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Consumption without Borders? Competence Attribution in EU Consumer Law and the American Federal Model

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Abstract
With an increasingly integrated common market, consumer protection in the EU obtains added relevance as consumers are being exposed to greater risks. Yet, national consumer laws can impede market integration, whereas EU-wide protection is far from being consolidated. The contention on the extent of harmonization can be drawn back to the question of competence allocation: how much regulatory autonomy should be transferred to the Community and how much discretion should be left to the Member States? In this paper, a comparison to the US federal model serves as a tool of analysis in determining the most suitable centre-state relationship in the EU governance of consumer law. Thereby, the focus lies on structuring competence allocation through constitutional doctrines so as to ensure consumer prediction that is coherent and predictable. It is argued that while EU Member States should be left with more regulatory autonomy in the meaning of reducing negative harmonization and ECJ excessive intervention into domestic situations, the Community level should have more rigorous policing powers curtailed only by subsidiarity and proportionality. National rules are important to account for diverse national preferences, yet Community competences should be enhanced to ensure cohesion. Finally, the method of coordination can provide an additional allocational mechanism, especially for sensitive policy areas.

Keywords
consumer protection; constitutional doctrines; harmonization; internal market; implied powers; competence attribution; Commerce Clause; Directive on Consumer Rights; ECJ; direct effect; regulatory gaps; Open Method of Coordination

1. Consumption Without Borders

On 18 March 2011 the European Economic and Social Committee (hereinafter: EESC) marked the annual celebration of the 13th European Consumer

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conference titled 'Consumption without borders'.[1] This title refers to the objective of current efforts in the European Union (hereinafter: EU) to enhance consumer protection with the aim to facilitate cross-border consumption. In general, the on-going initiatives to relaunch the single market and to achieve the European 2020 goals increasingly adopt a citizen-focused rhetoric, primarily considering citizens in their capacity as consumers. As Commissioner John Dalli stated in his speech at the conference 'Single Market: Time to Act': 'I believe that our key challenge will be the extent to which we succeed in putting our citizens at the heart of the Single Market.'[2]

The relevance of offering adequate protection to consumers has become ostensible in recent years, evidenced by the heightened EU activity in that area. An integrated common market exposes consumers to more risks.[3] Yet, national consumer protection laws can impede further market integration and pose barriers to interstate commerce. Consumer expenditure currently amounts to 56% of EU GDP[4] and if consumers encounter barriers when shopping cross-border, they will most likely be hesitant to do so. According to the recent Directive on Consumer Rights,[5] legal fragmentation has a negative effect on cross-border trade. However, it is contested whether differences in consumer law explain why domestic trade has increased more than European trade over the last few years.[6] Although it is difficult to establish causality between legal rules and economic

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[1] Title of 13th European Consumer Day in Budapest. See: 'Consumption Without Borders': the EESC celebrates its 13th European Consumer Day in Budapest (Press Release CES/11/31, 14 March 2011) <http://europa.eu/rapid/press-release_CES-11-31_en.htm> accessed 20 November 2012.

[2] John Dalli, 'European citizen at the Heart of the Single Market' (Speech delivered on 'Single Market: Time to Act Conference, Brussels, 8 February 2011). <http://ec.europa.eu/commission_2010-2014/dalli/docs/speech_single_market_08022011_en.pdf> accessed 20 November 2012.

[3] Thierry Bourgoignie and David M. Trubek, 'Consumer Law, common markets and federalism in Europe and the United States' in Mauro Cappelletti (ed), *Integration through law: Europe and the American Federal Experience* (Berlin De Gruyter 1987) III, 4.

[4] John Dalli, 'EU Consumer Policy: Tacking Stock and Moving Ahead' (Address delivered on 26 May 2011) <http://ec.europa.eu/commission_2010-2014/dalli/docs/speech_26052011_imco.pdf> accessed 20 November 2012.

[5] 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 [2011] OJ L304/64.

[6] In fact, tax law or procedural law can form much greater barrier to the proper functioning of the internal market than consumer law. See: Jan Smits 'Full Harmonization of Consumer Law? A Critique of the Draft Directive on Consumer Rights' (2010) 18(1) European Review of Private Law 5.

performance - as many other factors such as culture or politics sometimes better account for economic development than legal institutions[7] - differing national levels of consumer protection create fragmentation and uncertain situations for the parties involved in consumer transactions.[8] Uncertainty will prevent businesses from engaging in interstate trade due to the potential risks and costs involved through the compliance to differing rules.[9] As this cumbers cross-border transactions, consumers are deprived from fully profiting from an integrated market. By positing consumers at the heart of the single market, Dalli stresses the importance of consumer protection[10] for transnational consumption and hence, for market integration.

On 10 October 2011, the new EU Directive on Consumer Rights, first tabled by the Commission back in 2008,[11] was formally adopted by the EU's Council of Ministers.[12] This directive replaces the EU Directive in respect of distance contracts[13] and the Directive in respect of contracts negotiated away from business premises,[14] and shall reduce the legislative fragmentation persisting in European consumer protection. It attempts to strike the right balance between a high level of protection and the competitiveness of enterprises. In particular, it addresses protection of online shopping, rules on delivery and digital downloads.[15] The Directive opts for a full harmonization approach and therefore, will have a great impact on national legal

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[7] Michael Faure and Jan Smits, 'Does Law Matter? An Introduction' (2011) Maastricht European Private Law Institute Working Paper 2011/35, <http://www.ssrn.com/abstract=1950335> accessed 20 November 2012.

[8] Vanessa Mak, 'A Shift in Focus: Systematisation in European Private Law through EU Law' (2011) 17(3) European Law Journal 403.

[9] Commission, 'Proposal for a Directive on Consumer Rights' COM (2008) 614 final.

[10] According to Dalli, 'consumer law' is 'a set of rules and principles specifically designed to protect the consumer in his relationship with the enterprise', including measures that cover different aspects of market transactions, advertising, health and safety of products as well as contractual terms (n 2). For the sake of simplicity, this analysis adopts the notions of Community consumer policy and consumer protection as well as related terms as synonyms of Community consumer law.

[11] Commission, 'Proposal for a Directive on Consumer Rights' (n 9).

[12] 'New EU rules on consumer rights to enter into force' (MEMO/11/675, Brussels 10 October 2010) <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/675&type=HTML> accessed 20 November 2012.

[13] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19.

[14] Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/ 31.

[15] Andrew Williams, 'SMEs balk at new Directive on Consumer Rights' (2011) Euractiv <http://www.euractiv.com/consumers/smes-balk-new-consumer-rights-directive-news-505974> accessed 20 November 2012.

orders.[16] The lengthiness of the adoption process illustrates that high stakes are involved for national governments, and that disunity continues to persist regarding the adequate means of achieving improved protection.[17]

A lack of coordination between different actors and a lack of focus in legislative action are results of this unsettled debate. Consumer protection – as a shared competence of EU and Member States with diverging values and objectives at both levels – is fragmented,[18] and thus not optimally administered, reducing the protection offered to consumers. The contention on the extent of harmonization (full *v.* minimum) can be drawn back to competence allocation: how much regulatory autonomy should be transferred to the Community and how much discretion should be left to the Member States? This allocational question, which underlies the debate on means and extent of harmonization in a federal system, had stalled the adoption of the said Directive in 2011. Although the current directive opts for maximum harmonization,[19] the debate is not settled and shall be subject of the present analysis.

The method chosen here is a horizontal legal micro-comparison[20] of the vertical competence allocation and underlying doctrines between the EU and the United States (US).[21] The US will be used as an example to guide the analysis on how to evaluate, and where possible, solve problems and challenges the EU is facing in the field of consumer protection. Such a comparison is naturally not without its limitations. While the EU and US share a similar sized market and a federal structure where centre-level intervention in state activity is needed when the latter interferes with

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[16] Marco B.M. Loos, 'Full harmonization as a regulatory concept and its consequences for the national legal orders. The example of the Consumer rights directive.' (2010) Centre for the Study of European Contract Law Working Paper Series 2010/03 http://ssrn.com/abstract=1639436 accessed 20 November 2012.

[17] EurActiv, 'The battle for EU consumer rights' [2011] <http://euractiv.com/en/food/battle-eu-consumer-rights-linksdossier-504087> accessed 20 November 2012.

[18] Mak, 'A Shift in Focus' (n 8) 403.

[19] Directive 2011/83/EU (n 5) art 4: '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'.

