The consumer in European regulatory private law. A functional perspective on responsibility, protection and empowerment

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Published in:
The Image(s) of the Consumer in EU Law: Legislation, Free Movement and Competition Law

Publication date:
2016

Document Version
Peer reviewed version

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The Consumer in European Regulatory Private Law

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I. Introduction

The 'image' of the consumer in law is a fictional image. In seeking to balance the rights of consumers against those of businesses the law makes a choice that applies to all consumers, regardless of their actual characteristics, their ability to express or enforce their preferences or their need for guidance or protection. For the law, Homer's self-reliant Ulysses is treated the same as the less sophisticated Homer Simpson.[1] The choices that have been made in relation to consumer images in law, in other words, are simplifications of reality, which have been modelled to fit with certain rationales or policy goals. And different choices fit different markets.

The question that I will seek to answer in this chapter is what normative choices have been made with regard to the image(s) of the consumer in European regulatory private law ('ERPL'), and whether these choices may (or may not) need revision as insights on consumers' needs for protection evolve. European regulatory private law can be defined as the rules laid down by the EU legislator that seek to facilitate private law relationships whilst also pursuing specific policy goals, such as consumer protection or the integration of the EU internal market. They can be rules of private law—for example, introducing mandatory contractual terms in consumer contracts—but often take the form of administrative law or even, in a broader definition of ERPL, competition law.[2] In the definition used by Hans Micklitz, ERPL is regarded as (the emergence of) a self-sufficient European private

[1] The example is taken from RH Thaler and CR Sunstein, *Nudge* (New Haven, Yale University Press, 2008). For an insightful discussion see S Frerichs, 'False Promises? A Sociological Critique of the Behavioural Turn in Law and Economics' (2011) 34 *Journal of Consumer Policy* 289, 294–95.

[2] cf H-W Micklitz, 'The Visible Hand of European Regulatory Private Law—The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation' (2009) 28 *Yearbook of European Law* 3.

law, which exists alongside national private laws.[3] My focus will be on a relatively small part of this field, relating to EU legislative intervention in consumer contract law.

In this chapter, consequently, I will focus on the 'active' side of ERPL. By that I mean the rules of EU law that have sought to enhance consumer protection through positive measures of harmonisation, such as EU directives in contract law. They can be contrasted with measures of negative harmonisation, which also pursue harmonisation but instead of through the introduction of legislation do this by taking away barriers posed by national laws to the integration of the internal market.[4] It has been noted that this active branch of harmonisation takes a markedly more pro-consumer stance than rules of negative harmonisation do.[5] Fitting with this approach, the image of the consumer for whom these rules are written—although it is not spelled out in any of the legislation—seems to lean towards a weak(er) party who is in need of protection to make up, for example, for a lack of bargaining power or for cognitive limitations to rational choice.[6] Consumers can be regarded as weak vis-à-vis businesses, for example, because they do not have access to the same product information that businesses have, but also because of more personal attributes such as age, mental or physical infirmity, or perhaps even poverty.[7]

The image of the weak consumer, however, does not sit well with the general framework for economic regulation of private law relationships in the EU as laid down for instance in competition law; nor does it fit with the general principle of party autonomy that underlies most national private laws.[8] In either of these systems, the consumer is regarded as a rational actor who—like other private actors—makes autonomous decisions and for whom the law normally only offers a facilitative back-up, rather than protection. The choice of ERPL to focus on weaker consumers, therefore, seems to diverge from the norm. That divergence, as we will see in the discussion of, for example, the protection against unfair contract terms, is increasing as a result of the Court of Justice ('CJEU') case law in which consumer protection is steadily drawn out further both in the context of procedural law and more recently even in the substantive test for unfairness.[9]

[3] See the description of the ERPL project at: H-W Micklitz, 'Project Description—The Visible Hand of European Regulatory Private Law (ERPL)—The Transformation from Autonomy to Functionalism in Competition and Regulation' <http://blogs.eui.eu/erc-erpl/project-description> accessed 12 April 2015. Also H-W Micklitz, Y Svetiev and G Comparato (eds), 'European Regulatory Private Law—The Paradigms Tested' *EUI Working Paper LAW* 2014/04.

[4] Such as the rules on the free movement of goods; Art 34 TFEU.

[5] H Unberath and A Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection' (2007) 44 *Common Market Law Review* 1237.

[6] The latter as a response to insights from behavioural sciences with regard to 'bounded rationality'; see A Tversky and D Kahneman, 'Judgment Under Uncertainty: Heuristics and Biases' (1974) 185 *Science* 1124.

[7] See section II of this chapter on unfair commercial practices.

[8] cf S Grundmann, 'Information, Party Autonomy and Economic Agents in European Contract Law' (2002) 39 *Common Market Law Review* 269, 270 ff.

[9] See section III of this chapter.

The question whether these inroads into party autonomy in private law can be explained, or even justified, in the light of the EU's internal market policy become newly relevant as the Court discovers the 'sleeping beauty' of consumer protection rules laid down in EU directives.[10] To assess whether they can be, it is submitted that a functional approach may provide some guidance. With this I mean that a focus on the function that consumer protection standards have in the broader framework of regulation in which they operate can explain why certain policy choices have been made and why they make sense in that context. An example is the 'average consumer' of EU law as a benchmark but also as a means by which to mediate between EU law and national laws.[11] The notion of the average consumer, and the level of protection attached to it, is in that case chosen with particular policy goals in mind. As will be seen, the goals are different in other areas, such as ERPL and national private laws, and as a result the consumer protection standards adopted there also come out differently.

The structure of the chapter is as follows. I will first describe the 'standard' consumer image that has emerged in EU law in a broader sense, that is, encompassing not just consumer (contract) law but also competition and intellectual property law (section II). I will then elaborate the image of the consumer as it has developed in European regulatory consumer contract law, that is ERPL in the narrow definition (section III), and compare this with the consumer notion in national private laws (section IV). National regulatory laws relating to private law—contractual—transactions are not discussed in this chapter. They form an interesting field of investigation, for example, because they often also introduce stricter protection for consumers, like ERPL. The type and level of regulatory consumer protection, however, differs greatly between the Member States' laws, not to mention that sometimes enforcement of consumer protection laws is also pursued through criminal laws.[12] An investigation of the overlaps and differences between ERPL and national regulatory laws therefore goes beyond the scope of this chapter. I will focus on EU law to provide a bird's-eye view of ERPL's position in the broader framework of the EU internal market, and national private laws as a way to compare it to images of the consumer in general private law relationships.

