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SOURCES OF CONSUMER LEGISLATION
WITHIN THE MEMBER STATES OF THE
EUROPEAN COMMUNITY

par

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NOTE TO THE READER

The following paper has been drafted during the summer 1981 while taking advantage of a research stay at the University of Wisconsin - Madison Law School (USA).

It is based on a text presented at a meeting held in Louvain-la-Neuve, on 14-15 May 1981, on prospects for integration of consumer law and policy within the European Community : Th. Bourgoignie, Towards Consumer legislation at European Community level ? Potential scope and limits, Centre de droit de la consommation, Faculté de Droit, U.C.L., 114 p. .

This paper attempts to outline specific issues which could make comparisons with the U.S. Federal experiment valuable. The choice of the issues has been made on the basis of intensive reading of US materials and illuminating comments received by Professor David Trubek and Mrs Louise Trubek.

It will serve as part of a contribution to a research project directed by Professor Mauro Cappelletti (European University Institute, Florence, Italy) on "Prospects for integration of law within the European Community, in the light of the U.S. experience".

1. Consumers living within the boundaries of the E.C. have protection from three major sources :

- member countries of the community or the national sources : each country which is member of the E.C. has developed some programme and made some achievements in order to promote the interests of its national consumers;
- the community itself or the "central" source, which is indeed involved in the formulation and in the implementation of a comprehensive consumer action programme;
- international or interstate non-community initiatives, which will be referred to as the "parallel" sources; these may be public or private, bilateral or multilateral.

This paper describes the respective relevance of each source for consumers living within the E.C. The main emphasis is given to the relevance of the central source since this constitutes the subject of our comparative and prospective analysis.

Most of the protection for consumers living within the E.C. derives from national action (section 1). Despite the fact that there is no explicit provision within the Treaty of Rome which calls for a common or at least an integrated policy in the consumer field among Member States there has been a commitment of the Community towards the promotion of the interests of the consumers in the E.C.-countries; initiatives have been taken which benefit consumers but still the achievements actually made in this area of Community activity fall, for various reasons, short of expectations and potential (section 2). Parallel sources of consumer law and policy (CLP) within the Community play a relatively modest role, though some private initiatives have proved to be more influential (section 3).

Section 1. E.C. national sources of consumer law and policy

2. C.L.P. has been a major event in recent years in all E.C. countries; it has not been drawn up artificially but has tried to correct the failures which affect the free-market mechanisms in all E.C. countries : failure to provide proper information from professionals failing or refusing to incur expenditure or providing necessary information to consumers, high pressure selling methods and manipulative marketing techniques; safety failures linked to the increase in products and services made available on the market, the high differentiation and complexity of many consumer goods, the increased social cost of the treatment of defective and dangerous products or unsatisfying services; competition failures deriving from a higher concentration of market power on the part of big corporations, especially multinationals, restrictive agreements or practices on prices, quotas of production, terms of sale, warranties, etc... Consumerism became the slogan in mobilising countervailing powers against such an imbalance between the respective interests of the partners in the Market. .

"The legal superstructure in most E.C. countries was hardly adapted for taking up and regulating the new problems created by the increased consumption process" (1). Legal principles and tools which serve to formalise the liberal, classical and individualistic approach to relationships between consumers and professionals are denounced as they create "myths or rights" or give the consumers an illusory but not effective protection and maintain a clear imbalance between the respective rights and obligations of the so-called partners. The reality of the standardisation of consumer relationships, the nature of adhesion contracts of most consumer transactions, the use of aggressive marketing practices, selling methods and advertising, the presence of unfair or unconscionable terms in consumer contracts, the transfer to the consumer of major risks and costs linked to defective, dangerous or unsatisfying products or services through warranty and liability exemption clauses, the multiple barriers which impede consumers from having effective access to legal

advice and assistance, adequate remedies and mechanisms of redress, have been uniformly revealed in the E.C. countries (2). These factors question the basic principles of legal liberalism which are confirmed by the law of all E.C. countries, regardless of its different historical and cultural origins, namely : freedom of contract, freedom of competition, equality of rights and duties of the citizens, non-interventionism by the State on the private bargaining process, liability for fault and requirement of an individual interest to search for judicial redress.

3. Thus, it can be seen that similar market and legal failures were at the origin of a common concern which motivated all E.C. countries to take initiatives aimed at promoting the interests of the consumers on their national market. No country has defined a comprehensive code of consumer protection-as it exists in Japan, Mexico and Quebec- but multiple initiatives have been taken in the last few decades and there is now consumer legislation in all Member States of the Community. Common major concerns are product and price information, regulation of advertising, marketing and selling methods, controls on market prices and tariffs, preventive quality and safety controls on consumer goods and services, product and services liability, warranty liability, regulation of unfair or unconscionable consumer contracts or clauses, consumer credit, consumer remedies, legal advice and handling of consumer complaints.

It is not intended to develop here the various and numerous initiatives that have been taken by the E.C. countries towards the promotion of consumer interests on their national market nor is an attempt made to compare the methods and tools that have been used to that end. Such a description and comparative analysis have been made in the recently published set of 8 volumes on consumer legislation in the E.C. countries edited by N. Reich (3).

However, there are some general observations which must be made to emphasise the fact that there is great diversity among the Member States of the E.C. with regard to their respective C.L.P. systems :

a) the stage of development of the consumer movement remains quite unequal in the various E.C. countries: while a strong popular movement in several countries, it still is going through a crusading stage in others as Greece, Ireland and Italy which have no powerful consumer organizations and not much legislative activity (4);

b) the organization of the consumer's interests, which is essential if the movement is to get some countervailing power and support for actual reforms in economic, social and legal structures, take various forms and reaches different degrees of penetration into society : private associations dealing exclusively with the promotion of the consumer's interests (especially in the U.K., Netherlands and Belgium), private federations of various existing groups (especially in Germany, Denmark, Italy and Luxembourg), semi-public consumer bodies (National Consumer Council in the U.K., C.R.I.O.C. in Belgium, Institut National de la Consommation in France, Stiftung Warentest in Germany, etc...), housewives organizations, and so on...; in some countries, such as Denmark, The Netherlands and Belgium, trade-unions and consumer co-operatives play an important and complementary role in the organization and the representation of the consumer's interests. Usually, the combination of these various forces gives the movement a high degree of penetration into society, especially by taking benefit of already well-organized structures such as trade-unions, by making decentralization possible and by reaching a greater diversity of people. It may also result in sharp conflicts and hinder the recognition of the special nature of consumer interests and their organization as a separate partner on the economic market;

c) while a common trend can be noted in all E.C. countries towards a decrease in governmental concern with consumer policy during the present economic crisis, it varies in intensity from one country to another :

conservative measures and setbacks are now the rule in England, while France, for the first time, has given the responsibility for implementing the consumer policy in the hands of a full Minister for Consumer Affairs in 1981;

d) methods and legal tools of consumer protection vary depending on the constitutional, legal and cultural backgrounds of the countries : Latin countries appear more reluctant than others to initiate legislative measures in private law areas such as contract, tort or judicial law; Nordic countries, such as Denmark and to some extent England, have created administrative supervisory and enforcement agencies - Ombudsman, Office of Fair Trading - where others rely on the courts system; civil law methods may be preferred to those of administrative or criminal law, voluntary or negotiation schemes (England, Denmark, Netherlands) to regulatory methods.

Section 2 - E.C. central source of consumer law and policy

3. The Community institutions have been involved, especially in recent years, in activities aimed at promoting, either directly or indirectly, consumer interests throughout the European Community.

In order to assess the relevance of this central source of protection for consumers living within the E.C. countries, the following six issues have been raised :

a) has there been a policy recognition of the need for a specific consumer action programme at the Community level ? Such a recognition of the specific nature of the consumer's interests within the common market ~~should~~ make it more likely to expect the formulation and the implementation of a comprehensive, far-reaching and co-ordinated policy towards consumers by the Community institutions;

b) is the legal authority of the Community to initiate consumer measures and to promote integration of national consumer laws clearly established ? Unless there is clear legal authority and legal basis for Community action in the consumer area, proposals for action will remain highly controversial, significantly delayed and most unlikely to be adopted;

c) what is the legal effect of the Community interventions within the consumer area ? The examination of the legal effect of the various Community interventions and of the tools that are used in order to give implementation to the Community-C.L.P. must be made at the level of both the individuals living in the E.C. countries and States themselves :

- upon individuals : does central law create individual rights or impose obligations on individuals living in the E.C. countries so that consumers could see their rights directly promoted through the Community acts ?

- upon Member States : to what extent do the central initiatives supersede or limit the national sovereignty of the Member States in the development of their own C.L.P. ?

d) what has been to date the actual scope of implementation of the central consumer activity ?

e) did the measures which have been taken result in an effective increase in consumer protection throughout the Community, that is achieve positive integration of consumer law ?

f) do certain structures, groups or mechanisms ensure consumer participation at the levels of decision-making and enforcement of central legislation ? An active organization of consumer interests at the Community level together with mechanisms providing for consumer representation and consultation in the various sectors of Community activity appear to be essential requirements as they are at national levels, for the establishment of some countervailing power towards other pressure groups acting at central level and for the adoption of measures more specifically oriented towards consumer protection.

The examination of each of these issues will allow us to stress the basic patterns of C.L.P. at the E.C. central level. It will make comparisons feasible with the U.S. federal consumer activity and provide for the basic elements needed before discussing prospects for further action towards consumers within the E.C.

§ 1. Policy recognition of the need for a central C.L.P.

4. There is a clear policy recognition of the need for an active and specific consumer policy at the Community level. First expressed in 1972, it has been confirmed since by the adoption of both the 1975 and the 1981 Community consumer action programmes. These provide the Community institutions with an instrument that no E.C. country does in fact possess, i.e. a detailed, comprehensive and co-ordinated guideline aimed at improving the position of consumers in the various sectors of policy activity.

The perception which is made of the interests of the consumers goes far beyond the mere economic and individual needs of consumers that are suggested by the provisions of the T.R. or by a restrictive construction of the concept of "common market". It includes social considerations and takes into account the collective interests of consumers as well. Fundamental

and specific rights are granted to consumers and clear assignments are given to the E.C. Commission for making proposals in order to have these rights actually implemented within the Community.

A. Consumers, common market and the Treaty of Rome

5. Countries who signed the T.R. had for objectives, "by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it" (art. 2); they were "anxious to strengthen the unity of their economies" (Preamble, para. 5). The creation of a common market is thus sought which requires the elimination of frontiers and obstacles to the free circulation of goods, services, labour and capital between the Member States, the definition of common policies which will be substituted for national ones - the Treaty enumerates those of agricultural policy, transport and commerce - or, at least, the co-ordination of national economic policies in general through consultation between the States and close collaboration with the Community institutions - so it is provided for by the T.R. with regard to industrial, budgetary, monetary and social policies. Competition is to be the only regulatory factor of the market to be created, except in some limited areas such as common agricultural policy.

The consumption function, as perceived by the writers of the T.R., remains limited to an increase in the net value of income of the citizens and directly depends on the production and distribution functions. "C'est en fonction de la production, et comme dans le prolongement de celle-ci que l'attention portée à la consommation trouve sa raison d'être" (5).

6. Provisions of the Treaty which explicitly refer to the "consumer" clearly illustrate the "productivist" **perception** of the consumer interests within the common market :

- article 39, when determining the objectives of the common agricultural policy, calls for "reasonable prices in deliveries to consumers";

- article 85, para. 3 provides for an exemption from the Community competition rules for those agreements which contribute "to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit..." : selective distribution agreements have been admitted for the marketing of many consumer goods (mainly cosmetics, perfumes, cars, photo equipment, hi-fi and TV, household appliances, etc) on the basis that such distributive schemes would result in better after-sales, maintenance and warranty terms for consumers; until recently, however, there was no concern expressed that there should be clear evidence of such an effect and the actual benefits for consumers that could result from selective distributive agreements have been strongly questioned, especially with regard to the prices of the products subject of the agreement (6);

- article 86, which prohibits any abuse of a dominant position by an individual firm or several firms within the Community market, cites as an example of such an abuse the fact of "limiting production, markets or technical development to the prejudice of consumers" (at 2,b) : consumer interests, as it is usually the case in antitrust law, are not seen as such but through the eyes of those producers who will suffer prejudice from an anticompetitive behaviour of other firms on the market (7).

Apart from these three provisions, the T.R. does not make any reference to the consumer. Consumer interests are not considered otherwise than as a sub-product of more general Community policies or concerns, such

as an increase in exchange of goods and services, higher competition, common agricultural policy, and accelerated raising of the standard of living of the citizens.

This view of the consumer within the common market has related consequences which characterise the Community consumer policy, if any, under the T.R. provisions :

a) the consumer is individually considered and defined merely as a buyer of products or user of services;

b) his needs are determined and his protection guaranteed through free market mechanisms only;

c) consumers are not viewed as a specific category of economic and social activity which could justify their participation to the Community decision-making process : they are not granted any representation within the consultative Economic and Social Committee established under article 293 of the Treaty.

B. The 1975 and 1981 Community consumer action programmes

7. A dramatic evolution occurred in 1972 as part of a general desire by the governments of the Member States to develop a Community with a human face. At the Paris Summit of October, 1972, the Heads of State and Government strongly emphasised the need for an active and comprehensive social policy within the Community. The Summit noted that economic expansion was not an end in itself : social considerations were also important. Disparities in living conditions had to be reduced and this should be achieved with the participation of all social partners. The quality of life as well as the standard of living had thus to be improved with particular attention being given to intangible values (8).

Among several other policies to be adopted in implementation of the proposed social programme, "strengthening and consideration of measures taken for the benefit of consumers" were expressly mentioned (9). More precisely, the Paris Summit asked for the formulation of a comprehensive action programme in the consumer area to be submitted before the year 1974.

The first Preliminary Programme of the E.E.C. for a consumer protection and information policy was the E.C. Commission's answer to that particular demand (10). Approved by the Council of Ministers on April 14, 1975, the text of the programme was to be regarded as "the first stage of a more comprehensive programme which might need to be developed at a later date"; the aim of the Preliminary Programme was to complete this first stage within a period of four years. A second Programme was then submitted by the Commission in 1979; it was adopted by the Council of Ministers on May 19, 1981 (11). Its provisions are aimed at "keeping up to date the preliminary programme in order to assure continuity for these measures already adopted and undertaking new actions for the years 1981-1986".