[20] Typology adopted according to Aleksandar Momirov and Andria N. Fourie, 'Vertical Comparative Law Methods: Tools for Conceptualising the International Rule of Law' (2009) 2(3) Erasmus Law Review 291, 295; and Peter DeCruz, *Comparative Law in a Changing World* (Cavendish 1995) 224.

[21] DeCruz (n 20) 224: the conducted legal comparison is 'horizontal' as it occurs on the same level (both on the federal and national level). 'Vertical', in turn, refers to the competence allocation between federal and national level. 'Micro-comparison' relates to the fact that the juxtaposition of the two legal systems is limited to a specific area of law, here consumer protection.

interstate commerce,[22] their fundamental differences also have to be constantly recalled. The US is a state and, contrary to the EU, the process of integration in the US is predominantly concluded. While the EU is still in a phase of market integration, the US can rather be described in a state of 'market maintenance'.[23] Therefore, the 'battle for competences' has mostly ceased.

The EU is strictly speaking less than 'federal': EU central institutions exert less control over Member States than do federal governments of established federal polities; the European Commission has little influence in policy implementation and Community staff amount only to a fraction of the size of other federal bureaucracies.[24] Further limitations derive from differences in other areas, such as historical background, political orientation or culture. Conversely, similarities in these realms can provide new incentives to draw a comparison.[25] Bearing both advantages and disadvantages of a comparative study in mind, an attempt to a fruitful comparison shall be made, not as an ends in itself, but as a tool for inspiration in finding a solution to a common problem (i.e. the appropriate organization of the centre-state relationship).

The question guiding this study is how should the centre-state relationship in the EU governance of consumer law be structured to attain an adequate level of consumer protection from the point of view of the European consumer? How can it be decided to which degree Member States should retain regulatory autonomy and to which degree the European Community should be able to intervene?[26] The focus here lies on the means of structuring the centre-state relationship in such a way as to provide response-mechanisms to consumer problems that are consequent and predictable, aiming at the best possible protection. There are not many criteria with which to address this question. However, in focusing on

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[22] Catherine Barnard, 'Restricting Restrictions: Lessons for the EU from the US' (2009) 68(3) Cambridge Law Journal 575, 578.

[23] Miguel P. Maduro, *We, The Court. The European Court of Justice and the European Economic Constitution. A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing 1998) 89.

[24] Daniel Kelemen, *The Rules of Federalism: Institutions and Regulatory Politics in the EU and Beyond* (Harvard University Press 2004) 2.

[25] For example, the fact that the nationals of Member States feel sometimes feel threatened by invasive Community policies bases, *et al.*, on the evolution of nation states in Europe. In the US, a similar threat was perceived in the forming years of the federation, but is today mainly discarded.

[26] The query whether the EU should adopt a full, minimal or mixed harmonization approach or what exactly should be the competences of the Community legislature and the Member States respectively fall outside the scope of this study.

(constitutional) guidelines that help structure the separation of powers or competences between Member State and EU level, while taking into account the US federal example, alternative solutions might be identified. Most importantly, it should be understood in this regard that the relationship between central and state level is usually established by principles and doctrines governing the interactions of the legal systems.[27] Moreover, the focus on institutional doctrines shall aid in providing a more systematic response mechanism to problems of EU consumer protection as opposed to fragile policies.[28]

The following study is structured into four paragraphs that eventually give rise to the conclusion, which attempts to address the research question above. First, the controversy, which has been touched upon in the introduction, is analyzed more clearly. Second, the evolution of EU consumer protection laws and policies is briefly sketched, highlighting the essential challenges of present-day consumer policy. Third, the American allocational system is explained. Here, relevant doctrinal and institutional devices structuring the centre-state relationship are illustrated to enable an informed comparison to its European counterpart. Fourth, the study examines in detail the consumer protection system in the EU in the light of considerations on doctrinal devices of competence attribution. The paragraph is divided into a subsection on negative as well as positive integration to facilitate understanding of the various devices introduced. Finally, it is discussed which lessons can be drawn from the different application of allocational doctrines in the EU and the US and which implications or limitations this comparison bears with regard to the posed research question.

2. Explaining the Controversy

Consumer protection has a bearing on perhaps the most central issues in the process of economic integration for it reveals the tensions and controversies between 'open borders, protectionism and *bona fide* intervention of the Member State'.[29] The problems with consumer protection in the EU are manifold. First, there is a fundamental conflict between the

[27] Mauro Cappelletti, Monica Seccombe and Joseph Weiler, 'Methods, Tools and Institutions' in Mauro Cappelletti (ed) *Integration through law: Europe and the American Federal Experience* (De Gruyter 1987) Vol. 1 Book 1, 200.

[28] For a more elaborate explanation of such doctrinal approach, see Mak, 'A Shift in Focus' (n 8).

[29] Bourgoignie and Trubek (n 3) vi.

policy of fostering market integration and free movement of goods, on the one side, and the policy of governmental action on behalf of consumers, on the other. Second, there is the long-lasting division on the choice between a centralized and a decentralized harmonization model,[30] or on the question of which powers Member States should retain and which ought to be exercised by the EU. This disunity in the questions of the necessary level of protection of consumers, as well as the appropriate level of integration and EU-level intervention, lead to an ambiguity with regards to the means of EU governance. This third conflict concerns the different channels of harmonization: through positive integration by the adoption of harmonized rules or through negative integration by the elimination of trade-inhibiting national laws.

The difficulty in identifying the appropriate level of protection in the light of the importance of internal market goals for EU policy represents a fundamental question of Community action in private law matters, which invariably involve a tension between market integration and protection-oriented policies (such as consumer protection or protection of public health).[31] In theory, the establishment of a border-free, competitive, and thence, more efficient single market is meant to be conducive to the interests of consumers by making available a greater choice of products at a lower price (due to increased competitiveness).[32] In practice, however, there is no such direct advantage deriving from market integration for consumers, at least not without being accompanied by major drawbacks. National consumer protection in an integrated market, however, hampers inter-state trade. This inherent conflict between free trade and consumer protection (as well as other societal values) impacts, or inhibits, the formation of an adequate protection system and is reflected in the interplay between negative and positive harmonization.[33]

Concerning the model of governance, the EU follows a decentralized model meaning that states retain regulatory freedom in the majority of policy matters provided that national rules do not interfere with the proper functioning of the internal market.[34] In this sense, Community consumer protection has been left mainly a competence of the individual Member

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[30] Catherine Barnard, *The Substantive Law of the EU. The Four Freedoms* (Oxford University Press 2010) 17.

[31] Mak 'A Shift in Focus' (n 8) 408.

[32] See Stephen Weatherill, *EU Consumer Law and Policy* (Edward Elgar Publishing Ltd 2005), or Paolisa Nebbia and Tony Askham, *EU consumer law* (Richmond Law & Tax 2004) 36.

[33] Mak (n 8) 403.

[34] Barnard, *The Substantive Law of the EU'* (n 30) 18.

States,[35] as although the main aim is integration, unity should not trigger the demise of national diversity.[36] This approach is perceived consumer-friendly because Member States might be better able to respond to regional consumer needs.[37] However, geographical discriminations between consumer protection legislation follow. Thereby, differing consumer protection policies can again constrain the free flow of goods.[38] The inherent risk of allowing diversity is that lacking coordination leads to diverging practices across the Union and thus, (legal) uncertainty. This is especially alerting in European private law where the shared competence of EU and Member States can account for such large degree of fragmentation.[39] It seems from this perspective that EU level intervention is necessary to ensure uniform protection of consumers. The most recent Directive on Consumer Rights advocates full harmonization, which does not grant any more or less stringent protection.[40] However, this provision could oblige some Member States to lower their level of protection in existing legislation.[41] Differing levels of protection can also represent varying preferences of Member States.[42] In general, consumer rights groups, as well as the European Parliament, argue that a 'one-size-fits-all' approach is detrimental for consumer protection.[43] It is contested whether full harmonization leads to increased cross-border trade as well as whether a EU-aligned level of protection can provide the 'best' level of protection for consumers within the whole Community.[44]

The ambiguity between a commitment to EU-level market integration and consumer protection is intrinsic to the debate of increased integration on Community level *versus* national sovereignty discussed above and looms in the relation of negative and positive harmonization. These three challenges of consumer protection are relevant to the debate on the competence distribution between Member State and EU level because the

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[35] Although already decisive steps in the harmonization of Community consumer policies have been taken, as shall be explained more amply in the following section.

[36] Vanessa Mak, 'Standards of Protection: In Search of the 'Average Consumer' of EU Law in the Proposal for a Consumer Rights Directive' (2010) TISCO Working Paper Series on Banking, Finance and Services 04/2010 < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1626115> accessed 20 November 2012.

