements have to be taken into account in defining and implementing other Community policies and activities.

The Nice Treaty which came into force in 2003 maintained the importance of consumer protection with the appropriate legal framework. The Nice Treaty was more of a technical nature and hardly modified the substance. The Lisbon Treaty did not add any notable changes to the consumer policy.

For the sake of completeness, it should be noted that since the early 1990s the Commission has prepared four three-year action plans. These action plans introduced initiatives that targeted specific themes, e.g. product safety. The first action plan focused on four main sectors: consumer representation, information, safety and transactions. Those four main sectors, especially information and consumer representation, recur throughout most of the action plans.

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78 H.W. MICKLITZ, N. REICH AND P. ROTT, Understanding EU consumer law, 13, 1.6.
79 Ibid.
82 H.W. MICKLITZ, N. REICH AND P. ROTT, Understanding EU consumer law, 14, 1.7; A. VERMEERSCH AND M. DE WITTE, Europees Consumentenrecht, 9, No. 53.
83 H.W. MICKLITZ, N. REICH AND P. ROTT, Understanding EU consumer law, 15.
84 Due to the upcoming growth of the European Union the EU had to be prepared, which had been done by revising 4 key areas which were mainly of a structural/institutional nature.
87 For a clear and concise summary of this matter I refer to: P. NEBBA AND T. ASHKAM, EU Consumer law, 28-34.
Subsequently, the Commission adopted several consumer policy strategy programmes. Contrary to the action plans, a consumer policy strategy does not limit itself to the introduction of specific initiatives. The purpose of the consumer policy strategy is to set forth objectives that should maximise the consumer’s full potential. To date, there have been three consumer policy strategies, of which the most recent one was adopted on 26 February 2014.88

The Consumer Policy Strategy for 2002-200689 had three main objectives: a high common level of consumer protection, effective enforcement of consumer protection rules and the proper involvement of consumer organisations in Community policies. Important to note here is that the Commission’s Consumer Policy Strategy for 2002-2006 stated that the first objective requires “moving away from the present situation of different sets of rules in each Member State towards a more consistent environment for consumer protection across the EU”.90 Furthermore, concerning the protection of consumer’s economic interests the Commission stressed the need “to review and reform existing EU consumer protection Directives, to bring them up to date and progressively adapt them from the minimum harmonisation to “full harmonisation” measures”.91

The objectives of the Consumer Policy Strategy for 2007-201392 reflect a high degree of continuity with the previous EU consumer policy objectives. The same can be said about the Consumer Policy Strategy for 2014-2020.93

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CHAPTER 2: A UNIFORM NOTION OF “CONSUMER” IN EUROPEAN PRIVATE LAW?

1 LEGISLATIVE HARMONIZATION

In chapter 1 we have seen that the entry into force of the Maastricht Treaty in 1993 brought with it the explicit formal recognition of consumer protection as an EC competence. Nevertheless, it should be noted that European consumer law is primarily composed of the harmonization of national laws of consumer protection, before and after the Maastricht Treaty. Evidently, prior to the entry into force of the Maastricht Treaty, the measures taken by the European legislator could only be of a harmonising nature.

The harmonization of national laws of consumer protection was not an end in itself. On the contrary, those harmonising measures were the means to ensure the functioning of the internal market. One dominant argument justifies the harmonising approach to consumer law. The argument is view from two perspectives, that of the trader and that of the consumer. From the perspective of a trader the differences between consumer laws of various Member States are considered as a serious obstacle to cross-border consumer transactions within the EU. Mainly because traders could deter from dealing across borders, due to their insecurity of the different levels of protection of their costumers in various Member States. From the perspective of the consumer there appears to be a lack of consumer confidence. The concern is that consumers are not confident that they will be adequately protected when buying goods or services in another Member State. As a result the consumer restrain from participating in cross-border trading. The argument suggests that the objective of the establishment and functioning of the internal market was the sole rationale for the harmonization of national laws. It is true that, especially in the early days, the harmonising consumer measures were part of the internal market policy. Nevertheless, the harmonization of national laws of consumer protection has always served two purposes, i.e., the internal market and the consumer interests. In other words the rationale

96 The use of the only legislative alternative at the time, meaning (Article 100 EEC) harmonization as an objective to establish and ensure the functioning of the internal market, only magnified the consumers policy as part of the internal market policy.
behind the harmonising consumer measures was to ensure the establishment and functioning of the internal market and the protection of consumer interests.\footnote{The ECJ has long confirmed this point of view e.g. C-361/89 Criminal proceedings v Patrice Di Pinto [1991] ECR I-01189 (hereinafter Di Pinto case); S. Weatherill, EU Consumer Law and Policy, 64; Reich, N. and Woodroffe, G. (eds.), European consumer policy after Maastricht, 331.}

When the Single European Act came into force in 1987 the harmonising landscape changed considerably. Article 114 TFEU implemented by the SEA introduced a qualified majority vote, whereas Article 115 TFEU requires unanimity.\footnote{Renumbered Article 100a EEC to article 95 EC and finally article 114 TFEU. Article 100 EEC was renumbered to Article 94 EC and finally to Article 115 TFEU} Evidently, Article 114 TFEU became the new legal basis for the following consumer Directives and lead to a serious increase in consumer legislation. Interesting to note is that Article 114 TFEU does not limit the harmonising measures to the use of directives, but permits a high level of harmonization, e.g. regulations.\footnote{Article 114TFEU refers to “measures of approximation”, whereas Article 115 TFEU explicitly refers to “directives for the approximation”.} Yet, it is not because a sword is raised, that it will be used. In other words, having the possibility to use something, e.g. Regulations, does not mean it will be used. The same is true for the qualified majority voting, many consumer Directives were still adopted unanimously. In any case, the European legislator saw its instruments increase in the consumer area.

\section*{2 Analysis of the EU Consumer Acquis}

In order to acquire more insight into the consumer notion in European private law, I am required to analyse the consumer \textit{acquis}. Since the consumer is largely present in the area of contract law it only seems fitting to examine this area extensively. Nevertheless, to get a complete picture of the issue at hand my research cannot be limited to contract law, and therefore should include all of the significant areas of law with regard to the consumer.

To process the various Directives, we have chosen to discuss each Directive individually. The objective of each Directive will be presented, followed by the legal definition of a consumer and trader. The reason for discussing the definition of a trader is simple. It is impossible for a person to have the capacity of a consumer and trader in relation to one and the same contract. As a result, having the capacity of a trader will, in relation to one and the same contract, exclude you from being qualified as a consumer.\footnote{For the sake of simplicity, we use the term “trader” to refer to the commercially active counterpart of the consumer. Nevertheless, in certain Directives the “trader” is referred to as producer, creditor, etc. depending on the content of the Directive.} Furthermore, the consumer and trader definition are complementary and should be considered as a whole. Therefore, we feel obliged to examine both definitions.
Obviously, one of the objectives of harmonising consumer Directives is the harmonisation of certain national laws. That is why this will not be mentioned recurrently during the discussion of the various directives.

In essence, I will try to find the true scope of the notion of consumer in the consumer *acquis* and with it the main characteristics. Moreover, the analysis will provide us with an answer to the question whether a uniform consumer notion, in general or in a specific area of law, exists on a European level.

2.1 Consumer Contracts

2.1.1 Doorstep Selling Directive 85/577/EEC

The Doorstep Selling Directive stems directly from the preliminary programme for consumer protection and information policy which had provided that appropriate measures should be taken to protect consumers against unfair commercial practices in respect of doorstep selling\(^\text{101}\). The Directive applies to contracts under which a trader supplies goods or services to a consumer and which are concluded at a time when the consumer is in his or her natural environment, generally at home. The reason for the adoption of this Directive has to do with the fact that consumers were deemed to be in need of protection since, in such cases, the consumer is surprised and unprepared while facing an unexpected opportunity, with the added high-pressure selling methods of the trader\(^\text{102}\). In addition, the consumer is not able to compare the quality and the price of the offer with other offers, *i.e.*, he is not able to make a well-informed decision. Consequently, those circumstances often lead to consumers acting rather irrational and not in their best interests.

Article 2 of the Directive defined a consumer as "a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession". The same Article defined a trader as "a natural or legal person who, for the transaction in question, acts in his commercial or professional capacity, and anyone acting in the name or on behalf of a trader".

At first glance the definition of a trader seems to be the exact opposite of the definition of a consumer, if not for several subtle nuances. Obviously, a natural person or legal person acting in pursuit of his commercial or professional activities cannot be considered a consumer. In that regard the definition of a trader is indeed the exact opposite of that of the consumer. However,


\(^{103}\) P. Nebbia and T. Askham, *EU Consumer law*, 239.
the legal person that is not acting in pursuit of his commercial or professional activities will not be considered a trader nor will he be considered a consumer, since a textual analysis revealed that every legal person is excluded from the definition of a consumer.\textsuperscript{104} The initial proposal of the Directive did not comprise the words “acting in the name or on behalf of a trader”.\textsuperscript{105} The European Economic and Social Committee was of the opinion that properly authorised representatives should also be included in the trader definition.\textsuperscript{106} Adding those words did not widen the trader definition, since even in the absence of those words, the inclusion of such authorised representatives is implied.

Article 2 reveals an ambiguity, namely the use of the word "regarded". The use of this word makes it rather unclear whether a transaction designated for private use, which also has a (slight) professional use, can be “regarded” as outside of his trade or profession. This, essentially, concerns the debate whether or not dual purpose transactions can be considered as private purpose transactions, which will be discussed further \textsuperscript{107}.

As of 13 June 2014 the Directive on Consumer Rights will be the governing measure concerning, \textit{inter alia}, doorstep selling\textsuperscript{108}.

\textbf{2.1.2 Consumer Credit Directive 87/102/EEC\textsuperscript{109} and 2008/48/EC\textsuperscript{110}}

In Chapter 1 we have mentioned that information is the central device of the consumer policy. This tendency is particularly clear in measures concerning financial services, such as the Consumer Credit Directive. The key objective of the Directive is, indeed, to improve the

\textsuperscript{104}The relevance should not be underestimated. For instance, if the counterparty of a consumer does not have the capacity of a trader, the consumer will not be able to rely on the protection provided by this Directive.


\textsuperscript{106}Opinion of the Economic and Social Committee on the proposal for a Council Directive to protect the consumer in respect of contracts which have been negotiated away from business premises, [1977] OJ C 180/39-43.


transparency in the provision of credit by ensuring that the consumer receives adequate information on the conditions and cost of credit.\footnote{Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy [1975] OJ C 92/1.}

Article 2(a) defines a consumer as “a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession”. Once more we notice the use of the word "regarded" which makes it unclear whether a person entering into a dual purpose transaction can be qualified as a consumer.\footnote{The word “regarded” was also used in the definition of the Doorstep Selling Directive.} This definition, aside from the use of the word "regarded", is one of the more common definitions and is exactly the same as the consumer definition of the Doorstep Selling Directive. Article 2(b) defines a creditor as “a natural or legal person who grants credit in the course of his trade, business or profession, or a group of such persons”. The wording “in the course of” points to the fact that it is not necessary to grant credit as a main activity, it should suffice even if it is only occasionally, as long as it is part of his business.

In 2008 a new Consumer Credit Directive was adopted. With the adoption the new Directive introduced a slightly different wording of the consumer and creditor definition. Article 3(a) defines a consumer as "a natural person who, in transactions covered by this Directive, is acting for purposes which are outside his trade, business or profession".\footnote{Notice that the word “regarded” was omitted from the definition.} Article 3(b) defines a creditor as "a natural or legal person who grants or promises to grant credit in the course of his trade, business or profession".\footnote{The words “or promises” were added to the creditor definition. This does not change the scope of the Directive, since promises were also included under the former Directive. The former Directive only referred to "promises" in the first paragraph of Article 2(a) where it defines the credit agreement.} The new Directive like the former Directive, comprises the same personal scope, regardless of the different wording of the consumer and creditor definition. One of the key changes, however, was the introduction of full harmonisation.\footnote{Infra.}


The first programme of 1975 already set forth the idea to protect consumers from unfair commercial practices in the area of unfair contract terms.\footnote{Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy [1975] OJ C 92/2, paragraph 22.} The subsequent programmes continued to stress the need for protection in this area and the first steps towards such protection were taken.\footnote{Recital 8 of the Unfair Contract Terms Directive.} Micklitz correctly notes that justification for a consumer policy intervention can be found in the asymmetry of economic powers which was only possible
because of the principle of contractual freedom.\textsuperscript{119} Which meant that the pre-formulated contracts by one contractual party, in particular by undertakings or their associations, which are unilaterally imposed on the other party, in particular on consumers, without negotiation, breaches the principle of contractual freedom\textsuperscript{120}. Indeed, generally consumers do not have the bargaining power to enforce its own conditions. Consequently, by adopting the Unfair Contract Terms Directive, which aims to protect consumers from unfair contract terms, another step in the right direction of restoring the equality of power between contracting parties has been taken.\textsuperscript{121}

Article 2 (b) of the Directive defines a consumer as “any natural person who in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession”.\textsuperscript{122} It is interesting to note that the European legislator seems to have been aware of the ambiguity of the word “regarded”. Whereas the initial proposal still referred to purposes as those “which can be regarded as outside his trade,”, the Directive that was adopted revealed a more transparent approach by having withdrawn the word “regarded” from its consumer definition.\textsuperscript{123}

Article 2(c) of the Directive defines a seller or supplier as “any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.”. Both definitions are very similar to the majority of definitions presented by the various Directives. Nevertheless, several elements in the seller or supplier definition stand out. Firstly, the notion of seller or supplier was used instead of the more common notion of trader. Secondly, the definition of a seller or supplier expressly states that it makes no difference whether the seller or supplier is publicly or privately owned.\textsuperscript{124}

\begin{itemize}
  \item[119]What Micklitz stated is nothing more than the European ratio legis for consumer protection and is clearly stated in recital 10 of the Directive: H.W. MICKLITZ, N. REICH and P. ROTT, \textit{Understanding EU consumer law}, 122.
  \item[120]H. W. MICKLITZ, N. REICH and P. ROTT, \textit{Understanding EU consumer law}, 112.
  \item[121]This is especially true since this Directive applies to all contracts, not just contracts in a specific sector, which is not too uncommon in European consumer law. The annex of the Directive contains an indicative, yet non-exhaustive list of the terms which may be regarded as unfair.
  \item[122]It is nearly the exact same definition as the Doorstep Selling Directive, with the exception that on top of trade and profession the word “business” is added. This, however, does not change the meaning of the definition. In the proposal the words “trade” and “business” are considered to be synonyms. Therefore we can conclude that by adding “business” to the definition, nothing more than a hollow word was added. COMMISSION, Proposal for a Council Directive on unfair terms in consumer Contracts COM (90) 322 final – SYN 285, [1990] OJ C 243/2.
  \item[124]See case: C-59/12 \textit{BKK Mobil Oil Körperschaft des öffentlichen Rechts v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV}. [2013] Not yet published.
\end{itemize}
2.1.4 Distance Selling Directive 97/7/EC\textsuperscript{125}

The underlying reasons for the necessity of the Distance Selling Directive were principally the same as for the Doorstep Selling Directive. The fifth recital of the Directive explicitly refers to paragraph 18 and 19 of the programme of 1975 expressing the need to protect purchasers of goods or services from demands of payment for unsolicited goods and from high-pressure selling methods. The similarities in the underlying reasons between the Doorstep Selling Directive and the Distance Selling Directive do not come to us as a surprise. Indeed, the high-pressure selling methods are inherent to doorstep selling and distance selling. It therefore seems rather straightforward that both Directives would share a similar base. Evidently, the difference lies in the scope of those Directives. Where the Doorstep Selling Directive requires a physical visit of a trader at your door, the Distance Selling Directive can be seen as its counterpart. The latter exclusively applies to contracts for which distance communication was used, up to and including the moment at which the distance contract is concluded. A few popular forms of distance communication to date are: teleshopping, electronic mail and radio.

Article 2(2) of the Directive defines a consumer as “any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession.”. Article 2(3) provides a definition of supplier “any natural or legal person who, in contracts covered by this Directive, is acting in his commercial or professional capacity.”. These definitions are very much in line with the majority of definitions. The use of the notion of supplier and a different wording of the commercial purpose are the only elements that stand out.

2.1.5 Distance Marketing of Financial Services Directive 2002/65/EC\textsuperscript{126}

Financial services were originally included in the proposal for the Distance Selling Directive, but due to the complexity and diversity of the European financial sector the European legislator deemed it desirable to adopt specific rules for those services.\textsuperscript{127} The underlying reasons and objective therefore, are similar to those of the Distance Selling Directive. Indeed, one of the main problems in distance sales lies in the anonymity of the contracting parties and the difficulty of verifying the territorial jurisdiction. The Distance Marketing of Financial Services Directive filled the gap that was created through the exclusion of financial services from the Distance Selling Directive.

Article 2(d) defines a consumer as “any natural person who, in distance contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession”. Article 2(c) defines a supplier as “any natural or legal person, public or private, who, acting in his commercial or professional capacity, is the contractual provider of services subject to distance contracts”.

2.1.6 Consumer Sales Directive 99/44/EC

The European legislator deemed it necessary to create a common set of minimum rules of consumer law in relation to the conformity of goods with the contract. As, according to the European legislator, this is the area where the consumer mainly experienced difficulties and it also appeared to be the main source of disputes with the seller. Consequently, the purpose of the Consumer Sales Directive is to protect consumers from non-conformity of goods with the contract, by providing a set of minimum rules that apply in the entire Community.

