

Chapter 2

Post-private Law?

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Abstract In 2012, Hans Micklitz presented a report (*Gutachten*) for the German lawyers' association (*Deutscher Juristentag*) on the future of consumer law. The focus of the report was primarily on German law. However, as usual, Micklitz' main argument clearly had a broader, Europe-wide vocation. Therefore, it is particularly fortunate that the report recently was published also in English, entitled 'Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought Provoking Impulse'. Micklitz answers the question of whether there is a need for a new design of consumer law positively. Consequentially, he proposes to reshape consumer law into a special law. In this short contribution in his honour, I will take issue with that proposal and with the main reasons Hans Micklitz offers in its support.

2.1 A Thought-Provoking Impulse

In 2012, Hans Micklitz presented a report (*Gutachten*) for the German lawyers' association (*Deutscher Juristentag*) on the future of consumer law.¹ The focus of the report was primarily on German law. However, as usual, Micklitz' main argument clearly had a broader, Europe-wide vocation. Therefore, it is particularly fortunate that the report recently was published also in English, entitled 'Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought Provoking Impulse'.² Micklitz answers the question of whether there is a need for a new design of consumer law positively. Consequentially, he proposes to reshape consumer law

¹ H-W Micklitz, 'Brauchen Konsumenten und Unternehmen eine neue Architektur des Verbraucherrechts?', *Gutachten A zum 69. Juristentag* (Munich, CH Beck, 2012).

² H-W Micklitz, 'Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought Provoking Impulse' (2013) 32 *Yearbook of European Law* 266. The references will be to the English version.

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into a special law. In this short contribution in his honour, I will take issue with that proposal and with the main reasons Hans Micklitz offers in its support.

2.2 The Tanker and the Sailing Boat

A decade after the reform of the German law of obligations (*Schuldrechtreform*), Micklitz takes stock of the integration of consumer protection law into the Civil Code (BGB). Micklitz' verdict is unequivocally negative: the integration has failed substantially. It could be characterised as a success only at a very superficial, conceptual level, but a true, normative integration has never taken place. Worse, it could not even have occurred since the private law of the BGB, on the one hand, and consumer law, on the other, are irreconcilably—indeed 'essentially'—different:³ the private law of the civil code is essentially static, while consumer law is intrinsically dynamic.

Micklitz compares the BGB and consumer law, respectively, to a heavy tanker and a sailing boat. 'The heavy tanker BGB cannot keep up with the dynamics of the agile consumer law.'⁴ This metaphor is powerful and imaginative. However, what exactly does it mean? It cannot be intended that developments in the civil code just take place more slowly than in consumer law, since presumably an oil tanker will cross the ocean much faster than a skiff. Nor can it mean that the BGB should carry bulk transactions while consumer law should remain reserved for occasional (and recreational) use. No, what Micklitz has in mind is another difference: a heavy tanker ship, he explains, 'can change its direction in only a limited way and needs time for every change of direction' while sailing boats 'can change their direction quickly and easily, but are exposed to wind and weather—that is to say political current—in a far stronger way.'⁵ So, the metaphor is about the possibility for the captain to rapidly adapt its course, whenever there is a change of plan.

2.3 Forever Young?

At first sight this idea may seem plausible. However, upon further consideration, it is not entirely clear why consumer law would be intrinsically more dynamic than other parts of private law.⁶ Is it because consumers are whimsical and inconstant, always running after the latest fashion? That does not seem to be what Micklitz means. He writes: 'The dynamic of consumer law cannot be harmonized with the static of the BGB. Consumer law presents itself as a restless field of law, subjected

³ Ibid, 269.

⁴ Ibid, 281.

⁵ Ibid, 269.

⁶ In the same sense, E Hondius in his contribution to this volume.

to continuous changes, which furthermore do not emerge from the centre of German law or German politics, but which ‘invade’ Germany via the European Union.’⁷ However, this image seems to confuse the intrinsic nature of consumer law with characteristics that are more typical of youth. Are not all new legal fields for some time more dynamic and subject to rapid changes, especially when they are in the eye of political turmoil, than the more settled and mature fields of law? Today, financial law seems at least as restless and subjected to continuous change as consumer law.

