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The Notion of Consumer in EU Consumer Acquis and the Consumer Rights Directive— a Significant Change of Paradigm?

The word ‘consumer’ is used in various meanings in practice. The notion of consumer as it is known in law differs from the concept of consumer as used in marketing and sociology. In law, precise definition of the ‘consumer’ is essential in order to delimit the circle of persons entitled to extended legal protection in relations with traders whose position is stronger. The wider the circle of persons covered by the definition of consumer, the more extensive the scope of consumer law provisions is and the less reason there is to speak about consumer law as a special regulation concerning a narrow group of persons.

In recent years, as the EU consumer *acquis* is being systematically revised and the fundamental principles of European contract law are being drafted, the academic discussion in international legal literature has mainly been focussed on the aims and principles of consumer contract regulation.^{*1} On the other hand, the issue of determination of the circle of persons entitled to extended protection as consumers has been relatively less touched upon in the discussion hitherto. In this article the authors attempt to bridge this gap and address in greater detail the bases of the concept of consumer in the light of the changing EU consumer *acquis*. The article analyses the concept of consumer in current EU consumer *acquis* and from the perspective of Member States, in particular from that of Estonian national law. Then the impact of the recent EU consumer law initiatives on the concept of consumer is explored, relying on the new consumer rights directive adopted by the European Parliament.^{*2} For that purpose, the main bases of changes are highlighted while addressing the potential risks and challenges of implementing the law in the future.

¹ See, e.g., J. Karsten, A. R. Sinai. The Action Plan on European Contract Law: Perspectives for the Future of European Contract Law and EC Consumer Law. – Journal of Consumer Policy 2003/26; G. Howells, R. Schulze. Modernising and Harmonising Consumer Contract Law. Munich: Selliers 2009; H. Schulte-Nölke. Perspectives for European Consumer Law. Munich: Selliers 2010.

² Position of the European Union adopted at first reading on 23 June 2011 with a view to the adoption of Directive 2011/.../EU of the European Parliament and of the Council 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 (P7_TC1-COD(2008)0196). Available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0293&format=XML&language=ET#BKMD-21>.

1. Notion of consumer *de lege lata*

1.1. The notion of consumer in current EU consumer *acquis*

In current EU consumer *acquis*, the notion of consumer has been specified separately in each adopted instrument. Thus the notion of consumer has been defined in several directives in the area of contract law³; in the area of non-contractual obligations, a ‘consumer’ has been defined in the EU producer liability directive⁴ (85/374/EC) and, in the area of procedural law, in the regulations Brussels I⁵ and Rome I.⁶

The definitions of consumer, as provided for in various EL instruments, do not entirely coincide. A majority of current EU directives defines the consumer as a natural person who, in transactions covered by the directive, is acting for purposes which are outside his trade, business or profession.⁷

The notion of consumer as defined in the price indication directive and the original doorstep selling directive is essentially similar, treating the consumer as any natural person who, in transactions covered by the directive, is acting for purposes that do not fall within the sphere of his commercial or professional activity. Albeit differently worded, the scope of the notion of consumer is, in essence, the same in the Brussels I and Rome I regulations, pursuant to which a consumer is a natural person who has concluded a contract for a purpose outside his commerce or profession. Article 2 (a) of the unfair commercial practices directive goes a little further and excludes from among the persons who can be regarded as having the characteristics of a consumer such persons who operate in crafts (‘is acting for purposes which are outside his trade, business, **craft** or profession’).

Thus, as evidenced above, the definitions of consumer as provided in EU legislation do not completely overlap as far as their content is concerned. Nevertheless, having analysed the notion of consumer in the current EU consumer *acquis* it can be said that most instruments describe a consumer as sharing two central characteristics:

- (a) a consumer is a natural person, and
- (b) in concluding a contract he is acting for purposes which are outside his commercial or professional activities.⁸

As already said, this applies to most of the legislative acts. The package travel directive⁹ is exceptional among the other directives in that in Article 2 (4) it defines consumer as a person ‘who takes or agrees to take the package (‘the principal contractor’), or any person on whose behalf the principal contractor agrees to purchase the package (‘the other beneficiaries’) or any person to whom the principal contractor or any of the other beneficiaries transfers the package (‘the transferee’)’. Though said directive includes a definition of consumer, as do other directives regulating the area of contract law, it is clearly different from the other directives in that the notion of consumer covers not just natural persons but all other buyers of package travel, including persons who conclude a package travel contract inside their commercial or professional activities.¹⁰

³ Article 2 of the original doorstep selling directive (85/577/EEC) and Article 2 (2) of the distance contracts directive (97/7/EC); Article 2 (b) of the unfair terms directive (93/13/EEC); Article 1 (2) a) of the consumer sales directive (99/44/EC); Article 2 (e) of the electronic commerce directive (2000/31/EC); Article 2 e) of the price indication directive (98/6/EC); Article 2 (1) f) of the new timeshare directive (2008/122/EC); Article 2 (D) of the distance marketing of consumer financial services directive (2002/65/EC); Article 2 (a) of the unfair commercial practices directive (2005/29); Article 4 (11) of the new payment services directive (2007/64/EC); Article 2 (4) of the package travel directive (90/314/EEC); Article 3 (a) of the original consumer credit directive and Article 3 (a) of the new consumer credit directive (2008/48/EC).