The recognition of the need for an active consumer policy at the Community level as part as the social objectives of the common market to be created under the provisions of the T.R. of course implies a fundamentally different view of the interests of the consumers within the E.E.C. "The consumer is no longer seen as a purchaser and a user of goods and services for personal purposes but also as a person concerned with the various facets of society which may affect him, either directly or indirectly, as a consumer" (Preliminary Programme, point 3). Consumers are granted 5 basic rights the implementation of which will describe the scope of the Community activity : (a) the right to protection of health

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

Both programmes (1°) define the objectives of the Community policy towards consumers - "effective protection against hazards to consumer health and safety; effective protection against damage to consumers' economic interests; availability of adequate facilities for advice, help and redress; consumer information and education; consultation with and representation of consumers in the framing of decisions affecting their interests"

(Preliminary Programme, point 14)-, (2°) state the principles on which measures taken in order to achieve each of these objectives should be based and (3°) enumerate initiatives to be considered as priorities.

Explicit mention is made of the fact that action under specific Community policies already enforced which affect the consumers' position on the market, such as the free circulation of goods and services, economic, common agricultural, social, competition, environment, transport and energy policies will have to give greater substance to these newly defined consumer rights.

Consumer measures set out by the programme go far beyond the protection of a consumer who is simply seen as an individual economic agent acting in a free market system. While many measures have the effect of increasing the information available to consumers on the market, the limits of a consumer policy based on informational mechanisms only have been clearly perceived : health and safety requirements impose preventive controls on products and services put on the market; the protection of the economic interests of the consumers requires that purchasers and users be protected against abuse of power by sellers not only by correcting failures in information affecting the transaction but also by regulating the use of specific clauses, conditions of credit, liability provisions for defective, dangerous or unsatisfactory goods or

services, high-pressure selling methods. Information is also viewed as part of a global policy which includes education, advice, help and redress. Besides, both programmes clearly recognize the fact that some of the interests of the consumers are of a collective nature and require collective means of action (12) : the satisfaction of the collective, in addition to the individual, needs of the consumers is defined as one of the prime tasks of the Community; collective systems of information are encouraged, such as comparative testing, informative labelling, exchange of information about dangerous products,...; mechanisms of collective redress for consumers are suggested among other measures aimed at facilitating consumer access to justice; collective bargaining of consumer contracts and codes of practice between consumer groups and business are especially stressed by the Second Programme; increased consumer consultation and participation at the Community level is said to be a priority objective of the Community action.

§ 2. Legal authority of Community activity towards consumers

8. Community institutions are given legal authority to initiate consumer measures since the promotion of consumer interests throughout the Community is recognized as an objective of the E.E.C.; such a recognition results from a now commonly accepted evolutive reading of article 2 of the T.R. (A). A similar reading of other relevant provisions of the Treaty confirms the authority of the Community process aimed at integrating those national laws and rules which concern consumers in each of the Member States (B). It also significantly enlarges the choice of legal basis on which Community action may rely and thus the variety of instruments or tools to which it may resort (C).

A. Consumer policy as an objective of the E.E.C.

9. When referring to the need for a common market with a human face and stressing the importance of improving the quality of life as well as the standard of living of citizens throughout the E.C., the Heads of State and Government, at the 1972 Paris Summit, did in fact do nothing else than give full effect to this Community objective, described within the Preamble of the Treaty as being an "essential" one and consisting in "the constant improvement of the living... conditions" of the peoples of Europe (Preamble, al. 4).

It is now well agreed that article 2 of the Treaty is to be construed by reference to the more general motivations which are formulated within the Preamble of the Treaty (13). Only such a reading of the provisions of the Treaty takes into account the fact that any integration process is in its own nature an evolutive or progressive one : objectives which were not seen as primary by the writers of the Treaty itself but take part to those general concerns expressed in the Preamble of the Treaty may receive greater consideration afterwards.

By emphasizing the need for a construction of the objectives of the common market which would also include social considerations and by making consumer policy part of a vast social programme aimed at improving the condition of life of citizens throughout the E.C., the Heads of State and Government have given the Community a clear mandate and confirmed its authority to adopt consumer measures intended to increase the promotion of the interests of the consumers living in the common market (14).

Both the 1975 and the 1981 Council Resolutions which adopt the E.C. Commission proposed consumer action programmes describe the legal grounds of the initiatives in similar terms :

"Having regard to the Treaty establishing the E.E.C.;...

Whereas, pursuant to Article 2 of the Treaty, the task of the E.E.C. is to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion and an accelerated raising of the standard of living;

Whereas the improvement of the quality of life is one of the tasks of the Community and as such implies protecting the health, safety and economic interests of the consumer;

Whereas fulfilment of this task requires a consumer protection and information policy to be implemented at Community level;

Whereas the Heads of State or of Government meeting in Paris on 19 and 20 October 1972 confirmed this requirement by calling upon the institutions of the Community to strengthen and co-ordinate measures for consumer protection and..."

B. Consumer law as an authorized subject of integration within the Community

10. The integration of law, as perceived by the writers of the T.R., was to serve the prime objective of the Treaty, that is the process of economic integration. Article 3, d, e and f call for uniform rules in specified spheres where common policies have been adopted, such as agriculture, transport and competition. Article 3, h calls upon approximation of the laws of the Member States to the extent required "for a proper functioning of the common market". The main objectives of the European legal integration process thus consists in ensuring the establishment and functioning of the market to be created. Therefore, the Community efforts made in order to eliminate all legal and administrative obstacles to the free circulation of consumer goods and services within the Community are justified.

Unification or approximation of national laws is however to serve a much broader goal : one or the other may be resorted to whenever national policies interfere not only with the economic but also with the political and social objectives of the Community as those are defined by Article 2 of the Treaty and also by the Preamble (15). Though the prime objective of legal integration is to support economic integration, this may require integration initiatives in areas other than strictly economic ones the regulation of which at a central level would have an impact on the achievement of the general goals of the Treaty. While some chapters of the

Treaty. While some chapters of the Community consumer action programmes actually concern, albeit indirectly, the Community process of economic integration-approximation of laws in the agricultural, foodstuffs and industrial sectors, product information systems, regulation of advertising, credit and selling methods, etc.- others mainly relate to social considerations - such as the protection of purchasers against one-sided contracts, unfair exclusion of essential rights in contracts, protection of low-income consumers, consumer education programmes, distribution of legal services granting consumers effective access to advice, help and redress mechanisms, and so on. Legal integration efforts in these last mentioned areas are also deemed to serve the establishment and proper functioning of the common market, these aims being construed in the same evolutive or dynamic way as have been the objectives of the Community itself. The formulation of common rules or the approximation of national laws in the consumer field is thus justified at the central level whenever such a process of integration contributes to the achievement of one of the Community objectives towards consumers as these are defined within the Community consumer action programmes.

C. Legal basis for Community action towards consumers

11. Several provisions of the Treaty of Rome could serve as legal bases for central measures aimed at achieving the objectives of the Community consumer action programmes; they provide the Community institutions with various methods and tools of intervention.

a) Articles 3, d, e and f, 38 ss., 75, 85 and 86 validate the formation of common rules or Community regulations in those traditional common policies of the Treaty, i.e. agriculture, transport and competition.

b) Article 3, a and c validates Community initiatives aimed at eliminating, as between Member States, quantitative restrictions on the import and export of goods and all measures having equivalent effect, and at abolishing similar obstacles to freedom of movement for services within the E.C. Such Community actions could include regulations, directives, recommendations or complementary informational systems.

c) Articles 30 ss., by creating an obligation upon all Member States to refrain from any quantitative restrictions on imports or exports and all measures having equivalent effect, open the way to a judicial control by the European Court of Justice under art. 169 on the observance by the Member States of the Treaty rules on the free circulation of goods; the Court may make constructions or define exemptions which will affect consumer interests in various ways.

d) Article 100 allows the Council, acting unanimously on a proposal from the Commission and after consultation of the European Parliament and the Economic and Social Committee, to issue directives for the approximation of national laws, regulations or rules which "directly affect the establishment or functioning of the common market". Its wording explicitly refers to article 3, h of the Treaty and is to be given a similar evolutive or broad construction. The legality of using article 100 for the approximation of national measures related to areas not expressly covered by the Treaty, such as the protection of the environment or of the consumer, but which, directly or indirectly, concern the general objectives of the Community, has been confirmed by the Court of Justice (16). Article 100 however contains a stricter requirement - a "direct" effect of the uniform rule on the establishment or the functioning of the common market - which may not be met in all areas of C.L.P. Though this requirement itself has commonly received a dynamic construction which reduces its actual impact (17), it may force the Community to look for alternative tools of integration.

e) Article 155 allows the E.C. Commission to formulate recommendations in order to promote "the development" of the common market without requiring any closer link to the actual establishment and functioning of this market (18).

f) Article 220 calls upon the conclusion of international agreements or conventions between Member States in specific matters some of which might affect consumer areas such as "the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards".

g) Article 235 allows the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, to take "the appropriate measures" "if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community" and when "the Treaty has not provided the necessary powers" : the ratio legis of article 235 precisely is the perception that the writers of the T.R. had of a long, slow and dynamic integration process which was likely to require actions not provided under article 3 of the Treaty. Accordingly, article 235 has been explicitly referred to by the Heads of State and Government at the Paris Summit of 1972 as one of the privileged instruments to be used for the implementation of these newly defined Community policies (19). "Appropriate measures" may include non-legislative tools, such as consumer research funding, conferences, pilot experimentation schemes, negotiation of codes of practice, etc. They are construed to cover Community regulations and directives as well (20) and to authorize the Council to adopt measures aimed to the approximation of laws where recourse to article 100 is likely to raise doubts or controversies (21).

§ 3. Legal effects of the Community interventions in the consumer area.

12. The search for uniformity among Member States' policies is a clear objective of the Treaty of Rome and thus characterizes any legal integration process that the Community enters into. The instruments which penetrate the national legal orders of the Member States and reach complete uniformity of law by creating common rights and obligations for all individuals living in the E.C. countries are preferred. The direct-applicability doctrine together with the supremacy of the Community law

theory have been established and later developed by the European Court of Justice to that effect (A). Several factors, however, make it most unlikely to expect such a full integration process in the consumer field. The use of directly applicable tools, such as Community regulations, remains exceptional within the framework of implementation of the Community consumer action programmes (B). When other directly applicable tools are resorted to, they are usually linked to the achievement of some broader goals of the Community, such as the elimination of national laws and regulations impairing the free movement of goods and services among the Member States or the prohibition of anticompetitive agreements or practices likely to affect the common market (C). The privileged instrument of central action in consumer matters is the Community directive which, in principle at least, has a limited binding force on States only and is not directly enforceable on individuals (D). Instruments or interventions with no or very limited binding force have not received great attention to date at the Community level (E).

A. Direct applicability and supremacy of Community law.

13. Direct applicability is a general theory which applies to any Treaty provision, Community act or provision thereof which satisfies three requirements laid down by the European Court of Justice : to be directly applicable, the provision or the act must impose on the Member States an obligation (a) which is clear and precise or the scope of which is perfectly defined, (b) which is unconditional or the implementation of which is not subject to any fundamental reservation or condition on the part of the Member States and (c) which is self-sufficient and legally complete so that no action is required on the part of either the Community institutions or of the Member States for its implementation or its entry into force (22). It is of particular significance since "it enables legal provisions of an extraneous, i.e. Community, origin automatically to reach beyond the Member States and thus to penetrate their internal laws orders; it makes the individual subject to

Community law side by side with the Member States, and finally it increases the legal protection of individuals considerably by ensuring them access to the national courts and remedies in matters governed by Community law" (23).

Community provisions which are directly applicable form an integral part of the national codes of the E.C. countries and have uniform validity and equal binding force throughout the Community. In national proceedings, whether civil or criminal, they may be invoked by individuals before the national courts which must give effect to them, either for the purpose of asserting subjective rights or for safeguarding their interests affected by any violation of these provisions, or to prevent conflicting national measures being applied to them.

Direct applicability of Community acts has as a consequence the coexistence within each Member State of two distinct, autonomous codes which must be applied concurrently by the same national authorities. Conflicts of rules belonging to the two different systems may thus arise whenever a Member State enacts new laws or fails to repeal or amend existing laws which are contrary to the directly applicable Community provision or act. The problem is solved by the recognition of the principle of supremacy of Community law, said to follow "not from national constitutional provisions or from the primacy of international treaty law, but from the very nature of Community law itself as an autonomous supranational legal order in whose favour Member States have restricted the exercise of their sovereign powers in the areas determined by the T.R." (24). The doctrine of the supremacy of Community law has been confirmed by a now well-established case law of the European Court of Justice (25).

B. The use of Community regulations in C.L.P.

14. The far-reaching integrative effect of Community regulations is confirmed by the T.R. itself. According to art. 189, Community regulations are directly applicable in all Member States, binding in their entirety and not only on the States but also on individuals. They achieve complete uniformity of substantive law in all E.C. countries. Unless otherwise provided in the regulation, Member States may not modify or add provisions to it to alter its effect in any way. The effect of regulations automatically prevents

any domestic measure, whether enacted previously or subsequently, whether legislative or administrative, whether general or individual, from applying if it is incompatible with their provisions (26). The observance of the Community rule is subject to the control of the Court of Justice, at the initiative not only of the Commission acting under Art. 169 of the Treaty but also of individuals seeking preliminary rulings under art. 177 in the course of proceedings before their national jurisdictions.

The fact that regulations achieve such uniformity at central level actually discourages their use in the consumer area. As a unanimous vote is needed at the final stage of the Community decision-making process (this is due either to common Council practice or is a legal requirement if the rule is to be adopted on the basis of art. 235) a consensus among Member States will only be possible :

- if the Member States have a common political will to adopt a genuine Community approach to the issue concerned;
- when national laws do not reveal great disparities;
- when basic principles of law or legal traditions are not questioned by the proposed uniform rule;
- in areas where conflicts between the economic and social motivations of consumer activity or conflicting interests between consumer groups and business ones remain relatively minor.

15. These conditions are hardly to be met on basic matters of consumer policy (27) : those Member States which, for various reasons, are less committed than others to the development of general or specific consumer-oriented measures will veto the adoption of similar Community and directly applicable provisions; national consumer legislations, as already suggested, reveal great disparities in substantive law and methods of protection. Since the intention is to depart from a liberal and individualistic model of consumer law (supra), rules or legal mechanisms are often proposed which actually question basic legal principles in force

in the Member States, especially in private law matters; finally, since consumer-business relationships in the capitalist market are fundamentally contentious (28), areas where conflicts of interests will remain minor are extremely rare, if any at all.

