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SQUARING THE CIRCLE? RECONCILING CONSUMER LAW AND THE CIRCULAR ECONOMY[86]

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Disclaimer: my academic career is strongly connected to the rise of consumer law in the heydays of the welfare state in the 1970s and 1980s and the delegation of consumer law making from the Member States to the European Union. As part of the EU enlargement process, the 13 more recent Member States had to take over the consumer acquis. I was involved in many projects about the transfer of European consumer law not only to the new member states, but to the EU's neighbouring states, to the Far East, to India and China, to the Global South (particularly Africa) and to the Global West (South America). The shift from the national to the European, and then to the international, is tied to a change in perspective. At the national level, consumer law is, or at least was, connected to the building of a better, more just society; at the European level, consumer law is tied to providing and giving the Internal Market project a social face; at the international level, consumer law is to be connected to the post-war international economic order, today the Global Value Chains. My short essay intends to convey a simple message: in light of the 17 UN Sustainable Development Goals[87], the 2015 EU document on circular economy[88] and the exploding digitalisation it is time to wipe the slate clean and design a new consumer law from scratch. I will formulate 8 key issues which urgently call for an answer in order to conceptualise a sustainable consumer protection law.

86 I would like to thank Evelyne Terryn for her incredible patience and encouragement to write that paper as well as M. Durovic, A. de Franceschi, M. Namyslowska, P. Rott, E. Terryn and Ch. Twigg-Flesner for their amazing comments which pushed me ever further and deeper. The usual disclaimer applies.

87 Https://www.un.org/sustainabledevelopment/sustainable-development-goals/.

88 COM (2015) 614 final.

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OUT OF THE COMFORT ZONE

The title of the book is consumer protection and the circular economy. Law and consumer law play a role, but major contributions are coming from other disciplines and broaden the picture far beyond the existing corpus of European and national consumer laws. Consumer protection is the legacy of the welfare state, the regulatory response to the consumer society, the rise of consumption economically but also societally. Economically, consumption makes up the biggest chunk in the current economy; societally, consumption is part of identity building. When the EU took over consumer policy in the aftermath of the Single European Act to establish the Internal Market, consumer law was deprived of its protective role; instead, consumer protection law turned into consumer law without *protection*.[89]

So why return to consumer *protection*, and what kind of protection is needed in the circular economy? The reference to protection immediately revitalises the idea of the consumer as the weaker party. However, what we have perceived in recent decades is a differentiation of the consumer into two or three categories: the responsible consumer, the confident consumer and the vulnerable consumer. In such a perspective, the vulnerable consumer would be the primary addressee in the circular economy. This is certainly much too narrow, but it allows us to put the question on the table as to what consumer protection means, and who is in need of protection, against what and what for.[90]

But is consumer protection as it developed in the consumer society of the 1980s comparable to consumer protection in the circular economy? The political rhetoric runs the risk of reducing the linkage between the two to just another technocratic problem, an exercise of adjusting regulatory techniques to the circular economy. There is more needed than a mere adjustment of the existing body of consumer law, than sticking with familiar regulatory techniques rather than investing in the work necessary for a fundamental recasting of consumer policy and consumer protection law. Consumer protection and consumer law have to be rethought (if not redesigned altogether), if one takes the circular economy and sustainability seriously. There is an obvious tension in the contributions to this book, which can only be overcome by going back to legal theory. On one side, there are, crudely speaking, the non-lawyers who provide a broader perspective, who highlight the economic, societal, psychological

89 H.-W. Micklitz, The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law – A Bittersweet Polemic, Journal of Consumer Policy: Volume 35, Issue 3 (2012), 283–296.

90 Th. Wilhelmsson, Critical Studies in Private Law. A Treatise on Need-Rational Principles in Modern Law (Dordrecht: Kluwer Academic Publishers, 1992).

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and natural sciences dimension of the concepts of circular economy and sustainability. On the other side, there are the lawyers, who tend to break down the big issues into nitty-gritty legal questions of how and by what means the circular economy and sustainability can be squeezed into the existing legal regimes. Such an exercise implies – to use fashionable EU speak – that consumer law is 'fit for purpose'[91], that consumer law as it has developed over the last 50 years is at least in principle able to handle the call for circular economy.[92]

I have my doubts. This volume makes it abundantly clear that lawyers have to leave their comfort zone. They have to actively engage with those disciplines that have been and are working for decades on what is called today sustainability and circular economy. It is the century-old debate on the law and …: law and economics, law and sociology, law and psychology, law and natural sciences etc.[93] The rise of the consumer society in the 1960s in the US, later in Europe and now in the other continents initially triggered a deep theoretical debate on what consumer law stands for, how consumer law and consumer protection could carry the social policy implications and how the legal rules should be designed so as to cope with the new economic, societal and social challenges. The political dimension has got somewhat lost over the decades.

Consumer lawyers have to leave the safe harbour of the rules that the nation states and the EU have established to give first the national economy and society, and later the Internal Market, a social face. In short, what is needed is a theoretical debate on what the role of consumer protection and consumer law could be and how a consumer law that meets the needs of a circular economy should be designed. In the 1960s/1970s, the opponents of consumer law argued that consumer policy is politics and not law. Consumer law was political law. Over time, and through the shift away from the Member States to the EU (which goes hand in hand with the decline of the welfare state), consumer law was de-politicised. The political, economic and societal recognition of consumer law ended in consumer bureaucracy and consumer technocracy. Seen in this way, theorising and politicising consumer law in the age of the circular economy requires the re-politicisation of consumer law as a necessary requirement. This is will not be possible without serious self-reflection.

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91 This is the aim of the better regulation programme and the consumer refit initiative, https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal-consumers_en.

92 Insightful Roger Brownsword's distinction between "coherentism" and "regulatory instrumentalism" is interesting (a good summary is at R. Brownsword, "After Brexit: Regulatory-instrumentalism, Coherentism and the English Law of Contract" (2017) 34 Journal of Contract Law 139–164, esp. 142–3.

93 V. Nourse and G. Shaffer, Varieties of New Legal Realism, Can a New World Order Prompt a New Legal Theory, Cornell Law Review, 95 (2009), 60.

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CIRCULAR ECONOMY AND SUSTAINABILITY

The 2015 EU Communication on the Circular Economy[94] has to be placed into the context of the 17 United Nations' Sustainable Development Goals (SDG). A brief look at the substance of the two documents suffices to make it clear that the UN's approach goes much further and asks many more fundamental and comprehensive questions about the effects on consumers, on consumer protection and consumer law. Be that as it may, the EU document is ambitious enough to trigger a deeper debate. It remains surprising though that it needed the United Nations to pressure the Global North to adjust its economy to the ever more visible effects of the climate change. The EU Member States and the EU were unable to generate the necessary commitment to the urgently needed change of our economies.