⁴ 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. – OJ L 210, 7.8.1985, p. 29.

⁵ Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Said act replaces the Brussels I convention of 27 September 1968.

⁶ Regulation (EC) No. 593/2008 of the European Parliament and Council of 17 June 2008 on the law applicable to contractual relations (Rome I). – OJ L 177, 4.7.2008.

⁷ Such a definition can be found in the consumer sale, unfair terms, e-commerce, distance marketing of consumer financial services and payment services directives as well as in the new consumer credit directive.

⁸ M. Ebers. The notion of ‘consumer’. – H. Schulte-Nölke, C. Twigg-Flesner, M. Ebers. EC Consumer Law Compendium. Comparative Analysis, 2008. Available at www.eu-consumer-law.org/consumerstudy_part3a_en.pdf (1.7.2011).

⁹ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours. – OJ L 158, 23.6.1990, pp. 0059–0064.

¹⁰ In transposing the directive, the Estonian legislator managed to avoid terminological confusion in Law of Obligations Act by using the term ‘traveller’ instead of ‘consumer’ in its provisions dealing with package travel contracts (§866 *ff.*).

1.2. The notion of consumer in Member States' law

While exploring the notion of consumer as defined in EU Member States' national law, a rather mottled picture unravels influenced by the Member States' legal traditions and facilitated by the principle of minimal harmonisation used in EU directives to date. Several Member States, such as Estonia, Germany, Belgium, Poland and others, provide for a negative definition of consumer. For example, pursuant to §2 (1) of the Estonian Consumer Protection Act^{*11} (hereinafter referred to as the CPA), consumer means a natural person to whom goods or services are offered or who acquires or uses goods or services for purposes **not related** to his or her business or professional activities. Several other Member States (e.g., Finland, Sweden) use the so-called positive method to define consumer by listing the characteristics of a consumer.^{*12}

In transposing the directives, some Member States (e.g., Hungary, United Kingdom, Cyprus, Ireland, and Luxembourg) have followed the example of the directives and incorporated the definition of consumer into each instrument transposing an EU legislative act. However, several Member States have adopted an approach to develop a general definition of consumer applicable to all of the transposed directives.^{*13}

Estonia is among those Member States which have several general definitions of consumer.^{*14} Besides the definition provided in the CPA, consumer has also been defined in the Estonian Law of Obligations Act^{*15} (hereinafter referred to as the LOA). Section 34 of the LOA sets out that for the purposes of the LOA, a consumer is a natural person who performs a transaction not related to an independent economic or professional activity. This definition does not fully overlap with that provided for in §2 (1) of the CPA. Firstly, as formulated in the LOA, a consumer is a person who **performs a transaction** and not a person to whom **goods are offered**, i.e., a person who might not enter into the transaction. However, the criterion of transaction is not necessarily the decisive constitutive element in clarifying the position of the consumer, as the LOA also sometimes uses the notion of consumer in a context where there is no transaction *per se* (e.g., LOA §99: Provision of goods or services not ordered). Another difference between §34 of the LOA and §2 (1) of the CPA is more fundamental by its nature: Namely, the definition provided in the LOA makes no reference to the *purpose* for which the consumer is purchasing or using the goods or services, but limits itself to transactions **not related** to an independent economic or professional activity. Therefore, it can be argued that LOA's definition is broader than that of the CPA and allows a much wider circle of contracts to be treated as consumer contracts. This conclusion is corroborated by earlier Estonian case-law regarding the contracts of suretyship entered into by the members of the management board of a legal person to guarantee the fulfilment of the obligations of the person. Combining §34 of the LOA and §2 (1) of the CPA, the Supreme Court has taken the view that a person who enters into a contract of suretyship due to having interest in the economic activities of the company cannot be deemed to be a consumer.^{*16} In other words, the court has found that the definition of consumer contained in §34 of the LOA should be delimited and used the definition provided in the CPA for that purpose. It is, however, true that as of 5 April 2011 this practice of the Supreme Court no longer applies to the suretyship issued by a member of the management board because, in order to improve the situation of all sureties who are natural persons^{*17}, §143 (1) of the LOA was amended so that a contract of consumer surety is a contract of suretyship where the surety is a **natural person**.

Teleological interpretation of the definition of consumer as specified in §2 (1) of the CPA leads to the conclusion that the law delimits the notion of consumer only to such a person who purchases or uses goods or services **solely** outside his economic or professional activity. For example, the Austrian and Belgian regulations follow similar principles, while several Member States (Finland, Sweden, Denmark, etc.) proceed

¹¹ Tarbijakaitse seadus. – RT I 2004, 13, 86; 2010, 31, 158 (in Estonian).

¹² C. Joustra. Consumer Law. – A. Hartkamp *et al.* Towards a European Civil Code. Kluwer Law International 1998, pp. 143–144.