Community regulations are used for the implementation of the traditional common policies defined by the Treaty, i.e. agriculture, transport and competition. There are relatively few in other areas affecting consumers, even within the harmonization process aimed at eliminating trade barriers and facilitating the free movement of consumer goods and services between Member States. Early proposals for regulations in this last area had to be dropped and changed into directives (29). It should be noted, however, that proposals have been formulated which encourage the use of Community regulations under art. 235 of the Treaty in matters of administrative law, such as when the creation of new structures likely to serve the promotion of consumer interests is envisaged : see the Commission's proposal for the creation of a Community trademark office (30), the European Parliament recommendations for the establishment of uniform advice centres throughout the Community (31) and common informal consumer disputes settlement procedures (32). The institution of an independent E.C. Consumer Ombudsman has also been suggested on that legal basis (33).

C. The use of other directly applicable tools in E.C.-C.L.P.

16. Two other major tools which are provided by the T.R. and held to be directly applicable on individuals may contribute to the implementation of the Community consumer policy : (1) the provision of art. 30 of the Treaty prohibiting any national measure imposing quantitative restrictions on imports or having equivalent effects; and (2) the antitrust provisions of art. 85 and 86 of the Treaty.

1. Article 30 of the Treaty : free movement of goods

17. Article 30 of the Treaty is a directly applicable provision. The prohibition that it contains has been held to meet the criteria laid down by the European Court of Justice : the obligation imposed on the Member States is precise and unconditional (34).

When seeking to implement the Treaty free trade policy, the European Commission has shown little interest so far in using art. 30 instead it has preferred to direct harmonization of laws through directives. Most cases decided by the Court of Justice under art. 30 to date have been brought by individual traders - normally importers - or companies in proceedings originating in their jurisdictions. Their aim is to prevent specific national requirements or rules said to be incompatible with art. 30 of the Treaty from applying as far as imported products are concerned. Thus, it is not a primarily consumer-oriented action. It might even be used to the detriment of the consumers if priority given to the enlargement of the economic market results in setting aside national genuine consumer measures (infra).

The Court of Justice gives a broad interpretation to art. 30 which was first developed in the famous Dassonville case (35) : all Member States measures are considered "measures having equivalent effect" if they directly or indirectly, actually or potentially, are likely to hinder free trade. These measures do not have to have a discriminatory effect or intention; it matters not whether they apply only to foreign products or to all products, whether manufactured locally or imported (36). Article 30 does not concern direct products bans only; it applies to all regulations which have the effect of adding to the costs of the importer or of impairing his chances on the market. Such regulations will include as far as consumer matters are concerned, quality and safety requirements, labelling, packaging and advertising rules, price controls, etc.

18. Article 36 of the Treaty lists certain justifications for exemptions from the Community rules on the free movement of goods and services on public policy grounds. It includes "public morality, public policy or public security; the protection of health and life of humans,

animals or plants; the protection of national treasures possessing artistic, historic or archeological value; or the protection of industrial and commercial property. Such restrictions or prohibitions may not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States". Article 36 is very narrowly construed by the Court of Justice and could not be applied to protection of fair trade or consumer interests except when safety or public health is at stake (37).

19. In a series of recent cases, however, the Court of Justice has formally recognized that consumer protection could also motivate a valid exemption from the Community free-trade rules. First developed in the 1979 Cassis de Dijon case (38), the new doctrine of the Court has now been applied on several occasions (39). It may be summarized as follows (40) :

(a) first, the defence of consumers is explicitly recognized as an *imperative requirement* which justifies the non-application of article 30 of the Treaty : in most cases, the Court will not refer to article 36 even though this was suggested by the pleadings of the General Advocate in the Cassis de Dijon case; consumer protection is thus made an exception to article 30 as the result of a specific general interest requirement or coercive need within article 30 itself;

(b) second, article 30 will still apply when the national provision does not in fact give more protection to consumers than that actually needed against non-conforming imported products : the Court here applies a *test of reasonableness* to the national measure. Only unreasonable measures having equivalent effect to a quantitative restriction on imports will be forbidden. Reasonableness is measured :

- by the purpose pursued, i.e. consumer protection : the Court distinguishes between "true" and "false" consumer protection measures; the free movement of goods should not be restricted by measures whose actual objective is the protection of other interests, such as local business ones;

- and by the ways and means that are used by the specific regulation in order to obtain consumer protection : the Member States measure must be sensible and necessary to reach the goals set by the legislator; it must also harm free trade as little as possible;

(c) judgement as to the actual benefit that consumers get from a national rule will remain flexible, cautious and restricted to a *case-by-case approach*, especially when safety issues are involved.

The stand taken by the European Court of Justice has induced the European Commission to reassess its policy under the Treaty rules on the free movement of goods. According to its new policy, (this was stated within a communication note sent to all Member States in october 1980 (41)), the European Commission now clearly intends to take a stricter course against national measures creating obstacles to free trade among the Member States, such as consumer protection ones, by taking action in the European Court of Justice to challenge under art. 169 disputed Member States' laws. The principle is strongly reaffirmed that every Member State is obliged under article 30 to allow a product which lives up to the standards of its country of origin to be imported into its territory. Stricter regulations than those of the country of origin are said to be allowed only (a) if they can be justified by the general interest or "imperative requirements" test as developed by the Court (and which includes consumer protection); (b) when aimed at such a coercice general as to justify a deviation from one of the basic aims of the Treaty, i.e. the free movement of goods; and (c) to the extent that they damage free trade as little as possible.

This new Commission set of rules, by requiring the application of a stricter "general interest" test than that laid down by the Court and by extending what was to remain a case-by-case judgment basis into some sort of uniform set of rules involves a very broad and somewhat questionable interpretation of the European Court of Justice's decision in the Cassis de Dijon and similar cases (42).

2. Antitrust rules of art. 85 and 86 of the Treaty.

20. There is no question that art. 85 and 86 of the T.R. are directly applicable provisions (43). Whilst it is obvious that an active competition policy may serve the consumer interest, it is also well agreed that anti-trust law only holds the promotion of consumer interests as a secondary and sometimes even conflicting goal (44). It is only recently for example, that the Commission saw the possibilities of using the exemption procedure provided by art. 85, para. 3 for negotiating with the applicant a greater "share of benefit for consumers" in the form of better contractual terms for the buyers of the products covered by the restrictive distributive agreement, such as extensive and uniform warranty certificates. The first application of such a positive use of antitrust regulations was made in the 1978 Zanussi case (45).

D. The use of directives in E.C.-C.L.P.

21. The E.C. legal integration process in the consumer area is most commonly sought by approximation rather than unification of laws. The reasons why the Member States refrain from adopting common and directly applicable rules in basic consumer matters have already been suggested : lack of common political will of the Member States to adopt consumer-oriented measures at their own national level or at the Community one; great disparities in national consumer legislation, methods of consumer protection and basic principles of law to be applied; conflicting motivations of an effective consumer policy and irreconcilable interests at stake (supra).

It is, however, possible to achieve some degree of integration through Community directives, whilst, at the same time, allowing the Member States to maintain at least part of their sovereignty in the particular sector of activity. The statutory provisions, the contents of which will be made as uniform as possible, will still be made by separate legal or-

ders where Member States retain their own authority. In principle at least, the binding force of the directive remains limited and it has no directly applicable effect on individuals living within the E.C. countries (1.).

There is, however, no clear rule as to the exact amount of sovereignty actually left to the Member States. This varies according to the greater or lesser willingness of the Member States to transfer their legislative powers to the central authority in specific sectors of activity or on particular issues within the general framework of the E.C.-C.L.P. Ways and means are found either to extend State authority or, more often, to try to limit this (2.).

1. Legal effect of Community directives

22. Community directives, whether based on art. 100 or on art. 235 -this remains quite exceptional (46) -, are not directly applicable tools since they require a specific act of incorporation by the Member States in order to be applicable in each E.C. country. Directives are primarily intended to give instructions to the Member States and to create legal relationships between the Community and the States. They do not create, as a rule, directly enforceable rights and obligations for individuals.

Also the binding force of the directives upon the States is limited. While they have binding force in respect of "the result to be achieved" by each Member State, it is left to the discretion of the national authorities to choose "the forms and the methods" of enforcing it (art. 189, para. 3 of the Treaty). Each State is required to introduce the directive into its own legal code - which may require it to repeal or modify an existing legislation or enact a new one - but it keeps the authority to decide the form under which the directive will be introduced (act, regulation, administrative order,...) and also to determine its own methods of administration of the provisions introduced into the national legal code as well as its own enforcement and redress structures or procedures.

23. States, however, do not have the same authority towards national legislation resulting from the implementation of a Community directive as they have towards other provisions of their national laws. Any abrogation or modification of a provision resulting from a Community directive will only be allowed after the directive itself has been modified. Prior to or in the absence of their implementation, directives are in principle not binding on the national courts. As they are not intended to interfere with the legislative power of the Member States, they cannot have the effect of modifying national laws. But, following implementation, the national courts will be bound by and give priority to the implementing measure.

Since non-directly applicable tools do not confer on private persons rights which the national courts would be bound to protect, their proper implementation and observance by the Member States is under the exclusive control of the European Commission and of the other Member States under art. 169 of the Treaty. "It follows that individuals are as a whole not only unable to derive enforceable rights from a non-directly applicable provision itself but also they are powerless to enforce the implementation of such a provision at the national level and, once implemented, to control the conformity with it of the implementing measure by way of a court action" (47).

Individuals, however, are not left without any defence. They are allowed, in the framework of national proceedings before the Courts, to avail themselves of the preliminary ruling procedure of Art. 177 : that is, to obtain the interpretation of the directive by the European Court of Justice so as to ensure, regardless of the limited legal effects of the directive, that the domestic law or measure adopted for its implementation is interpreted and applied in a manner which conforms to the requirements of Community law. Individuals can also use the same procedure in order to establish whether the provision in function is, against

all appearances to the contrary, in reality directly applicable and thus must be given effect by the Courts by virtue of the supremacy of Community law. The Court of Justice indeed has admitted in recent cases that some provisions of directives may have a direct legal impact on the position of individuals to the extent that they satisfy the general requirements of the direct applicability doctrine (*supra*). The Court has developed its opinion in the Ratti judgment of April 4, 1979 (48) and in the Grunert case of June 12, 1980 (49). Direct applicability is said to be a general concept which is applicable to the whole area of Community law according to identical criteria : if a Community directive contains "unconditional" and "precise" provisions and the Member State law does not abide by it, the individual citizen - an importer of consumer goods in the respective cases - may not be punished in having contravened the domestic measure (50).

2. Mechanisms and practices extending or limiting State sovereignty

24. We, of course, do not intend to describe the whole set of techniques or practices that the Community institutions may use in order to ensure an efficient and acceptable coordination of central and national activities. We limit ourselves to some of the major methods or common practices actually used in the consumer area. Some give more authority to the Member States (a); Community practice however stresses the need for greater uniformity (b).

a. Extensions of State sovereignty

25. Three main techniques must be mentioned.

(1°) Approximation of law, while introducing Community legislation applicable to cross-borders exchanges, may allow Member States to maintain provisions for domestic products sold on the national or on a local market only : the approximation process is said to be *optional* (51). Optional approximation is frequent : most directives aimed at the elimination of trade barriers which impede the free movement of industrial products between the Member States (especially motor vehicles and measuring instruments) and directives relating to the prepackaging of goods (52) allow the States to prescribe specific requirements for domestic products.

(2°) States may be allowed to maintain or to enact stricter rules than those provided by the Community act : the directive is said to be *minimal* (53). Minimal directives are aimed at protecting consumers from some E.C. countries from the actual loss that they would sustain if a less protective pattern of legislation was to be enacted at the Community level. The concept of a minimal directive is well-known in many areas outside of consumer policy (54). In matters affecting consumers, it is used only to allow Member States to add specific labelling requirements to the Community provisions relating to the marketing of such products as drugs (55), dangerous substances (56) and cosmetics (57). The recently proposed directive on the safety of toys also contains such a provision (58). Even more interesting is the fact that all drafts of directives relating to the protection of the economic and legal interests of consumers which are proposed under the consumer action programmes are couched in terms suggesting that the proposed Community legislation is the minimal requirement (59).

(3°) Most directives on the approximation of the laws of the Member States relating to the composition or labelling of consumer goods contain *safety clauses* which allow the Member States to initiate an action on their own when the product, though conforming to the Community provisions, is deemed to be dangerous to consumer health or safety. These clauses vary significantly from one sector to another (60); they usually allow the States to take temporary emergency measures which may consist of modifying the provisions of the directive or of prohibiting or restricting the marketing of the particular product on their national market.

b. Limitations to State sovereignty

26. The fundamental basis of Community practice when implementing the E.C.-C.L.P. remains the search for uniformity. Total approximation of the laws of the Member States is the usual rule when the protection of consumer health or safety is at stake, such as in the case of dangerous substances, dangerous preparations (solvents), cosmetics, most foodstuffs and toys. Extremely limited use of minimal directives has made to date in the

consumer area and proposals to extend it face strong criticisms and opposition not only from business groups but also from members of the European Parliament who condemn the technique as maintaining legal disparity and thus creating new competitive distortions among the Member States (61). The recently introduced draft directive on insurance contracts (62) does not contain any provision which would confirm its minimal nature (63). The use of safety clauses by Member States also remains strictly controlled by the European Commission which imposes the observance of several information and consultation procedures; it may even be made subject to a prior Community authorization process, such as in the cosmetics area.

Many consumer directives or drafts of such directives contain detailed and unconditional provisions - such as safety and quality standards, labelling and packaging requirements, lists of admitted or of prohibited ingredients and additives, disclosure regulations in consumer contracts, prohibition of the use of specific negotiable instruments within consumer credit transactions... which in fact give the Member States no other choice than merely transforming these Community rules into their own legal code. Besides, these are the provisions which are more likely to be held directly applicable under the case law of the European Court of Justice, as suggested earlier (*supra*).

Another Community practice in the consumer area which has the effect of increasing the restrictions of State sovereignty where Community directives are enacted, consists in extending the scope of the Community intervention to cover methods of implementation, too. Several Community directives or proposals of directives in the consumer area impose preventive controls by Member States such as licensing systems, prior authorization or registration procedures, product recall procedures etc. Enforcement or redress measures may also be suggested. The provisions then used may remain rather vague and merely call for the definition, by each Member State, of "adequate, efficient, rapid and low-cost methods of redress", such as in the draft directives on misleading advertising (art. 5, at 2) and safety of toys (art. 14).

Community rules may also be made more precise and grant consumers specific civil remedies - see the draft directives on doorstep selling (art. 5 and 6), correspondence courses (art. 10 and 11) and misleading advertising (art. 5, al. 3) -, establish consumer complaints handling systems - see the draft directives on consumer credit (art. 14, 1, c and 2) and misleading advertising (art. 5, al. 3) - or confirm the legal standing of consumer groups to take court action - see the draft directive on misleading advertising (art. 5, al. 2).