In each section, I will seek to describe not only which images of the consumer exist, but also what the ratio behind them is and their function in a particular area of law. To illustrate these approaches, I discuss selected examples from the CJEU's case law. In section V, I connect the various consumer images. It will emerge that function is a determinative factor in defining consumer images in ERPL and beyond. A functional perspective can explain the balance that has been struck

[10] H-W Micklitz and N Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 *Common Market Law Review* 771.

[11] See below, section II.B.

[12] That is, eg, the case for remedies relating to the infringement of unfair commercial practices law in France; see G Howells, H-W Micklitz and T Wilhelmsson, *European Fair Trading Law. The Unfair Commercial Practices Directive* (Ashgate, Aldershot, 2006) 7.

between responsibility, protection and empowerment of consumers, and why in this context a more lenient consumer image has been adopted in ERPL. Whether this is also a justification, however, is doubtful.

II. Image I: The 'Rational' Consumer in EU Law

The prevailing image in EU law appears to be that of the consumer as a 'rational actor'. This image implies that:

> [e]ach individual in the market is assumed to be the best judge of his own interests and to act rationally, maximising his utility (or personal satisfaction) within the constraints of his economic resources.[13]

This notion of the consumer, as can be seen, emphasises a number of economic rationales. The consumer is defined purely in economic terms and the focus lies on their role as a market participant, not on other roles that individuals may have in society (for example, citizen, subject of fundamental rights). Further, a specific goal is defined which the consumer is assumed to pursue, namely the maximisation of utility or personal satisfaction.[14] In this context, the consumer is assumed to be the best judge of their own interest, to take rational decisions, and to do so within the constraints of their economic resources.

The rational consumer in EU law appears in a number of instances in unfair commercial practices regulation, competition law, and in intellectual property law—albeit that some discussion is possible with regard to the degree of 'rationality' that is required of a consumer. I will explore these areas with reference to the case law (section II.A) and will then elaborate on the rationales for these consumer images in the context of EU market regulation (section II.B).

A. Image

One of the core images of the consumer in EU law is the 'average consumer'. This consumer type is encountered in unfair commercial practices regulation,[15] but has its origins in the regulation of the free movement of goods.[16] In a number of cases, the CJEU was asked to rule on the compatibility of national rules with EU free movement law where national measures to protect consumers against misleading marketing or advertising could constitute barriers to intra-Community trade.

[13] I Ramsay, *Consumer Law and Policy* 3rd edn (Oxford, Hart Publishing, 2012) 47.

[14] On this, see further below, section II.B.

[15] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive') [2005] OJ L149/22, Art 5.

[16] Art 34 TFEU, formerly Art 28 EC.

In *Mars* it was noted that 'reasonably circumspect' consumers should be able to understand that a marking on product packaging indicating a quantity increase is not necessarily linked to the size of that increase.[17] National law should therefore be set aside if it sought to impose stronger protection for consumers. In a further set of cases,[18] culminating in *Gut Springenheide*, the Court developed this benchmark to that of the 'presumed expectations' of a consumer who is 'reasonably well-informed and reasonably observant and circumspect'.[19] Again, this notion sets a high bar for consumer protection measures.

It is worthwhile noting that parallel to the development of this 'average consumer' notion sometimes similar cases used the criterion whether 'a significant number of consumers' would be misled as their benchmark.[20] The CJEU has more recently indicated that it regards this quantitative assessment as a measure that may be interchangeable with the average consumer test. In assessing whether advertising with regard to parallel imports should be considered misleading, the national court should determine whether a 'significant number of consumers' would have been deterred from a purchase had they known the true state of affairs.[21] That finding appears to fit with some approaches seen in national systems, such as in German law, where the assessment of whether consumers will be misled is often tested through empirical studies.[22] It should be noted, however, that the 'average consumer' in EU law is foremost a normative concept. As the CJEU indicates in *Gut Springenheide*, national courts may determine the presumed expectations of an average—reasonably well-informed and reasonably observant and circumspect—consumer 'without ordering an expert's report or commissioning a consumer research poll'.[23] The CJEU's reference to a 'significant' number

[17] Case C–470/93 *Verein gegen Unwesen in Handel and Gewerbe Köln eV v Mars GmbH* [1995] ECR I–1923, para 24.

[18] The CJEU refers to Case C–362/88 *GB-INNO-BM v Confédération du commerce luxembourgeois* [1990] ECR I–667; Case C–238/89 *Pall Corp v PJ Dahlhausen & Co* [1990] ECR I–4827; Case C–126/91 *Schutzverband gegen Unwesen in der Wirtschaft eV v Yves Rocher GmbH* [1993] ECR I–2361; Case C–315/92 *Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH* [1994] ECR I–317; Case C–456/93 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Privatkellerei Franz Wilhelm Langguth Erben GmbH & Co KG* [1995] ECR I–1737; and Case C–470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln eV v Mars GmbH* [1995] ECR I–1923. Van Dam notes correctly that the earlier cases, unlike the Court seems to suggest by its reference to them, do not explicitly engage with the 'average consumer' benchmark; see Cees van Dam, 'De gemiddelde Euroconsument—een pluriform fenomeen' (2009) *Sociaal-economische wetgeving SEW* 3, 6.

[19] Case C–210/96 *Gut Springenheide and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt* [1998] ECR I–4657, paras 30–31. This definition was followed in Case C–220/98 *Estée Lauder Cosmetics GmbH & Co OHG v Lancaster Group GmbH* [2000] ECR I–117, paras 27 and 30; Case C–44/01 *Pippig Augenoptik GmbH & Co GK v Hartlauer Handelsgesellschaft mbH* [2003] ECR I–3095, para 55; Case C–99/02 *Criminal proceedings against Linhart and Biffl* [2002] ECR I–9375, para 32.

[20] See Case C–373/90 *Criminal proceedings against X* (*Nissan*) [1992] ECR I–131, para 15.