The second paragraph of Article 1(a) defines a consumer as “any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession”. The initial proposal, however, did state a different definition which was eventually altered. It defined a consumer as “any natural person who, in the contracts covered by this Directive, is acting for purposes which are not directly related to his trade, business or profession”. This definition appears to follow the Commission's reluctance to exclude the professional purpose in its entirety from the consumer definition. In the end, it seems that the European legislator was not convinced that persons who indirectly act in pursuit of a trade or profession should fall under the consumer definition. This follows from the fact that the word "directly" had been withdrawn from the definition. However, if the European legislator truly wanted to exclude even the slightest professional use, it should have opted for a different wording. As it is not entirely clear whether the wording “not related to his trade,...” has to be interpreted as “in no way related to his trade,...” or if it should be interpreted in such a manner that the slightest relation to his trade would suffice.

129 Recital 5-6 of the Consumer Sales Directive.
131 Firstly, the Commission wondered why different legal systems should apply to the same goods depending on the status of the purchaser: “why should the buyer of a motor car be subject to different rules as regards the legal guarantee, depending on whether he buys his car for private or for business purposes?”. Secondly, the Commission pointed out that the guarantee is generally conceived as an attribute of the product itself: COMMISSION, Green paper on guarantees for consumer goods and after-sales services, COM (93) 509 final, 83-95, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51993DC0509&from=EN accessed 8th July 2014.
132 This refers to the exceptional nature of the act.
133 This political decision is in line with the Di Pinto case, infra.
The second paragraph of Article 1(c) defines a seller as "any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession". This is the more common definition. The reference to "consumer goods" only serves the purpose of limiting the scope of the Directive to a certain type of goods.\textsuperscript{134}

2.1.7 Consumer Rights Directive 2011/83/EC\textsuperscript{135}

In 2004 the Commission launched the Review of the Consumer Acquis\textsuperscript{136} with the objective to simplify and complete existing and future legislation. In its introduction the Review stressed the important role the Common Frame of Reference (hereinafter CFR) would play in improving the coherence between existing and future legislation. The Green Paper on the Review of the Consumer Acquis of 2007\textsuperscript{137} reviewed eight consumer Directives. This resulted in three main issues of which the fragmentation of rules is the most important for our research. The Commission noted that the Consumer Acquis is fragmented in two ways. Firstly, due to the minimum harmonization approach of the consumer Directives, Member States are allowed to adopt more stringent rules in their national laws. Secondly, the consumer Directives are rather inconsistent themselves. One of those inconsistencies can be found in the various definitions of a consumer and a professional.

Shortly after, the Commission adopted a proposal with the aim of replacing four Directives in one single Directive, namely the Doorstep Selling Directive, the Distance Selling Directive, the Unfair Contract Terms Directive and the Consumer Sales Directive.\textsuperscript{138} Together with the targeted full harmonisation approach\textsuperscript{139}, the emphasis most certainly lay on simplifying the targeted Directives, as well as removing the inconsistencies between the latter.\textsuperscript{140} In the end, the

\textsuperscript{134} Article 1,§2,b of the Consumer Sales Directive defines consumer goods as “any tangible movable item” and excludes certain goods.


\textsuperscript{139} Full harmonisation, contrary to minimum harmonisation, does not allow Member States to provide more or less protection than the Directive in question. In other words, the minimum becomes the maximum level of protection and vice versa. In case of targeted harmonisation, only certain measures are fully harmonised. Article 4 of the Consumer Rights Directive comprises the harmonisation clause.

\textsuperscript{140} Like the Green Paper on the Review of the Consumer Acquis, the proposal, with reference to the Impact Assessment Report, favoured a common definition of consumer and trader. However, the Commission noted that this would have a very limited impact on the contribution to the better functioning of the
Consumer Rights Directive only replaced the Doorstep Selling Directive and the Distance selling Directive. The specificities and controversies regarding the full harmonisation approach will be discussed further.

It is important to note that despite the Commission’s original plans to use the CFR in improving the existing and future legislation, little use of it has been made by the proposal and only slightly more by the Directive. Which is unfortunate, mainly from a consumer’s point of view, as the Draft Common Frame of Reference provides a higher level of protection than the Directive. Noteworthy is Article I: 105 that defines a consumer as “any person who is acting primarily for purposes which are not related to his or her trade, business or profession”. The original proposal did not include the primary purpose in the consumer definition. Nevertheless, after amending the seventeenth recital, the Directive adopted the approach of the primary purpose in dual purpose transactions, therefore increasing the scope of the Directive significantly. However, if the main objective truly was to simplify the existing and future legislation, the primary purpose should have been included in the consumer definition, not in a recital.

Article 2(1) of the Directive defines a consumer as “any natural person who, in contracts covered by this Directive, is acting for purposes which are outside of his trade, business, craft or profession”. As mentioned above, the consumer definition has to be read as “any natural person who, in contracts covered by this Directive, is acting for purposes which are primarily outside of his trade, business, craft or profession. Not only does this increase the number of persons that will benefit from consumer protection provided for by the Directive. It also provides more legal certainty, as one of the complaints was that the consumer definitions were ambiguous in relation to dual purpose transactions. However, it should be noted that the term “primarily” itself is rather ambiguous. Amato proposes to solve the ambiguity by giving an express internal market. The main reason for a common definition of consumer and trader was to increase the quality of the legislation and thus the legal certainty.

For completeness sake, the Consumer Rights Directive also slightly amended the Unfair Contract Terms Directive and the Consumer Sales Directive.


Recital 17 of the Consumer Rights Directive states that “in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person’s trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer”.

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indication on the basis of the competence and of the distinction between “acts of the profession” and “acts relative to the profession”.  

Article 2(2) of the Directive defines a trader as “any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive”. Note that the European legislator adopted a single notion, the trader, to cover the various notions of the Directives it replaced. In addition, the trader definition makes it clear that not only privately owned, but also publicly owned persons can be qualified as a trader.

I already stated that the Directive is based on a full harmonisation approach. Nevertheless, Member States remain competent to maintain or introduce national legislation corresponding to the provisions of the Directive, or certain of its provisions, in relation to contracts that fall outside the scope of the Directive. The Thirteenth recital of the Directive expressly states that “Member States may decide to extend the application of the rules of this Directive to legal persons or to natural persons who are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or small and medium-sized enterprises”. In other words, the Member States are allowed to adopt a consumer definition which deviates from the consumer definition provided by the Directive. This is only logical since the consumer definition limits the personal scope of the Directive. Furthermore, since the legislative instrument is a Directive, Member States do not have to implement the Directive verbatim, nor is it required to implement the Directive in one single legal measure. Consequently, Member States may not only adopt a consumer definition that is wider than the Directive, the consumer definition may deviate in relation to the particular measures provided by one single Directive. As a result the consumer definitions will still differ between Member States.

147 The Doorstep Selling Directive referred to a person acting in pursuit of his trade as a trader, whereas the Distance Selling Directive referred to a supplier.
148 The Unfair Contract Terms Directive was the first Directive to expressly include “private or publicly owned” to its seller definition. It would appear that the European legislator reviewed the various trader definitions existent among the Consumer Directives and summarised all of it in one single definition.
149 Christian Twigg-Flesner and Daniel Metcalfe briefly examined whether the use of a Regulation may have been more opportune: C. TWIGG-FLESNER AND D. METCALFE, “The proposed Consumer Rights Directive – less haste, more thought?”, *ERCL* 2009, Vol. 5, No. 3, 368-391.
150 The Directive replaced the Doorstep and Distance Selling Directive with the aim of creating coherent legislation. Nonetheless, some Articles respectively refer exclusively to doorstep selling and distance selling. However unlikely, Member States may opt to adopt a wider definition in relation to doorstep selling without doing the same for measures concerning distance selling.
2.2.1 Product Liability Directive 85/374/EEC\textsuperscript{151} and General Product Safety Directive 2001/95/EC\textsuperscript{152}

The Product Liability Directive aims to protect every consumer from defective products by holding producers liable for damage caused by a defect in their products, irrespective of fault on the part of the producer. It was considered that the introduction of liability without fault on the part of the producer was the favoured approach to spread the risk inherent in modern technological production.

Interestingly enough, only the notion "producer" is defined in the Directive.\textsuperscript{153} Article 3 defined a producer as "the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.". The second paragraph of Article 3 adds that "any person who imports into the Community a product for sale, hire, lease or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of the Directive...". This definition includes all manufacturers, even those acting in pursuit of their private purposes. That is why the Directive provides producers of certain products the right to prove that their product belongs to any of the six categories mentioned in Article 7. In which case the manufacturer of such a product shall not be held liable.

For instance, a product that was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business.\textsuperscript{154} The definition of Article 3 is very broad indeed, as it refers to the economic producer\textsuperscript{155}, and thus covers more than the common trader definition. Nevertheless, if we take Article 7 into account "private producers"\textsuperscript{156} will fall outside the scope of the Directive on the condition that product was not manufactured for sale. Even though this proves the European legislator's intent to target commercial traders, rather than every sale, and is therefore in line with the intent of consumer acquis. It does not change the fact that the producer definition as such, is very different from the common trader definition.


\textsuperscript{153} Note that the European legislator opted for the use of the term "producer", contrary to the use of the term "trader". We admit that the term "producer" seems logical from a linguistic point of view and given the definition that followed. However, seeing as the legislator limited the definition in Article 7 of the Product Liability Directive to de facto that of a trader, the use of the same term "trader" was, would have been preferred.

\textsuperscript{154} Article 7(c) of the Product Liability Directive.

\textsuperscript{155} Which, in this context, roughly translates to a person who sells something to another person.

\textsuperscript{156} Meaning a person acting outside his trade.
The Directive does refer to injured person or consumer, yet without further defining those notions. Nebbia and Askham find that this approach can be justified by the awareness that some measures need to cover wider economic categories and that therefore also consumers who act in a professional capacity should be included.\textsuperscript{157} The provisions in this Directive are such measures, since it aims to hold producers responsible for their products. Nebbia and Askham further argue that it would be impractical and morally unacceptable to prescribe different degrees of product safety or liability according to the use the purchaser makes of the product.\textsuperscript{158} Hence, the lack of necessity to restrict the obligations of the producer to a certain category of consumers. So in theory this Directive considered the consumer as the \textit{economic} counterpart of the producer, as the buyer versus the seller. Yet, Article 9 of the Product Liability Directive reveals that damage to property can only be compensated if the product is of the type ordinarily intended for private use or consumption and was used by the injured person mainly for his own private use or consumption. Notwithstanding the intent to cover all \textit{users}, the provisions in Article 9 drastically limited the implied consumer notion. Nevertheless, this implied consumer notion is still wider than the definition introduced in most Directives.\textsuperscript{159}

The General Product Safety Directive has been drafted in a similar way, as the intent was also to protect all of the buyers from unsafe products, not just a certain category.\textsuperscript{160} Hence, the introduction of a producer definition\textsuperscript{161} without a definition of its counterparty. This producer definition also includes persons acting in pursuit of their private purposes. However, in its producer definition a reference was made to the notion "product", which in turn was defined as "any product which is intended for consumers or likely, under reasonably foreseeable conditions, to be used by consumers even if not intended for them, and is supplied or made available, whether for consideration or not, in the course of a commercial activity, and whether new, used or recondition". As a result, only producers pursuant of their trade or profession are targeted.\textsuperscript{162} This definition, as such, is in line with the common core of the trader definition.\textsuperscript{163}

\textsuperscript{158}Ibid.
\textsuperscript{159}Damage caused by death or personal injuries is covered irrespective of the use, which means that consumers acting in pursuit of their trade or profession will be entitled to compensation. Even in case of damage to property we can see a broader approach, allowing dual purpose transactions, provided that the private purpose was predominant.
\textsuperscript{160}It is called the General Product Safety Directive because it does not target a specific product. The Directive applies to all products to which no provisions apply or complements provisions with a narrower scope.
\textsuperscript{161}Article 2e of the General Product Safety Directive.
\textsuperscript{162}Article 2a of the General Product Safety Directive.
\textsuperscript{163}Note the contrast between producer definitions.
For completeness sake it should be noted that, contrary to certain aspects the Product Liability Directive, the General Product Safety Directive does not exclude consumers acting in pursuit of their trade or profession. In other words, all of the users can enjoy the full benefit of the General Product Safety Directive.


The reason why we discuss the Misleading Advertising Directive together with the Product Liability and General Safety Liability Directive is because all three of those Directives have in common that their consumer area was considered of such importance that they should cover wider economic categories. The aim was to protect every person from misleading advertising and thus no definition of producer or consumer was drafted. In 2005, however, the Unfair Commercial Practices Directive was adopted, replacing the Misleading Advertising Directive with regard to the business-to-consumer context. The Unfair Commercial Practices Directive therefore drafted a limited definition of “consumer” in Article 2(a) “any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession.”. Evidently, Article 2(b) also defines “trader” as “any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader”.

The adoption of the Unfair Commercial Practices Directive was more than a routine update of the former Misleading Advertising Directive. As the title may have implied, the Directive added consumer protection measures in relation to unfair commercial practices. The Misleading Advertising Directive, however, still plays its part in the business-to-business context. Even though the Misleading Advertising Directive was codified in 2006, it does not offer protection to persons acting in pursuit of their trader or profession from unfair commercial practices. It is remarkable that the legislator found it necessary to protect every person from misleading advertising.

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166 The Unfair Commercial Practices Directive is discussed here because it replaced the Misleading Advertising Directive with regard to the business-to-consumer relation.


advertising, yet “at the same time” only protect persons acting for purposes which are outside their trade, business, craft or profession from unfair commercial practices. It definitely seems odd in light of the EU’s emphasis on the necessity of reducing fragmentation.169

2.3 HOLIDAYS AND TRAVEL

2.3.1 Package Travel Directive 90/314/EEC170

The second programme marked the start of the development of Directives concerned with tourism, such as the Package Travel Directive. A strong impetus, however, was given by the Commission’s communication to the Council entitled “A New Impetus for Consumer Protection Policy”, which lists among the measures proposed by the Commission, the harmonization of legislation on packages.171

The aim of this Directive is to provide protection to consumers who entered into a package contract, i.e., a contract where the “organizer” organised transport and accommodation.172

Article 2 (4) of the Directive defines a consumer as “the person who takes or agrees to take the package (“the principal contractor”), or any person on whose behalf the principal contractor agrees to purchase the package (“the other beneficiaries”) or any person to whom the principal contractor or any of the other beneficiaries transfers the package (“the transferee”). This is a rather unusual definition. Usually the notion of “consumer” is expressly limited to a natural person acting in pursuit of his trade or profession. This wide definition of a consumer does not exclude any person. Even a person acting in pursuit of his trade or profession will be able to enjoy the benefits from this Directive.

Article 2(2) defines the consumer’s counterparty, the organiser, as “the person who, other than occasionally, organizes packages and sells or offers them for sale, whether directly or through a retailer.”. This definition has a wider scope since, contrary to most Directives, it is not limited to packages offered by a person who is acting in pursuit of his trade or profession. However, only when a person organises package travels on a regular basis will he be considered an organizer.

The Directive is about to undergo a significant change as it will be repealed in the near future, by the proposal for a revised Package Travel Directive173. Remarkable, other than the full

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172 For the sake of completeness, a package contract requires a pre-arranged combination of at least two of the following to be sold or offered for sale: transport, accommodation and other tourist services if they account for a significant proportion of the package. Article 2(1) of the Package Travel Directive.
harmonisation approach, is that the proposal of the new Directive changed the notion of consumer into “traveller”. The proposed Article 2(6) defined a traveller as “any person who is seeking to conclude or is entitled to travel on the basis of a contract concluded within the scope of this Directive, including business travellers insofar as they do not travel on the basis of a framework contract with a trader specialising in the arrangement of business travel.”. Clearly, the definition changed along with the notion. The proposed definition no longer includes all persons, as it excludes certain business travellers.\footnote{The European Consumer Organisation: BEUC agreed that some major businesses could be excluded, but it believed that the exclusion should not apply to NGO’s and small businesses. They argue that such would be coherent with the Consumer Rights Directive, which allows Member States to apply the Directive to NGO’s, start-ups or small and medium-sized enterprises; BEUC, Revision of the Package Travel Directive: Commission proposal COM (2013) 512 (X/2013/082-29/11/2013) available at http://www.beuc.org/publications/x2013_082_package_travel Directive.pdf accessed on 17th July 2014.} Nevertheless, the scope of the definition is still wider than the majority of Directives.

The proposal for a revised Package Travel Directive also altered the definition of an organiser, mainly by introducing a trader definition to which is referred to in the organiser definition. Article 3(7) defines a trader as “any person, who is acting for purposes relating to his trade, business, craft or profession.”. As a result, a person who regularly offers packages without pursuing a commercial activity will no longer be considered an organiser.\footnote{Under the current Package Travel Directive there is some doubt whether a non-profit or sporting organisation, acting on a regular basis, should be considered as an organiser: P. NEBBIA and T. ASKHAM, EU Consumer law, 276; G. HOWELLS AND T. WILHELMSSON, EC Consumer law in European business law library, Aldershot, Alsgate, 1997, 234.} Whereas certain trader definitions refer to the commercial activity as “acting in his commercial or professional capacity”, the proposal seems to have opted for a widening approach with regard to the wording “relating to his trade”.\footnote{The trader definition presented by the proposal for a new Package Travel Directive is not atypical. The more recent Directives seem to prefer the wording “relating to his trade”.} In reality the scope of both definitions is the same. One thing is certain, the use of a different wording, does not add to the legal certainty which one should be able to expect in this day and age.
2.3.2 Timeshare Directive 94/47/EC\textsuperscript{177} and 2008/122/EC\textsuperscript{178}

The need for a Timeshare Directive is not spelled out clearly in the Directive itself, but it is obvious that the great deal of timeshare scandals in the 1980s and 1990s certainly had its influence.\textsuperscript{179} The Directive aimed to establish a minimum basis of common rules which would protect the consumer’s timeshare rights, i.e., the annual right to use accommodation during a certain period of time in a holiday property or several properties.