It is agreed, on the basis of a comprehensive construction of the words "result to be achieved" of art. 189 of the Treaty, that such infringements of the sovereignty of the national authorities with regard to the "methods" of implementing the Community code have effective binding force whenever the result to be achieved, construed by reference to the general objectives of the Community activity in the concerned sector, makes such provisions necessary or useful (64). As yet, this particular Community practice has not passed beyond the stage of mere proposals and remains highly controversial, even for consumer lawyers (65).

E. Community Interventions with no or very limited binding force

27. The use of *recommendations* by the Commission under its general authority conferred by Art. 155, para 3 of the Treaty remains extremely rare, at least in the consumer field. To our knowledge, indeed, only one recommendation has been in force and another is now proposed in matters affecting consumer interests within the E.C. : a 1965 recommendation on the approximation of laws relating to the quality, composition, packaging, conservation and control on some industrial and agricultural products (now repealed) and a 1980 proposal for a recommendation on tests to be made before marketing pharmaceutical products. Reference should also be made to a 1977 recommendation to Member States concerning transferable securities (66). This gives a precedent for a code of conduct at Community level. It establishes a code of

professional ethics; although addressed to Member States, it was negotiated directly with commercial interests and adopted by them (67).

European conventions under Art. 220 also are quite few. In the consumer area, two such conventions have been drafted so far, only one being in force: the 1968 Convention on jurisdiction and enforcement of civil and commercial judgments as modified in 1978 and the 1980 Convention on the law applicable to contractual obligations. Both concern the unifying of conflict of law rules and contain specific provisions aimed at not depriving consumers from the effective protection they receive from the legislation of the country where they have their domicile or usual residence. Member States in this case maintain their authority as to the actual approval, effective date of entry into force and construction of the legal effects of the implementation of this instrument within their own national legal code (68).

Non legislative actions such as those mentioned within the Community consumer action programmes also remain rather modest, e.g. *pilot experimentation schemes* - only two such schemes are now in operation, one concerning consumer education and involving several scholastic establishments throughout the Community and the other relating to ways of improving the settlement of consumer disputes in a limited geographical area in one E.C. country (69) and - still unexplored - the negotiation of *voluntary codes of practice* with business (70).

Efforts made by the central or Community source of C.L.P. to encourage and stimulate national activity, without actually passing any Community acts, mostly consist in running *conferences* on the major themes of the consumer action programmes and limited funding for *comparative legal research, publication and exchange of information systems* on respective C.L.P. of the E.C. countries (71). The development of *model laws* to be offered for voluntary use by the Member States, for example, has received no consideration to date.

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§ 4. Actual scope of implementation of the Community consumer action programme to date

28. Two years have elapsed since the expiration of the First Preliminary Programme for Consumer Protection and Information; a second Programme of Action has now been adopted. A first evaluation is thus possible of the actual achievements of the Community activity under these C.L.P. programmes.

To put it in very concise terms (72) , it can be said that Chapter A "Protection of consumer health and safety" of the programme has received most attention , taking into account the impressive amount of directives which have been adopted with a view of eliminating technical barriers to trade in industrial products and foodstuffs resulting from disparities between the provisions laid down by the laws , regulations or administrative rules of the Member States (73). In addition, a clear concern of several directives or proposals introduced under the same chapter is that consumer information on product characteristics, ingredients and prices (classification, presentation, labeling, packaging, unit pricing rules, etc...) should be increased, thus implementing part of Chapter D of the general Community programme (74). On the other hand, initiatives relating to "advice, help and redress", "consumer education" and "consumer consultation and representation" have not gone far beyond polls, studies , research projects, colloquia and pilot experimentation schemes.

Proposals to promote the protection of the economic and legal interests of the consumers are at the intermediate stage of draft directives which have been submitted by the Commission and are now debated before the European Parliament , the Economic and Social Committee and the Council of Ministers. Five major issues are the subject of such proposals : most concern trade or marketing practices and more precisely misleading and unfair advertising (1978, amended 1979), contracts negotiated away from business premises (1977, amended 1978) , courses of education by correspondence (1977, amended 1978) and consumer credit (1979); among strictly private law matters, only works on product liability have resulted in a draft directive (1976, amended 1979) (75) . National laws relating to insurance contracts are also the subject of a proposal of approximation (1979), which

is based on the rules of the Treaty concerning freedom of establishment and free movement of services within the Community and does not refer to the consumer action programme (76). No one of these proposals has been adopted by the Council yet.

29. Concrete achievements of the Community objectives towards consumers to date thus fall far short of the aspirations outlined in the 1975 charter of consumer rights. Parts of the programme have received no consideration at all or only a very modest attention such as the protection of consumers against one-sided contracts or unfair contract terms, the regulation of consumer services and consumer product warranties as well as the fundamental desire that any legalisation process should ensure that consumers have effective access to justice (77). The process of implementation is extremely slow and time-consuming : it should be observed that the European Commission still concentrates on proposals first introduced years ago.

In fact, most achievements affect areas where there is a certain degree of convergence between the promotion of the consumer interests at one hand and a broader goal of the Community on the other. Indeed , most of what has actually been done consists in pursuing the first aim of enlarging the economic market of the Community by enforcing the approximation of the laws of the Member States which relate to the manufacture, trade, classification and presentation of various consumer goods (78). Crossborder exchanges are also expected to be eased by common rules on advertising, credit offers and insurance contracts. The consumers' right to information, which is regarded as the key factor of the free-market structure, constitutes the main concern of those directives already adopted by the Council, i.e. the directives on labelling and advertising of foodstuffs (1979), labelling of dangerous substances (1967, as amended in 1970, 1971, 1973, 1975 and 1979), labelling of dangerous preparation (solvents) (1973, as amended in 1980), unit pricing of foodstuffs (1979), etc. Trade practices for which proposals for legislation are made are those which question more directly the rational buyer's consent, such as advertising, doorstep selling and mail-order sales. The regulatory mechanisms

proposed concentrate on the development of consumer information : prohibition of misleading or confusing advertisements, conditional admissibility of comparative advertising, disclosure requirements, etc.

When there is a duality , if not a multiplicity, of motivations linked to the Community undertaking, that is when the proposed measure goes beyond the prime economic aim of the integration process, then concrete actions remain modest and proposed Community laws either are non-existent or highly debated. For example, as far as the draft directives aimed at the protection of the economic interests of consumers are concerned, proposed laws , which, departing from the provision of requirements for information for consumer protection, raise more fundamental issues of C.L.P. or involve basic reforms of private law are precisely those conflicting provisions which impede or delay the adoption of the directive. Debates surrounding the adoption of the draft directives on product liability and credit or those concerning the introduction of cooling-off procedures in some of the Community proposals clearly illustrate our statement (79).

§ 5. European Community C.L.P. and positive integration.

30. The Community objectives towards consumers are to promote consumer interests throughout the common market by implementing the five fundamental rights of consumers set out in the adopted consumer action programmes. Since legal integration is required to serve that objective, it cannot be viewed as an end in itself and will only be justified when it results in an actual increase in protection for consumers living in the E.C. countries. Only such a positive integration process contributes to the promotion of the interests of the consumers throughout the European Community.

There is no doubt that most Community undertakings under the E.C.-C.L.P. achieve that type of positive result for consumers, though their actual impact may

remain limited or indirect. But there is also evidence that in some areas at least, or when resorting to specific methods ,Community action may lead to adverse effects and must be subject to a deeper critical valuation from the consumer's point of view. Concurrent larger Community concerns, such as the protection of the interests of producers and retailers under antitrust laws or the enlargement of the market under Article 30 of the Treaty, together with the need for compromise solutions linked to the process of approximation of national laws through directives , explain why the effectiveness of some Community initiatives under the E.C.-C.L.P. is being strongly criticized by consumer groups.

A. Selective distributive agreements and consumer protection.

31. We know that , under art. 85, paragraphe 3 of the T.R., exemption from the Community competition rules may be granted for selective distributive agreements which give the consumers "a fair share of the benefit" resulting from the restriction of trade. Such benefits are usually said to consist of increased safety standards, better conditions of supply , dependable warranty and after-sales services etc. ; they should , of course , be compared with the cost of restrictive distributive agreements to the consumer in paying higher purchase prices.

The fair share of the benefit requirement has, however, been commonly construed by the European Court of Justice in a very lenient way and without clear evidence of a given benefit to consumers. Recent Commission decisions and Court cases such as the BMW and SABA ones, have come under severe attack from consumer lawyers who require that Art.85, paragraphe 3 be used on the ground only of a proved benefit to consumers, such as better warranty and after-sales service terms (80).

B. E.C. rules on the free movement of goods and services and consumer protection.

32. As described earlier (supra) , action under Article 30 of the T.R. can result in questioning the validity of State measures which actually benefit consumers in a concerned E.C. country. If these measures are declared to be in conflict with the Community rules on the free movement of goods and if consumers are not granted a similar degree of protection at the Community level,

the integration process will result in a loss , that is, will have negative effects for those consumers who were indeed better protected under their national legislation . Not surprisingly, there has been, in recent years , a renewed interest by producers and business groups in challenging specific national laws or rules, such as those for consumer protection, under article 30 of the Treaty. National price controls, for example, have been the subject of several attacks in countries where, as in Belgium, a strict price policy is in force (81). National advertising regulations have also been questioned on similar grounds (82) as have safety and quality standards, labelling requirements, bans on the use of certain additives, etc. (83).

Consumers are most likely to benefit from the flexible approach that the European Court of Justice has adopted to deal with these various cases (supra). But the stricter pattern announced by the European Commission after the "Cassis de Dijon" case (supra) has raised much criticism from consumer groups which fear that consumer protection be sacrificed on the altar of uniformity. While positive in some regards - the Commission admits consumer protection as an exemption from the Treaty rules on the free movement of goods ; it has also shown that it intends to develop a more preventive policy under art. 30 by requiring Member States and standardisation organisations to give information to the Commission about new and non-harmonised technical standards and norms to be introduced, together with a justification of the need for the restraints and restrictions imposed (84) ; the Commission also believes it will be necessary to introduce a procedure to postpone the introduction of new norms in order to ensure compliance with European standards - , the new Commission policy may have substantially negative integration effects if applied without discrimination : the exemption of imported products from stricter national consumer rules will lead domestic producers to call for the elimination of these new competitive distortions ; incentives are in fact created for manufacturers to invest in countries with less rigorous consumer legislation since products manufactured there will have to be admitted in all other countries,...

C. Directives and potential effects of negative integration.

33. The same reasons which explain the choice of the directive as the privileged instrument for legal integration of C.L.P. within the Community also explain why the approximation process itself is limited. Uniformity - and unanimity within the Council of Ministers - may mean that compromises have to be reached which will actually limit the positive effects of the initiatives or even result in negative integration for national consumers of some E.C. countries :

1) first, the approximation made may remain quite incomplete or ignore issues which are fundamental to an effective consumer protection in the particular area : for example, the proposed directive on insurance contracts does not even consider basic consumer protection measures which are in force in most Member States such as the establishment of a licensing system, recognition of a cooling-off period and regulation of specific terms deemed to be unfair. The adoption of an incomplete or limited legislation might mean less policy motivation for this particular sector of activity and postponement of more positive or consumer-oriented measures;

2) secondly, uncertainty as to the final product, if any, which will be adopted at the end of the Community decision-making process may induce Member States to delay any action on the matter concerned in the expectation of Community legislation ; because of the slowness of the Community decision-making process, delays may be substantial, during which time there will be no consumer measure taken at either central or national level. There is some evidence of such an effect, at least in Belgium, in the product liability, credit and advertising law areas where draft legislation has been pending for years , partly in expectation of Community rules;

3) thirdly, the approximation of national rules may result in legislation which instead of being drafted according to the terms of the most advanced national legislation possible - as has been demanded by many, including the European Parliament itself - will be aligned along "the smallest common denominator", thus involving losses for consumers in some Member States. Examples of such "negative" provisions within Community directives are numerous : they may concern product packaging and labelling requirements, positive or negative lists of additives used in foodstuffs, cosmetics and drugs, disclosure of actual cost and finance charges in consumer credit transactions, recognition and implementation of cooling-off periods in specific contracts or within the framework of particular trade practices, ceilings for compensation of damages and statutes of limitation rules in product liability law, etc...Positive integration would require such directives to be declared "minimal" allowing the States to maintain or to enact stricter , though not uniform, laws (supra)..

§ 6. Consumer participation.

34. Actual promotion of the interests of the consumers requires that these be associated to the formulation and the implementation of any programme launched in their favour. This assumes some degree of organisation of consumer interests on the market and the recognition of certain groups as being representative of these interests (84); increased support to these organisations which represent consumers will then strengthen their action and make their presence more active. Participation, if we want it to be truly effective, must be ensured at the levels both of policy decision-making and of enforcement. The granting of specific rights to consumers is indeed likely to give consumers no more than an illusory protection if effective access to the existing enforcement and redress mechanisms is denied to them . Consumer participation will thus require far-reaching reforms such as the creation of new structures, organs and committees, the development of consultation procedures and the definition of adequate

and collective redress measures.

Consumer participation is one of the five basic rights set out by the Community 1975 consumer action programme "consultation with and representation of consumers in the framing of decisions affecting their interests" constitutes one of the objectives of Community policy towards consumers. The need for such measures has been reaffirmed and stressed with even more force by the 1981 programme.

Substantial efforts have been made by the Community in order to promote the organisation of consumer interests at the European level. Significant initiatives have also been taken in order to increase consumer consultation and representation within the Community decision-making process. However, effective consumer participation remains limited and is far from compensating the natural imbalance of powers which opposes consumer and business groups on the economic market.

A brief analysis of the structures, mechanism and procedures established in order to develop consumer participation at the Community level allows us to advance four major reasons likely to explain the problems which are affecting the actual achievement of that particular objective of Community policy towards consumers : (a) consumer groups remain underorganized at the Community level ; (b) an administrative structure has been created which is in charge of enforcing the implementation of the Community C.L.P. and promoting consumer interests in the various sectors of the Community activity but this administrative unit has not been given the ways and means needed for its tasks ; (c) consumer consultation is achieved through the works of various organs and committees but still only covers part of the Community activity and gives consumers no formal guarantee that they will be heard at the final stage of decision-making; (d) actual consumer participation in the enforcement of Community legislation depends on the existence, in each national legal order, of rules, regulations and practices providing for adequate consumer disputes settlement procedures.

