Consumers

I suppose that it may be safely said, about contemporary market that to one of its main characteristics belongs presence of a specific group of participants who enjoy constantly increasing protection in relations with other subjects. Members of this group are being called consumers.

Due to the fact that law provides consumers with some privileges (for instance duty of providing information, cool off period, etc…) it is very important to determine who exactly belongs to this privileged category in order to determine whether in a particular situation one of parties is entitled to such privileges or not.

Term “consumer” already has its **well-established meaning**. Usually consumer is described as: *one who uses an article made by another* [30], person who *uses goods* [31], *one that utilizes economic goods* [32] or *a person who purchases goods and services for his own personal needs* [33]. There are two important elements supplementing these definitions that allow to achieve more precise picture of this ambiguous concept.

First is “**consumer**” being contrasted with “**producer**” [34] who is presented as *one who produces, a farmer or a manufacturer* [35], *person who produces goods* [36], *one that produces; esp. one that grows agricultural products, manufactures crude materials into articles of use* [37] or *a person or business enterprise that generates goods or services for sale* [38].

Secondly, while verb "**consume**", as having very broad meaning, does not help in obtaining more precise view of who consumer is; than strictly defined term "
consumer goods
" certainly does. It's usually presented as:
goods to be used, without further manufacturing process, to satisfy human needs
[39]
, goods that directly satisfy human wants
[40]
goods which directly satisfy human needs and desires (eg. food and clothing) (opposing to ***capital goods***
, eg. factory equipment)
[41]
.

Basing on these definitions consumer could be described as a: natural person, purchasing and using for his own use specific kind of goods and services, namely consumer goods which are aimed not at production of another goods but directly at satisfying his (her) needs and desires.

What's usually mentioned while describing consumer as a passive participant of the market is his **position of the "last chain"** (which could be described as "final consumer" – German *Endv erbraucher*
) in the circulation of products on the market. Nonetheless description of a consumer as of a person purchasing product for the sole purpose of using it to satisfy his own and his family needs, although presenting a typical situation, nevertheless
constitutes a rule with many exceptions
. Rapidly developing market of
consumer to consumer transactions
, taking very often form of auctions – albeit not being limited to them, constitutes the best proof of such exceptions.

The law of European Union is neither clear nor unambiguous in determining the scope of the term consumer. As professor M. Dauses wrote EC law does not poses any exhaustive definition of the term consumer. As a result of this fact what's usually used is description of partly economic and partly political nature, due to which consumer is described as **an addressee of all activities undertaken by offerors of consumer goods aiming at their sale**
. Such a definition was supplemented by European Parliament with description of a consumer as
an individual entity, which acts for the purpose of a particular transaction out of scope of trade or profession

.
[42]

In fact there is one definition which dominates in Communities' secondary law:
"consumer" means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession [43]

Despite differences between particular directives their comparison may lead to some general conclusion. To ascertain that we deal with a consumer three preconditions must be met – these preconditions include simultaneous existence of three elements:

- right person,
- right transaction and
- right another contracting party.

right person

I'm strongly convinced that reasonable is limiting the scope of special protection offered by consumer law only to natural persons, such approach is represented in most acts of EC law. Only Directive on package travel, departs from this "natural person" approach in article 2.4 defining consumer as: *the 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')* .

Nevertheless the minimal nature of directives allows Member States to introduce higher level of consumer protection, what may mean covering also other subjects with the same protection as received by consumers. Nonetheless also in the Polish law, the new article 22^1 of the Polish Civil Code, contrary to derogated article 384§3, limits the notion of a consumer only to natural persons.

Also **Council Regulation (EC) No 44/2001** on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as well as derogated by this Regulation, **Brussels Convention**
of 1968, defines consumer as

a person who concluded a contract for a purpose being outside his trade or profession , allowing to construe this term also in its broader sense.

Extension of consumer protection, onto subjects other than natural persons, is not just a theoretical possibility – for instance in France and Denmark such protection was extended onto wider category of subjects (in France, for instance, onto political parties). [44]

Admissibility of such approach was confirmed by ECJ in the case C-361/89.

Situation is clearer on the other side of Atlantic, as all pieces of legislation in the US relating to consumers' protection in e-commerce, define consumer as *"**an individual**"* [45] what leaves out anyone but natural persons, moreover evidently cover management of personal and family investments with consumer protection.
[46]

Transaction

Not all transactions concluded by natural persons come within the scope of consumer transactions. Transaction must lie **outside trade, business or profession** of a natural person undertaking it.

