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EUROPEAN CONSUMER IN SALES CONTRACT – THE ANCIENT APPROACH, *DE LEGE LATA & DE LEGE FERENDA**

Consumers, by definition, includes us all.
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ABSTRACT

This paper delves into the historical roots of consumer protection in European legal history, looking beyond its contemporary association with EU regulations from the mid-70s. It explores buyer-seller dynamics, prevalent in both ancient and post-industrial societies, with a particular focus on ancient Rome. Specifically, it studies the need to shield buyers, as the vulnerable party, in sales contracts with professional sellers. It also examines who qualified as a consumer in ancient European legal history and compares it to the contemporary definition in European private law.

The first section explores the position of the consumer in ancient Roman society, analyzing legal and non-legal sources to uncover measures aimed at enhancing consumer rights against professional sellers. The role of the curule aediles, particularly their legal innovations in buyer protection, is scrutinized. The paper then transitions to EU law, specifically examining the definition of consumers in Directive 1999/44/EC and the subsequent changes introduced in Directive (EU) 2019/771.

The paper concludes with a proposal for a unified definition of consumers at the EU level, drawing insights from the ancient Roman society. It questions the feasibility of crafting a comprehensive consumer definition applicable across directives to foster consistency in consumer protection laws. In essence, the paper explores the historical inception of consumer protection, its current status in contemporary law, and suggests a forward-looking proposition for the future.

Keywords*: consumer, defect, European private law, Roman law, sales contract*

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1. INTRODUCTION

Consumer protection is hardly a contemporary concept in European legal history. While it has been a focal point of European Union (EU) consumer protection regulations since the mid-70s, its roots reach far back into European legal order, including in ancient Roman law. Across both ancient and contemporary societies, there was and is a consistent need to shield individuals, often the weaker party, from unfair practices of professional sellers. Yet, the definition of the consumer remains a subject of interpretation, both historically and today.

To truly grasp the fundamentals of consumer protection, it is crucial to delve into its historical and present-day understanding. Given the vastness of consumer protection law (encompassing the consumer's right to be informed, protection of health, and procedural right), this research zooms in on consumer protection within the realm of sales contracts, given their prevalence.

This paper unfolds in three main parts. Firstly, it traces the concept of consumerism back to ancient Roman law, examining the legal safeguards that were established for added consumer protection in sales contracts. Next, fast-forwarding to EU law, it provides a brief overview of consumer policies from the inception of the European Union to contemporary legal frameworks. This part segues into an analysis of the definition of the consumer in Directive 1999/44/EC, and the amendments introduced with Directive 2019/771, shedding light on the evolution (and similarities) of consumer definitions (in terms of sales contracts) across ancient and modern European legal history.

Furthermore, to streamline future directives within EU law and ensure consistency, the paper explores the potential for a unified definition of the consumer. In doing so, it navigates through the origins, evolution, and current status of the legal concept of consumers, while contemplating future solutions.

2. THE CONSUMER IN ANCIENT ROMAN LAW

2.1. Consumerism in Ancient Rome and Emperors' Approach to Consumer Protection

Sociologist Max Weber viewed ancient Rome as a consumer city – a notion later debated, affirmed, contested, and expanded by various scholars.[1] Under this socio-

[1] Weber, M., *The City*, translated and edited by Martindale, D.; Newuwirth, G., The Free Press, New York, 1958, p. 69, 208. For instance, see: Parkins H., *The 'consumer city' domesticated? The Roman city in élite economic strategies,* in Parkins, H. (ed.), *Roman Urbanism, Beyond the Consumer City*, Routledge, London, 1997., p. 105; Morley, N., *Cities in context: urban systems in Roman Italy*, in Parkins, H. (ed.),

historical and socio-economic model, Rome was the government and military hub, providing services to its inhabitants in exchange for taxes, land rent and other non-market transactions. Historian Finley expanded on this concept, suggesting Rome was both a consumer and a parasite city, exploiting rural residents – an idea that stirred academic discourse.[2]

Whether Rome was primarily a consumer or a parasite city remains a matter of debate, especially during the Republic and early Empire era (200 BC to 300 AD). However, if we consider Rome a consumer city, it is fitting to label its inhabitants as consumers, given that the English verb 'to consume' derives from the Latin *consumere*, meaning to use up, devour, or spend.[3]

Various sources suggest that ancient Roman society, particularly in the early Empire era, was one of consumption and pleasure, evident in various aspects of daily life.[4] Traces of consumerism beyond basic needs, particularly of luxury items such as ivory from Africa and silk from China, are well-documented.[5] This indicates that certain aspects of consumerism existed in the early Empire era, coinciding with territorial expansion and economic development, which, in turn, provided relative security to many inhabitants.[6]

However, applying the contemporary term 'consumer' to ancient Rome requires caution to avoid projecting modern perceptions onto ancient society. If regarding the consumer as one who gathers basic commodities for one's own use, then one of the earliest comprehensive measures aimed at their protection can be traced to the *Lex Iulia de Annona*. The legislation was enacted by Emperor Augustus in 18

Roman Urbanism, Beyond the Consumer City, Routledge, London, 1997, p. 41; Erdkamp, P. M., *Beyond the Limits of the 'Consumer City. A Model of the Urban and Rural Economy in the Roman World*, Historia: Zeitschrift für Alte Geschichte, Vol. 50, No. 3, 2001, pp. 332-356.

2 Finley, M. I., *The Ancient Economy*, University of California Press, Berkeley, 1973, p. 125. *Cf.* Ellickson, R.C., *Ancient Rome: Legal Foundations of the Growth of an Indispensable City,* in Dari-Mattiacci, G.; Kehoe, D.P., (eds.), Roman Law and Economics Volume 2 Exchange, Ownership, and Disputes, Oxford University Press, Oxford, 2020, p. 169.

3 Lewis, C. T.; Short, C., *A Latin Dictionary,* Clarendon Press, Oxford, 1879. Available at: [https://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.04.0059:entry=consumo&highlight=consumo], Accessed 03 January 2024.