[21] Compare Case C–356/04 *Lidl Belgium GmbH & Co KG v Etablissementen Franz Colruyt NV* [2006] ECR I–8501, paras 78 and 82; and see *Nissan* (n 20), paras 15–16, as well as the Opinion of AG Tesauro, para 9.

[22] See *Gut Springenheide* (n 19), para 36.

[23] ibid, para 31.

of consumers therefore should probably be interpreted in a normative manner, without the need for empirical evidence.[24]

The standard by which conduct is assessed is adopted in other areas too. The 'average consumer' has since been included in Directive 2005/29 concerning unfair commercial practices as a benchmark by which to measure whether consumers should be protected against specific practices.[25] The standard is used to assess whether a practice is unfair, in the sense that it has misled the consumer and causes or is likely to cause them to take a transactional decision that they would not have taken otherwise.[26] In this context it copies the consumer image used in the free movement case law of the CJEU. It includes further definitions of the image of the consumer in two respects. First, besides the 'average consumer' another 'targeted average consumer' is defined. In cases where practices are directed at a specific group of consumers (for example, children) it is deemed desirable that practices are assessed from the perspective of an average member of that group.[27] Second, the Directive protects 'vulnerable consumers'. It specifies that the protection of consumers who, because of their 'age, mental or physical infirmity or credulity', are more susceptible to being misled by commercial practices should be assessed from the perspective of an average member of that group.[28] These further definitions are, however, not easy to apply in practice and the categories mentioned may be under-inclusive; they do not, for example, reckon specifically with poverty.[29]

In the regulation of intellectual property rights, another area of internal market regulation, the image adopted is also that of the consumer as a rational actor. It is given a more specific definition there. In the regulation of models, reference is made to the 'informed consumer', whereas in patent law the standard is that of the 'man skilled in the art'. Both reflect a standard of informed reasonable behaviour from the consumer that is higher than that of the 'average consumer', albeit to different degrees. For patent law, the standard is really that of an expert in the field.[30]

B. Function

The function of the consumer image(s) in EU law that emerges from this overview is two-pronged. First, the consumer image provides a normative benchmark for

[24] Support for this conclusion can also be gleaned from the Opinion of AG Tesauro in *Nissan* (n 20), which seems to conflate the two concepts: 'that the average consumer, who I am convinced is not wholly undiscerning, is inclined, not least in view of the considerable expense he is contemplating, to make a careful comparison of the prices on offer' (para 9).

[25] For a comprehensive analysis, referring also to national case law in Germany, England and Italy, see B Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (doctoral thesis, University of Amsterdam 2014).

[26] Unfair Commercial Practices Directive, Art 5.

[27] See Unfair Commercial Practices Directive, Rec 18.

[28] Unfair Commercial Practices Directive, Rec 19.

[29] P Cartwright, 'The Image of the Consumer in EU Law' in C Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar, 2015, forthcoming).

[30] cf Joined cases C–101/11 P and 102/11 P *Herbert Neuman v José Manuel Baena Grupo SA*, judgment of 18 October 2012.

the substantive rules that should be adopted in a business–consumer relationship. Further, this benchmark has a broader function in EU internal market law as an instrument for mediating the competences of the EU and the Member States.

Looking at the normative content first, the consumer image gives guidance to the type of intervention in consumer markets (in the form of regulation) that is introduced through EU law. The image of the 'average consumer' as a reasonably well-informed and circumspect actor fits with the neo-classical economic school. The neo-classical view starts from the premise that intervention in consumer markets can be justified if it addresses market failures, that is to say, factors that hinder the optimal operation of a competitive market, in particular factors hindering efficiency.[31] The key example is that of information asymmetries between businesses and consumers, for example in relation to the characteristics or the quality of goods.[32] The model assumes that such failures can be addressed by, for example, providing relevant information. That should enable the consumer to make a decision that maximises their utility (or personal satisfaction). Of course, for that model to work, the assumption is that the consumer is a 'rational' actor who only needs this additional information to be in an equal position vis-à-vis the business to make a sound—or in economic terms, optimal—decision.

It should be noted that this perspective underlies many consumer laws in the world—for example in the US but also in most European private laws—and explains why these laws seek to increase the bargaining power of consumers by focussing on information requirements. Their aim is to create equality between consumer and business by taking away the asymmetry that exists between on the one hand the consumer (who has limited information about the product) and on the other hand the business (who is in possession of, presumably, full information about the product). As a basis for intervention in consumer markets this view is likely to encounter the least resistance because its intervention will be of the minimum degree deemed necessary to correct market failures. Regulation will be introduced sparingly, taking account also of the costs that regulation is likely to have, such as compliance and enforcement costs.[33]

Regulatory intervention, when it occurs, will often take the form of information requirements but can also appear as a delimitation of options. A common case is where regulation is used to steer consumers towards a default option, such as for a specific pension scheme which will give them adequate pension payments upon retirement.[34] The creation of options may be regarded as a form of (soft) paternalism but it is not entirely excluded from the neo-classical school of thought. In the neo-classical perspective, one could also say that by more clearly defining

[31] cf Ramsay (n 13) 42–43.

[32] R Epstein, 'The Neoclassical Economics of Consumer Contracts' (2008) 92 *Minnesota Law Review* 803.

[33] cf O Bar-Gill, 'The Behavioral Economics of Consumer Contracts' (2008) 92 *Minnesota Law Review* 749.

[34] Thaler and Sunstein (n 1).

options consumers have better information and are therefore better able to make (rational) choices. Soft paternalism is then turned into empowerment.[35]

The consumer image in EU law, based on neo-classical economic thought, has a second function. That function is to mediate between the EU and the Member States levels of regulation. Choosing a restrictive notion of the 'average consumer' and (by corollary) a lower level of consumer protection makes it harder for Member States to maintain or introduce stricter rules of consumer protection. The 'rational' consumer image chosen by EU law therefore has the effect that it supports EU internal market law. The threshold for unjustified barriers to trade in the internal market is set higher.[36] From the perspective of market regulation in the EU, therefore, the benchmark of a rational, well-informed consumer not only fits normatively with the neo-classical economic view, and the neo-liberal politics of the EU. That normative image is also given support by its central function as a mediating instrument in the EU's internal market or free movement regulation.