A. Organization of consumer interests at the Community level.

35. The consumer movement in all E.C. countries was still in its infancy in 1957; the first organizations which had the defence of consumers as their main object only appeared in the mid-50s (86). Five pressure groups concerned with the protection of consumers at the level of the common market were created between 1957 and 1962; most of them included this new object along with other main objects linked to the trade-union, the co-operative or the family movements (87). They were recognized as representatives of the consumer interests at the Community level as early as 1962. Under their present denomination and after the merging of two of the initial groups, the four organizations representing consumer interests by the Community institutions are the following : the European Office of Consumer Unions (BEUC), the Committee of Family Organizations for the European Communities (COFACE), the European Community of Consumer Co-operatives (EURO-COOP) and the European Confederation of Trade Unions (CES). These organizations consist of federations of powerful groups at national levels (88). Their diversity ensures an adequate representation of the various groups involved, either directly or indirectly, in the consumer movement at national levels, mainly consumer associations, trade unions, consumer co-operatives and family organizations.

The European Commission until now has strongly favoured the organization of consumer interests at the Community level. It was the Commission itself which, in 1961, called for the creation of a common consultative structure regrouping the groups which were representative of consumer interests throughout the Community. The Commission aid now takes various forms which include the support of the administrative and financial burden of operation of the Consumers Consultative Committee - which is the main consumer consultation organ established by the Community institutions (infra) -; subsidies to the European consumer organizations to be used in the preparation of studies and reports (89); provision of means for training their officials and improving technical facilities; conferences, seminars, etc.

36. Despite of these developments, European consumer organizations remain weak pressure groups when compared with the multiple interest groups acting in Brussels (90). Estimates about the number of such interest groups vary significantly, from 400 (91) to 2.000 (92). Numerous legal and economic consultants also work in Brussels for trade and industry clients. A recent study made by the Economic and Social Committee on all European interest groups represented within this Committee supports by strong evidence the statement that business interests organizations have reached a much higher degree of integration within the European Community and exert a much more effective influence on the Community institutions (93). BEUC and EUROCOOP are ranked far behind industry groups, such as the Union of Industries of the C.E. (UNICE), bank groups and professional agricultural organizations (COPA, COGECA); COFACE level of integration is even ranked lower (94).

The following factors, among others, may give some explanation to this relative failure :

(1°) European consumer organizations remain very poor in staff and in budget : BEUC employed 7 people in 1979 with a budget of 100.000 US \$; EUROCOOP, 8 people with a budget of 200.000 US \$; COFACE, 4 people with a budget of 45.000 US \$; CES, 28 people with a budget of 1 million US \$ but only a small part of it being directed to consumer affairs (95);

(2°) there is an obvious lack of will for co-ordination of activities or policy statements among European consumer organizations on some issues because of conflicting views resulting from the diversity of social interests that they represent;

(3°) there is no clear "European consumer public opinion" which could back up the position adopted by the European consumer organizations or even call for a direct representation of consumer interests at the Community level by the creation and recognition of a European consumer association based on individual membership; active support of the European consumer groups by their own member organizations is not always **certain** : national consumer

groups may want to concentrate their efforts and resources on domestic issues and reforms, holding European developments as secondary ones; reaction by these national groups as a result of the works and initiatives undertaken at the Community level by both the European institutions and the European consumer organizations generally remains very modest. Finally, European consumer organizations have not looked for ways of addressing themselves directly to the general public; recent initiatives of BEUC such as press statements, news conferences and co-ordination of consumer boycotts at the European level (see the hormones and the Kleber cases) are a first step towards increasing the national consumer sensitivity to European C.L.P. developments.

B. Consumer representation within the Commission administrative structure.

37. The need for co-ordinating the Community consumer policy in the various sectors likely to affect the consumer interests on the common market was first noted by the European institutions in 1968. It has been regularly confirmed since.

In 1968, a special administrative unit was created with the express purpose of dealing with all questions of interest to consumers within the Community. It was to act in liaison with the European consumer organizations and had to represent the consumer point of view in discussions taking place under other Community policies such as agriculture, elimination of trade barriers among the Member States, harmonization of legislation, transport and competition. Not surprisingly at time when consumer interests were not particularly recognized (supra), the unit was placed within the Directorate dealing with competition matters.

Mainly as a result of the 1972 Paris Summit and the emergence of new Community commitments to social policies such as the protection of consumers and the protection of the environment, an Environment and Consumer Protection Service was established in 1973. The existing unit was taken out of the competition sector and enlarged into a Division to form the Consumer Protection and Information Division of the Service. This was placed directly under the authority of the Vice-Chairman of the Commission.

Further expansions included increases in personnel resources and budgetary means and the creation, in 1977, of a directorate for the promotion of consumer interests, composed of three administrative units : a division for physical protection of consumers, a division for economic and legal protection and a specialized service for information and education.

The Service went through important changes, some negative ones and some encouraging ones, in 1980-1981 : its specialized unit on information and education of consumers was suppressed; in January 1981, at the beginning of the term of office of the new Commission, it lost its independence by being placed under the authority of the Commissioner who was also in charge of internal market affairs; in June 1981, the ECPS was promoted to the status of a Directorate-General; finally, the nomination of a new head of the Service was made actual commitment of whom to the promotion of consumer interests remains uncertain.

38. The mandate of the administrative structure established within the European Commission to represent consumer interests is very broad : it mainly consists in an impulsion role for Community actions under the E.C. consumer programmes and in co-ordination of the works of other Directorates-General. The Service makes studies, grants research funding, runs conferences, etc; it prepares the Commission's proposals to the Council of Ministers and participates in initiatives taken within other sectors of Community activity; it also represents the Commission on international bodies and at conferences.

The Service was gradually assigned primary responsibility for the administration of important matters previously falling within the competence of other Directorates-General, such as safety of toys, labelling of foodstuffs and textiles, household maintenance products, cosmetics, consumer credit, misleading advertising and unfair contract terms.

Following the general rule in the E.C., it has no authority with regard to the enforcement of Community consumer legislation. Only the Directorate General charged with competition law has been granted such powers. Indeed, while Community law is put into day-to-day operation mostly by national organs, competition rules are administered directly by the Commission which disposes of far-reaching instruments to act in that field : opinions on pre-notified agreements or practices, negative clearances, granting of individual exemptions or by groups, access to the records, premises and bookkeeping of individual firms, issue of cease-and-desist orders, imposition of heavy fines, etc. (96).

39. Despite the fact that the present Directorate General competences, budget and personnel resources have been regularly increased in recent years, its actual impact on the orientation of the various Community activities likely to affect consumer interests in the E.C. countries still faces severe limits. The most obvious one is its lack of human and financial resources : in 1981, the staff and budget of the ECPS were allocated among environmental units and consumer protection ones according to a ratio of 5 to 1; consumer units being allowed 19 people and granted a credit of 1,025,000 EUA or US \$. Problems which are more difficult to assess for an outside observer are linked to difficulties in establishing an active internal co-ordination between the consumer administrative unit and the other Commission's directorates or services, especially on issues involving conflicting interests.

C. Consumer consultation procedures

40. Informal contacts between European consumer organizations, national consumer lawyers and academics and the competent Commission's services, especially the ECPS, have developed on a very regular basis. Formal practices and specific structures have also been established which are intended to give consultation an official and permanent character.

In 1961, the Commission, stating the lack of any voice from the consumer side within the common market, suggested the creation of a committee which could be considered as representative of the consumer interests at the Community level (97). The Consumers Contact Committee of the E.C. was set up by those five organizations which had as one of their purposes, directly or not, the protection of consumers at the Community level (*supra*). The Committee, however, never succeeded in solving major internal conflicts between its members and also had administrative and financial problems. It thus decided its own dissolution in 1972. One year later, the Commission came with a new initiative : the *Consumers Consultative Committee* (C.C.C.) was established by a formal decision of the Commission (98) and given direct administrative and financial support.

The consultative role of the Committee appears very comprehensive : the Committee is to "represent consumer interests by the Commission and give the Commission opinions on all matters relating to the conception and the implementation of the policy towards consumer information and protection, either upon the Commission's request, or on its own initiative". The Committee is composed of representatives of the four European consumer organizations - each of them with an equal number of seats (99) - and by individuals specially qualified in consumer affairs; members are appointed by the Commission upon proposal from the consumer groups.

The C.C.C. has proved to be very active : it meets regularly, has created several working groups, makes frequent use of outside experts; its opinions usually are well founded, detailed and constructive; these concern not only consumer matters *sensu stricto* - such as doorstep sales, advertising, consumer credit, product liability, regulation of drugs and so on but also the more general interests of consumers, such as common agricultural policy, price policy, energy conservation measures, etc (100).

Several *specialized consultative committees* also exist within the Commission which grant consumers with some representation (101). Let us mention mainly : the Advisory Committees for foodstuffs, for animal nutrition, for veterinary matters and for customs matters as well as 17 agricultural advisory committees for individual products. Some co-ordination is achieved between these consultative organs and the C.C.C.

41. Initiatives have thus been taken which undoubtedly improve consumer consultation and representation at the level of the E.C.. But severe loopholes still affect this process :

(a) Consumer participation never reaches the final stage of elaboration of the Community acts : there is no administrative unit competent on consumer matters nor is there any consultation structure or procedure at the level of the Committee of Permanent State Representatives by the Council of Ministers. Contacts at this level remain unofficial and in fact quite irregular (102). A final decision will be taken within the Council by those members of the national governments who have the concerned matters under their competence. The failure of all Member States but France, to appoint a Minister specifically in charge of consumer affairs directly weakens the consumer participation to the Community global decision-making process;

(b) Consumer consultation through the C.C.C. is not made mandatory, though it seems to be effective. Only the opinions of the Economic and Social Committee and of the European Parliament are required before final adoption of Community regulations and directives (Treaty, art. 100 and 235). Consumer representation within the ESC is mostly ensured by trade-union representatives and by a few members of national consumer organizations designated by the Member States. There is no formal and direct representation of European consumer organizations such as B.E.U.C.

EUROCOOP or COFACE (103). It should be noted, however, that the opinions of the ESC on the Community consumer policy in general and on some consumer issues in particular have usually proved to be quite constructive (104). As to the European Parliament, its present commitment to the promotion of consumer interests throughout the Community remains unclear. Obviously, its role was predominant in the early 70s with regard to the creation of a consumer administrative unit within the Commission and the formulation of the First Preliminary Programme of action (105). Opinions of its Committee on the Environment, Public Health and Consumer Protection, multiple questions from members on legislative proposals and administrative actions and the publication, in 1977, of a comprehensive and very constructive report on consumer policy at Community level in general (the Brégégère report), all have actively contributed to the development of a genuine consumer policy within the Community. In recent years, however, the EP behaviour towards the Commission's initiatives under the Community consumer action programmes appears less unanimous and much more critical. Its Legal Affairs Committee has questioned the legal basis and the opportunity as well of several measures, such as provisions of the draft directives on product liability, misleading advertising and consumer credit. The recent debates surrounding the adoption of the second Community programme have revealed sharp divisions between the members of the E.P., even within the Committee on the Environment, Public Health and Consumer Protection itself (106). Contacts between the E.P. and the European consumer groups remain rather limited;

(c) preliminary public hearings before the adoption of community acts likely to affect consumer interests are not requested nor do they occur. Article 19, para. 3 of Regulation n° 17 of the Council under Community antitrust law is the unique example that we can cite of such a procedure as far as consumer matters are concerned : it gives "any interested third-parties", i.e. consumer groups, the right to submit their observations to the Commission when it intends to grant an exemption from the Treaty rules under art. 85, para. 3. Note, however, that the procedure is most often not followed by the Commission which merely notifies the applicant by a simple administrative circular (107);

(d) *ratione materiae*, specialized consultative committees remain few : they in fact all concern the food area. No direct representation of consumers is provided in such important sectors as regulation of industrial products, cosmetics and drugs, though scientific advisory committees have been established in some of those areas (108).

D. Consumer participation to the enforcement process.

42. Consumer participation in the enforcement of Community legislation will mostly depend on effective access-to-justice for consumers at the national level of each E.C. country. The control of the observance, by Member States, of their Community obligations and the enforcement of individual rights created by directly applicable Community acts require that an action be taken before the national enforcement authorities.

(a) The primary control of State application of Community law belongs to the Commission (Treaty, art. 169). Any interested person, whether an individual or group, may inform the Commission about the alleged violation. The Commission then, if it decides to proceed, will issue a motivated statement on the complaint and, if no agreement is reached with the State, bring the case before the European Court of Justice. Individual consumers and consumer groups, whether national or European, thus have no direct access to the European Court of Justice when they consider that a Member State does not fulfil its Community obligations, either by not implementing Community law or by enacting non-conforming provisions. Such an action, however, will probably give rise to State liability at local national level on the particular provision. Legal suits could thus be brought against the State on that ground before national courts, but effective negligence, damages and causal link will probably be hard to establish.

(b) In national proceedings before Courts or other enforcement authorities (109), the parties may avail themselves of the preliminary ruling procedure of article 177 of the Treaty in order to ask the European Court of Justice for the construction of a Community act and obtain effective recognition of rights created by central law. Application of art. 177, however, can only take place when national proceedings, whether civil, criminal or administrative, have been engaged.

43. Community mechanisms of judicial control do not interfere with dispute settlement systems in force at the national levels of the E.C. countries. They are no alternative to national enforcement and redress procedures. Obstacles to access to justice, which are commonly denounced in all E.C. countries as in others (110), are in no way attenuated or avoided by the Community enforcement system in place.

On the contrary, the two-step procedure of art. 177 is even more likely to create additional barriers which will dissuade individuals from taking action before their national courts : the higher the complexity of the case, the more the need for a lawyer specialized in Community law and proceedings, further delays, greater costs, increased psychological and cultural barriers, etc...

Within the present system of enforcement of Community legislation (or because of the lack of such a system), the effectiveness of consumer participation to the enforcement of European consumer rights remains directly linked to the effectiveness of access-to-justice structures, mechanisms and procedures in force in each Member State. Greater participation would require reforms at national levels, to which of course the Community could contribute through the approximation process. Indeed we have noted earlier that some initiatives were taken in that direction. But the reforms envisaged will most probably have to be fundamental such as giving a full recognition of legal standing to consumer groups or other methods of collective action (111), thus creating greater reluctance of the Member States to accept Community legislation on such matters.

Section 3. - Parallel sources of C.L.P. in E.C. countries

44. Consumers living in the E.C. countries are thus granted protection through initiatives originating both from national public authorities and European Community institutions. Actions taken at the initiatives of other groups or bodies which are active on the international or on the European scene may affect the promotion of their interests, too. While they differ significantly as to their respective origin, scope and impact, these parallel sources of C.L.P. for E.C. consumers have in common the participation in the unifying process of specific national laws, regulations, standards, or practices which relate, directly or not, to consumer matters.