¹³ Research Group on the Existing EC Private Law. Principles of the Existing EC Contract Law. Contract II—General Provisions, Delivery of Goods, Package Travel and Payment Services. Munich: Sellier, European Law Publishers 2009, p. 56.

¹⁴ Belgium, Lithuania, Portugal and Slovakia use a similar approach. See M. Ebers. The notion of 'consumer'. – H. Schulte-Nölke, C. Twigg-Flesner, M. Ebers. EC Consumer Law Compendium. Comparative Analysis 2008, p. 456.

¹⁵ Võlaõigusseadus. – RT I 2001, 81, 487; RT I, 4.2.2011, 2 (in Estonian).

¹⁶ CCSCd, 23.3.2006, 3-2-1-8-06, paragraph 15; 8.12.2009, 3-2-1-126-09, paragraph 12.

¹⁷ Võlgade ümberkujundamise ja võlakaitse seaduse eelnõu seletuskiri (Explanatory memorandum to the Draft Act on Restructuring of Debts and Debt Protection). Available at <http://www.riigikogu.ee/?page=eelnou&op=ems&emshelp=true&eid=1004095&u=20110530145824> (1.4.2011) (in Estonian).

from the **principal** purpose of use, i.e., the predominant purpose of use.^{*18} The original wording of the CPA (1.4.2003) too defined a consumer as a natural person who intends to purchase or use goods or services for a purpose which is not **directly** related to his economic or professional activity.^{*19} However, in the course of processing the draft, the definition of consumer was changed and protection was precluded for persons who use, even if just in part, the goods or services in their economic or professional activities.

As evidenced above, similarly to several other Member States and the EU consumer *acquis*, the general notion of consumer as provided for in current Estonian law, as a rule^{*20}, proceeds from a narrow definition of consumer, delimiting the concept to a natural person who uses the commodity solely outside his economic or professional activity. There are, however, Member States which, under certain circumstances, also extend consumer protection provisions to legal persons. As far as the purpose of consumer transactions is concerned, based on the national law of most Member States it cannot be said whether treating a contract as a consumer contract depends on the **principal** purpose of the contract or if just any connection with the person's professional activity precludes the application of consumer provisions.^{*21}

2. Main characteristics of the concept of consumer in the context of the changing EU consumer *acquis*

2.1. Revision of the EU consumer *acquis*

The revision of the EU consumer *acquis* is a part of the measures implemented to apply Community's contract law uniformly and improve the functioning of the internal market. The review was necessitated by the need to tackle the fragmentation of consumer protection legislation and to modernise and simplify the system of rules which had become out-dated due to rapid development of technical capabilities. The procedure was initiated back in 2004 by the Commission, with its communication^{*22}, and it covers eight consumer directives.^{*23} The Green Paper on the review of Community's consumer *acquis*, published in February 2007, notes that the overarching aim of the Review is to 'achieve a real consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring the strict respect of the principle of subsidiarity' and at the end of the exercise it should, ideally, be possible to say to EU consumers 'wherever you are in the EU or wherever you buy from it makes no difference: your essential rights are the same'.^{*24} The Green Paper also notes that there are certain issues which are common to all directives of the consumer *acquis* which could be extracted from the existing directives and regulated in a horizontal instrument. The notion of consumer is one of such issues: The Commission stresses that a consistent definition of the notions of consumer and professional is important since it permits to delimit the scope of the *acquis* more accurately and that during the review the widening of the definitions to cover transactions for mixed purposes should be considered.^{*25}

¹⁸ Research Group on the Existing EC Private Law. Contract II—Principles of the Existing EC Contract Law. Sellier. European Law Publishers 2009, p. 55.

¹⁹ Clause 2 1) of the original draft Consumer Protection Act (SE 14, 1.4.2003) defined consumer as follows: a natural person who intends to purchase or purchases and uses goods and services for a purpose which is not directly related to his economic or professional activity.

²⁰ One exception to the rule is, e.g., the Electronic Communications Act (elektroonilise side seadus. – RT I 2004, 87, 593; RT I, 23.03.2011, 1 (in Estonian)) whose §2 55) sets out that a consumer is an end-user who is a natural person and who mainly does not use electronic communications services in his or her economic or professional activities. The current regulation does not specify the criteria of predominant use.

²¹ There are 20 of such Member States. See M. Ebers. The notion of 'consumer'. – H. Schulte-Nölke, C. Twigg-Flesner, M. Ebers. EC Consumer Law Compendium. Comparative Analysis, 2008. Available at www.eu-consumer-law.org/consumerstudy_part3a_en.pdf (30.5.2011).

²² Communication of the Commission to the European Parliament and Council. European Contract Law and the revision of the *acquis*: the way forward. Brussels 11.10.2004. COM(2004) 651 final. – OJ C 14, 20.1.2005, p. 3 ff.

²³ Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises; directive 93/13/EEC on unfair terms in consumer contracts; directive 97/7/EC on the protection of consumers in respect of distance contracts; directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees.

²⁴ Green Paper on the Review of the Consumer *Acqui*. Brussels 8.2.2007, COM(2006) final, p. 3.

