

# Normative Standards and Global Law-Making

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## Abstract

This contribution explores the meaning of ‘global law’ in private law. Private law relationships occur across borders more and more often, but does this also mean that the law governing these relations has become global? It is suggested that in law-making a connection can be made between different levels of regulation (international, national or regional) through the use of normative standards such as the ‘average consumer’ of EU law.

## Keywords

private law theory; multi-level regulation

What does global law mean to a private lawyer? The words of Erasmus’ famous adagium ‘the World is my home’ seem true for many of us today and consequently many private law matters have obtained an international flavour. We travel, we work, we marry, we buy, we do business – often within our own country but often also in other parts of the world. That *we* have become more globally active does not mean, however, that the *law* governing these private law issues has become global. The majority of transactions and private law relationships are still governed by national laws and only a small part by transnational or harmonised law.<sup>1</sup>

Global law in relation to private law, therefore, must mean something else; in this short contribution I will explore what meaning it can have for private law. I will focus in particular on law-making in private law. From this perspective, globalisation has had a significant impact on the way that law is perceived. National legislators are no longer central to law-making, in particular in multi-layered systems of regulation such as the EU. New actors and new sources of rules, whether they can be called ‘law’ or not, have

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<sup>1</sup> For an overview and analysis of instruments of transnational law, see Roy Goode and others, *Transnational Commercial Law* (two volumes, Oxford University Press 2007).

appeared in the form of transnational or supranational law and perhaps are most visible in self-regulation.

This contribution consists of three parts. Part 1 sketches the development of ‘global law-making’ in private law and proposes a new theoretical model aimed at law-making across different levels of regulation. Part 2 tests the model through a short case study on European consumer law. Part three 3 draws together the lines that were set out in the previous parts.

## 1. Global Law-Making and Private Law

To start with, the idea of ‘global law’ is somewhat elusive. It is attractive to see it as a new paradigm or perspective on the nature of law in times of globalisation, but it could equally well be posited that it is an analytical tool that helps us understand processes of law-making and legal development in the world without those laws necessarily having a global (or international, or other non-local) nature.<sup>2</sup> The former view relates more to substance, the latter - to form.

The first view demands that we scrutinise the essence of law and ask ‘what *is* law?’, presuming that the answer to this question differs depending on whether rules stem from national legislation or from other, international, supranational or even private sources. The latter view, by contrast, does not so much ask as to what law is, but seeks to formulate an analytical framework, or organising concept, that helps us understand law in a world where the focus is shifting away from national legal orders. Either view has commendable points and I will, within the limited space of this contribution, not seek to choose between them.

There is, however, an interesting connection that can be made between substance and form in ‘global law-making’ within the sphere of private law. Global law-making – or: post-national law-making, both terms denoting the creation of legal rules in an international or multi-layered legal order – requires a perspective that is markedly different from law-making in national legal systems. Multiple actors can be involved (e.g. legislators but also private parties through self-regulation) who develop rules at different levels of regulation. The substance of these rules can diverge precisely because in this format of law-making several different actors are involved, with different roles and aims. One can think of legislators, courts, regulators, and private parties which self-regulate. The question is how their

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<sup>2</sup> Cf William Twining, *General Jurisprudence* (Cambridge University Press 2009) 66.

law-making activities can be coordinated so that fragmentation of laws, which normally hinders the transparency of laws to private parties and threatens legal certainty, is kept to a minimum.

Existing strategies for better regulation, as seen, in particular, in European law, have not been very successful at decreasing such fragmentation. Harmonisation of laws in a top-down manner often does not work since the new rules do not fit with national laws and, moreover, are often not politically accepted.

The alternative, ‘spontaneous harmonisation’, would work in a bottom-up manner;<sup>3</sup> however, there is no evidence that it occurs. By suggesting a new approach that could qualify as a model for global law-making, this contribution submits that part of these problems may be countered by using normative standards as central reference points for law-making. Normative standards in this context are defined as open norms to which more concrete rules can be attached. If a standard is central to several forms and levels of regulation, it can provide a reference point for communication between those levels.