The EU has to face a challenge that Ludwig Krämer put upfront as early as 1997 in the *Liber Amicorum* for Norbert Reich.[95] The event resulting in that book brought together the then leading scholars of consumer law in Europe. Backed by the newly introduced qualified majority voting rule, the EU succeeded to get a whole series of consumer law rules adopted. Looking back, the 1990s could be regarded as the heydays of European consumer law. The building of consumer law through the EU strengthened the belief that the EU could turn into more than market building, into something which could be described as building a European society, or perhaps even building a European Constitution and European Civil Law. Ludwig Krämer destroyed the festive mood with his forceful critique that consumer law had neglected the environmental dimension. Whilst each and every consumer lawyer nodded her head and admitted that there is a need to bring consumer and environmental protection into a holistic legal perspective, nothing happened. The cautious attempts to merge the two fields did not produce consistent results. In fact, consumer and environmental law developed separate rationales and have followed their own path dependency until today.

Therefore, whether the link is environmental protection, sustainability or circular economy, the question remains whether and how these three other fields could be merged into one, and then, depending on the level of abstraction, whether this could be brought into line with the consumer society and consumer law? I do not want to be misunderstood. For sure, there remained

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94 COM (2015) 614 final.

95 L. Krämer, in Krämer, L., Micklitz, H.-W. and Tonner, K. (eds.), Law and diffuse Interests in the European Legal Order / Recht und diffuse Interessen in der Europäischen Rechtsordnung. Liber amicorum Norbert Reich (Baden-Baden: Nomos, 1997).

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voices advocating the need for a sustainable European constitution[96] as there were doctrinal attempts to find gateways in the existing body of consumer law through which environmental protection, sustainability and circular economy implications could be channelled. Throughout the text I will refer back to the attempts to break down the grand concepts – sustainability and circular economy – into particular substantive or procedural requirement that allow for the greening of consumer law.

I see myself as having been and as being part of the group of these consumer lawyers, well-minded but all too easily ready to fall back into their/my comfort zone. These incremental attempts, however, did suppress the crucial questions lying beneath, which can now no longer been avoided if we take sustainability, circular economy and climate change seriously:

> Is consumer law as it was developed in the consumer society the problem?
> Is 'irresponsible' behaviour of consumers the problem?
> Is the consumer the problem?
> Are we the problem?

Consumer law follows the market rationale. Consumer law is intrinsically tied to the market and its relevance for the society we are living in. If the gross income in the EU results basically from consumption – 54,4%[97] – then consumption is needed for sustaining and growing the economy. The rationale of the market requires the consumer to buy ever more products and to constantly replace the old ones with new ones. The more the consumer buys, the better it is for the economy. The consumer shall not repair products but replace them immediately, she shall not tinker around to get the product going again, but get rid of it.[98] From a purely economic point of view, planned obsolescence makes perfect sense.[99] It keeps the economy going. Language matters. Old used products are second hand = second best products. They are waste, they are not raw material.

The critique that behavioural economics and behavioural science has to face is that they promote economic efficiency to steer consumer behaviour into one particular direction – the direction of increasing the efficiency of the

96 A. Azmanova and M. Pallemaerts, The European Union and Sustainable Development: Internal and External Dimensions, 2006.

97 Https://ec.europa.eu/eurostat/statistics-explained/index.php/Household_consumption_by_purpose.

98 For an early discussion Ch. Twigg-Flesner, "The Law on Repairs and Guarantees" in T.Cooper (ed.), Longer Lasting Products (Gower, 2010).

99 T. Brönneke /A. Wechsler (eds.) Obsoleszenz interdisziplinär Vorzeitiger Verschleiß aus Sicht von Wissenschaft und Praxis, VIEW Schriftenreihe Volume 37, 2015; A. De Franceschi, Editorial Planned Obsolescence: The Apple and Samsung Cases, EuCML 2019, 217.

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market.[100] No doubt behavioural economics and behavioural science can also be instrumentalised to steer the consumer into sustainable behaviour, into strengthening and building the circular economy. I will come back to this point at the end of my essay. The multifunctionality of the tool points to a deeper problem, the relationship between individual autonomy and the public interest. In his breath-taking reconstruction of 500 years of consumption, Frank Trentmann[101] leaves us with a rather pessimistic assessment on how we have behaved and behave until today. We the consumers are longing for ever more consumption. The Europeans are following the lead given by the United States, and China is to be regarded as the culmination point for a society in which consumption becomes the politically-promoted substitute for a meaningful life. The exchange of letters between Rawls and van Parijs has not lost its significance. Here is what Rawls asked in 2003[102]:

> One question the Europeans should ask themselves … is how far reaching they want their union to be … The long-term result of this [the US federal union driven by market efficiency HM] … is a civil society awash in a meaningless consumerism of some kind. I can't believe that that is what you want.

There is a huge gap between the economic importance of private consumption and the deep philosophical and societal questions that consumer law faces today. What might have worked in the 20th century in the historical compromise of the Global North between a capitalist market economy and a democratic regime, has obviously not only led to a crisis of democracies and the EU in the 21st century[103], but it has catapulted the very political and societal importance of consumption for our lives into the limelight. This exactly is the place where the relationship between the circular economy, sustainability and consumer law has to be placed.

TECHNOLOGY

The new consumer law I am advocating cannot be designed without taking digitalisation into account. It seems that history is repeating itself once more. The current hype about digitalisation, about machine learning, neuronal nets and blockchain, about algorithms and big data analytics, has conquered the

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100 H.-W. Micklitz, The Politics of Behavioural Economics of Law, in: H.-W. Micklitz/ A.-L. Sibony/ F. Esposito, Research Methods in Law and Consumer Law, Elgar, 2018, 513–556.

101 F. Trentmann, The Empire of Things, How we became a world of consumers, from the fifteenth century to the twenty-first (London: Penguin Books, 2016).

102 J. Rawls and P. Van Parijs, 'Three Letters on the Law of Peoples and the European Union' (2003) 4 *Revue de philosophie économique* 7–20, available at: www.uclouvain.be/cps/ucl/doc/etes/documents/RawlsVanParijs1.Rev.phil.Econ.pdf.

103 P. F. Kjaer and N. Olsen (eds.), Critical Theories of Crisis in Europe. From Weimar to the Euro (London: Rowman & Littlefield, 2016).

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awareness of lawyers around the world, first in the US and Israel, and now, with the usual delay, also Europe. The research invested into digital consumer law or more broadly the impact of digitalisation on consumer law has triggered conferences, publications and the new EU Directive on digital content.[104] This trend of research and political action is again following its own path, and is by and large separated from the parallel claim of building a circular economy and of implementing the 17 SDGs.