Communities' law is rather vague on this point, what could be suggestive is mention in directive on e-commerce which in article 3.4.a.i.paragraph 4 says about ***consumers, including investors*** , what could indicate that in the other articles term "consumer" does not comprise investors. On the other hand directive 2002/65 definitely covers also financial services which belong to investments
[47]
, granting thus protection to those natural persons who conduct such transactions for purposes which are outside their trade, business or profession. Although it may be possible to find transactions which could be considered as investment nevertheless are not covered by directive 2002/65, moreover this directive covers only the issue of distance marketing of such transactions.

Some of these doubts may be seen in opinion presented by W. Szpringer who defines

consumer as *usually a minor client, natural person, for instance a petty saver but not a institutional investor (…) What's characteristic for a consumer is that he doesn't act as an entrepreneur* . [48]

According to the ECJ, determination of whether a person has the capacity of a consumer rests on an **objective evaluation of relationship** between the person and concerned contract. Reference must be made to the **nature and aim of the contract** and not to the subjective situation of the person concerned. In other words, what is relevant is not the actual use made of the purchased product but rather the purpose of the contract. As ECJ held in aforementioned case C269/95 (Benincasa) only **contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption** are embraced by articles 13-15. Moreover, the concept of consumer does not encompass a person who entered into a contract "with a view to pursuing a trade or profession, not at the present time but the future".

However, in some cases besides contracts concluded not just for private consumption also those concluded for family requirements are considered as embraced by articles 13-15 of the Brussels Convention. [49]

Aforementioned regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters states which transactions are covered. Presenting three potential situations where jurisdiction is determined by the Section 4 of Regulation – *Jurisdiction over consumer contracts,* these three cases are:

- a contract for the sale of goods on instalment credit terms; or
- a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
- in all other cases, **the contract concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State** or to several States including that Member State, **and the contract falls within the scope of such activities** .

It’s rather unquestionable that company which offers sale of goods or services over a website to residents of a particular Member State directs its activities to that Member State. Here we come to the last necessary element – right contracting party.

RIGHT CONTRACTING PARTY

Transactions concluded between two consumers (two persons acting out of their trade or profession) are not covered by typical consumer protection. The very idea of consumer protection assumes imposition of greater responsibility onto one subject because its position is somehow stronger – what may be a result of a better access to information, economical potential, professional knowledge which such an entrepreneur possesses or at least ought to posses.

So only, when a contracting party is natural or legal person acting within the scope of its business or profession consumer protection takes place.

After an attempt of creating a definition of e-commerce basing on the notion of information society services it would be advisable to show relations between terms consumer, entrepreneur and notions introduced by directive on e-commerce: service provider and service recipient.

Service provider means any natural or legal person providing an information society service. Directive on e-commerce distinguishes besides “average” service providers also their qualified form – **established service provider** – what means service provider who effectively pursues an **economic activity using a fixed establishment for an indefinite period**. The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an **establishment** of the provider;

Recipient of the service – any natural or legal person who, for professional ends or otherwise, **uses an information society service**, in particular for the purposes of **seeking information or making it accessible**.

While it's certain that **entrepreneur may play both roles of service provider as well as of service recipient,** and do it even at the same time. For example person who wants to establish Internet shop needs to obtain services of provider of access to communication network (Inernet access provider) and in most cases he'll need to place his webpage on someone's server (use so called hosting). At the same time as a person running an Internet shop in contacts with consumers he'll act as a service provider.

Consumers may act only as recipients of the service, and absolutely cannot act in character of established service providers or even that of service providers. Even if a consumer runs a private webpage it still doesn't constitute a information society service, as hobbyist webpages cannot be treated as a service **normally provided for remuneration**. Once a person builds such a webpage for the purpose of placing paid advertisements (banners, etc…) than he cannot take advantage of protection provided by consumer law.

What is important in the light of ECJ's judgements – for instance Case C-269/95 between Francesco Benincasa and Dentalkit Srl is the fact that the specific protection granted by consumer law is unwarranted in the case of contracts for the purpose of trade or professional activity, **even if that activity is only planned for the future**, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character (C-269/95, point 17) – it has un-consumer nature from the very beginning, not for example from the moment of placing the first advertisement, etc…

Notion of a consumer and entrepreneur in Poland

Definitions of consumer in Polish law:

Not only notions – of service provider and recipient – are used in the act on providing services by electronic means, in the same way as in directive 2000/31, also the notion of a consumer in Polish law does not differ from this adopted in most of directives.