[37] Smits (n 6) 10.

[38] Weatherill (n 32) 8.

[39] Mak, 'Standards of Protection' (n 36).

[40] Directive 2011/83/EU (n 5) art 4.

[41] Mak, 'Standards of Protection' (n 36).

[42] Faure and Smits (n 7) 10.

[43] EurActiv (n 17) 3.

[44] Faure and Smits (n 7) 11.

appropriate level of EU involvement is dependent upon the agreed scope of harmonization and the means of implementation thereof.

By pursuing negative harmonization, the European Court of Justice (ECJ) assumed the role of safeguarding the four freedoms and removing obstacles to intra-Community trade.[45] Negative harmonization is evidently biased in favor of trade and leads to deregulation, if not counterbalanced. Soon it was acknowledged that positively harmonizing consumer protection on EU level reduces internal market barriers to trade and that positive legislative action was necessary to compensate the gaps created by ECJ deregulation. Directives protecting consumer interests were hence largely prompted by case law on national barriers to trade.[46] In that sense, consumer protection is viewed as instrumental to internal market policy, as a means to achieve free market objectives. It is detrimental to consumer protection if considerations of economic efficiency take overhand.[47] While this is clear, the problem remains that the competence of the EU is fundamentally aimed at internal market goals via full harmonization; this tension of protection policies and internal market objectives has been an ongoing theme since the establishment of the common market.

3. Development of Consumer Policy in the EU

Although no common policy on consumer protection was envisaged at the inception of the European Community, particular consumer issues, such as public health, were early treated as part of Community policies (e.g. in the area of agriculture).[48] It was initially at the Paris summit in 1972 where it was recognized that the attainment of a proper functioning internal market implied the protection of the health, safety and economic interests of consumers and that the consumer should be the ultimate beneficiary of an integrated market.[49] It was therefore in the context of fostering cross-border trade that consumer protection was pursued. Since the first preliminary program by the European Community on consumer protection and information policy was adopted in 1975, a growing number of legislative

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[45] Hannes Unberath and Angus Johnston, 'The Double-Headed Approach of the ECJ concerning Consumer Protection' (2007) 44 Common Market Law Review 1237.

[46] Ibid 1241.

[47] Vanessa Mak, 'Review of the Consumer Aquis – Towards Maximum Harmonisation?' (2008) Tilburg Institute of Comparative and Transnational Law Working Paper 2008/ 6 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1237011> accessed 20 November 2012.

[48] Nebbia and Askham (n 32) 11.

[49] ibid 5.

measures have been assumed that took consumer interests into account. This was possible mainly via (a) 'soft law' initiatives and action plans;[50] (b) harmonization of national laws in the field, and most importantly; (c) negative harmonization by the ECJ.

Noteworthy is that these initiatives were predominantly geared towards the establishment of an internal market due to a lack of an appropriate self-standing legal base for Community action.[51] In the majority of cases, Article 94 TEC (ex 100) served as a legal basis for consumer measures.[52] Although non-binding acts, such as action plans, are capable of guiding the interpretation of binding EU law, the absence of any explicit legal basis left Community legislative action *per se* foreclosed.[53] The fragmented nature of the current consumer protection can be attributed largely to this limited competence.[54]

In the absence of any proper legal basis, the Community adopted harmonization directives that took into account the interests of consumers, particularly in the field of foodstuff, animal health, nutrition and pharmaceuticals, on the basis of Art. 94 TEC and 308 TEC (ex 235).[55] The harmonization articles confer powers to the Community legislature to take measures, including the approximation of laws, necessary to ensure the proper functioning of the common market. These directives then preponderantly served the internal market by harmonizing legitimate obstacles to trade – as opposed to unjustified obstacles created by some Member States' national legislation.[56] With the entry into force of the Single European Act (SEA) in 1987, Art. 95 TEC (today Article 114 TFEU) replaced Art. 94 as a legal basis and facilitated positive harmonization by requiring qualified majority vote instead of unanimity.[57] Still, consumer protection remained a by-product of the internal market: SEA recognized as a legitimate goal of the Community only within the context of the internal market.[58]

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[50] See, e.g. OJ 1975 C92/1; OJ 1992 C186/1; OJ 1996 C295/64; OJ 1999 C206/1 and OJ 2002 C137/2.

[51] Nebbia and Askham (n 32) 6.

[52] See section 3.

[53] Weatherill (n 32) 8.

[54] Mak, 'A Shift in Focus' (n 8) 407.

[55] Weatherill (n 33) 12.

[56] Unberath and Johnston (n 45) 1242.

[57] Single European Act of 1 February 1985 [1986] OJ L 169/1, art 18 supplements the EEC Treaty by art 100a providing qualified majority voting as a derogation from art 100 for the adoption of internal market measures.

[58] Single European Act (n 57); Unberath and Johnston (n 45) 1242.

With the entry into force of the Maastricht Treaty, Art. 153 (ex 129a) was included as an explicit legal basis for EC action in the field of consumer policy. In form of a separate title on 'Consumer Protection', it conferred upon the EU a legislative competence independent from the internal market imperative.[59] Art. 153 (3) provides that the Community shall contribute to consumer protection via: '(a) measures adopted pursuant to Art. 95 in the context of the completion of the internal market; (b) measures which support, supplement and monitor the policy pursued by the Member States'.[60] Eventually, however, Art. 153 has been of little practical reach.[61] Indeed, it has been barely exclusively relied on; the only example of a consumer protection directive being Directive 98/6 on the indication of prices of products.[62] Art. 153 (5) includes the principle of minimum harmonization according to which a Member State may, in areas already covered by Community legislation, maintain or introduce stricter protection measures.[63] Finally, the Lisbon Treaty in 2009 did not bring any major changes to consumer protection. It merely clarified legal instruments of the EU; consumer protection is now listed among the areas of shared competence of the EU. However, Lisbon does not further develop the areas of EU policy-making, consumer law included.[64] Despite the introduction of an explicit legal basis for Community action, the principal motor of action in Community consumer protection lies in the pursuit of further market integration.[65]

Consumer policy in the EU can thus be described as a mix of legal techniques with highly differential harmonization measures enclosing a range of techniques and assumptions.[66] The legal basis for harmonization mainly rests on Art. 94 and 153 TEC (now Articles 114 and 169 TFEU); whereby, the preferred instruments of positive harmonization are directives. Directives

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[59] OJ C 325, 24/12/2002, 101.

[60] In addition, consumer protection was added to the list of Community activities set out in art 3 EC.

[61] Unberath and Johnston (n 45) 1243.

[62] European Parliament and Council Directive 98/6/ EC of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers [1998] OJ L 080/70.

[63] This permission is subject to the condition that the provisions remain compatible with the EC Treaty.

[64] Weatherill (n 32) 30.

[65] Nebbia and Askham (n 32) 11; This lack of independency can be drawn back to the tension between internal market and consumer protection.

[66] Whereas some directives concern mainly health and safety issues, others focus on economic interests and, again others, introduce prohibitions or techniques of information provision.

are flexible and leave Member States a lot of room to manoeuvre when implementing the Community legislation into national law. As held by the Consumer Law Compendium, 'the Directives are often incoherent, and contain a significant number of ambiguities, which makes it difficult to transpose them into domestic law, and to ensure correct application.'[67] Now, the Commission tends to prioritize maximum harmonization measures.[68] Full harmonization reduces Member States' discretion and can ensure a more uniform implementation across diverging legal systems. This raises the question of which is the most suitable approach of harmonization, concerning both ends (minimum or maximum) of harmonization and the means (positive or negative) thereof. Even with consideration of the most recent directive, many principal issues causing difficulties in Community consumer law, e.g. the precise scope of the competence to harmonize, remain unsolved.

Differing protection systems are harmful for all parties involved in cross-border trade.[69] The existence of EU and simultaneous Member-State-level governance give rise to the question of how to allocate the regulatory competence between the central level and its constituent units. As competence allocation is not systematized, consumer protection is fragmented, and thus, reduces protection through legal uncertainty.[70] Member States need to retain substantial legal power to structure and regulate national markets, adapted to regional needs. At the same time, their powers ought to be limited to ensure that the common market can function without constraints.[71] Where the powers of the constituent units (of a federal system) are curtailed, the central level needs sufficient power and capacity to act in order to avoid regulatory gaps. Loopholes emerge where national legislation is annulled, but the Community lacks the competence to fill the legislative gap. This was mentioned in the latest Consumer Law Compendium, which stated variations in national legislations result from regulatory gaps in the fragmented patchwork of directives that represent current Community consumer protection.[72] Then neither central nor state

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[67] Hans Schulte-Nölke, Christian Twigg-Flesner, and Martin Ebers *Consumer Law Compendium* (Universität Bielefeld 2008) <http://www.eu-consumer-law.org/consumerstudy_full_en.pdf> accessed 20 November 2012, 789.