The Consumer Refit exercise was a kind of stock taking effort under five major paradigms: effectiveness, efficiency, coherence, relevance and added value.[105] The European Commission set a huge machinery into motion: studies were commissioned, hearings were held, a 'New Deal for Consumers' was presented that eventually led to concrete proposals for reform of the existing body of EU consumer law rules and even the introduction of a collective compensation claim.[106] At the time of writing, it looks as if this initiative will have to be handled, if any, in the next Parliamentary session.[107] This major effort of reform which must have swallowed up millions of taxpayers' money neither links consumer law to the circular economy/sustainability nor to digitalisation. The bifurcation of consumer law, the separation between the market and the environment, has now led to a trifurcation. When it comes to consumer law, the market based consumer law, environmental law and the digital consumer law are separate silos, without much interaction. The language used in the context of the Consumer Refit uses the necessary catchwords, but the overall political exercise was not meant to review whether the existing body of consumer law is fit for the circular economy and for the challenges of the digital economy and society. The whole undertaking follows the Internal Market rationale.[108] One might even argue that out of the five parameters, economic efficiency dominates.

There is no difficulty to find academic research on the digitalisation of environmental law and of consumer law, but how are the two interconnected in light of the circular economy and sustainability? The political promise of

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104 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (Text with EEA relevance.) PE/26/2019/REV/1 OJ L 136, 22.5.2019, p. 1–27.

105 Https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal-consumers_en and the analysis of H.-W. Micklitz and A. Villaneuva, Refit or Rethink – The Politics of EU research – A Grand Misunderstanding? in E. van Schagen/St. Weatherill (eds.), Impact Assessments in EU Contract Law: The Unfair Terms Directive after the Fitness Check, Hart Publishing 2019.

106 Website of the European Commission, COM(2018) 183 and 184 final.

107 According to the legislative observatory, Parliament has already voted on the compromise text and the Council is still to vote: https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2018/0090(COD)&l=en.

108 Ch. Twigg.-Flesner, Editorial: From REFIT to a Rethink: Time for fundamental EU Consumer Law Reform? (2017) 6 Journal of European Consumer and Market Law, 185–189.

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digital capitalism is that all the dysfunctionalities and failures of the old market economy will be overcome through the new technology.[109] Through 3D printing, the production is brought back home to the industrial states. Online platforms are said to promote the sharing economy far beyond Uber and Airbnb, through the joint use of do-it yourself products or the local organisation of all sorts of daily life activities. There are no limits to imagination. However, the promising land ahead of us should not be entered without a deeper understanding of the political economy behind digitalisation.[110] Digitalisation of the economy and the society could be understood as response of capitalism to the increased social costs of labour. Industrialisation replaced blue collar labour through machines, digitalisation substitutes not only the remaining rest of blue collars but now also white collar labour.[111]

It is by no means clear what the digital economy and digital society will look like in, say, 10 years from now, let alone what the role of consumption as well as that of consumer law will be.[112] Ten years is a huge time span in light of the exponential development of technology. In the business world and in academia, the feasibility of personalised law gains ground.[113] We are gradually getting accustomed to personalised advertising and personalised prices. Personalised consumer law, tailored along the lines of our alter ego in the net, responds to our behavioural preferences, both our own and those that are associated with our profile through data generated from other consumers with a similar profile. What might be a nightmare for some looks like the promised land for others – at last we can achieve the just society in which everybody gets the law she needs.

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109 OECD Guidelines on AI 26 May 2019 refers 8 times to SDGs, without addressing the tension: *RECOGNISING that AI has the potential to improve the welfare and well-being of people, to contribute to positive sustainable global economic activity, to increase innovation and productivity, and to help respond to key global challenges*, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449#_ga=2.241625666.15407406.1559741306–1807715073.1520074357.

110 Y. Benkler, The Role of Technology in Political Economy, 25. July 2018, Harvard University, Berkman Klein Center, https://cyber.harvard.edu/story/2018–07/role-technology-political-economy.

111 See the publications of P. Drahos, which point into that direction, for instance, The Global Governance of Knowledge: Patent Offices and Their Clients, 2010 and R. Süsskind, https://legal-tech-blog.de/legal-tech-book-series-tomorrows-lawyers-by-richard-susskind-part-3.

112 See the editorial of H.-W. Micklitz/Ch. Twigg-Flesner, Think Global – Towards International Consumer Law, Journal of Consumer Law 2010 (33) pp 201–207.

113 A. Casey & A. Niblett, "The Death of Rules and Standards" (Coase-Sandor Working Paper Series in Law and Economics No. 738, 2015, https://chicagounbound.uchicago.edu/law_and_economics/775/; A. Porat & L. J. Strahilevitz, Personalizing Default Rules and Disclosure with Big Data, 112 Mich. L. Rev. 1417 (2014). Available at: http://repository.law.umich.edu/mlr/vol112/iss8/2; A. Porat & O. Ben-Shahar, Personalised Mandatory Rules in Contract Law, University of Chicago Law Review, Forthcoming. University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 855, U of Chicago, Public Law Working Paper No. 680, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3184095.

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But where is sustainability in this personalised law and where is the circular economy? A personalised consumer law would be tailored and adjusted to the behavioural preferences taken from the net. A consumer who has no interest in sustainability would receive information on her needs and the respective remedies for undisturbed consumption, a consumer who looks for sustainable consumption would get what she needs. Personalised law, in short, favours the choice model.

ECONOMICS

Current consumer law is built on the premise that the same rules could, in principle, be applied to all the consumers in the European Union, and that potential differences in the capabilities of consumers can be balanced out through the triad of the responsible, the confident and the vulnerable consumer. It must be recalled that the existing body of consumer law was adopted by and large in the 1990s, largely based on predecessors elaborated within the then 15 Member States during the 1970s and 1980s.[114] The EU used the existing national rules for the development of minimum standards that left the 15 Member States with leeway for the development of higher standards of protection. The Lisbon Agenda 2000 paved the ground for the adoption of the consumer policy programme 2002–2006. Here, the Commission advocated full harmonisation, gradually replacing the minimum standards with uniform rules throughout the EU. The Consumer Refit is the latest attempt to achieve this objective.[115] Member States and large parts of the Consumer Law Community resisted full harmonisation for long. However, the recently adopted Directive on Consumer Sales provides for full harmonisation.[116] The European Commission will celebrate its adoption as a success and as an incentive to fight for full harmonisation in the remaining parts of consumer law. Full harmonisation reduces the leeway of Member States to deviate from European standards.[117]

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114 This is the first wave of European consumer law, the second wave is much more vertical, introducing consumer rights into the EU rules on regulated markets. Here the EU was overall much more successful to realise full harmonisation.

115 More generally on the evaluation of EU policy making, Smismans, S. and Minto, R. 2017. Are integrated impact assessments the way forward for mainstreaming in the European Union?. Regulation & Governance 11(3), pp. 231–251. (10.1111/rego.12119), Smismans, S. 2017. The politicization of ex post policy evaluation in the EU. European Journal of Law Reform 19(1), pp. 74–96. (10.5553/EJLR/138723702017019102005); Claire A. Dunlop (Author, Editor), Claudio M. Radaelli (Author, Editor), Handbook of Regulatory Impact Assessment (Research Handbooks on Impact Assessment series) (Englisch), 2016.