Before 25 September 2003

Similarly as in EC law also in Poland there is no one universal definition of a consumer. The most important among statutory definitions is one in the Civil Code. For the first time such definition had been introduced to the Civil Code on the 1 of July 2000 by the Act on the protection of some of consumers' rights [50] which besides other amendments to article 384 of the Civil Code introduced § 3 saying that: **as a consumer is considered a person who concludes a contract with an entrepreneur for a purpose not directly connected with running a business**

.

Also Regulation on specific conditions of concluding and performing contracts of sale of movables (already abolished) presented consumer as: **every person purchasing goods for a purpose not connected with business**
.

Such approach (as it could relate not only to legal persons of non-profit nature, but even to commercial ones as long as a particular transaction does not directly relate to running a business) was much broader than typical definition of a consumer present in EU directives and closer to this found in French legislation.

This definition covered not only natural persons but also organizations; still it could be understood in many ways. J. Kolczyński suggested that a kind of presumption of consumer nature of transaction; saying that everyone ought to be regarded as a consumer besides professionals in professional transactions. [51]

More moderated opinion expressed W. Kocot, who suggested presumption that a party dealing with a professional is a consumer, burden of proof laying here on the professional as he derived legal consequence of the fact that the other contracting party is not a consumer. This burden of proof was a consequence of the phrase: "*as a consumer is considered person who…*" Assumption of such a rule would let court to determine consumer nature of a transaction basing on the contracting party's statement that he concluded the contract acting as a consumer (*for a purpose not connected directly with business*), unless another party proved something different.

W. Kocot suggested also some circumstances which may help in establishing direct connection between running a business and the aim of concluding a contract. To such circumstances belong for instance: amount and kind of purchased goods, delivery address, nature of transactions so far concluded between these parties, etc.… [52]

As E. Łętowska wrote – idea of covering by consumer protection also commercial entities entering transaction *for a purpose not connected directly with business* is justified because a lack of knowledge and experience in such transactions determines that even a commercial entity is as vulnerable as a typical consumer.
[53]

However even E. Łętowska questioned appropriateness of extending protection granted by consumer law onto commercial entities in some cases – for instance in distance contracts. This idea, rather questionable in the context of enterprises, could be seriously considered in relation to nonprofit organizations (associations, foundations, etc..) especially these not conducting business activity.

After 25 September 2003

Presently situation became even more complex as the Act amending the Civil Code and some other acts of 14 February 2003, which entered in force on 25 September 2003 (Dz.U.2003.49.408) removed definition of consumer from the article 384, adding instead article 22^1 saying that ***as a consumer is considered a natural person undertaking a legal action not connected directly with its business or profession*** . This regulation presents a significant change in consumer law. The most noticeable is limitation of consumers only to natural persons, what means a turn towards mainstream of European regulations. However there are two other important innovations, since 25 of September to obtain a status of consumer it is not necessary to conclude a contract –
any legal action
not connected directly with its business or profession
suffices. Last but not least legislator introduced important distinction between business and profession activities – considering lack of statutory explanation of the meaning "professional activity" this may lead to excessive narrowing down of subjective scope of consumer protection [54]
.

Nonetheless previous definition has not disappeared form the Polish legal system – it is still used in the Act on the Trade Inspection (article 2.6) and in the Act on protection of competition and consumers – its article 4.11. contains definition of a consumer identical to that used in article 384 §3 of the Civil Code; though the draft act amending the act on protection of competition and consumers amends also the definition of consumer – instead of providing its own definition art 4.11 refers to the Civil Code [55] .

Even before introduction of article 22^1 into the Civil Code some acts limited the scope of the term consumer to natural persons only. Chronologically first was an act on consumer credit – its article 2.4 presents consumer as: ***natural person concluding a contract with an entrepreneur for a purpose not connected directly with business*** .

Another example is presented by the act on special terms of consumer sale its article 1

expressis verbis limits the scope of application only to natural persons; however this act uses the notion "**purchaser of consumer goods**" instead of consumer. As may be read in the official introduction to the draft of this act – legislator intentionally avoided defining the term consumer as a compromise between exact implementation of directive 1999/44 into the Polish legal system and reluctance to introduce definition different from this already present in the derogated art 384 §3 of the Civil Code.

Broader meaning is given to the term consumer in the Act on making available business information, where consumers are described as *natural persons concluding a contract with an entrepreneur for a purpose not connected directly with business, member of housing community and member of housing association possessing a right to a flat according to the act of 15 December 2000 on housing associations* .