Moreover, the image of a fresh and brisk consumer law also seems somewhat outdated. Consumer law was born in the early 70s’ and came of age in the early 90s’.⁸ Core subjects like the protection against unfair terms seem very well settled today, and certainly not restless. At the same time the consumer movement also starts to show definite signs of conservatism. The role of consumer protection groups today seems to be geared no longer only towards reform but as least as much towards the preservation of what has been achieved so far, in spite of the fact that ‘the consumer acquis’ in reality often represents the vested interests of the most privileged consumers in Europe which are not necessarily shared by the newcomers and outsiders from Europe’s periphery.⁹ A telling example was the recent debate concerning the European Commission’s proposal for a Common European Sales Law, where consumer groups (and their advocates in the European Parliament) fought, tooth and nail, for the preservation of what they regarded as one of their main successes, i.e. Art 6 Para 3 of the Rome I regulation, while knowing very well that the main effect of this provision is that it forces consumers in the new Member States to subsidise the more extensive protection enjoyed by consumers living closer to Europe’s political and economic centre.

2.4 BGB: Building Site or Austere Monument?

Micklitz’ report focuses on the future of consumer law. So, we cannot blame him for not developing in any detail his views concerning the future of commercial law. However, if the explicit conclusion is that ‘an outsourcing of the consumer law of the BGB is necessary and desirable’,¹⁰ then by implication non-consumer private law seems to be doomed to remain behind in the BGB—otherwise there would be no reason for consumer law to leave in the first place. In other words, while consumer law will move to its brand new premises commercial law will have to stay

⁷ Micklitz, ‘Do Consumers and Businesses Need a New Architecture of Consumer Law?’, 359.

⁸ The Paris Summit of 1972 or the Council’s first consumer protection programme of 1975 are usually referred to as the cradle of consumer law in Europe. If we take John F Kennedy’s, ‘Special Message to the Congress’ of 1962 as the starting point, then consumer law today is already beyond middle age.

⁹ D Caruso, ‘Qu’ils mangent des contrats: rethinking justice in EU contract law’ in G de Burca, D Kochenov and A Williams (eds), *Europe’s Justice Deficit?* (Oxford, Hart, 2014, forthcoming).

¹⁰ Micklitz, ‘Do Consumers and Businesses Need a New Architecture of Consumer Law?’, 359.

in an old dysfunctional building.¹¹ Thus, we seem to be confronted with another contrasting pair of images, consumer law as the busy building site where modernity is shaped, and the BGB as an austere monument with the formalist architecture of classical private law, to which respectful visits are paid but which has lost most of its relevance for our daily lives. This will be all the more true given the fact that in Micklitz' proposal the consumer law that will be moving out, will take with it also the large and economically important group of transactions concluded between small businesses.¹²

While Micklitz's image of a dynamic consumer law seems overstated, the picture that he paints, largely by implication, of the civil code that will continue to apply to non-consumer transactions seems unduly dim. Consumer law is where the action is, general private law is static, if not lethargic, and without any realistic prospect for reanimation. The problem with Micklitz' proposal, therefore, is not that it goes too far, as some conservatives might be inclined to argue, but rather that it does not go far enough. Why should we accept that the general private law in the civil code be static to the point of becoming dysfunctional? Are not the parties to commercial contracts equally entitled to a private law that is fully up to date and in touch with the latest economic, technological and social developments? Micklitz writes: 'The BGB will continuously remain a building site, if the consumer law stays there.'¹³ Well, maybe it should. To the extent that technological innovations and socio-economic developments, of national and (increasingly) transnational origin, call for an adequate response, would we not want to have a new architecture also for non-consumer private law?

2.5 Re-depoliticising Private Law

There is a persistent myth according to which a formal understanding of party autonomy, freedom of contract and corrective justice is of the essence of private law. The German version of the myth is called 'ordoliberalism' and its programme is entitled 'the private law society'. This is a myth because it is not even remotely descriptive of private law as it exists today in Germany or elsewhere in Europe. Indeed, in reality much of the socialisation of private law that took place in the

¹¹ Micklitz only discusses contract law and civil procedure. Thus, it remains unclear what should happen to the transfer of title aspects of consumer sales and, more generally, to the private property owned by consumers, to torts committed by consumers, to family quarrels among consumers, and to the application of succession law to consumers. Micklitz seems to imply that these subjects should continue to be taken care off by the BGB. That makes good sense. However, the question arises why *from his point of view* these subjects should not become part of consumer law as well.