None of these sources, whether public or private, is limited to the European Community scene, though some cover European countries only; they remain few and their impact on the development of a genuine C.L.P. is rather modest; some are quite undeveloped or unexplored (112).

§. 1. Non-community public initiatives

45. Among international public institutions, the works of the Council of Europe, on the one hand, and of the O.E.C.D., on the other, seem to have the most influence both on the consumer policy of the countries which are members of these two organizations and on the European Community consumer programme (113).

The Assembly of the *Council of Europe* also granted a Consumer Protection Charter which was adopted in 1973, that is before the Community programme (114). Though far less comprehensive, the Charter also grants the consumer fundamental rights and sets out priority measures some of which were developed by the European Community much later such as the promotion of voluntary codes of practice and the need for reforms on consumer product warranties and after-sales service. The Council has issued several resolutions and one convention has been concluded on matters interesting consumers,

i.e. door-to-door sales, misleading advertising, unfair contract terms, after-sales service, product liability, consumer representation in standardization bodies, consumer information and education, protection of consumer collective interests. Some achievements have thus been made on particular private law issues, such as unfair contract terms and after-sales service, where Community activity remains extremely limited to date. The legal impact of these initiatives of course cannot be compared : Council resolutions have no legal binding force; they are directed exclusively to member countries and may have no effect on individuals.

The Committee on Consumer Policy of the *Organization for Economic Co-operation and Development*, in addition to annual comparative reports on consumer policy in all its member countries, regularly publishes studies and reports on specific consumer matters, such as labelling and comparative testing, unit pricing, consumer credit, mail order trading, data collection systems relating to injuries involving consumer products, severity weighting of data on accidents involving consumer products, advertising directed to children, recall procedures for unsafe products sold to the public, etc. The Council of the O.E.C.D. has also adopted recommendations relating to consumer issues; they concern safety controls for cosmetics and household products (1976), consumer credit (1977), data collection relating to accidents caused by consumer products (1978), information and protection of tourists as regards all inclusive air tours (1979) and consumer product safety (1979).

§ 2. Non-Community private initiatives

46. Among private initiatives likely to affect uniformity in consumer matters, two major activities are mentioned :

a) the *European Consumer Law Group* ; founded in 1975, this informal group composed by lawyers working in or in close relationship with national consumer organizations from European countries makes studies and issues papers dealing with the present position on common legal issues interesting consumers in all E.C. countries. Its objective is to act as an independent pressure group upon the European Community institutions and also on the national public authorities. Its published reports concern product liability, travel services and purchase of new cars; its present

work deals with measures of collective redress for consumers, cooling-off periods and unenforceable instruments of consumer protection. On one topic, travel services, the group proposed a basic model legislation;

b) *standardization bodies* : several private international and European standardization bodies are developing quality and safety standards for a great variety of products sold to the public; these are the International Standards Organization, the International Electrotechnical Commission, the European Committee for Standardization and the European Committee for Electronical Standardization. It is difficult to assess the actual impact that the work of these bodies has on Community decisions in that area of C.L.P.

Existing international standards are integrated in some Community directives or even simply referred to (115), such as in the 1973 directive on electrical equipment (116). But such a procedure remains exceptional and seems to be used only in default of harmonized European standards.

47. Other private initiatives remain virtually non-existent in the consumer field. Let us mention only the *Unidroit* works in the product liability area, the *ICC international codes of practice* on advertising and mail-order sales and conferences or research projects by the *European University Institute* (Italy) or the *Centre de droit de la consommation* (Belgium).

E.C. countries have not promoted coordination techniques designed to increase the likelihood of uniform solutions to consumer problems nor do such initiatives exist among Member State authorities charged with the enforcement of consumer law or among those administrative units or officials charged with the law-making itself.

PRELIMINARY CONCLUSIONS

1. Most protection for consumers in E.C. countries comes from national legislation or action.

2. Central source is Community-oriented ; horizontal co-ordination and non-Community initiatives ("parallel" sources) remain undeveloped.

3. Community action and State action form a two-tiered system :

- the privileged instrument of action of the Community is the directive which, in its nature, is directed towards States (and not individuals) - is not directly applicable - and has a limited binding force (result to be achieved v. forms and methods). Co-ordination mechanisms do exist which either extend or limit State sovereignty under the directive scheme;

- even under art. 30, national consumer protection measures remain possible, either under art. 36, or when satisfying the criteria recently laid down by the European Court of Justice.

4. Central activity in C.L.P. remains limited and may even result in negative integration effects : Community action mostly concerns areas where there is convergence of interests between promotion of consumers and a broader goal of the Community (antitrust, elimination of barriers to trade; development of free-markets based on information procedures; such conflicting motivations and interests, together with the unanimity requirement within the Community decision-making process, explain why Community initiatives - designed to unify - may have adverse effects on consumer protection. Illustrations of such a possible contradiction have been given : Treaty, art. 30; "smallest common denominator" directives.

5. Community-State relationship does not reflect an actual partnership

a. This is not to be attributed to a lack of policy recognition : two comprehensive consumer action programmes have been adopted .

b. This is not to be attributed to a lack of legal authority on the part of the Community to initiate consumer measures : a now commonly accepted

reading of the provisions of the Treaty confirms the authority of Community institutions to pursue the objective of promoting consumer interests within the Community, confirms the validity of a legal integration process in that area and gives multiple legal basis for Community action.

c. Defects appear to be structural rather than instrumental, though the choice of instruments could sometimes be more adequately made (f. ex. , art. 235 versus art. 100). Defects are linked to both the Community decision-making process and the Community lack of enforcement system :

(1°) unanimity rule (required by law under art. 100 and art. 235 or Community practice elsewhere) : most unlikely to work on basic matters of consumer policy :

- lack of common political will of Member States to adopt a genuine Community approach to the concerned issue;
- disparities in national consumer movements and consumer legislation;
- reluctance to accept reforms to basic principles of law or legal traditions;
- conflicting interests at stake in most consumer matters;

(2°) lack of Community enforcement measures and systems : no administrative machinery (except antitrust law); limited European judicial system; need for national redress mechanisms;

(3°) limited consumer participation in the legislative and judicial processes :

- underorganization of consumer interests at Community level;
- modest administrative structure charged with the implementation of C.L.P. within the Commission;
- limited consumer consultation procedures;
- no effective access-to-justice to enforce European consumer rights.

FOOTNOTES

- (1) N.REICH, H. MICKLITZ, Consumer legislation in the E.C. countries : a comparative analysis, Van Nostrand Reinhold Cy, London , 1980, at 1.
- (2) Main general studies on legal protection of consumers in the E.C. member countries are : on the FRG : N.REICH and H.MICKLITZ , Verbraucherschutzrecht in der Bundesrepublik Deutschland, Van Nostrand Reinhold Cy , London, 1980; E. VON HIPPEL , Verbraucherschutz, J.C.B.Mohr, Tübingen, 2ed, 1979; N.REICH, K.TONNER, H. WEGENER, Verbraucher und Recht, O.Schwartz, Göttingen, 1976. On Belgium : M.FONTAINE et Th. BOURGOIGNIE , Le droit de la consommation en Belgique et au Luxembourg, Van Nostrand Reinhold Cy, London, 1981; J. STUYCK, Consumentenrecht, Preadvies voor "Honderdvijftig Jaar Rechtleven 1830-1980" , Gent, 5-7 november 1980 (to be published); Th. BOURGOIGNIE, Réalité et spécificité du droit de la consommation, Journal des Tribunaux, 1979, p. 293-306. On Denmark: B. DAHL, Consumer Legislation in Denmark, Van Nostrand Reinhold Cy, London, 1981 . On France: J. CALAIS-AULOY, Droit de la consommation, Précis Dalloz, Paris , 1980; J.CALAIS-AULOY et al, Le droit de la consommation en France, Van Nostrand Reinhold Cy, London, 1980; J.C.FOURGOUX, J. MIHAILOV and M.V. JEANNIN, Droit de la consommation, Delmas et cie, Paris 1979; D. BAUMANN, Droit de la consommation, Librairies techniques , Paris, 1977; L.BIHL, Consommateur , défends-toi!, Denöel , Paris, 1976; G.CAS, La défense du consommateur, ed. du Cerf, Paris, 1975; D.NGUYEN-THANH, Techniques juridiques de protection des consommateurs, Institut national de la Consommation ,Paris , 1970. On the UK and Ireland : M. WHINCUP , Consumer legislation in the united Kingdom and the Republic of Ireland, Van Nostrand Reinhold Cy, London, 1979; R. CRANSTON, Consumers and the law, Weidenfeld and Nicholson, London, 1978; G. BORRIE and A.L. DIAMOND, The consumer, society and the law , Hermondsworth, 3d ed, 1973. On Italy : G. GHIDINI, Consumer Legislation in Italy, Van Nostrand Reinhold Cy, London , 1980; G.Ghidini, Per I consumatori, Zanichelli, Bologna, 1977; G. ALPA, Tutela del consumatore e controlli sull'impresa, il Mulino, Bologna, 1977 . On the Netherlands: E. HONDIUS, Consumer Legislation in the Netherlands, Van Nostrand Reinhold Cy, London, 1980. E. HONDIUS, Konsumenterecht, Kluwer-Deventer, 1976; A. BRACK, Kernpunten van het Konsumentenrecht, H.D. Tjeenk Willinck, Groningen, 1975. On comparative law : N. REICH and H. MICKLITZ, Consumer Legislation in the E.C. Countries - A Comparative Analysis, Van Nostrand Reinhold Cy, 1980; E. HONDIUS, Konsumentenrecht : een rechtsgebied in ontwikkeling, Preadvies voor "Honderdvijftig jaar Rechtsleven 1830-1980" Gent, 5-7 november 1980 (to be published, Press University, Leiden).
- Main works on access to justice for consumers in the E.C member countries are : On comparative law : M. CAPPELLETTI, Access to Justice , 3 vol. Sijthoff-Guiffre, Alphen aan den Rijn-Milan, 1978; CEC., Les moyens judiciaires et parajudiciaires de protection des consommateurs, Brussels-Luxembourg, 1976. On the FRG : U. REIFNER, Verbraucherschutz und Rechtshilfe, International Institute of Management, Berlin, 1979. On Belgium : Th. BOURGOIGNIE, G. DELVAX F. DOMONT-NAERT and C. PANIER, L'aide juridique au consommateur, Centre

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- (3) The set is published by VAN NOSTRAND REINHOLD Cy, London, All volumes will be available in English. A volume on consumer legislation in Greece is under preparation.
- (4) On a proposed life cycle analysis of the consumer movement in selected countries , see W. STRAVER, The international consumerist movement, European Journal of Marketing, vol. 11, number 2, 1977, 92-117.
- (5) A brilliant analysis of the productivist approach adopted by the writers of the Treaty of Rome has been made by J.MEYNAUD, in Les consommateurs et le pouvoir, Etudes de science politique 8 , Lausanne, 1964, p.443 sv.
- (6) Most relevant cases are BMW and SABA. See comments in Th. BOURGOIGNIE, Towards consumer legislation at European community level ? Potential scope and limits , Workshop on "Prospects for integration of consumer law and policy in the European community", Louvain-la-Neuve, 14-15 May 1981, p.51-52 (to be published) (hereafter cited as May workshop paper); N. Reich , Community consumer law : authoritative power of the European Commission and the role of the Court of Justice with regard to integration of consumer law and policy , May Workshop , p. 19 (to be published). Strong criticisms on the Commission's policy have been expressed by B.E.U.C. in BEUC News 6, 7 and 10/1980.
- (7) Ch. JOERGES , Zielsetzungen und Instrumentarien den europäischen Verbraucherrechtspolitik : Eine Analysis von Entwicklungen in Bereich des Zivilrechts, Journal of Consumer Policy, 1979, p.217; N.REICH , Markt und Recht, 1977, p. 200 sv. . On the role of monopolies legislation as an instrument of consumer policy, see : B.DHAEYER and J.THILMANY, La protection du consommateur et le droit antitrust européen, Revue trim. dr. europ., 1978, p. 223 sv. ; SCHRICKER, Wettbewerbsrecht und Verbraucherschutz, Rabels Z.36 (1972), 315; id. , Wettbewerbsrechtliche Aspekte des Verbraucherschutzes, Rabels Z.40 (1976) , 535; N. REICH, Verbraucherschutz und Wettbewerb , Jus, s. 50 ff (1974 a) ; E. VON HIPPEL, Verbraucherschutz , J.C.B. Mohr Tübingen , 2ed. 1979, p. 116 et seq. ; S. REISENFELD, Consumer protection and antitrust laws, Rabels Z.40 (1976), 579.

- (8) Point iii of the Preamble of the post-conference communique. See comments in D. SWANN , The Economics of the Common Market, Penguin Books, 4th ed., 1978, p. 256 sv.; E. CEREXHE, Le droit européen, Ed. Nauwelaerts, Leuven, 1979, p. 77.
- (9) Point 6 of the post-conference communique.
- (10) OJ of 25-4-1975, C 92.
- (11) OJ of 03-06-1981, C 133.
- (12) On consumer interests as diffuse or collectives ones, see G. GHIDINI, L'intérêt des consommateurs comme intérêt "diffus" et sa défense, Riv. del Dir. Com. , 1978, pp. 33-40; Th. BOURGOIGNIE et cts, L'aide juridique au consommateur, 1981, p.35 sv.
- (13) J. PIPKORN , Les méthodes de rapprochement des législations à l'intérieur de la C.E.E., in L'influence des Communautés européennes sur le droit international privé des Etats-membres, Larcier, Brussels, 1981, p. 29 sv. and references cited; C. CLOSE, Harmonisation of laws : use or abuse of the powers under the E.E.C. Treaty ?, European Law Review, 1978, p. 474.
- (14) L. KRÄMER, Les consommateurs et L'Europe, Agence Européenne d'Informations, Bruxelles, 1978, p. 21.
- (15) C.CLOSE, op.cit. , p.474; J. PIPKORN , op. cit. p.19 and p. 25; Th. BOURGOIGNIE, May Workshop paper, p. 28-37 ; N. REICH, May Workshop paper, p. 24; G. SCHRICKER, Probleme der europäischen Angleichung des Rechts des unlauteren Wettbewerbs, Festschrift Zweigert, 1981, p. 548 sv. Contra : M. SEIDEL, Ziel und Ausmass der Rechtsangleichung in der EWG, Europarecht 1979, p. 171 sv.; F.MARX, Funktion und Grenzen der Rechtsangleichung nach Art.100 EWG-Vertrag, 1976, p.160.
- (16) Case 92/79 (Commission v. Italian Republic), 18 March 1980.
- (17) N. REICH, May Workshop paper, p. 25.
- (18) P. SOLDATOS, G. VANDERSANDEN, La recommandation, in D. de RIPAINSEL-LANDY and others, Les instruments de rapprochement des législations dans la C.E.E., Ed. Université de Bruxelles, 1976, p. 103 sv.
- (19) Sixth General Report on the Activity of the Community, 1972, p.17 .The promotion of art. 235 has since been regularly stressed : see the Commission's statement in reply to a parliamentary question, in OJ C 285/27 and 28 , 13 december 1975; see also the Parliament's statement in its Report on Community Consumer Policy, doc. 114/77, 2 June 1977, pp. 48-49.