[68] Commission, 'Consumer Policy Strategy 2002 – 2006, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions', COM (2002) 208 final.

[69] Mak, 'A Shift in Focus' (n 8) 404.

[70] ibid 403.

[71] Bourgoignie and Trubek (n 3) 13.

[72] Schulte-Nölke et al. (n 67) 789.

levels are empowered to act, but action is needed for effective protection.[73] This problem shall be examined in more detail in part 5. The following elaborations on American consumer protection will particularly focus on the question of how competences are divided between the two levels of government in the US.

4. The American Allocational System: Doctrinal And Institutional Devices

The novelty of the European system makes it difficult to make predictions on its future development; there never has been a comparable forerunner. Starting in 1963, the ECJ established Community law doctrines (direct effect, supremacy, implied powers) that structured the relationship between Community and Member State level and rendered it indistinguishable from the corresponding legal relationships in other federal states.[74] Nowadays, especially in the area of regulatory policies, it is held that the EU can best be understood as a federal system.[75] A legal comparison with the American system of protection guided by the analysis of doctrines structuring the centre-state relationship can be conducive to answering the research question. The focus lies on the means of structuring the centre-state relationship in such a way as to provide response mechanisms that are consequent and predictable, providing legal certainty to involved parties.

The relationship between centre and states is predetermined by its constituent documents, which, expressly or implicitly, contain the principles and doctrines governing the interactions of the legal systems.[76] The following overview therefore mentions, first, doctrinal devices for structuring the centre-state relationship in the United States. These are the express and implied powers doctrine (in the application of the Commerce and the Dormant Commerce Clause as well as the 'Necessary and Proper' Clause), the supremacy and the preemption doctrine. On the other hand, it considers allocational institutions that resolve disputes of competence: the role of the US Supreme Court and the role of federal intervention *via* the preemption doctrine are examined. Certainly, it is highly problematic to constrict the American system to a set of institutional and doctrinal devices,

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[73] Weatherill (n 33) 20.
[74] Joseph Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403, 2413.
[75] Among others, Kelemen (n 24) 1.
[76] Cappelletti *et al.* (n 27) 200.

as it is an evolving, fluid system subject to constant change.[77] Nonetheless, a summary is necessary for the comparative analysis.

4.1. Legal Authority for Federal Action

The central government of the US is endued with enumerated powers. Any federal consumer legislation can only be enacted on behalf of one of the powers granted to the government by the Constitution. State governments, in contrast, have inherent policing powers that do not require legitimization.[78]

The competence to pass consumer protection legislation is derived from the Commerce Clause[79] which confers the power to US Congress to regulate 'interstate commerce'. In the beginning of the 1930s, the Supreme Court interpreted this power so as to legitimize almost any federal level involvement in the area of commerce. In particular, Congress can regulate in three areas: interstate commerce, activities affecting interstate commerce and activities that are 'necessary and proper' to regulate commerce.[80] Necessary and proper activities are such that are considered 'appropriate' for exercising the powers enumerated by the Constitution.[81] Furthermore, the Supremacy Clause of the US Constitution[82] declares the central government as being the supreme power in the federal system, i.e. federal legislation overrules state laws. Although Congress has never fully exercised this power, it does play a major role in determining the allocation of competences between federal and state level. The federal government uses two major doctrines to allocate competences: the 'Preemption Doctrine' and the 'Dormant Commerce Clause'.

Preemption is applied when the federal government has already legislated in a certain area. State laws can then be preempted if an act of Congress conflicts with state law or if federal legislation includes provisions prohibiting parallel state law.[83] Nonetheless, there remain many areas in which the competence of the state is not all too clear. Here, courts try to determine what the intention of Congress is, mandated to do so by the Dormant Commerce Clause.[84] As the Commerce Clause does not prohibit

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77 Bourgoignie and Trubek (n 3) 28.
78 Bourgoignie and Trubek (n 3) 29.
79 US Constitution, art 1 par 8, clause 3.
80 Bourgoignie and Trubek (n 3) 29, see also *Wickard* v. *Filburn* [1942] 317 US 111.
81 Cappelletti *et al.* (n 27) 227.
82 US Constitution, art 6, clause 2.
83 Bourgoignie and Trubek (n 3) 63.
84 First articulated in *Gibbons* v. *Odgen* [1824] 22 US 1.

state-created restrictions on interstate trade, the US Supreme Court has interpreted this silence by implying the negative power, i.e. 'dormant' or 'negative' commerce clause, to invalidate state regulation that 'unduly burdens' interstate commerce.[85] This means that state law protecting consumers may not place undue restrictions on interstate commerce.

States have inherent police powers that authorize to regulate for health, security, welfare and morals of their citizens. Although states' powers in the area of consumer protection are subject to such limitations, elaborated on above, they retain a major regulatory role.[86] As will be analyzed in the following section, courts are reluctant to strike down state laws and apply strict tests to the application of the Dormant Commerce Clause.[87] Likewise, the central government rarely completely preempts state level intervention, so that in many areas, states freely pass regulation.

4.2. Allocational Institutions

Centre-level involvement must not only be based on proper legal provisions transferring competences to federal institutions. The respective level of involvement is usually determined through different institutions. Two of these institutions in the US are analyzed below: The courts, which act through the Dormant Commerce Clause and the Congress and administrative agencies that adopt federal legislation. These institutions enable a multi-layered response to problems inherent in a federal system.

In the US system, many areas of consumer protection are left to the authority of the individual states. Without federal coordination, however, state laws can contradict each other and burden the common market. It is in these situations that courts can strike down state regulations based on the Dormant Commerce Clause.[88] More specifically, the US Supreme Court uses a two-tiered framework to assess the validity of state legislation: (1) the discrimination tier and (2) the non-discrimination tier.[89] The former is adopted for laws that *de jure* or *de facto* discriminate on the basis of origin of a product or service. The latter applies to non-discriminatory rules. These are subject to less strict review under the 'balancing test' set out in

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[85] Barnard 'Restricting Restrictions' (n 22) 585. Also see *Pike v. Bruce Church, Inc.,* [1970] 397 US 137 or Jack L. Goldsmith & Alan O. Sykes, 'The Internet and the Dormant Commerce Clause' [2001] 110 Yale Law Journal 785, 788.

[86] Bourgoignie and Trubek (n 3) 30.

[87] Barnard 'Restricting Restrictions' (n 22) 590.

[88] Bourgoignie and Trubek (n 3) 61.

[89] Barnard 'Restricting Restrictions' (n 22) 585; See *Brown-Forman Distillers Corp.* v. *N.Y. State Liquor Authority* [1986] 476 US 573, 579.

Pike v. *Bruce Church, Inc.*[90] State law is upheld, when the effects on free trade are only incidental and minimal. Most importantly, state law is subject to presumed legality, if it is not discriminatory. The court then balances the 'local benefit' of the rule with the 'burden imposed on commerce',[91] whereby interventions on behalf of consumers are mostly looked upon favorably in order not to unduly sacrifice protection.[92] Additionally, the Supreme Court can invalidate state laws that regulate extraterritorially[93] as well as statutes that potentially subject an area of interstate commerce to inconsistent regulation.[94] While some state statutes have been invalidated in such ways, the Court generally recognizes the local nature of safety and protection issues and has often upheld law even if such impact interstate trade.[95]

The federal government and administrative agencies also play a role in allocating responsibility. This is done by negative methods of law making under the preemption doctrine on the one hand, and positive methods as well as coordination of state-level consumer protection on the other. When an area of law is federalized, there are different ways to deal with state legislation. Legislation can either be preempted all at once, or selectively, by banning only those that are weaker than the federal law. If, for example, state laws impede free trade, they might be preempted all together. With this power, the federal government can organize the centre-state relationship. In addition, Congress can coordinate state and federal consumer protection activities via the use of different techniques, e.g. development of model state laws, federal agency liaisons with state governments, federal funding of or research on state initiatives and consumer representation in federal agencies.[96]

A complex framework enacted on state and federal level, with both actors having certain authorities to enact legislation, defines the US consumer protection system. It is not presupposed that the American system is necessarily superior to the EU system. The important issue here is whether the allocational mechanisms can protect consumers. It seems that in the area

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[90] *Pike v. Bruce Church, Inc* [1970] 397 US 137 142.