4 *Cf.* Rodgers, D.K., *Taking the Plunge: A Twenty-First-Century Look at Roman Bathing Culture*, in: Gretzke, A.E.; Brice, L. L.; Trundle, M. (eds.), *People and Institutions in the Roman Empire*, Brill, Leiden, 2020, p. 147.

5 Zimmermann, R., *The Law of Obligations, Roman Foundations of the Civilian Tradition*, 1996, Oxford Univeristry Press, Oxford, 1996, p. 406.

6 Green, K., *Learning to consume: consumption and consumerism in the Roman Empire*, Journal of Roman Archaeology, Vol. 21, 2008, p. 67.

BC when he assumed control over the public supply of grain and wheat in Rome.[7] With a population of approximately one million inhabitants, including slaves, Rome required a significant amount of food to sustain itself.[8] Although the original text of Augustus' legislation lacks in preserved original text, fragments from Roman jurists like Marcian, Ulpian, and Papirius Justus confirm its existence and content.[9]

According to Marcian, slaves could bring criminal charges against their masters for defrauding the public grain supply.[10] Ulpian's writings in his ninth book on consular duties detailed penalties under the *Lex Iulia de Annona* for prejudicial actions harming grain supply, such as price manipulation (through forms of proto-cartels) or obstruction of transport (holding back ships). These penalties included fines of 20 aurei.[11] Additional insight into the grain supply issues is offered in the preceding book. There, Ulpian referred[12] to those profiting from raising the prices of *annona* as *dardanarii,* noting that they were subject to various punishments such as trade prohibition, deportation, or even community service.[13] A few centuries later, Justinian's *Institutiones* (I.,4,18,11) confirmed the *Lex Iulia de Annona* measures against price manipulation, with penalties less severe than death.

While the said measures targeted fraudulent sellers and their immoral practices aiming to boost profits, it is doubtful whether the population receiving free grain qualifies as consumer-buyers. After all, they did not purchase these products from

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7 *Cura annona* was Rome's grain import and the distribution system, akin to a government program providing free grain to its citizens. Initially *ad hoc*, it evolved into a permanent institution associated with the Roman state, doubling as an important political instrument. Emperor Augustus is credited for creating the permanent post of *praefectus annonae*, magistrates tasked with overseeing the city's grain supply. Emperor Tiberius later acknowledged this duty as personal and imperial. See more in: Rickman, G. E., *The Grain Trade under the Roman Empire,* Memoirs of the American Academy in Rome, *vol.* 36, 1980, p. 263.; Casson, L., *The Role of the State in Rome's Grain Trade,* Memoirs of the American Academy in Rome, *vol.* 36, 1980, p. 21-33.; Erdkamp, P. *The Food Supply of The Capital,* in: Erdkamp, P. (ed.), *The Cambridge Companion to Ancient Rome,* Cambridge University Press, New York, 2013, pp. 262-264.

8 Garnsey, P.; Saller, R., *The Roman Empire, Economy, Society and Culture*, Bloomsbury, London, 2014, p. 109, 121 *et seq.* Crisofori notes that, before Augustus implemented his measures, there were over 320,000 beneficiaries of free grains in 46 BC. Cristofori, A., *The grain distribution in the Late Republican Rome,* in: Jensen, H. (ed.), *The Welfare State. Past, Present and Future*, Edizioni Plus, Pisa, 2002, pp. 150-151.

9 Title of D. 48.12, *De lege Iulia de annona* (Lex Iulia on grain supply).

10 D. 48,12,1 Marc. 2 Inst.

11 D. 48,12,2 Ulp. 9 Off. Pro. See more in: Hamza, G., *Wirtschaft und Recht im Römischen Recht, eine Skizze zum römischen Kartellrecht,* Annales Universitatis Scientiarum Budapestinensis de Rolando, Vol. 23, 1981, pp. 91-92.

12 D. 47,11,6pr. Ulp. 8. Off. Pro.

13 The name of the delict itself was *dardanariatus. Cf.* Cowen, D.V., *A survey of the law relating to the control of monopoly in South Africa,* South African Journal of Economics, *vol.* 18, no. 2, 1950, p. 126; Hamza, *ibid.*, p. 93. Bekker, E.E., *Monopolies and the role of the competition board,* Journal of South African Lax, No. 4, 1992, p. 619.

professional sellers but received them either for free or at preferential prices. Nevertheless, without a doubt, these measures can be viewed as a form of proto-consumer protection legislation.

A similar perspective on consumers could be viewing them as amateur buyers entering mandatory sales contracts with professional sellers to buy essential goods like food and basic provisions. The professional sellers' advantage then stems from their business and negotiation experience honed through the sheer number of sale contracts.

In this context, one explicit legal text with the provision aiming to protect consumers in the Roman Empire was the *Lex Flavia Irnitana*,[14] a municipal law issued by Emperor Domitian in 91 AD for communities in Spain. This law, stemming from an earlier grant of *ius Latii* by Emperor Vespasian, prohibited speculative practices, hoarding, and cartel arrangements aimed at price manipulation, clearly with a view to safeguarding the interests of consumer-buyers by preventing price distortions and ensuring fair market distribution.[15]

Although the impact of this provision is uncertain, particularly due to its brevity and ambiguity, it indubitably applied to all goods (as visible from the Latin word *quit*),[16] not just essentials like food, indicating a broader intent to prevent excessive pricing. Given its provincial origin, similar administrative measures likely existed in Rome, possibly much earlier.

A harsh yet unsuccessful attempt at price control was made by Emperor Diocletian in 301 AD. With the Roman Empire facing economic and military challenges, trade reverted to barter, leading to rampant inflation and economic crisis. Diocletian responded by issuing the *Edictum de pretiis rerum venalium*.[17] While the original text of the edict was not preserved, plentiful epigraphic evidence shows that

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14 Lex Flavia Irnitana 75: *Ne quis in eo municipio quid coemito supprimito neve coito convenito, societatemue facito, quo quit carius veneat, quove / quit ne veneat setiusue veneat.* Full translation available in González, J.; Crawford, M., *The Lex Irnitana: A New Copy of the Flavian Municipal Law*, The Journal of Roman Studies, Vol. 76, 1986, p. 193.