²⁵ Green Paper, pp. 11 and 15.

The new consumer credit directive^{*26} and timeshare contract directive^{*27}, replacing previous directives, were the first to be adopted during the revision of the EU consumer *acquis*. The new directives approach the notion of consumer the same way as the original directives and, as a result, each directive defines the notion of consumer separately but not in the same wording. Thus, it can be said that unlike the emphasis of the Green Paper, it was not deemed necessary to use a uniform and consistent approach to the notion of consumer in the first revised directives.

In October 2008, in the framework of revising the consumer *acquis* the Commission tabled a proposal for a directive on consumer rights.^{*28} The European Parliament adopted the new directive on 23 June 2011. The new directive, in whose drafting the standpoints that had evolved during the drafting of the Draft Common Frame of Reference^{*29} (hereinafter referred to as the DCFR) were taken into account, combines into one whole two previous EU directives.^{*30} The goal is to enhance consumers' trust and curb the bureaucracy which has hindered companies' activities in other EU Member States, thus stripping the consumers of the freedom of choice and competing offers. In legal literature the new directive has already been seen as a suitable foundation for a future European code of consumer rights (contracts).^{*31} The consumer rights directive uses for the first time in the EU consumer *acquis* a uniform general notion of a consumer applicable to all of the consumer contracts covered by the framework directive.

2.2. Consumer as a natural person

As noted above, in the EU consumer *acquis* the notion of consumer covers as a rule just natural persons. This has been on several occasions emphasised in the case law of European Court of Justice. In joined cases *Idealservice* the European Court of Justice took a firm stance in interpreting the unfair terms directive^{*32} that the notion of consumer covers only natural persons.^{*33}

In the *Di Pinto* case the European Court of Justice interpreted, for the purposes of the doorstep selling directive^{*34}, the notion of consumer in a narrower sense, noting that a trader canvassed with a view to the sale of his business is not to be regarded as a consumer protected by the directive and explained that the directive does not afford protection to legal persons even if they are in a position similar to that of a consumer.^{*35}

In a number of Member States, including in Estonia's current law and case-law, the notion of consumer is solely delimited to natural persons^{*36} and this position is also supported in legal literature.^{*37}

In the discussions held in the Commission on the consumer regulation of the Draft Common Frame of Reference, the experts agreed that the notion of consumer should cover solely natural persons.^{*38} This

²⁶ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC. – OJ L 133, 22.5.2008, pp. 66–92.

²⁷ Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contract. – OJ L 033, 3.2.2009, pp. 0010–0030.

²⁸ Proposal of the EC Commission for a Directive of the European Parliament and of the Council on consumer rights COM(2008) 614 final, 8.10.2008.

²⁹ C. von Bar, E. Clive, S. Nölke (eds.). Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Munich: Selliers 2009.

³⁰ Doorstep selling directive and distance contracts directive; in addition, the unfair terms directive and consumer sale directive will be amended; the Commission originally intended to replace all four directives with a new directive.

³¹ M. W. Hesselink. Towards a Sharp Distinction between B2B and B2C? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive (June 8, 2009). – Centre for the Study of European Contract Law Working Paper Series 2009/06.

³² Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. – OJ L 095, 21.04.1993, pp. 0029–0034.

³³ ECJ, 22.11.2001, joined cases C-541/99 and C-542/99, *Idealservice*, paragraph 17. – ECR 2001, pp. I-09049.

³⁴ Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises. – OJ L 372, 31.12.1985, pp. 0031–0033.

³⁵ ECJ, 14.3.2003, C-361/89, *Patrice Di Pinto*, paragraphs 19 and 23. – ECR 1991, p. I-01189.

³⁶ See CCSCd, 3-2-1-126-09, paragraph 12; 3-2-1-111-10, paragraph 11; 3-2-1-118-05, paragraph 34. In the latter case the Supreme Court clearly noted that a consumer is also regarded as a natural person under §34 of LOA.

³⁷ I. Kull, M. Käerdi, V. Kõve. *Võlaõigus I: Üldosa* (Law of Obligations I. General Part). Tallinn 2004, p. 122 (in Estonian).

³⁸ Commissions Second Progress Report on the Draft Common Frame of Reference, COM(2007) 447 final, 25.7.2007, p. 3.

stance is also expressed in the DCFR: Pursuant to Article I.-1:105 of the DCFR, a consumer is a natural person. Legal persons performing transactions outside their normal economic or professional activities are not regarded as consumers.

Pursuant to Article 2 (1) of the proposal for a consumer rights directive^{*39} the notion of consumer initially covered just natural persons. The opinion published on 16 July 2009 by the European Economic and Social Committee^{*40}, however, noted that the framework directive should adopt a clear position, *inter alia*, regarding whether the notion of consumer could be extended to certain legal persons, as a number of Member States have done. Based on the opinion of the European Economic and Social Committee, the proposal for a directive was supplemented by a clause to the effect that the Member States may maintain or extend the rules of the directives to natural or legal persons who are not consumers within the meaning of the directive.^{*41}

Recital 13 of the adopted directive includes the right of the Member States to maintain or introduce national legislation corresponding to the provisions of the directive or certain of its provisions in relation to transactions that fall outside the scope of the directive. However, the same recital sets out the right of the Member States to decide to extend the application of the rules of the directive to legal persons or to natural persons who are not ‘consumers’ within the meaning of the directive, such as non-governmental organisations, start-ups or small and medium-sized enterprises.