This theoretical model can be made more concrete by examining a case study. An illustrative example is that of the ‘average consumer’ in European consumer law. This open norm is used as a benchmark for consumer protection in several areas of EU consumer law and can provide a normative standard for law-making.<sup>4</sup>

## 2. The ‘Average Consumer’ of EU Law<sup>5</sup>

The ‘average consumer’ is a central standard in EU consumer law. What makes it interesting for law-making in a global law view is that its normative content is developed at (at least) two levels of regulation. First, the test

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<sup>3</sup> See Norbert Reich, ‘Competition between Legal Orders: A New Paradigm of EC Law?’ (1992) 29 *Common Market Law Review* 861; Jan Smits, *The Making of European Private Law; Towards a Ius Commune Europaeum as a Mixed Legal System* (Intersentia, 2002).

<sup>4</sup> See in particular Directive 2005/29/EC concerning business-to-consumer unfair commercial practices [2005] OJ L149/22 (UCP Directive), Art. 5(1); Directive 2004/39/EC on Markets in Financial Instruments (MiFID) [2004] OJ L145/1; Directive 2006/73/EC implementing Directive 2004/39 [2006] OJ L241/26 (MiFID Implementing Directive), Art. 27(2). Cf. earlier Directive 97/55/EC on misleading and comparative advertising [1997] OJ L290/18.

<sup>5</sup> For a more elaborate discussion, see Vanessa Mak, ‘The “Average Consumer” of EU Law in Domestic and European Litigation’, in: Dorota Leczykiewicz and Stephen Weatherill, *The Involvement of EU Law in Private Law Relationships* (Hart 2012, forthcoming) chapter 14.

developed by the Court of Justice of the EU (CJEU) looks at the ‘presumed expectations’ of an average consumer rather than at factual evidence. Second, in national private laws the ‘average consumer’ is used as a normative reference point for the balancing of rights and duties between private parties.

It is important to realise, however, that the content of the standard does not only come from the balancing of private law rights and duties, but also from public law or in this case EU internal market policy. This can explain why the ‘average consumer’ of EU law is mostly regarded as a rational actor, rather than a weaker party in need of protection. A few words on this before coming back to the normative function.

### 2.1. *The Internal Market Function*

Who is the ‘average consumer’ of EU law? After earlier judgments – e.g., in *Mars*,<sup>6</sup> where the Court referred to ‘reasonably circumspect consumers’ as the standard by which to judge consumer confusion in intellectual property law – the ‘average consumer’ has reached its current definition in the *Gut Springenheide* judgment. The case concerned the marketing of eggs to consumers. Whereas the label on the packaging of the eggs stated ‘6-grain – 10 fresh eggs’, the manufacturer of the eggs admitted that the chickens producing the eggs were fed the six varieties of cereals in question as only 60 per cent of their diet. But would consumers understand this, or would they assume that the chickens were only fed these six special cereals and that the eggs consequently were of a certain quality? The German court handling the main dispute was in doubt as to the standard that should be adopted in the interpretation of Regulation 1907/90 and referred the question to the Court of Justice.<sup>7</sup>

The Court’s response that an average consumer is ‘reasonably well-informed and reasonably observant and circumspect’ opts for the empowered notion of a consumer.<sup>8</sup> EU law does not seek to protect the ‘casual consumer’ but rather regards consumers as responsible individuals. That view coincides with the neo-liberal policies that are reflected in EU

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<sup>6</sup> Case C-470/93 *Verein gegen Unwesen in Handel and Gewerbe Köln eV v Mars GmbH* [1995] ECR I-1923, para 24.

<sup>7</sup> Art 10(2)(e) of Council Regulation (EEC) No 1907/90 of 26 June 1990 on certain marketing standards for eggs [1990] OJ L 173/5.

<sup>8</sup> Case C-210/96 *Gut Springenheide and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt* [1998] ECR I-4657, para 31.

legislation, extending also into private law.<sup>9</sup> It also fits with the aims of the internal market.

