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Comment & Analysis

Prof. Dr. Marco B. M. Loos*

Where do you go to, my lovely?

50 years of European consumer protection in the EU

I. Introduction

In 1975, the first European consumer policy program was adopted. That means that in 2025, the European Union celebrated 50 years of EU consumer law. Such an anniversary calls for an evaluation. What have 50 years of European consumer law brought us? What may be seen as reasons to celebrate (high points), what should we rather forget or step away from (low points), and what are the contemporary points of attention? In this paper, I will address these matters.

II. The 1975 Consumer Policy Programme

But let us first return to the dawn of European consumer law. Whereas at national level the first examples of consumer law date back to the 1950s, the start of a consumer law movement on a wider scale may be dated back to US President John F. Kennedy's Special Message to the Congress on Protecting the Consumer Interest of 15 March 1962.[1] This message started with the famous words 'Consumers, by definition, include us all'. This special message led to the development of consumer law in the United States, but also in the European Economic Community, as the EU was called back then.[2] The first traces thereof may be found in the Statement from the Paris Summit of 19 to 21 October 1972.[3] In that summit, the Heads of State and the Heads of Government of the Member States acknowledged that there was a need for strengthening and coordinating measures of consumer protection. Consumer protection, however, was not the only element in Paris Summit Statement: it also refers to a need for a Community approach to environmental law.

The Statement encouraged the European Commission to develop the first Consumer Policy Programme, which was adopted on 14 April 1975.[4] The Consumer Policy Programme 1975 continued with a list of five basic rights:[5]

'(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).'

These rights are subsequently reproduced as the aims of consumer policy at the level of the Community:

'A. effective protection against hazards to consumer health and safety,

B. effective protection against damage to consumers' economic interests,

C. adequate facilities for advice, help and redress,

D. consumer information and education,

E. consultation with and representation of consumers in the framing of their interests.'[6]

Much, if not most, of EU consumer law legislation since then may be traced back to the content of the 1975 Consumer Policy Programme and the five basic rights recognised in that Policy Programme. It should be noted, however, that where over the years, consumer law more and more focused on the protection of the consumer as a rational actor on the internal market, originally – and in line with the development of consumer law in the Member States, where the focus of consumer law was primarily based on the protection of a weaker party[7] – the consumer at European level was not primarily regarded as an economic actor, but rather as an individual operating in a societal capacity. The consumer as a citizen, one could say. In this respect, the words of the first Consumer Policy Programme are informative: it sets out that the consumer 'is no longer seen merely as a purchaser and user of goods and services for personal, family or group purposes but also as a person concerned with the various facets of society which may affect him either directly or indirectly as a consumer'. Over the years, we may have forgotten about that a bit.

III. High Points of Legislation and Case-Law

At a moment when we celebrate 50 years of EU consumer law, we should, of course, pay tribute to the high points in legislation and case-law. There are, of course, many, but I shall limit myself to mention only four pieces of legislation and three strands of case-law.

First, the 1985 Doorstep Selling Directive[8] introduced, at European level, a right of withdrawal. The right of withdrawal may be seen as one of the cornerstones of European consumer law and can nowadays be found in several Euro-

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1 Available online at https://www.presidency.ucsb.edu/documents/special-message-the-congress-protecting-the-consumer-interest (last visited 25 November 2025). See also E. Terryn, 'Can Consumer Law Become Sustainable ?, in: H. W. Micklitz & Chr. Twigg-Flesner, *The transformation of consumer law and consumer policy in Europe*, Oxford: Hart Publishing 2023 (159-186) 161.

2 See also H.-W. Micklitz, 'Aufstieg, Wandel, Abstieg, Wiederaufstieg (?) des Verbraucherrechts', *Verbraucher und Recht* 9/2025 (323-334) 323.

3 Available online at https://www.cvce.eu/content/publication/1999/1/1/b1dd3d57-5f31-4796-85c3-cfd2210d6901/publishable_en.pdf (last visited 26 November 2025).

4 Council resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, *OJ* 1975, C 92/1, hereafter: Consumer Policy Programme 1975.

5 Consumer Policy Programme 1975, 2.

6 Consumer Policy Programme 1975, 4.

7 Terryn (note 1) 162.

8 Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L 372/31.

pean directives. It is, however, not without problems – I will come back to that in section V. Art. 2 Doorstep Selling Directive also signals the first definitions of a consumer and a trader, which have remained more or less the same ever since.

1993 signals a second high point: the adoption of the Unfair Contract Terms Directive.[9] The UCTD introduced consumer protection against unfair contract terms in consumer contracts throughout the European Union, and for the first time introduced European legislation in – what in many legal systems is considered to be – the very heart of contract law.