In the Timeshare Directive the notion of consumer was not used to describe the person consuming goods or services. Instead the term “purchaser” was used. According to Article 2 of the Directive a purchaser is “any natural person who, acting in transactions covered by this Directive, for purposes which may be regarded as being outwith his professional capacity, has the right which is subject of the contract transferred to him or for whom the right which is the subject of the contract is established.”. Again a different notion is used to refer to the consumer and even though the wording of the definition itself is different, it is in line with the common core of consumer definitions.

The consumer’s counterparty in this Directive is called the “vendor” and is defined in Article 2 as “any natural or legal person who, acting in transactions covered by this Directive and in his professional capacity, establishes, transfers or undertakes to transfer the right which is the subject of the contract”. Other than a different notion and the different wording of the definition, nothing appears to stand out. This definition is in line with the common core of trader definitions.

The new Timeshare Directive of 2008 repealed the former Timeshare Directive and is currently the governing measure.\textsuperscript{180} The new Directive adopted and defined the notion of consumer in Article 2(f) as “a natural person who is acting for purposes which are outside that person’s trade, business, craft or profession”. The new Directive also introduced and defined the notion of trader in Article(e) as “a natural or legal person who is acting for purposes relating to that person’s trade, business, craft or profession and anyone acting in the name or on behalf of a trader”. This removed the differences in the wording of the aforementioned definitions and


\textsuperscript{179} P. NÉBBIA and T. ASKHAM, EU Consumer law, 279; Howells and Wilhelmsson give several reasons why the need for consumer protection is dire: G. HOWELLS and T. WILHELMSSON, EC Consumer law, 250.

\textsuperscript{180} The new Directive is aimed at full harmonisation.
notions. It demonstrates the legislator’s awareness of the inconsistency of similar notions and definitions between the various Directives.

2.4 **LABELLING**


Before the Price Indication Directive\(^ {183}\) came into force, two other Directives were the governing measures on price indication, the Foodstuffs Price Indication Directive\(^ {184}\) and the Non-food Price Indication Directive\(^ {185}\). The programme of 1975 clearly indicates that price indication is one of the priorities in enabling consumers to make informed decisions.\(^ {186}\) In order to meet those objectives the Foodstuffs Price Indication Directive was adopted. Since the latter Directive only focused on the food sector the natural follow-up was to adopt a similar directive for non-food products. Both those Directives had the same intent, to create a system that would make it easier for consumers to compare prices at the place of sale.\(^ {187}\)

Neither of the Directives that were repealed by the Price Indication Directive, defined the notion of consumer. The Foodstuffs and Non-food Price Indication Directive, however, did limit the scope to the common consumer area by referring to the *final consumer* in the first paragraph of Article 1 and by expressly excluding “consumer”\(^ {188}\) purchases for professional or commercial reasons in the second paragraph of Article 1. The notion of seller is mentioned once in both Directives, but just like the notion of consumer it is not defined. The emphasis lies on the products that are offered for sale. This will generally be the case for sellers acting in pursuit of a

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\(^{183}\) Sometimes referred to as the Unit Prices Directive.


\(^{187}\) I refer to the preamble of the Foodstuffs and Non-food Price Indication Directive.

\(^{188}\) The Foodstuffs Price Indication Directive dates back to 1979, a time before the multiplicity of consumer Directives and thus a time before the various legal definitions of the notion of consumer. That and its context made it clear that the latter Directive referred to the economic consumer. Nevertheless, the use of the notion of buyer, customer or purchaser would have been preferred. The Non-food Price Indication Directive, about nine years later, excluded the same category of customers but did so without referring to any person. It simply stated that the Directive would not apply to “products bought for the purpose of a trade or commercial activity”.

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commercial activity.\textsuperscript{189} Even more so, since the second paragraph of Article 1 of the Non-food Price Indication Directive exempts, \textit{inter alia}, private sales.\textsuperscript{190}

The Price Indication Directive repealed the Foodstuffs Price Indication Directive and the Non-food Price Indication Directive. The intent was to reform the rather complex system of price indication established by the latter two Directives\textsuperscript{191}. In other words, the goal was to create a new and simplified system. This new system should substantially improve consumer information and subsequently enable consumers to evaluate and compare the price of products in an optimum manner.\textsuperscript{192} As a result consumers should be able to make informed decisions on the basis of simple comparisons.\textsuperscript{193}

The Price Indication Directive did adopt a definition of consumer and trader.\textsuperscript{194} Article 2(e) of the Directive defined a consumer as “any natural person who buys a product for purposes that do not fall within the sphere of his commercial or professional activity”. The wording in that Article does not provide a clear definition, as it is unclear what exactly the “sphere of his commercial or professional activity” entails.\textsuperscript{195} Article 2(d) of the Directive defined the trader as “any natural or legal person who sells or offers for sale products which fall within his commercial or professional activity.”. Even though the trader definition does not contain the word “sphere” it reflects the same ambiguity as the consumer definition.

\textbf{2.5 Electronic Commerce}

\textbf{2.5.1 E-Commerce Directive 2000/31/EC}\textsuperscript{196}

Whereas the majority of consumer Directives strongly focus on the consumer, the main objective in the E-Commerce Directive is to set up a common legal framework for the provision of information society services.\textsuperscript{197} The Directive established harmonised rules on issues such as the transparency and information requirements for online service providers, commercial

\textsuperscript{189}The second paragraph of Article 1 of the Foodstuffs Price Indication Directive does, however, exempt certain commercial sellers.

\textsuperscript{190}The Foodstuffs Price Indication does not exempt private sales, but expressly leaves it up to the Member States to do so.

\textsuperscript{191}Recital 5 of the Price Indication Directive.

\textsuperscript{192}Recital 5-6 of the Price Indication Directive.

\textsuperscript{193}Recital 6 of the Price Indication directive.

\textsuperscript{194}However, the original proposal, like the older the Directives, did not provide a definition of consumer or trader: \textit{COMMISSION, Proposal for a European Parliament and Council Directive on Consumer Protection in the Indication of the Prices of Products offered to Consumers}, COM (95) 276 final.

\textsuperscript{195}The French and Dutch translations use a similar ambiguous wording.


communications, electronic contracts and limitations of liability of intermediary service providers.\textsuperscript{198} Although the main priority is to improve the internal market by facilitating the provision of information society services across borders, the legal framework adds to the legal certainty and consumer confidence. Furthermore, some of the provisions are directly beneficial to the consumer, which is why it deserves a place among the consumer Directives.\textsuperscript{199}

The initial proposal did not include a consumer definition.\textsuperscript{200} Which is understandable, as the initial proposal made no distinction between recipients of services acting in- or outside their commercial capacity. The Directive, however, does contain a consumer definition. Article 2(e) defines a consumer "any natural person who is acting for purposes outside of his or her trade, business or profession". Nevertheless, it is of little significance as the provisions apply to all recipients of services.\textsuperscript{201} Which is rather remarkable, since Consumer Directives that included a consumer definition normally use that definition to limit the scope of the Directive.

The consumer’s counterparty is referred to as the “service provider” and is defined in Article 2(b) as "any natural or legal person providing an information society service". This definition is in accordance with the common core, since the reference to an information society service implies the commercial activity.

2.6 JURISDICTION AND CONFLICT OF LAW RULES\textsuperscript{202}

The Brussels Convention of 1968\textsuperscript{203} provided a set of rules regulating which courts had jurisdiction in legal disputes of a civil or commercial nature between individuals, resident in different member states of the Community.\textsuperscript{204} However, it was not until 1978 that consumer contracts were introduced in the Brussels Convention.\textsuperscript{205} The scope of section 4 was expanded to include such consumer contracts. From then on, section 4 specifically focused on consumer

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\textsuperscript{199} E.g. : Article 5 of the E-commerce Directive requires that the service provider renders information to the recipients of the service.


\textsuperscript{201} The recipients mainly benefit from the information requirements which the service supplier is obliged to fulfil. The only difference is that certain information requirements shall not apply to a recipient acting in pursuit of a commercial activity, on the condition that the parties agreed otherwise.

\textsuperscript{202} When I refer to “the Regulations” I am referring to the Brussels I and Ia Regulation and the Rome I Regulation.


contracts as opposed to the initial section 4, which only included sales of goods on instalment credit terms and loans repayable by instalments.\textsuperscript{206} Evidently, a definition of a consumer was added in Article 13, which defined a consumer as "a person [that concluded a contract] for a purpose which can be regarded as being outside his trade or profession". However, the revised section 4 did not provide a trader definition.\textsuperscript{207}

Several years later the Rome Convention of 1980\textsuperscript{208} was adopted.\textsuperscript{209} A Convention that would govern the choice of law in relation to contractual obligations in the Community until 2009. With regard to the consumer contracts the Rome Convention was very much in line with the Brussels Convention, in the sense that it only applied to certain types of consumer contracts. Article 13 defines a consumer as "a person [that concluded a contract] for a purpose which can be regarded as being outside his trade or profession,...", which is essentially the same definition as provided for by the Brussels Convention.\textsuperscript{210} Not only that, both Conventions share a great number of correlations. Consequently, the case law of the Brussels Convention can be used to interpret certain provisions of the Rome Convention.\textsuperscript{211} Note that the Rome Convention also did not provide a trader definition.

In 2002 the Brussels I Regulation\textsuperscript{212}, which replaced the Brussels Convention, came into force. The Regulation increased the scope of the consumer contracts provisions to cover not just certain, but all contracts concluded between a consumer and a professional.\textsuperscript{213} The Rome I Regulation\textsuperscript{214}, which came into force in 2009 and replaced the Rome Convention, also revised

\textsuperscript{206} The initial section 4 of the Brussels Convention, however, did not expressly limit the personal scope to persons acting in pursuit of a private purpose. It only referred to a buyer and borrower respectively, without defining either.

\textsuperscript{207} Apparently it appeared obvious that the counterparty of a consumer in relation to consumer contracts had to be a professional. On a side note, the initial section 4 did refer to a seller or lender, without defining either of those notions.


\textsuperscript{210} Which can be explained easily, as the substance of the definition of a consumer contract was taken from Article 5 of the then preliminary draft convention on the law applicable to contractual and non-contractual obligations, later to become – with reference to contractual obligations only – the Rome Convention. Referred to in the Schlosser Report: Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, signed at Luxembourg, 9 October 1978. [1979]OJ C 59.


\textsuperscript{213} All contracts minus the exception mentioned in the third paragraph. Article 15, first paragraph, (c) of the Brussels I Regulation.

the scope of the consumer contracts. Since that date, all contracts concluded between a consumer and a professional fall under the scope of the consumer contracts provisions.\textsuperscript{215} As a result, the revised versions of the Conventions (the Brussels I and Rome I Regulation) were in line once more. The consumer definitions are nearly exactly the same as those provided for by their predecessors (the Conventions). All of the consumer definitions define a consumer as “a person [that concluded a contract] for a purpose which can be regarded as being outside his trade or profession”, whereas the Rome I Regulation defines a consumer as “a natural person [that concluded a contract] for a purpose which can be regarded as being outside his trade or profession”. The introduction of the word “natural” in the consumer definition of the Rome I Regulation adds to the legal quality and clarity of the provision. However, it should not be seen as a reduction of the scope of the consumer definition, since the consumer definitions of the Conventions have always implied to only apply to natural persons.\textsuperscript{216}

Contrary to the Conventions, these Regulations do define a trader, namely as “a person who pursues commercial or professional activities”.\textsuperscript{217}

Those Regulations were built on the principles of the Conventions in the majority of regulated points.\textsuperscript{218} The adequate protection for so-called weaker parties to contractual obligations, such as the consumer, is such an underlying principle which we find in both Conventions and Regulations.\textsuperscript{219} Due to the similar principles and strong correlations, it is possible to use the case law of the Conventions to interpret certain provisions of the Regulations.\textsuperscript{220}

For the sake of completeness, it should be noted that the Brussels Regulation has been revised in 2012.\textsuperscript{221} With the exception of two provisions which already apply today\textsuperscript{222}, the new Brussels I \textit{a} Regulation will apply as of 10\textsuperscript{th} January 2015.\textsuperscript{223} However, the new Brussels I \textit{a} Regulation does

\textsuperscript{215} Article 6, fourth paragraph of the Rome I Regulation provides several exceptions.
\textsuperscript{216} The Brussels I Regulation continues the tendency of limiting the consumer definition to natural persons.
\textsuperscript{217} The Brussels I Regulation merely defines the trader without expressly referring to such a notion; Article 6,§1 Rome I and Article 15,§1 Brussels I.
\textsuperscript{219} Indeed, the initial text of the Brussels Convention did not expressly provide additional protection to weaker parties to the extent as it does now (Brussels I and I\textit{a} Regulation). Yet, the initial section 4 shows awareness of such weaker parties and did provide additional protection in two specific cases (contracts).
\textsuperscript{222} Article 75 and 76 of the Brussels I\textit{a} Regulation.
\textsuperscript{223} Article 81 of the Brussels I\textit{a} Regulation of 2012.
not introduce any key changes in the consumer area, nor does it alter the consumer and trader definition provided for by its predecessor.

It is important to make two remarks concerning the relation between other acts of Community legislation (consumer Directives) and the Regulations. Firstly, the consumer definition provided for by the Regulations is sufficient to conclude whether the Regulations are applicable, regardless of whether the case is covered by a particular consumer Directive. In other words, the consumer definition cannot (at least not without reservations) be associated with consumer definitions under any other consumer Directive. Secondly, under the Regulations the consumer (protection) is treated as an exception, whereas consumer protection is the general rule under the various consumer Directives. For instance, Article 3 of the Rome I Regulation comprises the general rule, the freedom of choice, after which several exceptions are summed up in the following articles. It is inherent to exceptions to interpret such provisions restrictively. Consequently, we should be cautious when comparing case law based on consumer Directives, as they are not necessarily bound by the same restrictive interpretation.

3 EVALUATION OF THE VARIOUS CONSUMER AND TRADER DEFINITIONS

3.1 INCONSISTENT WORDING

If the review of the many consumer and trader definitions has shown us one thing, it is that the wording could not be any more diverse. For instance, the Doorstep Selling Directive defines a consumer as “a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession”, whereas the former Timeshare Directive defines a purchaser as “any natural person who, acting in transactions covered by this Directive, for purposes which may be regarded as being outwith his professional capacity, has the right which is subject of the contract transferred to him or for whom the right which is the subject of the contract is established”.

Martin Ebers correctly stated that the differentiation in wording also occurs in other language versions of the consumer Directives and thus is not limited to the English version of the

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224 J. Bělohlávek, Rome Convention-Rome I Regulation : commentary : new EU conflict-of-laws rules for contractual obligations, 1142, No. 06.205

225 Note that not even the notion of consumer is used to refer to a natural person acting in pursuit of private purposes. This, however, is one of the few Directives where the notion of consumer is not used.
Nevertheless, it should be noted that the German definitions appear to be more consistent in their wording.

Originally the older consumer definitions only referred to a person's trade or profession. In more recent consumer and trader definitions the European legislator appears to feel pressured, by the need for legal certainty, to stress that such a person should also respectively act outside or in his *business* or *craft*. The introduction of these two terms, however, added little to the existing consumer definition and did not create a more narrow definition. The intent was simply to make sure that only persons acting in pursuit of private purposes would benefit from the consumer protection rules. In a similar fashion but with regard to the trader definition it should be noted that the wording “acting in the name of or on behalf of” was merely meant to stress the fact that the extension of the trader would also be considered as a trader. In other words, trader definitions that do not mention the wording “acting in the name of or on behalf of”, also cover those persons. The same, however slightly more controversial, can be said about the wording “irrespective of whether publicly or privately owned”.

It is noteworthy that the European legislator has many different ways of referring to the purpose of a consumer or trader. In general, we can see two trends in the consumer definition. A consumer is a person who can either be acting for purposes which "can be regarded as outside" or which “are outside” of his trade or profession. From a legal-linguistic point of view one could easily argue that the first trend provides more wiggle room than the second. The trader definitions are characterised by similar inconsistencies. In certain trader definitions the purpose is often referred to as “in the course of his trade”, “relating to his trade”, “is acting in his commercial activity” or “pursues commercial activities”. Even though the intent and scope of the consumer and trader definitions is the same in the majority of definitions, it is poorly reflected by the inconsistency towards their wording.

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227 For instance, the English wording in the Doorstep Selling, the Distance Selling and the Consumer Sales Directive differs slightly with regard to the purpose of the contract (infra table 2). Whereas the German wording always refers to “zu einem Zweck, handelt der nicht ihrer beruflichen oder gewerblichen Tätigkeit zugerechnet werden kann”.

228 The Brussels I and Rome I Regulation are an exception in that respect, as they still only refer to a person's trade or profession.

229 Sometimes neither of those four terms are used. Instead, as is the case in the Price Indication Directive, the consumer definition may refer to a commercial or professional activity. The same is true for the trader definition where a trader's purpose is sometimes referred to as “commercial or professional activity [or capacity]”.

230 C-59/12 BKK Mobil Oil Körperschaft des öffentlichen Rechts v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV. [2013], not yet published.