15 Casico, E. L., *Setting the Rules of the Game*, in: Dari-Mattiacci, G.; Kehoe, D.P., (eds.), Roman Law and Economics Volume 2 Exchange, Ownership, and Disputes, Oxford University Press, Oxford, 2020, p. 117.

16 Galsterer, H., *Municipium Flavium Iridium: A Latin Town in Spain,* The Journal of Roman Studies, Vol. 78, 1988, p. 85.

17 Zimmermann, R., *op. cit.,* note 5, p. 260; Temin, P., *The Roman Market Economy,* Princeton University Press, Princeton, 2013, p. 77; Alonso, J.J.; Babusiaux, U., *Papyrologische und epigraphische Quellen,* in: Babusiaux, U. *et al.* (eds.), *Handuch des Römischen Privatrechts,* Band I, Mohr Siebeck, Tübingen, 2023, p. 294. Full text and translation (in German) in: Lauffer, S., *Diokeltians Preisedikt*, de Gruyter, Berlin, 1971, p. 90 *et seq.*

it imposed maximum prices for over 900 goods and services (products, materials, slaves, animals, labor etc.), excluding certain (major) commodities like iron, copper and bronze.[18] Despite severe penalties for non-compliance, including death, the edict's effectiveness in protecting consumers was undeniably minimal. After Diocletian's death, it became obsolete, highlighting the impracticality of such measures. While most goods and services subject to fixed prices were those purchased by the army,[19] the edict reflects Diocletian's aim to curb market profiteering by those controlling prices, indirectly contributing to consumer protection. Nonetheless, history has repeatedly demonstrated the ineffectiveness of such measures.

2.2. The *Curule Aediles* impact

The origins of institutional consumer-buyer protection can be traced back to the Western Roman Empire, particularly in the Rome predating the above described emperors' measures. If considering a typical Roman consumer as a buyer, not necessarily of groceries, then the crucial role in protecting their legal position was introduced rather early by magistrates known as *aediles curules.* In most of early Roman history, *aediles* were semi-police magistrates responsible for preventing forgery of legislative *senatus consulta*, which they safeguarded in the Temple of Ceres.[20,21] However, their role expanded as early as 367 BC, when they gained additional competences and the name *curules*.[22] Among their vital duties was supervising and controlling the slave and livestock market, with the authority to adjudicate disputes between sellers and buyers, giving them both a policing and judicial role, as evidenced by their power of *iurisdictio* and *ius edicendi*.

Similar to *praetor*, the key Roman magistrate, *aediles* also issued an edict specifying cases in which they would enable litigation.[23] Under the edict, sellers in the market were obligated to inform buyers about certain unwanted features and defects in slaves they were selling (illness, physical handicaps), or behavioral issues (prone-

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18 Michell, H., *The Edict of Diocletian: A Study of Price Fixing in the Roman Empire*, The Canadian Journal of Economics and Political Science, Vol. 13, No. 1, 1947, p. 2, 6.

19 *Ibid.*

20 Ceres was a goddess of agriculture, grain crops, fertility and motherly relationships.

21 According to Pomponius and Varro, their name derived from their temple (*aedes*) overseeing duties. Pomp. D. 1,2,2,21; Varro, De lingua latina libri XXV, V, 81. *Cf.* Jakab, E. *Praedicere und cavere beim Marktkauf*, Beck, Münich, 1997, p. 98.

22 The term *curules* also refers to the right to use the *curule* seat, which symbolizes power. See more in: Herbert Felix Jolowicz, H. F.; Nicholas, B., *A Historical Introduction to the Study of Roman Law*, Cambridge University Press, Cambridge, 1972, pp. 49-50; Lintott, A., *The Constitution of the Roman Republic*, Oxford University Press, Oxford, reprint 2009, pp. 129-130.

23 Only partial quotes of the edict remain in Justinian's Digest. The most influential source containing a direct quote of *aediles*' edict is D. 21,1,1,1, Ulp. 1 ed. aed. cur.

ness to escape or attempt suicide), or noxal liability. Some cases were borderline and might seem trivial from a contemporary perspective, such as disputes among jurists regarding whether a missing tooth constituted a hidden defect.[24]

If sellers failed to disclose defects specified in the *aediles*' edict and the bought slave displayed them, sellers were liable regardless of their knowledge. Buyers had two options: rescind the contract and return the slave for a refund (later known as *actio redhibitoria*) or keep the slave but seek price reduction on account of the defect's impact of value (*actio quanti minoris*).[25] Additionally, *aediles* required sellers to provide buyers with a contractual warranty in oral form (*stipulatio duplae*) promising the absence of defects in slaves or livestock,[26] offering buyers assurance against deception (with the seller promising to refund "double the price" if the buyer was deceived).

The emergence of *aediles*' legal practice stemmed from issues of information asymmetry, where buyers were unaware of potential defects or mislead about the goods they were purchasing.[27] Many sellers exaggerated or lied during pre-contractual negotiations, which was permissible to a certain extent. For instance, classical jurist Florentin noted that visible defects exempted sellers from liability, as the buyers had the chance to observe them.[28] Nevertheless, the fine line between permissible embellishment and impermissible deception varied case by case and was open to interpretation.

As Frier and Kehoe highlight, large commercial transactions, particularly those involving complex goods like slaves, attracted swarms of less scrupulous traders,

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24 D. 21,1,11 Paul 11 ad Sab. or Gellius, Noctes Atticae 4,2,12.