Whereas the Unfair Contract Terms Directive banned unfair contract terms, the 2005 Unfair Commercial Practices Directive (UCPD)[10] did the same with unfair contracting practices. It famously introduced the use of 2 'small' open clauses – for aggressive and for misleading commercial practices and misleading omission – and a 'large' open clause for other unfair commercial practices as well as two black lists of commercial practices that, under any condition, were to be considered as unfair. Whereas the private law remedies for the injured consumer were missing in the original Directive, this was remedied by the 2019 Modernisation (or Omnibus) Directive.[11] Under the original Directive, Member States were free to only introduce or maintain public law mechanisms to enforce compliance with the UCPD. Consumers that had fallen victim to an unfair commercial practice and concluded a contract that they would not have concluded, or not under the same conditions, if the unfair commercial practice had not been committed, would then have to invoke traditional private law remedies such as damages on the basis of tort law or for lack of conformity, or to invoke avoidance of the contract on the basis of mistake (in case of a misleading commercial practice) or threat (in case of an aggressive commercial practice). The Modernisation Directive added that Member States would be required to offer the consumer at least a possibility to escape from the contract – whether by way of avoidance or of termination of the contract – and a right to damages.[12]

The last high point that should be mentioned is the adoption of the Sale of Goods Directive (SGD)[13] and the Digital Content Directive (DCD)[14] in 2019. The SGD replaced the 1999 Consumer Sales Directive,[15] and introduced the notion of goods with digital elements[16] and the update obligation which comes alongside with it.[17] The update obligation implies that the seller is no longer only liable for what is supplied at the moment of delivery of the goods themselves, but also for the updates of the embedded digital content or the associated digital services or the absence of such updates. For the first time, consumer sales law, therefore, recognised a long-term element in a consumer sales contract. The DCD, in turn, extended the application of non-conformity to contracts for the supply of digital content or digital services in cases where no tangible goods are provided or where the tangible good is only the carrier of the digital content, as in the case of a DVD that contains music or video files.[18] In addition, the DCD also contains the possibility of modification of the digital content or the digital service if the contract is to be performed over a period of time, which again confirms that contracts nowadays often cannot just be performed at once but often create a long-term relationship between the parties.[19]

At the level of the Court of Justice, three other high points should be memorized. The first is the recognition of state liability for incorrect transposition of EU law, as accepted in *Francovich and Bonifaci v Italy*[20] and applied to consumer law in *Faccini Dori v Recreb*.[21] With this case-law, the Court of Justice remedied one of the weak points of Directives as a means of harmonisation. With the shift from unanimity to majority vote in the Council under the Single European Act,[22] the chances that a Member State would be forced to transpose directives they do not agree with have risen considerably. Whereas the instrument of a directive allowed Member States to properly embed European law into their national legal systems, it also offered them a possibility *not* to comply with European rules that they did not agree with: whereas a regulation may be directly invoked in a case between two individuals – consumers and/or businesses –, a directive does not have such direct effect.[23] Of course, the European Commission may start infringement procedures against a Member State that fails to transpose a directive, but the individual consumer or business is not helped by that fact. By introducing state liability – albeit under strict conditions –, Member States may face financial consequences if they fail (or are late) to transpose European directives. Since consumer protection law does not always feature prominently on the agenda of national governments, state liability operates as an incentive for proper and timely transposition.

The same applies to the second high point: 'harmonious' or 'consistent interpretation' of national law. This requirement, first set out in *Marleasing*,[24] requires a national court to interpret national law as far as possible in line with European law in order to give full effect to the relevant provisions of European law. If, for instance, a provision in European law could have led to an amendment of national legislation, but that amendment did not take place, the national court is to assume that the legislator was of the opinion that the existing legislation was already in line with that European instrument. Therefore, the court will interpret the relevant provisions of national law in such manner as is (best) consistent with European law. For European consumer law, even though consumers and business cannot directly rely on the rights

9 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29.
10 Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22.
11 Directive (EU) 2019/2161 of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L 328/7.
12 Cf. Art. 11a UCPD, as introduced by Art. 3(5) Modernisation Directive.
13 Directive (EU) 2019/771 of 20 May 2019. on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L 136/28.
14 Directive (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019], OJ L 136/1.
15 Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L 171/12.
16 Cf. Art. 2(5) SGD.
17 Cf. Art. 7(3) SGD.
18 Cf. Art. 6-8 DCD.
19 Cf. Art. 19 DCD.
20 CJEU case C-6/90 and C-9/90, *Francovich and Bonifaci v Italy* ECLI:EU:1991:428.
21 CJEU case C–91/92, *Faccini Dori v Recreb* ECLI:EU:1994:292.
22 Single European Act [1987] *OJ* L 169/1; see in this sense also Micklitz (note 2) 323.
23 Cf. CJEU case C–271/91, *Marshall v Southampton and South West Hampshire Area Health Authority* ECLI:EU:1993:335; CJEU case C–91/92, *Faccini Dori v Recreb* ECLI:EU:1994:292.
24 CJEU case C-106/89, *Marleasing v Comercial Internacional de Alimentación* ECLI:EU:1990:395.