231 This enumeration is not exhaustive.
It is rather unfortunate that the wording in the definitions of these two significant notions is not more consistent. Nevertheless, within the category of the consumer contracts there appears to be an almost uniform consumer definition. Norbert Reich states that the notion of the term “consumer” is most unambiguous in contract law. Reich refers to a consumer in contract law as “any natural person who upon the conclusion of a contract is acting for purposes which are outside of his trade, business or profession”. Thus, omitting at least one ambiguous aspect of certain consumer definitions in this category, namely the word “regarded”. Aside from his distilled consumer definition in contract law, which omits the word “regarded”, I find it hard to fully agree with his statement. Primarily, due to the fact that the second part of the definition does not consider the dual purpose issue. Regardless, what remains true is that out of all consumer areas, contract law provides one of the most consistent consumer definitions. The same, however, cannot be said about the trader definition in contract law. The wording of the trader definition is generally more diverse than that of the consumer definition. This is, regrettably, no different in the contract law area.

3.2 TENDENCY TOWARDS CONSISTENCY

It is indeed most unfortunate that notions, which are that important to limit the personal scope of the majority of the consumer acquis, were defined with little regard to its consistency. Fortunately, the European legislator became aware of this issue and granted a certain priority to take measures in that respect.

A tendency towards a more consistent consumer and trader definition can now be seen in the more recent consumer Directives. They are proof of the European legislator’s intent to simplify and complete existing and future legislation, as well as to reduce the fragmentation of rules. For instance, the new Timeshare Directive did away with the purchaser definition and introduced the more common consumer definition, namely “a natural person who is acting for purposes which are outside that person’s trade, business, craft or profession”. Said Directive also turned away from the vendor definition and introduced the more common trader definition,

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232 H. W. MICKLITZ, N. REICH and P. ROTT, Understanding EU consumer law, 47, 1.37.
233 Aside from the package travel directive (and timeshare directive)...niet onder dezelfde categorie
234 The only reviewed category with a better track record, when it comes down to consistency, can be found in the procedural law and rules on the conflict of laws category. However, one should be aware that this category only contains two legal acts with a different scope.
235 Not only the wording of the trader definition, but even the term “trader” strongly differs between the various consumer Directives.
namely “a natural or legal person who is acting for purposes relating to that person’s trade, business, craft or profession and anyone acting in the name or on behalf of a trader”.

This tendency is even stronger in the Consumer Rights Directive, which unified the consumer definitions of the Doorstep Selling and Distance Selling Directive. What I find most striking is the importance the European legislator seems to dedicate to the creation of a uniform consumer definition. This appears from the fact that the European legislator wanted to introduce a dual purpose approach, yet without directly altering the consumer definition. Thus introducing the dual purpose approach in a recital.238 Another aspect which shows the Directive’s focus on consistency is the fact that the new consumer definition no longer mentions “can be regarded as outside”, but simply states “are outside”. Oddly enough, said Directive was not as consistent in relation to the trader definition. With regard to the trader definition the linguistic unification seemed to have lost the fight from the fragmented legal certainty.239

At first glance the proposal for a new Package Travel Directive seems to break with this tendency. Instead of referring to a consumer, as the current Package Travel Directive does, it refers to a traveller. In reality, however, this does not appear to be the case at all. The consumer definition of the current Package Travel Directive strongly deviates from the common consumer definition. In actuality, the consumer definition of the latter Directive is the adoption of the economic consumer in a legal act. Therefore, we can but welcome the use of a different term to describe the economic consumer. In other words, since the Package Travel Directive does not provide protection to a different (wider) category of persons, the use of a different term seems appropriate. A term such as “traveller” seems to fit nicely, considering the scope of the Directive. The focus on the consistency of definitions is also apparent from the trader definition which the proposal introduced.240

238 Recital 17 of the Consumer Rights Directive.
239 The trader definition in the Consumer Rights Directive unnecessarily emphasises “privately or publicly owned” and “acting in name or on behalf of”, which are thought to already be comprised by the more basic trader definition. The wording “relating to his trade,...”, however uncommon in the older trader definitions, appears to be the preferred wording today (the new Timeshare Directive, the Consumer Rights Directive and the proposal for a new Package Travel Directive use it).
240 As contrary to its predecessor, which used a different term and wording.
The table below shows the European legislator’s preferred wording today.

<table>
<thead>
<tr>
<th>Formerly frequently used wording</th>
<th>Current wording</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consumer</td>
<td>Consumer</td>
</tr>
<tr>
<td>“can be regarded as outside”</td>
<td>“are outside”²⁴¹</td>
</tr>
<tr>
<td>“trade or profession”</td>
<td>“trade, business, craft or profession”</td>
</tr>
<tr>
<td>Formerly frequently used wording</td>
<td>Current wording</td>
</tr>
<tr>
<td>Trader</td>
<td>Trader</td>
</tr>
<tr>
<td>“commercial or professional capacity”</td>
<td>“trade, business, craft or profession”²⁴²</td>
</tr>
</tbody>
</table>

Table 1: comparison of formerly and currently used European legislator’s wording

3.3 AMBIGUOUS WORDING

The lack of consistency in wording between the various consumer and trader definitions, however bothersome, is not the only issue at hand. As I mentioned above, the various consumer definitions, aside from several exceptions, do not deal with the dual purpose issue. The majority of consumer definitions do not expressly include or exclude dual purpose transactions, leaving a trail of doubt behind. The use of the wording “outside his trade” does not provide an adequate answer. The use of the wording “can be regarded as outside his trade” only adds to the confusion. One could of course argue that, had the European legislator intended to protect persons acting in pursuit of a dual purpose, he would have done so by expressly including the dual purpose. This argument, however, stands or falls depending on the European legislator’s awareness of the issue and the legislative approach, which is more than likely to be the case.²⁴³

The fact that the dual purpose approach of the Consumer Rights Directive is considered to widen²⁴⁴ the consumer definition, could be attributed to the extent to which it allows dual purpose contracts to fall under the consumer definition.²⁴⁵ In my opinion, the widening aspect of the dual purpose approach of said Directive should also be attributed to the increase in legal certainty. In any case, the European legislator seems to be increasingly aware of the ambiguity surrounding the majority of consumer definitions with regard to the dual purpose issue. This may very well result in a general tendency towards the inclusion of dual purpose contracts in the consumer definition.

²⁴¹ The Regulations still hold on to the formerly used wording.
²⁴² The Regulations still hold on to the formerly used wording.
²⁴⁵ Not only contracts that serve a negligible professional or commercial purpose, but every dual purpose contract as long as the private purpose is predominant.
The trader definition is imbued with a similar issue. If we were to interpret the trader definition literally, transactions that are not directly linked to a person's trade would not fall under the wording "his trade". The addition of "in the course of his trade" or "relating to his trade" are less ambiguous in that respect.

3.4 **Main Characteristics**

Regardless of the diverse wording and ambiguous aspects of the consumer and trader definition, it is clear that there are several characteristics that recur in the majority of consumer and trader definitions. In principle, there are two main characteristics of the consumer and trader definition.

The consumer definition is generally limited to:

- a natural person
- who is acting outside his trade, business, craft or profession. 246

The trader definition on the other hand is generally limited to:

- a natural or legal person
- who is acting for purposes relating to his trade, business, craft or profession.

These characteristics reveal a mixed approach in defining both notions. By which I mean that a consumer or trader is not defined by the type of person alone, but also takes into account for which purpose the transaction will be used. Thus a personal and functional approach is used to limit both definitions. Connected: zie case di pinto

**Chapter 3: The ECJ’s Interpretation of the Consumer and Trader Definition**

1. **Approach**

Chapter 2 has revealed that the consumer definition of the consumer *acquis* shares two main characteristics, namely a natural person acting in pursuit of a private purpose. In this chapter I will examine those characteristics by digging through the ECJ case law, based on the consumer *acquis* which we discussed in the precedent chapter. The trader will not always be expressly discussed, since the majority of consequences will clearly follow from the evaluation of the two main characteristics of the consumer.

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246 Hereinafter more commonly referred to as private purpose.
I will firstly discuss the natural person because of several reasons. First of all, the characteristic of the private purpose is so closely connected to that of the natural person, that I find it hard to discuss the characteristic of the private purpose without the knowledge of the characteristic of the natural person. Moreover, it seems fitting to work our way up to the more complex issues, which happen to be related to the characteristic of the private purpose. Finally, if there were to be one single reason, it would be that there can be no action without an actor.247

The second characteristic to be discussed will therefore, evidently be that of the private purpose. Specific attention will be given to the dual purpose issue.

The manner in which the various case law will be presented is rather straightforward. In principle the facts of every case will be stated before its analysis. These facts will be followed by the most important arguments of the ECJ, during which we will also pay attention to the Opinion of the Advocate General. Finally, every case will be concluded with a concise summary of the case in question, with regard to its relevance of the main characteristics of the consumer definition.

After the analysis of every case individually, I will evaluate the ECJ’s interpretation of the main characteristics. Finally, this will be followed by a table that lists the consumer and trader definitions as adopted by the consumer acquis, the ECJ’s interpretation of those definitions and the deviation found in certain legal acts of the consumer acquis.

2 MAIN CHARACTERISTICS

2.1 NATURAL PERSON

A lay person in the area of law would most likely find the discussion of the natural person to be redundant. Why indeed, would a natural person mean anything other than ... a natural person. The discussion is essentially driven by the fact that certain Member States felt the need to protect legal persons that were not acting in pursuit of their trade.248 Therefore, they wondered whether a natural person could be interpreted in such a manner that it would include certain legal persons. It is not uncommon in the area of law to adopt one thing, yet to mean another. It is not possible for a legislator to cover all possible situations in one static rule. Consequently, the interpretation of law by the appropriate court is essential to keep law up to date and to counter

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247 The answer to the question “Which came first, the actor or the action?” is simply, the actor.
248 This was the case in the former Belgian Trade Practices Act, which defined a consumer as a natural or legal person buying products, goods or services exclusively for private purposes. The new consumer definition, however, only refers to natural person. For more examples I refer to H. Schulte-Nölke, C. Twigg-Flesner, and M. Ebers, (eds.), EC Consumer Law Compendium –Comparative Analysis- Annotated Compendium including a comparative analysis of the Community consumer acquis, 795.
any accidental omissions. In that respect it would not have come to us as a surprise if the ECJ had decided that certain legal persons could, indeed, be considered as natural persons with regard to the consumer acquis.\textsuperscript{249} The most important and only case to expressly deal with this issue is the Idealservice case.\textsuperscript{250}

It is imperative to note that, even though I discuss the main characteristics separately, both are closely connected. Therefore, it is more than likely that certain cases which were discussed under one characteristic will also hold information concerning the other characteristic.

2.1.1 Bertrand v Paul Ott Kg [1978]\textsuperscript{251}

Société Bertrand (hereinafter Bertrand) concluded a contract with Paul Ott KG (hereinafter Paul). Bertrand agreed to buy a machine on the basis of a price to be paid by two equal bills of exchange payable at 60 and 90 days. The question was whether such a contract could be held to be the sale of goods on instalment credit terms within the meaning of Article 13 of the Brussels Convention.

This case dates back to June 1978 when Section 4 of Title II of the Brussels Convention was not yet restricted to the legal consumer. This was only several months before the Brussels Convention was amended in October 1978.\textsuperscript{252} The amendment, inter alia, expressly introduced the limitation of the personal scope of section 4 by adopting a consumer definition.

What makes this case important is that the ECJ held that the rules in question were to be interpreted strictly due to its derogation from the general principle and in conformity with the objectives pursued by Section 4.\textsuperscript{253} Consequently, the jurisdictional advantage should be restricted to buyers who are in need of protection because of their weaker economical position in comparison with the sellers. The ECJ clarified that a buyer is in an economically weaker position when he is a private final consumer and is not engaged in trade or professional activities.\textsuperscript{254}

It was the Government of the United Kingdom that stated that it is illogical to regard all buyers who arrange for payment on deferred terms as being in need of protection, and that it would be

\textsuperscript{249} For instance, small and medium-sized enterprises and charitable associations.

\textsuperscript{250} Joined cases C-541/99 and C-542/99 Cape Snc v Idealservice Srl and Idealservice MN RE Sas v OMAI Srl [2001], ECR I-9049.

\textsuperscript{251} C-150/77 Bertrand v Paul Ott KG [1978] ECR-01431 (hereinafter Bertrand case).

\textsuperscript{252} Council convention 78/884/EEC on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, [1978] OJ L 304.

\textsuperscript{253} Bertrand case, No. 21.

\textsuperscript{254} Bertrand case, No. 21.
more sensible to speak of consumer protection. Since the protection of consumers is a general problem in Community law as well as in many national laws, it seemed evident to target this category of buyers as they are typically in a position of inferiority.

Accordingly, the ECJ ruled that due to the fact that both parties were companies, Article 13 of the Brussels Convention could not be applied.

Shortly after, the Brussels Convention was revised. The material scope of section 4 was expanded to include consumer contracts, and not just sales of goods on instalment credit terms and loans repayable by instalments. Evidently a consumer definition was added and in doing so the interpretation of Article 13 of the Brussels Convention in the Bertrand case was codified.

The reference made by the ECJ to the private final consumer seems to imply that a consumer can only be a natural person. Therefore, we consider this case to be the first in which the ECJ expressed, however not in those exact words, itself to favour a consumer that is a natural person who is acting outside his trade.

2.1.2 Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH [1993]

Following the appearance of an advertisement in the German press, a natural person instructed an American firm of brokers, Hutton Inc., to carry out currency and security future transactions under an agency contract. In order to do so he dealt with the American firm’s German subsidiary, Hutton GmbH.

After investing considerable sums in 1986 and 1987, which were almost entirely consumed by losses, he assigned his claims to a German trust company, Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen GmbH (hereinafter TVB).

TVB brought an action before the Landgericht München for the recovery of the claims against the American firm of brokers, Hutton, which had in the meantime been taken over by another American company, namely Shearson Lehman Hutton Inc. The Landgericht held the action to be inadmissible, yet on appeal the Oberlandsgericht München overturned that decision and held that the Landgericht did have jurisdiction. Hutton Inc., however, appealed on a point of law against that decision to the Bundesgerichtshof, which in turn referred four questions to the ECJ.

255 Bertrand case, Opinion of the Advocate General, No. 3.
256 Ibid.
The questions as such, are not as interesting as what the ECJ decided to examine before answering those questions. The ECJ found it appropriate to ascertain whether the conditions for the application of Article 13 of the Brussels Convention were met. To do so, the ECJ needed to examine whether TVB, the assignee of the claims, was able to claim to have the capacity of a consumer solely because the assignor was a consumer.

The ECJ stated that the exceptional protection, worded in Article 13 et seq of the Brussels convention, offered to consumers is inspired by the concern that the latter needs protection as this party is deemed to be economically weaker and less experienced in legal matters than the other party to the contract. Therefore it was clear that this sort of protection should not be extended to a party acting in pursuance of his trade or profession.

Accordingly, the ECJ ruled that because TVB was acting in pursuance of his trade, it did not have the right to claim the capacity of a consumer. Hence, TVB could not benefit from the protection offered to consumers.

Most interesting to note is that in paragraph 22 the ECJ referred to a previous case, namely the Bertrand Case, to emphasise that only a private final consumer, not engaged in trade or professional activities is protected by the said provisions. In other words, this case confirmed the private final consumer approach expressed in the Bertrand case, and with it the implication that only natural persons can be consumers.

2.1.3 Cape Snc v Idealservice Srl Case [2001]

Idealservice MN RE Sas and Idealservice Srl (hereinafter Idealservice) concluded two contracts with respectively OMAI and Cape on 14 September 1990 and 26 January 1996, for the supply to the latter two of vending machines. The vending machines were installed on the premises of those companies and were intended to be used exclusively by their staff.

In relation to those contracts, OMAI and Cape instituted proceedings contesting a payment order, arguing that the clause granting exclusive jurisdiction, included in the contracts, was

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259 Shearson Lehman Hutton case, No.18.
260 Important to note is that TVB was not acting in the name nor on behalf of the consumer. TVB bought the claim from the consumer, and thus was merely acting on its own account. This should be clearly distinguished from the middlemen issue, for which I refer to: H.W. Micklitz, J. Stuyck, E. Tuyckyn, D. Droshout, J.-S. Broghetti, S. Camara Lapuente, V. Colaert, G. Howells, E. Poillot, P. Rott, L. Tichy, C. Twigg-Flesner and T. Van Dyck, *Cases, materials and text on consumer law*, Portland, Hart, 2010, 34; Commission, *Green Paper on the Review of the Consumer Acquis*, COM (2006) 744 final, 16.
261 Bertrand case, No. 21.
262 Joined cases C-541/99 and C-542/99 *Cape Snc v Idealservice Srl and Idealservice MN RE Sas v OMAI Srl [2001], ECR I-9049* (hereinafter Idealservice case).
unfair pursuant to Italian law and could therefore not be enforced against the parties.\footnote{263} By doing so OMAI and Cape had hoped to set the payment order aside.

The issue here was that the application of the legislative rules concerning unfair terms depended on the fact whether OMAI and Cape could be considered as consumers. Since the terms “seller or supplier” and “consumer” referred to in Italian law\footnote{264} constituted the transposition of the Unfair Contract Terms Directive, it was necessary to find the ECJ’s interpretation of those two terms.

In that respect three questions were referred to the ECJ:

“(1) Is it possible to regard as a consumer an undertaking which, by a contract with another undertaking using a form produced by the latter in so far as the contract falls within the scope of its normal business activity, acquires a service or merchandise for the sole benefit of its employees, which is wholly unconnected with and remote from its normal trade and business? Can it be said in such circumstances that that party acted for purposes which do not relate to the undertaking?