[91] Barnard 'Restricting Restrictions' (n 22) 587.

[92] Bourgoignie and Trubek (n 3) 61.

[93] See *Healy* v. *The Beer Inst.* [1989] 491 US 335–337.

[94] See, *Bibb* v. *Navajo Freight Lines, Inc.* [1959] 359 US 520, 526-27, 529-530 (state highway regulation); *S. Pac. Co.* v. *Sullivan* [1945] 325 US 761, 779-82 (state railroad regulation).

[95] See *Bibb* v. *Navajo Freight Lines, Inc.* (n 95), or *Raymond Motor Transp., Inc.* v. *Rice* [1978] 434 U.S. 429, 443.

[96] Bourgoignie and Trubek (n 3) 69.

of consumer protection, the United States can offer a rigorous and reliable system of laws and protection that is conducive to consumers.[97]

5. Regulating the Centre-State Legal Relationship in the EU

This paragraph elaborates on how the centre-state relation is structured in the EU, focusing on the allocation of competences through doctrines of constitutional character in the harmonization process of Community consumer protection. In particular, these are: conferred powers, judicial activism and proportionality in the case of negative harmonization; and supremacy, direct effect, implied powers and subsidiarity concerning positive integration.[98] The main allocational institution to be mentioned here is the ECJ. Based on Art. 28 TFEU (ex Article 23 TEC) on the free movement of goods, the Court of Justice may eliminate national laws that inhibit trade.[99] In several landmark decisions concerning the nature of the EC Treaty and the four freedoms, the ECJ attributed to itself a crucial role in ensuring the proper functioning of the internal market, as prior to the SEA, the legislative process was often stalled due to the requirement of unanimity in the Council.[100] Activism of the ECJ represents a considerable factor in Community law-making and will be examined in more detail below.

5.1. Negative Harmonization

The ECJ engages in securing the functioning of the internal market by striking down national laws that might constrict trade. The elimination of such discriminatory national legislation is based on Art. 28 TFEU. Consumer protection was first and foremost implemented by means of negative harmonization, i.e. by the power of the Court to ensure free movement of goods.

The decision of whether a national consumer measure constitutes a barrier to interstate trade lies at the discretion of the Court. There is a possibility of justification for obstructive national rules. Under Art. 36 TFEU (ex Article 30 TEC) national measures can be upheld based on certain

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[97] ibid. 85.

[98] It should be mentioned that this distinction between negative and positive harmonization is artificial and is thus not clear-cut in many cases.

[99] According to the 'Dassonville' formula, mentioned in *Keck and Mithouard*, 'equivalent effect' means market-partitioning effects, see cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

[100] Unberath and Johnston (n 45) 1237.

grounds, e.g. for 'protection of health and life of humans'. Although Art. 36 TFEU thereby sets a limit to complete deregulation;[101] the ECJ has yet been very sceptical in granting such exceptions, fearing disguised restrictions on trade.[102] There are also protective measures that fall outside the scope of justifications mentioned in Art. 36 TFEU for instance, rules against deceptive marketing practices or rules requiring the display of information to consumers.[103] In such cases, compatibility of state legislation with Article 28 TFEU is assessed along the lines of the *Cassis de Dijon* rationale. The court held that national barriers to trade are accepted if they are necessary to 'satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer'.[104] Here, the Court takes the pattern set out in the treaty (cf. Article 36 TFEU) and specifies the formula of judging the validity of national measures by supplementing Article 36 TFEU with 'mandatory requirements'.[105]

There are some general principles of 'federal' law that provide guidelines in judging the permissibility of national law. In the US, the Supreme Court adopts non-discrimination on the grounds of nationality as the main principle upon which to assess national legislation.[106] The ECJ applies the 'market access' model or 'restrictions' test. This test provides that national rules inhibiting market access are unlawful regardless of whether they discriminate against imports or migrants.[107] The ECJ scrutinizes the relative impact of the national rule upon market access by applying the yardstick of the four basic freedoms.[108] According to Micklitz, the ECJ judges

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[101] See, e.g., Julien Cazala, 'Food Safety and the Precautionary Principle: the Legitimate Moderation of Community Courts' (2004) 10(5) European Law Journal 539, 554.

[102] For example, this was found in Case C-178/ 84 *Commission* v. *Germany* [1987] (Beer Purity) where a certain beer-making tradition (*Reinheitsgebot*) led German authorities to close the market off to brewers using additives – allegedly for public health reasons. German government's policy was found to be not a 'genuine' health policy, as it permitted the use of additives in other drinks and as the additives were identified not hazardous to public health. The German measure was declared invalid.

[103] Weatherill (n 32) 44.

[104] Case C-120/78 *Rewe Zentrale AG* v. *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 ('Cassis de Dijon').

[105] For judgments on 'mandatory requirements' check Case C-315/92 *Verband Sozialer Wettbewerb e.V.* v. *Clinique Laboratories SNC* [1994] ECR I-317 ('Clinique'), or Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln* v. *Mars GmbH* [1995] ECR I-1923 ('Mars').

[106] Maduro (n 23) 96.

[107] Barnard, *The Substantive Law of the EU* (n 31) 19.

[108] Unberath and Johnston (n 45) 1245.

legislation not necessarily according to these four freedoms, but along the lines of a social model aimed at guaranteeing access – to the labor market as well as market of consumer goods – free from discrimination.[109] Regardless of the underlying intention of the ECJ, it manifests the Court's desire to maintain a broad power to control national market regulation is evidenced by the fact that ECJ considers cases dealing with entirely internal situations.[110]

According to Barnard, the ECJ thereby prioritizes economic freedom over legitimate national measures of consumer protection.[111] This is also enforced by the fact that the ECJ adopts a presumption of illegality when considering national rules: all state legislation affecting interstate trade is *a priori* considered a potential obstacle to 'market access' ('*v* formula).[112] The burden is put on the state to advocate national policy choices and to prove its proportionality.[113] Already this procedural requirement indicates a strong tendency towards negative harmonization.[114] In general, the ECJ has taken a very strong position for enforcing free movement rules and sets a very high threshold for consumer protection.[115] National legislation is often struck down as an unjustified barrier to trade, taking as a basis an average consumer who is 'reasonably well informed'.[116]

If the reference consumer for judging national rules is equipped with this skill, then, e.g., compulsory information requirements are sufficient for adequate protection.[117] This conceptualization of the consumer clearly cuts down national regulatory autonomy. The ECJ indicates a preference of judge-led negative harmonization over positive harmonization by

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[109] Hans-W. Micklitz, 'Judicial Activism in the European Court of Justice and the Development of the European Social Mode in Anti-Discrimination and Consumer Law' (2009) EUI Working Papers Law 2009/19 <http://ssrn.com/abstract=1557139> accessed 20 November 2012.

[110] See Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH* v. *Troostwijk GmbH* [2004] ECR I-3025.

[111] Barnard, 'Restricting Restrictions' (n 22) 576.

[112] For an in-depth analysis of the legal tool of 'market access' and 'restrictions' approach, as well as the 'high impact' approach by federal law to control state law which is allegedly adopted by the ECJ, see Barnard, 'Restricting Restrictions…' (n 23) 575-606.

[113] ibid 590.

[114] Unberath and Johnston (n 45) 1245.

[115] Mak, 'Standards of Protection' (n 36).

[116] Case C-210/96 *Gut Springenheide GmbH* v. *Oberkreisdirektor des Kreises Steinfurt* [1998] ECR I-4657. For the average consumer, labels on product are sufficient to inform him/ her on the risks of usage. The vulnerable consumer, on the other hand, does not read labels and must be protected by higher standards on products.

[117] Unberath and Johnston (n 45) 1250.

Community legislature and thus, claims for itself the function of judging the worth of centralized *v.* decentralized EU governance.[118] It is a common understanding that most of the European legal order is 'judge-made'.[119]

5.2. Positive Harmonization

Just like US federal legislation overrules national laws, EU law enjoys supremacy over conflicting national laws.[120] As pointed out previously, Community legislature can make use of Art. 114 TFEU (ex 95) and Art. 169 TFEU (ex 153), as a legal basis for positive action in the sphere of consumer protection. Considering these provisions in conjunction with Art. 352 TFEU (ex Art. 308 TEC), which includes the doctrine of implied powers, as well as the principle of supremacy of EU law, the central legislature has satisfactory legislative competence. If the Treaty has not provided the necessary powers in order to obtain the objectives of an integrated common market, then the Community shall take 'appropriate measures'. These legal powers are furthermore coupled with the principles of supremacy and direct effect of Community law. The former is not set forth in the Community treaties, but has been developed by the Court.[121] In contrast to the Court's approach towards national legislation, its stance in evaluating EU directives of harmonization is fundamentally consumer-friendly.[122]

The principle of direct effect results from the direct applicability of Community legislation, but is only expressly mentioned and enforced by the ECJ. However, the TFEU only provides a legal basis for directives (with Art. 109 TFEU), where direct applicability does not take effect.[123] Directives leave Member States the choice of 'form and method' of implementation.[124] Individuals cannot rely on the direct effect to make claims against

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[118] Weatherill (n 32) 46.