By adopting a restrictive notion of the protection that an ‘average consumer’ deserves, the Member States’ possibilities for maintaining stricter rules of consumer protection become limited. From this perspective, it can be explained why the Court of Justice often objects to national legislation on the ground that the ‘average consumer’ does not need extra protection (cf *Gut Springenheide*) and that it is therefore disproportionate. The Court thereby gives preference to internal market objectives, taking away barriers to trade that arise from differences in national consumer laws.<sup>10</sup>

By contrast, the Court of Justice tends to take a very pro-consumer stance in cases where it is asked to interpret EU consumer law Directives. In other words, whereas negative harmonisation is promoted by the Court’s proactive objection to national legislation that may create barriers to trade, the positive harmonisation of national (private) laws through Directives is given a boost by interpreting them in a far-reaching and consumer-friendly manner. As noted by Unberath and Johnston, one wonders what the ‘average consumer’ of EU law would make of such cases.<sup>11</sup> These cases confirm that the Court regards the concept as a mediating tool between EU law and national laws, not only in its free movements case law but also in the interpretation of Directives.

## 2.2. *The ‘Average Consumer’ as a Normative Standard*

The content of the ‘average consumer’ notion may fluctuate and, as we see, be influenced by policy considerations. Nevertheless, it has a second function – namely its use as a standard for normative evaluation – that gives it potential for global law-making.

Its normative use can be seen in particular in national private laws, which are not directly influenced by the internal market problems discussed in the previous part. In the national context, the standard functions as a normative reference point for the balancing of rights and duties between

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<sup>9</sup> Compare Martijn W Hesselink, ‘The Politics of a European Civil Code’ (2004) 10 *European Law Journal* 675, 687.

<sup>10</sup> Note that the Court, on the other hand, also objects to national legislation where it appears that national legislators (ab)use the ‘average consumer’ to justify consumer protection laws that hamper competition. Cf Case C-315/92 *Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC et Estée Lauder Cosmetics GmbH* [1994] ERC I-317.

<sup>11</sup> Hannes Unberath and Angus Johnston, ‘The Double-Headed Approach of the ECJ Concerning Consumer Protection’ (2007) 44 *Common Market Law Review* 1237, 1282.

private parties. Here, it mediates between the general premise of autonomy of the parties and the protective duties owed by businesses to consumers – e.g., duties of care – that seek to counter the imbalance of power that is paradigmatic for consumer contracts.

That does not mean that there is always a direct reference to the ‘average consumer’ standard in national legislation and case law, but its contours can often be made out in the balance that legislators and courts strike between the interests of businesses and consumers. Examples of this can be seen in domestic legislation in consumer credit and investment cases.<sup>12</sup>

The ‘average consumer’, therefore, functions as a benchmark or a normative standard against which the interests and responsibilities of businesses and consumers can be tested. That type of standard is common to national legal systems, in which a fictional ‘officious bystander’ or the ‘man on the Clapham omnibus’ can be used to determine whether or not there is ground for liability in contract or tort.<sup>13</sup> Examples also exist in other areas of law, such as in social security law. To determine the height of unemployment benefits, reference can be made to the salary that a fictional ‘average employee’ would earn in a similar employment position as the claimant.<sup>14</sup> In each case, a benchmark is sought on the basis of which concrete norms can be established.

The EU law concept of the ‘average consumer’ is also used for normative evaluation. That dimension can be gleaned from the judgment of the Court in *Gut Springenheide* from which, as seen above, the current definition of the average consumer stems. The test for misleading statements, read in full, is the following:

[I]n order to determine whether the description, trade mark or promotional description or statement in question was liable to mislead the purchaser, the Court took into account the presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect, without ordering an expert’s report or commissioning a consumer research poll.<sup>15</sup>

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<sup>12</sup> See references in (n 6).

<sup>13</sup> Both terms spring from English law. For the first, see Scrutton LJ in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, 605 and MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227; for the second, Greer LJ in *Hall v Brooklands Auto-Racing Club* (1933) 1 KB 205.

<sup>14</sup> Compare the ‘maatman’ in Dutch social security law; Art 18(1) Wet op de arbeidsongeschiktheidsverzekering (WAO), Art 1 Wet Werk en Inkomen naar Arbeidsvermogen (WIA).

<sup>15</sup> Case C-210/96 *Gut Springenheide* [1998] ECR I-4657, para 31.

The definition adopted by the Court therefore is in principle a normative standard on the basis of which the ‘presumed expectations’ of consumers are assessed. The fact that it is not necessary to order an expert’s report or to commission a research poll to establish if, and how many, consumers are misled by the statement emphasises the normative nature of the standard. It is possible, after all, that the facts of a case give sufficient information as to the context in which the statements were made to enable a court to *deem* it plausible that any reasonably well-informed and reasonably observant and circumspect consumer would have erred in interpreting a statement correctly. Thus, it is also not surprising that the Court feels competent to determine what standard of fairness was required and whether the contested statement was misleading or unfair.