(2) If the foregoing question is answered in the affirmative, is it possible to regard any party or entity as a consumer when it is acting for purposes not relating or conducive to its normal trade or business, or does the term consumer relate only to natural persons, to the exclusion of any other?

(3) Can a company be regarded as a consumer?\footnote{265}

The ECJ found it appropriate to consider the second and the third questions first, since the national court essentially sought to ascertain whether the term “consumer” as defined in Article 2 (b) of the Unfair Contract Terms Directive should be interpreted as referring exclusively to natural persons.\footnote{266}

Idealservice, the French and Italian governments, the European Commission and the Advocate General were all of the opinion that the term “consumer” referred to natural persons exclusively. The European Commission argued that it is clear that only natural persons fall under the term “consumer”, as Article 2(b) of said Directive specifically provides that “any natural person” must be regarded as a consumer. Indeed, a strict literal reading would lead to the conclusion that the provision only relates to natural persons and thus that legal persons are excluded.\footnote{267}
In addition, the Advocate General pointed out that, the given interpretation appeared to be confirmed by the objective of the Community legislation at issue.\[268\] He referred to the Océano case in which the ECJ noted that “the system of protection introduced by the [Unfair Contract Terms] Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms”\[269\]. The Advocate General concluded that companies and legal persons generally don’t find themselves in a weaker position, and that therefore no reason was at hand to grant those parties protection.\[270\]

The Advocate General’s final argument was based on a reference to the Shearson Lehman Hutton case and the Benincasa case in which the ECJ interpreted the term consumer respectively as meaning a private final consumer\[271\] or as referring to an individual\[272\]. The Advocate General found that this could only imply that a natural person is concerned.\[273\]

The ECJ shared a similar view and added that while there is no reference to legal persons in the consumer definition, there is a reference in Article 2(c) of the Directive which defines the term “supplier or seller”. The supplier definition refers to both natural and legal persons. Consequently, a consumer can only be a natural person in respect of this Directive, otherwise the consumer definition would have included legal persons.

In accordance with the foregoing the ECJ ruled that the term “consumer”, as defined in article 2(b) of the Directive, should indeed be interpreted as referring to natural persons exclusively. Due to the fact that in this case it concerned legal persons (OMAI and Cape), that entered into a contract, the ECJ did not find it necessary to answer the first question. Since the national court should be able to rule over the case in question by virtue of the answers given to the second and third question.\[274\]

The Advocate General did, however, give his view on the first question, yet without actually answering the question. The Advocate General found it rather difficult to give a straight answer, regarding the fact that the person acting is a natural person.\[275\] He referred to the Di Pinto case where the ECJ had to decide whether a trader canvassed with a view to the conclusion of an

\[268\] Idealservice case, Opinion of the Advocate general, No.13.
\[269\] Océano case, No. 25
\[270\] Idealservice case, Opinion of the Advocate general, No.16.
\[271\] Shearson case, No. 22.
\[272\] Benincasa case, No. 17.
\[273\] Idealservice case, Opinion of the Advocate general, No.17.
\[274\] Idealservice case, No. 18.
\[275\] Idealservice case, No. 25.
advertising contract concerning the sale of his business was to be regarded as a trader or a consumer within the meaning of the Doorstep Selling Directive. The ECJ ruled that the acts of selling a business, as mentioned above, are “managerial acts performed for the purpose of satisfying requirements other than the family or personal requirements of the trader”\textsuperscript{276}.

By referring to the family or personal requirements in the Di Pinto case, the ECJ had shown that the status of the consumer as a natural person affects the meaning of terms such as “to act for purposes which are outside his trade, business or profession.”\textsuperscript{277} Consequently, the Advocate General found it unnecessary, even useless, to answer the first question.

It is rather unfortunate, yet understandable, that the first question was not answered. The ECJ should have taken this opportunity to clarify the ambiguous wording “acting outside his trade”. In doing so, a clear and complete interpretation of “acting outside his trade” could have lifted the ambiguity surrounding the dual purpose issue.

It should be noted that limiting the consumer to a natural person has the secondary effect that one person in relation to a similar transaction will be considered as a consumer or not at all, depending on whether the purchase was made via a legal person. This will primarily be the case for the small businessman. A common example is that of a hairdresser who buys chairs for his private home.\textsuperscript{278} In principle, the hairdresser will be seen as a consumer in light of the consumer acquis if the hairdresser was not acting through a legal person. That same person, with the same lack of bargaining power and experience, will not be considered as a consumer in case he acted through a legal person.\textsuperscript{279} At first glance, this may appear to be discriminatory. One should, however, not forget that the small businessman can always opt not to act through a legal person. The reason for using a legal person to enter into contracts that serve the private purpose, is often motivated by financial benefits.\textsuperscript{280} The option of not acting through a legal person, presents itself with more practical problems with regard to e.g. charitable associations. Thus, due attention should still be given to the issue.

In conclusion, pursuant of the Unfair Contract Terms Directive a consumer can only be a natural person, thereby confirming the narrow scope of the consumer definition. Consequently, legal persons entering into contracts which solely serve their private purposes cannot be considered

\textsuperscript{276}Di Pinto case, No.16.
\textsuperscript{277}Idealservice case, Opinion of the Advocate General, No. 28.
\textsuperscript{278}H.W. Micklitz et al., Cases, materials and text on consumer law, 31.
\textsuperscript{279}Stuyck correctly assumed that in the approach of the ECJ the information asymmetry does not seem to play a role: K. Boele-Woelki and W. Grosheide (eds.), The Future of European Contract Law : essays in honour of Ewoud Hondius to commemorate his retirement as Professor of Civil Law at the University of Utrecht, Alphen aan den Rijn, Kluwer Law International, 2007, 429
\textsuperscript{280}Mainly fiscal “benefits”. 
as consumers with regard to the consumer *acquis*. However, seeing as the Unfair Contract Terms Directive is based on minimum harmonisation, Member States are free to introduce a consumer definition which is wider than its European variant.

2.2 *PRIVATE PURPOSE*

In the precedent chapter we noted that the functional aspect of the majority of consumer definitions was very ambiguous, and not only due to the inconsistency of the wording. It was unclear what the extent of the private purpose was. The Dietzinger case revealed that private purpose can be considered very strictly. Essentially, it was impossible for a person to know whether he would still be considered as a consumer if a contract also (slightly) served a professional purpose. The importance lies in the field of the dual purpose contracts. So far, this issue has only been expressly addressed in the Gruber case in relation to the Brussels Convention.

Furthermore, it was unclear whether a natural person acting in pursuit of a future trade could be considered as a consumer. The ECJ dealt with this issue in the Benincasa case and (indirectly) the Berliner Kindl Brauerei case. The Benincasa case also provided more insight with regard to the private purpose.

The trader, on the other hand, faced ambiguity with regard to the functional aspect of the trader definition. The main question was whether actions which were secondary in relation to his trade, should still be considered as "acting for the purpose of his trade".

2.2.1 *Criminal proceedings v Patrice Di Pinto* [1991]281

Mr. Di Pinto, manager of a private limited liability company "Groupement de l'Immobilier et du Fond de Commerce", published a periodical in which businesses are advertised for sale. In July 1985 and during 1986 and 1987, Mr Di Pinto arranged for the canvassing of traders wishing to sell their business, for the purpose of persuading them to insert advertisements in the periodical which he published. The contracts Mr. Di Pinto concluded did not mention the right of cancellation within a seven-day period for reflection as prescribed by French law.

The Cour d'Appel de Paris found Mr. Di Pinto guilty by default for having violated those provisions. Mr. Di Pinto appealed against the enforcement of that judgment, and in the course of that appeal the Cour d'appel de Paris referred two questions for a preliminary ruling on the interpretation of the Doorstep Selling Directive to the ECJ.

The first question is of great significance:

“Is a trader canvassed at home in connection with the sale of his business entitled to the protection accorded to consumers by the [Doorstep Selling Directive]?”

Essentially, the Cour d'Appel de Paris sought to ascertain whether a trader who was canvassed for the purpose of concluding an advertising contract concerning the sale of his business should be regarded as a consumer under the Doorstep Selling Directive.

The ECJ stated that, pursuant of Article 2 of said Directive, the criterion for the application of protection lies in the connection between the transactions which are subject of the canvassing and the professional activity of the trader wishing to sell his business. This means that the latter can only claim the applicability of the Directive, if the transaction in respect of which he was canvassed lies outside his trade or profession. The ECJ continued by stating that Article 2 of the Directive, which is drafted in general terms, did not make it possible, with regard to acts performed in the context of such a trade or profession, to draw a distinction between normal acts and those which are exceptional in nature.\(^{282}\)

The ECJ considered that acts which are preparatory to the sale of a business, such as the conclusion of a contract for the publication of an advertisement in a periodical, are connected with the professional activity of the trader. Even though such acts would bring the running of the business to an end, they are "managerial acts performed for the purpose of satisfying requirements other than the family or personal requirements of the trader''.\(^{283}\)

The Commission, however, did not see it that way. The Commission favoured the application of the Directive, because it was convinced that the trader was as unprepared as an ordinary consumer. The Commission implied the need for a distinction between certain acts, by taking into account that the abilities and competencies of a person differ depending on the act. In other words, the Commission favoured a subjective criterion to define a consumer.

The Advocate General's view is consistent with that of the Commission and the French government. One of the arguments of the Advocate General is based on the textual analysis of Article 2 of said directive. According to Article 2 a consumer is he who acts outside of his trade or profession and a trader is he who acts in his commercial or professional capacity. Due to the use of the possessive pronoun "his", the Advocate General came to the conclusion that when a trader engages in certain preparatory steps which would lead to the sale of his business it could not be seen as within the framework of his trade or profession.\(^{284}\) His main argument, however, was not

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\(^{282}\) Di Pinto case, No. 15.
\(^{283}\) Di Pinto case, No. 16.
\(^{284}\) The Advocate General gave the example of a butchers, baker or hotelier selling his business: Di Pinto case, Opinion of the Advocate General, No. 21.
based on a literal reading of Article 2, but on the key finding that the average trader has little to no experience or know-how concerning the preparatory steps that will lead to the sale of his business.\footnote{Di Pinto case, Opinion of the Advocate General, No.22.} Meaning, that such traders are as unprepared as consumers.

The ECJ did not follow the reasoning of the European Commission and that of the Advocate General, since there was every reason to believe that a normally well-informed trader knows the value of his business and that of every measure required by its sale.\footnote{Di Pinto case, No. 18.} Consequently, if a trader enters into an undertaking, it cannot be due to the lack of forethought and solely under the influence of surprise.\footnote{Ibid.} Thus the court concluded that a trader canvassed with a view to the conclusion of an advertising contract concerning the sale of his business is not to be regarded as a consumer protected by said directive.

In conclusion, the private purpose must be interpreted very strictly, meaning that only acts performed for the purpose of satisfying family or personal requirements can be considered to fall under the consumer definition. The ECJ hereby confirms the objective approach of European consumer law. As a result, a trader performing acts which do not belong to his area of expertise, as well as acts which are only indirectly connected to his trade or profession, cannot fall under the consumer definition.

\noindent \textbf{2.2.2 Francesco Benincasa v Dentalkit Srl [1997]}\footnote{C-269/95 Francesco Benincasa v Dentalkit Srl. [1997] ECR I-3767 (hereinafter Benincasa case).} 

In 1987 Dentalkit developed a chain of franchised shops in Italy specializing in the sale of dental hygiene products. In 1992 Mr Benincasa concluded a franchising contract with Dentalkit with the intent of setting up and operating a shop in Munich. In that contract Dentalkit authorized Mr Benincasa to exploit the exclusive right to use the Dentalkit trademark within a particular geographical area. Dentalkit further undertook to supply goods bearing that trademark, to support him in various spheres, to carry out the requisite training, promotion and advertising activities, and finally not to open any shop within the geographical area covered by the exclusive right.

In return, Mr Benincasa undertook to equip business premises at his own cost, to exclusively stock Dentalkit’s products, not to disclose any information or documents concerning Dentalkit and to pay it a sum of LIT 8 million as payment for the cost of technical and commercial assistance provided when opening the shop, as well as 3\% of his annual turnover. By reference to Italian law, the parties specifically approved a clause of the contract reading ‘The courts at
Florence shall have jurisdiction to entertain any dispute relating to the interpretation, performance or other aspects of the present contract' by separately signing it.

Mr Benincasa set up his shop, paid the initial sum of LIT 8 million and made several purchases, for which he did not pay. In the meantime, however, he had ceased trading altogether. Subsequently, he brought an action against Dentalkit before the Landgericht Munich I, where he sought to have the franchising contract declared void on the ground that it was void under German law. He also claimed that the sales contracts concluded subsequently, pursuant to the basic franchising contract, were void.

Mr Benincasa argued that the Landgericht München I had jurisdiction as the court of the place of performance of the obligation in question within the meaning of Article 5(1) of the Brussels Convention. He argued that the clause of the franchising contract conferring jurisdiction on the courts in Florence did not have the effect of derogating from Article 5(1) as regards his action to avoid the contract. Since that action sought to have the whole franchising agreement declared void and, therefore, also the jurisdiction clause. Mr Benincasa further argued that, since he had not yet started trading, he should be regarded as a consumer within the meaning of the first paragraph of Article 13 and the first paragraph of Article 14 of the Brussels Convention.

The Landgericht München I declined jurisdiction on the ground that the jurisdiction clause, included in the franchising contract, was valid and that the contract was not a contract concluded by a consumer. The national court found that it was clear from the wording and the purpose of Article 13 of the Brussels Convention that an agreement intended to establish a trade or profession must be deemed to have been concluded for the purpose of a trade or profession. Hence, the contract in question was not deemed a consumer contract under Article 13 of the Brussels Convention.

Mr Benincasa appealed against that decision to the Oberlandesgericht München, which stayed proceedings and referred three questions to the Court for a preliminary ruling, of which we will only examine the first question as it holds the most significance:

"(1) Is a plaintiff to be regarded as a consumer within the meaning of the first paragraph of Article 13 and the first paragraph of Article 14 of the Convention even if his action relates to a contract which he concluded not for the purpose of a trade which he was already pursuing but a trade to be taken up only at a future date (here: a franchising agreement concluded for the purpose of setting up a business)?"
The ECJ pointed out that regard should be had to the principle laid down by the case law\textsuperscript{289}, according to which the concepts used in the Brussels Convention, which may have a different content depending on the national law of the Contracting States, must be interpreted independently. Principally, by reference to the system and objectives of the Brussels Convention, in order to ensure that the Brussels Convention is uniformly applied in all the Contracting States. The ECJ emphasised that this should definitely apply to the notion of consumer within the meaning of Article 13 et seq. of the Brussels Convention, in so far as it determines the rules governing jurisdiction\textsuperscript{290}.

The notion “consumer”, defined in the first paragraph of Article 13 of the Brussels Convention, had to be interpreted as a private final consumer not engaged in trade or professional activities. According to settled case law, this follows from the wording and the function of that provision\textsuperscript{291}.

The ECJ is of the same opinion as the Advocate General when it comes to determining whether a person has the capacity of a consumer or not. The Advocate General stated that the same natural person may be a consumer for certain purposes and an entrepreneur for others\textsuperscript{292}. That is why the ECJ found it necessary that reference was made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned\textsuperscript{293}.

Subsequently, the ECJ considered that only contracts concluded for the purpose of satisfying an individual’s own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the economically weaker party\textsuperscript{294}. The ECJ continued stating that specific protection sought to be afforded by those provisions was unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity was only planned for the future, since the fact that an activity was in the nature of a future activity does not divest it in any way of its trade or professional character\textsuperscript{295}. The ECJ considered that such an interpretation is consistent with the wording, the spirit and the aim of the provisions concerned, to consider that the specific protective rules enshrined in them apply only to contracts.

\textsuperscript{289} Bertrand case, No. 14-16 and 19; Shearson Lehman Hutton case, No 13.
\textsuperscript{290} Benincasa case, No. 12.
\textsuperscript{291} Benincasa case, No. 15; Shearson Lehman Hutton case, No. 20 and 22.
\textsuperscript{292} Benincasa case, Opinion of the Advocate General, No. 38.
\textsuperscript{293} Benincasa case, No. 16; Benincasa case, Opinion of the Advocate General, No. 38.
\textsuperscript{294} Benincasa case, No. 17.
\textsuperscript{295} Ibid.
concluded outside and independently of any trade or professional activity or purpose, whether present or future.  

Accordingly, the ECJ interpreted the first paragraph of Article 13 and the first paragraph of Article 14 of the Brussels Convention, in such a manner that it excludes a person that concluded a contract with a view to pursuing a trade or profession in the future.

Some of the arguments definitely appear invalid, in particular the argument of the economically weaker party. It is hard to imagine that a person who is going to pursue a trade or profession in the future, but is not acting in his trade or profession at the time of the transaction, is in an equally strong position as a person who is pursuing a trade or profession. In my opinion such persons are just as weak as the customer who acts outside his present and future trade.

However, it is possible that the ECJ saw the “future trader” as an actual trader because of the business risk he was willing to take. In other words, he may have appeared to be economically stronger than a consumer due to the business risk he was willing to take. Indeed, a consumer does not take such business risks and solely acts in the private sphere. The basis for this can be found, as stated above, in the fact that the ECJ found it necessary that reference was made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned. The Advocate General emphasised that the activity in question, and not the existing personal circumstances, was the factor taken into account when special rules of jurisdiction in relation to certain contracts were laid down in Article 13 of the Brussels Convention. If we were to merely consider the subjective situation of a franchisee with no business experience Mr. Benincasa would clearly be considered as a consumer.