25 Buyers could rescind the sales contract within six months of its conclusion, and could request a price reduction within a year. See more in detail in: Arangio-Ruiz, V., *La compravendita in diritto romano,* Jovene, Naples, 1954, pp. 361-393; Kaser, M., *Das Römisches Privatrecht*, Erster Abschnit, Beck, Münich, 1971, p. 559; Zimmermann, R., *op. cit.,* note 5, pp. 315-316; Ernst, W., *Klagen aus Kauf,* in: Babusiaux, U. *et al.* (eds.), *Handuch des Römischen Privatrechts,* Band II, Mohr Siebeck, Tübingen, 2023, p. 2231 *et seq.*

26 D. 21,2,37,1 Ulp. 32 ed. or D. 21,2,31 Ulp. 42 Sab. The seller's liability could also be reduced to *stipulation simplae.* See more in: Platschek, J., *Strict Liability for Defects as to Quality of an Object Sold*, in: Babusiaux, U.; Igimi, M., (eds.), *Messages from Antiquity, Roman Law and Current Legal Debates*, Böhlau, Köln, 2019, pp. 18-19, 31.

27 Wyrwinska, K., *New Institutional Economics in Research on Roman Law*, in: Benincasa, Z.; Urbanik, J., (eds.), *Mater Familias, Scritti Romanistici per Maria Zabłocka*, The Jorunal of Juristic Papyrology, Varsaw, 2016, pp. 1194-1195.

28 D. 18,1,43pr. Flor. 8 inst. *Cf.* Nicholas, B., *Dicta Promissave*, in Daube, D. (ed.), *Studies in the Roman Law of Sale,* Clarendon Press, Oxford, 1959, p. 98-99; Donadio, N., *La tutela del comparatore tra actiones aedilicae e actio empty*, Giuffre editore, 2004, p. 177-179; Sukačić, M., *Some remarks on slave sellers' liability under Roman Law,* Pravni vjesnik, Vol. 38, No. 1, 2022, p. 52, 60.

creating what they termed a "lemon market." In such markets, prices were driven down due to an influx of low-quality slaves, and buyers insisted on hefty discounts. Consequently, sellers offering defect-free slaves were deterred from entering the market, fearing they would not receive fair value.[29] Thus, relying solely on freedom of contract and the unofficial paradigm of *caveat emptor*[30] was insufficient. A degree of institutional intervention was necessary to protect inexperienced buyers, restore market equilibrium and encourage honest sellers to participate. This illustrates that the proto-consumer was not merely someone buying groceries but rather a disadvantaged buyer forced to engage with professionals in a market where rule-breaking was common. When the imbalance heavily favored sellers, the entire market suffered, prompting the need for institutional action.

Over time, extending from the era of Emperor Diocletian (284-305 AD) to the reign of Emperor Justinian in the sixth century, the scope of rules governing contract rescission or price reduction began to encompass all goods traded, not just slaves and livestock. This evolution culminated in the Byzantine Empire, when Emperor Justinian compiled the Digest, incorporating classical jurists' quotes. These sources explicitly state that the rules set by the *curule aediles* apply to all goods in legal transactions, including immovables.[31] Given that other sources primarily addressed slaves and livestock, the inclusion of 'all goods' in the Digest likely reflects interpolations made by the Digest's compilers. The broadening of consumer protection measures was likely prompted by the effectiveness of the *aedile* rules in dealing with issues concerning slaves and livestock, prompting their application to other goods as well. This likely occurred well before the Digest was compiled.[32]

Hence, the ancient Roman legal system did provide some form of institutional proto-consumer-buyer protection, albeit with notable limitations. Initially, this

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29 Frier, B. W.; Kehoe, D., *Law and Economic Institutions*, in Scheidel, W.; Morris I.; and Saller, R., (eds.), *The Cambridge Economic History of the Greco-Roman World*, Cambridge University Press, Cambridge, 2007, pp. 119-120.

30 The paradigm essentially means "let the buyer beware," suggesting that buyers should exercise extreme caution when inspecting goods they intend to purchase. While the term originates from seventeenth-century common law (not from Roman law sources) and is in Latin, it applies, to some extent, to Roman law on sales. *Cf.* Rabel, E., *Nature of Warranty of Quality*, Tulane Law Review, Vol. 24, No. 3, 1950, pp. 274–276; Zimmerman, T. *op. cit.,* note 5, pp. 306–308; Ernst, W. *op. cit.,* note 25, pp. 2208-2209.

31 D. 21,1,1pr. Ulp. 1 ed. aed. cur.

32 *Cf.* Lanza, C., *D. 21.1. "res se moventes" e "morbus vitumve"*, Studia et documenta historiae et iuris, *vol.* 70, 2004, p. 120; Donadio, *op. cit.* (n. 28), p. 241; Sukačić, M., *Primjena pravila edikta kurulskih edila na nekretnine* (rerum esse tam earum quae soli sint quam earum quae mobiles aut se moventes*)* [*The Application of the Curule Aediles Rules on Immovables (*rerum esse tam earum quae soli sint quam earum quae mobiles aut se moventes*)*], Zbornik Pravnog fakulteta u Zagrebu, Vol. 72, No. 6, 2022, pp. 1459-1460.

protection was contingent on the type of goods sold (*ratione materiae*) and the location of the transaction, i.e., contract conclusion (*ratione loci*). Although the surviving sources do not explicitly state that these rules were primarily intended to regulate transactions involving professional sellers, it is inferred from their (and the *aediles*') intent, mainly targeting such sellers. Therefore, the extent of protection was also contingent on the parties involved (*ratione personae*). As these rules specifically pertained to livestock and slaves traded in markets, the explicit definition of the consumer itself is not mentioned in sources. However, by way of deduction from the above, one could propose defining a consumer-buyer in classical Roman law as an amateur buyer entering into a mandatory sales contract for slaves or livestock at a market, where the seller is a professional in that trade.