116 Directive (EU) 2019/771 of the European Parliament and of the Council 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, OJ L 136, 22.5.2019, p. 28–50.

117 I will enter the debate on the reach of full harmonisation, see N. Reich, Von der Minimal- zur Voll- zur „Halbharmonisierung" – Ein europäisches Privatrechtsdrama in fünf Akten, ZEuP

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Ten new Member States joined the EU in 2004, 2 more in 2007, with Croatia in 2013 being the latest Member State. When these countries joined the EU, the legislative standards were already set. The new Member States were obliged to take over the consumer acquis as part of the accession process. The Agreements concluded with the then candidate states did not take the socialist past and the different standards in the economy into account. Or, to put it the other way round, – the consumers in the new Member States were supposed/promised to enjoy the same level of protection as the consumers in the old Member States, independent of the differences in the economies of the established Western capitalist markets and the Eastern socialist markets in the process of change.

The approach developed by the EU in the enlargement process governs its policy towards neighbouring countries. The different agreements concluded with the Western Balkan countries, Georgia and the Ukraine contain a long list of consumer law directives which have to be implemented.[118] The EU monitors the implementation process and requires progress reports on a regular basis.[119] The ideology is identical – consumers in the neighbouring countries shall enjoy the same standards as those in the EU itself, both new and old Member States. The EU does not take potential differences in the markets and the societies into account. To give just one example: sponsored by the German Gesellschaft für Internationale Zusammenarbeit, a team of Georgian lawyers and economists produced a Regulatory Impact Assessment of the draft consumer law – meant to implement key consumer law directives (unfair terms, unfair commercial practices, consumer sales, consumer rights) along the lines of the requirements laid down in the Association Agreement.[120] On the basis of the available quantitative and qualitative data, the RIA analyses the economic and societal impact of the EU-imposed consumer rules on the Georgian economy and society. The key finding is the existence of two markets: the first is one for the 'rich' people who can afford to buy the same products as in the West. These products are usually imported from the old West or from the US. The other market is local, where the 'poor' people buy substandard and often counterfeited products at low prices. These products are produced locally and/or imported

2010, 7.

[118] J. Stuyck/M. Durovic, The External Dimension of Consumer law in H.-W. Micklitz/ M. Cremona (eds.), Private Law in the External Dimension of the EU, OUP, 2016, pp. 227.

[119] M. Karanikic/ H.-W. Micklitz/ N. Reich, Modernising Consumer Law – The Experience of the Western Balkan, Nomos Baden-Baden, 2012.

[120] Draft Law on Consumer Rights Protection, Regulatory Impact Assessment, May 2019 on file with the author Chapter 1 – Kety Gujaraidze (Georgian Institute of Public Affairs) Chapter 2 – Davit Maisuradze and Irakli Shakiashvili (Ilia State University) Chapter 3 – Jaba Gvelebiani (Georgian Institute of Public Affairs) Chapter 4 – Jaba Gvelebiani (Georgian Institute of Public Affairs) Chapter 5 – Liana Akhobadze (GIZ Legal Program) Chapter 6 – Ana Khurtsidze, Nata Sturua and Gaioz Japaridze (University of Georgia) Chapter 7 – Working group Chapter 8 – Working group.

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from China. The economists are claiming that the imposition of one and the same consumer protection standard on the two markets would squeeze the local producers out of the market and would lead to a supply shortfall.

There is no need to "Go East" in order to find two markets within one economy. The rising tension between the global cities and the forgotten regions and between the centre and the periphery[121] can be observed both in the US and in the EU itself. It suffices to travel through the old coal and steel regions in Belgium, France, Germany, Luxemburg and the UK. It seems that the phenomenon of the two markets in one country is no longer to be found in former socialist states or in the Global South. These are all variations of what S. Santos terms "localised globalisation" and "globalised localisation".[122] The next generation of European consumer law has to take the reality of the *two* markets into account, if the idea of a circular economy and sustainable consumption should remain more than a pipe dream.

ETHICS

The digitalisation of the economy and society has triggered a debate in the Western world about the ethics of the world in which we are already living and into which we are ever deeper drawn. Western democratic states have set up ethics commissions, the European Union just published ethics guidelines[123] and the academic debate is blossoming.[124] The German Advisory Council to the Ministry of Justice and Consumer Protection, of which I am a member, tried to launch a debate about if and eventually on how digitalisation requires regulatory measures in order to protect the digital sovereignty of the consumer.[125]

In practice, the states are united in a 'wait and see' approach, at the very best a 'watch and see' approach. 'Watch' and 'see' requires top level competence of computer scientists in ministries and supervisory agencies. It is plain that the reality is different. The best computer scientists are by and large working for

121 D. Kukovec, Law and the Periphery, European Law Journal, Vol. 21, No. 3, May 2015, pp. 406–428.

122 De Sousa Santos, B. 'Law: A Map of Misreading: Toward a Postmodern Conception of Law' (1987) 14 Journal of Law and Society 279–302.

123 Http://ec.europa.eu/research/participants/data/ref/h2020/grants_manual/hi/ethics/h2020_hi_ethics-data-protection_en.pdf.

124 F. Pascale, The Black Box Society, The Secret Algorithms That Control Money and Information, Harvard University Press, 2015, S. Zuboff, The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power, 2019.

125 The relevant three opinion on Consumer Law 2.0 (2016), Digital Sovereignty (2017) and Consumer-Friendly Scoring (2018) are available also in English on the website of the Advisory Council, www.svr-verbraucherfragen.de/en/documents/documents/.

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the big four (Google, Amazon, Microsoft, Apple) and, if not for the big four, for one of the many digital start-up companies. There are two reasons: the high salaries and the creative space. The big four may pay the best salaries, which allows them to recruit the best people. The salary scales for public officials in western democracies do not offer a competitive income. However, there is more to this than salaries. The tech firms offer the most interesting jobs in a very different working environment, largely without traditional hierarchies, in a protected space where individuality and creativity are strongly promoted.[126] Salary constraints, better job opportunities, hierarchical command and control structures and the empty labour market render it difficult to establish the necessary competence within states, even if the states were ready to establish such a monitoring and surveillance unit in whatever form. 'Watch' and 'see' requires an institution similar to the national and the European Central Bank. The salaries paid for central bankers are by and large competitive. We need institutions that survey the market and the exponential development of technology. However, such institutions do not even exist, at least not in the Western World, let alone a political debate on the ethics of digitalisation. There does not seem to exist the political will and the political preparedness to take action beyond investing in research, including consumer informatics. Europe does not have a Cyber Ministry like Audrey Tang from Taiwan.[127]

What are the ethics of a circular consumer law in light of the fast moving digitalisation of the economy and the society? Strictly speaking these are two separate though interconnected discourses. The circular economy requires a human being which accepts to be steered into the politically recognised right direction, at least if we are ready to learn from the 500 years of the 'Empire of Things'. Somewhat empathically, one might argue that the circular economy needs a new human being who accepts responsibility for the environment, for sustainability and for climate change. Such a claim looks frighteningly similar to communist times which had called for the creation of the 'new individual'.[128] In the digital economy and society, the human risks turning into an appendix of technology.[129] If digitalisation is apt to contribute to the building of a circular economy the ethical question is whether technology can take over steering humans in the "right" – i.e., the politically correct and desired – direction, the

126 One of my phd researchers Anna Maria Nowak is writing her phds on Fintechs. She has interviewed the employees at all levels in the firms. These interviews provide a deep insight into the motivations of those who decide to work for a small Fintech instead for a big bank or a public agendies.