[119] Maduro (n 23); Micklitz (n 109).

[120] Supremacy of EU law was mentioned for the first time in Case 6/64 *Falminio Costa* v. *ENEL* [1964] ECR 585, 593.

[121] The ECJ developed this principle with the help of three propositions; namely that the Treaties as well as Community legislation have primacy of Community legislation in order for it to have direct effect as stated in art 288 (ex art 249 TEC), that they have primacy even over Member States' constitution and that every national courts must apply Community legislation.

[122] Mak, 'Standards of Protection…' (n 37): Rather than adopting the standard of the well-informed consumer, directives of consumer protection provide rights and remedies that ensure protection to even the most vulnerable consumer.

[123] Unberath and Johnston (n 45) 1253.

[124] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2010] OJ C-83/49 art 288 (ex 249).

other private parties before national courts (horizontal direct effect).[125] This is especially detrimental in the area of consumer protection where central level intervention is so far only carried out in form of directives and where disputes arise essentially between private parties.[126]

Implied powers, supremacy and direct effect are limited by the constitutional doctrines of conferral, subsidiarity and proportionality in Art. 5 (3) TEU. In the area of consumer protection, the EU and its Member States share competence, i.e. both can enact legislation, but the principle of subsidiarity requires action only to be taken on EU level, if Member States are incapable of dealing with a problem individually (residuary powers). The need for centralized standards is normally premised on market failure resulting from imperfect regulatory competition.[127] Notably, these limits were recently reinforced by ECJ landmark decision in *Tobacco Advertising I* where an EU-wide ban on tobacco advertising was annulled in want of Community competence.[128] The ban was claimed necessary to facilitate the functioning of the internal market (Art. 114 TFEU).[129] The ECJ found the hidden agenda of this ban to be the protection of public health, and held Art. 114 TFEU as the wrong legal basis for this measure.[130] In its judgements, the ECJ also specifically mentioned the principle of conferral. The Court's reluctance to find implied powers can be perceived as embedded in a more general trend towards 'competence sensitivity',[131] i.e. the anxiety that Community level harmonization has gone too far. This fear results from a perceived competence creep between the principle of attributed competence and the practice of harmonization and from an ostensive automatism of transferral of competences to the centre.[132] In *Tobacco Advertising I*,

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[125] Case C-152/84 *Marshall* v *Southampton and South West Hampshire AHA* (No. 1) [1986] ECR 723.

[126] Weatherill (n 32) 233 and Weiler (n 74) 2416.

[127] Barnard, *The Substantive Law of the EU* (n 30) 27: In the ideal scenario of an integrated market, regulatory competition works effectively. This entails that the constituents units of a federalized market compete for the best laws. The host state does not have to invoke the consumer protection mandatory requirements; because the goods produced in the home state already have a very high standard in order to be able to compete with other high-standard products. Otherwise products will not be sold or citizens move to other states with better standards of protection. However, regulatory competition is rarely perfect; and, hence, states legislation is often insufficient to respond to consumer needs in a federal market.

[128] Case C-380/03 *Germany* v. *European Parliament and Council* [2006] ECR I-8419.

[129] ibid.

[130] Christophe Hilion, 'Tobacco Advertising: If You Must, You May' (2001) 60(3) Cambridge Law Journal 487.

[131] Nebbia and Askham (n 32) 13.

[132] Armin Bogdandy, 'Das Verhältnis der Gemeinschaft zu den Mitgliedsstaaten: Brauchen wir eine neue Kompetenzenverteilung?' in Roman Herzog und Stephan Hobe

the ECJ limited the use of implied powers, severely limiting consumer protection to the pursuit of internal market objectives. Consequently, a full harmonization approach can only be premised on internal market reasons.

In conclusion, although legal tools are available,[133] consumer protection cannot be exercised to its full possible extent. Minimum harmonization, on the other hand, is posited as one of the great flaws in EU consumer protection policy as it creates a fragmented patchwork of regulations.[134] National trade-restrictive measures can thence be more easily upheld along the lines of *Cassis de Dijon* and under the minimum harmonization formula contained in the remaining directives.[135] Yet, minimum harmonization directives might not provide satisfactory protection in some cases.[136]

6. Alternative Competence Allocation in the EU

Based on the ensuing comparison with the US system, it will be proposed that by adopting different interpretative approaches and adjusting the application of discussed doctrines, it might be able to advance competence allocation in the EU so as to attain an adequate level of consumer protection in the sense defined above. Table 1 below provides an overview of (1) central level powers of each the US and the EU, (2) above mentioned doctrines that structure the centre-state relationship and (3) powers of States, and Member States respectively, to derogate from central level regulation. In the US, Congress is authorized to enact regulations in all matters relating to interstate commerce, it can preempt state legislation and coordinate the competence attribution in areas of the common market (*cf.* Table 1. US/1).

(eds.) *Die Europäische Union auf dem Weg zum verfassten Staatenverbund: Perspektiven der europäischen Verfassungsordnung* (C.H. Beck 2004) 28.

133 Bourgoignie and Trubek (n 3) 23.

134 See Commission, 'Proposal for a Directive on Consumer Rights' (n 9).

135 Cf. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95, 29-34 and Directive 99/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171 12-16, which both will remain in force after implementation of the Directive on Consumer Rights on 13 June 2014.

136 Angus Johnston and Hannes Unberath, 'Law at, to or from the centre? The European Court of Justice and the Harmonisation of Private Law in the European Union', in Fabrizio Cafaggi (ed) *The Europeanization of Private Law* (Collected Courses of the Academy of European Law 2006).

Additionally, the Supreme Court contributes to the structuring of the centre-state relationship by eliminating national regulatory barriers to trade. Most importantly, these powers are not excessively used. The US system of competence attribution provides a predictable and rigorous response mechanism to consumer concerns. In comparison, the EU central level has little regulatory autonomy in the area of consumer protection. By the application of the implied powers doctrine, Community legislature can regulate in areas relating to the internal market. However, these competences are limited to the pursuit of market objectives and, since *Tobacco Advertising I*, the reliance on implied powers doctrine has also been curtailed (*cf.* Table 1, EU/1).

Furthermore, the European court is far more restrictive on national measures of consumer protection amounting to judicial activism or even deregulation. Then again, it adopts different notions of the consumer depending on whether it addresses an internal market case or whether it deals with a case relating to the failure to transpose a Community directive.[137] While the tools of positive harmonization, here meaning the introduction of common standards,[138] are rather restricted, negative harmonization often reaches out too far into the domestic situation of Member States. This ambiguity in the extent of central level involvement is highly detrimental to consumer protection by causing uncertainty for the parties involved. It can therefore be concluded that negative harmonization should be limited as long as Community legislation experiences difficulties in enacting EU-wide consumer protection laws to restore a balance within the different channels of central level involvement.

An adjustment of means of integration might be possible through a differential application of doctrines and principles. Orientation along the lines of doctrines can aid to alleviate uncertainty, which originates from the inherent tension of internal market objectives versus consumer protection, as these constitutional doctrines can offer a more secure basis for legal certainty, than policies deriving from directives or secondary legislation.[139] How can Community legislature and the ECJ apply the constitutional doctrines and tools of interpretation at their disposal in such a way so as to ensure adequate consumer protection?

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[137] Unberath and Johnston (n 45).

[138] As defined in the 'Glossary' of the European Commission (Better Regulation, 23 August 2011) <http://ec.europa.eu/governance/better_regulation/glossary_en.htm#_R> accessed 20 November 2012.

[139] Mak, 'A Shift in Focus' (n 8) 404, 417.

Table 1. Comparison US / EU Allocation of Competences.