3. EVOLUTION OF CONSUMER AGENDA IN EU LEGISLATION

3.1. First Steps in EU Policies

Moving from ancient times to the post-modern era, the need for consumer protection remains unchanged. As if no time had passed, consumers are still in need of legal and administrative protection. Even at the outset of the European Community, policies were not aimed at consumers or their protection whatsoever. The Treaty of Rome,[33] the Community's founding document, provided no consumer-related competences to the Community. References to consumers were sparse, primarily confined to agricultural policies (Articles 39 and 40) and competition policies (Articles 85 and 86).[34] However, Article 117, addressing social provisions, provided a window. It empowered the Community to enhance living standards and working conditions, paving the way for consumer protection to be recognized as a social policy, specifically, at the Paris Summit of October 1972. Despite this, consumers were profoundly affected by the inception of the Common Market, particularly in regard to agriculture and competition.[35]

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33 Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957.

34 Article 39 emphasizes ensuring that "supplies reach consumers at reasonable prices," while Article 40 prohibits "discrimination between producers or consumers within the Community" under the common organization. Article 85 prohibits agreements between undertakings that impede the common market, except when they contribute "to improving the production or distribution of goods or to promoting technical or economic progress," while ensuring consumers benefit fairly. Lastly, Article 86 addresses the abuse of dominant position, citing examples such as limiting production, markets or technical development to the detriment of consumers.

35 Leucht, B.; Meyer, J. H., *A citizens' Europe? Consumer and environmental policies*, in: Leucht, B.; Siedel K.;Warlouzet, L. (eds.), *Reinventing Europe, The History of the European Union, 1945 to Present,* Bloomsbury Academic, London, 2023, pp. 204, 212-213.

Other important aspects of consumer protection in the early days of the European Union include consumer interest groups, such as the *Bureau européen des unions de consommateurs*,[36] advocating for consumer protection within the new Common Market. They underscored concerns about how open borders, protectionism, and other Member State interventions (as aimed at protection of social values and goods) might affect consumers and disrupt the free flow of goods envisioned for the Common Market.[37] These groups argued that while consumers could benefit from European market integration, they also risked losing out. As a response, the Council of the EEC adopted a preliminary program for consumer protection and information policy in 1975.[38]

> The program introduced five fundamental rights for consumers:
> (a) the right to protection of health and safety,
> (b) the right to protection of economic interests,
> (c) the right of redress,
> (d) the right to information and education,
> (e) the right of representation (the right to be heard).[39]

While the wording of these five rights may seem original, it was actually adapted from US President John Kennedy's 1962 special message to Congress on consumer interest protection, with minor modifications.[40] Following the adoption of the program, the Commission embarked on aligning the varying legislation on consumer protection across Member States.[41] However, progress was slow. For instance, the Commission's proposal Directive concerning liability for the defective products of 1976 was not adopted by the Council until 1985,[42] a nine-year gap. Subsequent to the initial program, second and third preliminary programs

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36 See more in: Docter, K., *The Early Years of the European Consumer Organization BEUC, 1962-1985,* in: Micklitz, H. W. (ed.), *The Making of the Consumer Law and Policy in Europe,* Hart, Oxford, 2021, p. 32.

37 *Ibid.,* 214. *Cf.* Bourgoignie, T.; Trubek, D., *Consumer Law, Common Markets and Federalism in Europe and the United States vol.* 3 in: Cappelletti, M.; Secommbe, M.; Weiler, J. (eds.), *Integration Through Law, Europe and the American Federal Experience*, de Gruyter, 1986, p. VI.

38 Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy. OJ C 92, 25 Apr 1975.

39 Preliminary programme of the European Economic Community for a consumer protection and information policy OJ C 92, 25 Apr 1975.

40 Kennedy, J.F, *Special message to Congress on protecting consumer interest*, 15 March 1962, available at: [https://www.jfklibrary.org/asset-viewer/archives/jfkpof-037-028#?image_identifier=JFKPOF-037-028-p0001], Accessed 3 January 2024.

41 Leucht, B.; Mayer, J. H., *op. cit.,* note. 35, p. 215.

42 Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210, 7 Aug 1985.

for consumer protection and information policy were introduced in 1981,[43] and 1986,[44] respectively, highlighting the molasses-like impact of the so-called soft law.[45]

The landscape changed significantly with the landmark Cassis de Dijon case,[46] where the Court of Justice of the EU (CJEU) introduced the doctrine of mutual recognition. This gave the Commission a more efficient tool for developing a new approach to the creation of the Common Market.[47] The recognition of consumer protection as an autonomous policy goal in the internal market was introduced in 1987 with Article 100a of the Single European Act.[48] Regrettably, this legislation did not grant the Community competences for secondary legislation. Another recognition and direct mention of the 1975 preliminary program by the CJEU came with the GB-INNO case in 1990,[49] confirming the program's influence and importance. In other words, case law aimed at the completion of the Common Market ultimately significantly influenced consumer protection. The 1993 Maastricht Treaty marked another significant step, explicitly addressing Consumer Protection in Title XI, Article 29a:

"The Community shall contribute to the attainment of a high level of consumer protection through: (a) measures adopted pursuant to Article 100a in the context of the completion of the internal market; (b) specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers."[50]

The Maastricht Treaty marked a shift from non-binding soft law to granting legislative competences to the Community. In doing so, it officially broadened the EU's competences in the field of consumer protection. However, its powers were limited with the subsidiarity principle, allowing the EU to act only where the ob-

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43 Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy, OJ C 133, 03 June 1981.

44 Council Resolution of 23 June 1986 concerning the future orientation of the policy of the European Economic Community for the protection and promotion of consumer interests OJ C 167, 5 July 1986.

45 Benöhr, I., *EU Consumer law and Human rights,* University Press, Oxford, 2013, p. 19.

46 Case 120/78 Rewe Zentrale v. Bundesmonopolverwaltung für Branntwein [1979] ECR 649

47 Leucht, B.; Mayer, J. H., *op. cit.,* note 35, p. 215. *Cf.* Weatherill, S., *EU Consumer Law and Policy,* Elgar Publishing, shining, 2005, pp. 46-47.