The notion that the consumer in EU law is only seen as a 'rational' actor in the utility maximising sense, however, can be downplayed.[37] Weatherill has pointed out that much of the case law concerns situations in which—rather than taking issue with the content of the consumer notion in national laws—the CJEU had difficulty with particular measures of national law because they were hard to justify, and that the Court has accepted restrictive measures where compelling justifications were given.[38] In other words, the case law itself has made it hard to engage the Court in a constructive dialogue with the Member States as to what degree of protection a consumer requires in the European internal market. Some support may even be found in the cases for the notion that the consumer is not regarded as a rational consumer in the strictly economic sense, but that instead a less demanding average consumer test is used.[39] Whichever way this should be understood, it is clear that some degree of rationality or competence must be assumed on the part of the consumer in order to maintain a workable regulatory framework.[40] The purpose of the framework, after all, is not to give unqualified protection to consumers, but rather to strike a fair balance between the interests of consumers, businesses and—on a more abstract level—the conditions for trade and competition in the EU internal market. Consumers therefore also have a responsibility to look out for their own interests and to prevent themselves from entering into

[35] Y-H Alex Lee and K Jeremy Ko, 'To Empower, Prohibit or Delegate? Regulatory Strategies for Modernizing the Consumer Credit Market' *University of Pennsylvania Business Law Journal* (forthcoming) <http://ssrn.com/abstract=1903595> accessed 12 April 2015.

[36] cf Unberath and Johnston (n 5); see also V Mak, 'The "Average Consumer" of EU Law in Domestic and European Litigation' in D Leczykiewicz and S Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Oxford, Hart Publishing, 2013) 333.

[37] See also Cartwright (n 29).

[38] S Weatherill, 'Who is the "Average Consumer"?' in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29* (Oxford, Hart Publishing, 2007) 115.

[39] cf Weatherill (n 38), and see Cartwright (n 29).

[40] ibid.

economically detrimental transactions if they could have avoided doing so by, for example, reading the product information more carefully.

That the internal market function can also be supported in other ways, with use of a different consumer image, becomes clear when we consider ERPL. It is to this area of EU law that I now turn.

III. Image II: The 'Calimero Consumer' in European Regulatory Private Law

The image of the consumer in ERPL has taken various forms. I will, in this section, elaborate a number of these. One connecting factor is that all of these images appear to take a very protective stance towards consumers, viewing them generally as a weak party in need of protection. An image that fits well with this notion is the cartoon character Calimero—created in Italy and famous in some other European countries too—who is a small, black chicken that gets into trouble often and does not quite understand why grown-ups around him are angry at him for his clumsiness. The phrase that he utters invariably at the end of each episode is: 'They are big and I is [sic] small and it's not fair, oh no!'

The consumer as a weaker party, or the 'Calimero consumer', is prevalent throughout ERPL. I will first describe the instances in which this consumer appears in ERPL and will then elaborate on the function of this consumer image.

A. Image

ERPL, in the form of EU secondary law relating to consumer contracts, is based on the idea that consumers are weaker parties who need to be protected. The image of the consumer, therefore, although it may start from the presumption of consumers as 'rational' actors, tends to pay greater heed to the weaknesses and biases that prevent consumers from making rational choices. As a result, the rules laid down in these instruments not only seek to empower consumers—for example by imposing information duties on traders—but often also to lay down substantive rights aimed at consumer protection. The notion of the consumer's right to protection by law has also given rise to far-reaching measures to achieve effective protection of these rights through national remedies. Remedies, in this sense, include secondary rights laid down in legislation such as the right to repair non-conforming goods, but also the enabling of remedial actions through procedural law, with a prime example in unfair terms regulation.[41]

[41] The right to repair non-conforming goods follows from Art 3 of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12. On unfair terms, see section III.A.i.

The scope of this chapter does not allow for a full discussion of all the case law. I will therefore only discuss a few selected highlights to illustrate the position of the consumer in ERPL. The selection below focuses on two types of case that have been particularly influential in the case law of the Court since, roughly, 2000.

It should be noted that, unlike in the examples from EU law that I discussed in section II, ERPL does not normally refer to specific notions or images of the consumer. In other words, a benchmark such as the 'average consumer' or the 'man skilled in the art' is not identified in the legislation or in the case law. Nevertheless, it is possible to distil from the cases what kind of attitude is taken towards consumer protection in ERPL. Comparing it to the 'average consumer' case law—and similar EU regulation—it can be surmised that the image of the consumer to which ERPL is attuned must be more protective towards consumers.[42]

i. Unfair Terms and Other ex Officio Protection

The first, and perhaps most extreme, example of consumer protection through ERPL is the policing of unfair terms in consumer contracts. Directive 93/13 on unfair terms stipulates that terms which have not been individually negotiated should be regarded as unfair and should not bind the consumer if, contrary to the requirement of good faith, they 'cause a significant imbalance in the parties' rights and obligations arising under the contract'.[43] Content-wise, the goal of the Directive is already more focussed towards protection than the examples seen in EU internal market law. The rule that unfair terms will be regarded as non-binding has very little to do with the expectations of the EU 'average consumer', or of an otherwise informed consumer. The test is more objective: it looks at the effect that a term has on the balance of the parties' interests under the contract. Recent case law moreover reflects that the CJEU is gradually filling in more of the substance of the test,[44] whereas it had in the early years of the Directive not interfered much with the substance and left it to national courts to make the assessment of unfairness within the context of national law and the circumstances of the case.[45]

Although one could in theory expect a reasonably well-informed, observant and circumspect consumer—such as the 'average consumer' in EU internal market law—to consider the rights and obligations which they enter into more carefully, that is not what the Directive requires. Of course some of this protective attitude can be explained by the fact that most consumers are unable to properly assess the effects of general terms and conditions before signing a contract.[46] That, however,

[42] See also Unberath and Johnston (n 5).

[43] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29, Arts 3(1) and 6(1).

[44] eg Case C–415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa),* judgment of 14 March 2013; Case C–226/12 *Constructora Principado SA v José Ignacio Menéndez Álvarez,* judgment of 16 January 2014.

[45] See also Micklitz and Reich (n 10).