This clause may be seen as being different from the original proposal for a directive, as proposed by the Commission, whose aim was maximum harmonisation, but rather as the retention of the principle of minimum harmonisation and concession to those Member States which have provided in their current laws for an option to regard certain legal persons as consumers (e.g., Spain, Belgium, Slovakia, Denmark, Greece, and Austria).^{*42}

For those countries, the requirement of maximum harmonisation would have meant significant restriction of the scope of the consumer *acquis*. It has been likewise noted in legal literature that in such a situation maximum harmonisation does not widen the consumer’s rights but instead restricts them.^{*43}

On 9 October 2010, the European Commission published an unofficial note to the proposal for a consumer rights directive^{*44}, which is intended to serve as a guide to the implementation of the proposal for a directive as regards certain types of contracts. The note provides clarification as to who might be these legal or natural persons which are not ‘consumers’ in the meaning of Article 2 (1) regarding whom the Member States may maintain or extend the application of the rules of the proposal. According to the note, a Member State may, e.g., give NGOs or small businessmen status equal to that of consumers. However, it is pointed out that such persons that have equal rights with the consumers should not be referred to as ‘consumers’ as that would be incompatible with the definitions in the proposal for a directive.^{*45}

Given that the initiatives of the past few years do not directly regard legal persons as consumers and continue to stress the need to delimit the notion of consumer to just natural persons, one may conclude that there have not been significant changes in the paradigm of EU law regarding this issue.

³⁹ Proposal of the EC Commission for a Directive of the European Parliament and of the Council on consumer rights COM(2008) 614 final, 8.10.2008.

⁴⁰ European Economic and Social Committee. Opinion on the Proposal for a Directive of the European Parliament and of the Council on consumer rights (16.7.2009), p. 5.4.1. INT/464 – CESE 1190/2009 – 2008/0196 (COD). Available at <http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=2&procnum=COD/2008/0196> (1.7.2011).

⁴¹ Draft European Parliament Legislative Resolution on the proposal for a directive of the European Parliament and the Council on consumer rights (COM(2008)0614 – C7-0349/2008 – 2008/0196(COD)). Ordinary legislative procedure—first reading. Amendment 59 (Article 2—point 1). Available at <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A7-2011-0038&language=EN> (1.7.2011).

⁴² Research Group on the Existing EC Private Law. Contract II—Principles of the Existing EC Contract Law. Sellier. European Law Publishers 2009, p. 59.

⁴³ G. Howells, R. Schulze. Modernising and Harmonising Consumer Contract Law. Sellier European Law Publishers 2009, p. 10.

⁴⁴ European Community Note (9.10.2010—working document). The Proposal for a Directive on Consumer Rights: Scope, relationship with national general contract law and relationship with other community legislation. Available at http://ec.europa.eu/consumers/rights/docs/note_CDR_en.pdf (1.7.2011).

⁴⁵ *Ibid.*

2.3. Consumer acting outside his economic or professional capacity

As a rule, the wording of the consumer directives does not provide a clear answer to the question whether or not consumer protection is also extended to a natural person in cases where his transaction is at least slightly connected with his economic or professional activity.^{*46}

The European Court of Justice has in its earlier case-law supported the approach that even the minor connection with professional activity is sufficient to preclude the application of consumer provisions. In the *Dietzinger* case, the European Court of Justice adopted in 1998 the position that a contract of guarantee concluded by a private person for the purpose of guaranteeing the obligations of a building firm cannot be treated as a consumer contract in the meaning of the doorstep selling directive 85/577. The court noted that as regards a guarantee, the provisions applicable to a consumer can be implemented only if the commitment is entered into for a purpose which is unconnected with the guarantor's trade or profession.^{*47} The European Court of Justice has also found that a person who had entered into a contract for the purpose of engaging in business in the future cannot be treated as a consumer.^{*48}

In the 2005 *Gruber* case^{*49}, the European Court of Justice demonstrated a somewhat more accommodating approach. In that case, a decision was needed on whether a contract entered into by a farmer for the purpose of buying roof tiles was a consumer contract in view of the fact that the area of the building used for personal purposes was slightly more than 60% of the total floor area. The European Court of Justice found that a person may be treated as a consumer where the link between the purpose of a transaction and the trade or profession is so slight as to be **marginal**. Hence, the European Court of Justice acknowledged that a slight connection to a professional activity does not preclude the application of the consumer provisions. As mentioned above, it cannot be unambiguously said on the basis of the national laws of the majority of Member States whether or not a contract should be regarded as a consumer contract on the basis of the **primary** purpose of use.^{*50} A number of Member States have extended the application of consumer provisions to transactions primarily entered into outside professional either *expressis verbis* (Denmark, Finland, and Sweden) or address the issue in their case-law (Germany). It is precisely from the German case-law that the often cited in legal literature example of a lawyer who buys a car, which he then uses both for business and private purposes, comes.^{*51} Likewise it has been concluded in Estonian legal literature that where a natural person enters into a contract which is partly linked to his professional activities, the contract is qualified depending on the predominant purpose of the transaction.^{*52}