Finally it could be worth mentioning that also Polish Supreme Court in its resolution of 2000.02.29, determined that for the purpose of civil procedure also leaseholder may be considered consumer providing that the lessor is a professional. [56]

Notion of entrepreneur in Poland

Introduction

The very purpose of consumer protection is to restore the balance of powers between subjects participating on the market by protecting weaker parties against potential abuses of subjects having greater power resulting of both superior knowledge and economic power. This purpose decides about applicability of norms protecting consumers only to dealings with entrepreneurs (professionals) what in consequence makes it necessary to determine the scope of this notion.

Legal definitions

Legal definitions of this term may be found in at least four acts relevant for this thesis: Act on unfair competition of 16 April 1993, Act on business activity of 19 November 1999, Act on protection of competition and consumers of 15 December 2000 and since the entry in force of recent changes to the Civil Code also there.

Chronologically first was the act on unfair competition, its article 2 defines entrepreneurs broadly, as natural persons, legal persons or organisational entities without legal capacity, which conducting (even on part time basis) activity of paid or professional nature participate in business activity.

Second – was the act of 19 November 1999 – its article 2 contains two important definitions. In §1 is defined **business activity** itself, it's described as paid activity belonging to: production, trade, construction, services and prospecting, identification and utilization of natural resources conducted continuously and in an organized manner.

§ 2 defines entrepreneur as: natural person, legal person or commercial company without a status of legal person professionally undertaking and conducting on its own business activity described in §1 of the same article. Accordingly to article 2 §3 for the purpose of performed by them business activity described in §1as entrepreneurs are considered also **partners** of a civil partnerships.

Act on protection of competition and consumer bases on definition of entrepreneur created in the aforementioned Act on commercial activity, expending it significantly. For the purpose of this act as entrepreneurs are treated also:

- entities organizing or providing services of public utility which do not belong to business activity as defined by act on business activity,
- natural persons performing profession on their own behalf and their own account, or conducting business activity within such a profession,
- natural person being the owner of stocks or shares securing at least 25% of votes in authorities of at least one entrepreneur or fulfilling other requirements described in article 4.13.

Finally the newest definition of the entrepreneur may be found in article 431 of the Civil Code, which has been added by the Act amending Civil Code and some other acts of 14 February 2003 which entered in force on the 25 of September 2003.

This article defines entrepreneur as a: ***natural person, legal person or other organizational unit described in article 33 ^{1}§1 of the Civil Code*** [57] ***, conducting on their own behalf business or professional activity***
.

So definition contained in the Civil Code bases on two criteria: subjective and functional. The former limits entrepreneurs to natural persons, legal persons and organizational units without the status of a legal person enabled however with legal capacity – such enumeration excludes civil partnerships from the list of entrepreneurs. The latter indicates qualities which must

characterize entrepreneur's activity. It must be permanent, paid, activity belonging to production, service or trade. Such approach excludes any activity run on behalf of someone else.

This depiction of entrepreneur is more up to date than that from the article 2 of the act on business activity; very significant here is distinction made between business and professional activity. It breaks with approach of treating every individually conducted, paid activity as business. It wasn't appropriate in these cases where the result of activity is strictly intellectual like in case of: solicitors, physicians, etc… Thus article 43[1] appropriately notices that some kinds of activity may be described as business activity while others have professional nature and these two do not have a common denominator.
58

Comparison of the scope of definitions contained in the Act on the business activity and in the Civil Code.

Both these acts encompass with their scope both natural and legal persons. Differently they regulate the problem of other entities, while accordingly to article 43[1] of the CC as entrepreneur may be treated every organizational entity granted by law with the legal capacity, than the act on business activity attributes this quality only to commercial companies without a status of legal person. Both regulations exclude from the scope of entrepreneurs civil partnerships – the act on business activity expressly says that as entrepreneurs are considered **partners** of the civil partnership – what indicates exclusion of this partnership as such. Definition contained in article 43[1] of the CC contains reference to article 33[1] which does not cover civil partnerships.

Both regulations indicate, as a circumstance distinguishing entrepreneurs from the other subjects of the civil law, conducting business activity on their own behalf. Differences concern the scope of this activity. Article 2 of the act on business activity defines such activity as *activity belonging to: production, trade, construction, services and prospecting, identification and utilization of natural resources*, most likely this list encompasses all potential categories of business and is equal to the scope of article 43[1] of the CC. However the definition of conducting business activity is narrowed by article 3 of the act on business activity which excludes from the scope of this act multiple categories of activities mostly belonging to widely understood agriculture. This solution at the same time not

only limits the scope of application of this act but also significantly limits the scope of the notion “entrepreneur” as defined by this act which applies only to this act “art. 2 expressly says “for the purpose of this act…”. On the other hand the definition in the Civil Code does not contain any limitations like this and consequently encompasses all kinds of business activity.