¹² Micklitz, 'Do Consumers and Businesses Need a New Architecture of Consumer Law?', 351. Thus, the BGB would also become a rather empty house as well. Incidentally, it seems somewhat paradoxical that Micklitz wants to leave the BGB but then wishes to take most of its present inhabitants with him.

¹³ *Ibid*, 284.

twentieth Century was based, especially in Germany, on general clauses in the civil code, like § 242 BGB on *Treu und Glauben* (good faith), and in the context of commercial contracts. The policing of unfair terms (especially limitation clauses) and doctrines like *Wegfall der Geschäftsgrundlage* (frustration of contract) were first developed in business-to-business (b2b), not in business-to-consumer (b2c) relationships. It is therefore misleading to conflate weaker party protection with consumer law, even if the definition of consumers is extended to small businesses. There exists no pure, politically neutral private law, to be contrasted with the intrinsically political consumer law. If anything, today the idea of a private law society constitutes a neoliberal programme for radical political reform. Curiously enough, however, the ordoliberal myth of private law is cultivated most diligently by its German academic critics from the left.

A direct implication of the formal understanding of private law and of contrasting general private law with the special private law that protects certain weaker parties, has always been that it makes general private law appear rather technical and apolitical.¹⁴ One important consequence of the inclusion of weaker party protection law (consumers, patients, tenants, employees) into the German civil code in 2002 (and previously in the new Dutch civil code in 1992) was that it changed the political colour of the civil code.¹⁵ A danger of outsourcing consumer law, as Micklitz proposes, is therefore that, as a result, the colour of the civil code will change again, after the departure of ‘red’ consumer law. Micklitz’ proposal risks, in other words, to contribute to reviving the ordoliberal myth once again by re-depoliticising general private law.

2.6 Unfair Exploitation

In reality, there is no convincing substantive reason for limiting weaker party protection to consumers, even if this category is extended to small businesses, as Micklitz proposes. The example of unfair exploitation can illustrate this point. Article 51 of the proposed Common European Sales Law on unfair exploitation reads as follows:

‘A party may avoid a contract if, at the time of the conclusion of the contract:

- a. that party was dependent on, or had a relationship of trust with, the other party, was in economic distress or had urgent needs, was improvident, ignorant, or inexperienced; and
- b. the other party knew or could be expected to have known this and, in the light of the circumstances and purpose of the contract, exploited the first party’s situation by taking an excessive benefit or unfair advantage.’

¹⁴ D Kennedy, ‘The Political Stakes in “Merely Technical” Issues of Contract Law’ (2002) 10 *European Review of Private Law* 7.

¹⁵ With regard to European contract law, cf. S Grundmann, ‘European Contract Law(s) of What Colour?’ (2005) *European Review of Contract Law* 184. With regard to Dutch law, see EH Hondius, ‘De zwakke partij in het contractenrecht; over de verandering van paradigma van het privaatrecht’ in T Hartlief and CJJM Stolker (eds), *Contractsvrijheid* (Deventer, Kluwer 1999) 387, who speaks of a paradigm shift. See also his contribution to the present volume.

As a provision of general contract law this Article is meant to apply in both b2c and b2b relationships.¹⁶ It conveys a strong normative message that unfair exploitation is not tolerated in the internal market, not only in b2b, but also between businesses. This article is of great practical and symbolic value. It provides a long-awaited impulse to moralising the internal market. It does so in concert with the general duty to act in accordance with good faith and fair dealing (Art 2), which requires ‘conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question’, the obligation to co-operate (Art 3), and the many references in the text to ‘reasonableness’ (defined in Art 5). The internal market is not a jungle where might is right; the operators on the internal market are subject (within the scope of EU law) to the Charter of Fundamental Rights of the EU, which guarantees the fundamental rights to dignity, freedom, and equal treatment. Art 51 may be regarded as giving expression to those fundamental rights and, if enacted, it will have to be interpreted in their light.¹⁷ EU private law rules provide guidance to individuals and businesses with regard to permissible conduct in the internal market. General private law, as rules of just conduct, may be regarded as a polity’s civil constitution: the BGB expresses the German understanding of justice among private parties, a CESL could similarly constitute an expression of what we regard as contractual justice in the European Union.