[46] For a critical perspective, see eg O Ben-Shahar and CE Schneider, 'The Failure of Mandated Disclosure' *University of Chicago Law & Economics Olin Working Paper* No 516 <http://ssrn.com/abstract=1567284> accessed 12 April 2015.

does not explain why a consumer is not protected against equal nonchalance in reading the information on products in the supermarket or adverts in the newspaper, as is the case for the 'average consumer' in unfair practices regulation.[47]

Apart from the substantive component of the test laid down by the Directive, unfair terms protection has also received a significant boost from the CJEU's case law concerning the ex officio assessment of unfairness by national courts. In a line of cases, starting with the judgment in *Océano*,[48] the CJEU has established that an effective protection of consumers against unfair terms in certain circumstances requires active involvement of the judge. Article 3(1) in combination with Article 6(1) of Directive 93/13 requires that unfair terms should be 'non-binding' on the consumer. In order for this protection to be effective, the Court reasoned, a national court should be able to determine of its own motion (or: ex officio) whether a contract term is unfair. If consumers were obliged to raise the unfair nature of such terms themselves, the Court states, there is a 'real risk' that they will not do so either because of ignorance of their rights or because the fees for obtaining expert assistance, for example, by a lawyer, are too high in comparison to the amount at stake in the litigation.[49] This protection was taken further in subsequent judgments, where the CJEU ruled that this ex officio protection of consumers is not just possible, but mandatory for national courts. Accordingly, a national court must examine, of its own motion, whether a contract term is unfair,[50] where it has available to it the legal and factual elements necessary for that task.[51]

The ex officio protection of consumers on the basis that their weaker procedural position may make it harder, if not impossible, for them to give effect to substantive consumer rights arising from EU law extends into other areas than unfair terms too. Examples to which this applies are off-premises contracts (*Martín Martín*),[52] consumer credit (*Rampion*),[53] and consumer sales (*Duarte Hueros*).[54] It is noteworthy that protection in these cases seems to be more restricted than

[47] See above, section II.A.

[48] Joined cases C–240/98 to 244/98 *Océano Grupo Editorial SA v Roció Murciano Quintero* [2000] ECR I–4941.

[49] See *Océano* (n 48), para 26. Also Case C–473/00 *Cofidis SA v Jean-Louis Fredout* [2002] ECR I–10875.

[50] Case C–168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I–10421, paras 27 ff; Case C–40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I–9579, with an important addition, namely the ruling that 'Article 6 of the directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy', para 52.

[51] Case C–243/08 *Pannon GSM Zrt v Erzsébet Sustikné Győrfi* [2009] ECR I–4713, para 32. Note also that the court is obliged, if it finds that a term is unfair, not to apply it, unless the consumer opposes that non-application; *ibid*, para 33. See also Case C–137/08 *VB Pénzügyi Lízing Zrt v Ferenc Schneider* [2010] ECR I–10847.

[52] Case C–227/08 *Eva Martín Martín v EDP Editores SL* [2009] ECR I–11939.

[53] Case C–429/05 *Max Rampion and Marie-Jeanne Godard, née Rampion v Franfinance SA and K par K SAS* [2007] ECR I–8017.

[54] Case C–32/12 *Soledad Duarte Hueros v Autociba SA, Automóviles Citroën España SA*, judgment of 3 October 2013. Note also that the CJEU has recently adopted far-reaching consumer protection in relation to the notification duty in consumer sales law; Case C–497/13 *Froukje Faber* (nyr).

in the unfair terms cases. Whereas protection under Directive 93/13 requires a court to test the unfairness of a term, in the case of the other Directives the Court is not obliged but has the *possibility* to, of its own motion, assess whether rules of national law hinder the effectiveness of substantive rights arising out of EU law.[55] Still, the Court's overall attitude seems to be that national procedural restrictions should not create barriers to substantive consumer protection. In order to enable consumers actually to make use of their rights, the Court is willing to make significant inroads into national procedural autonomy where it finds that national procedural law imposes restrictions on consumers' possibilities to exercise these rights.

Across a wide area of ERPL, therefore, the CJEU has backed up substantive rights with procedural mechanisms to give effect to those rights. The consumer image that is central to these cases is that of the consumer who is in 'a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge'.[56] This consumer is given protection through the ex officio involvement of the court, to counter 'the real risk that he is unaware of his rights or encounters difficulty in enforcing them'.[57]

ii. The Right of Withdrawal, Extended Version

Another set of cases that offers a good example of the pro-consumer approach taken in ERPL are cases in which the trader or supplier had omitted to inform the consumer about their right to withdraw from the contract. The right to withdraw, which in essence gives consumers some time to consider their purchase and/or to inspect or test the goods or services, has become a common feature of European regulatory contract law. It is included in the Consumer Rights Directive, which of course replaces two earlier Directives in which a right of withdrawal was already included (Directive 85/577 on doorstep selling and Directive 97/7 on distance contracts).[58]

The case law of the CJEU makes clear how important the right to withdraw can be in terms of consumer protection, and in particular how its reach can be extended in cases where the seller has failed to inform the consumer that they have the right to withdraw. In *Pia Messner*,[59] a distance contracting case, the consumer of that name had bought a laptop from an online seller. When the laptop's screen

[55] In Dutch: JHM Spanjaard, 'Pénzügyi/Lízing: HvJ EU verzet de bakens inzake ambtshalve toetsing van algemene voorwaarden' [2011] *Maandblad voor Vermogensrecht* 75, with reference to Van der Beek. Also A Ancery [2014] *Tijdschrift voor Consumentenrecht* 153, 154, with a different reading of *Rampíon*.

[56] *Océano* (n 48), para 25.

[57] *Mostaza Claro* (n 50), para 28, with reference to *Océano* (n 48), para 26 and *Cofidis* (n 49), para 33.

[58] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ L304/64 (Consumer Rights Directive), Art 9; Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/33 (Doorstep Selling Directive), Art 5; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 concerning the protection of consumer in respect of distance contracts [1997] OJ L144/19, Art 6.