- (20) Ch. JOERGES, op. cit., p. 214; G. ISAAC, L'action de la C.E. pour la protection des intérêts économiques et juridiques des consommateurs, Annales Univ. Sciences sociales de Toulouse, 1979, p. 177; I. SCHWARTZ, Le pouvoir normatif de la Communauté notamment en vertu de l'art. 235: une compétence exclusive ou parallèle, Rev. march. com., 1976, pp. 280 et seq.; I. SCHWARTZ, Article 235 and Law-making powers in the European Communities, 27 I.C.L.Q. 1978, pp. 614-628.
- (21) See the cases C.J.E.C. 1973, case 8/73, p. 897; C.J.E.C. 1976, case 43/75, p. 455.
- (22) A.G. TOTH, Legal protection of individuals in the European Communities, North-Holland Publ. Cy, 1978, vol. 1, pp. 15-16; W. VAN GERVEN, De rechtsbescherming van particulieren in het recht van de Europese economische gemeenschap, Tijdschrift voor Privaatrecht, 1980, pp. 411 sv; W. VAN GERVEN, The legal protection of private parties in the law of the E.E.C., in JACOBS, European law and the individual, 1976, pp. 4 sv.
- (23) A.G. TOTH, op. cit., vol. 1, p. 11.
- (24) A.G. Toth, op.cit., vol.1, p. 27-29; E.CEREXHE, op. cit., p. 278-327; P. KAPTEYN, P.VERLOREN VAN THEMAAT, Introduction to the law of the European Communities, Sweet. Maxwell, London, 1973, pp. 25-31; P. RAWORTH, Article 177 of the Treaty of Rome and the evolution of the doctrine of the supremacy of Community law, 1977 Canadian Yearbook of International Law 276 (1977); J.P. WARNER, The relationship between European Community law and the national laws of member States, 93 Law Quarterly Rev., 349 (1977).
- (25) See specially Costa c/ E.N.E. case 6/64, C.J.E.C. of 15-07-1964, Rep. 1964, p. 1141. Further illustrations are Wilhem c/ Bundeskartellamt, case 14/68 C.J.E.C. of 13-02-1969 Rep. 1969, p. 15; ECC c/ Italian Republic, case 48/71, C.J.E.C. of 13-07-1972, Rep. 1972, p. 534; Italian Finance Department c/ Simmenthal, case 106/77, C.J.E.C. of 9-03-1978, Cahiers de droit européen, 1978, pp. 263 sv.
- (26) P. KAPTEYN, P. VERLOREN VAN THEMAAT, op. cit., p. 110; A.G. TOTH, op.cit., vol. 2, p. 186; J.V. LOUIS, Le règlement, source directe d'unification des législations, in D. DE RIPAINSEL-LANDY and others, Les instruments..., op. cit., p. 31.
- (27) See also N. REICH, May Workshop paper, p. 3.
- (28) The consumption process is still viewed as a means for reproducing the capitalist production system. This is referred to as the "social norm of consumption" ("norme sociale de consommation"). J. ROBINSON,

J. EATWELL, L'Economie moderne, Ediscience, Paris, 1975, pp. 253-254.
 See also : M. AGLIETTA, Régulation et crises du capitalisme, Coll. Perspectives de l'économie, Calmann-Levy, Paris, 1974; A. GRANO, Capitalisme et mode de vie, coll. Objectifs, Ed. Cerf, Paris, 1974; M. WIEVIORKA, L'Etat, le patronat et les consommateurs, coll. Politiques, P.U.F., Paris 1977. For legal implications of such a perception, see Th. BOURGOIGNIE a.o. L'aide juridique au consommateur, op. cit., pp. 27 sv.

- (29) L. KRÄMER, op.cit., p. 179.
- (30) E.E.C. Doc III/D/1294/79.
- (31) Resolution of 14.9.1977 on Community consumer policy, O.J. of 10-10-1977, C 241/23.
- (32) idem.
- (33) N. REICH, May Workshop paper, p. 30.
- (34) Case 74/76, ECR 1977, at 575.
- (35) Case 8/74, July 11, 1974, ECR 1974, at 837.
- (36) C. EHLERMANN, Das Verbot der Massnahmen gleicher Wirkung in der Rechtsprechung der Gerichtshofes, in Festschrift Ipsen, 1977, p. 579 sv.; P. VERLOREN VAN THEMAAT, Inleiding tot het recht van de Europese Gemeenschappen, Kluwer Samson, 1970, pp. 213 et seq and 389 et seq; id., Bevat artikel 30 van het E.E.G.-Verdrag slechts een non-discriminatie beginsel ten aanzien van invoerbepalingen?, S.E.W., 1967, pp. 632-643; id., E.E.G.- richtlijnen betreffende discriminerende aankooppolitiek overheidsinstellingen discriminerende prijsvoorschriften en andere maatregelen van gelijke werking als kwantitatieve invoerbepalingen, S.E.W. 1970, pp. 258 to 266; id., De Gemeenschapsrechtelijke grenzen van het nationale prijsbeleid, S.E.W. 1976, pp. 402 sv.; M. WAELBROECK, Les réglementations nationales de prix et le droit communautaire, Institut d'Etudes Européennes, Ed. de l'Univ. de Bruxelles, 1975, pp. 15 to 43. Different views were voiced by R. BERAUD, Mesures d'effet équivalent au sens de l'article 30 du Traité de Rome, Rev. trim. dr. europ., 1968, pp. 265 sv.; F. MARX, op. cit., p. 84 sv.
- (37) Case 7/68, Dec. 10, 1968, ECR 1968, 633 (644); case 13/68, Dec. 19, 1968, ECR, 1968, 679 (694); case 29/72, Dec. 14, 1972, ECR 1972, 1309 (1318). The Nisine decision of Feb. 5, 1981 case (53/80, O.J. 6-03-1981, C/47) which involved a Dutch regulation prohibiting the additive nisine in cheese was made on the basis of art. 36.
- (38) C.J.E.C. of 20-2-1979, case 120/78 (Rewe-Zentral / Bundesmonopolverwaltung für Branntwein), ECR 1979, p. 649.
- (39) C.J.E.C. of 26-6-1980, case 788/79 (Gilli and Andres); C.J.E.C. of 16-12-1980,

- case 27/80 (Fietje); C.J.E.C. of 5-2-1981, case 53/80 (Officier van Justitie/Eyssen) , O.J. of 6-3-1981, n° C/47 (Nisine); case 130/80 , ECR 1981,... (not yet published) (Dutch bread case).
- (40) Th. BOURGOIGNIE, May Workshop paper, pp. 54-60; N. REICH, May Workshop paper, pp. 5-15. See also J.C. MASCLLET, Les articles 30, 36 et 100 du traité C.E.E. à la lumière de l'arrêt "Cassis de Dijon", Rev. trim. dr. europ., 1980, p. 623; A. MATTERA, L'arrêt "Cassis de Dijon" : une nouvelle approche pour la réalisation et le bon fonctionnement du marché intérieur, Rev. Marché com., 1980, pp. 505 to 513.
- (41) Communication from the Commission concerning the consequences of the Judgement given by the Court of Justice on 20-2-1979 in Case 120/78 ("Cassis de Dijon"), O.J. of 3-10-1980, n° C 256/2.
- (42) Consumer groups have strongly emphasized the dangers of the Commission's position : Consumer Consultative Committee, Opinion on the consequences of the judgement in the "Cassis de Dijon" case , adopted on 16.10.1981, C.C.C. 29/81, 31 p.
- (43) For art. 85(1) , see case 127/73, ECR 1974, 62; for art. 85 (2) , see case 48/72, ECR 1973 , 86; for art. 86, see cases 127/73, ECR 1974, 62 and 155/73, ECR 1974, 430. See also cases cited by J.P. WARNER, op.cit., 93 Law Quarterly Rev., 356 (1977).
- (44) See references cited supra.
- (45) Commission Decision of 23-10-1978 relating to proceeding under Art. 85 of the Treaty attacking the guarantee scheme offered by the Italian firm ZANUSSI to buyers of its products in the various member States of the European Community, OJ of 16-11-1978, L 322/36 . The Commission has recently taken a similar position in regard to the firms BAUKNECHT and MOULINEX , which have also introduced European guarantee certificates as a result (BEUC-News, novembre 1980).
- (46) Only one directive, the directive on consumer protection in the indication of the prices of foodstuffs (June 19, 1979, OJ of 26-6-1979, L 158/19) has been based on Art. 235 to date. The object of the directive is stated to be to make it easier for consumers to compare prices "at the place of sale", so that it can have no more than local impact and cannot directly affect trade in the common market.
- (47) A.G. TOTH, op. cit. , vol. 2, p. 188.
- (48) April 4, 1979, case 148/78, ECR 1979, 1629 (1642). For prior decisions, see J.P. WARNER, op.cit., at 357-358.
- (49) June 12, 1980, case 88/79, ECR 1980, 1827 (1837).
- (50) N. REICH , May Workshop paper, pp. 27-28; see also W. VAN GERVEN, op. cit. , at 412.

- (51) E. LASNET, L'élimination des entraves techniques aux échanges dans la C.E.E., Cahiers de droit européen, 1976, pp.8 sv. Examples are the directive 75/106/EEC of 19 December 1974 (OJ 1975, L 42/1) on the making up by volume of certain pre-packaged liquids, the directive 76/211/EEC of 20 January 1976 (OJ 1976, L 46/1) on the making up by weight or by volume of certain pre-packaged products, the directive 80/232/EEC of 15 January 1980 (OJ 1980, L 51/1) on nominal weights and volumes admitted for certain pre-packaged products.
- (52) Th. BOURGOIGNIE, May Workshop paper, pp. 71-72; L. KRAMER, op. cit., pp. 180-186.
- (53) L. KRAMER, op. cit., pp. 186-190.
- (54) Examples of such minimal directives are: Council Directive of 16 June 1975 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States (OJ of 25 July 1975, L 194/26), seventh paragraph of preamble and Article 6; Council Directive of 20 February 1978 on waste from the titanium dioxide industry (OJ of 25 February 1978, L 54/19), Article 12; Council Directive of 29 June 1978 on approximation of the laws of the Member States concerning the lead content of petrol (OJ of 22 July 1978, L 197/19), Article 2; Council Directive of 5 March 1979 co-ordinating the conditions for admission of securities to official stock exchange listing (OJ of 16 March 1979, L 66/21), fifth and sixth paragraphs of preamble and Article 5; Council Directive of 17 March 1980 co-ordinating the requirements for the drawing up, scrutiny and distribution of the particulars to be published for the admission of securities to official stock exchange listing (OJ of 17 April 1980, L 100/1), fourth paragraph of preamble and Article 5.
- (55) Directive of 26 January 1965 on proprietary medicinal products (art.19), OJ 9-2-1965, n° 22, p. 369/65; directive of 20 May 1975 on proprietary medicinal products (art. 7), OJ 9-6-1975, L 147/13.
- (56) Directive of 18 September 1979 amending the directive on the classification, packaging and labelling of dangerous substances (art. 15, 2 and art. 18), OJ 15-10-1979, L 259/10.
- (57) Directive of 27 July 1976 on cosmetic products (art. 7), OJ 27-9-1976, L 262/169.
- (58) Proposal for a directive on toy safety, 3 July 1980; art. 6(4), OJ 8-9-1980 C 228/10.
- (59) See the proposals for directives on misleading advertising, art 8; on correspondence courses, art. 16; on contracts negotiated away from business premises, art. 13; on manufacturer's liability, art. 11; and on credit, art.16.
- (60) L. KRAMER, op. cit., pp. 203-209.
- (61) See, for example, the draft report prepared for the Legal Affairs Committee by Mr. PROUT on the proposed EEC directive on consumer credit (doc. P.E. 59.430/fin), end of statement 15. It should be remembered that in 1977

the European Parliament called for the alignment of Community consumer protection measures with the most advanced legislation. See its Resolution on Community consumer policy (Brégégère report), 2 June 1977, Statement 27. The Parliament had already expressed the same wish in its opinion on the preliminary programme for a consumer information and protection policy in 1974 (OJ of 30-5-1975 , C 62/8).

- (62) Proposal of 10-7-1979, OJ 28-7-1979, C 190/2.
- (63) For a severe criticism of the proposal , see R. GARTNER ,Les objectifs d'une harmonisation du droit régissant le contrat d'assurance dans la perspective des consommateurs, in L'harmonisation du droit du contrat d'assurances dans la C.E.E., Brussels, Bruylant, 1981, pp. 60-79.
- (64) P. KAPTEYN, P. VERLOREN VAN THEMAAT, op.cit., p. 112; D. DE RIPAINSEL, A. GERARD, La notion juridique de la directive utilisée comme instrument de rapprochement des législations dans la C.E.E., in D. DE RIPAINSEL-LANDY a.o. ,Les instruments ... , op.cit. , pp.47sv. ; I. SCHWARTZ, De la conception du rapprochement des législations dans la C.E.E., Rev. trim. dr. europ. , 1967, pp. 263-264; J. MEGRET, La technique communautaire d'harmonisation des législations , Revue du Marché Commun , 1967, p. 186.
- (65) N. REICH , May Workshop paper , p. 27.
- (66) Recommendation of 25-7-1977, OJ 20-8-1977, L 212.
- (67) S. FREEDMAN, The non-legislative role of the European Commission towards integration of consumer law and policy , Louvain-la-Neuve Workshop, 14 and 15 May 1981, p. 9 (to be published).
- (68) I. SCHWARTZ, op. cit., p. 238; A. LIMPENS-MEINERTZHAGEN, La coordination ou l'unification du droit par voie de convention entre les Etats membres, in Les instruments, ..., op.cit., pp. 155 et seq. The Convention on Law Applicable to Contractual Obligations does not have Community status, since it has not been signed by all Member States.
- (69) S.FREEDMAN, op. cit., p. 12; Bulletin of the E.C., Supplement 4/79, Second Community programme for consumers, Annex 1, pp. 18 and 19.
- (70) S. FREEDMAN, op. cit., p. 5-11.
- (71) Private projects for an European Consumer law review and the creation of an effective exchange of information system on consumer law and policy in the E.C. countries have been elaborated for some time now but still not resulted in concrete achievements. See, e.g., the European Consumer Law Bulletin , n° "0" , published in October 1980, by the Centre de droit de la consommation (Louvain-la-Neuve, Belgium) and BEUC.