awarded to them in a directive, the same effect is achieved if the national court interprets national law in line with the directive. Such interpretation will often be possible in case national law contains open clauses, such as 'unfairness', 'reasonableness' or 'equity'.[25]

Thirdly, and more specific for European consumer law, in a steady flow of decisions, the Court of Justice held that Member States courts have an obligation to test of their own motion (*ex officio*) whether a European directive in the area of consumer law has been complied with. The doctrine of *ex officio*-testing was developed – first as a power,[26] later as an obligation[27] – to compensate for the fact that a consumer, who is considered to be in a weak position vis-à-vis a trader, as regards both their bargaining power and their level of knowledge, agrees to unfair terms which they had no possibility to influence, and for the fact that the consumer, because of their level of knowledge or because of financial constraints, does not challenge the unfairness of terms. Effective protection of the consumer may, therefore, be attained only if the national court tests unfair terms of their own motion. In subsequent case-law, the Court of Justice has held that national courts are also required to test, of their own motion, whether or not the parties have incorporated into their contract, to the detriment of the consumer, provisions derogating from the rights awarded to the consumer under the Doorstep Selling Directive,[28] the Consumer Credit Directives of 1987[29] and of 2008,[30] and the Consumer Sales Directive.[31] In *Bankia*,[32] the Court held that no such obligation existed with regard to the UCPD as Member States were not required to award specific private law remedies for a trader's use of an unfair commercial practice, but that decision is likely to have been overturned by the amendment of the UCPD by the 2019 Modernisation Directive, as mentioned above. Nevertheless, the reasoning used by the Court in *Bankia* could imply that the Court of Justice would not require a national court to test of its own motion whether or not a trader has respected the provisions of the Consumer Rights Directive, as the CRD – similar to the UCPD – does not require specific sanctions for a breach of most of the information obligations imposed on traders.

IV. Low Points of Legislation and Case-law

The information obligations under the CRD bring us to the low points. I shall limit myself to four points: the information paradigm, the lack of substantive legislation, in particular with regard to services contracts, the unavailability of the preliminary reference procedure for ADR entities, and the consequences the Court of Justice attaches to the fact that a term is found to be unfair.

Let us first discuss the information paradigm. The information paradigm is based on the idea that the weak position of consumers vis-à-vis traders can largely be remedied by informing consumers of all information that may be relevant for the consumer either at the moment of conclusion of the contract or afterwards. As a consequence, traders are being burdened with numerous obligations to inform consumers about each and every detail before the conclusion of the contract. Examples may be found in Articles 5 to 6 a and Article 16 of the Consumer Rights Directive,[33] Articles 6 and 7 of the Unfair Commercial Practices Directive, and Articles 5-7 of the Package Travel Directive.[34] As was already mentioned, these directives do not always make clear what the consequences are of a failure to provide the information. Much is actually left to national courts.

However, the sheer amount of information that is being provided to consumers leads to an information overload: as the amount of information that is provided to consumers is exorbitant, there is a severe risk that the information consumers *do* need at the moment of conclusion of the contract is hidden in a pile of information consumers do not need at that time (or even: do not need at all).[35] This problem is worsened by the way that the Court of Justice applies the fiction of the average consumer to determine whether the trader may be considered to comply with the information obligations and whether the information is clear and understandable. According to the average consumer benchmark, the average consumer is reasonably circumspect and reasonably observant,[36] which is interpreted by the Court to mean that the average consumer is expected to read and – in as far as the information is drafted in plain and intelligible language – to have understood all information provided to them before the conclusion of the contract. It will be clear that no ordinary consumer can live up to the ideal of the average consumer.[37] In reality, consumers are only boundedly rational, at best.[38] Moreover, the information overload also has consequences with regard to general contract law matters: if the trader has provided all relevant information (alongside with not-so-relevant information), the chances that the consumer may invoke traditional contract law remedies such as mistake or misrepresentation diminish: the trader can, after all, argue that they have provided all information the consumer reasonably needs to determine whether or not they want to conclude the contract with the trader on the terms offered by the latter. The information paradigm, therefore, even threatens to deprive the consumer of ordinary contract law remedies without offering a substantive alternative. It should be noted that