[59] Case C–489/07 *Pia Messner v Firma Stefan Krüger* [2009] ECR I–7315.

started to malfunction, some eight months after the purchase was concluded, the seller refused to repair it free of charge. Ms Messner then sought to undo the contract by invoking the right to withdraw.[60] Although this right would normally have expired for distance contracts after seven days, in this case the seller had failed to inform Ms Messner about her right to withdraw. Under German law, which applied to the contract, no prescription period applied and the consumer would therefore be able to invoke the right to withdraw indefinitely.[61] Moreover, as the right of withdrawal prescribes, she would be able to do so without paying compensation to the seller apart from the direct cost of returning the goods.[62]

The CJEU confirmed that consumers are in principle able to withdraw from distance contracts without paying compensation for use to the seller. To hold otherwise could impair the effectiveness and efficiency of the right to withdraw by imposing a financial burden on consumers—which could deter them from making use of the right to withdraw—and by curtailing their possibility to test (as opposed to use) the goods free of charge.[63] The consumer therefore could, even after almost a year, invoke the right to withdraw and, in principle, incur no expenses. This conclusion was somewhat attenuated by the Court's ruling that the consumer could be required 'to pay fair compensation in the case where he has made use of the goods acquired under a distance contract in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment'.[64] Also, the Consumer Rights Directive now contains not only a codification of this case law but also a specification of the requirements regarding compensation for use.[65]

Another instance in which the right of withdrawal gave rise to an extensive interpretation by the Court was in the *Schulte* and *Heininger* cases.[66] These cases concerned investments in immovable property which for many consumers turned out to be unprofitable. In an attempt to escape such contracts, consumers invoked the Doorstep Selling Directive. The CJEU applied the Directive with great emphasis on consumer protection. First, it held that the contracts at issue fell within the scope of the Directive and that the fact that consumers had not been informed of their right of cancellation meant that the right was valid indefinitely.[67] That did not solve the problem, however, as it allowed consumers to get out of the credit agreement but not automatically also to cancel the underlying contract for the

[60] Which, although it may not be the most obvious action in these circumstances, has the advantage that the consumer does not have to supply evidence to support her claim that the non-conformity was present from the time of delivery. Messner's choice to invoke the right of withdrawal was in this respect a clever alternative.

[61] See *Messner* (n 59), para 6.

[62] Directive 97/7 (n 58), Art 6(1).

[63] *Messner* (n 59), paras 17–29.

[64] ibid, para 26.

[65] Consumer Rights Directive, Art 14.

[66] Case 481/99 *Georg Heininger and Helga Heininger v Bayerische Hypo- und Vereinsbank AG* [2001] ECR I–9945; Case C–350/03 *Elisabeth Schulte and Wolfgang Schulte v Deutsche Bausparkasse Badenia AG* [2005] ECR I–9215.

[67] *Heininger* (n 66), para 40 and 48.

purchase of immovable property. The Court, in a very consumer-friendly judgment, gave an opening for doing that by holding that 'if the bank failed to comply with the obligation to inform the consumer of his right of cancellation, then the bank should bear the consequence that the risks "associated" with the failure to comply actually materialize'.[68] Essentially, the CJEU therefore extended the right of withdrawal to enable consumers not only to get out of contractual obligations years after the conclusion of the contract, but also to get out of linked contracts. It should be noted that this protection proved of only limited use in the ensuing litigation in Germany. By ending the credit agreement, consumers would be liable for immediate repayment and would therefore on balance be worse off. The CJEU's decision in *Schulte* opened the door to alternative solutions but in their search for these national courts get very little help from the rather vague pronouncements of the Court of Justice.[69]

What emerges from the case law, nonetheless, is an image of a consumer who is in need of protection. The CJEU is willing to extend protection very widely on the basis that consumers in comparison to businesses have a weaker bargaining position and less access to relevant information.[70] This type of protection goes much further than in the 'average consumer' cases discussed above, where vulnerability is defined in relation to specific concepts such as age, mental or physical infirmity or credulity.

B. Function

Observing the function of the consumer image in this field, it is noteworthy that ERPL, although it is referred to as 'private law', has a distinct policy influence that is absent in particular in (national) contract laws. Contract law—stereotypically—is based on the autonomy of parties and has a facilitative character. This means that parties are free to decide with whom to contract and on what terms. Contract law does not interfere with the content but provides the legal backup to enforce the rights that are created in this way.[71] Although inroads on this ideal type are present also in national systems, not least because those systems have also developed consumer protection law through mandatory contract rules, ERPL is by its

[68] Unberath and Johnston (n 5) 1260; *Schulte* (n 66), paras 94–103.

[69] cf N Reich, 'The Social, Political and Cultural Dimension of EU Private Law' in R Schulze and H Schulte-Nölke (eds), *European Private Law—Current Status and Perspectives* (München, Sellier, 2011) 70–73.

[70] See above, n 57.

[71] See further section IV of this chapter. See also, inter alia, Grundmann (n 8), PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, Oxford University Press, 1979), G Gilmore, *The Death of Contract* (Columbus OH, Ohio State University Press, 1974), SA Smith, *Contract Theory* (Oxford, Oxford University Press, 2004) and F Bydlinski, *Privatautonomie und objektive Grundlagen des verpflichtenden Rechtsgeschäftes* (Wien, Springer, 1967).

nature based on and influenced by such policy goals. In other words, ERPL is instrumentalist in nature.[72]

The function of *European* regulatory private law, therefore, is fundamentally different from regulatory contract law at the national level. In national private law, regulatory elements have been introduced, for example, to strengthen the position of weaker parties in contract (consumers, or employees), or to redistribute losses in cases where liability can be established in tort law. In these instances regulation intervenes to achieve a re-balancing of responsibility between private parties.[73] The law shifts from responsibility to protection. Where in contract law parties would otherwise be regarded as autonomous actors, instead consumers are given protection because they are considered to be 'weaker' parties. In tort the starting point is that 'losses lie where they fall, but this perspective changes if damage can reasonably be attributed to another party' (the tortfeasor).

ERPL, although it pursues similar regulatory goals *in* private law, also seeks to achieve policy goals *through* private law. The goals that it seeks to achieve through private law are related to the role of law in the EU in a more general sense: namely, to install measures that support the integration of the internal market.[74] It has been noted that ERPL through positive harmonisation seeks to achieve what free movement regulation seeks to achieve through negative harmonisation: namely to support the integration of the internal market.[75] That can explain, and perhaps justify, why a 'weak' consumer image seems to underlie this field. It requires that regulation is put in place to protect the consumer.