In conclusion, the ECJ ruled that the objective situation of a person had to be considered and not the subjective situation. Which lead to the view that, to be a consumer, a contract should always be concluded outside and independently of any trade or professional activity or purpose, whether it is concluded for the present or future. Note that the emphasis in this case does not lie on contracts that aim on a future trade, but also on the fact that the contract should be concluded

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296 Benincasa case, No.18.
297 Benincasa case, No.19.; On a sidenote, the Advocate General referred to Article 1 of the Commission Regulation (EEC) No 4087/88 of 30 November 1988 on the application of Article 85 of the Treaty to categories of franchise agreements, as it also presumes that a franchise agreement is entered into by two economic entities operating on a commercial basis: Benincasa case, Opinion of the Advocate General, No. 31.
298 A similar reasoning can be found in relation to the Gruber case: H.W. Mickenitz et al., Cases, materials and text on consumer law, 53; C-464/01 Johann Gruber v Bay Wa AG [2005] ECR I-00439.
299 Benincasa case, No. 49.
independently of any trade. Which seems to imply that a person can never be considered as a consumer in case of dual purpose contracts.

2.2.3 Bayerische Hypotheken-und Wechselbank AG v Edgard Dietzinger [1998]300

Mr Dietzinger, son of a trader, had given a written guarantee of up to DM 100,000 of his parents' obligations to the bank. This occurred during an unsolicited visit of an employee of the bank. Mr Dietzinger was not informed of his right of cancellation. About one year after the conclusion of the agreement, the bank claimed DM 50,000 from Mr Dietzinger under the guarantee. Subsequently, Dietzinger sought to renounce the guarantee in accordance with German law.

During the litigation of this case before the Bundesgerichtshof a question was referred to the ECJ for a preliminary ruling:

"Where a contract of guarantee or suretyship is concluded under German law between a financial institution and a natural person who is not acting in that connection in the course of his trade or profession, in order to secure a claim by the financial institution against a third party in respect of a loan, is it covered by the words "contracts under which a trader supplies goods or services to a consumer""

In essence, the Bundesgerichtshof wanted clarity on whether a contract of guarantee falls under "contracts under which a trader supplies goods or services to a consumer" as prescribed by the Doorstep Selling Directive.

Even though there were good arguments as to why a contract of guarantee should not fall under the scope of said Directive and despite the opposition of several countries, including Germany and the Advocate General, the ECJ concluded otherwise. The ECJ ruled that such contracts do fall under the scope of the Directive. However, one must not forget that in order to directly benefit from a consumer Directive, you have to be a consumer. According to the ECJ this meant that a) a natural person serving a private purpose had to enter into a contract of guarantee with a financial institution and that b) the third party which benefited from this guarantee also had to be a natural person acting in pursuit of a private purpose in respect of the principal agreement.301 The ECJ basically applied the accessorium sequitur principale principle.

301 Dietzinger case, No. 23.
The reason why Mr Dietzinger could not apply the Directive had to do with the fact that the principal agreement was concluded in pursuit of a trade. Which resulted in Mr Dietzinger not being able to be considered as a consumer pursuant of the Directive.

In conclusion, the ECJ considered a contract of guarantee to fall under the notion “contract” of the Doorstep Selling Directive. Furthermore, the ECJ stressed that it is not enough to be a consumer entering in a contract of guarantee. The *third beneficiary party* also has to be a consumer with regard to the principal agreement. In other words, the ECJ retained a strict interpretation concerning the private purpose, in the sense that both the principal agreement and the contract of guarantee must be entered into by natural persons who were not acting in pursuit of a trade.

2.2.4 Berliner Kindl Brauerei AG v Andreas Siepert [2000]302

Mr Diesterbeck was granted a loan of DEM 32.000 and a lease of a property of the value of DEM 58.523 by a firm called “Berliner Kindl Brauerei” (hereinafter Brewery). These loans were granted with the sole purpose of enabling the financing of the opening of Mr Diesterbeck’s restaurant. Another person, Mr Siepert, declared in writing to stand as a guarantee for the obligations of Diesterbeck to the Brewery, up to an amount of maximum DEM 90.000. The declaration of Mr Siepert was not made in connection with any trade or profession engaged in by the latter. Moreover, Mr Siepert was not informed of his right to cancel the declaration of guarantee.

Since the principal debtor (Mr Diesterbeck) failed to meet his obligations, the Brewery called in the loans and obtained, by judgment of the Landgericht Rostock of 25 July 1997, an order directing Mr Diesterbeck to pay the sum of DEM 28 952.43 together with interest. In his capacity as guarantor, Mr Siepert was ordered to pay the same amount, by judgment in default given on 8 December 1997.

Following the order of payment, Mr Siepert applied to have that judgment set aside. The Landgericht Potsdam decided to stay proceedings and to refer the following question to the ECJ for a preliminary ruling:

“Does a contract of guarantee concluded by a natural person not acting in the course of a trade or profession fall within the scope of the [Consumer Credit Directive], if it serves to secure the repayment of a debt which the principal debtor did not incur in the course of a trade or profession already being pursued by him?”

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It was common ground that a contract of guarantee was not a credit agreement in the meaning of article 1 (2) (c) of the Consumer Credit Directive. Nevertheless, the Commission as well as the Spanish and French government argued that a contract of guarantee should fall under the scope of said Directive because of the link between the contract of guarantee and the credit agreement. The Commission and the French government agreed that the meaning of the credit agreement did not include the contract of guarantee. They, however, attributed the lack thereof to an unintentional oversight. The Commission and the French government did apply the same conditions as under the Dietzinger case, meaning that it is necessary for both the principal agreement and the contract of guarantee to be entered into by natural persons who are not acting in pursuance of a trade or profession.

Due to the fact that a contract of guarantee is not a credit agreement in the meaning of said Directive, it must be determined whether they fall within its scope by implication, in the light of its scheme and aims. The ECJ considered the objectives of the Consumer Credit Directive to be the creation of a common consumer credit market and to inform the principal debtor (Diesterbeck) regarding the implications of his commitments. There are barely any provisions that may offer safeguard to the guarantor, suggesting the Directive was not designed to apply to contracts of guarantee.

By virtue of its scheme and aims, the Consumer Credit Directive is to be distinguished from the Doorstep Selling Directive. Whereas the Consumer Credit Directive is ratione materiae strictly limited to credit agreements, the Doorstep Selling Directive has a much broader scope and is ratione materiae only limited to the supply of goods or services that were negotiated away from business premises. Needless to say, the purpose pursued by a natural person has to outside his trade in both Directives. The main objective of the Doorstep Selling Directive is to protect consumers that entered into a contract on the initiative of a trader, by giving them a general right to terminate a contract, since the consumers may not have been able to appreciate all the implications. It was essentially on the basis of that objective that the ECJ ruled that a contract of guarantee cannot be excluded a priori from the scope of said Directive in the Dietzinger case.

No support can be found in the wording of the Consumer Credit Directive to widen the scope to cover contracts of guarantee, solely based on the fact that such agreements are ancillary to the principal agreement whose performance they underwrite. Neither was there any support in its

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303 Berliner Kindl Brauerei case, No. 15; Berliner Kindl Brauerei case, Opinion of the Advocate General, No. 44.
304 Berliner Kindl Brauerei case, No. 18.
305 Berliner Kindl Brauerei case, No. 20.
scheme and aims. Therefore, the ECJ ruled that such contracts of guarantee did not fall under the scope of said Directive.

This meant that even if both the principal agreement and the contract of guarantee were entered into by natural persons who were not acting in pursuit of a trade, the guarantor would still not be protected under the Consumer Credit Directive.

What is most interesting about this case is that the principal debtor (Mr Diesterbeck) was granted a loan for the sole purpose of enabling him to finance the establishment of a commercial activity. Technically, Mr Diesterbeck was not yet exploiting a commercial activity. The Brewery argued that in such a case the principal debtor cannot be seen as a consumer under the Directive, since the latter was acting in pursuit of a (future) trade.\textsuperscript{307} That way the Brewery disputed the admissibility of the order for reference. Unfortunately, the ECJ did not pay very much attention to the consumer aspect. In doing so, the ECJ missed a great opportunity to give a clear ruling on whether natural persons who are entering into contracts for the purpose of starting up a trade should either be considered as consumers or traders in light of the consumer Directives. Admittedly, we already had the Benincasa case in which the ECJ ruled that a person entering into contract for the purpose of a future trade cannot be considered as a consumer. The Benincasa case, however, was based on the strict interpretation of Section 4 of the Brussels Convention, due to its derogation from the general principle worded in Article 2 of the Brussels Convention. Therefore, it was not entirely clear whether the interpretation in the Benincasa case should apply to the consumer Directives.

Nevertheless, the ECJ implied that such a person cannot be considered as a consumer under the Directive.\textsuperscript{308} Since, the ECJ considered the transposition of the Directive in German law to have provided for a wider consumer definition. Under German law the principal debtor was considered as a consumer when granted credit to set up a commercial activity.

In conclusion, a contract of guarantee does not fall under the former Consumer Credit Directive. Furthermore, the fact that the ECJ considered the German transposition of the consumer definition to be wider than that of the Directive, makes it apparent that a natural person who was granted credit to commence a commercial activity cannot be considered as a consumer under the scope of the Directive. This leads us to conclude that a natural person does not already have to act in pursuit of an existing trade or profession, at the time of the transaction, in order to

\textsuperscript{307} Berliner Kindl Brauerei case, Opinion of the Advocate General, No. 21.
\textsuperscript{308} The ECJ referred to the minimum harmonisation clause of Article 15 of the Directive, followed by the German rule: Berliner Kindl Brauerei case, No. 7-8.
fall outside of the scope of the consumer definition. In that respect, this case is in line with the Benincasa case.

2.3 Dual Purpose Transactions

Dual purpose transactions (also known as “mixed situations”) are transactions that do not exclusively serve a private or business purpose. As seen above, one of the main characteristics of a consumer is that he acts outside his trade, and thus a consumer must act within the frame of the private purposes. The Di Pinto case revealed that one is not acting for private purposes when the act is a “managerial act performed for the purpose of satisfying requirements other than the family or personal requirements of the trader”. In other words, when one acts for the purpose of satisfying family or personal requirements one acts for a private purpose.

In the Benincasa case the ECJ ruled that consumer contracts should always be concluded outside and independently of any trade or professional activity or purpose, which appears to imply that only pure private purpose contracts can be considered to fall under the consumer definition. As mentioned above, we do have our reservations concerning the transposition of the interpretation of this case to the consumer Directives.

The dilemma here is what should be done with a person that acts for both private and business purposes. Should the slightest display of a business related purpose rule him out as a consumer? Should we only let those persons whose business related purpose is so marginal in comparison with their private purpose enjoy the benefits of a consumer? Or should we resort to a mathematical measure, accepting only those persons whose private purpose is predominant. In case the ECJ would opt for the latter option, another question arises, namely what standards should be used to measure whether the private or professional use of goods or services is predominant.

Those questions have been expressly addressed in the Gruber case in relation to the Brussels Convention, which will be discussed below.

2.3.1 Gruber v Bay Wa AG [2005]

Mr Gruber, a farmer, owned a farm building constructed around a square (“Vierkanthof”), situated in Austria, close to the German border, of which a dozen rooms were used as a dwelling for himself and his family. In addition over 200 pigs were kept there, as well as fodder silos and a large machine room. Between 10 and 15 per cent of the total fodder necessary for the farm was

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309 Di Pinto case, No. 16; Di Pinto case, Opinion of the Advocate General No. 26.
also stored there. The area of the farm building used for residential purposes was slightly more than 60 per cent of the total floor area of the building.

With the desire to replace the roof tiles of his farm building, Mr Gruber contacted Bay Wa, a German firm that also published and distributed brochures in Austria. Mr Gruber made several telephone enquiries to an employee of Bay Wa concerning the different types of tiles and the prices, stating his name and his address without mentioning the fact that he was a farmer. The employee made him an offer by telephone, yet Mr Gruber wished to inspect the tiles on site. On his visit to Bay Wa’s premises, he was given a written quotation. During that meeting Mr Gruber told Bay Wa’s employee that he had a farm and wished to tile the roof of the farm building. He stated that he also owned ancillary buildings that were used principally for the farm, but he did not expressly state whether the building to be tiled was used mainly for business or private purposes. The following day a contract was concluded by correspondence.

When the tiles were delivered by Bay Wa, Mr Gruber determined that the tiles showed significant variations in colour, despite the warranty that the colour would be uniform. As a result the roof would have to be re-tiled. He therefore decided to bring proceedings on the basis of the warranty together with a claim for damages, seeking reimbursement of the cost of the tiles (ATS 258 123) and of the expense of removing them and re-tiling the roof (ATS 141 877) and a declaration of liability for any future expenses.

Mr Gruber instituted proceedings before the Landesgericht Steyr (Austria). Bay wa, however, contested the court’s competence under Article 13 of the Brussels Convention. The Landesgericht Steyr dismissed Bay Wa’s objection of lack of jurisdiction and ruled that it was competent to hear the dispute. According to the Landesgericht Steyr, the conditions for the application of Article 13 (3) of the Brussels Convention were satisfied. The Landesgericht Steyr stated that where a contract has a dual purpose, the predominant purpose, whether business or private, must be ascertained.312

Bay Wa’s appeal before the Oberlandesgericht (Higher Regional Court) Linz was upheld and Mr Gruber’s claim was dismissed on the ground that Austrian courts did not have jurisdiction to hear the dispute. Subsequently, Mr Gruber brought an appeal before the Obster Gerichtshof (Supreme Court) against the judgment of the Oberlandesgericht Linz. The Obster Gerichtshof referred several questions to the ECJ of which the two most relevant questions were:

“1. Where the purposes of a contract are partly private, does the status of “consumer” for the purposes of Article 13 of the Convention depend on which of the private and the trade or

312 Gruber case, No. 19.
professional purposes is predominant, and what criteria are to be applied in determining which of
the private and the trade or professional purposes predominates?

3. In case of doubt, is a contract which may be attributed both to private and to trade or
professional activity to be regarded as a consumer contract?”

First of all, the ECJ looked at the scheme of the Brussels Convention in order to determine how
the term “consumer” was to be interpreted. The general principle, mentioned in Article 2, is that
the courts of the Contracting State in which the defendant is domiciled have jurisdiction. Thus,
the provisions that derogate from this general principle are to be strictly interpreted. This
means that the term "consumer" cannot be interpreted in such a fashion that it would give rise
to cases not envisaged by the Brussels Convention.\footnote{Gruber case, No. 32.}

The ECJ went on stating that the rules of special jurisdiction for consumer contracts "serve to
ensure adequate protection for the consumer as the party deemed to be economically weaker and
less experienced in legal matters than the other, commercial, party to the contract, who must not
therefore be discouraged from suing by being compelled to bring his action before the courts in the
Contracting State in which the other party to the contract is domiciled".\footnote{Gruber case, No. 34.}

Based on the scheme of the rules of jurisdiction put in place by the Brussels Convention, as well
as the rationale of the special rules concerning consumer contracts, the ECJ concluded “that
those provisions only cover private final consumers, not engaged in trade or professional activities,
as the benefit of those provisions must not be extended to persons for whom special protection is
not justified”.\footnote{Gruber case, No. 35.}

The ECJ expressly referred to paragraphs 16 to 18 of the judgment in the Benincasa case. In this
case the ECJ stated that the concept of “consumer” for the purposes of the special rules
concerning consumer contracts\footnote{First paragraph of Article 13 and the first paragraph of Article 14 of the Brussels Convention.}must be strictly construed, reference being made to the
position of the person concerned in a particular contract, having regard to the nature and aim of
that contract and not to the subjective situation of the person concerned. Due to the fact that one
person may be regarded as a consumer in relation to certain supplies and as an economic
operator in relation to others. The ECJ held that only contracts concluded outside and
independently of any trade or professional activity or purpose, solely for the purpose of
satisfying an individual’s own needs in terms of private consumption, are covered by the special
rules laid down by the Convention to protect the consumer as the party deemed to be the
weaker party. Such protection is unwarranted in the case of contracts for the purpose of a trade or professional activity.\textsuperscript{317}

The ECJ referred to the paragraphs 40 and 41 of the Opinion of the Advocate General. In essence, the Advocate General stated that even though it may be possible to determine the proportion of a dual purpose contract that serves, respectively, a private or professional purpose, it is not possible to deem the customer to be both in a weaker position than the supplier and on equal footing with the supplier in relation to one and the same contract. According to the Advocate General this means that a dual purpose customer can never rely on the exceptional protection, afforded by Article 13 \textit{et seq} of the Brussels Convention, provided that the trade or professional purpose is significant.