48 Single European Act OJ L 169, 29 June 1987.

49 Case C-362/88 GB–INNO–BM v. Confédération du Commerce Luxembourgeois (CCL) [1990] ECR I-667.

50 Treaty on the European Union (Maastricht Treaty), OJ C 191, 29 July 1992.

jectives of a given action cannot be sufficiently achieved by the Member States.[51] This Maastricht Treaty novelty substantially limited the possible actions of the Community. As a result, consumer protection largely relied on existing tools: one being the enforcing of competition rules and ensuring of free movement, and, the other, harmonizing of (mostly private) law.[52] This trend continued with the Amsterdam Treaty[53] and its Article 153(1), which mandated the Community to ensure a high level of consumer protection, and expanded consumer rights to include information, education, and organization.

After 2000, three significant changes unfolded in consumer policy. Firstly, the principle of full harmonization was introduced with the Consumer Policy Strategy 2002–2006.[54] This aimed to progressively adapt existing consumer directives from minimum to full harmonization measures. While full harmonization fosters economic integration and encourages cross-border consumer trade, thus promoting competition and potentially reducing prices, it could also dilute consumer protection in certain states (specifically, the states that had granted the consumer broader rights, under the minimum harmonization approach).[55]

Secondly, the Charter of Fundamental Rights,[56] signed in 2000 and enforced in 2009, and, specifically, its Article 38 addressing solidarity, mandated all EU policies to ensure a high level of consumer protection. The extent of its application, however, remains debatable.

Thirdly, the Lisbon Treaty, which came into force in 2009,[57] did not introduce substantial changes in consumer protection. However, it relocated the former Article 153(2) of the Amsterdam Treaty, which dealt with consumer affairs, to Article 12 of the Treaty on the Functioning of the European Union, indicating the growing importance of the topic. Additionally, the Treaty on European Union, in Article 6, recognizes the rights, freedoms and principles outlined in the Charter of Fundamental Rights, stipulating that they hold the same legal value as the Treaties. In essence, this places a high level of consumer protection on par with the Treaties, underscoring the acknowledgment of its significance.

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51 Weatherill, S., *op. cit.,* note 47, p. 19.

52 Leucht, B.; Mayer, J. H., *op. cit.,* note 35, p. 216.

53 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts OJ C 340, 10 Nov 1997.

54 Communication from the Commission of 7 May 2002— 'Consumer Policy Strategy 2000–2006', COM (2002) 208 final—OJ 2002 C137/2.

55 Benöhr, I., *op. cit.,* note 45, p. 33.

56 Charter of Fundamental Right of the European Union, OJ C 326, 26 Oct 2012.

57 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 83, 30 March 2010.

3.2. Sale Contract Solutions

Having reviewed the evolution of consumer protection agenda and policies, the paper zooms in on consumer protection in the domain of sales contacts. Navigating the diverse landscape of consumer protection across the 27 EU Member States poses a challenge due to significant variations in sales rules and respective consumer concepts. Unlike a uniform consumer society, the EU comprises numerous (mini) consumer societies. (This also holds true for the legal cultures of Member States.) Consequently, defining the consumer becomes complex, mainly due to differing approaches to EU private law (at the EU and national levels). Additionally, the approach to national legislation development is also contingent on the national legal culture.[58] This diversity makes crafting a universal definition applicable across all Member States exceedingly difficult, if not virtually impossible.

Prior relevant directives aside, the Commission's 1993 Green Paper, concerning guarantees and after-sales services, marked a significant milestone in the realm of sales contracts. This document reviewed guarantee laws across the then 12 Member States, addressing disparities and proposing solutions.[59] Of particular relevance is Chapter 2.2, titled 'Harmonisation focusing on consumer protection.' It suggests a definition of the consumer akin to that in the preceding consumer protection directive (Unfair Terms Directive) as "any natural person who […] is acting for purposes which are outside his trade, business or profession."[60] While dubbed a consumer wish list of guarantees protection,[61] the Green Paper's influence cannot be overstated. It influenced the creation of the Consumer Sales Directive (CSD 1999),[62] a cornerstone legislation in EU consumer protection.

The CSD 1999 exemplifies the minimum harmonization approach, setting a baseline for consumer protection across EU Member States.[63] Despite its value, issues inherent to minimum harmonization persist. The preamble underscores the

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58 Beale, H., *et al., Cases, Materials and Text on Contract Law,* third edition, Hart, Oxford, 2019, p. 175. *Cf.* Scarpellini, E., *Consumer societies in Europe after 1945,* in: Hesee, J.O. *et al.* (eds.), *Perspectives on Euroepan Economic and Social History,* Nomos, Baden, 2014, p. 174.

59 Green Paper concerning guarantees and after-sales services, COM/93/509 final, p. 83.

60 Article 2(b) of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21 Apr 1993.

61 Zollers, F. E.; Hurd, S. H.; Shears, P., *Consumer Protection in the European Union: An Analysis of the Directive on the Sale of Consumer Goods and Associated Guarantees*, University of Pennsylvania Journal of International Law, Vol. 20, No. 1, 1999, p. 105.

62 Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7 July 1999.

63 Howells, G.; Đurović, M., *The Rise of EU Consumer Law between Common Law and Civil Law Legal Traditions*, in: Elizade, de, F. (ed.), *Uniform Rules for the European Contract Law? A Critical Assessment,* Hart, Oxford, 2018, p. 118.

fundamental role that consumers play in the completion of the internal market, emphasizing the need to safeguard their economic interests. Echoing sentiments from the 1975 preliminary program, economic protection stands as a fundamental consumer right. The Directive's first chapter offers definitions, characterizing the consumer as "any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession" – a definition consistent with the Green Paper and the Unfair Terms Directive. Notably, the definition of the consumer is slightly narrower than those of other directives.[64] For instance, the Consumer Rights Directive[65] broadens the scope of the definition to include "any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession." Even though the two may appear identical, 'purposes that are not related to the trade, business or profession' is more restrictive then 'purposes that are outside of the trade, business, craft or profession.' This subtle difference suggests that if a buyer's purpose for purchasing goods is linked to their professional activity, they may not qualify as a consumer under the CSD 1999.