IV. Image III: The 'Autonomous' Consumer in National Private Laws

In national private laws, a third image of the consumer can be found. Contract laws are based on the principle of party autonomy,[76] which entails that private parties are free to decide whether and with whom to contract, but also that they are responsible for the choices that they make. In tort law, similarly, responsibility lies first with the party who suffers a loss and can only be reverted to another party

[72] R Michaels, 'Of Islands and the Ocean: The Two Rationalities of European Private Law' in R Brownsword and others (eds), *The Foundations of European Private Law* (Oxford, Hart Publishing, 2011).

[73] On responsibility in (Dutch) private law, see eg KJO Jansen, *Informatieplichten. Over kennis en verantwoordelijkheid in contractenrecht en buitencontractueel aansprakelijkheidsrecht* (Kluwer, Deventer 2012).

[74] The competence of the EU in private law, therefore, is normally found in the internal market provision, Art 114 TFEU.

[75] Unberath and Johnston (n 5).

[76] See citations at n 71.

if certain conditions (such as a duty of care, causation) can be established. The image of private parties, therefore, is foremost one of autonomous actors.

For consumers, the same applies as a default. General doctrines in private law, for example, relating to mistake or misrepresentation at the stage of pre-contractual negotiation but also at a later stage the interpretation of contracts, will not normally be applied in a more protective or consumer-friendly way than they would for other parties. Consumers, like other parties, have their own responsibility to take reasonable care in private law relationships. In some instances, however, exceptions may be introduced, for example, through a particular application of private law doctrine to take account of an ad hoc or a generally weaker position of consumers, or of course through the introduction of specific consumer protection laws. I will describe a few examples from national systems and will then elaborate on the function of the consumer image.

A. Image

An apt illustration of the way that private laws take account of consumers is given by doctrines relating to non-disclosure or misinformation of the consumer. In English law, one would think of mistake or misrepresentation; in civil law systems of doctrines like *dwaling* (Dutch law) or *Irrtum* (German law), or fraud. In many consumer cases problems will arise because consumers are under a false impression with regard to the characteristics of goods or services. In some cases that impression has even, wilfully or not, been induced by the trader. The doctrines of misrepresentation or mistake—or equivalents in other systems—establish under what circumstances a party may be protected against such false impressions.

English law takes the most restrictive approach to protection. Non-disclosure is in principle not an actionable omission. As the case of *Smith v Hughes* established, a seller is not obliged to disclose information about the goods, even if they are aware that the buyer is operating under a mistaken presumption.[77] That becomes different only if the mistaken term becomes part of the contract. In that case, the buyer can bring an action for misrepresentation—also referred to as 'induced mistake'—on the basis that the seller has provided them with false information. An action for misrepresentation exists for fraudulent or negligent statements, but also for false statements that were innocently made.[78] The ratio of the rules is that buyers have a responsibility to acquire the necessary information before entering into a contract. Where they fail to enquire, they will have to bear the consequences of their own mistake. Only where the seller has actively done something to mislead the buyer does the law give an action.

[77] In this case, the buyer mistakenly believed that he was buying old oats instead of new oats. The latter were not suitable as horse feed. See *Smith v Hughes* (1871) LR 6 QB 597.

[78] Misrepresentation Act 1967.

Dutch and German laws are more protective. Rescission is possible in both systems if a party is mistaken about the 'essential characteristics' of the subject-matter of the contract, that is to say, if they would not have entered into the contract if they had been aware of the actual characteristics.[79] One can think of cases where a consumer believes a DVD to be playable in their home country, only to find out later that they are unable to do so because of a different region code. If the seller had failed to inform the consumer about the existence of different region codes, an action may lie for mistake. Further, if the seller had provided the wrong information about the envisaged use of the DVD, an action may exist for misrepresentation. In both cases, the consumer may rescind the contract.

Even though Dutch and German laws give wider scope to actions for, in particular, mistake that does not mean that they require a generally lower level of responsibility from the consumer. For an action in *dwaling* in Dutch law to succeed, for example, a balance has to be struck between the trader's duty to inform and the consumer's duty to enquire.[80] Where information is ambiguous, or where the consumer has their mind set on specific characteristics of the goods which are not common, they have a specific duty to enquire with the trader whether the goods do indeed have the characteristics that they require.

The image of the consumer as an 'autonomous' actor is continued in related areas of private law. Even in cases where more protection is given by law, the starting point of the enquiry is that consumers have their own responsibility to take reasonable care. Duties of care, for example, are recognised in Dutch or German law for specific cases in which consumers are deemed to be dealing with situations of a complexity that they are unable to navigate, like the purchase of complex financial products.[81] In the Netherlands, the provider, as the expert party, is obliged to take account of the interests of the consumer and to protect them against the risks associated with their lack of insight or their own rash decision-making. More specifically, this means that banks and investment firms are obliged to warn consumers about the specific risks of a product, to investigate the financial position of the client, and if the circumstances demand it even advise the client against purchase of the product.[82] It may seem that such a duty of care goes further in protecting consumers than duties arising under the doctrine of *dwaling*. However, that is not the case per se. It has been suggested that the Supreme Court chose the route of recognising a special duty of care because that would make it possible

[79] cf Art 6:228 Dutch Civil Code; s 119 German Civil Code.

[80] Dutch Supreme Court (Hoge Raad) 17 November 1957, *Nederlandse Jurisprudentie* 1958, 67 (*Baris/Riezenkamp*). In Dutch, see AS Hartkamp and C Sieburgh, *Asser/Hartkamp & Sieburgh 6 III. Algemeen overeenkomstenrecht* (Deventer, Kluwer, 2013), no 218 ff. For a comparative overview, see R Sefton-Green (ed), *Mistake, Fraud and Duties to Inform in European Contract Law* (Cambridge, Cambridge University Press, 2005).

[81] See on this Mak (n 36).

[82] Dutch Supreme Court (Hoge Raad) 5 June 2009, *Nederlandse Jurisprudentie* 2012, 182, ECLI:NL:HR:2009:BH2815 (*De Treek/Dexia*), para 4.8.1. cf Dutch Supreme Court (Hoge Raad) 5 June 2009, *Nederlandse Jurisprudentie* 2012, 183, ECLI:NL:HR:2009:BH2811 (*Levob*), paras 4.5.4, 4.5.6 and 4.5.10.

to divide responsibility between the bank and the consumer: unlike with *dwaling*, where the remedy would be rescission plus full compensation, the court was now in a position to divide the loss between both parties. In many cases, consumers had to bear up to 40 per cent of the loss themselves.[83]

B. Function

The picture that emerges from national private laws, therefore, is that consumers are regarded as autonomous, responsible actors. The general doctrines of private law may be adjusted to give some protection—as in the financial services cases—but will not take all responsibility away from the consumer.