The ECJ found support for this interpretation in the fact that the definition of the notion of consumer in the first paragraph of Article 13 of the Brussels Convention is worded in clearly restrictive terms, using a negative turn of phrase ("contract concluded ... for a purpose ... outside [the] trade or profession").\textsuperscript{318} Furthermore, as mentioned above, the specific consumer rules are a derogation from the general principle, the consumer definition must, therefore, be strictly interpreted.\textsuperscript{319} According to the ECJ the interpretation is also dictated by the fact that classification of a contract can only be based on an overall assessment of it, since it serves one of the main objectives of the Brussels Convention, namely the avoidance of multiplication of bases of jurisdiction as regards the same legal relationship.\textsuperscript{320} As the Advocate General correctly stated "It would be absurd and contrary to the very purpose of the Convention, if one court were to have jurisdiction over a dispute concerning part of the value of a contract, while another court has jurisdiction as to the remainder".\textsuperscript{321}

The last argument that supports this interpretation is based on legal certainty. Denying the capacity of consumer, within the meaning of the first paragraph of Article 13 of the Brussels Convention, when the professional use of goods or services is not negligible is most consistent with the requirements of legal certainty, as well as the requirement that a defendant should be able to know in advance the court which he may be sued. These requirements constitute the foundation of the Brussels Convention.\textsuperscript{322} Note that only in case it is not possible to demonstrate

\begin{itemize}
\item \textsuperscript{317} Gruber case, No. 36.
\item \textsuperscript{318} Gruber case, No. 43.
\item \textsuperscript{319} Gruber case, No. 43
\item \textsuperscript{320} Gruber case, No. 44; Gruber case, Opinion of the Advocate General, No. 35.
\item \textsuperscript{321} Gruber case, Opinion of the Advocate General, No. 35.
\item \textsuperscript{322} Gruber case, No. 45.
\end{itemize}
the negligible character of the professional purpose, based on objective evidence in the file, the contract should be considered to fall under Article 13 et seq of the Brussels Convention.\textsuperscript{323}

Quite remarkable is that the ECJ did not exclude all dual purpose contracts, and therefore left room for an exception. The exception is that in case the link between the contract and the trade or profession of the person concerned is so slight as to be marginal and, therefore, plays only a negligible role in the context of the supply in respect of which the contract was concluded, considered in its entirety, the person can be considered as a consumer.\textsuperscript{324} Consequently, it does not matter whether the private use of the goods or services is predominant, provided that the proportion of the professional usage is not negligible.\textsuperscript{325}

It is imperative to stress that since one of the key arguments of the ECJ is based on the strict interpretation of Article 13 of the Brussels Convention, due to its derogation from the general principle worded in Article 2, it remains to be seen whether the narrow interpretation, that \textit{de facto} excludes consumer protection in the so-called “mixed situations”, will also apply to the consumer directives.\textsuperscript{326}

Similarly to what I noted in relation to the Benincasa case, the ECJ seemed to see the consumer as the weaker party on the basis of the risk he is taking rather than on the basis of information asymmetry.\textsuperscript{327} The person taking a professional risk can therefore not be assimilated to a person needing protection because he is not taking any business risk and is acting entirely in the private sphere.\textsuperscript{328} If the ECJ saw the consumer as the weaker party on the basis of bargaining power (information asymmetry) one could undoubtedly argue that a farmer does not know more about tiles than an ordinary consumer.

In conclusion, the ECJ explicitly opened the door to dual purpose contracts, allowing customers to benefit from the exceptional protection on the condition that the proportion of the contract that is linked to the customer’s trade is negligible. However, this interpretation remains very strict making it highly unlikely that it would affect many customers positively, since the link to a customer’s trade can easily be considered as significant.

\textsuperscript{323} Gruber case, No. 50; The Advocate General presented two views, of which the more protective view towards the consumer seemed to have been maintained. However, due to restrictive criteria set forward with regard to dual purpose contracts, both views would lead to the same result in practice: Gruber case, Opinion of the Advocate General, No. 30-31.

\textsuperscript{324} Gruber case, No. 39.

\textsuperscript{325} Gruber case, No. 42.

\textsuperscript{326} H.W. Micklitz \textit{et al.}, \textit{Cases, materials and text on consumer law}, 53.

\textsuperscript{327} K. Boele-Woelki and W. Grosheide (eds.), \textit{The Future of European Contract Law}, 432

\textsuperscript{328} H.W. Micklitz \textit{et al.}, \textit{Cases, materials and text on consumer law}, 53.
2.4 Recognition as a Consumer

In the wake of the private purpose the question arises whether the trader should be made aware that he is entering into a contract with a natural person who is acting in pursuit of a private purpose. In other words, is the consumer obligated to inform the trader of his capacity of a consumer, in order for the consumer to lawfully invoke his consumer rights?

This question has been addressed by the Gruber case. I discuss this issue separately to make clear that it needs to be distinguished, though closely linked, from the dual purpose issue.

2.4.1 Gruber v Bay Wa AG [2005]

The Obster Gerichtshof referred five questions to the ECJ for a preliminary ruling. The second question is the only one that I will discuss here:

"Does the determination of the purpose depend on the circumstances which could be objectively ascertained by the other party to the contract with the consumer?"

Firstly, the ECJ stated that the need to determine whether the customer’s counterparty to the contract could have been aware of the professional purpose only presents itself in case Article 13 et seq of the Brussels Convention can be applied. If the contract served a professional purpose to a non-negligible extent, those special rules cannot be applied and therefore the issue does not present itself. 329

In case Article 13 et seq of the Brussels Convention should be applied, the question arises whether the consumer’s counterparty was reasonably aware of the private purpose. In principle, the trader is aware of the private purpose of a customer. It is only when a consumer, by his own conduct with respect to the trader, gave the latter the impression that he was acting for professional purposes, that the awareness or lack thereof has significant consequences. 330 If the consumer, indeed, gave the impression that he was acting for professional purposes and because of it lead to the reasonable unawareness of the trader, the special consumer rules of the Brussels Convention will not be applicable, even if the contract did not serve a non-negligible professional purpose. The ECJ considered that by acting in such a fashion the consumer renounced the protection afforded by the special consumer rules of the Brussels Convention. 331

The ECJ summed up several examples of situations which could lead to giving the trader the impression that one is acting for professional purposes. He referred to individual orders,

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329 Gruber case, No. 49.
330 Gruber case, No. 51.
without giving further information, that could be used for a business, the use of business stationery, the deliverance to a business address or mentioning the possibility of recovering value added tax.\textsuperscript{332}

In conclusion, the issue of the recognition as a consumer only presents itself when a person has the capacity of a consumer, yet gives the impression by his own conduct, of acting for professional purposes. If, in that case, a trader was then reasonably unaware of the private purpose, a consumer will not be entitled to apply the special consumer rules of the Brussels Convention. Whether the consumer in light of the consumer Directives should be interpreted in a similar fashion is not entirely certain. As mentioned many times above, the consumer Directives are not bound by the same restrictions as the Brussels Convention.

3 Evaluation of the ECJ Case Law

3.1 General Remark

A common thread appears to run throughout the ECJ case law that is concerned with the personal scope of the rules protecting consumers. In all of the cases discussed above, the ECJ used a rather literal and restrictive approach towards the interpretation.\textsuperscript{333} Nebbia and Askham correctly stated that, in contrast with cases that concern the personal scope, when dealing with cases that concern the consumers, the ECJ adopts the interpretation which is most favourable to them.\textsuperscript{334}

3.2 Main Characteristics: Interpreted

3.2.1 Natural Person

There was some doubt whether the term "natural person" could be interpreted in such a manner that certain legal persons were included. The Bertrand case already seemed to imply in an early stage that a consumer could only be a natural person, by referring to the "private final consumer". The Shearson Lehman Hutton case confirmed those implications by referring to the "individual". Nevertheless, it was the Idealservice case that explicitly dealt with this issue. The ECJ ruled that the term "consumer" solely referred to natural persons.

3.2.2 Private Purpose

The first issue we discussed was the ambiguity of the functional aspect of the trader definition. Regardless of the dual purpose issue, I found it rather impossible to conclude whether a contract had to be directly linked to a person's trade in order to fall under the trader definition. The ECJ

\textsuperscript{332} Gruber case, No. 52.
\textsuperscript{334} P. NEBBIA and T. ASKHAM, \textit{EU Consumer law}, 39.
clarified this issue in the Di Pinto case. The ECJ held that acts of selling a business, are "managerial acts performed for the purpose of satisfying requirements other than the family or personal requirements of the trader". Consequently, an act which is indirectly connected to a person’s trade will be considered as an act performed for the purpose of satisfying requirements other than family or personal requirements of the trader. Therefore, a person indirectly acting in his trade cannot be considered as a consumer.

Subsequently, I addressed the issue of the future trader. In the Benincasa case the ECJ came to the conclusion that the fact that an activity was in the nature of a future activity does not divest it in any way of its trade or professional character. The Berliner Kindl Brauerei case implicitly confirmed the Benincasa case. It should be noted that the view that transactions which serve the founding of a business are principally not to be regarded as consumer contracts has also been confirmed by the Distance Marketing of Financial Services Directive.

Another issue I addressed was the accessorium sequitur principale principle in relation to ancillary contracts, in particular the contract of guarantee. In the Dietzinger case the ECJ ruled that not only should a contract of guarantee be entered into for a private purpose, the principal agreement should also be entered into for a private purpose. In other words, the decisive factor is not only whether the guarantor is a consumer, but whether the guarantor and the principal contractor are consumers. The ECJ clearly opted for a narrow interpretation of the consumer definition with regard to the ancillary contracts.

From a consumer’s point of view the most important issue, however, is that of the dual purpose. A decision in either way can drastically alter the scope of the notion of consumer. Regrettably, I am not able to give a straight answer. So far, there has only been one case, the Gruber case, that expressly addressed the issue of dual purpose contracts. That judgement, however, cannot be used to interpret the entire consumer acquis without any reservations, as the decision was taken in respect of the Brussels Convention. The special consumer rules in the Brussels Convention are a derogation from the general principle and should therefore be interpreted restrictively. The consumer Directives on the other hand are not faced by such a restrictive approach. Thus, it is not certain to what extent the judgement of the Gruber case can be used to interpret the consumer definitions found in the consumer Directives.

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335 Di Pinto case, No 16.
336 Benincasa case, No. 17.
337 Recital 29 of the Distance Marketing of Financial Services Directive.
338 I refer to the Benincasa case and the Gruber case for a more detailed explanation.
Nevertheless, in relation to the current Brussels I Regulation and Rome I Regulation we now have certainty that a natural person can only be considered as a consumer if, in case of a dual purpose contract, the professional purpose is so slight as to be marginal. Only when the professional purpose plays a negligible role in the context of the contract considered in its entirety, can a natural person be considered as a consumer. The narrow approach used in the Gruber case is very much in line with the Benincasa case, which implied a narrow approach towards the dual purpose issue. It appeared to imply that an act which served even the slightest, insignificant professional purpose should be considered as outside the scope of the notion of consumer.\textsuperscript{339}

In light of recent legislative developments it appears that the consumer definition in (certain) consumer Directives has a wider scope than the consumer definition in the Regulations. The Green Paper on the Review of the Consumer Acquis proposed two consumer definitions that should eliminate the current inconsistencies. In one of those consumer definitions the consumer is defined as “a natural persons acting for purposes which primarily fall outside their trade, business or professions”. An approach which the most recent consumer Directive, the Consumer Rights Directive, followed. Time will tell whether we should interpret all of the existing consumer Directives, or consumer Directives in a certain area such as contract law\textsuperscript{340}, in a similar manner.

For completeness sake, it should be noted that even a person acting in pursuit of a purely private purpose can still be excluded from the application of certain consumer rules in case the person in question gave its counterparty the impression that he was acting in pursuit of a trade.

\textsuperscript{339} Benincasa case, No. 18.
\textsuperscript{340} For which I refer to the DCFR which also includes the primary purpose in its consumer definition.
<table>
<thead>
<tr>
<th>Legal Act</th>
<th>Consumer Definition</th>
<th>Trader Definition</th>
<th>ECJ Interpretation</th>
<th>Deviation from the common core</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Consumer Contracts</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Doorstep Selling Directive Article 2</td>
<td>A consumer is a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession.</td>
<td>A trader is a natural or legal person who, for the transaction in question, acts in his commercial or professional capacity, and anyone acting in the name or on behalf of a trader.</td>
<td>Case: Di Pinto The commercial activity of a secondary nature does not grant a person the status of a consumer. Case: Dietzinger When entering into a contract of guarantee, the principal agreement must also have been entered into for a private purpose in order to fall under the consumer definition.</td>
<td></td>
</tr>
<tr>
<td>Consumer Credit Directive 87/102 Article 2(a) Article 2(b)</td>
<td>A consumer is a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession.</td>
<td>A creditor is a natural or legal person who grants credit in the course of his trade, business or profession, or a group of such persons.</td>
<td>Case: Berliner Kindl Brauerei Implicitly: Consumer credit should be acquired outside of any trade or professional activity or purpose, whether present or future.</td>
<td></td>
</tr>
</tbody>
</table>


342 The deviation from the common core does not only take into account the definitions as such, but looks at the entire context which helps define the consumer or trader.

343 By which I mean: acts that are not directly connected to a person's trade or profession. In other words, the ECJ opted for an objective, rather than a subjective approach.
| New Consumer Credit Directive 2008/48  
Article 3(a)  
Article 3(b) | A consumer is a natural person who, in transactions covered by this Directive, is acting for purposes which are outside his trade, business or profession. | A creditor is a natural or legal person who grants or promises to grant credit in the course of his trade, business or profession. | / |
| Unfair Contract Terms Directive  
Article 2(b)  
Article 2(c) | A consumer is any natural person who in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession. | A seller or supplier is any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned. | Case: Idealservice  
Only natural persons fall under the scope of the consumer definition. | / |
| Distance Selling Directive  
Article 2(2)  
Article 2(3) | A consumer is any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession. | A supplier is any natural or legal person who, in contracts covered by this Directive, is acting in his commercial or professional capacity. | / |
| Distance Marketing of Financial Services Directive  
Article 2(d)  
Article 2(c) | A consumer is any natural person who, in distance contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession. | A supplier is any natural or legal person, public or private, who, acting in his commercial or professional capacity, is the contractual provider of services subject to distance contracts. | / |
| Consumer Sales Directive  
Article 1(2)(a)  
Article 1(2)(c) | A consumer is any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to A seller is any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession”. | / |
<table>
<thead>
<tr>
<th><strong>Consumer Rights Directive</strong></th>
<th>A consumer is any natural person who, in contracts covered by this Directive, is acting for purposes which are [primarily](^{344}) outside of his trade, business, craft or profession.</th>
<th>A trader is any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive.</th>
<th>Explicit approval of dual purpose transactions: predominant private purpose</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Article 2(1)</strong></td>
<td><strong>Article 2(2)</strong></td>
<td><strong>Article 9(a)</strong> of the Product Liability Directive does not limit the producer's liability for damage caused by death or by personal injuries to persons acting outside of their trade or profession. As a result a professional can be entitled to compensation. Whether a legal person can be compensated, for instance, in cases where compensation was paid by the legal person to an injured employee is rather controversial.</td>
<td>Consumer: 1. The economic consumer. 2. Explicit approval of dual purpose transactions: predominant private purpose</td>
</tr>
<tr>
<td><strong>Product Liability, General Product Safety and Misleading Advertising</strong></td>
<td><strong>Product Liability Directive</strong></td>
<td><strong>Article 3</strong></td>
<td><strong>Producer</strong> is the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.(^{347}) Furthermore, any person who imports into the Community a</td>
</tr>
<tr>
<td><strong>Undefined.</strong></td>
<td><strong>The ratio legis and a textual analysis revealed two definitions:</strong> 1. The (economic) consumer is a (natural) person who is acting for purposes which may lie in- or outside his trade or profession.(^{345}) 2. The consumer is a natural person who is acting for purposes</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\(^{344}\) Recital 17 of the Consumer Rights Directive states that, in the case of dual purpose contracts, a person should be considered as a consumer as long as the trade purpose is not predominant. In other words, a person should be considered as a consumer as long the transaction primarily servers a private purpose.  
\(^{345}\) Article 9(a) of the Product Liability Directive does not limit the producer's liability for damage caused by death or by personal injuries to persons acting outside of their trade or profession. As a result a professional can be entitled to compensation. Whether a legal person can be compensated, for instance, in cases where compensation was paid by the legal person to an injured employee is rather controversial.
<table>
<thead>
<tr>
<th>General Product Safety Directive</th>
<th>Undefined. Implicitly: a (economic) consumer is a person who is acting for purposes which may lie in- or outside his trade or profession.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 2(e)</td>
<td>A <em>producer</em> is the manufacturer of the product, when he is established in the Community, and any other person presenting himself as the manufacturer by affixing to the product his name, trade mark or other distinctive mark, or the person who reconditions the product acting in pursuit of a commercial activity.</td>
</tr>
<tr>
<td></td>
<td>The economic consumer.</td>
</tr>
</tbody>
</table>

| Misleading Advertising Directive | Undefined Implicitly: a consumer is a person who is acting for purposes which are outside his trade or profession.  
Article 2(a) of the General Product Safety Directive defines "product" and in so doing it limited the producer definition to persons acting in pursuit of a commercial activity.  
Meaning, a person who "sells" something to a person.  
In relation to damage to property: Article 9(b) of the Product Liability Directive.  
Article 7(c) provides that a producer shall not be held liable if he can prove that the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business. |
|---------------------------------|---------------------------------------------------------------------------------------------------|
| Article 2(a)                    | Undefined Implicitly: a trader is a person carrying on a trade, business, craft or profession.  
/ |

347 Even though this definition includes persons acting outside of their trade or profession, they will not necessarily be held liable under the Product Liability Directive. Since, Article 7 provides certain exceptions, e.g. Article 7(c) provides that a producer shall not be held liable if he can prove that the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business.
348 Meaning, a person who "sells" something to a person.
349 Article 2(a) of the General Product Safety Directive defines "product" and in so doing it limited the producer definition to persons acting in pursuit of a commercial activity.
350 The protection is not limited to the consumer who is acting for purposes which are outside his trade or profession, on the contrary, the Misleading Advertising Directive protects every person. The narrow definition which appears to be implied stems from Article 1, which puts the consumer *vis-à-vis* the producer.
<table>
<thead>
<tr>
<th>Unfair Commercial Practices Directive</th>
<th>A consumer is any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession.</th>
<th>A trader is any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader.</th>
<th>/</th>
</tr>
</thead>
<tbody>
<tr>
<td>Holidays and Travel</td>
<td>A consumer is the person who takes or agrees to take the package (&quot;the principal contractor&quot;), or any person on whose behalf the principal contractor agrees to purchase the package (&quot;the other beneficiaries&quot;) or any person to whom the principal contractor or any of the other beneficiaries transfers the package ('the transferee').</td>
<td>An organiser is a person who, other than occasionally, organizes packages and sells or offers them for sale, whether directly or through a retailer.</td>
<td>The economic consumer</td>
</tr>
<tr>
<td>Package Travel Directive 90/314</td>
<td>A consumer is the person who takes or agrees to take the package (&quot;the principal contractor&quot;), or any person on whose behalf the principal contractor agrees to purchase the package (&quot;the other beneficiaries&quot;) or any person to whom the principal contractor or any of the other beneficiaries transfers the package ('the transferee').</td>
<td>An organiser is a person who, other than occasionally, organizes packages and sells or offers them for sale, whether directly or through a retailer.</td>
<td>The economic consumer</td>
</tr>
<tr>
<td>Proposal for a revised Package Travel Directive</td>
<td>A traveller is any person who is seeking to conclude or is entitled to travel on the basis of a contract</td>
<td>A trader is any person, who is acting for purposes relating to his trade, business, craft or profession.</td>
<td>The economic consumer 352</td>
</tr>
</tbody>
</table>

351 The Misleading Advertising Directive targets every person who deals in misleading advertising, irrespective of its private or professional purpose. Article 1, however, refers to a trader (without actually mentioning the notion of trader) as "persons carrying on a trade or business or practising a craft or profession".