Moreover art. 2.1 of the act on business activity enumerates three qualities which must characterise business activity – which are: **paid nature, conducted continuously and in an organized manner** . The expression paid nature (“zarobkowość”) is typically understood as activity not only provided for remuneration but also for the purpose of yielding profit. Contrary – article 43[1] of the Civil Code does not contain such limitation what enables to rate among entrepreneurs also non-profit organizations conducting business activity.

The notion of entrepreneur adopted in the act on business activity requires that the activity of entrepreneur ought to be somehow registered (article 7 says that “*entrepreneur may undertake business activity after being registered in the register of entrepreneurs*”) – again there is no such requirement in article 43[1] of the CC.

Finally arises the question of regulated professions. The act o n business activity does not contain any general provisions on the subjects of its applicability to such professions, however the article 87 excludes of the notion of entrepreneur (for the purpose of this act) barristers, legal counsellors and persons providing help within the scope of intellectual property, specific acts on regulated professions contain other numerous exclusions (physicians, auditors). Again no such exclusions may be found in the Civil Code. [59]

Reasons and consequences of broad depiction of “entrepreneur” in the Civil Code

As long as the term entrepreneur was used only in specific acts it could be used only for the purpose of a particular act. Introduction of this term into the Civil Code gives it more universal nature and allows using it, within the area of civil law, regardless of presence of this term in a particular act [60] .

The act on business activity constitutes an act of public law and one of its purposes is determination of the limits to, guaranteed by article 20 of the Constitution, freedom of economic

activity, what is being realized for instance by means of indicating activities requiring licence or permission and imposing upon entrepreneurs duties dictated by public interest.

Contrary, the Civil Code regulates relationships between private entities whose mutual relationships are based on principles of equity and contractual freedom. Fair and efficient realisation of these principles requires much broader definition of “entrepreneur”.

Nonetheless, the main motive for incorporation of such definition into the Civil Code was connected with approximation of Polish legal system to requirements of the EU law. What is also worth mentioning is fact that the present **definition of entrepreneur is synchronised with contained in article 22 ^{1} of the Civil Code definition of consumer – both base on the same criterion – professionalism of contracting party** .

This approach is justified by assumption that subject acting on the market as an active participant in the character of professional ought to meet high expectations consisting in being competent within his profession and should bear liability resulting of this fact, but at the same time should be able to expect the same from other professionals with whom he maintains relationships. [61]

Relationships between notions of service provider service recipient and consumer in Poland.

Act on providing services by electronic means covers not only business to consumer e-commerce but also business to business transactions. That’s why it is important to establish what are relations between used in this act terms of service provider and service recipient and that of consumer (and entrepreneur). These relationships are similar as in the directive 2000/31, both service provider and service recipient may be natural as well as legal persons. The notion of service provider practically mirrors that of an entrepreneur, without any express requirement of being conducted continuously it is closer to definition of entrepreneur from the article 43^{1} of the Civil Code (such a proximity may be also deducted from expression “paid or professional activity” used in article 2.6 of the act on providing services by electronic means).

The notion of “service recipient” covers every subject using services provided by electronic means and as such may concern either a consumer or an entrepreneur what depends on two factors: whether recipient of the service is natural or legal person and the purpose he uses such

a service for. Again, like in the case of directive 2000/31, while entrepreneur may act at the same time as a service recipient (in relation to service provider) and a service provider in relation to other subjects; whereas consumer may play only role of a service recipient.

It may be also reasonable to mention here that the term **services provided by electronic means** may be treated as a synonym of the term **information society services** as used in directive 98/34 as amended by directive 98/48. [62]

STANDARDS OF A CONSUMER

Notion of standards of a consumer

By a standard I mean here: an accepted or approved example of something against which others are judged or measured. If to accept that the role of consumer protection is to restore balance of market powers than determination of a standard of consumer is especially important.

In fact great part of the problem can be summarized to one question: ***How much (in terms of diligence, intelligence, and care) can we reasonably expect from an average consumer?***

Such standards result from conclusions gathered during many years of European Court of Justice's work as well as from opinions worked out by jurisprudence. Two main approaches are **paternalistic** and **liberal** model of consumer. What makes the choice between those two more difficult is disparity between standards traditionally applied in several member states.