The Commission's Green Book notes that during the review of consumer *acquis* the widening of the definitions is needed to cover transactions for mixed purposes, i.e., transactions whose object is used in part to satisfy personal needs, in part for business or professional activity.^{*53} This would be a major conceptual change in the definition of a consumer compared to the current approach employed in EU consumer *acquis* which does not recognise transactions for mixed purposes as consumer transactions. The DCFR too mirrors the changes in the perception of the extent of the concept of a consumer: pursuant to Article I.-1:105 (1), a consumer is any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession. However, the definition of consumer as worded in the DCFR allows partial use of the transaction object in trade or profession (so-called dual use). The DCFR also regards as consumer contracts such contracts whose purpose is to generate one-time profit—for example, resale of a purchased item, unless such activity is regular. The frequency and volume of transactions determine whether or not such resale activity qualifies as a consumer contract.^{*54} Article I.-1:105 (3) of the DCFR deals with contracts

⁴⁶ Article 9 (b) ii of directive 85/374 is exceptional in that it speaks about the main purpose of use.

⁴⁷ ECJd 17.3.1998, C-45/96, *Bearish Hypothesen- und Wechselbank AG v. E. Dietzinger*. – ECR 1998, p. I-1199, paragraph 22. Here, parallels may be drawn regarding the Supreme Court's case-law on suretyship issued for the purpose of guaranteeing the obligations of a legal person dealt with above in the text.

⁴⁸ ECJd, 3.7.1997, C-269/95, *Francesco Benincasa/.Dentalkit Srl*.

⁴⁹ ECJd, 20.1.2005, C-464/01, *Gruber*. – ECJ Cases 2005, p. I-00439.

⁵⁰ M. Ebers. The Notion of 'consumer'. – H. Schulte-Nölke, C. Twigg-Flesner, M. Ebers. EC Consumer Law Compendium. Comparative Analysis, 2008. Available at www.eu-consumer-law.org/consumerstudy_part3a_en.pdf (30.5.2011).

⁵¹ OLG Celle, 7 U 193/06. Available at <http://app.olg-ol.niedersachsen.de/efundus/volltext.php4?id=4389> (1.4.2011).

⁵² P. Varul *et al.* *Võlaõigusseadus I. Kommenteeritud väljaanne* (Law of Obligations Act. Commented Edition). Tallinn: Juura 2006, §34 comment 2 (in Estonian).

⁵³ Green Book, Annex I, clause 4.1.

⁵⁴ DCFR, p. 92.

that have different purposes of use. If a person can be treated both as a consumer and a trader, he is deemed to be a consumer in the context of provisions providing protection to consumers. This clause is intended to solve those situations where a transaction carries a personal as well as trade and profession related purpose. Thus, a person who buys a computer which he primarily uses for personal purposes and, to a slight extent, also for the purposes of trade, is a consumer.^{*55}

Article 2 (1) of the original proposal tabled by the Commission regarding the consumer rights directive defined a consumer as any natural person who, in contracts covered by the directive, is acting for purposes which are outside his trade, business, craft or profession. This approach matched the more narrow approach that had become rooted in EU consumer *acquis* but differed significantly from the approach to consumers employed in the DCFR, and, as such, the proposal was criticised in the legal literature exploring the proposed directive.^{*56} Also, the opinion of 16 July 2009 of the European Economic and Social Committee, mentioned above, referred to a contradiction between the proposed directive and the approach of several Member States regarding the transactions for mixed purposes.

Pursuant to the note of the European Commission dated 9 October 2010, the scope of the directive includes contracts concluded both for professional and private purposes when the private purpose is clearly predominant. The note recommends that the predominant purpose be assessed by national courts on a case by case basis.^{*57} The legal definition of a consumer was changed in the proposal for a directive submitted on 24 March 2011 to the European Parliament for the first reading^{*58}, defining it as follows: ‘consumer’ means any natural person who, in contracts covered by this directive, is acting **primarily** for purposes which are outside his trade, business, craft or profession.

Article 2 (1) of the consumer rights directive adopted by the European Parliament defines a consumer as any natural person who, in contracts covered by the directive, is acting for purposes which are outside his trade, business, craft or profession. This regulation should be viewed in conjunction with Recital 17 of the directive, pursuant to which if the contract is concluded for purposes partly within and partly outside the person’s trade (dual purpose contracts) and the trade purpose is so limited as not to be predominant in the overall context of the supply, that person should also be considered as a consumer.

The authors hold that considering a person as a consumer based on the main goal of the transaction represents, at the EU level, a significant paradigmatic change in the concept of a consumer, resulting in a major expansion of the scope of consumer provisions.