127 The web is full of information about her commitment to building a democracy where AI is used to survey what the government does and not to control the citizens, see the passionate article in Süddeutsche Zeitung, https://www.sueddeutsche.de/digital/cyberministerin-audrey-tang-taiwan-1.4468006?reduced=true.

128 C. Milosz, The Captive Mind, 1953.

129 There is much debate on human centred AI – see OECD Guidelines loc. cit.

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building of a circular economy. I will not suggest that I have any answers to these issues. However, the new consumer law should ideally have at least a tentative, perhaps experimental answer to the triangular relationship between the ethics of the circular economy, the ethics of technology and the role of the (consumer) law.

If the answer is to be expected from technology, then we are back to the political economy of digitalisation. Since Samuelson, since 1948, economics relies on mathematics, and, more recently, econometrics. Vogl[130] has vehemently criticised the idea, or even ideology, that man is able to forecast the future through developing mathematical models. It is only more recently that empirics have come back to economics, mainly, but not only, through behavioural economics. The political message of mainstream economics is that Law, can only work if it increases efficiency. I will not deny that the quantitative efficiency test helps to discover the unwanted distributive effects of well-meant consumer protection regulation.[131] However, law is more than what can be measured and tested in categories of economic efficiency. Law, this is the plea, cannot be reduced to numbers and statistics. The measuring of the law in allusion to the well-known book of D. Kehlmann *Measuring the World*[132] does not do justice to the societal and ethical role and function of the law.[133]

BEYOND THE NATION STATE

The world we are living in is a world beyond national consumer law, whether public or private, it is a world beyond the nation state. Nation states are under pressure to adapt their rules to the needs of a globalised – many say neo-liberal[134] – economy. The credo of the Lisbon Agenda of 'transforming the EU into the most competitive economy of the world' has never been repealed or corrected. The SDGs and the 2015 EU document on the circular economy speak a different language. One question is how to reconcile these goals and whether technology is the answer to present-day problems. The other question is WHO does it – the nation state, the EU as a regional organisation, or the community of the states within the United Nations?

130 J. Vogl, The Specter of Capital, 2010.
131 O. Ben-Shahar, The Paradox of Access Justice, and Its Application to Mandatory Arbitration' (2016) 83 The University of Chicago Law Review 1755–1817.
132 D. Kehlmann, Die Vermessung der Welt, 2005, Measuring the World, 2010.
133 H.-W. Micklitz, The measuring of the law, Manuscript, on file with the author.
134 There is a word of caution needed on the loose use of 'neo-liberal'. There is more than one concept behind, C. Crouch, The strange non-death of neo-liberalism (Cambridge: Polity Press, 2011), the same, Crouch, Can Neoliberalism Be Saved from Itself? (Social Europe Edition, 2017).

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The debates about the circular economy and the role consumer law and consumer policy might play more often than not address, if not explicitly then implicitly, the nation state, i.e. the state as the key regulator. This is the undercurrent of most of the contributions to this book, be they by economists, lawyers or philosophers. For more than 20 years, the market dominated the minds of politicians. Now it seems as if we can discover a revival of the nation state as the key actor, not only across the Atlantic but also within the European Union. Legally speaking, the Member States have no competence when and where the EU fully harmonised consumer law. The rather generous interpretation on the scope of EU consumer law through the ECJ has even strengthened the position of the EU.[135] Any attempt to put the Member States into the driver's seat in leading the transformation of the current linear economy into a circular economy faces strong constitutional constraints. One might argue that the concept of the circular economy remains outside the scope of the whole integration process which was based first on the Common Market and nowadays on the Internal Market. Let us assume there is a Member State, and the Nordic countries belong certainly to the group of candidates, who is willing to take drastic steps in order to set an end to the linear economy. The legal measures to be taken nationally have to be brought into line with the Treaty. There is a potential escape hatch offered by Art.114(5) TFEU and following, permitting derogation from harmonisation measures adopted on the basis of Art 114 where "a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure". It's not a broad exception – the criteria are very specific. It needs (i) new scientific evidence (ii) relating to the protecting of the environment (iii) on grounds of a problem specific to that Member State. So it would be difficult, albeit not impossible, to use this to push through a national initiative in support of the circular economy. However, Member States could use this provision as a means of forcing the European Commission to put forward proposals for amending harmonising measures to take better account of the circular economy. Art.114(5) etc are based on a notification procedure. If the Commission was flooded with notifications from individual Member States, then that might result in some kind of reaction resulting in changes to existing harmonisation directives or entirely new initiatives.[136]

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[135] ECJ case law on full harmonisation of product liability Case C-183/00 González Sánchez/ Medicina Asturia, [2002] ECR I-3901 or the ECJ case-law on the scope of the Unfair Commercial Practices Directive, Joined cases C-261/07 and C-299/07 VTB-VAB et al v Total Belgium et al, [2009] ECR-2949, confirmed by case C-522/08 Telekommunikacia Polska [2010] ECR I-(10.3.2010) para 31.

[136] I would like to thank Christian Twigg-Flesner for pointing to Art. 114 (5) TFEU.

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Is the competence shift from the national to the European level a satisfactory answer in light of the challenges ahead of us – the 17 SDGs? Certainly not, which is why there is so much debate about the political future of the EU. Interestingly enough, even the most powerful critics like W. Streeck[137] do not put much emphasis on sustainability and circular economy. Their major concern is the decline of democracy and sovereignty in the Member States. It should not be forgotten though that the Member States, their governments and their parliaments supported and promoted the kind of market society we are living in, the one Rawls criticises forcefully. The Member States joined forces with the EU, even used and instrumentalised the EU to a point where the peoples of Europe tend to perceive the EU as the neo-liberal hegemon which destroys the national welfare state, solidarity and justice, forgetting about the complicity between the Member States and the EU. Taking the plea of sustainability and the circular economy seriously requires nothing less and nothing more than rebuilding the foundation on which the whole European project stands – the Internal Market.