Or respectively those two alternative approaches to consumers' standards may be described by contrasting **confident consumer** with **circumspect** one. The former one is favoured by directives (for instance directive on product safety) introducing notion of ***justified expectations*** of a consumer. The later attitude predominates in directives putting stress on transparency, moment of concluding a contract and right to withdraw from it. As examples may be given here directives: 85/577, 92/59 or especially relevant here Directive 97/7.

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As prof. M. Dauses says : **EC law doesn’t have any clear standard of a customer** what results from the fact that till introduction of article 129a by Treaty on European Union consumer protection was seen as just one of many aspects of free market’s realization. What could be construed from ECJ’s judgements is that it
prefers average, adult consumer who is able to understand information directed to him and act in a reasonable way
.

What confirms such a thesis are multiple ECJ’s judgments on products labelling trying to strike a balance between market freedoms and consumer protection, ad which are based on information about the product which ought to be clear and easily obtainable to everyone interested in purchasing such a product in question.

Moreover consumer should adjust their habits to increasing dynamism of European market. Its development and especially growing integration and liberalization of movement of goods, require from consumers more careful examination of product packages and enclosed information necessary to learn about crucial characteristics of a particular product.

Such a standard of customer differs radically from those recognized by German competition law, which bases on the assumption of careless consumer who is apt to be easily misled by information provided in advertisements and as such requiring special protection. 64

Although still there is no one universal answer to this question, it may be claimed that EC law in the course of the last quarter of the century has worked out some guidelines.

This required answer is changing, what’s neither strange nor undesirable. On the one hand all of us, what also means all consumers, live in constantly changing situation as all Community undergoes constant evolution.

On the other hand consumers themselves are also changing. It results not only from changes in

surrounding them environment but also from conscious actions of Community's authorities which take care of **providing consumer with information and education** what constitutes part of their duty since the first long term plan from 1975.

For the very promotion of consumers' interests and providing them with a high level of protection, accordingly adopted in form of general framework of activities, for the period from 1 January 1999 to 31 December 2003 they are provided for that purpose with EUR 112,5 million. [65]

ECJ since nineteen eighties maintained that standard of a consumer, as well as consumers' customs and habits are not something constant. For example in case 178/84 (Commission of the European Communities v Federal Republic of Germany) the Commission brought an action under article 169 of the EEC treaty for a declaration that, by prohibiting the marketing of beers lawfully manufactured and marketed in another member state if they do not comply with articles 9 and 10 of the Biersteuergesetz (law on beer duty) (law of 14 march 1952, Bundesgesetzblatt i, p . 149), the federal republic of Germany has failed to fulfil its obligations under article 30 (article 28 now) of the EEC treaty.

Article 9 (1) of the Biersteuergesetz provided that bottom-fermented beers may be manufactured only from malted barley, hops, yeast and water . Article 9 (2) laid down the same requirements with regard to the manufacture of top-fermented beer but authorized the use of other malts. In the view of German government, consumers associated the designation "bier" with a beverage manufactured from only the raw materials listed in article 9 of the Biersteuergesetz.

ECJ responded that consumers' conceptions which vary from one member state to the other are also likely to evolve in the course of time within a member state. The establishment of the common market is, it should be added, one of the factors that may play a major contributory role in that development. It also revoked the case 170/78 Commission v United Kingdom ((1980)) ecr 417), where ECJ held that: ***the legislation of a member state must not crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to comply with them*** .

Standard may be something likely to evolve during the span of time but it is also is something measurable, and it's absolutely possible to carry out research checking for example what percentage of consumers was mislead by a particular advertisement. However too often usage

of this method would be unpractical, thus what's required is theoretical standard of a consumer which could be used for a purpose of assessing informational obligations in a particular situation.

Mere efficiency requires that courts use some constant standard of consumer and only in extraordinary situations resort to other means. Significant statement on that point was made by the European Court of Justice in the case C-210/96.