25 See extensively M. B. M. Loos, 'Chapter 4. Positive Integration: Harmonisation of National Law through Directives and Regulations, in: M. Bartl, L. Burgers & C. Mak (eds.), *Uncovering European Private Law. A Student Handbook*, Cambridge, UK: Open Book Publishers, 2025, https://doi.org/10.11647/OBP.0448, (65-87) 75-76, available at https://doi.org/10.11647/OBP.0448.04 (visited on 1 December 2025).
26 CJEU case C-240/98 to C-244/98, *Océano Grupo Editorial and Salvat Editores v Murciano Quintero* ECLI:EU:C:2000:346.
27 CJEU case C-243/08, *Pannon GSM v Sustikné Győrfi* ECLI:EU:2009:350.
28 CJEU case C-227/08, *Martín Martín* ECLI:EU:C:2009:792.
29 CJEU case C-429/05, *Rampion* ECLI:EU:C:2007:575.
30 CJEU case C-377/14, *Radlinger v Finway* ECLI:EU:C:2016:283.
31 CJEU case C-497/13, *Faber* ECLI:EU:C:2015:357.
32 CJEU case C-109/17, *Bankia/Marí Merino* ECLI:EU:C:2018:735.
33 Directive 2011/83/EU of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] *OJ* L 304/64.
34 Directive (EU) 2015/2302 of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] *OJ* L 326/1.
35 Cf. J. Luzak, '9. Consumers in European Private Law', in: M. Bartl, L. Burgers & C. Mak (eds.), *Uncovering European Private Law. A Student Handbook*, Cambridge, UK: Open Book Publishers, 2025, https://doi.org/10.11647/OBP.0448, (171-190) 173, available at https://doi.org/10.11647/OBP.0448.09 (visited 1 December 2025); A. Davola, '13. Data Subjects in European Private Law', in: M. Bartl, L. Burgers & C. Mak (eds.), *Uncovering European Private Law. A Student Handbook*, Cambridge, UK: Open Book Publishers, 2025, https://doi.org/10.11647/OBP.0448, (255-271) 263, available at https://doi.org/10.11647/OBP.0448.13 (visited 1 December 2025).
36 CJEU case C-210/96, *Gut Springenheide* ECLI:EU:C:1998:369.
37 In class, I usually refer to the average consumer as Superman.
38 Cf. J. de Lange-Collins, '14. EU Sustainable Finance Regulation: An Analysis in the Context of Contemporary Debates in European Private Law', in: M. Bartl, L. Burgers & C. Mak (eds.), *Uncovering European Private Law. A Student Handbook*, Cambridge, UK: Open Book Publishers, 2025, https://doi.org/10.11647/OBP.0448, (273-293) 289, available at https://doi.org/10.11647/OBP.0448.14 (visited 1 December 2025)

in the 2024 case of *Compass Banca*,[39] the Court of Justice has shown to have become a little bit more open to behavioural insights, so perhaps this is signalling a change for the future here.

Another point pertains to the lack of substantive legislation at EU level. Substantive protection is available with regard to consumer sales contracts and, since 2019, with regard to contracts for the supply of digital content or digital service. With regards to (other) services, much less EU legislation exists. This is problematic since over the years, services have become more and more important for everyday life. As *Micklitz* put it: 'Die Dienstleistungsgesellschaft verlagerte den Schwerpunkt vom Kaufrecht auf das Recht der Dienstleistungen'[40] – without the law of services having been sufficiently developed, I would add. The trend away from consumer sales towards consumer services is also seen in the development of servitisation contracts: in many cases, consumers no longer own the goods in their household but lease them with accompanying services provided by the trader. Similar to what was said earlier regarding update obligations for embedded digital content, servitisation brings about that contracts are not just performed at once but that long-term relationships between the parties are created. However, legislation is lagging behind: both at EU level and at national level, a coherent legislative framework regarding services contracts is missing. This is not necessarily something that we can blame the European legislator for, as in many cases it is difficult to see a legal basis for intervention at EU level: in many cases, it is simply unrealistic to assume that consumers will conclude cross-border contracts. This pertains in particular, of course, to physical services. A consumer is unlikely to go to a hairdresser's across the border unless they live in a region close to a national border. That means that Article 114 of the Treaty on the Functioning of the European Union (TFEU),[41] the furthering of the internal market, cannot serve as a legal basis. Art. 169 TFEU, on consumer protection, could, but this can only lead to minimum harmonisation,[42] and therefore will not necessarily lead to much convergence between the laws of the Member States.

There are, however, some exceptions where the argument of stimulating the conclusion of contracts cross-border may be used, as is evidenced by the DCD and other instruments in the area of digitalisation – as will be addressed below. The same is true for financial services, including consumer credit[43] and mortgage credit,[44] as well services in the area of transport[45] and tourism.[46] In addition, a case could be made for legislation pertaining to (cross-border) lease of cars, and, of course, for the rental of holiday accommodation. As regards the latter, there is the 1962 Paris Hotel-Keepers Convention, which was concluded under the auspices of the Council of Europe, which, however, was ratified only by a minority of the Member States.[47] The Convention does show, however, that legislation in this area is possible.