Let us assume that the EU and the Member States are willing to take exactly these steps, to rethink the Internal Market project and to gradually transform the linear into a circular economy; to merge economic, social, consumer and environmental regulation, how about the role and function of the EU in the global world? So far, the EU seems to torn between two extremes – the gentle civilizer and the neo-liberal hegemon.[138] The EU exported its consumer law to the new Member States and via the Association Agreements to the neighbouring countries. However, the looser the connections between the EU and the respective third countries, the weaker becomes the role of consumer law and policy and the more dominant the free trade paradigm. The necessary consequence would be to fix the role and function of consumer law in EU law on external relations – a sustainable consumer law that takes the economic and political reality of the *two* markets into account could indeed turn into an export hit and help to justify the EU's raison d'être.[139]

It seemed naïve to expect the decisive move to come from the international organisations. However, exactly this happened in the elaboration and the unanimous adoption of the SDGs by 193 states in the General Assembly. What remains is the need to overcome the divide between the United Nations and its institutions on the one hand, and the World Trade Organisation on the other. So

137 W Streeck, How will Capitalism End? Essays on a Failing System, Verso 2016.

138 H.-W. Micklitz, The Role of the EU in the External Reach of Regulatory Private Law – Gentle Civilizer or Neoliberal Hegemon? An Epilogue in M. Cantero/H.-W. Micklitz (eds.), The Role of the EU in Transnational Legal Ordering: Standards, Contracts and Codes, Elgar forthcoming 2019.

139 Gráinne De Burca, 'Europe's Raison d'être' in Dimitry Kochenov and Fabian Amtenbrink (eds), The European Union's Shaping of the International Legal Order (CUP 2013), 21.

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far any attempt to bring together the two institutions and the rules they developed has failed. The dividing line between free trade on the one hand and environmental and consumer protection on the other seems to be even deeper than in the EU and in the Member States. The two poles reflect the distinction between product and process regulation, national product regulation shall not work as a barrier to international trade, process regulation may follow national requirements on labour, consumer and environmental protection.[140] One may wonder whether hope results from the transformation of the global economy itself. The rise of global value chains breaks down the clear distinction between product and process and makes it theoretically possible for the lead company to exercise control over the whole process, including the degree to which local, regional and national standards on labour, consumer and environment are respected.[141] Consumers could in theory be informed on the conditions under which the products are manufactured. Sustainability clauses are ever more common in global value chains. The practical problem is compliance and enforcement before courts.[142]

RESPONSIBILISATION

In the globalised economy and society, in the law beyond the nation state, beyond the distinction between the public and the private, private responsibilities come into sharp focus. The public attention is very much on the behaviour of European and American transnational companies in the Global South. *Kiobel* was the latest effort thus far to hold an American company liable under the Alien Tort Claims Act.[143] The US Supreme Court rejected any liability for the infringement of customary international law of the indigenous people in Niger. To my knowledge, there is no similar case which ever entered the jurisdiction of the ECJ. This type of litigation is usually decided before national courts, sometimes with promising results.[144] L. Azoulai[145] argues that *Viking* and

140 For recent attempts to connect the two poles, C. Glinski, CSR and the Law of the WTO – The Impact of Tuna Dolphin II and EC–Seal Products, NJCL 2018, 122, S. Sankari, Sustainable Consumption: The Right to a Healthy Environment in Alberto do Amaral Junior, Luciane Klein Vieira and Lucila de Almeida (eds.) (forthcoming: Springer International Publishing AG, 2019).

141 R. Baldwin, The Great Convergence: Information Technology and the New Globalization, 2016.

142 On practice N. Klein: No logo: taking aim at the brand bullies. Knopf, Canada 2000. It would be interesting to get to know whether the situation has improved in the last 20 years.

143 US Supreme Court Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) https://www.supremecourt.gov/opinions/12pdf/10–1491_l6gn.pdf.

144 UK Supreme Court Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents) before Lady Hale, President Lord Wilson Lord Hodge Lady Black Lord Briggs Judgment given on 10 April 2019 https://www.supremecourt.uk/cases/docs/uksc-2017–0185-judgment.pdf, AAA v Unilever (2018) EWCA Civ 1532, and Okpabi v Royal Dutch Shell Plc (2018) Bus L.R. 1022.

145 L. Azoulai, The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realisation' (2008) 45 Common Market Law Review 1335–1355.

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Laval[146] if put upside down, allows for arguing that European companies bear the legal responsibility to respect social rights. Whether this would equally apply to their behaviour outside the European territory is open for discussion. The responsibilisation of business is at the forefront of the debate. Rightly so.

What about the responsibility of consumers, of us? The European system of consumer law is built on obligations imposed on business to the benefit of consumers. European consumers are free to decide whether they want to enforce these rights in case business has not respected them. There is no legal obligation for consumers to make use of their rights. It is for the consumers to decide whether they read the information provided to them, how they handle information and whether they are ready to translate information into action. The EU has adopted a whole set of rules which inform the consumer on the environmental implications of the product or service she intends to order. It is plain and well researched that consumers do not read standard terms and do not take notice of the information provided and that there is a mismatch between the publicly declared willingness to buy sustainable products and their actual behaviour.[147] It is also true that the decision of an individual consumer to utilise their rights is obviously also constrained by their individual capabilities and capacity The individual decision of the consumer NOT to read and NOT to bring wishful thinking and behaviour into compliance forms an integral part of individual autonomy.

Currently I can identify three ways under discussion how to overcome this mismatch. The first is through labelling. The consumer has the choice between circular and non-circular products. This is by and large the current state of affairs, provided the consumer has access to both categories of products; which is quite often not the case and provided she receives the information in an appropriate form, eg. not only in writing by using logos and symbols. The second option would be to integrate the external costs into the price. This would probably make non-circular products more expensive. The poor consumer cannot afford the increased costs. Redistributional measures would be needed to give this option a perspective. The third is the most delicate one, but one that needs to be taken seriously in the light of 500 years of borderless consumption.[148] We need to open Pandora's box and discuss the responsibilisation of the consumer. The International Association of Consumer Law organised a

[146] ECJ Case C-341/05, Laval un Partneri [2007] ECR I-11767; ECJ Case C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, ECR 2007 I-10779.

[147] Overview on the state of the debate by A.-L. Sibony, Data and Arguments: Empirical Research In Consumer Law in H.-W. Micklitz/ A.-L. Sibony/ F. Esposito, Research Methods in Law and Consumer Law, Elgar, 2018, 165.

[148] F. Trentmann, loc. cit. locates the beginning the Renaissance.

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conference in 2015 under the provocative title of 'virtue and consumer law'.[149] This could have been an invitation to bring the responsibility of the consumer to the fore and to rethink the consumer rights rhetoric. Unfortunately, this was only partially taken up, mainly in the keynote speeches of O. Ben-Shahar and O. Bar-Gill.