Therefore it is all the more surprising how the definition of a consumer has been structured in the two already revised directives compared with the DCFR and the new consumer rights directive. Namely, Article 3a of the new consumer credit directive and Article 2 (1) of the timeshare contract directive are based on the early dogmatic approach that a natural person can be regarded as a consumer only if the purpose of his transactions is in no way related to his economic or professional activity. At that, Article 22 (1) of the consumer credit directive sets out that Member States may not maintain or introduce in their national law provisions diverging from those laid down in this directive. For the Estonian legislator, e.g., it means that a contradiction between the directive and §403 (2) of the LOA needed to be removed as it extends the definition of consumer credit to cover also the transactions entered into to start a business. As the Estonian legislator did not want to relinquish the already existing protection of the recipient of loan or credit^{*59}, the following solution was found: a natural person who concludes a contract to take out credit in order to start independent economic or professional activity is not considered as a consumer, however, consumer credit provisions apply to such a contract.

⁵⁵ DCFR, p. 94.

⁵⁶ G. Howells, R. Schulze. *Modernising and Harmonising Consumer Contract Law*. Sellier European Law Publishers 2009, p. 12; M. B. M. Loos. *Review of the European Consumer Acquis*. Sellier European Law Publishers 2008, p. 11.

⁵⁷ European Community Note (9.10.2010—working document). *The Proposal for a Directive on Consumer Rights: Scope, relationship with national general contract law and relationship with other community legislation*. Available at http://ec.europa.eu/consumers/rights/docs/note_CDR_en.pdf (1.4.2011).

⁵⁸ Proposal for a directive of the European Parliament and of the Council on consumer rights (COM(2008)0614 – C6-0349/2008 – 2008/0196(COD)). Ordinary legislative procedure: first reading. Amendment 59 Article 2-point 1. Available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0116> (1.7.2011).

⁵⁹ Seletuskiri võlaõigusseaduse ja teiste seaduste muutmise seaduse eelnõu juurde (Riigikogu XI koosseisu eelnõu 761 SE III) (Explanatory Memorandum to the Draft Act Amending the Law of Obligations Act and Other Acts (draft 761 SE III of the 11th composition of the Riigikogu)), p. 12. Available at <http://www.riigikogu.ee/?page=eelnou&op=ems&emshelp=true&id=1033413&u=201101312101> (in Estonian).

Upon enforcement of the consumer rights directive, there is also a question on how to address the situation where under national law the same general definition of a consumer applies both to consumer credit and consumer sale (as it is under Estonian law), but EU directives foresee concepts of a consumer with varying scope for those contracts. The authors believe that in such a situation it would be reasonable to proceed from the wider general definition of a consumer and provide for necessary restrictions for specific types of contracts. One must, however, acknowledge that such a regulative method is justified only as long as the wider general definition covers more types of contracts than contracts to which the more narrow definition applies. Several Member States have attempted to introduce a general definition of a consumer in their national law on the basis of EU consumer *acquis*; however, as things stand currently, the situation is much better in those Member States which have defined the notion of a consumer in each law separately. This is a paradox given that the main goal of revising the consumer *acquis* is to achieve greater coherence and that the Commission has in the Green Book emphasised the need to harmonise basic terms.

2.4. Recognition of a person as a consumer— a subjective or objective approach?

Having concluded that the provisions protecting consumers also apply to natural persons (Section 2.2) who primarily enter into transactions outside their economic or professional activity (Section 2.3), a question emerges whether the interpretation of his conduct by the other party is relevant in recognising a person as a consumer. In other words, if a natural person enters into a transaction in his economic or professional activity but that purpose is not recognisable to his contractual partner, should the consumer provisions be applied to such a transaction? Or should the consumer provisions also be applied in a case where a person enters into the contract for personal purposes but his conduct creates an impression that he is a person engaged in economic or professional activity?

An example from German Supreme Court case-law illustrates such a situation.⁶⁰ A car dealer wished to sell a used car only to such a person who is not a consumer because he wanted to use the possibility to exclude the seller's guarantee. The buyer, who wanted the car for personal use, was aware of the fact; however, as the case was, the car would not have been sold to him and so he maintained that he was buying it for his economic and professional activity. Later, the buyer wished to withdraw from the contract due to the seller's breach and invoked that the contract was a consumer contract. The court found that a person who deceives his contractual partner in order to avoid the contract being qualified as a consumer contract cannot, based on the principle of good faith, subsequently enjoy legal remedies designed for consumers.