352 The traveller definition also includes the business traveller, but it makes an exception in case of framework arrangements. This will apply to large companies. As a result, the scope of the new "consumer" definition is slightly more limited than its predecessor.
### Article 3(6)
**Article 3(7)**

Concluded within the scope of this Directive, including business travellers insofar as they do not travel on the basis of a framework contract with a trader specialising in the arrangement of business travel.

### Timeshare Directive 94/47
**Article 2**

A *purchaser* is any natural person who, acting in transactions covered by this Directive, for purposes which may be regarded as being outwith his professional capacity, has the right which is subject of the contract transferred to him or for whom the right which is the subject of the contract is established.

A *vendor* is any natural or legal person who, acting in transactions covered by this Directive and in his professional capacity, establishes, transfers or undertakes to transfer the right which is the subject of the contract.

### New Timeshare Directive 2008/122
**Article 2(f)**

A *consumer* is a natural person who is acting for purposes which are outside that person’s trade, business, craft or profession.

A *trader* is a natural or legal person who is acting for purposes relating to that person’s trade, business, craft or profession and anyone acting in the name or on behalf of a trader.

### Labelling

<table>
<thead>
<tr>
<th>Foodstuffs Price</th>
<th>Undefined.</th>
<th>Undefined.</th>
<th>The economic trader[^355]</th>
</tr>
</thead>
</table>

[^355]: Note that the Foodstuffs Price Indication Directive provides several exceptions in Article 1.
<table>
<thead>
<tr>
<th>Indication Directive</th>
<th>Implicitly: a consumer is a person who is acting for purposes which are outside his trade or profession.\textsuperscript{353}</th>
<th>Implicitly: a <em>seller</em> is any person who, sells or offers for sale foodstuffs, irrespective of the private or professional purpose.\textsuperscript{354}</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-food Price Indication Directive</td>
<td>Undefined. Implicitly: a consumer is a person who is acting for purposes which are outside his trade or profession.\textsuperscript{356}</td>
<td>Undefined. Implicitly: a <em>seller</em> is any person who, sells or offers for sale non-food products, is acting for trade or professional purposes.\textsuperscript{357}</td>
</tr>
<tr>
<td>Price Indication Directive Article 2(e) Article 2(d)</td>
<td>A consumer is any natural person who buys a product for purposes that do not fall within the sphere of his commercial or professional activity.</td>
<td>A trader is any natural or legal person who sells or offers for sale products which fall within his commercial or professional activity.</td>
</tr>
</tbody>
</table>

Electronic Commerce

| E-Commerce Directive Article 2(e) Article 2(b) | A consumer is any natural person who is acting for purposes outside of his or her trade, business or profession. | A *service provider* is any natural or legal person providing an information society service. |

\textsuperscript{353} The second paragraph of Article 1 of the Foodstuffs Price Indication Directive excludes purchases for professional or commercial purposes.

\textsuperscript{354} The emphasis lies on products that are offered for sale. The Foodstuffs Price Indication Directive does not expressly exempt all private sales, but leaves it up to the Member States to do so for certain private sales.

\textsuperscript{356} Similar to the Foodstuffs Price Indication Directive. The first and second paragraph of Article 1 of the Non-food Price Indication Directive implicitly include such a consumer definition.

\textsuperscript{357} Article 1 of the Non-foodstuff Price Indication Directive expressly exempts all private sales.
### Jurisdiction and conflict of law rules

| Brussels Convention\(^{358}\) Article 13 | A consumer is a [natural]\(^{359}\) person [that concluded a contract] for a purpose which can be regarded as being outside his trade or profession. | Undefined Implicitly: A trader is any person who pursues commercial or professional activities.\(^{360}\) | Case: Bertrand + Shearson Lehman Hutton Only the private final consumer ought to benefit consumer protection rules, which implies a natural person.\(^{361}\) Case: Benincasa Consumer contracts should always be concluded outside and independently of any trade or professional activity or purpose, whether present or future. Case: Gruber In case of dual purpose contracts, one can still be considered as a consumer on the condition that the proportion of the contract that is linked to the customer's trade or profession. |

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\(^{359}\) Though not expressly mentioned in the consumer definition, the Bertrand case and following case law imply as much.

\(^{360}\) Apparently it appeared obvious that the counterparty of a consumer in relation to consumer contracts had to be a professional. On a side note, the initial section 4 of the Brussels Convention did refer to a seller or lender, without defining either of those notions.

\(^{361}\) The findings in the Bertrand case were codified in 1978 by the amended Brussels Convention, which from then on, included a consumer definition similar to that of the Bertrand case.
<table>
<thead>
<tr>
<th>Brussels I Regulation</th>
<th>Article 15(1)</th>
<th>A consumer is a [natural] person [that concluded a contract] for a purpose which can be regarded as being outside his trade or profession.</th>
<th>A trader is a person who pursues commercial or professional activities.</th>
<th>/</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brussels I Regulation</td>
<td>Article 17(1)</td>
<td>A consumer is a [natural] person [that concluded a contract] for a purpose which can be regarded as being outside his trade or profession.</td>
<td>A trader is a person who pursues commercial or professional activities.</td>
<td>/</td>
</tr>
<tr>
<td>Rome Convention Article 5(1)</td>
<td>A consumer is a [natural] person [that concluded a contract] for a purpose which can be regarded as being outside his trade or profession</td>
<td>Undefined Implicitly: A trader is any person who pursues commercial or professional activities.</td>
<td>/</td>
<td></td>
</tr>
<tr>
<td>Rome I Regulation Article 6(1)</td>
<td>A consumer is a natural person [that concluded a contract] for a purpose which can be regarded as being outside his trade or profession.</td>
<td>A professional is a person acting in the exercise of his trade or profession.</td>
<td>/</td>
<td></td>
</tr>
</tbody>
</table>

Table 2: overview

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362 Article 15(1)(c) of the Brussels I Regulation provides a trader definition without referring to the notion of trader.
CHAPTER 4: ROAD TO UNIFORMITY

1 INTRODUCTION

Few would dare to question the statement that the consumer and trader definitions are (at least cosmetically) diverse, following the overview I have presented in the precedent chapters. For those that still believe that differences between the various definitions are inexisten, I gladly refer to table 2. Admittedly, some areas of law provide more consistent definitions than others. Yet, no area of law, was able to provide definitions that were entirely uniform.

The lack of coherence in consumer definitions can be justified in some cases and to some extent as due to the need to give account of a pluralistic reality. This justification, however, only applies to the difference between the consumer sensu lato and the consumer sensu stricto. No justification can be found for the lack of coherence in wording between the various legal consumer and trader definitions. However, before wanting to change anything, one should always ask three questions:

Is it necessary to change the current situation?

Will changing it improve the global situation?

If it is indeed necessary and/or would improve the situation, how can we accomplish our goal in a manner that is most efficient?

Whether there is a need to create a consumer and trader definition which are uniform in wording as well as substance depends on several factors. From the point of view of the natural person who acts outside his trade it is important to know whether he is aware of his position as a consumer which entitles him to additional protection under various consumer regulations. Or if the awareness is being blocked by the variety of consumer definitions, which makes it harder to comprehend the actual scope of a consumer regulation. I think it is safe to assume that the diverse consumer definitions do not form a significant barrier for a consumer to ascertain his rights. If any, it would be the lack of awareness that a consumer has specific rights in various

363 Such as contract law.
364 P. NEBBIA and T. ASKHAM, EU Consumer law, 38.
365 The consumer sensu lato is to be understood as the economic consumer, whereas the consumer sensu stricto is the more common and narrower legal consumer.
domains. A similar trend can be seen from the trader’s point of view, in the sense that he does not appear to be aware of his obligations towards consumers.

Even if only a little, the consumer and the trader will benefit from the unification of the consumer and trader definition. Besides, consistency is never a bad thing. Such uniform notions would undoubtedly provide more clarity and reduce the linguistic discussions. The need for unification of those definitions should, therefore, be seen from the perspective of the quality of law. The Commission presented two possible approaches it could follow in light of the revision of the consumer acquis, namely a vertical approach or a more horizontal approach (mixed approach).

2 Vertical Approach

One of the approaches the European legislator could use to eliminate the inconsistencies between the various consumer and trader definitions is the vertical approach. A vertical approach means that existing Directives will be amended separately. Principally, the advantage of the vertical approach is that issues specific to a certain Directive, can easily be addressed. However, considering the fact that the consumer and trader definition are common to all the consumer Directives, this is not so much of an advantage.

This approach is more likely to take much longer than the horizontal approach, since the same issue will have to be addressed separately with regard to every Directive. Moreover, it is less likely to achieve the simplifying effect of the horizontal approach, due to the increase in legislative acts.

The vertical approach has been the preferred approach in the past, as it was less complicated than the horizontal approach. Especially with regard to a specific issue. With the increased awareness of the European legislator concerning the fragmented regulatory environment and its consequences, a slight shift towards the horizontal approach is notable.

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366 It shows that even when given a limited number of possibilities, a significant number of people are convinced that they do not have any or fewer rights: EUROBAROMETER FLASH 358, Consumer attitudes towards cross-border trade and consumer protection, available at http://ec.europa.eu/public_opinion/flash/fl_358_en.pdf, accessed the 5th of July 2014.


368 The trader and consumer can already enjoy a decent level of legal certainty since the majority of consumer definitions share a common core.


370 Ibid.
Nevertheless, I find this approach to be useful in cases where a Directive refers to the consumer *sensu lato*, especially when it defines this economic consumer. These are issues that are rather specific to few Directives. The vertical approach could be used to change the consumer notion to customer. This would increase the consistency in substance of the consumer notion, since the economic consumer is much wider than the legal consumer. Therefore, the implementation of a different notion, such as customer, would be preferred through the use of the vertical approach. A timely example is the proposal for a new Package Travel Directive, in which the notion consumer has been changed to *traveller*. Even though the intent was good, I sincerely hope that the proposal will be amended with regard to the notion “traveller”. I consider a less sector-specific notion to be a better option, since this may otherwise result in the creation of numerous notions to describe the economic consumer. In other words, in the worst case scenario it could result in taking one step forward and steps back in light of consistency.

### 3 Horizontal Approach

Contrary to the vertical approach, the horizontal approach does not address issues specific to a certain Directive. Instead the horizontal approach focuses on issues which are common to “all” consumer Directives. The consumer and trader definition are such issues that are of relevance in the context of the majority of consumer Directives. Therefore, the horizontal approach appears to be the preferred approach in the creation of uniform definitions.

The most recent Directive to have used this approach is the Consumer Rights Directive. Although the intent was to merge four Directives together, only two Directives were merged together. Even though the Consumer Rights Directive is generally considered as a failure of the Commission’s original approach, it does prove that the horizontal approach can be successfully used to unify the European consumer and trader definitions of the consumer Directives.

The principal merit of the horizontal approach is the creation of a simplified regulatory framework. The use of a Directive does limit the potential, because Directives need to be transposed into national law and Member States are not required to do this *verbatim* in one
single measure. Consequently, the amount of (national) legislative acts will not necessarily decrease.375

4 CONCLUSION

Even if the consumer and trader would not benefit tremendously from the unification of the various consumer and trader definitions, the quality of law will have greatly improved. The preferred method to reach a unified legal consumer and trader definition is that of the horizontal approach. The speed at which it can accomplish the unification should be far greater than that of the vertical approach. Furthermore, the horizontal approach has the advantage of only creating one legislative act, whereas the vertical approach would create several.

It is imperative to note that the unification of the various consumer and trader definitions will most likely be limited to the European level. Since, the legislative act is a Directive, even if the European legislator succeeded in unifying the consumer and trader definitions on a European level, the Member States would still be able to adopt a different (wider) definition, regardless of full harmonisation.376 This follows from the ruling by the ECJ in the Di Pinto case that revealed that Member States cannot be precluded from adopting measures in an area with which a Directive is not concerned.

Nevertheless, the improvement of the quality of law, and with it legal certainty, should always be heartily welcomed.

375 In that respect Twigg-Flesner suggested the use of a Regulation rather than a Directive, which has the benefit of not having to be transposed into national law. Twigg-Flesner mainly considered a cross-border only Regulation: J. DEVENNEY AND M. KENNY (eds.), European consumer protection: theory and practice, 15; C. TWIGG-FLESNER AND D. METCALFE, “The proposed Consumer Rights Directive – less haste, more thought?”, ERCL 2009, Vol. 5, No. 3, 368-391; Reich and Micklitz argued that such Regulation proposals have no chance of being realised at this time: N. REICH, H.W. MICKLITZ, P. ROTT AND K. TONNER, European Consumer Law, Antwerp, Intersentia 2014, 65.

CHAPTER 5: GENERAL CONCLUSION

The purpose of my research is to be able to reply to the question "Who is a consumer?". The main purpose was not find out who the economical, social, ethical, etc. consumer is, but to find out who could be considered as a consumer from a legal perspective. And subsequently, being able to determine the personal scope of the consumer acquis.

To do so, I first examined the legal history of the consumer, which was a bare necessity to understand what was to follow, namely the consumer acquis. After the examination of the most significant legislative acts of the consumer acquis from various areas of law, I examined the ECJ case law, which was necessary to clarify the ambiguities surrounding the consumer definition.

The main question was whether the consumer acquis contained a uniform consumer definition, either in wording, substance or both. The examination of the consumer acquis revealed that there was no such definition. However, with regard to certain areas of law, such as contract law, I discovered a more consistent consumer definition in wording and in substance. It also revealed a tendency towards more consistency.

The examination of the ECJ case law helped to clear the multiplicity of ambiguities, and provided a better understanding of the legal consumer.

In light of the foregoing we researched the necessity and possibilities of the creation of a uniform consumer notion. From the consumer and trader’s point of view a uniform consumer notion is not absolutely necessary. Although they would clearly benefit from more legal clarity and the quality of law would increase significantly.

In conclusion, it is certain that no uniform consumer definition exists to date. Yet, that the majority of consumer definitions share a common core, namely a natural person acting outside his trade. The European legislator is aware of the inconsistencies and is trying reduce the fragmentation. The European legislator recently used the, in my opinion preferred technique in today's legal system, to create consistent consumer notions, namely the horizontal approach.
**NEDERLANDSE SAMENVATTING (SUMMARY IN DUTCH)**

Het begrip “consument” binnen het Europees Privaatrecht is een vrij dubbelzinnig begrip dat vele ladingen dekt. De doelstelling van deze Masterproef is dan ook om het begrip, voornamelijk vanuit een juridisch perspectief, uit te spitten. Op het einde van deze Masterproef willen we namelijk antwoord kunnen geven op de vraag “Wie is een consument?”.

Deze Masterproef is echter meer dan een loutere opsomming van eigenschappen die aan de juridische consument kunnen worden toegeschreven. Er wordt immers ook onderzocht of er zoiets bestaat als een “uniform consumentenbegrip”, en zo niet, of dit wenselijk is.

Dit alles werd onderzocht aan de hand van een grote brok wetgeving uit het consumentenacquis en relevante rechtspraak. Waaruit enerzijds is gebleken dat de verscheidene consumentenbegrippen gekenmerkt worden door een aantal eigenschappen die gedeeld worden door de meerderheid, namelijk een natuurlijk persoon die handelt voor beroepsdoeleinden. Anderzijds is het zo dat er geen uniform consumentenbegrip, wat de formulering betreft, bestaat. Als nuance dien ik mee te geven dat in bepaalde rechtstakken, zoals het contractenrecht, het consumentenbegrip meer gelijkenissen vertoont.

Erg noodzakelijk lijkt een uniform consumentenbegrip, wat de formulering betreft, niet. Desalniettemin is het zo dat iedereen baat heeft bij consistent juridisch taalgebruik. De Europese wetgever is zich bewust van deze inconsistenties en heeft recent een, eveneens door ons verkozen, horizontale aanpak gebruikt om verscheidene consumentenbegrippen beter op elkaar af te stemmen. Naar de toekomst toe zullen we dus hopelijk nog meer consistentie mogen verwachten wat betreft het consumentenbegrip.
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