2.7 Market Citizens

A troubling dimension of consumer law has always been that it addresses us as consumers rather than as the full persons that we are. Are we really merely consuming when we download the music that we love, book a well-deserved holiday, switch on the heater in the winter, or buy medicines? And is it desirable that we are encouraged to identify even more with our roles as consumers, as will happen, inevitably, if the part of private law most relevant to our daily lives will be relabelled as consumer law? Do we need further incentives for consumerism and commodification? As it is well known, the European commission tends to confuse citizens with consumers (e.g. when its citizens’ agenda focuses on roaming rights),¹⁸ the European Union

¹⁶ It is true that the CESL-proposal limits the personal scope in b2b-contracts to cases where at least one of the parties is an SME (Art 7 para 1). However, the definition of SMEs is so broad (see Art 7 para 2) that apparently it covers 99% (!) of all businesses in the EU. See Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, [2003] OJ L 124/36. Moreover, under the proposed Regulation, the Member States are allowed to extend the personal scope of application to the largest businesses as well (Art 13 para 2).

¹⁷ See recital 37 of the proposed regulation.

¹⁸ JHH Weiler, ‘To be a European Citizen: Eros and Civilization’ in JHH Weiler (ed), *The Constitution of Europe; “Do the New Clothes Have an Emperor?” and Other Essays on European Integration* (Cambridge, CUP 1999) 324, 334; A Supiot, *Homo Juridicus; essai sur la fonction anthropologique du Droit* (Paris, Seuil 2005) 165; MW Hesselink, ‘European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?’ (2007) *European Review of Private Law* 323, 345.

with its single market, and justice with economic growth¹⁹ (e.g. when it proposes a common European sales law underlining its potential for growth of the European economy).²⁰ Should we really follow the Commission's example?

Micklitz seems somewhat ambivalent with regard to the idea of the market-citizen. On the one hand, he is very critical of the fact that in the EU consumers are given the task to shop cross-border for the sake of the European economy. He is entirely right when he points out that in the EU 'it is incumbent upon [the consumer] to support, promote, and expand the single European market' and that this is 'a political task that goes beyond the simple purchase decision in individual cases.'²¹ We must indeed reject this illegitimate confusion by public authorities of our roles as citizens and consumers.

On the other hand, however, Micklitz himself seems to endorse the idea that citizens should (sometimes) participate in the democratic debate qua consumers, e.g. when he claims that 'democratic participation means the inclusion of consumers in the legislative procedure'.²² However, that seems equally wrong. Surely, we must participate in the democratic debate, even about consumer law, as citizens, not as consumers? When considering the merits of weaker party protection we should consider and weigh the interests of all potentially affected parties, including sellers and (potentially) third parties (i.e. in the case of negative externalities).²³ If we aspire to a meaningful political deliberation, we cannot enter the political debate as mere stakeholders—politics is for citizens, not for consumers.

2.8 Consumers and Their Lifeworld

It could be pointed out—and it seems implicit in Micklitz' analysis of consumer law—that our advanced societies are characterised by an ever further going functional differentiation, also in law, and that there is no way back. This is true as an empirical matter and there is also nothing per se worrying about this trend. For contract law, it means that social, economic, and technological developments require specifically appropriate rules for new types of contracts, for new contracting techniques, and for socially differently situated contracting parties. Clearly, it is not true that one size fits all, nor that it should. However, this does not mean that

¹⁹ See Vice-President Reding's 'Justice for Growth Agenda'. Cf. 'Speech: Justice for Growth makes headway at today's Justice Council' (http://europa.eu/rapid/press-release_SPEECH-13-29_en.htm?locale=en).

²⁰ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, Brussels, COM(2011) 635 final, recital (16); Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Common European Sales Law to facilitate cross-border transactions in the single market, COM(2011) 636 final, 12.

²¹ Micklitz, 'Do Consumers and Businesses Need a New Architecture of Consumer Law?', 293.

²² *Ibid.*, 307.