A third point regards the interpretation of EU consumer law rules.[48] Since rules are hardly ever self-evident, diverging opinions may exist as regards the interpretation of a directive or regulation. If this is necessary for them to give judgment in a particular case, in accordance with Art. 267 TFEU, a national court or tribunal may refer a question on the interpretation of such provision to the Court of Justice. In the area of consumer law, however, the European Union promotes the development and use of alternative dispute resolution (ADR) mechanisms, which may provide consumers with better access to justice. Member States are required to ensure that a consumer is not deprived from the protection of the applicable mandatory rules when they opt for resolution of their claim by a recognised ADR entity.[49] From this, it follows indirectly that ADR entities are required to apply the rules deriving from European consumer law. However, from standing case-law of the Court of Justice it follows that these ADR entities are not courts or tribunals within the meaning of Article 267 TFEU, since they can operate only if the parties agree to have their dispute being decided by such entity. For that reason, they are not allowed to refer their questions as to the correct interpretation of EU legislation to the Court of Justice for prejudicial ruling.[50] In practice this means that these ADR entities will have to decide the questions themselves without any possibility of checking whether their interpretation of EU law is correct. This necessarily implies that the ADR entities will develop their own 'case-law', which subsequently will differ from one ADR entity to the next, and will most certainly lead to diverging interpretations in different countries. This suggests that the success of ADR may in fact undermine the potential success of harmonisation.[51]

Finally, whereas the adoption of the Unfair Contract Terms Directive and the Court's case-law regarding *ex officio* testing of unfair terms may be seen as high points in the development of European consumer law, the Court of Justice's case-law on the consequences that are attached to the unfairness of a term may be considered as one of its low points. In *Dexia Nederland*,[52] the Court of Justice decided that if a term is held to be unfair, it must be stricken from the contract altogether and it may not be replaced, not even by the other-

39 CJEU case C-646/22, *Compass Banca* ECLI:EU:C:2024:957.
40 Micklitz (note 2) 325.
41 Consolidated version published in [2008] *OJ* C 115/49.
42 Cf. Art. 169(4) TFEU.
43 See Directive (EU) 2023/2225 of 18 October 2023 on credit agreements for consumers and repealing Directive 2008/48/EC.
44 See Directive (EU) 2014/17/EU of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 [2014] *OJ* L 60/34.
45 Regulation (EC) No 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004] *OJ* L46/1; Regulation (EU) No 1177/2010 of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 [2010] *OJ* L334/1; Regulation (EU) No 181/2011 of 16 February 2011
concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 [2011] *OJ* L55/1; Regulation (EU) No 2021/782 of 29 April 2021 on rail passengers' rights and obligations (recast) [2021] *OJ* L172/1.
46 With regard to tourism, one may point to the 2015 Package Travel Directive.
47 Convention on the Liability of Hotel-Keepers concerning the Property of their Guests, *European Treaty Series* No. 41, available at https://rm.coe.int/168006b648 (last visited 26 November 2025). The Convention has been ratified by less than half of the Member States, signed but not ratified by some other, and neither signed nor ratified by more than a third of the Member States.
48 See earlier on this: M. B. M. Loos, 'Enforcing consumer rights through ADR at the detriment of consumer law', (2016) 24 *European Review of Private Law* 1 (61-80) 75-76.
49 Cf. Art. 11 of Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] *OJ* L 165/63.
50 CJEU case C-497/13, *Nordsee Hochseefischerei* ECLI:EU:C:1982:107; CJEU case C-205/08, *Umweltanwalt von Kärnten/Kärntner Landesregierung* ECLI:EU:C:2009:767.
51 Of course, this problem may be solved, either by expressly awarding ADR entities the power to refer questions for prejudicial ruling to the Court of Justice, by the Court of Justice amending its interpretation of 'tribunals', or by introducing at national level a means for ADR entities to refer questions for prejudicial ruling to the ordinary courts, which in turn can then refer those questions, if need be, to the Court of Justice. See further Loos (note 48) 76-78.
52 CJEU case C-229/19 and 289/19, *Dexia Nederland* ECLI:EU:C:2021:68

wise applicable default rule.[53] This is problematic, and it signals a misunderstanding among the Court of Justice about the consequences of its decisions for private parties. This may be demonstrated by what could be seen as a somewhat silly example. Imagine that a standard contract term is incorporated in a consumer sales contract between a seller and a consumer regarding the place of delivery of the goods, which determines that the goods may be delivered to the consumer's neighbours instead of the consumer's own home. Let's assume that a court holds this term to be unfair, e. g. because is forces the consumer to accept delivery to their neighbours' home without their consent. In such case, the court would invalidate the term. If that term is simply struck from the contract without any kind of replacement, it is unclear for both the seller and the consumer where delivery has to take place. The consumer may not demand delivery at their home, and the seller cannot rely on the otherwise applicable default rule, which would normally imply that delivery will take place at the seller's place of business. So, what then? European consumer law, as such, does not provide an answer. Instead, it forbids the application of the default rule *and* does not provide for an alternative, such as the consumer's home. By simply forbidding the application of the default rule the Court of Justice ignores the consequences of its case-law for the actual dispute at hand.