In that case ECJ was asked by the Bundesverwaltungsgericht three questions:

1. *In order to assess whether, for the purposes of Article 10(2)(e) of Regulation (EEC) No 1907/90, statements designed to promote sales are likely to mislead the purchaser, must the actual expectations of the consumers to whom they are addressed be determined, or is the aforesaid provision based on a criterion of an objectified concept of a purchaser, open only to legal interpretation?*
2. *If it is consumers' actual expectations which matter, the following questions arise:*
   (a) Which is the proper test: the view of the informed average consumer or that of the casual consumer?
   (b) Can the proportion of consumers needed to prove a crucial consumer expectation be determined in percentage terms?
3. *If an objectified concept of a purchaser open only to legal interpretation is the right test, how is that concept to be defined?*

I'm convinced that the answer to this questions given by the ECJ may serve as a standard approach to this problem. It held that:

In order to determine whether a statement or description designed to promote sales is liable to mislead the purchaser the national court must take into account the presumed expectations which it evokes in an ***average consumer who is reasonably well informed and reasonably observant and circumspect*** *. However, Community law does not preclude the possibility that, where the national court has particular difficulty in assessing the misleading nature of the statement or description in question,*
it may have recourse, under the conditions laid down by its own national law, to a consumer research poll or an expert's report as guidance for its judgment
.

This standard of a circumspect consumer for a long time has been a leading concept used by the ECJ. It revoked it for example in cases among others: court (see, in particular, Case C-362/88 GB-INNO-BM [1990] ECR I-667; Case C-238/89 Pall [1990] ECR I-4827; Case C-126/91 Yves Rocher [1993] ECR I-2361; Case C-315/92 Verband Sozialer Wettbewerb [1994] ECR I-317; Case C-456/93 Langguth [1995] ECR I-1737; and Case C-470/93 Mars [1995] ECR I-1923).

Still **introduction of such a standard does not mean treating all consumers as a homogenous group** . What's very important in determining whether a statement could be misleading for a consumer only persons **to whom it is addressed** are considered and the actual risk that such a statement might affect their economic behaviour.

The International League of Competition Law in 1996 adopted a resolution to that effect, that may be useful: *"When applying the prohibition against misrepresentation the* ***concept of the consumer of average intelligence and attentiveness*** *should be used. The target audience at which the advertising is directed should be taken into account when applying this standard."*
66

Children are one group which requires a separate standard of protection, however ECJ, recognizes also other groups like for instance in case R. Buet and Educational Business Services (EBS) v Ministčre public (Case 382/87)

Mr Buet was sentenced to a term of imprisonment and a fine and held EBS liable in civil law for having **infringed Article 8 II of Law No 72-1137 of 22 December 1972 on the protection of consumers with respect to canvassing and to selling at private dwellings (JORF, 23.12.1972, p . 13348), which prohibits canvassing for the purpose of selling educational material**

Mr Buet, EBS and the Ministčre public appealed against the judgment claiming **that application of the prohibition on canvassing to his case was contrary to the provisions of Article 30 et seq. of the Treaty inasmuch as it forced him to abandon a particularly effective sales technique and thus restricted the marketing in France of products from another Member State** .

ECJ found out that a prohibition on canvassing in order to sell foreign-language teaching material from another Member State must be regarded as constituting an obstacle to imports. Moreover **to guard against that risk it is normally sufficient to ensure that purchasers have the right to cancel a contract concluded in their home** .

However in it's decision which really shown rising significance of consumer protection, the court held that **it is permissible for the national legislature of the Member State to consider that giving consumers a right of cancellation is not sufficient protection and that it is necessary to ban canvassing at private dwellings** .

Moreover in the same decision the court acknowledged that consumers don't constitute a homogenous group. As there is greater risk of an ill-considered purchase when the canvassing is for enrolment for a course of instruction or the sale of educational material . Because the potential purchaser often belongs to a **category of people who, are behind with their education and are seeking to catch up** . That makes them **particularly vulnerable** when faced with salesmen of educational material who attempt to persuade them that if they use that material they will have better employment prospects.

Similar spirit may be found also in case of Fratelli Graffione SNC v Ditta Fransa. In this case ECJ held that prohibition, on grounds of consumer protection, on the marketing by all traders of products coming from a Member State where they are lawfully marketed, **is acceptable** provided that the prohibition is necessary in order to ensure consumer protection and proportionate to that objective, which must be incapable of being achieved by measures which are less restrictive of intra-Community trade. The national court must, in particular, examine whether the risk of misleading consumers is sufficiently serious to be able to override the requirements of the free movement of goods.

It is possible that because **of linguistic, cultural and social differences between the Member States** a trade mark which is not liable to mislead a consumer in one Member State **may** be liable to do so in another (Case C-313/94).

Consumers online.

When we observe rapid changes in technologies used by consumers, new ways of concluding

transactions and most of all consumers' increasing capability of gathering information a question arises whether there should be a different standard of consumer protection used for the purpose of transactions concluded online?