		United States	European Union
1	**Central level powers**	- Commerce Clause - Necessary and Proper Clause	- Article 114 TFEU in conjunction with the implied powers doctrine - These powers are limited by the principle of conferral (since *Tobacco Advertising I*)
2	**Structuring the relationship between central level & its constituent units**	- Supremacy - Self-restraint of federal government - Coordination and preemption - Dormant Commerce Clause (Supreme Court)	- Supremacy - Subsidiarity, proportionality and conferral - No direct effect - Minimum harmonization - Article 28 TFEU on discriminatory national legislation (ECJ)
3	**State *Autonomy* through derogations**	- Dormant Commerce Clause - Non-discrimination-tier and balancing test	- Article 36 TFEU regarding derogations - Mandatory requirements (since *Cassis de Dijon*) - 'Market access'/ 'restrictions' test

A juxtaposition of the considerations on either legal system mentioned above leads to conclude that the doctrines guiding the centre-state relationship are applied in the US in such a way that federal level involvement is clearly defined, consequent and predictable. Furthermore, the federal level is capable of coordinating national legislation whereas individual states still retain powers to regulate according to national preferences. One suggestion that can be drawn might seem internally contradictory at first: EU Member States should be left more regulatory autonomy in the meaning of reducing negative harmonization and ECJ excessive intervention

into domestic situations, while the Community level should have more rigorous policing powers curtailed by subsidiarity and proportionality. This redistribution is required with regards to the complexity of competence distribution in the EU.

6.1. Limiting Negative Integration

It has been observed that the ECJ indicates a preference of judge-led negative harmonization over positive harmonization by Community legislature and thus, claims for itself the function of judging the worth of centralized *v*. decentralized EU governance.[140] The imbalance in EU consumer protection derives from the fact that central level involvement to the largest part comes from ECJ involvement. In the US, courts are rather reluctant to strike down state regulations (*cf.* Table 1, US/3).

In assessing the permissibility of national legislation affecting interstate commerce, the US Supreme Court adopts a discrimination approach, which only permits review of national measures that are 'discriminatory' on the basis of origin of a product or service.[141] If national measures only incidentally affect free trade, they are not scrutinized as strictly as 'discriminatory' legislation. Latter measures benefit from presumed legality. The ECJ, however, follows a 'restrictions' test which presumes all laws that represent a restriction to free trade or inhibit 'market access' to be unlawful, until they are justified as derogations (Art. 36 TFEU) or as mandatory requirements (*Cassis de Dijon*) (*cf.* Table 1, EU/3).[142]

The market access approach is much more intrusive into national regulatory autonomy, especially as eventually any national rule can be construed to have an effect on interstate trade.[143] Sometimes national laws having cross-border effect had to be defended even though there was no discrimination based on the origin of the product imminent.[144] With this approach the ECJ maintains significant policing powers to intervene in national legislation. This is evidenced by the heightened activity of the Court in infringement proceedings for failure to transpose directives.[145] Arguably, ECJ activism is a very particular trait of the EU system linked closely to the

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[140] Weatherill (n 32) 46.
[141] Maduro (n 23) 35.
[142] Barnard 'Restricting Restrictions' (n 22) 588.
[143] Barnard, *The Substantive Law of the EU* (n 31) 21.
[144] Unberath and Johnston (n 45) 1239.
[145] ibid 1255.

historical development of the EU. However, as has often been criticized,[146] it is not for the ECJ to fill gaps in directives and extend the scope of positive harmonization.[147]

From the comparison, it is thus suggested that a presumption of legality of non-discriminatory EU Member State legislation as well as the adoption of a discrimination approach coupled with a balancing test as in the US model would clearly facilitate adoption of state-level consumer protection, and thus, offer increased protection to consumers. The ECJ should engage in judicial self-restraint and not involve in contentious policy choices, which ought to be left to the Member States. State regulation is necessary and leaves room for diversity and national preferences while still ensuring the functioning of the internal market. It is not suggested to bring judicial activism to a complete halt, since it has traditionally contributed to the furtherance of internal market goals and integration. Rather, attention is drawn to the fact that with increased cross-border trade, consumer protection has become an important part in advancing the internal market; and that is best done if Member States have a greater regulatory discretion.

Furthermore, a more decentralized approach makes regulatory competition possible. Here, again, an example from the US can provide guidance: The American state of Delaware succeeded in attracting companies and consequently, other states attempted to adapt their corporation laws to those of Delaware which were seen as reasons for Delaware's success.[148] This was possible by leaving states sufficient autonomy to adopt individual and creative rules.

6.2. Enhancing Positive Integration

The expansion of Community competence through the implied powers doctrine (applied to Art. 114 TFEU) can be compared to the American Necessary and Proper Clause (*cf.* Table 1, 1).[149] Despite the fact that the EU is thereby provided with a similarly strong legal basis for action, it is not as widely construed as the US Commerce Clause, but limited by the principles of subsidiarity and proportionality. Whereas the US federal government

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[146] The questions of 'judicial activism' and 'democratic deficit' in the European Union form a substantial part in academic debate, but cannot be comprehensively discussed at this point.

[147] This view is also held in Unberath and Johnston (n 45) 1277.

[148] Barnard, *The Substantive Law of the EU* (n 30) 26.

[149] Cappelletti *et al.* (n 27) 237 and Fernanda Nicola, 'Book Review: Stephen Weatherill, EU Consumer Law and Policy (2005)' (2008) Washington College of Law Research Paper 2008-52 <http://ssrn.com/abstract=1131282> accessed 20 November 2012.

chooses to restrain itself in certain fields to grant deference to individual States, the EU central level is bound by subsidiarity and proportionality in enacting harmonization legislation (*cf.* Table 1, 2).

Moreover, since the perception of a 'competence creep' and ECJ decision in *Tobacco Advertising I*, Community competences have been further limited. Although the check on Community powers is highly essential, it is held that if the Court can distance itself from the strict decision in *Tobacco Advertising I*, the Community could be enabled to adopt more protective measures. It is essential that the Community legislature possess ample regulatory autonomy to take action on Community level if necessary. This does not entail that these powers lead to complete transfer of competences to the EU level, but merely that the overarching legislator, the EU, can structure the competence distribution centrally. Especially, as it is disputable whether the decision on how to structure the centre-state relationship should be at the discretion of the Court alone.

At US federal level, this is possible through various means of coordination, such as preemption (*cf.* Table 1, US/2). Of course, an increased use of the implied powers doctrine might support such automatic transfer of competences to EU level.[150] However, by equally permitting more Member State level legislation to persist (as suggested in section 6.1.), excessive deregulation can be prevented. The EU merely needs central coordination functions, which until now are largely exerted by the ECJ. It should be noted here, that the US federal government also uses its regulatory powers with restraint, i.e. by applying a balancing test similar to that employed in the US Supreme Court, to assess the necessity of preemption and of central level involvement.[151] Such a restraint is equally desirable for an empowered Community legislature. The EU could balance which areas need to be regulated jointly and which are sufficiently addressed at Member State level guided by the principles of subsidiarity and proportionality enshrined in the European treaties. This mechanism would further prevent an excessive transfer of powers to the EU level.

The Community legislators are also not capable of defining the centre-state relationship as US Congress is by its power of preemption (*cf.* Table 1, 2). Some instances of Community preemption of state legislation exist, e.g. in common commercial policy or concerning EU regulations.[152] However, they are not satisfactory to allow the EU to structure the competence distribution, which is essential in ensuring appropriate consumer protection.

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[150] Nicola (n 150) 9.

[151] Bourgoignie and Trubek (n 3) 66.

[152] Cappelletti *et al.* (n 27) 238 and Weiler (n 74) 2417.

Congress and US courts work together in allocating competences according to whether central or sub-central levels offer the most consumer protection.[153] In the EU, it is mainly the ECJ that makes allocational decisions based on internal market considerations within the framework of Art. 114 TFEU. The power of preemption could be extended to facilitate Community law-making and enable integration through common rules instead of deregulation.

Another means of empowering Community legislature is by enabling direct horizontal effect for directives to remedy the fact that federal preemption as a means of coordination is not available to EU level governance.[154] This would significantly aid to structure the competence allocation in the EU. Although directives are chosen as means of harmonization, because they enable the co-existence of heterogeneous systems of law, they complicate the legislative process and add complexity to the interpretation of law by national courts.[155] One of the problems in the current protection system was identified with the transposition of directives into national law, partly due to minimum harmonization requirements.[156] ECJ judgments have, thus, attempted to increase the efficacy of directives and compensate for the lack of direct effect. This should be curtailed, as the Court is not mandated to extend legislation. Moreover, techniques employed to compensate for lacking direct horizontal effect, such as the interpretative method, create non-uniform interpretations of directives.[157] Also, the flexibility advantage of directives is not achieved in practice if the ECJ employs judicial activism to bind national legislations to a certain way of implementation.