V. Contemporary Challenges

Of course, 50 years of European consumer law does not mean than consumer law matters are over. Over the last years we've seen the development of new areas where consumer protection may be needed, in particular with regard to digitalization and sustainability.

Legislation in the area of digitalization started with the 2017 Cross-border portability of online content services regulation,[54] followed in 2019 by the already mentioned Digital Content Directive. In 2022, the Digital Services Act (DSA)[55] and the Digital Markets Act[56] followed. In 2023, the Data Act was adopted,[57] and in 2024 the Cyber Resilience Act[58] and the AI Act.[59] It is not always clear whether this legislation is actually all that relevant for consumer protection. This is certainly the case with the DCD, but the first signs are not very reassuring. The DCD had to be transposed by 1 July 2021 and to be applied to contracts as of 1 January 2022. However, in a paper published in 2025, *Van Schagen* shows that there is little compliance with and underenforcement of the provisions transposing the DCD in The Netherlands.[60] There is little reason to expect that the results are different in other Member States. Moreover, with regard to the DSA, the DSM, the Cyber Resilience Act and the AI Act one may wonder where in this picture is the consumer? These European acts basically regulate markets in general and impose obligations on gateway keepers and on other large companies. However, they hardly offer additional protection for consumers on top of the protection offered to other users, and mostly in the form of indirect rights regarding compliance by design and by, again, additional information obligations.[61] Substantive legislation offering enforceable rights to consumers are by and large missing, basically confirming the point made earlier in section IV.

The second contemporary challenge that should be discussed here, is sustainability. There is certainly a trend towards a larger role for sustainability in EU legislation. The 2019 Sale of Goods Directive introduced the notion of a commercial guarantee of durability. If such commercial guarantee of durability is offered for a certain period of time by a manufacturer, then Art. 17(1) SGD provides that the manufacturer is liable directly to the consumer, during the entire period of the commercial guarantee of durability, for repair or replacement of the goods in accordance with Article 14 SGD. This implies that in case of a lack of conformity of the goods delivered under the contract, the manufacturer is liable for repair and replacement in the same manner as the seller is throughout the period for which the commercial guarantee of durability is awarded. This period may even be longer than the period during which the seller is liable, as the seller's liability is capped to two years after delivery unless national law provides otherwise.[62]

In 2024, three related pieces of legislation were adopted:[63] the Eco-Design Regulation 2024,[64] the Right to Repair Directive[65] and the Empowerment Directive.[66] Most relevant here is the Right to Repair Directive, which introduced an obligation for the manufacturer to repair goods, even if the good had previously been repaired by an independent repairer, provided that for the goods repairability requirements are provided for by Union legal acts.[67] In addition, it amended the Sale of Goods Directive by extending the conformity period from two to three years after delivery in case the goods had been repaired because of a lack of conformity that had manifested during the first two years after delivery.[68]

Still, the question is whether this leads to a more sustainable economy. In this respect, it should be noted that the Sale of Goods Directive itself, in 2019, introduced an extension of the right to terminate in the case of lack of conformity,

53 The Court accepts (at point 66) an exception only if not applying the default rule would mean that the whole contract would be void *and* that result would be particularly disadvantageous for the consumer.
54 Regulation (EU) 2017/1128 of 14 June 2017 on cross-border portability of online content services in the internal market [2017] *OJ* L 168/1.
55 Regulation (EU) 2022/2065 of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277/1.
56 Regulation (EU) 2022/1925 of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information [2022] OJ L 265/1.
57 Regulation (EU) 2023/2854 of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828.
58 Regulation (EU) 2024/1781 of 23 October 2024 on horizontal cybersecurity requirements for products with digital elements and amending Regulations (EU) No 168/2013 and (EU) No 2019/1020 and Directive (EU) 2020/1828.
59 Regulation (EU) 2024/1689 of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828.
60 Cp. E. A. G. van Schagen, '(Niet-)handhaving van de Richtlijn digitale inhoud en diensten', *Tijdschrift voor Consumentenrecht* & *handelspraktijken* 2025/5, 191-199.
61 See Art. 31-32 DSA.
62 Cf. Art. 10(1) and (3) SGD.
63 On these instruments, see extensively M. B. M. Loos, 'Repairing Consumer Sales Law', (2024) 32 *European Review of Private Law* 6 (945-978) 960-974.
64 Regulation (EU) 2024/1781 of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC; the regulation is also known as the Ecodesign for Sustainable Products Regulation (ESPR).
65 Directive (EU) 2024/1799 of 13 June 2024 on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394 and Directives (EU) 2019/771 and (EU) 2020/1828.
66 Directive (EU) 2024/825 as regards empowering consumers for the green transition through better protection against unfair practices and through better information.
67 Cf. Art. 5(1) and (7) Right to Repair Directive.
68 Cf. Art. 16(2) Right to Repair Directive, which introduced Art. 10(2a) SGD and amended Art. 10(3) SGD.