The European Union is speaking of the *consumer citizen* in quite a number of documents.[150] Similarly the worker could be called the *worker citizen* and the employer the *employer citizen*. There are good reasons why it makes sense to use such a designation in EU law, in the law beyond the nation state. The "citizen", as opposed to "the consumer", bears obligations towards a European society beyond the nation state. Taking the idea of the consumer citizen seriously eventually leads to the responsibilisation of the consumer.[151] Legally speaking, the question would be whether the consumer may lose her rights when she is not making use of them or whether the non-use or the mis-use of rights can even be sanctioned and the consumer can be held liable. The notion of responsibilisation entails that consumers should expect to be subject to a number of active duties, particularly to act in a manner which prioritises conduct in line with the circular economy. In this context, a broadening of consumer education, perhaps even at school, would be a practical step towards increasing awareness of this responsibility.

The triad of the vulnerable, the confident and the responsible consumer paves the ground for a context-sensitive solution. Whereas the vulnerable consumer should and must be exempted from any responsibility, the confident and the responsible consumer might very well become the addressee of legal obligations. The change would be dramatic. Individual autonomy, the legacy of the enlightenment, would be sacrificed on the altar of the public interest, the need for a circular economy. I will not downplay the tectonic shift, but this is no excuse not to address the question. The tricky question then is how non-compliance with such a duty could be tackled. Reliance on the triad begs a number of questions. First, what is the conception of vulnerability here – is it category-based or situational? Secondly, how can one define that a person was vulnerable, confident or responsible in any given context? Thirdly, why should vulnerability mean that there would be exemption from any sanction/liability

[149] Https://csecl.uva.nl/content/events/conferences/2015/06/virtues-and-consumer-law.html.

[150] J. Davies, The European Consumer Citizen in Law and Policy, 2011; M- Hesselink, European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice? European Review of Private Law, Vol. 15, pp. 323–348, 2007.

[151] M. Dani, Assembling the fractured European Consumer' (2011) LSE 'Europe in Question' Discussion Paper Series (LEQS Paper) No. 29; N. Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 Common Market Law Review 1597–1628; critical M. Everson and Ch. Joerges, 'Consumer Citizenship in Postnational Constellations?' (2006) EUI Working Paper Law No. 47.

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for non-compliance with this duty? If sustainability/promotion of the circular economy is the goal, then should not all consumers be subject to a sanctionable duty? There is more to study.

Merging the two dimensions of the increased responsibility of the relevant actors would lead to a twin approach: (i) the lead company which has demanded/imposed these terms in its supply contracts; and (ii) consumers/customers of the lead company who could hold the lead company to claims about ethical and sustainable conduct in its supply chain. For (i), the question is what sort of consequence there might be if a supplier in the value chain was in breach of the clause – would the lead company terminate the contract or would this be outweighed by the economic disbenefit of seeking a new and more expensive supplier? Alternatively, could the contract impose penalties on the supplier? As for (ii), if goods are marketed as sustainably produced etc., then the UCPD regime should be robust enough to offer one route to enforcement (subject to the general concerns about enforcement etc), and it might in any event be a breach of contract which might entitle the consumer to a remedy. Difficulty is which remedy would be appropriate, particularly as damages are not easily available for this kind of breach if the consumer cannot demonstrate a loss, the "consumer surplus" idea?

CONSUMER LAW

What then are the consequences for the future of consumer law? Is the current body of consumer law fit for purpose? Is it possible within the existing body of consumer law to handle the challenges of the circular economy in the digital economy and society? I propose to distinguish between three different options – the possibilities to integrate the circular economy into the existing body of law, the possibilities to use technology and new regulatory techniques to steer the consumer into the politically needed direction, and the rethinking of consumer law from scratch.

There have been manifold efforts to integrate sustainability into European private law. It suffices to mention the notion of defect in the Consumer Sales Directive, the broad scope of application of the Unfair Commercial Practices Directive or the use of the cross-section clause in Art. 6 TFU.[152] Recitals 32 and

[152] For a systematic account of European and national consumer policy LE Europe, VVA Europe, Ipsos, ConPolicy, Trinomics, Behavioural Study on Consumers' Engagement in the Circular Economy Final Report-ANNEXESOctober2018Specific contract –No 2016 85 06Implementing Framework Contract –CHAFEA/2015/CP/01/LE, pp. 17, 18 and 21 https://ec.europa.eu/info/sites/info/files/ec_circular_economy_final_report_0.pdf.

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48 of the revised of the Consumer Sales Directive 2019/77/EU build bridges towards sustainability in the conformity test and in the choice of consumer remedies. The still rather unexplored question in the Unfair Commercial Practices Directive is whether and to what extent it provides for an obligation to inform the consumer on sustainability.[153] One might bring forward good arguments. The problem remains that there is no clear-cut case law of the ECJ that would allow to connect the set of information duties enshrined in various directives, the verdict on misleading omissions and the notion of defect into one coherent legal concept. The ECJ seems to treat the UCPD as *lex generalis* with specific obligations elsewhere sometimes displacing the UCPD requirements The other gateway is the right to repair. It is worth recalling the battle over the hierarchy between the four remedies in consumer sales law. The first draft of the European Commission intended to leave the choice to consumers. Consumer lawyers strongly supported the model and the ideology behind. Under pressure from business and from some Member States including Germany, the finally adopted version distinguishes between two layers, first repair and replacement then price reduction and termination. A closer analysis reveals that the two remedies at the first level do not enjoy the same status. In fact, the consumer is bound to ask for repair first. Doctrinal details do not matter. In 1997 I wrote an article in which I tried to make the case for the free choice model through an interpretative route, without even considering sustainability.[154] In light of the circular economy, consumer lawyers and business lawyers seem to be walking hand in hand, united in the emphasis on repair.[155] However, replacement might be cheaper than labour intensive repair. The answer might be that the Sales Directive is flawed in the way the proportionality test is designed by focusing on the financial impact on the trader as the determining factor. A solution might have been a rule that the threshold for proportionality should have been raised – e.g., not just significant difference in cost but that repair would “not be

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[153] H. Schebesta, Regulating Sustainability Claims on Seafood – EU Ecolabel, Unfair Commercial Practices Directive or Seafood Information Requirements? Journal of European Risk Regulation Volume 7, Issue 4 December 2016, pp. 784–788.