²³ On such cases, see L Tjon Soei Len, *The Effects of Contracts Beyond Frontiers. A Capabilities Perspective on Externalities and Contract law in Europe* (Amsterdam, 2013).

the various differentiated contract types and contracting situations have nothing in common anymore that could be of any normative relevance. The idea of a closed, self-referential system of consumer law is both descriptively inadequate and normatively unattractive.²⁴ In addition to being a consumer, persons also have several very different roles and identities. It does not make sense, either descriptively or normatively, to reduce their agency when they are contracting, exclusively to their roles as consumers. Consumers are not locked-up in a self-referential system of consumer law; they still share together a common world of private law and contract law, and their rights and responsibilities qua wholly integrated persons cannot be outsourced.²⁵

For private law, the ever growing functional differentiation in advanced societies like ours, means that we observe and need the development of differentiated rules for many different types of contracts, for different types of parties, for different contracting techniques et cetera. However, at the same time we also keep needing more general rules, on different levels of generality for the aspects (sometimes very few) that remain similar in differentiated contracts. This double requirement of differentiation and generality fits remarkably well with the structure of modern civil codes, which are both fully integrated and internally differentiated according to types of contracts, types of parties etc. The civil code comprehensively covers the entire world of private law (i.e. all the aspects of our lives that may be affected by private law), which remains merely one sector of the broader world of law (to the remainder of which it is fully connected in multiple ways). It means to treat cases similarly to the extent that they are indeed similar and differently to the extent that they differ.

It is the task of private law theorists and practitioners constantly to rethink the more general rules of private law in terms of the social, economic and technical developments: can and should certain rules that were adopted for a specific situation in fact be generalised? Do certain rules that were adopted as general rules actually require one or more exceptions? This need for rethinking applies to all parts of private law, including its most general rules and principles. It should not be accepted—and certainly not as a matter of dogma or resignation—that the general rules and principles of private law will remain behind in the nineteenth Century (or will be sent back to it) while consumer law moves fast forward, further into the twenty-first Century. The social *acquis* of the twentieth Century cannot be reduced to a consumer *acquis*. Weaker party protection cannot be outsourced to consumer law; it is an integral part of private law and remains a concern for all situations where unequal bargaining and unbalanced contracts occur, including b2b. ‘Materialisation’ (*Materialisierung*)—the abandonment of strict formal notions of freedom and equality in private law relationships—has nothing specifically to do with con-

²⁴ For systems theory applied to law, see N Luhmann, *Das Recht der Gesellschaft* (Frankfurt, Suhrkamp, 1993); N Luhmann, ‘Law as social system’ (1988–1989) 83 *Northwestern University Law Review* 136.

²⁵ For the critique of systems theories of law, and for the concept of lifeworld, see J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Polity Press, 1996).

sumption and consumerism. The concept rather represents a generally applicable normative understanding of core values and principles of our legal order—whose influence extends well beyond private law as well-, in particular the principles of freedom and equality. Obviously, just like the formal private law of the nineteenth Century also the material private law of the twentieth Century should not be reified. This notion also needs constant and thorough rethinking and reconsideration in light of new social, economic and technological developments, not only on the national level but also on the European and international levels. So the real question is (and will always be): do we need a new architecture for private law? There is no natural end to reconsidering the normative structure of private law.

The differentiation of contracting situations, contractual relationships and contract disputes takes place (and should take place), to some extent, along a variety of different axes, from rich to poor, from powerful to powerless, from expert to ignorant, from repeat player to one-off, from long-term to spot contract, from rational to fool, from relational to discrete, from sales to service, from private to public, and indeed from commercial to consumer. Obviously, there is a limit to the degree of nuance that a legal system can manage. The matrix may risk becoming too refined. It would be too costly to consider all contract cases individually in accordance with each of the relevant continua and try to find the proper legal response. And even if it could be found by the legislator at reasonable cost, it is likely that the outcomes would not be sufficiently foreseeable for the parties to plan their future conduct with confidence. So, there need to be some cut-offs: we develop sets of rules for certain types of ‘nominate’ contracts and weaker party protection has to be categorical at least to some extent. However, there is no logical or normative reason, nor is it somehow required by the empirical practice on the ground, to treat any of these axes for functional differentiation as absolute, and to leap—in its regard—from differentiation to full segregation.²⁶

The challenge is to develop general principles of private law in terms of which we can consider the need for differentiations along different functional lines. Those principles, in order to be legitimate, will have to be developed in a fully inclusive democratic process. In this context, private law scholars and theorists, as specialists, have an opportunity (and maybe also a responsibility) to propose good reasons and convincing arguments, but no privileged normative authority.