It could be useful here to revoke to a fundamental question – *why consumers are protected, and what is the purpose of this protection?*
I think that it is not controversial that they are protected because of their weaker position on the market. And that the purpose of such protection is to restore disturbed balance of market powers. The principle was aptly expressed by W. Szpringer who wrote that consumer law is aimed at protection of a market position of consumers and not interest of a particular person. [67]

Undertaking such approach must lead to an obvious conclusion that
any differentiation of a protection standard must arise of a difference in balance of market powers
.

Some claim that the traditional concept of the consumer is no longer adequate in the Internet environment: increasingly, the consumer will be an Interwise consumer, able to retrieve information, to negotiate contractual terms, to address possible problems with providers and, **th us, able to do without some levels of protection in certain areas**
(e.g. unfair contractual terms). These people advocate that this type of consumer should be the touchstone when dealing with the challenge of shaping consumer protection in the information society. To some extent, this has also been an assumption in the eEurope initiative, stating that consumers will have increasing powers, due to the ease of gathering information.

It is necessary to admit that the role of consumers is less univocal in the Information Society. Firstly, the classical distinction between consumer and producer is blurring. Consumer (groups) are offering goods and services on-line more and more.

Rise of e-commerce provides for many difficult questions that must be solved. Many phenomena are completely new and don't have any regulations on grounds of EC law. One of such phenomena is **powershopping**. **Powershopping (or co-shopping)** describes an accumulation of customers that is gathered through the Internet in order to buy goods or services at a reduced price that is granted by providers of the goods or services provided that a sufficient quantity has been ordered. [68]

What is rather evident is also the fact that in online world consumers have to their disposition much more tools for gathering information than they ever had before [69] . And their possibilities to compare and estimate profitability of particular options greatly mollifies their position of a “weaker part”

Nonetheless there are more arguments against lowering of protection level than in its favour. There could be possibly two reasons why the level of protection should be lowered. One of them – that **consumers making purchases online constitute specific, untypical group of society which is characterized by lower aptness for being mislead by businesses** . If to consider data presented in multiple researches on the current trends in e-commerce [70]

and demography of consumers participating in it,
it is quite clear that demographic profile of an average consumer is swiftly drifting towards those of offline buyers
, what excludes possibility of using the first argument.

Another argument could be based on the assumption that Internet as such constitutes new environment, possessing specific qualities eradicating need for consumer protection or placating it. Such an argument could be based most of all on the ease of obtaining and exchanging information on the Internet and providing consumers with means of opposing organized way the businesses act by providing them with a convenient platform for self-organization. However such argumentation would be difficult to uphold.

First of all, increase in consumers power is matched by, much more impressive, **increase in the powers of companies** . In the Information Society everyone who owns the technologies will become even more important. Since companies own technologies (as opposed to consumers), they will be able to gather and process data on consumers, allowing them to apply all sorts of new and unprecedented marketing techniques (e.g. directed at children).

Secondly, one may also question whether the Information Society consumer is a better informed (and more emancipated) consumer than the off-line consumer. **This question cannot be answered by mere enumerating new ways of obtaining information.**
What matters is question
if consumers are conscious of the information available
. One can raise the issue (particularly in relation to children) whether they can actually inform themselves sufficiently. In this respect, it should be stressed that it is not enough to provide consumers with information

What should be remembered is that not only consumers are not a homogenous group, also **not all goods and services present the same difficulties for customers in making profitable decisions, and correct estimation of offers presented on the market**
. From that point of view goods may be divided into three categories:
a) **search goods** – goods which quality may be estimated before consumption – as a very popular categories of such goods commonly sold in e-commerce one could mention books and CDs.
b) **experience goods** – their quality may be evaluated after consumption, what is the case with for instance clothes, and finally
c) **trust goods** – quality of these goods is difficult to determine even after their consumption. [71]

Depending on the category to which goods belong to, information duties towards customers ought to be stricter or more lenient, the strictest in case of trust goods, to which category belongs many goods and services offered in e-commerce.

What they really need is clear relevant, accurate, easily accessible and timely information
: the basic and essential information for consumers should not be more than one click away. Given the enormous increase in available information combined with difficulties with verifying it, it will be difficult to shape this aspect.

Thus, **there does not seem to be any reason to lower the level of consumer protection because of an alleged change in the concept of 'consumer'** . Even though, what must be admitted, off-line rules do not completely cover requirements presented by new technologies on the Internet. **These specific aspects of concluding transactions online ought to be matched by specific solutions of protecting customers.**