At this point, it might be useful to refer to the debate of full *v.* minimum harmonization. The new Directive on Consumer Rights contains full harmonization methods. As elaborated by Unberath, the lack of direct effect in

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153 Bourgoignie and Trubek (n 3) 66.

154 Such an approach was suggested also by A.G. Lenz, namely to grant full vertical and horizontal effect after the expiry of the implementation period. See Case C-91/92, *Dori* v. *Recreb Srl* [1994] ECR I-3325; It is even suggested that regulations might be the more appropriate instrument of harmonization; See, Eva-Maria Kieninger, 'Koordination, Angleichung und Vereinheitlichung des Europäischen Vertragsrechts' (2004) Schweizerische Zeitschrift für internationales und europäisches Recht 483, 506 or in Christian Twigg-Flesner and Daniel Metcalfe, 'The proposed Consumer Rights Directive – less haste, more thought?' (2009) 6(3) European Review of Contract Law 4, where a cross-border only regulation is suggested.

155 Unberath and Johnston (n 47) 1271.

156 Twigg-Flesner and Metcalfe (n 154) 4.

157 Schulte-Nölke *et al.* (n 67).

cases of total harmonization directives requires 'parallel yet completely pre-determined legislative activity at national level',[158] which leads to confusion and legal uncertainty. Full harmonization, thus, should be administered in conjunction with direct effect.[159] There has been considerable debate on the advantages and disadvantages of both full and minimum harmonization,[160] some of which has been discussed earlier. Suffice to be mentioned here that maximum harmonization is a relative concept: it can still be circumvented.[161] One example is the Product Liability Directive,[162] which aims at maximum harmonization, but thereby, does not preclude injured parties from claiming on other legal bases, such as contractual liability.[163] Total harmonization is not as irrevocably strict as perceived. Just like the US system, the EU governance system should be fluid and adaptable to divergent national preferences. In the US, the federal government has different options for preemption at its disposal. Some authors likewise demand flexible, differentiated response mechanisms in EU law.[164] In some instances, consumer protection is best realized with full harmonization whereas in others, minimum harmonization might be more reasonable. In this regard, targeted full harmonization has been suggested. It would provide a flexible response by ensuring legal certainty in those cases where barriers to trade would be created or consumers would be deterred to shop cross-border.[165]

Moreover, flexibility can be guaranteed by the following solution regarding EU competence distribution in the EU in general. The EU is defined by a competence distribution slightly more complex than that of the US. As formulated by Bogdandy, the EU by trend follows a *Verflechtungsmodell*,

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158 Unberath and Johnston (n 45) 1271.

159 An important, critical comment made in Twigg-Flesner and Metcalfe (n 154) 3, is that full harmonization requires using art 114 TFEU as a legal basis (instead of art 169 TFEU, which only allows for minimum harmonization measures). Thus, full harmonization would again be primarly focused on the internal market, rather than ensuring optimal protection.

160 Mak, 'A Shift in Focus' (n 8); Smits (n 6); Mak 'Review of the Consumer Acquis' (n 47); Loos (n 16).

161 Twigg-Flesner and Metcalfe (n 155); Here Twigg-Flesner uses this as a counterargument to introducing full harmonization, stating that it would create a legal mess.

162 Council 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 [1985] OJ L210/ 29, amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 [1999] OJ L141/20.

163 Michael Faure, 'Product Liability and Product Safety in Europe: Harmonization or Differentiation?' (2000) 53 Kyklos 467; Twigg-Flesner and Metcalfe (n 154) 3.

164 Smits (n 6) 14; See also Mak, 'Standards of Protection' (n 36).

165 Loos (n 16) 27.

i.e. an interdependence or linkage model of competence allocation (similar to the model of German federalism), whereas the US can be described as *Trennungsmodell* or partition model.[166] Competences are related to each other, linked and intertwined mostly via a cooperative division of powers. In the US there seems to exist a more clear-cut separation of competences, while European Community and Member State competences constantly interfere. Accordingly, it has been suggested that traditional means of competence distribution are no longer sufficient.[167] Instead, current developments depict the open method of coordination as an alternative solution to the formal reassignment of powers from national to EU-level.[168]

The open method is based on the concept of regulatory competition employing various cooperative techniques, such as benchmarking, mutual learning, and peer review.[169] Co-ordination is also successfully applied in the US model of consumer protection: Congress structures the centre-state relationship by methods of co-ordination (mentioned in chapter IV. B), including the development of model state laws or the liaison of federal agencies with state governments.[170] Currently, the EU adopts co-ordination methods predominantly in areas of economic policies, applying guidelines, performance indicators and benchmarks.[171] Co-ordination in EU governance is an emerging concept that requires more in-depth research and analysis for further evaluation that for now exceeds the purpose of this paper. It is sufficient to mention here that the EU could learn from the US model and expand the use of open method to areas of shared competence, such as consumer protection, (which has already partially been done[172]). Although it might enhance the problem of fragmentation of consumer protection legislation, with increased regulatory autonomy of Member States and implied 'emergency' powers for the Community, a coordinated response to 'delicate' policy areas, including consumer protection, seems the most suitable.

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166 Bogdandy (n 132) 36.

167 Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press 2009) 71.

168 ibid 72 and Dermot Hodson and Imelda Maher, 'The Open Method as a New Mode of Governance: The Case of Soft-Economic Policy Coordination' (2001) 39(4) Journal of Common Market Studies 720.

169 Hodson and Maher, 'The Open Method' (n 168) 724.

170 Bourgoignie and Trubek (n 3) 71.

171 Hodson and Maher, 'The Open Method' (n 168) 724.

172 ibid 725.

7. Conclusions

Community-wide consumer protection is essential for consumption across borders and for the proper functioning of the internal market. Differing national protection levels prevent both consumers and businesses to engage in cross-border trade. Therefore, consumer-related initiatives have always aimed at contributing to the functioning of the internal market. This was predominantly done by the elimination of national protection legislation (negative integration). For positive harmonization measures, the Community legislature often lacked, and still does lack, an independent legal basis in order to take authoritative steps towards enhanced protection. Directives have mostly been adopted based on Art. 114 TFEU, pursuing internal market purposes. In conclusion, the current consumer protection in the EU is far from being consolidated. It suffers from fragmentation and incoherence, due to minimum harmonization measures and little significant positive integration, but most importantly because the central legislation does not have the competence to coordinate and structure Community-wide consumer protection. Instead, the legal order is judge-made through piece-meal judicial activism on sides of the ECJ.

Lessons can be drawn from the American allocational system. In the US, Congress has major regulatory autonomy in all matters relating to interstate commerce. It can furthermore preempt state legislation and coordinate the competence attribution in areas of the common market. In addition, the federal court can also structure the centre-state relationship by eliminating national regulatory barriers to trade. Most notably, federal institutions do not exploit their powers. The Congress refrains from exceedingly interfering in national consumer policy and courts view national consumer legislation favorably. All these characteristics facilitate competence allocation by providing a predictable and rigorous response mechanism to consumer concerns. In contrast, the EU Community legislature lacks a proper legal basis in the area of consumer protection. Although it is endued by the implied powers doctrine to regulate in all spheres relevant for the proper functioning of the internal market, these competences are limited strictly to those that truly pursue said objective (especially since *Tobacco Advertising I*). Furthermore, the ECJ uses a far stricter validity test on national measures affecting the internal market, creating fears of excessive deregulation. The central legislation is in want of coordination powers, e.g. through preemption or direct effect. In consequence, the EU is limited in enacting adequate Community legislation while at the same time deregulates national protective measures.

By adopting a balancing test for non-discriminatory national rules combined with the presumption of legality, it is possible to curb excessive negative harmonization. National rules are important to account for diverse national preferences. Additionally, Community competences should be enhanced by enabling the use of Art. 114 TFEU and the implied powers doctrine, whereby subsidiarity and proportionality principles prevent any abuse thereof. Also, by providing preemptive powers and by granting direct effect of directives, the Community would be able to structure the centre-state relationship and provide legal certainty. Finally, it can be added that coordination of state and centre legislation on consumer protection can harmonize Member States' actions and transcend difficulties of competence attribution in sensitive policy areas. With these solutions suggested from three different angles (i.e. positive, negative harmonization and coordination), fragmentation can be reduced. This eventually can eliminate uncertainty for all parties involved by providing a functional allocational framework that enables the creation of a coherent and effective system of law. Only with such allocational system can consumers take full advantage of the integrated market in the sense of enjoying 'consumption without borders'.