In the Faber case, the CJEU ruled that national courts of Member States hold the authority to determine whether a buyer qualifies as a consumer on a case-by-case basis.[66] This means that Member States have the autonomy to interpret the definition as their own discretion, potentially adding to the legal ambiguity. Some Member States have opted for a broader interpretation, encompassing small businesses and other legal persons.[67] While extending protection to such entities is understandable, especially when purchasing goods unrelated to their business, it seriously undermines the uniformity of the definition and may introduce ambiguity in its application.

The CSD 1999 defines the consumer as a natural person, a concept generally clear in both practice and academic discourse. However, the condition that the purpose of the purchase should not be related to trade, business or profession can lead to complexities, as illustrated by a German case.[68] Here, a buyer purchased goods

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64 Howells, G.; Twigg-Flesner, C.; Wilhelmsson, T., *Rethinking EU Consumer Law,* Routledge, Milton Park, 2018, p. 173.

65 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22 November 2011.

66 Case C-497/13 [2015] Froukje Faber v Autobedrijf Hazet Ochten BV. ECLI:EU:C:2015:357.

67 Canavan, R., *Contracts of Sale,* in: Twig-Flessner, C. (ed.), *Research Handbook on EU Consumer and Contract Law,* Elgar, Cheltenham, 2016, p. 270.

68 BGH 30 Sep 2009 VIII ZR 7/09. *Cf.* Suzuki-Klasen, A.K., *A Comparative Study of the Formation of Contracts in Japanese, English, and German Law*, Nomos, 2020, p. 214.

for personal use but requested delivery to their workplace. The German national court ruled the buyer as a consumer, emphasizing that delivery to the workplace did not negate their consumer status. Similarly, the Hungarian Supreme court determined that even suppliers (businesses) can, in certain circumstances, classify as consumers, granting them legal protection.[69] Lastly, the Dutch Court of Appeal extended consumer status to natural persons who initially purchase goods for personal use but later sell them professionally.[70]

The CSD 1999 defines the seller as any natural or legal person who, under a contract, sells consumer goods in the course of their trade, business or profession. The challenge lies in determining when a transaction falls under trade, business, or profession. Canavan questioned whether this relates to profit or if even incidental sales by professionals could fall under the CSD 1999.[71] Article 7 of the CSD 1999 makes any pre-contract agreements between the consumer and the seller that waive or limit the rights under the CSD 1999 invalid once a lack of conformity arises. Thus, it is crucial to ascertain the applicability of the CSD 1999 before entering a contract. Although the CSD 1999 lacks a definition of a sales contract, its absence during consumer protection law harmonization is understandable, given that its incorporation could have impacted traditional civil law concepts of sale in Member States. Lastly, the CSD 1999 defines the object of the sales contract, i.e., consumer goods, as tangible movable items,[72] raising potential disputes over distinguishing between typical goods and consumer goods (especially since there is no clear distinction between tangible consumer goods and other tangible goods). Ultimately, the application of CSD 1999 rules hinges more on defining the parties involved (consumer and seller) rather than the object itself.

The CSD 1999 reshaped the private legal frameworks of Member States, introducing a distinction between consumer sales (between professional sellers and consumer buyers) and non-consumer sales (all other forms of sales contracts).[73] Implementation varied across Member States with Germany undergoing a comprehensive obligations law reform (*Schuldrechtsmodernisierung*), while the Neth-

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69 Magyar Köztársaság Legfelsőbb Bíróság Legf Bír Gf VI. 30.642/2000.

70 Court of Appeal, Hertogenbosch, 17 April 2018, 200.223.477_01. Summary available at: [https://e-justice.europa.eu/caseDetails.do?idTaxonomy=36728&idCountry=20&plang=nl], Accessed 25 January 2024.

71 Canavan, R., *op. cit.,* note 67, p. 271.

72 Certain exclusions apply, such as goods sold by way of execution, water, gas, and electricity. Member States may add further exclusions, such as second-hand goods.

73 Keirse, A. L. M.; Loos, M. B. M., *Alternative Ways to Ius Commune, The Europaisation of Private Law*, Intersentia, Cambridge, 2012, p. 7.

erlands[74] and Croatia took different approaches. The Netherlands supplemented existing regulations, a method also adopted by Croatia, then a candidate state, which amended its civil obligations act instead of enacting a new consumer protection act.[75] However, this approach, while technically correct, lacks transparency and clarity in legal texts, especially since additional acts on consumer protection were enacted, but only in regard to other consumer protection directives.[76] While nomothetically sound, this scattered approach makes it challenging for everyday buyers to discern when they are consumers and when they are not – a distinction with significant consequences.

On 20 May 2019, the EU replaced the CSD 1999 with the new Directive 2019/771/EU on certain aspects concerning contracts for the sale of goods (CSD 2019).[77] Unlike its predecessor, the CSD 2019 is a full harmonization directive,[78] meaning Member States no longer have the discretion to implement regulations that are more lenient or more stringent than the CSD 2019. The definition of 'consumer' remains unchanged, referring to any natural person who is acting for purposes which are outside that person's trade, business, craft or profession. Additionally, the CSD 2019 introduces a definition of the sales contract, specifying it as any contract under which the seller transfers or undertakes to transfer ownership of goods to a consumer in exchange for payment. While the CSD 2019 aims for legal clarity with this definition (paragraph 17 of its preamble), its impact on the fundamental structure of civil law in Member States remains uncertain in the long term, particularly concerning the sales contract – a cornerstone of private law. This definition solely applies to consumer sales contracts, effectively creating two distinct sets of sales contract rules within each Member State.

The definition of the consumer in the CSD can lead to complexities, especially when a natural person is acting for both private and professional purposes, such

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74 Hesselink, M., *The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience*, in: Vogenauer, S.; Weatherill, S., *The Harmonisation of European Contract Law Implications for European Private Laws, Business and Legal Practice*, Hart, Oxford, 2006, p. 46; Zimmermann, R., *Contract Law Reform: The German Experience*, in: idem, pp. 71-72.