allowing for immediate termination in more cases than under the preceding Consumer Sales Directive.[69] Moreover, the SGD does not prioritise repair or price reduction – which are the most sustainable remedies – over replacement: repair and replacement remained available as primary remedies on equal footing, and price reduction remained a secondary remedy, on equal footing with termination. Moreover, liability remained restricted to two years after delivery, which obviously does not contribute to the aim of extending the economic lifespan of goods, as there is no incentive for sellers or manufacturers to produce goods which last longer than the period during which the seller is liable.

From the point of view of sustainability, it would seem logical to limit the right of withdrawal under the Consumer Rights Directive, as the possibility of a withdrawal leads to excessive purchase decisions and unnecessary returns of goods that are perfectly fine, merely because the consumer has changed their mind. However, the 2019 Modernisation Directive did not introduce such limitation. Such clear decrease in consumer protection may have been too hard to swallow for the legislator, even though such development would seem unavoidable if the wish to come to a more sustainable economy is to be taken seriously. Consumers, as much as other 'players' on the market, should accept some responsibility, and letting go of untenable legal instruments could be one of achieving that.

The adoption of the Eco-Design Regulation 2024 is to be welcomed. Until then, on the basis of the pre-existing Eco-Design Directive,[70] the European legislator could only set eco-design requirements pertaining to energy-related products, aimed at increasing energy efficiency and energy security of products. Other product groups, therefore, had to be ignored. The 2024 Eco-Design Regulation extends the possible scope for legislation to almost all physical products. In its 2025 Communication, the European Commission set out its Working Plan regarding eco-design legislation for the years 2025-2030.[71] According to this Working Plan, eco-design requirements will be set for textiles and apparel as well as for tyres by 2027, for furniture by 2028, and for mattresses by 2029, as well as horizontal requirements pertaining to repairability (including scoring) by 2027.[72]

Such eco-design requirements, however, are fairly useless – and problematic for the competitiveness of European businesses – if they are not also imposed on and enforced against business from outside the EU. In this respect, it seems to be of key-importance that products sold on non-EU platforms such as Amazon, AliExpress, Temu and SHEIN are also in line with eco-design requirements. The European Commission reported that in 2024, 4.6 billion low value items (items up to € 150) were imported in the EU, which corresponds to up to 12 million small items per day. Most of these goods are likely to have been directly imported by consumers.[73] This shows that enormous amounts of goods are flooding the European markets. If the manufacturers of such goods are not bound by similar standards for the production of these goods, the goal of a climate-neutral content by 2050[74] is unattainable. Legislation applicable to such externally produced goods and enforcement of EU standards regarding the import of consumer goods is therefore essential. Fortunately, at least with regard to textiles, the European Commission is set on imposing a system of eco modulation of the financial contributions by those placing textiles on the market to extended producer responsibility schemes, requiring e-commerce players from outside and within the EU to be subject to the same rules.[75]

However, eco-design legislation alone is not enough as it does not (necessarily) prevent traders from discontinuing goods and services before they are technically no longer usable. In this respect, the notions of software degradation and abandonware should be mentioned. A well-known example of *software degradation* is 'batterygate', a term used to describe deliberate processor slowdowns on Apple's iPhones. According to Apple, these slowdown were necessary to prevent iPhones with degraded batteries shutting down when under high load, but critics argued the slowdown amounted to planned obsolescence,[76] potentially urging consumers to purchase a newer model. Similarly, Microsoft's announcement that it will no longer support its operating system Windows 10[77] while at the same time setting such high minimum system requirements for running Windows 11[78] that only a few computers running under Windows 10 could upgrade to Windows 11 may be seen as nudging consumers to purchase a new computer. In the case of *abandonware*, it is the software itself that is no longer available. An example is Philips HealthSuite, a series of connected health accessories. In 2021, Philips announced in the app that with two weeks notice, the app would stop functioning (and with it, all accompanying hardware on which the app was installed, such as smartwatches). These phenomena have in common that due to (economic) choices made by the manufacturer of software, consumers may be nudged or forced to purchase new goods as their existing goods no longer function properly. It is unclear how eco-design legislation can limit the possibility of manufacturers to make such choices. As far as I know, the Eco-Design Regulation 2024 as such does not pose a barrier to such choices.