Under Estonian positive law and the case-law to date, it is also possible to restrict the rights of a contractual party who, in concluding the contract, poses as an undertaking but wishes to invoke consumer protection provisions in submitting claims arising out of the contract. The authors find that such conduct has elements of contradictory conduct (*venire contra factum proprium*). Pursuant to §138 (1) of the General Part of the Civil Code Act⁶¹ (hereinafter referred to as the GPCCA), rights shall be exercised and obligations shall be performed in good faith. Under §6 (1) and (2) of the LOA, obligees and obligors shall act in good faith in their relations with one another and nothing arising from law, a usage or a transaction shall be applied to an obligation if its contrary to the principle of good faith. The Supreme Court's case-law has several examples where the principle of good faith has been used to restrict the claims of a person due to his contradictory conduct.⁶²

The same question has been raised in the case-law of European Court of Justice. In the above cited *Gruber* case the court found that the consumer contract provisions of the Brussels convention do not apply where the supposed consumer had in fact, by his own conduct with respect to the future contractual party, given the latter the impression that he was acting for business or professional purposes (e.g., the person uses corporate letterheads, asks the goods to be delivered to a business address, etc.). According to the approach of the European Court of Justice, such a conduct should be treated as waiver of the protection

⁶⁰ BGH NJW 2005, 1045 *ff.*

⁶¹ Tsiviilseadustiku üldosa seadus. – RT I 2002, 35, 216; RT I, 6.12.2010, 12 (in Estonian).

⁶² E.g., decisions of the Civil Chamber of the Supreme Court 3-2-1-37-00 (acceptance of unsatisfactory performance, creating an impression that the performance was satisfactory, and later invoking breach of contract); 3-2-1-66-05 (failure to submit timely penalty claims and invoices and subsequent claiming of damages) and 3-2-1-32-06 (invoking the nullity of standard terms by the very user of the standard terms).

provided for by the consumer provisions.^{*63} The authors of the DCFR also hold that if a consumer, upon entering into a contract, knowingly gives the other party impression of being an undertaking (or 'business'), the provisions protecting the consumer should not be applied as the person's conduct is contrary to the principle of good faith.^{*64}

EU consumer *acquis* does not impose a general duty to act in good faith. The Green Paper addresses the option to provide for such a principle and notes that the inclusion of such a principle, which would act as a safety net, would fill in any future regulatory gap and ensure that the *acquis* remains future proof.^{*65} However, neither the already revised directives nor the new consumer rights directives foresee such a good faith clause. The principle of good faith and fair trading has been expressed in the DCFR. Direct contradictory conduct is addressed in Article I.-1:103 (2) under which conduct of a person is contrary to good faith if it contradicts his previous conduct or representations.

The authors of the article hold that the approach according to which a natural person can objectively be regarded, upon entering into a contract, as a consumer is justified and the concluded contract should be treated as a consumer contract. But if, upon concluding a contract, a person creates an impression of being an undertaking, the application of the consumer provisions is not justified. The authors build their opinion, firstly, on the fact that it is important for an undertaking to know whether or not the other party is a consumer already before entering into the contract as this may determine the extent of the undertaking's pre-contractual and contractual obligations. For example, if an undertaking enters into a contract with a consumer he may be required to disclose more pre-contractual information, one must also take into account some specifics in using contractual legal remedies or restricting liability by agreement or in using standard terms. Therefore, an undertaking must be able to rely, upon concluding a contract, on the conduct and representations of the other party. Secondly, the authors hold that the duty to act in good faith should not only rest with undertakings but also with consumers—treating the consumer as the weaker part of a transaction does not mean that he should be allowed to behave contradictorily.

3. Conclusions

To date, the EU consumer *acquis* has employed an approach to incorporate the definition of a consumer in each separate legislative instrument and these definitions do not coincide. While the Commission notes in its Green Paper that the definition of a consumer is one of the issues which should be uniformly regulated in all of the directives to be revised, the two directives adopted in the consumer *acquis* revision process do not follow the principle. This conclusion is based on the observation that the definitions of a consumer in the new consumer credit directive, timeshare contracts directive and consumer rights directive do not match. As far as the consumer rights directive is concerned, there is also a reason to speak about a significant change in the concept of consumer as, although firmly holding on to the principle that a consumer is a natural person, unlike the EU consumer *acquis* to date, any natural person who acts **primarily** for a purpose not linked to his trade or business is also considered a consumer.

Hence, it can be said that the revision of the directives has not led to a greater consistency in the consumer *acquis* as far as the notion of consumer is concerned and if, until now, it could be said that the EU consumer *acquis* proceeded from a narrow definition of a consumer, two clearly differing doctrines are emerging at the legislative level. Member States who to date have limited themselves to just transposing the minimum criteria set out in the directives and have used one general definition of a consumer in the process, are now forced to decide whether to widen the definitions for certain types of contracts (which renders the idea of one general definition questionable) or amend the general definition (which involves a significant change in the addressees of the provision and its application instances, which requires a thorough analysis as well as legal and political decisions). The legislators of the Member States continue to face the challenge of tackling the problem of taking over EU legislation into their national laws where the instruments do not coincide. And paradoxically the problem related to the regulation of the definition of a consumer arises out of the revision of the EU consumer *acquis* whose goal is to achieve better coherence of *acquis*.

⁶³ ECJd, 20.1.2005, C-464/01, *Gruber*, paragraphs 52 and 53. – ECR 2005, p. I-00439.

⁶⁴ The approach employed in the *Gruber* case is considered too harsh as the court deemed wrong impression given by the consumer out of carelessness to be sufficient to preclude the consumer provisions. See C. Von Bar, E. Clive. Draft Common Frame of Reference (DCFR). München: Sellier 2009, p. 103.

⁶⁵ Green Paper, p. 18.