The normative legal standard expressed in the ‘average consumer’ notion of EU law can still have a factual component in cases where additional information is needed to determine whether a statement is misleading or a practice unfair. In that respect, the Court adheres to its general case law on the interaction of the European and national courts. In many instances, the interpretation of EU legislation requires a court to refer to the national law context because the provisions of EU Directives and Regulations are interwoven with provisions of national law.<sup>16</sup> Situations in which a factual component comes into the test can be cases in which the expectations of the ‘average consumer’ relate to ‘social, cultural and linguistic’ aspects which are particular to a Member State.<sup>17</sup>

A second category is constituted by situations in which the national court wishes to use additional information on the actual behaviour of consumers. The Court of Justice does not rule out such further testing.<sup>18</sup> Moreover it adds that, in the absence of EU intervention on this point, it is up to the national court to decide which percentage of consumers must be misled to justify banning a measure.<sup>19</sup> Surprisingly, that can lead to different outcomes to what one would expect on the basis of a normative assessment of consumer expectations.

For example, it was possible for the German court in *Gut Springenheide* to hold the description of the ‘6-grain’ eggs unfair on the basis that 10 to 15 per

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<sup>16</sup> Cf Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ulrike Hofstetter and Ludger Hofstetter* [2004] ECR I-3403.

<sup>17</sup> Cf Case C-313/94 *Fratelli Graffione SNC v Ditta Fransa* [1996] ECR I-6039. See also Case C-220/98 *Estée Lauder Cosmetics GmbH v Lancaster Group GmbH* [2000] ECR I-0117. Compare UCP Directive, recital 18.

<sup>18</sup> Case C-210/96 *Gut Springenheide* [1998] ECR I-4657, para 35.

<sup>19</sup> *ibid*, para 36.

cent of consumers would be misled. Not only may one think that this number is relatively low, even more surprising is that the surveys on which these numbers are based did not use the reasonably well-informed consumer of EU law as their benchmark but instead referred to a ‘casual consumer’.<sup>20</sup> Bearing this in mind, factual evidence may be helpful but the method by which it is acquired should be fine-tuned in order for the ‘average consumer’ truly to function as a normative standard.

### 3. Normative Standards and Global Law

Besides its function as a mediating tool between EU and Member State laws, the ‘average consumer’ therefore is ultimately a normative standard against which the expectations of consumers can be measured. This opens up possibilities for its use as a reference point in the development of law across different levels of regulation – or global law-making.

Still, the adoption of such a model in broader areas of global law-making is subject to a few conditions. It asks for a more open attitude towards sources of law and, importantly, towards the legitimacy of rules derived from non-legislative sources.<sup>21</sup> Furthermore, private lawyers need to be open to public law influences. The example of the ‘average consumer’ of EU law shows that its content is strongly influenced by EU internal market policy. Goals, often seen as part of regulation rather than private law, therefore also determine the way in which normative standards are given content. The fact that public law and private law often intertwine may not be surprising. Global law-making based on normative standards, however, should at least make transparent which content comes from regulatory goals and which is the result of a more principled private law approach.

Finally, for determining what substance rules should have – e.g. in terms of the level of consumer protection that is opted for – a normative reasoning in the context of a national legal system will no longer do. Comparison

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<sup>20</sup> See Stefan Dittmer, ‘Misleading advertising: an end to the “cursory average consumer”?’ (1998) 20 *European Intellectual Property Review* 313, 316; Cees van Dam, ‘De gemiddelde Euroconsument – een pluriform fenomeen’ (2009) 57 *Sociaal-economische wetgeving SEW* 7.

<sup>21</sup> Legitimacy is a point of contention; for a recent contribution in the light of general principles of law, see Martijn W Hesselink, ‘The General Principles of Civil Law: their Nature, Roles and Legitimacy’, in: Leczykiewicz and Weatherill (n 5).



with other levels of regulation, but also empirical-legal research, can provide important guidance for legislators, policy makers and other actors engaged in law-making. Global law, therefore, is international and interdisciplinary and with those features, an excellent flagship for Tilburg Law School.