2.9 Contractual Justice or Access Justice?

Thus, the question should not be what architecture is good for consumers. Consumers are not a section of society: we are all consumers. When the courts refuse to enforce a personal guaranty, they do so as a matter of constitutional protection

²⁶ Micklitz does propose to differentiate *within* consumer law, e.g. between responsible and vulnerable consumers. It is not clear why a broader spectrum of weaker party protection could not be considered.

of party autonomy (understood in a substantive sense) that any citizen should enjoy.²⁷ When we are protected against discrimination while contracting for goods and services (the horizontal effect of the non-discrimination principle), we are also addressed as citizens.²⁸ It is not clear why this should be any different when it comes to combating exploitative, abusive and unfair contracting practices. The state should never lend its support to such practices. That is why unfair terms and exploitative contracts should not be enforceable. It makes no difference whether we were consuming while being exploited or not. The state must show equal respect for the human dignity of all its citizens. Enforcing exploitative contracts is incompatible with that duty.

The principal aim should not be consumer protection, but contractual justice. A core aspect of contractual justice is the refusal by the state to enforce unfair terms and contracts resulting from unfair exploitation. Private law should refrain from enforcing exploitative terms and contracts as a matter of respect for the private autonomy, the equality, and the human dignity of all contracting parties in all types of contracts. What kind of architecture contractual justice exactly requires should be a matter of constant reconsideration and deliberation with a view to periodical reviews of private law. In this context, consumer protection may sometimes turn out to be the best way of achieving contractual justice. However, it is very doubtful that ‘recasting consumer law as special law’ would be the architectural choice most congenial to improving contractual justice.

Micklitz proposes to differentiate, within consumer law, between responsible consumers (a category which includes small businesses) and vulnerable consumers. The distinction is based on the idea that ‘different orders of values can be assigned to the members of the groups’.²⁹ According to Micklitz responsible consumers require ‘a legal model which does not primarily guarantee social justice through redistribution, but especially ensures access to the market, to enable him to benefit from the advantages of the plethora of products and services on offer in an expanded European or global environment’.³⁰ Micklitz calls this ‘access justice’ (*Zugangsgerechtigkeit*). He introduced this concept in an earlier paper to describe the EU model of justice.³¹ As a descriptive concept, the idea of access justice is very convincing: much of EU law seems indeed to be concerned with access rights and antidiscrimination, the two elements which Micklitz indicates as constitutive of access justice. However, in his report Micklitz goes one step further and claims that responsible consumers should not receive more than access justice. This raises the question whether it is really enough for responsible consumers that they have access to the market and are able to choose from a broad variety of products and

²⁷ BVerfG, 19/10/1993, 89 *Entscheidungen des Bundesverfassungsgerichts* 214 (*Bürgerschaft case*).

²⁸ Dir 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

²⁹ Micklitz, ‘Do Consumers and Businesses Need a New Architecture of Consumer Law?’, 363 f.

³⁰ *Ibid.*

³¹ H-W Micklitz, ‘Social Justice and Access Justice in Private Law’ (2011) *EUI Working Papers LAW* No. 2011/02.

services. What if that market is in fact a jungle, without any guarantees of at least minimal contractual justice, e.g. protection against unfair exploitation? If someone who concluded a very unbalanced contract will be defined ipso facto as a vulnerable consumer then, of course, there is no reason to worry. Otherwise, the limitation to mere access justice may well lead, in effect, to contractual injustice in certain cases. Therefore, much will depend on how exactly responsible consumers will be defined (ex ante or ex post, categorically or contextually).

As it often happens in friendships, Hans and I seem to be constantly divided, in our discussions, by strongly felt common ideals, in our case social justice and Europe. It has always been a pleasure to discuss these with Hans, at the very stimulating workshops organised by him at the EUI in Florence, at our research centre in Amsterdam where Hans has been a frequent and most welcome guest, and in many other places in Europe. Hopefully, there are still many more such occasions to come.

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