75 At that moment, *Zakon o obveznim odnosima* [Civil Obligations Act] (Offical Gazette No. 35/05, 41/08) was in effect.

76 At that moment, *Zakon o zaštiti potrošača* [Consumer Protection Act] (Official Gazette No. 96/03) was in effect.

77 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 May 2019.

78 Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more, or less, stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive.

as buying software for personal use on a computer also used for business.[79] A similar scenario was addressed in the Gruber case of 2005, concerning international jurisdiction. The CJEU ruled that the definition of the consumer should be interpreted restrictively.[80] According to the ruling, a person who enters a contract for goods intended for purposes that are partially connected to their trade or profession may be considered as a consumer only if the professional purpose of the trade is minimal compared to the overall context of the contract. In essence, if a contract is partially related to a person's profession (but not entirely), they may not be regarded as a consumer under procedural (private international law) rules of jurisdiction.

In a more recent case, the Milivojević decision tackled a similar issue in private international law.[81] Here, the CJEU ruled that a person who concluded a credit agreement to renovate property (specifically, their domicile) for tourist accommodation purposes cannot be classified as a consumer under the Brussels 1 Regulation.[82] This Regulation defines the consumer in relation to the purpose of the contract, specifying that it applies when the contract is clearly for private purposes, i.e., outside the buyer's trade or profession – a determination made by the competent court. However, under national and material private law, such individuals may still be considered consumers, as seen in cases from Germany or Netherlands,[83] and even under the new CSD 2019. The preamble of the CSD 2019 acknowledges this, allowing Member States to determine whether buyers in dual-purpose contracts should be considered consumers. However, as seen before, this dual system can lead to confusion and legal uncertainty, leaving buyers, sellers, and even courts unsure of the buyer's (consumer) status.

Considering all the points discussed, it is clear that both the old and the new CSD primarily address the sales contract, specifying the parties involved and the object of the contract.[84] While the definition of the consumer remains unchanged, the

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79 Loos, M., *Consumer Sales and Digital Contracts in The Netherlands after Transposition of the Directives on Digital Content and Sale of Goods*, Amsterdam Law School Research Paper No. 16, 2022, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4155453#], Accessed 25 January 2024.

80 Case C-464/01 Johann Gruber v Bay Wa AG [2005] ECLI:EU:C:2005:32.

81 Case C-630/17 Anica Milivojević v Raiffeisenbank [2019] ECLI:EU:C:2019:123. See more on both Gruber and Milivojević in: Calvo Caravaca, A. L., *Consumer contracts in the European Court of Justice case law. Latest trends*, Cuadernos de Derecho Transnacional, Vol. 12, No. 1, 2020, pp. 93-94.

82 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20 Dec 2012.

83 Loos, M, *op. cit.,* note 79. *Infra,* cases quoted in notes 68 and 70.

84 *Cf.* Kanceljak, I.*, Reform of Consumer Sales Law of Goods and Associated Guarantees - possible impact on Croatian private law*, in: Petrašević, T.; Duić, D., (eds.), *EU and comparative law issues and challenges*

new CSD introduces a definition for the sales contract, potentially clarifying when a buyer qualifies as a consumer. However, the inclusion of rules on private international law adds to the confusion and uncertainty, as a person may be a consumer under material law but not for jurisdictional purposes. This does not affect their material rights but adds complication to an already complex legal landscape. Thus, the seemingly straightforward question of who qualifies as a consumer is fraught with unanswered sub-questions that complicate the matter.

4. CONCLUSION OR FORWARD-LOOKING PROPOSITIONS

This research reveals that defining who qualifies as a consumer hinges on several factors. Looking back to ancient Roman times, it is evident that the concept centered on protecting the less privileged party in a sales contract, often the buyer, from exploitation by professional sellers. Though Roman law does not explicitly define the consumer, historical records show legal measures were in place to safeguard their interests, including protection from unfair pricing by emperors and oversight by *curule aediles* in sales contracts. The *aediles* protection was contingent on factors such as the type of goods sold (*ratione materiae*), where the contract was concluded (*ratione loci*), its nature (*ratione negotii*), and the parties involved (*ratione personae*). A possible definition of the consumer-buyer in classical Roman law might be: "an amateur buyer concluding the mandatory sales contract for slaves or livestock in the market, with the seller being a professional in such transactions."

In revisiting recent legal developments in Europe, consumer protection emerges as a growing concern. Despite the absence of direct mentions in the early European Community texts, the consumer's position was formally acknowledged in 1972, and has since evolved. Interestingly, while the Treaties, the Single European Act and the Charter of Fundamental Rights of the European Union emphasize consumer rights and protection, none provide a clear definition of the 'consumer.' However, both the old and the new CSD offer definitions akin to Roman law, revolving around the (consumer) goods involved (*ratione materiae*), the contract itself, as defined in CSD 2019, (*ratione negotii*), and the parties involved, specifically, the consumer and the seller (*ratione personae*).

The quest for a uniform definition of the consumer across all Member States hinges largely on the political landscape of the EU. It requires Member States' consent for further harmonization, which may entail the loss of longstanding legal traditions and identities, thus explaining the Member States' resistance. However, the reality of the single market and cross-border shopping does not wait for consensus. The

series, Vol. 2, 2018, p. 593.

complexity of EU and national legislation often leaves everyday consumers grappling with uncertainty. After all, we are all consumers in some form or another when purchasing goods, but sometimes the line blurs, like when using software on a personal computer for both personal and business purposes. Determining the strength of this connection is subjective and open to debate. Even in casual discussions, crafting a universal definition proves challenging. Overly complex definitions risk excluding much-needed consumer protection, leaving individuals uncertain about their status. This research only scratches the surface, focusing solely on consumer protection in regard to sales contracts. Kennedy's simple yet profound statement, which influenced the Community policies, "c*onsumers, by definition, includes us all*," resonates here. Without a comprehensive and less formal approach, consumer protection will only grow more convoluted under EU law.

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