Naturally, these rules may be complemented with mandatory rules of consumer protection in areas where the legislator deems such protection necessary. The choice for the introduction of such rules is a policy decision and, like in ERPL, is motivated by the desire to protect consumers as 'weaker' parties in comparison to businesses. However, it may be that the assessment of protection is by comparison more restrained. Autonomy, as a starting point, can imply that parties (consumers) who are not on equal bargaining terms with their counterparties (businesses), for example, because they lack relevant information, are assisted by law to achieve a more equal bargaining position. On that ground, the law may for example introduce information duties or other measures of consumer 'empowerment'.[84] Such measures, however, should go no further than necessary to support autonomy. They would not, one may assume, go quite as far as some of the developments that can be seen in ERPL with regard to, for example, the ex officio assessment of unfair terms.

Functionally, the consumer image in national private laws therefore can be explained mostly from a perspective of party autonomy. Protection of the weaker consumer in that light is an ancillary goal.

V. A Functional Approach Towards Consumer Images

Based on the foregoing, an overview of consumer images in EU law, ERPL and national private laws reveals a spectrum ranging from a reasonably well-informed and circumspect, 'rational' average consumer to—on the other end—a weak 'Calimero' consumer who is protected strongly through measures of ERPL. In the middle, we find the 'autonomous' consumer of national private laws who gets protection but only to the extent that it is necessary to ensure autonomy.

[83] See case note J Vranken, *Nederlandse Jurisprudentie* 2012, 184.

[84] G Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 *Journal of Law and Society* 34.

From a functional perspective, the choice for these images can be explained by the context in which they operate. These functions have been elaborated in the previous parts of this chapter. It is noticeable that the various images are nevertheless not easy to match. In this section, I will bring together some of the lines set out above in order to determine whether a functional perspective can clarify the relationship between the consumer images in the various fields.

First, it is clear that the starting point for regulation in each of these areas is the same. The legislature only intervenes if market failures exist.[85] Consumer law, from that perspective, only seeks to address such failures in order to create a new equilibrium in the market.

Second, intervention may nevertheless take different forms. Two degrees of intervention can be discerned. On the one hand, the images of the EU 'rational' consumer and the 'autonomous' consumer in national private laws—although they differ—appear to reflect a similar caution to intervene too soon or too strongly. Protection of these types of consumers is justified when it puts them back 'on par' with the businesses that are their counterparties. That can be because even a reasonably well-informed consumer would be misled by a particular practice and therefore deserves protection. It can also be because the consumer does not have equal bargaining power in comparison to the business and therefore does not have the same degree of autonomy. In either case, the legislature will exercise restraint before it intervenes with new regulation. Responsibility and empowerment are promoted, but strong protection not per se.

For ERPL, on the other hand, it appears that different policy choices have been made. In this field, protection is taken very far. Case law on unfair terms protection and the extensive application of withdrawal rights reveals that the CJEU is willing to take protection as far as can reasonably be justified within the scope of European Directives. In terms of protection, the outcomes go beyond what could be expected for the 'average' or 'autonomous' consumer. Even passive consumers are sometimes granted protection, as seen in the unfair terms cases.[86]

As a third point, the different degrees of intervention may be explained by the function that the consumer image has in ERPL, as opposed to its function in the other areas. All fields use the consumer image as a benchmark for assessing the appropriate level of consumer protection. However, that function is the most clear-cut in national laws, where it is the only consideration. Both EU law and ERPL bring in—different—considerations relating to market integration. In EU law market integration is helped by a consumer image that enables the Court to set aside measures of national law that, by adopting a higher level of protection, create barriers to trade in the internal market. ERPL approaches integration from an opposing perspective: the use of a 'weak' consumer image justifies intervention through EU regulation and thereby promotes the use of ERPL to contribute to the integration of the internal market.

[85] Ramsay (n 13).
[86] cf *Asturcom* (n 50).

Finally, can a justification for the different consumer images be found in their functions? That is a difficult point. Explanations may be given, but a normative framework that can justify the coexisting choices—for example, for a well-informed consumer or a weak consumer image—is hard to devise. In all likelihood, such a framework would combine justifications from various perspectives: neo-classical economics, market integration, behavioural studies, perhaps ideas of (social) justice or fairness. These are hard to combine into one theoretical framework; many of these perspectives conflict even.

It should be noted, however, that the contrast between the various choices may be less great than it is perceived. In order to have a workable regulatory framework, it is recognised at all levels that some responsibility must be assumed on the part of the consumer, but that this does not per se require fully rational behaviour in the economic, welfare-maximising sense.[87] A realistic approach, focussing on what can reasonably be expected from consumers, fits with the consumer images discussed here. It would seem for ERPL that the balance is sometimes struck very far towards protection. There may, however, be reasons to justify such a choice,[88] and it is also possible to correct certain choices through regulation at a later point in time.[89]

Perhaps the only realistic conclusion, then, is that consumer law in the EU functions with different consumer images and different degrees of protection. Is that problematic? Perhaps not if we consider that the problem of different degrees of protection is not unique to EU regulation. Also within national systems, differences may exist between areas of consumer law. Still, these systems are able to develop and to adopt new solutions when they are needed. An example can be seen in the cases concerning complex financial products, where new solutions—a duty of care—could be developed within the broader framework provided by public regulation and private law.[90]

That different images of the consumer exist does not mean, however, that no effort should be made to keep reassessing regulation in these areas. Businesses and consumers benefit from transparency and predictability of outcomes—that is, legal certainty—and it would help if regulation pursued these goals. Perhaps by looking at the images of the consumer, we can determine with greate precision which balance should be struck at different levels of regulation between responsibility, empowerment and protection.

[87] Above, section II.B.
[88] eg grounds of public policy; cf *Mostaza Claro* (n 50) and *Asturcom* (n 50).
[89] eg the rules on withdrawal in the Consumer Rights Directive, discussed above, section III.A.ii.
[90] cf *Dexia* (n 82).