[154] H.-W. Micklitz, Ein neues Kaufrecht für Verbraucher in Europa?, EuZW 1997, 229–237; to the possibilities of greening consumer sales law in line with sustainability Th. Wilhelmsson, Twelve Essays on Consumer Law and Policy, Publications of the Department of Private Law, University of Helsinki, Helsinki 1996, 267–287, C.Glinski/P. Rott, Umweltfreundliches und ethisches Konsumverhalten im harmonisierten Kaufrecht, EuZW 2003, 649–654; J.C. Dastis, Ethischer Konsum und Vertragsrecht, VuR 2017, 252, St. Sonde, Das kaufrechtliche Mängelrecht als Instrument zur Verwirklichung eines nachhaltigen Konsums, 2016, even more ambitious A. Halfmeier, Nachhaltiges Privatrecht, Archiv für civilistische Praxis, 2016 (216), pp. 717.

[155] K. Tonner/E. Gawel/S. Schlacke/M. Alt/W. Bretschneider: Gewährleistung und Garantie als Instrumente zur Durchsetzung eines nachhaltigen Produktumgangs, VuR 2017, 3, K. Tonner/E. Gawel/S. Schlacke, Stärkung eines nachhaltigen Konsums im Bereich Produktnutzung durch Anpassungen im Zivil- und öffentlichen Recht, Gutachten im Auftrag des Umweltbundesamtes, 2017.

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economically viable". Here we are back to how the products are designed and for how long, whether obsolescence is inbuilt and that manufacturers should be obliged to make spare parts available for the life span of the product.

The limited impact of a pro circular economy reading of these prominent areas of consumer law is all too obvious. More is needed. Two options gain ground in the political debate, on the one hand regulation by design (default), on the other regulation through nudging. Both avenues deserve careful analysis. What could be the role of regulation by design in the circular economy? Is it imaginable that business takes the lead and designs the product so that they last for ten years without repair?[156] I recall the famous example discussed in the 1960s when Americans flew to the moon. If a car – that was the story – was designed with the same degree of care as the shuttle, the car could and would not have the tiniest defect in the first 100,000 kilometres. Is it thinkable that industry is ready to produce such products without a stick behind the door and without consumers who are willing to accept that they will have to keep the very same car perhaps for the rest of their lives? It seems that regulation through nudging is the more promising option. Whilst I recognise the potential nudging offers, I am not ready to accept that nudging can be introduced by the Member States and by the EU without an open political debate in the parliaments. Democratic decision is needed on where and under what conditions nudging is legitimate.[157] The downside of nudging is plain. It suffices to recall China's policy on social scoring and the way how the Chinese citizens are 'nudged' towards politically promoted behaviour through surveillance technology.[158] For those in the West who reject such a scenario it might be useful to engage with Shoshana Zuboff's surveillance capitalism.[159]

More is needed. The 're' in the thinking about consumer law has become prominent. Geraint Howells, Christian Twigg-Flesner and Thomas Wilhelmsson[160] have just published their book on Re-thinking consumer law. The authors aim first and foremost at the re-introduction of the social in consumer law, at revitalising the protective device, but there is not much on sustainability and digitalisation. The European Commission has occupied the

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156 Beyond the contributions in this volume and those in A. Boos/T. Brönneke/A. Wechsler (eds.), Konsum und nachhaltige Entwicklung, Verbraucherpolitik neu denken, 2019.

157 Cass R. Sunstein and Lucia A. Reisch: Trusting nudges: Toward a bill of rights for nudging. Boca Raton, Florida: CRC Press, 2019, the same A bill of Rights for Nudging, Editorial Journal of European Consumer and Market Law, 209, 93.

158 M. Siems, The Chinese Social Credit System, A Model for other Countries, EUI Working paper Law 2019/1, http://cadmus.eui.eu/bitstream/handle/1814/60424/LAW_2019_01.pdf?sequence=1&isAllowed=y.

159 S. Zuboff, Big other: surveillance capitalism and the prospects of an information civilization. Journal of Information Technology, 30:75–89.

160 Howells, G., Twigg-Flesner, Ch. and Wilhelmsson, Th. Rethinking European Consumer Law (Abingdon: Routledge, 2017), but see pp.334–5, and especially the final sentence on p.335.

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're' most prominently in the Consumer REFIT, an exercise which is caught in its path dependency. In the rhetoric unfolded, European consumer law is doomed to succeed in order to keep the Internal Market going. Against this background I am advocating a more radical approach[161]

> Not Rethinking consumer law – but – A clean Salte design for a new consumer law
> Thinking consumer law from scratch

In this essay, I have tried to sketch out the broad range of questions which need to be put to the forefront, theoretically and conceptually – the 500 years of irresponsible consumption, the current belief in technology as a saver, the highly divided legal framework which carves out what belongs together, the economic and social reality in Europe, the existence of two markets and two societies which are governed by one law, the tension between the global cities and the forgotten regions. On the conference at the European University Institute in September 2018 '40 years Journal of Consumer Policy' Claudia Lima Marques advocates a Brundlandt-style[162] report on consumer law and policy which should set the tone for a fresh start.[163]

WHAT NEXT

This essay might leave the reader with the feeling, or even the conviction, that the future of consumer law and private consumption looks rather gloomy. This would indeed be correct if consumer policy and consumer law were to continue along the path taken in the 1970s – more consumption, better choice is good for the global economy, for the society and for the consumer herself. It is simply not enough to stretch the existing body of consumer law so as to be able to integrate sustainability into the notion of conformity, into the remedies under the Consumer Sales Directive or into misleading omission under the Directive on Unfair Commercial Practices. I will not downgrade these attempts. They provide for a first step into the 'coherentist'[164] direction we all have to move. Courts have been reluctant so far to accept the greening of consumer law through interpretation. Policy makers, whether at the national or the European level, try to integrate sustainability into the existing economic and legal order and plead for a harmony which might be unachievable.

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[161] A similar plea can be found in the book by A. Boos et al (eds.) loc.cit. The subtitle says 'Verbraucherpolitik neu denken'- thinking consumer policy a fresh. I am putting emphasis on consumer *law*.

[162] Http://netzwerk-n.org/wp-content/uploads/2017/04/0_Brundtland_Report-1987-Our_Common_Future.pdf.

[163] There will be a special issue in the Journal of Consumer Policy, scheduled for 2019/2020.

[164] See, Roger Brownsword, loc. cit.

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Inertia is the problem. There is a need to rethink the economy and the society we want to leave in. For consumer lawyers and consumer activists, the turn towards the circular economy offers breath-taking theoretical and conceptual opportunities for designing a sustainable consumer law which deserves its name and which is not mere window-dressing. The starting point for such a new concept must be the notion of the consumer herself, around which the new law is to be built. The move from consumer to customer indicates the erosion of the old concept, the move from the consumer in the proper sense of the word to the citizen consumer points into the direction the new design of consumer law has to move.

Some 20 years ago Ewould Hondius invited me to a conference under the provocative title 'has Consumer Law come to an End?'. Now, I ask: 'Is the circular economy setting an end to consumer law, at least to the consumer law as it stands after 50 years?' We should not be afraid of the question nor its possible answers, and tackle it upfront. Sustainability should be made one of the founding principles of consumer law.

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