- (72) For more details ,see B.E.U.C., Sélection des directives et de propositions de directives du Conseil présentant un intérêt pour les consommateurs (situation as at 31-12 1980) , Brussels, 1981, 71pp.; Summary of the most important work carried out and results obtained since 1973 in the field of consumer protection and information, Annex 1 to Draft Council resolution concerning the second programme of the E.E.C. for a consumer protection and information policy, OJ of 30-8-1979, C 218/14; CEC, Consumer Protection Information Policy - First Report, 1977, 100pp and Annex 2; id., Second Report, 1979, 59 pp, Annex 1. There have been few doctrinal works on the subject : see mainly Europe's consumer movement : key issues and corporate responses , A Business International Research Report, december 1980; G.ALPA, M. BESSONE, Il consumatore e l'Europa, Cedam, Padua, 1979; L. KRAMER, op. cit. , 1978. See also A.C.EVANS, European Consumer Protection Law, Journal of Business Law, 1981, pp. 77-88 ; G. ISAAC, L'action de la C.E. pour la protection des intérêts économiques et juridiques des consommateurs, Annales Université sciences sociales de Toulouse, 1979, pp. 173-199; Ch. JOERGES Zielsetzungen und Instrumentarien der europäischer Verbraucherrechtspolitik: Eine Analyse von Entwicklungen im Bereich der Zivilrechts, Journal of Consumer Policy, 1979, p. 213 sv. ; L. KRAMER, Entgegnung zu Joerges, J.C.P. 1979, p. 228 sv.
- (73) The list , up-to-date to 15-1-1978 , is given in Bibliography B/10 on promotion of consumer interests, vol. II , CEC, Brussels-Luxembourg 1978; for later directives, see the General Reports on the Activity of the Community for the years 1978 (pp. 372-375) , 1979 (pp. 374-377) and 1980 (pp. 356-358).
- (74) Council Directive of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling , presentation and advertising of foodstuffs for sale to the ultimate customer, OJ of 8-2-1979, L 33/1; Council Directive of 19 June 1979 on consumer protection in the indication of the prices of foodstuffs, OJ of 26-6-1979, L 158 ; Council Directive of 15 January 1980 on the approximation of the laws of the Member States relating to the ranges of nominal quantities and nominal capacities admitted for certain pre-packaged products, OJ of 25-2-1980, L 51; Council Directive of 18 september 1979 amending for the sixth time Directive 67/548/EEC on the approximation of laws , regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous substances , OJ 15-10-1979, L 259 ; Proposal of 13 February 1980 for a Council Directive amending the Directive of 26 July 1971 on te approximation of the laws of Member States relating to textile names, OJ 13-3-1980, C 63; Proposal for Council Directive on the approximation of the laws of Member States relating to the indication of the origin of certain textile and clothing products, OJ of 13-11-1980, C 294;

Council Directive of 14 May 1979 on the indication by labelling of the energy consumption of household appliances, OJ of 13-6-1979, n° L 145.

- (75) References of these proposals for directives are the following :
- advertising : OJ of 21-3-1978, C/70 as amended in OJ of 1-8-1979, C/194;
 - contracts negotiated away from business premises : OJ of 29-1-1977, C/22, as amended in OJ of 1-6-1978, C/127;
 - correspondence courses: OJ of 31-8-1977, C/208, as amended in OJ of 22-8-1978, C/200;
 - credit : OJ of 27-3-1979, C/80;
 - product liability : OJ of 14-10-1976, C/241, as amended in OJ of 26-10-1979, C/271.
- (76) OJ of 28-7-1979, C/190.
- (77) This does not mean that any action is absent in these areas. A working document has been drawn up by the Commission on a possible proposal for a directive on unfair clauses (the text thereof is quoted in G. ALPA and M. BESSONE, op.cit., p. 221). The Commission held important conferences on judicial and quasi-judicial means of protecting consumers (1975) and on consumer services (1979). We have already mentioned that it is organising a pilot scheme for the settlement of small consumer disputes in Scotland. The 1978 Convention on jurisdiction and enforcement of civil and commercial judgments, as amended in 1978, and the 1980 Convention on the Law applicable to contractual obligations also contain provisions likely to improve the access to Courts in cases of disputes arising from transnational consumer-business relationships.
- (78) Taking industrial products alone, the number of directives adopted by the Council by 31-12-1980 was 136. Fourteenth General Report on the Activity of the Community, CEC, Brussels-Luxembourg, 1981, pp 86 et seq.
- (79) For details, see Th. BOURGOIGNIE, May Workshop paper, pp. 60-65.
- (80) For suggestions for such Community rules on warranties, see Th. BOURGOIGNIE, New patterns of consumer protection under warranty law : lessons from the U.S. Magnuson-Moss Warranty Act, J.C.P. 1979/3 and 4, pp. 266-280.
- (81) Cases 16 to 20/79, 6 November 1979, Cassation 26 February 1980, Jurisprudence commerciale de Belgique, 1980, I, p. 244 sv.; see comments by M. WAELBROECK, Revue Critique de Jurisprudence Belge, 1981, p.5 sv.; P. DE VROEDE, Revue Internationale de la Concurrence, n°140, 1/1980. On the general issue, M. WAELBROECK, Les réglementations nationales de prix et le droit communautaire, Ed. Université de Bruxelles, 1975.

- (82) On French advertising restrictions on alcohol, see case 152/78, July 10, 1980, ECR 1980; on Belgian prohibition of advertisements on foreign cable-TV programs, see case 52/79, March 18, 1980, in Journal des Tribunaux, 1980, p. 279.
- (83) See cases cited supra.
- (84) Proposal for Council Directive laying down a procedure for the provision of information in the field of technical standards and regulations, OJ of 1-10-1980, C 253/2. It is worth noting that such a procedure for advance information has always been considered to be necessary : as early as 20-9-1976 the Commission recommended that Member States notify it of their intentions regarding new laws, regulations and administrative provisions on the quality, composition, packaging, conservation and inspection of certain industrial and agricultural products (OJ, 1965, p. 2611). The response from Member States to this recommendation has been modest : see D. DE RIPAINSEL-LANDY et al, op. cit. p.133 and p. 146. The 1965 Recommendation was cancelled by the Agreement of the Representatives of the Governments of the Member States meeting in Council on 28 May 1969 concerning standstill and information for the Commission, as amended by the Agreement of 5 March 1973 (OJ of 17-6-1979, C 76/9 and OJ of 15-3-1973 , C 9/3). See E. LASNET, op. cit. , p. 20.
- (85) It may be argued that the transfer of competence from national governments to a supranational centre favours those groups or circles which are in a position to organise themselves or take action at that level. J.MEYNAUD, op.cit., pp. 465-468; M. SHANKS, Le consommateur en Europe, Fonds Européen de Coopération, Brussels, 1979, pp. 2-4.
- (86) In chronological order : Forbrugerradet (Denmark, 1947), Union Fédérale des Consommateurs (France, 1951), Consumentenbond (Netherlands, 1953) Arbeitsgemeinschaft der Verbraucher (FRG, 1953), Unione Nazionale Consumatori (Italy, 1955), Consumers Association (United Kingdom, 1957), Association des Consommateurs (Belgium, 1957), Konsumentenkontakt (Netherlands, 1957), UFIDEC (Belgium, 1959), Union Luxembourgeoise des Consommateurs (Grand Duchy of Luxembourg, 1962), Stiftung Warentest (FRG, 1965), Consumers' Association (Ireland, 1966).
- (87) Community of National Consumer Cooperative Organizations in the Common Market (1957), European Organization of the International Confederation of Free Trade Unions (1958) , European Organization of the International Confederation of Christian Trade Unions (1959), European Action Committee of the International Union of Family Organizations (1959), European Union of Consumers' Unions (1962).

- (88) For a most recent description , see Comité économique et social , Les groupements d'intérêt européens et leurs relations avec le comité économique et social, Ed.Delta, Bruxelles, 1980, pp. 269-316.
- (89) Subsidies totalled 1.280.000 EUA (or US \$) up to 1979 ; 1981 budget amount was 345.000 EUA.
- (90) Comité économique et social , Les groupements ... , op. cit., 1980; E. KIRCHNER, Interest group behaviour at the Community level, in Contemporary Perspectives on European Integration : Attitudes, non-governmental behaviour and collective decision making, ed. by L. HURWITZ, Aldrich Press, London, 1980, pp. 95-119; J. MEYNAUD, D. SIDJANSKI, Les groupes de pression dans la Communauté européenne, Ed. Institut de Sociologie, Bruxelles, 1971, pp. 349-378; J. MEYNAUD, D. SIDJANSKI , L'action des groupes de pression, in La décision dans les Communautés européennes, Presses Universitaires de Bruxelles, 1969, pp. 133-148; J. MEYNAUD, D. SIDJANSKI, L'Europe des affaires : rôle et structure des groupes , Payot, Paris, 1967.
- (91) Comité économique et social , op. cit., p. 13.
- (92) L. KRÄMER, Uniform legislation in diverse legal cultures : experiences from the E.C. harmonization process, Louvain-la-Neuve, May 1981, p. 14 (to be published), citing DONATH, Brüsseler Machenschaften, Baden-Baden, 1975, p. 164.
- (93) Comité économique et social , op. cit. , pp. 25sv.
- (94) Comité économique et social, op. cit. , pp. 26, 272 and 304.
- (95) Comité économique et social , op. cit., p.15.
- (96) Regulation n°17 of the Council, 1962, as amended.
- (97) M. MANSCHOLT's speech at a seminar held in Brussels on 12 and 13 June 1961; for an account of this seminar, see the special issue of the information bulletin of the Union Fédérale de la Consommation, June/July 1961, quoted by J. MEYNAUD, op.cit., p. 425, and L. KRÄMER, Les consommateurs et L'Europe, Agence Européenne d'Information , Brussels, 1978, p. 5.
- (98) Commission Decision of 25 September 1973 relating to the setting-up of a C.C.C., OJ of 10-10-1973, L 283/18, amended on 3-12-1976 , OJ of 10-12-1976, L 341.
- (99) Commission Decision of 16-10-1980, OJ of 27-11-1980, L 320/33. Until then the BEUC, COFACE and EURO-COOP have had three seats each , with six for the E.S.C. and ten for outside experts.

- (100) A. CORNEROTTE, Rôle du C.C.C. et participation des consommateurs au processus décisionnel européen, Louvain-la-Neuve Workshop, May 1981, with an up-date list of all C.C.C. opinions, reports and statements (to be published); A. CORNEROTTE, Le C.C.C., in Le pouvoir économique des consommateurs, Rencontres européennes de la consommation, Paris, october 1980, pp. 50 sv.; A. DUMONT, Bilan des 3 premières années d'existence du C.C.C., in Report on the symposium of consumer organizations held on 2 and 3 december 1976, Luxembourg, C.E.E., 1978, pp. 50 sv.
- (101) Comité économique et social, Les comités consultatifs communautaires à composition socio-économique, Ed. Delta, Bruxelles, 1980; L. KRAMER, op. cit., pp. 18 sv.
- (102) Comité économique et social (I), op.cit., p.276.
- (103) Neither the Commission nor the Council seems to consider it desirable to have fuller representation of consumers on the Committee; see answers to parliamentary questions, OJ of 14-7-1977, C 186/2 and OJ of 29-8-1977, C 206/2.
- (104) Particular instances are its opinion on the preliminary programme for a consumer protection and information policy (1974), the implementation and future development of the Community programme on consumer protection and information (1977), the application and harmonisation of judicial and parajudicial facilities for consumer protection in the European Community (1979) and the second programme of the European Economic Community for a consumer protection and information policy (December 1979).
- (105) L. KRAMER, op.cit., pp. 23 sv. See its opinion published in the OJ of 3-5-1974, C 62/8.
- (106) EP, doc. 1-450/80, 8 october 1980.
- (107) Article 19 of Regulation n°17 requires the Commission to publish the essentials of the application for an exemption or of the relevant notification and to invite interested third parties to comment. Informal notification without publicity (sending of an administrative circular) is allowed, but if this procedure is adopted, the notification has no legally binding force (judgments of the Court of Justice of 10-7-1980, "scent" case, cases 37/79 and 99/79, OJ of 5-8-1980, C 199/7 and 8.
- (108) For details, see Th. BOURGOIGNIE, May Workshop paper, p. 84.
- (109) "National jurisdictions" as used by art. 177 do not only cover judicial courts but also include administrative or professional bodies. E. CEREXHE, op. cit., p. 173.
- (110) See references cited supra.

- (111) Except in France, the right of consumer groups in Europe to bring civil actions remains confined to very limited cases; class actions are unknown. N. REICH, H. MICKLITZ, op.cit., pp. 196-197.
- (112) For a general discussion, see M. FALLON, Non-community law initiatives as methods for European integration within consumer matters, Louvain-la-Neuve Workshop, May 1981 (to be published).
- (113) To be complete, the works of the United Nations, the World Health Organization, the Food and Agriculture Organization and the Codex Alimentarius should be mentioned too. These may consist in general policy statements-Consumer protection : A survey of institutionnal arrangements and legal measures, UN Economic and Social Council, 8 June 1978, E/ 1978/81; Consumer protection : Report of the Secretary-General UN Economic and Social Council, 14 May 1979, E/1979/65, draft of international codes of practice - see the W.H.O. draft of an international code of marketing of infant formula and other products used as breast milk substitute - and setting out food standards. Finally some of the The Hague Conference works interest consumer areas : product liability (The Hague, 1973), consumer sales (The Hague, 1980).
- (114) Resolution 543 (1973) on a consumer protection charter, texts adopted at the 25th ordinary session of the Consultative Assembly (14-18 May 1973), Part One. On the history of this chart, see P. HODGENS , Consumer protection in the Council of Europe, Annuaire Européen, vol XX, 1972, pp. 99 to 108; J.E. FREY and F.J. WARIN, European consumer protection : the Council of Europe Charter initiative, 6 Law and Policy in Int. Business, 1974, pp. 1107 to 1131.
- (115) E. LASNET, op.cit., pp. 12-15.
- (116) Directive of 19 February 1973, OJ 26-03-1973, L77.