A final observation pertains to the Right to Repair Directive. Under the Consumer Sales Directive and the Sale of Goods Directive, one could argue that in order to prevent significant inconvenience for the consumer, in case of repair of goods that consumers need for everyday life (such as a smartphone, which is also used for 2factor-authentication of other consu-

69 Cf. Art. 13(4) SGD.
70 Directive 2009/125/EC of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products (recast) [2009] *OJ* L 285/10.
71 Ecodesign for Sustainable Products and Energy Labelling Working Plan 2025-2030, Communication from the Commission, COM(2025) 187 final.
72 Working Plan, 4-6.
73 European Commission, *A comprehensive EU toolbox for safe and sustainable e-commerce*, Communication from the Commission, COM (2025) 37 final, 2. In this respect, it should be mentioned that in 2024, the EU imports from China alone amounted to € 519 billion. 34 % of imports (i. e., € 176,46 billion) pertained to other manufactured goods other than machinery and vehicles. Of that amount, more than € 50 billion pertained to telecommunications equipment, over € 15 billion pertained to household equipment and around € 10 billion pertained to clothes, and a slightly lower amount to shoes. Eurostat, *China-EU – international trade in goods statistics*, under 'EU-China trade by type of goods' and 'EU-China most traded goods, 2024', available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=China-EU_-_international_trade_in_goods_statistics#EU-China_trade_by_type_of_goods (visited on 1 December 2025). It stands to reason that the numbers mentioned in the European Commission's Communication make out a large portion of the 34 % of imports pertaining to other manufactured goods.
74 See recital (1) Eco-Design Regulation 2024.
75 European Commission, COM(2025) 37 final, 8-9.
76 J. Graham, 'Apple's apology for Batterygate didn't go far enough', *USA Today* 30 December 2017, available at https://eu.usatoday.com/story/tech/talkingtech/2017/12/30/apples-apology-batterygate-didnt-go-far-enough/991153001/ (visited on 1 December 2025).
77 Cf. https://www.microsoft.com/en-us/windows/end-of-support?r=1 (visited 1 December 2025).
78 Cf. https://support.microsoft.com/en-us/windows/windows-11-system-requirements-86c11283-ea52-4782-9efd-7674389a7ba3 (visited 1 December 2025).

mer goods and digital content), the seller could be expected to offer a temporary replacement good on loan for the period during which repair is carried out.[79] However, the Right to Repair Directive amended the Sale of Goods Directive by introducing, in Art. 14(1) SGD, the following sentence: 'During repair, depending on the specificities of the relevant category of goods, in particular of the need of the consumer to have such goods permanently available, the seller may provide the consumer free of charge with a replacement good, including a refurbished good, on loan.'[80] Therefore, whereas under the original text of the SGD, one could argue that the seller was *required* to provide such temporary replacement good, the new text of the Directive indicates that the seller *may* provide such temporary replacement good. This clearly shows that the seller is not, or no longer, required to do so. Therefore, from the viewpoint of sustainability, on this point, the Right to Repair Directive is a step in the wrong direction.

VI. Concluding Remarks

Consumer law in the EU is further developed than anywhere else in the world. It far surpassed the protection offered to consumers in the United States. However, the limitations of consumer protection in the EU lie in the fact that it is much, if not too much, based on the ideal of furthering the internal market. The weaker position of consumers on the internal market cannot be remedied by the provision of information alone. In fact, the information paradigm that is predominant at the level of the EU stands in the way of effective consumer protection. For that, both more substantive legislation and more enforcement of existing legislation is needed. Moreover, consumer protection itself needs to be recalibrated as it must be balanced against other interests, equally protected as fundamental principles of EU law. This applies, in particular, to environmental protection.[81] The question arises whether consumer rights should not go together with consumer obligations, in particular with a view to the negative aspects of consumption.[82] As already mentioned, a limitation of the right of withdrawal and of the right to claim replacement of non-conforming goods and of termination of a consumer sales contract seems inevitable if we want to take sustainability seriously. It would bring us back to the origins of consumer (protection) law, to the Consumer Policy Program 1975, where consumers were not so much seen as economic actors but as individuals operating in a society. In our current society, as much as in those days, environmental protection and consumer protection should go hand in hand.

Moreover, there are plenty of possibilities to already now interpret existing consumer law provisions in a more sustainable manner.[83] To name just one example: Art. 13(2) Sale of Goods Directive allows the consumer to choose, when ordering the goods to be brought into conformity, between repair and replacement, 'unless the remedy chosen would be impossible or, compared to the other remedy, would impose costs on the seller that would be disproportionate, taking into account all circumstances'. There is no reason why in determining whether replacement is disproportionate, no account may be taken of the fact that replacement is much more burdensome for the environment than repair is. Certainly, interpreting existing consumer law provisions in a more sustainable manner is just a small step towards sustainability, but it is a step that can be taken now without having to wait for new legislation. Let's take that step! ■

79 Cf. Loos (note 63), 952-953.
80 Cf. Art. 16(4) Right to Repair Directive. On this, Loos (note 63), 975.
81 See also Micklitz (note 2) 331-332.
82 Micklitz (note 2) 332.
83 Cf. Terryn (note 1) 171.